COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
MDL SUBCOMMITTEE

THE RULE 16.1 SKETCH AND THE MDL "RULES PROBLEM": HOW A PROMPT TO REQUIRE BASIC DUE DILIGENCE WOULD HELP FIRST-TIME MDL JUDGES MANAGE NEW PROCEEDINGS AND AVOID COMMON PITFALLS

December 22, 2022

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL Subcommittee ("Subcommittee").

Introduction

The Subcommittee's sketch Rule 16.1[2] holds promise for helping multidistrict litigation (MDL) judges and practitioners—especially first-time MDL participants—take action on topics whose significance can be difficult to foresee at the beginning of the proceedings. The most important of these subjects is the potential for the mass filing of unexamined claims including, as the Subcommittee well knows,[3] unsupportable claims on behalf of plaintiffs who were not exposed

[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] Advisory Committee on Civil Rules, *Agenda Book, Oct. 12, 2022*, pp. 174-75, *available at* https://www.uscourts.gov/sites/default/files/civil_agenda_book_october_2022_final.pdf.

[3] The Subcommittee recognizes:

> 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

to the product and/or did not have an injury within the scope of the suit. Rule 16.1 should help avoid the well-known problems that unexamined claims cause in MDL proceedings by prompting judges to require a demonstration of basic due diligence into plaintiffs' claims, such as evidence of exposure to the alleged cause and a resulting injury, early in the case.

Requiring basic diligence is a powerful management tool, not a shackle on MDL judges' discretion. Mountains of unexamined claims hamper judges' ability to make good initial management decisions and significantly thwart the possibility of timely resolution by depriving counsel and parties of the information they need to assess litigation risks and valuation. Allowing unexamined claims also violates the FRCP's goal of protecting court dockets from meritless litigation and deprives defendants of the basic due process right to know the claims asserted against them. In contrast, requiring early disclosure of basic information enhances judges' ability to manage the litigation efficiently.

An acknowledgment in the Federal Rules of Civil Procedure (FRCP) that judicial action might be needed to avoid the harms of unexamined claims would address a "rules problem" because the FRCP are failing to provide for pre-filing due diligence in MDL cases in the way that Rules 8, 9, 10, 11, 12, and 26(a)(1)(A) achieve in non-MDL cases. Accordingly, the sketch Rule 16.1 should be modified to include a prompt to consider the benefits of requiring an early demonstration of due diligence into plaintiffs' claims. It should also be edited to remove or modify 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.

I. RULE 16.1 SHOULD PROMPT COURTS TO REQUIRE A SHOWING THAT THE PLAINTIFFS BELONG IN THE LITIGATION

First-time MDL judges are presumably unaware that their early actions or inactions could influence whether the new MDL proceeding draws a mass of unexamined claims—the unfortunate hallmark of many mass-tort MDLs. Rule 16.1 should facilitate a newly appointed MDL judge's understanding that ignoring this problem at the outset will create future obstacles to the successful management of MDLs—and that taking prompt action can provide significant benefits to both parties and the court. Failure to require early demonstrations of counsel's due diligence of their clients' claims complicates early management decisions (including difficulty in selecting leadership counsel), slows the litigation, complicates bellwether case selection, and impedes settlement. Rather than distracting judges from key issues, a Rule 16.1 suggestion to require basic diligence would help judges understand the fundamental question of who belongs in the litigation, including whether the plaintiffs used the product at issue and suffered an injury within the scope of the lawsuit. Such information can be dispositive on decisions about discovery, motions, bellwether selection, and other critical issues in the course of the proceedings.

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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%.

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

A. The Mass Filing of Unexamined Claims is a "Rules Problem" that Hampers Judges' Ability to Organize MDLs Effectively

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. The rules that enforce diligence requirements in all other civil cases – Rules 8, 9, 10, 11, 12, and 26(a)(1)(A) – are not having that effect in many MDLs. This is a "rules problem" because it exists only because the FRCP are not working.[4] When filing attorneys expect that the normal FRCP standards will not apply to pleadings, disclosures, and discovery, they do the logical thing: "get a name, file a claim," and wait. They wait to learn whether the judge will require them to make the most basic inquiries of their clients; they wait to hear what the procedures and deadlines will be; and they wait to see whether the court will enforce its orders in a meaningful way. In the meantime, they treat the lack of FRCP guidance as an open invitation to file names and nothing more. Particularly when seeking leadership positions, plaintiffs' lawyers endeavor to gather as many names/claims as possible, as quickly as possible, often without regard to validity, forcing other lawyers competing for those positions to do the same. These large piles of uninvestigated names/claims are a self-perpetuating problem for the judge because, as the numbers grow, the lawyers have less and less ability to do their job. According to a prominent plaintiffs' lawyer, "[t]he 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."[5] A newly appointed MDL judge would be well served by rules guidance on managing the problem before it becomes unmanageable.

B. Prompting the Early Demonstration of Due Diligence Would Help Ensure an Orderly Process and Prevent Disruptions and Delays During Later Stages of the MDL

The belief that requiring early due diligence from plaintiffs' counsel would unduly restrain MDL judges' discretion is a shibboleth. It is based on the notion that judges cannot order a basic showing that a claim might exist without spending all their time handling individual motions to dismiss at the expense of considering big-picture issues such as preemption and general causation. Just the opposite is true. Creating the expectation of due diligence – as Rules 8, 9, 10, 11, 12, and 26(a)(1)(A) do in non-MDL cases, empowers MDL judges. It provides information judges need to make appropriate management decisions such as sequencing discovery, census efforts, and motions. It informs a judge's evaluation of legal issues, including preemption and

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[4] A growing volume of case law holds that the FRCP cannot be ignored in MDL proceedings. *See, e.g.*, *In Re: Paraquat Products Liability Litigation,* No. 3:21-md-3004-NJR (Nov. 10, 2021) at 2 https://www.ilsd.uscourts.gov/documents/Paraquat/ParaquatOrderDirectingPlaintiffstoRespond.pdf (ordering plaintiffs to respond to motion to dismiss and stating "an MDL court must adhere to the Federal Rules of Civil Procedure"); *In re Korean Air Lines Co.*, 642 F.3d 685, 700 (9th Cir. 2011) ("when it comes to motions that can spell the life or death of a case, such as motions for summary judgment, motions to dismiss claims, or, as here, a motion to amend pleadings, it is important for the district court to articulate and apply the traditional standards governing such motions"); and *In re Nat'l Prescription Opiate Litig.*, 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").

[5] *See* letter from Shanin Specter to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Dec. 18, 2020) at 2, *available at*: https://www.uscourts.gov/sites/default/files/20-cv-hh_suggestion_from_shanin_specter_-_mdls_0.pdf.

general causation, by providing information such as if, when, and where plaintiffs were exposed to the product, and what injuries or conditions allegedly resulted. And it serves the prophylactic effect of forestalling the gathering of more unexamined claims. Requiring information about claims also empowers plaintiffs, since their lawyers must make contact and gather information from them.[6] Moreover, it is quite possible (several examples exist) for courts to administer processes for dismissal of unsupported claims (perhaps with special masters) without neglecting other aspects of the litigation.

In contrast, placing due diligence "on hold" to be dealt with later does not advance the litigation, but impedes it. It puts more work on the judge's plate and adds uncertainty to the process and the schedule. It complicates discovery/fact sheet/census efforts by burdening those processes with many claims that would not survive the most cursory glance. It confounds the selection, workup, and scheduling of bellwether cases. And it confuses the remand process by delaying the understanding of individual case and collective issues, leading to further litigation about re-opening discovery and even new experts. Without an effective prompt in the rules, a newly appointed MDL judge might not understand that ignoring the unexamined claims problem is the very reason it happens, making the proceedings increasingly difficult to manage. As claims of unknown validity pour in, the complications of dealing with them accrue even as the possibilities for resolution diminish. The increasing unknowns cloud the litigation risks and valuation calculations that parties must understand before reaching meaningful settlement positions.

C. The Current Sketch Rule 16.1 Does Not Prompt Pre-Filing Diligence Because It Conflates the Problem of Unsupportable Claims with Discovery

Subsection (c)(7) of alternative 1 for Rule 16.1 will not help judges solve the due diligence problem because it conflates plaintiff counsels' duty to examine the basis of claims with discovery.[7] By asking "[w]hether the parties should be directed to exchange information about their claims and defenses at an early point in the proceedings," the subsection evokes the possibility of mutual discovery rather than providing a mechanism that substitutes for the currently ignored FRCP requirement that MDL plaintiffs, like all other plaintiffs, must have a basis for their claims. Instead, a Rule 16.1 should assist judges in communicating the expectation that plaintiffs' lawyers investigate whether their clients belong in the litigation, such as requiring evidence of exposure to the alleged cause and a resulting injury. Subsection (c)(7) might read as follows:

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[6] *See* Burch, Elizabeth Chamblee and Williams, Margaret S., *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd* (August 6, 2021) (hereinafter "Burch/Williams Survey"). Cornell Law Review, Forthcoming, available at SSRN: https://ssrn.com/abstract=3900527 or http://dx.doi.org/10.2139/ssrn.3900527. According to the Burch/Williams Survey, "nearly half [of plaintiffs surveyed] disagreed that their lawyer considered the facts of their case." *Id*. at 24. One plaintiff reported that "after having her case for five years, her lawyers never obtained her medical records." *Id*. at 29. She said, "If they had bothered in getting my medical records they would have had all the proper knowledge of my case." *Id*. Another said: "To this day I have never spoken with the attorney …. I had absolutely no input into my own case." *Id*. at 25.

[7] As to discovery, alternative 1's subsection (10) is unlikely to be helpful. Even first-time MDL judges and counsel will already know that discovery will occur and should be orderly. What would be helpful is a *requirement* for a scheduling order that includes clear timetables.

> How to require plaintiffs' counsel to demonstrate a good faith basis for their clients' claims, such as producing evidence of exposure to the alleged harm and a resulting injury within the scope of the litigation, at an early point in the proceedings

This language would suggest nothing more than what the FRCP already require. If included in Rule 16.1, it would help judges make informed early management decisions about the course of discovery, motions, bellwethers, and resolution. It would help avoid common problems that plague MDL proceedings down the road, including the creation of an unmanageable docket, unnecessary motions to dismiss and for sanctions, and the re-opening of discovery and motions after remand,[8] yet provide the judge flexibility to tailor the requirement to the needs of each case. In short, this language would help solve a "rules problem" because the FRCP provisions that effectively require due diligence in non-MDL cases are failing to do so in mass-tort MDLs. Providing the "rules solution" would help, rather than constrain, MDL judges in managing their proceedings.

II. RULE 16.1 SHOULD "DO NO HARM"

Alternative 1 of the Rule 16.1 sketch risks violating the Committee's well-known principle of avoiding negative unintended consequences because it includes provisions which: (i) are inconsistent with existing FRCP language; (ii) are complex or disputed; (iii) involve waiver of significant rights of parties, including constitutional due process rights; and/or (iv) are contrary to the MDL statutory mandate.[9] Although the purpose of a Rule 16.1 is to prompt discussion of issues that could need action at the outset of an MDL proceeding, the inclusion of problematic items could communicate an endorsement of procedures that could cause avoidable problems.

A. Rule 16.1 Should Not Invite Pleadings that Are Not Allowed by the FRCP

Subsection (c)(8) of Alternative 1, which prompts consideration of whether "a master [administrative] complaint" or "master answer" should be prepared, would have the unintended effect of endorsing a practice that is inconsistent with the FRCP. Rule 7 sets forth the seven "allowed" pleadings, and it does not include "master" complaints or answers in its list. This is more than semantics. Undefined pleadings present a quagmire about what standards apply. When judges require or allow a master complaint and answer, it is rarely clear whether Rules 8, 9, 10, 11, and 12 govern those documents. Expressly referring to such "pleadings" in Rule 16.1 would foreseeably invite forms of pleadings that do not adhere to FRCP standards and caselaw upholding those standards.[10] Perhaps this lack of clarity is a reason Rule 16.1 should prompt a discussion about this issue, but on the other hand, a much better "rules solution" (if these additional forms of pleading are desirable) would be achieved by amending Rule 7. If the Subcommittee is nevertheless inclined to reference master complaints and answers in a Rule 16.1, it should include clear direction that this procedural convenience does not provide a loophole to the FRCP's pleading standards.

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[8] *See, e.g., Hamer v. Livanova Deutschland GMBH*, 994 F.3d 173, 179-80 (3d Cir. 2021) (plaintiff determined to have non-MDL injury only after extended failure to obey discovery orders and consequent dismissal from MDL).
[9] 28 U.S.C. § 1407.
[10] *See infra* note 4.

B. Rule 16.1 Should Not Mislead Courts About the Law Concerning "Direct Filing"

Proposed Subsection (c)(12) of alternative 1 prompts the court and parties to consider "[w]hether a procedure should be adopted for filing new actions directly in the [MDL] proceeding." Commonly known as "direct filing orders," such orders ostensibly enable claimants to bypass the ordinary transfer of actions via the Judicial Panel on Multidistrict Litigation by filing their complaints directly in the MDL transferee court, even when the court otherwise lacks personal jurisdiction over the defendants in that forum, and where venue would otherwise not lie under the venue statute. Direct filing orders require defendants to waive objections to personal jurisdiction and venue, sometimes to their surprise,[11] and have invited ongoing disputes on the scope of such waiver, as well as associated choice-of-law questions. Outside the context of an MDL, such a complaint would be subject to a Rule 12(b)(2) (lack of personal jurisdiction) and/or Rule 12(b)(3) (improper venue) motion to dismiss.

Within an MDL proceeding, such orders defy the clear mandate of the MDL statute: "Such [MDL] transfers *shall be made by the judicial panel on multidistrict litigation*. . . . Each action so transferred *shall be remanded by the panel* at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[12] Actions directly filed in the MDL transferee court are neither transferred in nor out by the panel, and as a result are controversial.[13] One MDL transferee court observed this inherent problem with direct filing orders, finding no statutory "authority for this Court to require or otherwise authorize cases that do not satisfy the general venue requirements for this district to be filed here as tag along cases [to] an MDL. . . . [and] there is no basis upon which [the Court] has the legal authority to issue the requested direct filing order."[14] Therefore, introducing the concept of a direct filing procedure into the FRCP could lead a new MDL transferee judge to experiment with a procedure which is likely to create litigation about defendants' constitutional due process rights, personal jurisdiction, and statutory venue, as well as the mandate of the MDL statute.

C. Rule 16.1 Should Not Include a Provision About Special Masters that is Redundant to Rule 53

Subsection (c)(13) of alternative 1, which highlights the question of whether special masters should be appointed, risks both redundancy and unintended consequences. Rule 53 already governs appointment of special masters, and first-time MDL judges and counsel are likely to be familiar with the topic outside of MDLs. But within MDLs, urging early appointment of special

[11] *See Looper v. Cook Inc.*, 20 F.4th 387, 394 (7th Cir. 2021) (holding that 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).
[12] 28 U.S.C. § 1407 (emphasis added).
[13] *E.g.*, *Depuy Orthopaedics*, 870 F.3d at 357-59 (Jones, J, dissenting from denial of mandamus) (direct filing order insufficient to confer personal jurisdiction beyond constitutional limits).
[14] *In re Kaba Simplex Locks Marketing and Sales Practices Litig.*, Case No. 1:11 MD 2220, at 5-6 (N.D. Ohio Aug. 1, 2012) (Nugent, J.).

masters would likely exacerbate the already too-frequent appointment of special masters without due consideration of the problems that can ensue. MDL special master appointments, not uncommonly, are characterized by the nominee's personal relationship with the judge and/or counsel, poorly defined lines of authority, mission creep, lack of respect for Article III boundaries (including as to *ex parte* communications), and a known propensity to extend the duration of litigation.[15] In addition, appointment of a settlement master at the onset of a new proceeding, as mentioned in current subsection (c)(13), can divert a new proceeding to strained negotiations when the focus should be on the critical elements of the litigation. Although these problems may be a reason to prompt an early discussion about whether to appoint special masters, listing the topic in Rule 16.1 is likely to have the unintended effect of encouraging new MDL judges to appoint special masters as a matter of course without addressing the problems such appointments could likely create, or have the unintended consequence of conveying that settlement is the MDL's purpose. If, however, such a provision is to be included in a Rule 16.1, then it should be accompanied by a thorough discussion in the Committee Note providing guidance about avoiding common pitfalls.

III. COORDINATING COUNSEL AND COMMON BENEFIT FUNDS

It makes sense for a Rule 16.1 to prompt a decision whether to appoint plaintiffs' leadership counsel. On the other hand, such a provision regarding defendants' counsel is unnecessary because coordination is rarely needed among defendants, and may not even be appropriate. As to MDL plaintiffs, subsections (c)(1), (2), and (4) of sketch 16.1 alternative 1 are sufficient for this purpose; it is important to raise term limits and to ensure that the court is aware of the need to define the roles, duties, and limitations it envisions for plaintiffs' counsel. Rule 16.1 should also provide that leadership selection should not be on the basis of the number of claims represented because, absent the completion of due diligence, such numbers are inflated and often untethered to relevant claims.

In contrast, it would be a mistake to include creation of a common benefit fund in the FRCP as suggested in subsection (c)(5). The authority of courts to institute such arrangements is unsettled, and the complications are manifold.[16] If, however, a Rule 16.1 does address this fraught issue, then the Committee Notes should include guidelines for structuring, administering, and auditing of these funds, as well as requiring complete public transparency.

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[15] Burch, Elizabeth Chamblee and Williams, Margaret S., *Judicial Adjuncts In Multidistrict Litigation*, Columbia Law Rev. Vol. 120, No. 8, at 2182-86, https://www.columbialawreview.org/content/judicial-adjuncts-in-multidistrict-litigation/.

[16] *In re Showa Denko K.K. L-Tryptophan Products Liability Litigation II*, 953 F.2d 162, 165-66 (4th Cir. 1992) (MDL jurisdiction "is limited to cases and controversies between persons who are properly parties to the cases transferred" to it; no power to "compel contributions from plaintiffs in state or federal litigation who are not before the court and by claimants who have chosen not to litigate but to compromise their claims outside the court"); *In re Genetically Modified Rice Litigation*, 2010 WL 716190, at *5 (E.D. Mo. Feb. 24, 2010) ("[I]t is not allowed by the law. I have no jurisdiction over the state cases and I cannot order the defendants to withhold amounts they may end up owing the state plaintiffs"); *In re OSB Antitrust Litigation*, 2009 WL 579376, at *3 (E.D. Pa. March 4, 2009) ("the common fund doctrine does not afford me jurisdiction to order non-Parties . . . to pay Class Counsel's fees"); *Manual for Complex Litigation (Fourth)* §22.62 ("fees . . . may not be imposed by an MDL transferee judge on attorneys in cases that are not within the jurisdiction of the MDL court").

IV. MEANINGFUL PRECEDENT UNDERPINS THE SUBCOMMITTEE'S EFFORT TO PROVIDE MUCH-NEEDED GUIDANCE ABOUT MDL PROCEDURES

The Subcommittee's work on sketch Rule 16.1 is buttressed by the insight of the first Advisory Committee, which drafted what became the FRCP in 1938. 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 "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—and this situation was the impetus for Congress' development of the Rules Enabling Act.[17] 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).

The genius of these rules lies not only in their textual provisions; but also in having "rules" which establish common expectations that allow litigation to function with predictability from day one. This precedent is directly analogous to the Subcommittee's effort to provide guidance about the procedural needs of today's MDLs, which resemble pre-1938 courts in material ways. The hallmark of modern mass-tort MDLs is the mass filing of claims for which no pre-filing due diligence is conducted, and the reasons this happens would be familiar to the first Advisory Committee:

- Allowing/requiring pleadings that are not defined by Rule 7;
- Allowing/requiring pleadings that do not meet the pleading standards established by rules 8, 9, 10, 11, and 12;
- Not allowing motions to dismiss pleadings that fail to meet standards;
- Allowing/requiring discovery devices that are not defined by the FRCP; and

[17] 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), available at: http://scholarship.law.upenn.edu/faculty_scholarship/1396 (emphasis added).

- Not defining or enforcing discovery obligations as described by Rule 37.

These are not just problems from the defense perspective; they also bedevil plaintiffs and judges.[18] The most thorough survey of MDL plaintiffs reveals similar complaints: "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."[19] That survey concludes: "[W]e found the procedural mechanisms that judges design to make MDLs easier for them are the very things that silence and pose barriers for plaintiffs. . . ."[20] In other words, many of the problems that first-time MDL judges, parties, and lawyers face are the very ones that the first Advisory Committee on Civil Rules solved by providing formal, written guidance.

Conclusion

The need for a rule like the Subcommittee's Rule 16.1 sketch is well-founded. MDL judges and practitioners—especially first-time participants—need FRCP guidance to make early management decisions that facilitate the litigation and avoid problems that can be difficult to foresee. Most importantly, the rule should prompt action to require a demonstration of due diligence such as proof of exposure and injury early in the proceeding.

[18] *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").
[19] Burch/Williams Survey at 11.
[20] *Id*. at 4.