

Excerpts from the Advisory Committee on Civil Rules Agenda Book

(October 12, 2022)



**ADVISORY COMMITTEE
ON
CIVIL RULES**

October 12, 2022

TAB 6

1 **6. Proposed Amendments to Rules 16(b)(3) and 26(f)(3) (privilege logs)**

2 The Discovery Subcommittee (David Godbey, Chair, Jennifer Boal, Ariana Tadler, Helen
3 Witt, Joseph Sellers, David Burman, and Carmelita Shinn) recommends forwarding the proposed
4 amendments to Rules 26(f) and 16(b) presented below to the Standing Committee for publication
5 for public comment in August 2023.

6 These amendment proposals deal with what is called the “privilege log” problem. Before
7 1993, Rule 26(b)(1) exempted privileged materials from discovery, and Rule 26(b)(3) did the same
8 for work product materials, but no rule required producing parties to declare that they had withheld
9 responsive materials, much less provide any details about those materials or the ground for
10 declining to produce them.

11 Rule 26(b)(5)(A) addressed that problem and directed that a producing party must
12 expressly state that responsive materials had been withheld on grounds of privilege and describe
13 the materials in a manner that would “enable other parties to assess the claim.” The Committee
14 Note to the amendment said that the method of providing such particulars could vary depending
15 on the circumstances of the given case.

16 Despite that comment in the Committee Note, some courts adopted the “privilege log” idea
17 that had originally developed in litigation under the Freedom of Information Act for practice under
18 Rule 26(b)(5)(A). In many cases, that approach worked reasonably well, but in some it imposed
19 considerable burdens.

20 These burdens escalated as digital communications supplanted other means of
21 communication. The volume of material potentially subject to discovery escalated, and the cost of
22 preparing a privilege log for all of them also escalated. Nevertheless, there were also regular
23 objections that these very expensive and voluminous lists did not really provide the needed
24 information.

25 In 2020, proposals were submitted to the Advisory Committee supporting re-examination
26 of Rule 26(b)(5)(A). One idea was that the rule should provide that it was sufficient for the
27 producing party simply to identify “categories” of materials withheld on grounds of privilege. The
28 burdens of current privilege log practice were emphasized.

29 After these issues were introduced at the October 2020 meeting of the Advisory
30 Committee, a new Discovery Subcommittee (members identified above) was formed and it began
31 intense work on this project. In June 2021, it issued an informal invitation for comment on the
32 pertinent issues and received more than 100 comments. Summaries of these comments were
33 included at pp. 213-46 of the agenda book for the Committee’s October 2021 meeting.

34 In addition, the Subcommittee received presentations from members of the National
35 Employment Lawyers’ Association, the American Association for Justice, and Lawyers for Civil
36 Justice about experience under current Rule 26(b)(5)(A). Retired Magistrate Judge John Facciola
37 (D.D.C.) and Jonathan Redgrave also organized a two-day Symposium on the Modern Privilege
38 Log that was attended (virtually) by members of the Subcommittee.

39 This extensive input made a number of things clear. One was that there seemed to be a
40 rather pervasive divide between what might be called the “requesting” and “producing” parties.
41 The former frequently argued that detailed logs were critical to permit effective monitoring of
42 withholding on grounds of privilege and leveled charges of frequent over-withholding. Attorneys
43 who routinely made production demands urged that without the detail provided by document-by-
44 document logs they could not evaluate privilege claims, and also reported that producing parties
45 often abandoned claims of privilege when those were challenged, and that judges often rejected
46 the claims even when they were not abandoned.

47 Attorneys who are usually on the producing side emphasized the great cost and difficulty
48 of creating logs, even when the other side thereafter pronounced them inadequate. From their
49 perspective, too often requesting attorneys used the privilege log expectation as a club, either to
50 obtain a desired concession in regard to other discovery or to impose added costs on the producing
51 parties. They also emphasized that it was often possible to devise categories of materials that could
52 be exempted from any listing requirement in light of the issues involved in a given case, thereby
53 reducing the burden of logging.

54 Another point that became clear was the great variety in the cases governed by Rule
55 26(b)(5)(A). The original proposals for amendment came from those principally involved in
56 commercial litigation and often focused mainly on the attorney-client privilege and work product
57 protection. But the comments submitted in response to the invitation for public comment showed
58 that the rule was important in very different sorts of cases. One example raised in several comments
59 was an excessive force suit against the police. Such cases might involve very different privileges
60 from those that matter in commercial litigation, meaning that the information pertinent to privilege
61 claims would perforce be different. Another category brought to the Subcommittee’s attention due
62 to the public comment already received was medical malpractice -- again involving a very different
63 set of privilege criteria.

64 Yet another point that emerged from this study was the recurrent reality that delivery of a
65 privilege log shortly before the close of discovery could be a recipe for chaos. Resolving any
66 privilege disputes that emerged only at that point could disrupt trial preparation or require that
67 discovery be redone. It would be far better to unearth these issues early on, permitting the parties
68 to work them out or, at least, get them resolved by the court in a timely manner.

69 Perhaps the most pertinent point was that one size would not fit all cases. Some cases
70 involved only a limited number of withheld documents; for those cases a “traditional” document-
71 by-document privilege log might work fine. Depending on the nature of the privileges likely to be
72 asserted, the specifics necessary in one case might have little to do with the specifics important in
73 another case. Often the type of materials involved and the manner of storage of those materials
74 could bear on the information needed to evaluate a privilege claim.

75 Taking account of these aspects of the information it obtained through its outreach, the
76 Subcommittee concluded that trying to amend Rule 26(b)(5)(A) and prescribe an all-purpose
77 solution to the variegated problems of claiming privileges with regard to variegated materials
78 would not work.

Instead, what emerged was a consensus that the most beneficial rule amendment would be one that would make the parties focus carefully at the outset of litigation on the best method for compliance for their case and also that they apprise the court of their proposed method for complying with the rule, and also focus on the timing of that activity. None of this interaction will solve all problems that claims of privilege present, but the Subcommittee is convinced that these small additions to Rules 26(f) and 16(b) promise to significantly reduce difficulties that have occurred due to the requirements of Rule 26(b)(5)(A).

By the time the whole Committee met in March, this Subcommittee had come close to agreement on rule language, but because the MDL Subcommittee was then considering possible amendments to the same rules it seemed wiser to defer presentation of the privilege log package. Since then, as explored elsewhere in this agenda book, the MDL Subcommittee has shifted its focus to a possible new Rule 16.1.

Accordingly, by consensus the Subcommittee now proposes that the Advisory Committee recommend publication for public comment of the preliminary draft of the rule amendments set out below.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

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

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(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 for and method to be used to comply 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.

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COMMITTEE NOTE

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document “privilege log.” Those 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

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

116 This amendment provides that the parties must address in their discovery plan the question
117 how they will comply with Rule 26(b)(5)(A), and report to the court about this topic. A companion
118 amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about
119 complying with Rule 26(b)(5)(A) in scheduling or case management orders.

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

123 This amendment also seeks to grant the parties maximum flexibility in designing an
124 appropriate method for identifying the grounds for withholding materials, and to prompt creativity
125 in designing methods that will work in a particular case. One matter that may often be valuable is
126 candid discussion of what information the receiving party needs to evaluate the claim. Depending
127 on the nature of the litigation, the nature of the materials sought through discovery, and the nature
128 of the privilege or protection involved, what is needed in one case may not be necessary in another.
129 No one-size-fits-all approach would actually be suitable in all cases.

130 From the beginning, Rule 26(b)(5)(A) was intended to recognize the need for flexibility.
131 The 1993 Committee Note explained:

132 The rule does not attempt to define for each case what information must be provided
133 when a party asserts a claim of privilege or work product protection. Details
134 concerning time, persons, general subject matter, etc., may be appropriate if only a
135 few items are withheld, but may be unduly burdensome when voluminous
136 documents are claimed to be privileged or protected, particularly if the items can
137 be described by categories.

138 Despite this explanation, the rule has not been consistently applied in a flexible manner, sometimes
139 imposing undue burdens. And the growing importance and volume of digital material sought
140 through discovery have compounded these difficulties.

141 But the Committee is also persuaded that the most effective way to solve these problems
142 is for the parties to develop and report to the court on a practical method for complying with Rule
143 26(b)(5)(A). Cases vary from one another, in the volume of material involved, the sorts of materials
144 sought, and the range of pertinent privileges.

145 In some cases, it may be suitable to have the producing party deliver a document-by-
146 document listing with explanations of the grounds for withholding the listed materials.

147 As suggested in the 1993 Committee Note, in some cases some sort of categorical approach
148 might be effective to relieve the producing party of the need to list many withheld documents.
149 Suggestions have been made about various such approaches. For example, it may be that

communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. Depending on the particulars of a given action, these or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.

In some cases, technology may facilitate both privilege review and preparation of the listing needed to comply with Rule 26(b)(5)(A). One technique that the parties might discuss in this regard is whether some sort of listing of the identities and job descriptions of people who sent or received materials withheld should be supplied, to enable the recipient to appreciate how that bears on a claim of privilege. Current or evolving technology may offer other solutions.

Requiring that this topic be taken up at the outset of litigation and that the court be advised of the parties' plans 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 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. That resolution, then, can guide the parties in further discovery in the action. In addition, that early listing might identify methods to facilitate future productions.

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

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Management.

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(3) *Contents of the Order.*

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(B) *Permitted Contents.*

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

188 COMMITTEE NOTE

189 Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D), which directs
190 the parties to discuss the method to be used to comply with Rule 26(b)(5)(A) in the action, and to
191 report to the court about that issue. In addition, two words -- “and management” -- are added to
192 the title of this subdivision in recognition that it contemplates that the court will in many instances
193 do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an
194 illustration of such activity.

195 The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their
196 discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs
197 that the discovery plan address the timing for compliance with this requirement, in order to avoid
198 problems that can arise if issues about compliance emerge only at the end of the discovery period.

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

205 Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the
206 specifics of a given case -- type of materials being produced, volume of materials being produced,
207 type of privilege or protection being invoked, and other specifics pertinent to a given case -- there
208 is no overarching standard for all cases. For some cases involving a limited number of withheld
209 items, a simple document-by-document listing may be the best choice. In some instances, it may
210 be that certain categories of materials may be deemed exempt from the listing requirement, or
211 listed by category. In the first instance, the parties themselves should discuss these specifics during
212 their Rule 26(f) conference; these amendments to Rule 16(b) permit the court to provide
213 constructive involvement early in the case. Though the court ordinarily will give much weight to
214 the parties’ preferences, the court’s order prescribing the method for complying with Rule
215 26(b)(5)(A) does not depend on party agreement.

TAB 8

8. Multidistrict Litigation Subcommittee

Since the March 29, 2022, meeting of the Advisory Committee, the MDL Subcommittee has developed a revised approach to possible rulemaking. It has not determined that rule amendments are actually needed, but has concluded for the present that it would be preferable to focus on a possible new Rule 16.1 for multidistrict proceedings rather than trying to integrate MDL measures into existing Rule 16.

Some of the stimuli toward this new orientation were discussed during the San Diego meeting in March. In particular, comments the Subcommittee received after the agenda book for that Advisory Committee meeting was prepared raised questions about whether that approach (focusing on possible changes to Rules 26(f) and 16(b)) would actually work in MDL proceedings. Among the problems cited were:

(1) Rule 26(f) conferences probably do not occur as part of MDL proceedings in the same manner the rule says they should occur in individual actions. If they have already occurred in some transferred actions, the rule does not call for them to occur again, but probably the scheduling order for that individual action no longer applies. And after transfer it would be chaotic to expect them to occur in individual actions in which they have not occurred (including later-filed and “tagalong” actions) on the schedule set out in the rule for individual actions.

(2) It would also be desirable to provide a role for the court to consider designating “coordinating counsel” to meet and confer about the topics on which the court needs information prior to the initial case management conference. Otherwise, there may be unsupervised and possibly counterproductive jockeying among counsel.

Prompted by those concerns, the Reporters prepared a sketch of an alternative approach -- a possible new freestanding Rule 16.1, directed only to MDL proceedings. The goal of this sketch is to prompt the convening of a meet-and-confer session among counsel before the initial post-transfer case management conference with the court. Such a conference can produce a report providing the court with the parties’ views on issues the court may need to address in early case management orders.

On May 24, 2022, the MDL Subcommittee convened an online meeting to discuss the initial sketch of a possible Rule 16.1, and suggest revisions to it. Based on that discussion, the sketch was revised, and included in the Standing Committee agenda book for the June 7, 2022, meeting of that committee. See agenda book, Committee on Rules of Practice and Procedure, pp. 1067-72.

After the Standing Committee meeting, the Subcommittee began to receive reactions to the Rule 16.1 sketch. In particular, on July 11, 2022, members of the American Association for Justice (AAJ) met via Zoom with the Subcommittee to discuss this new approach, and on August 1, 2022, members of Lawyers for Civil Justice met with the Subcommittee to discuss the same topic. As presented below, both groups offered constructive reactions to the Rule 16.1 approach, though those approaches diverged in some ways.

Representatives of the Subcommittee also attended a conference on MDL proceedings organized by the Stanford Center on the Legal Profession at Stanford Law School on May 20, 2020, which included a number of experienced judges and lawyers.

In addition, further comments have been submitted. Professors Alan Morrison and Roger Trangsrud of George Washington University Law School submitted 22-CV-K, which is in this agenda book.

On Sept. 8, 2022, the Subcommittee met again via Zoom to consider this report to the full Committee. It seeks reactions from members of the Committee on this new approach, particularly with regard to the views expressed by members of AAJ and LCJ. Notes of the Sept. 8 meeting are included in this agenda book.

To introduce the issues, then, this report is in two parts. The first contains the supplemental report to the Standing Committee that was prepared after this Committee's March 29 meeting. The second part, then, attempts to integrate the AAJ and LCJ reactions, and to identify areas of agreement and disagreement. It bears emphasis that this attempt at integration reflects the Reporters' assessment and was not vetted with either AAJ or LCJ. As will be seen, the more detailed Alternative 1 in the sketch provided to the Standing Committee did not receive support from either AAJ or LCJ members, but both proposed revisions of Alternative 2.

One key point, going forward, is that it appears substantial progress has been made even if disagreements remain. Of course, neither the Subcommittee nor the full Committee is in any sense obligated to accept comments offered on its work, but a primary goal is to develop a rule, if one is to be adopted, that will work for the people who will need to make it work -- experienced lawyers and judges handling MDL proceedings in the future. Unless that seems likely, it may be that rulemaking is not warranted. But as that question is addressed, it is useful to keep in mind Judge Chhabria's comments in *In re Roundup Products Liability Litigation*, 544 F.Supp.3d 950 (N.D. Cal. 2021), urging this Committee to give serious consideration to providing rules for guidance of transferee judges and of counsel.¹

¹ Judge Chhabria was particularly focused on the common benefit orders often entered in MDL proceedings. As noted below, input the Subcommittee has received suggests trepidation among some in the bar about a rule dealing with such orders, or at least one that prompts early entry of such an order. Here is what Judge Chhabria said (*id.* at 953):

The fact that counsel is even requesting such a far-reaching order -- a request that has some support from past MDL practice -- suggests that courts and attorneys need clearer guidance regarding attorney compensation in mass litigation, at least outside the class action context. The Civil Rules Advisory Committee should consider crafting a rule that brings some semblance of order and predictability to an MDL attorney compensation system that seems to have gotten totally out of control.

399 **Rule 16.1. Multidistrict Litigation Judicial Management**

400 (a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation
401 orders the transfer of actions to a designated transferee judge, that judge may [must]
402 {should} schedule [an early management conference] {one or more management
403 conferences} to develop a management plan for orderly pretrial activity in the centralized
404 actions.

405 (b) DESIGNATION OF COORDINATING COUNSEL FOR PRE-CONFERENCE MEET AND CONFER. The
406 court may [must] {should} designate coordinating counsel to act on behalf of plaintiffs
407 [and defendants in multi-defendant proceedings] during the pre-conference meet and
408 confer session under Rule 16.1(c). [Designation of coordinating counsel does not imply
409 any determination about the appointment of permanent leadership counsel.] {Such
410 appointments are without prejudice to later selection of other permanent leadership or
411 liaison counsel.}

412 *Alternative 1*

413 (c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to
414 meet and confer through their attorneys or through coordinating counsel designated under
415 Rule 16.1(b) before the initial conference under Rule 16.1(a). [The parties must discuss
416 and prepare a report to the court on the following:] {Unless excused by the court, the parties
417 must discuss and prepare a report for the court on any matter addressed in Rule 16(a) or
418 (b), and in addition on the following}:

419 (1) Appointment of leadership counsel, including lead or liaison attorneys, the
420 appropriate structure of leadership counsel, and whether such appointments should
421 be for a specified term;

422 (2) Responsibilities and authority of leadership counsel in conducting pretrial activity
423 in the proceedings and addressing possible resolution, including methods for
424 providing information to non-leadership counsel concerning progress in pretrial
425 proceedings;

426 (3) Requirements for leadership counsel to report to the court on a regular basis [on
427 progress in pretrial proceedings];

428 (4) Any limits on activity by non-leadership counsel;

429 (5) Whether to establish a means for compensating leadership counsel [including a
430 common benefit fund];

431 (6) Identification of the primary elements of the parties' claims and defenses and the
432 principal factual and legal issues likely to be presented in the proceedings;

- 433 (7) Whether the parties should be directed to exchange information about their claims
434 and defenses at an early point in the proceedings;
- 435 (8) Whether a master [administrative] complaint or master answer should be prepared;
- 436 (9) Whether there are likely to be dispositive pretrial motions, and how those motions
437 should be sequenced;
- 438 (10) The appropriate sequencing of [formal] discovery;
- 439 (11) A schedule for [regular] pretrial conferences with the court about progress in
440 completing pretrial activities;
- 441 (12) Whether a procedure should be adopted for filing new actions directly in the [MDL]
442 proceeding;
- 443 (13) Whether a special master should be appointed [to assist in managing discovery,
444 discussion of possible resolution, or other matters]. [; and
- 445 (14) Any other matter addressed in Rule 16 and designated by the court.]

446 *Alternative 2*

- 447 (c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to
448 meet and confer through their attorneys or through coordinating counsel designated under
449 Rule 16.1(b) before the initial conference under Rule 16.1(a). Unless excused by the court,
450 the parties must discuss and prepare a report for the court on [any matter addressed in Rule
451 16(a) or (b),] {any matter addressed in Rule 16 and designated by the court,} and in
452 addition on the following:
- 453 (1) Whether the parties should be directed to exchange information about their claims
454 and defenses at an early point in the proceedings;
- 455 (2) Whether [leadership] {lead} counsel for plaintiffs should be appointed [and
456 whether liaison defense counsel should be appointed], the process for such
457 appointments, and the responsibilities of such appointed counsel, [and whether
458 common benefit funds should be created to support the work of such appointed
459 counsel];
- 460 (3) Whether the court should adopt a schedule for sequencing discovery, or deciding
461 disputed legal issues;
- 462 (4) A schedule for pretrial conferences to enable the court to manage the proceedings
463 [including possible resolution of some or all claims].

(d) MANAGEMENT ORDER. After an initial management conference, the court may [must] {should} enter an order dealing with any of the matters identified in Rule 16.1(c). This order controls the course of the proceedings unless the court modifies it.

Notes on Committee Note

(1) This approach is limited to instances in which the Panel grants centralization under § 1407. A Committee Note can explain why MDL proceedings may present particular judicial management challenges, but also emphasize that such challenges are not true of all instances in which the Panel enters a transfer order or unique to MDL proceedings. Accordingly, it likely will be worth noting that many -- perhaps most -- MDL proceedings can be effectively managed without resort to Rule 16.1. At the same time, it could also emphasize that similar organizational efforts may be valuable in other multiparty litigation not subject to a Panel transfer order.

(2) Picking a verb: During the March 29 meeting, one thought was that something that says “should consider” is not really a rule, though something that says “must” surely is, and that saying “may” also fits into a rule. To take Rule 16 as a comparison, one could say that it partly adheres to the views expressed during the meeting. Thus, Rule 16(b)(1) says that the court must issue a scheduling order, and Rule 16(b)(3)(A) lists the required contents of that order. Then Rule 16(b)(3)(B) says that the scheduling order “may” also include lots of other things. Rule 16(c)(2), on the other hand, says that at a pretrial conference the court “may consider and take appropriate action on” a long list of things. Perhaps that authorizes action that was not clearly within the court’s authority when this rule was adopted in 1983, but it does not seem much stronger than “should consider.” Probably a search through other FRCP rules would identify other instances in which it’s difficult to say that the rule either commands action or provides explicit authority for an action that courts previously lacked. Probably the orientation to adopt is “may” for the court but to empower the court to direct that the parties “must” do the things the court directs.

(3) Timing: Rule 16(b)(2) sets a time limit for entry of a scheduling order, triggered by the time when a defendant has been served or appeared. One might insert a time limit in 16.1(a) after the Panel order, but that may not make sense. Moreover, since this is a discretionary rule (unless “must” is used) it would seem odd to have such a mandatory timing aspect.

As adopted in 1983, when case management was a new idea, Rule 16(b) included a time requirement in part to prod judges to act. It is not clear that we are trying to do that. Indeed, it may be that *some* such conference is held in virtually every MDL proceeding even though there is no rule saying there should be such a conference. So a time limit seems unnecessary, and it is hardly clear what the trigger for holding the conference should be. Entry of a Panel order might be considered. Until that order is entered, the transferee judge has no authority to act in this manner. And if something like Rule 16.1 were adopted, perhaps the Panel could call attention to it when it sends the transferee judge whatever introductory information it sends. Particularly given the possible need for the court to designate coordinating counsel to manage the meet-and-confer session that should precede the initial conference with the court, setting a specific time limit for that conference seems unwise.

(4) Rule 16.1(c) is designed to make the parties discuss and share their views with the court on the topics the judge often must address early in MDL proceedings. Before the judge is called upon to make early and perhaps very consequential calls on those things, the parties should be expected to present their positions on these matters. Perhaps the rule should say the parties must submit their report no less than *X* days before the court has scheduled the conference. But given the challenges of putting a time limit on the court's action discussed in (3) above, it is probably best not to try to build in a specific time requirement on this topic either. Alternatively, the rule could say that "unless the court directs otherwise" the report must be submitted *X* days before the initial conference.

The Committee Note could also observe that this sort of conference resembles a Rule 26(f) conference in some ways, but that the requirements of Rule 26(f) are not really suited to situations in which many separate actions are combined for pretrial treatment in a single MDL docket. In early-filed actions there may have already been 26(f) conferences before the Panel orders a transfer, and Rule 16(b) orders may have been entered in those actions. But it may be that some transferor judges have stayed proceedings in other cases upon learning that a Panel petition is in the works or has been filed. Pre-transfer Rule 16(b) orders are surely subject to revision by the transferee judge, and might often be vacated across the board. Coordinated pretrial judicial management is what should follow instead of a patchwork of scheduling directives for individual actions. Chaos could result from trying to adhere to scheduling orders entered by different judges in cases filed at different times, and might also prevent the benefits of combined pretrial proceedings section 1407 seeks to provide.

(5) Integrating Rule 16.1 with existing Rule 16: The sketch presents alternative approaches to integrating existing Rule 16 with a new MDL-specific Rule 16.1. As a general matter, the question may be whether to direct the lawyers to discuss everything in Rule 16(a) and (b) (excluding Rule 16(c) as being too broad, but also recognizing that Rule 16(b)(3)(B)(vii) invites almost anything under the sun), or to leave it to the court to add specified items from the list of topics in Rule 16.1(c). In that connection, it might be noted that existing Rule 16(b) orders in transferred cases would, in most instances, be superseded by orders of the transferee court. The add-on provisions of Rule 16.1 in no way override the court's authority to act in any way authorized by Rule 16. Rule 16.1(c) is designed to tee these issues up for the judge to make a considered decision whether to enter such orders on various topics.

(6) It may be suitable to limit Rule 16.1 to an initial management conference, in part because 16.1(b)(11) calls for the parties to address the need for and timing of additional conferences, and also because it seems that the main goal is to get this information before the judge at an orderly and informative initial management conference. If we are to maintain flexibility for the judge, it may be inappropriate to seem to direct that additional conferences occur, though it's likely the judge will find those useful and schedule them. On the other hand, on some matters (e.g., appropriate common benefit fund orders) it may be better to defer action for a period of time.

(7) Rule 16.1(b) coordinating counsel may not be needed in many MDLs, but when there are large numbers of counsel it may be critical. A Committee Note could reflect on the problems that can emerge if the court does not attend to what happens before the initial 16.1(a) management conference, and could mention the "Lone Ranger" and "Tammany Hall" possibilities. To some

545 extent (the “Lone Ranger” problem) this sort of difficulty can appear in multi-defendant cases,
546 suggesting that judicial attention to the defense side’s representation in the meet-and-confer
547 session is warranted in some instances. The alternative bracketed last sentences of Rule 16.1(b)
548 may be overly strong, and perhaps a Committee Note to that effect would suffice. But this issue
549 may be important enough to include in the rule.

550 On the other hand, it may nonetheless be that appointment of leadership counsel on the
551 plaintiff side is sufficiently distinct from appointment of liaison counsel on the defense side that
552 these topics should be treated separately in a rule. In many instances, there may be only one or a
553 few defendants, making such appointments on the defense side unimportant. But there surely have
554 been MDL proceedings with a large cast of defendants (consider Opioids, for example).

555 (8) Rule 16.1(d) may be unnecessary. But because any Rule 16(b) scheduling orders
556 entered by transferor courts presumably are no longer in force when all the cases come before the
557 transferee judge, it seemed worth saying. It may be that there are topics to suggest in 16.1(d) that
558 would not be included in the direction regarding the meet-and-confer session called for by 16.1(c),
559 but that is not presently clear.

560 (9) Unlike prior sketches, there is very little in this one about settlement, though there is
561 brief reference in Alternative 1 of 16.1(c)(2) to the possible role of leadership counsel in achieving
562 “resolution” and the possible appointment of a special master, perhaps to assist in achieving
563 resolution. From what we have heard, it is not clear that there is a need to prod transferee judges
564 to keep an eye on settlement prospects. Similarly, it is a bit unnerving to think that the judge can
565 authorize leadership counsel to “represent” non-clients in negotiating settlements. Perhaps the
566 Committee Note can recognize that attention to settlement may loom large in many MDL
567 proceedings, as in other actions (see present Rule 16(c)(2)(I)).

568 (10) Another subject that might be appropriately addressed in a Committee Note is the
569 possibility that class actions might be included within an MDL proceeding. It could be somewhat
570 tricky to explicate how class counsel in the class action should collaborate with leadership counsel
571 guiding the MDL proceedings. It is not clear if there are often parallel structures, but it may be that
572 there are sometimes parallel operations. For example, consider an MDL proceeding including class
573 actions for economic loss and consolidated individual damage actions. Although it offers no
574 across-the-board solution, this rule could at least serve to put the issue before the court.

II. Redlining of Rule 16.1 sketch
by AAJ and LCJ

The following amalgam is an effort by the Reporter to present the positions offered during the AAJ and LCJ conferences. The positions of these two organizations focused on the Alternative 2 version of (c) set out above; Alternative 1 remains before the Subcommittee. It bears emphasis that this amalgam reflects the Reporter’s assessment, and was not reviewed by either AAJ or LCJ. The Subcommittee is indebted to both organizations for their careful attention to the specifics. This kind of thoughtful reaction is invaluable to the Subcommittee as it proceeds with its work. And it is worth emphasizing that the Subcommittee did not provide either group with the reactions offered by the other group, so that this compilation represents their independent thoughts. At the same time, it likely reflects misunderstandings on some points. The Subcommittee continues to discuss these points, and hopes the members of the full Committee will offer their views.

Rule 16.1. [Initial] Management of Multidistrict Proceedings²

(a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions to a designated transferee judge,³ that judge may⁴ [must⁵] {should}⁶ schedule [an early management conference] {one or more management conferences} to develop a [schedule⁷ and] management plan for orderly pretrial activity in the centralized actions.

² The title has been simplified and slightly rearranged, and the alternative of “Judicial Management of Multiparty Proceedings” has been removed. Neither AAJ nor LCJ favors that alternative.

³ LCJ suggests substituting “court” for “judge.” 28 U.S.C. § 1407(b) says the Panel may order transfer to a judge, and even a judge who does not usually sit in the transferee district. It does not seem that the Chief Judge of that district can “reassign” the MDL to a different judge.

⁴ AAJ prefers “may.”

⁵ LCJ prefers “must.”

⁶ The verb choice here remains open. There is an argument that “must” works here because it is highly likely that a new transferee judge, no matter what the size or complexity of the MDL, will convene a case management conference of some kind as one of the initial acts after receiving the assignment from the JPML. If such a conference almost invariably is going to happen, there is no hamstringing of judicial flexibility if the rules recognize (and encourage) it. However, there may be good reason to use “should” here. Even in the “simpler” MDLs, it is probably important to get organized at the outset. For one thing, orders entered by transferor judges, such as Rule 16(b) scheduling orders, probably ought to be supplanted by a combined management plan developed by the transferee judge. Indeed, because the 26(f)/16(b) sequence the rules direct for “ordinary” actions doesn’t really work in MDL proceedings, there seems a pretty strong reason for the court to hold such a conference. Whether it also directs the parties to meet and confer under 16.1(c), and perhaps appoints interim counsel under 16.1(b), are somewhat separate. Those steps may not be indicated in some MDL proceedings.

⁷ LCJ proposes adding “schedule” here.

593 (b) DESIGNATION OF [INTERIM] {COORDINATING} COUNSEL FOR PRE-CONFERENCE MEET AND
594 CONFER. The court may⁸ designate coordinating⁹ [interim] counsel to act on behalf of
595 plaintiffs [and defendants in multi-defendant proceedings]¹⁰ during the meet and confer
596 session under Rule 16.1(c). Designation as [interim] {coordinating} counsel is without
597 prejudice to later appointment of leadership counsel¹¹ and does not imply any
598 determination about whether leadership counsel should be appointed.¹²

⁸ At this point “may” seems the way to go. Both AAJ and LCJ favor “may.” Surely “must” is too strong, and in many MDL proceedings “should” is also too strong. If there are only two or three lawyers on the plaintiff side, “should” would be too strong. But it is valuable (on analogy to Rule 23(g)(3)) for a rule to make it clear that the court can designate somebody to organize and orchestrate the discussions covered by 16.1(c).

⁹ LCJ did not balk at “coordinating,” but AAJ did. Switching to “interim” (like Rule 23(g)(3)) might send the right signal.

¹⁰ Whether to keep this idea remains open. AAJ wants it out. The LCJ folks did not seem to balk on Aug. 1. But on the defense side there may be more resistance to judicial control than on the plaintiff side, at least from the clients themselves. So putting it into a rule that one defendant gets its lawyer appointed to run the show for all may prompt some resistance, but the reality is that when liaison counsel are appointed that is likely the consequence.

Separately, we have the debate about whether the plaintiff side lawyers must permit the defendants to have a say on who is designated lead counsel for the plaintiffs, mentioned again below. In class actions, defendants may have a valid interest in ensuring adequate representation (particularly in the settlement posture). As Professor Lynn Baker has pointed out in a recent article, in mass settlement situations the defendants often like having a special master devise the formula for distribution in order to deflect challenges to the deal by plaintiffs who argue that their lawyers have sold them short in favor of other “clients.” These are sticky points.

¹¹ The word “permanent” has been dropped.

¹² This is an attempt, as suggested during the July 11 call, to combine the statements in the two alternatives we originally presented. LCJ did not state a preference. AAJ tried to combine the thoughts. Here is what we presented in our sketch:

[Designation of interim counsel does not imply any determination about the appointment of leadership counsel] {Such appointments are without prejudice to later selection of leadership counsel}.

The amalgam in text seems cumbersome. The word “permanent” has come out. On the other hand, as pointed out during the July 11 AAJ session, it seems useful to say both that the appointment of interim counsel does not mean that this person will be appointed to leadership, and also to say that the appointment of interim counsel does not necessarily mean the court will later appoint leadership counsel.

599 (c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should}¹³ direct the parties
600 to meet and confer through their attorneys or through [interim] {coordinating} counsel
601 designated under Rule 16.1(b) before the [initial]¹⁴ conference [or conferences]¹⁵ under
602 Rule 16.1(a). Unless excused by the court,¹⁶ [If the court directs the parties to meet and
603 confer,] the parties must¹⁷ discuss and prepare a report for the court on [any matter
604 addressed in Rule 16(a) or (b),] {any matter addressed by Rule 16 and designated by the
605 court}¹⁸ and in addition on the following:¹⁹

¹³ Both AAJ and LCJ favor “may” here. There is good reason to have the verb here be “may,” but perhaps “should” is more appropriate. Rule 26(f) requires counsel to meet and confer in every case unless the case is in a category exempted from initial disclosure. But that 26(f) process seems not to work in MDL proceedings. So saying “should” here would be softer than 26(f) in ordinary cases, and it seems that often it will be desirable for the court to direct the parties to meet and report back before the court is called upon to make important early rulings.

¹⁴ Whether “initial” should be retained here is uncertain. Originally, the idea was that the court could, having been advised by the parties at the initial case management conference following the meet-and-confer session, make a determination about how to proceed from there. On the other hand, 16.1(a) speaks in one alternative of “one or more management conferences.” LCJ favors “early management” in place of “initial.”

¹⁵ This is added in brackets for parallelism with 16.1(a), but it seems that the main focus is before the first conference with the court. On the other hand, assuming there is a somewhat protracted process of selecting lead counsel it may well be that interim counsel will have a role to play for some time. LCJ appears to favor a singular “initial conference,” perhaps because it also favors adopting a schedule for later activities and decisions.

¹⁶ It appears that both LCJ and AAJ favor this locution to the bracketed phrase from our sketch.

¹⁷ Here we want “must.” Both AAJ and LCJ seem to accept this verb. The court is not required to do things, but the rule should say that if the court chooses to direct them to meet and confer they have to do so and report to the court.

¹⁸ Both AAJ and LCJ left untouched our alternatives presented here. This may be useful to emphasize that existing Rule 16 remains important, but could give rise to tricky questions about which rule applies to what. At least Rule 16(c)’s very capacious list should be left out of consideration.

¹⁹ It is likely that the rule text should make clear that the transferee judge may decide to direct discussion of all the matters identified in paragraphs (1) through (4), or only some of them. The ultimate choice must rest with the judge.

- 606 (1) [Whether the parties should be directed to] {A schedule for}²⁰ exchange {of}
607 information [and evidence²¹] about their claims and defenses at an early point in
608 the proceedings²²;
- 609 (2) Whether [leadership] {lead²³} counsel for plaintiffs should be appointed [and
610 whether liaison defense counsel should be appointed²⁴], the process for such

²⁰ Though both AAJ and LCJ addressed exchange of information, they did so in different ways. AAJ adheres largely to the approach in the sketch in the Standing Committee agenda book, raising this possibility. LCJ proposes that such exchange be mandatory, and that “and evidence” be added. On this subject, it might be noted that it is not clear whether defendants will often have much to exchange, but the LCJ folks stressed that this was not a “one way” proposal. Medical device MDLs may be examples of cases in which defendants may have important information that can track and identify individual plaintiffs in ways plaintiffs cannot on their own.

²¹ LCJ would add this provision. It seems clear LCJ wants plaintiffs to have to provide some backup up front, and that it continues to regard a prime objective as vetting “unsupportable” claims. Saying “information” seems more in keeping with the discovery rules, which emphasize that material sought through discovery need not be admissible to be discoverable. Using “evidence” might invite arguments about whether what plaintiffs were required to proffer would have to satisfy the rules of evidence. In the background is the reality that a PFS or an initial census response is not a *Lone Pine* order, which often leads to an argument about whether proposed expert evidence on causation is admissible. We have studiously avoided any suggestion that *Lone Pine* orders are a suitable starting point for an MDL proceeding.

²² If this provision is to be written as LCJ suggests -- requiring the parties to propose a schedule -- it is not clear why it should also say “at an early point in the proceedings.” Surely that does not restrict the court’s choice of a suitable schedule. Indeed, it may often be that the court will need more information to set up a suitable schedule and leave that open at the initial management conference. To the extent this provision is regarded as mainly imposing burdens on plaintiffs, the “early point” language might be viewed as strengthening the defendants’ preference for an early due date. Recall that H.R. 985 in 2017 had a very short fuse on the plaintiffs’ obligation to present evidence, and then a further short fuse on the court’s required sua sponte evaluation of that showing. The reality seems to be that these sorts of requirements for presentation of specifics by plaintiffs differ from what LCJ appears to prefer.

First, there does not appear to be any appetite among transferee courts for a self-starter role; and second, the courts of appeals have been troubled by dismissals for failure to comply, and have sometimes reversed even when transferee judges dismissed. For some recent examples of appellate decisions in such situations, see *In re Cook Medical, Inc.*, 27 F.4th 539 (7th Cir. 2022) (upholding dismissal); *Hamer v. LivaNova Deutschland GMBH*, 994 F.3d 173 (3d Cir. 2021) (reversing dismissal with prejudice); *In re Deepwater Horizon*, 988 F.3d 192 (5th Cir. 2021) (reversing dismissal with prejudice); *In re Taxotere (Docetaxel) Products Liability Litigation*, 966 F.3d 351 (5th Cir. 2020) (upholding dismissal). There are surely more cases to be considered, if needed, and probably many instances in which defendants have moved to dismiss claims by plaintiffs who missed deadlines but transferee judges have denied those motions. These citations simply happened to be at hand, and illustrate possible reasons to proceed with care.

²³ LCJ seems amenable to either “leadership” or “lead” counsel, but AAJ prefers “leadership.”

611 appointments, and the responsibilities of such appointed counsel, [and whether
612 common benefit funds should be created to support the work of such appointed
613 counsel²⁵];

614 [The AAJ/LCJ differences on (3) seem to merit separation in this
615 presentation; surely some amalgam could be devised but for present
616 purposes this seems a clearer way to proceed]

617 (3) [AAJ] Whether the court should adopt a schedule for ~~sequencing~~ discovery, or
618 deciding²⁶ disputed legal issues including remand;²⁷

619 (3) [LCJ] ~~Whether the court should adopt A~~ schedule for sequencing discovery, ~~or~~
620 deciding disputed issues, and dispositive motions; and²⁸

621 (4) A schedule for pretrial conferences to enable the court to manage the proceedings
622 [including trial plans, trials in exigent circumstances, and²⁹ possible resolution of
623 some or all claims³⁰].

²⁴ LCJ did not object to this bracketed provision, but AAJ sought to have it removed. AAJ members expressed worries about permitting defense counsel to have any say on selection of plaintiff leadership. On Aug. 1, the LCJ folks did not offer any examples of such activity by defense counsel, though it was noted that the judge might turn to them and ask if they have any objections to the appointments being considered by the court.

²⁵ Both AAJ and LCJ object to inclusion of this bracketed provision. The AAJ folks said it's too early to decide at the initial conference. One might say that Judge Chhabria's 2021 common benefit fund order, cited above, tends in that direction.

²⁶ AAJ proposes to drop "sequencing," but it is not clear why. Perhaps the concern is that early discovery would too often make more demands on plaintiffs than defendants. On the other hand, there might be a tendency among transferee judges to favor common discovery -- often, one would think, from defendants - over individualized discovery from plaintiffs.

²⁷ AAJ wants remand displayed prominently. It is not certain, but it seems this means remand to the transferor court (something only the Panel can order). But it might mean remand of removed cases back to state court. LCJ did not say that its members wanted early consideration of remand (probably focusing on remand to transferor courts not to state courts, since the removed cases would be in federal court because defendants wanted them there), though some defense-side attorneys in conferences have spoken in favor of remand instead of "forced" global settlement efforts.

²⁸ It is not surprising that "dispositive motions" is a term the defense side likes. It is not clear why "deciding disputed legal issues" is not sufficient. Perhaps the idea is that individual motions for summary judgment would be "dispositive motions" but not involve "disputed legal issues."

²⁹ AAJ adds this language. LCJ did not touch our sketch.

³⁰ AAJ would delete the bracketed language.

624 [Again, setting out the AAJ and LCJ approaches to (d) separately
625 may aid comprehension. The AAJ proposal changed only the verb,
626 favoring “may.” LCJ did more.]

627 (d) MANAGEMENT ORDER. [AAJ] After an initial management conference, the court may
628 ~~[must] {should}~~ enter an order dealing with any of the matters identified in Rule 16.1(c).
629 This order controls the course of the proceedings unless the court modifies it.

630 (d) MANAGEMENT ORDER. [LCJ] After ~~an~~ the initial early management conference and
631 allowing an opportunity for parties not represented by coordinating counsel designated
632 under Rule 16.1(b) to be heard, the court ~~may~~ [must] ~~{should}~~ enter an order establishing
633 deadlines and dealing with any of the matters identified in Rule 16.1(c). This order controls
634 the course of the proceedings unless the court modifies it.

635 * * * * *

636 This effort is clearly a work in progress, if indeed it is progress. The foregoing observations
637 in Part II (largely in footnotes) represent principally reactions of the Reporter, not the
638 Subcommittee. But they may call attention to issues deserving further attention. it is hoped that
639 representatives of the Subcommittee will be able to participate at the Judicial Panel on Multidistrict
640 Litigation Conference for Transferee Judges at the end of October, and perhaps receive some
641 judicial reactions to this new direction.

Notes of Zoom Meeting
MDL Subcommittee
Advisory Committee on Civil Rules
Sept. 8, 2022

On Sept. 8, 2022, the MDL Subcommittee of the Advisory Committee on Civil Rules held a meeting via Zoom. Those participating were Judge Robin Rosenberg (Chair, MDL Subcommittee), Judge Robert Dow (Chair, Advisory Committee), Judge David Proctor, David Burman, Joseph Sellers, Ariana Tadler, Helen Witt, Prof. Edward Cooper (Reporter to the Advisory Committee), Prof. Richard Marcus (Reporter of the MDL Subcommittee) and H. Thomas Byron of the Administrative Office.

The meeting began with an introduction of issues to be addressed in terms of the presentation to the full Committee. At a general level, the issues might be as follows:

(1) Is there a consensus on whether proceeding to work on a potential rule amendment is recommended?

(2) If such a consensus exists, is the focus on a Rule 16.1 approach the favored direction?

(3) As between Alternative 1 and Alternative 2, is there a consensus that one or the other is the better vehicle?

(4) Are there wordsmithing issues that can be addressed now? Some examples are:

(a) use of “may,” “must,” or “should”

(b) terms for counsel to be in charge of organizing for the initial case management conference -- “interim,” “coordinating,” or some other term.

(c) the term for the lawyers ultimately appointed by the court -- “leadership,” “lead,” “liaison,” or some other term

A reaction was that there is no hurry to be recommending anything for publication now. If a rule-amendment proposal is put out for public comment at the next opportunity, that would be in August 2023. To get to that point, it would have to be on the agenda of the Standing Committee for its June 2023 meeting, which means it would have to be proposed by the Advisory Committee at its March 2023 meeting. Nonetheless, it would be desirable to determine whether the Subcommittee might revert to favoring changes to Rule 16(b) and 26(f). The Discovery Subcommittee is planning to have an action item on the October agenda for changes to those rules regarding privilege logs. It held off presenting that at the March 2022 meeting in part because this Subcommittee might be advancing proposals for the same rules, but then this Subcommittee shifted attention. It would be good to verify that it will not shift back.

Another point was that the 16.1 approach was developed only after the March meeting in San Diego. The rest of the Advisory Committee has never seen it. So though the Subcommittee

677 has received abundant input on the 16.1 idea, and it was at least on the agenda of the Standing
 678 Committee as an information item, the other members of the Advisory Committee have not seen
 679 it.

680 Yet another consideration is that though the Subcommittee has received abundant feedback
 681 on the Rule 16.1 approach from AAJ and LCJ lawyers, it has yet to hear from judges. The judges
 682 on the Subcommittee will, however, be making a presentation on rule-amendment ideas at the
 683 JPML Conference for Transferee Judges at the end of October, and that event offers the promise
 684 of significant feedback.

685 A Subcommittee member offered some tentative reactions. The Subcommittee is in favor
 686 of proceeding to try to draft a rule that could be published for public comment. Rule 16.1 is the
 687 right approach. Put differently, nobody on the Subcommittee thinks the project should be
 688 abandoned now. To the contrary, though difficulties may emerge that ultimately mean no rule is
 689 adopted, this is not the time to stop working on it.

690 A question was raised: Do we have reasons why we think a rule is warranted. That drew a
 691 number of reasons:

692 (1) A very substantial proportion of the federal civil docket consists of actions subject to a
 693 JPML transfer order, but there is nowhere in the Civil Rules where the term “multidistrict”
 694 even appears;

695 (2) The JPML is making an effort to add judges to its roster of transferee judges, so there
 696 likely will be more judges handling these proceedings who are on their first or second Panel
 697 assignment, but who will be confronting a variety of high-stakes decisions right up front,
 698 so guidance is good for them;

699 (3) The transferee judges are looking to expand the opportunity to become leadership
 700 counsel to a broader array of lawyers, inevitably involving lawyers with less experience,
 701 so those lawyers would benefit from guidance in the rules;

702 (4) The Manual for Complex Litigation, which is a potential source of guidance, is not
 703 familiar to all lawyers, and its bulk may make it daunting to new transferee judges. Other
 704 sources of guidance -- “best practices” collections -- are not widely known;

705 (5) The Committee Note should provide an opportunity to provide further guidance beyond
 706 the spare provisions of the rule itself.

707 A different question was raised -- is there a presumption against creating new rules -- .1,
 708 .2, etc.? The answer was no; indeed, the Subcommittee earlier considered a new Rule 23.3.

709 Discussion returned to the question of choosing between Alternative 1 and Alternative 2.
 710 Caution is indicated. For one thing, we do not yet know whether judges might actually prefer the
 711 detail of Alternative 1. Our goal throughout will be to ensure that any rule makes clear that the
 712 transferee judge retains flexibility to manage the proceeding in the most effective manner. It is

713 possible that judges (particularly those new to MDL proceedings) could find a “checklist” very
714 useful.

715 Comments were made in favor of retaining Alternative 1 in the package even though it was
716 not favored by the AAJ or LCJ participants. For one thing, it was in the Standing Committee
717 agenda book even though there was uneasiness about delivering an amendment idea to the
718 Standing Committee that the Advisory Committee had not first seen. Having done that in order to
719 get input from the bar, it would be odd not to present the ideas to the Advisory Committee also.

720 On the merits of the choice: Alternative 1 is based on fairly widespread experience with
721 MDL proceedings and what has proven important in them. The challenges for transferee judges
722 will exist, and having a rule addressing those challenges is worthwhile. It seems that some lawyers
723 are uneasy about including some things on the long list of possible items in Alternative 1, but most
724 (if not all) of those things have often proved important.

725 A consensus emerged to include Alternative 1, and discussion shifted to specific features
726 of the list of topics that seemed to elicit uneasiness among the lawyers. One was reference to
727 appointment of a special master, and another was the possible use of master pleadings. The concern
728 seems to be that, if something is mentioned in a rule, some judges will think “I have to do that.”
729 Even if Alternative 2 turns out to be the favored route, things now in Alternative 1 might be
730 mentioned there. Moreover, the possibility of over-reading by judges does not seem to be borne
731 out by other rules. Consider Rule 16(c). It has a long list of possible topics, and it’s unlikely that
732 many judges regard it as mandatory that they enter orders on each of those topics.

733 The question was raised whether a very simple rule might suffice if a detailed Committee
734 Note accompanied it. That could sidestep the “it’s in the rule so I have to do it” problem.

735 A member observed that it’s too easy to think that we can solve all drafting problems by
736 shifting to the Note. Moreover, there is an abiding preference for avoiding Committee Notes that
737 are mini practice manuals.

738 Another member expressed a mild preference for Alternative 1. Perhaps the list includes
739 some things that could be removed, but most of them often prove important. It’s useful at least to
740 note them. Hearing from the judges seems most important. If they don’t want a list, that is a major
741 consideration.

742 A caution was offered: it is human nature to think that you should do something about all
743 the items in a rule like this. The option of addressing some things in the Note rather than the rule
744 should be kept on the table.

745 A comparison was offered: In the 2018 amendments to Rule 23(e) there were provisions
746 regarding the showing proponents of a class-action settlement had to make to the court that were
747 called the “early vetting” requirements. Though mainly in the Note, this change has caused positive
748 results.

749 The view was expressed that either version of a Rule 16.1 would be helpful to judges,
750 perhaps more helpful to them than to lawyers. At a minimum, it's important to see what the judges
751 at the JPML Conference for Transferee Judges say about these ideas. That recalled a 2018
752 presentation of some rule-amendment ideas at this Transferee Judges Conference during which the
753 judges were very resistant to the amendment ideas. But those ideas were very different from the
754 ones now under consideration, such as an automatic right to appeal and mandatory vetting of
755 claims in every case.

756 This Rule 16.1 approach directly addresses the concerns of judges like Judge Chhabria --
757 "If only I had known at the beginning how important this would prove to be later, I would have
758 approached it with greater diffidence." For judges new to this activity a "laundry list" may be just
759 what they need. Indeed, sometimes lawyers are better informed about these issues than the judges.
760 The goal is to advise the judge about what to discuss on the front end. And at least some of the
761 lawyers who have criticized Alternative 1 may mainly be on the lookout for what's good for them
762 in their practices, which is not necessarily the ideal criterion for developing a helpful rule.

763 Discussion shifted to what might be called a "chicken/egg" problem -- which comes first,
764 selection of leadership or a conference among counsel about management of the proceedings?
765 Sensitivities about the label for counsel initially designated to manage the early negotiations may
766 be motivated by these sorts of concerns. We have recently received a submission from two GW
767 professors who emphasize that only the "real" leadership should be in a position to represent the
768 plaintiff side in negotiations about the many items on the list in Alternative 1, many of which
769 surface also in Alternative 2.

770 One reaction was that the court has to have some input on who is representing the sides to
771 make the case-management process work. And the court also needs some method of sorting
772 through candidates for that early effort. This member is particularly concerned that this early
773 discussion include the perspectives not only of those with large stakes but also those with small
774 stakes. There are serious downsides to having the judge defer to plaintiff counsel and appoint
775 whoever is favored by a process that might strike some as similar to Tammany Hall.

776 Another member agreed -- the judge gets this "massive elephant" of a litigation and can't
777 instantly pick leadership either for the initial conference or the longer term. In one large MDL, that
778 is exactly what happened -- partly due to the constraints imposed by the COVID lockdown. The
779 court fairly early made "initial appointments" of counsel with specified duties -- the "April
780 Deliverables Team," for example. It's critical to get the proceeding moving, and not critical to
781 make permanent long-term appointments right at the outset. After some meet-and-confer activity,
782 it was possible in this MDL to appoint longer-term leadership. And "longer-term" does not mean
783 "permanent." Changes remain possible, and perhaps should be built into the process.

784 Another topic was whether a rule that said "may" is really a rule, and also whether it is
785 unduly peremptory for Rule 16.1 to say that the court "must" hold an early management
786 conference. One reaction to that was that with MDL proceedings it may be an essential substitute
787 for the Rule 16(b) process in individual cases. That process requires the judge to enter a scheduling
788 order. But once dozens or hundreds of cases are reassigned to a single judge it cannot be true that
789 all those schedules continue to apply. The statutory command is that the transferee judge manage

790 the pretrial proceedings, and it's very hard to understand how that can be done without convening
791 some sort of conference of counsel. "There's probably never been an MDL proceeding in which
792 the transferee judge did not hold an early management conference." Under these circumstances, at
793 least "should" seems a legitimate verb.

794 Another topic was raised -- there is very little about settlement here. Attention was drawn
795 to item (9) in the notes about the Committee Note in the material put before the Standing
796 Committee. Early on, there was an effort to devise some sort of "settlement review" authority, but
797 that proved too difficult to do.

798 Similar concerns were raised about reference to a common fund order. But that is such a
799 routine idea, that a rule saying it "may" be considered seems fairly justifiable.

800 Yet another possible sensitivity is the difference between saying "scheduling" and saying
801 "sequencing." The latter word may conjure up the wrong image, as with the old notion that in class
802 actions discovery had to be "sequenced," with "class discovery" first and "merits discovery"
803 afterwards. It would be desirable to arrive at a neutral term.

804 The conclusion was that all these matters should be put before the full Committee in
805 October, and that it might be possible to have a proposed preliminary draft for publication for
806 comment at the March 2023 meeting. That would probably require pretty fast work after the Nov. 1
807 Transferee Judges Conference session, and might prove impossible to achieve.

808 The draft agenda report can be used to educate the full Committee in October, and
809 Subcommittee members can express their views on how to proceed at that time.

August 18, 2022

COMMENT OF ALAN B. MORRISON & ROGER TRANGSRUD
CO-DIRECTORS, JAMES F. HUMPHREYS COMPLEX LITIGATION CENTER
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
RE
DRAFT MDL RULE 16.1

The draft proposed by the MDL subcommittee and its accompanying notes raise many questions. This comment will address only the threshold issue of what should take place at the preliminary meeting prior to the initial MDL management conference. Until that is determined, none of the other issues can be resolved. Therefore, this comment takes no position on these other issues at this time.

My first question is why is it necessary or at least desirable to have a meeting of some kind before the management conference? The answer requires an understanding of what will happen at the management conference. Although written for the preliminary conference, Alternative A, section (c), suggests the main areas that the MDL court should address at the management conference. They can be summarized as follows: (a) all matters relating to appointment of lead counsel and their relation to other counsel for MDL plaintiffs [items 1-5]; (b) identification of the principal legal and factual issues in these cases [item 6]; (c) preliminary discovery matters [items 7 & 10]; (d) pleadings and motions [items 8, 9 & 12]; and (e) scheduling of future conferences and other issues [items 11, 13, & 14].

There seem to be two main reasons why a preliminary conference should be held. The first is to help organize the information for the MDL judge. By definition, in complex MDL

proceedings there will be many attorneys for the plaintiffs and sometimes for the defendants. Cases will be at various stages of discovery and motion practice, with some subject to Rule 16 and Rule 26 orders and others just filed. Thus, one function will be to help sort through the cases and to prepare an organized summary of what is then known for the MDL transferee judge.

The second function of a preliminary meeting is to assist the transferee judge with the appointment process for lead counsel and for related functions. The work at the preliminary meeting would include presenting options for the appointment of counsel and might include gathering resumes and other information about counsel who are seeking appointment to various positions. Ideally, this information would be presented in writing to the transferee judge and made available to all counsel well in advance of the initial management conference.

Lawyers, like nature, abhor a vacuum, and so if there is no formal preliminary meeting, lawyers will get together and gather some or all of the information suggested above and have it available for the judge at the initial management conference. The most likely area in which this will occur is the appointment of lead and other counsel because lawyers in MDLs care more about that than anything else. And when that occurs, it is most likely that lawyers with prior MDL experience will band together and present the MDL judge with their preferred slate. At one time, that approach may have been appropriate, but today MDL judges are using many other options for deciding whom to appoint to various positions, and so one function of a formal preliminary conference would be to take those issues out of the hands of groups of lawyers alone, and assure that all lawyers have input into what is presented to the MDL judge.

It is for this reason that it would be advisable for the transferee judge to designate a magistrate judge or a special master (or perhaps even another district judge) to manage the preliminary conference and to oversee the production of a report that would include the relevant

information about the issues noted in Alternative A and present various options for appointing counsel. Designating coordinating counsel for the preliminary conference creates too great a risk that those lawyers would have a substantial advantage in becoming lead counsel, a problem that can be avoided by designating a magistrate judge to run the preliminary conference. The transferee judge would include in the designation order a statement as to whether the report should include specific information regarding proposed lead counsel etc, or whether that information will be submitted after the initial management conference.