**COMMENT**
**to the**
**ADVISORY COMMITTEE ON CIVIL RULES**

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

September 18, 2023

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

## INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

> First, to make uniform throughout the United States the forms of process, writs, pleadings, and motions and the practice and procedure in the district courts in actions at law. It is believed that if this were its only advantage that lawyers and litigants would find, in uniformity alone, a tremendous advance over the present system.
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> 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.
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> 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.
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> Fourth, it would make it more certain that if a plaintiff has a cause of action he would not be turned out of court upon a technicality and without a trial upon the very merits of the case; and, likewise, if the defendant had a just defense he would not be denied by any artifice of the opportunity to present it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[13] The MDL Subcommittee reported to the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An appropriate note could look like this:

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

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

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

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

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

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

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

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

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

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

[46] *Id.*

[47] *Id.*

[48] *Id.* at 444.

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

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

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

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

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

[50] *Id.*

[51] *Id.* at 450.

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

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

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

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

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

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

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

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

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

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

[56] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[79] 28 U.S.C. § 1407.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[91] Draft Note at lines 286, 288.

[92] *Id*. at line 293.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[106] *Id.*

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

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

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

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

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

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[107] *Id.*

[108] *Id.*

[109] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

[115] *Id.*

[116] *Id.*

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

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

## CONCLUSION

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

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