COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

CLARITY ON THE TWO "RULES PROBLEMS": EMPIRICAL EVIDENCE OF THE INSUFFICIENT CLAIMS PROBLEM IN MDLS AND KEY TESTIMONY ON MUCH-NEEDED REVISIONS TO THE PROPOSED RULE 16.1 AND PRIVILEGE LOG AMENDMENTS

February 16, 2024

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") addressing issues raised during the public comment process about the Committee's proposed amendments to the Federal Rules of Civil Procedure (FRCP) concerning initial management of multidistrict litigation proceedings (MDLs) and privilege log practices (the "Preliminary Draft").[2]

INTRODUCTION

During the Committee's October 2023 public hearing on the Preliminary Draft, Judge Dow's three-part test for rulemaking was discussed: (1) Is there a rules problem? (2) Is there a rules solution? and (3) Does the rules solution risk negative consequences that would outweigh its value?[3] The public comment period has delivered a variety of perspectives that all point to the same conclusion: There are two, and only two, "rules problems" in the Preliminary Draft for which a "rules solution" would help courts and parties without producing harm. Those problems

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

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

[3] Transcript of Proceedings, *In the Matter of: Proposed Amendments to the Federal Rules of Civil Procedure,* October 16, 2023, https://www.uscourts.gov/sites/default/files/2023-10_transcript_of_civil_rules_hearing_0.pdf ("October hearing"), 249 (Judge Proctor).

are (1) insufficient claims in MDL proceedings and (2) the misunderstanding of what is required when parties withhold documents on the basis of privilege. The "rules solutions" to both problems are based on existing FRCP principles and are therefore easily fashioned to avoid negative unintended consequences. In contrast, the public comments have not identified any "rules problems" supporting the proposed Rule 16.1 provisions focused on designating leadership counsel, facilitating settlement, managing direct filing, appointing special masters, or preparing pleadings that are not allowed by Rule 7—and rulemaking on these topics risks serious negative consequences.

I. Proposed Rule 16.1(c)(4) and Insufficient Claims in Multidistrict Litigation

Empirical data demonstrate that insufficient claims are prevalent in mass-tort MDLs. This is a "rules problem" because the FRCP provisions that largely prevent insufficient claims from posing problems in single-party cases[4] are failing to have that effect in mass-tort MDLs. This "rules problem" is also an initial management problem – and therefore in the bullseye of the Committee's rulemaking effort – because judges have only one opportunity to prevent the problem, and that occurs at the earliest stage of the proceedings. An effective "rules solution" would not only solve the management problems, but also would affirmatively enhance judicial management by improving understanding of the case, expediting the information needed for resolution, and providing fairness to plaintiffs and defendants alike.[5] Unfortunately, as drafted, Section 16.1(c)(4) is not a rules solution – in fact, it is not an improvement over the status quo[6] and perhaps is even a step backward. Revisions to the proposed Section (c)(4) are needed, and a few modest changes would help solve both the rules and management problems by creating compliance with well-accepted FRCP pleading standards. In keeping with the Committee's apparent decision to eschew mandatory requirements, LCJ's proposed solution is entirely discretionary and would therefore not cause unintended negative consequences. Rather, it would help MDL judges and parties to prevent a common problem that inevitably requires judicial attention and litigation resources later on.

A. Empirical Data Show that Insufficient Claims Are Very Common in Mass-Tort MDLs

During the Committee's October 2023 hearing, questions were asked concerning the existence of empirical data showing "the extent of the unsupported claims problem" in MDL proceedings.[7] Committee members clarified that "I don't think anybody would dispute that there are meritless cases filed in MDLs"[8] and "[n]o one is suggesting this isn't a problem."[9] At least one plaintiffs

[4] This comment uses "single-party cases" to mean typical federal civil litigation matters that have not been consolidated into multidistrict litigation proceedings.
[5] *See* Lawyers for Civil Justice, *A Rule, Not an Exception: How the Preliminary Draft of Rule 16.1 Should Be Modified to Provide Rules rather than Practice Advice and to Avoid the Confusion of Enshrining Practices into the FRCP that are Inconsistent with Existing Rules and Other Law* (Sept. 18, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0004 ("LCJ Public Comment on Rule 16.1").
[6] October hearing, 285 (Dahl testimony).
[7] October hearing, 48 (Professor Bradt).
[8] October hearing, 249 (Professor Bradt).
[9] October hearing, 131 (Judge Proctor).

lawyer agreed that meritless claims are filed in MDLs.[10] This problem has been noted by MDL judges as well.[11]

Despite the general consensus of the problem, data regarding insufficient claims are hard to find. Of course, in many MDL proceedings, there are no adjudications or findings on the sufficiency of claims.[12] Thus, "[t]he data is in the dismissals,"[13] and LCJ has endeavored to provide the Committee with reliable data from public dockets and public sources demonstrating that the MDL Subcommittee's conclusion about this issue is indeed correct.[14] Here are the facts:

- In the *Ethicon, Inc., Pelvic Repair System Products Liability Litigation*,[15] **53 percent** of the total 46,511 cases filed—24,695 claims—were ultimately dismissed for factual shortcomings or inability to establish a recognizable injury.[16]

- In the *Zofran* MDL, which began in 2015 and was closed by 2021 (after the court granted summary judgment), the 751-case[17] MDL saw approximately **40 percent** of its cases dismissed. During a status conference on September 19, 2019, counsel noted that the "common denominator" in that 40 percent was "cases that … *should never been filed in the first place*."[18]

- In the *Vioxx* MDL, which began in 2005 and reached a settlement in November 2007, sources cite around a **30 percent** failure rate. Out of 30,499 heart attack claims that went through the claims process, 9,888, or 32.4 percent, of the heart attack claimants were unable to satisfy the rudimentary requirements.[19] For strokes, there were 17,863 claims that went through the gates process, and 5,399, or 30.2 percent, of the ischemic stroke claimants failed to provide documentation of these requirements.[20] And out of 48,362 claims that went

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[10] October hearing, 265 (O'Dell testimony).
[11] *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*, Case No. 4:08-MD-2004, 2016 WL 4705827, at *2 (M.D. Ga. 2016) ("MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.").
[12] October hearing, 237 (Kole testimony).
[13] October hearing, 108 (Shepard testimony).
[14] The MDL Subcommittee reported to the Committee:

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

MDL Subcommittee Report, Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, pp. 142, 143 https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.
[15] MDL No. 2327.
[16] October hearing, 238 (Kole testimony).
[17] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2021*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report.pdf.
[18] MDL No. 2657, Dkt. 1656 at 4-5 (emphasis added).
[19] *See* Rules4MDLs, *Case Study: Vioxx MDL and Settlement*, https://www.rules4mdls.com/case-study-vioxx-mdl.
[20] *See* Rules4MDLs, *Case Study: Vioxx MDL and Settlement*, https://www.rules4mdls.com/case-study-vioxx-mdl.

through the process, 15,287 – nearly one-third – failed because they could not or did not demonstrate the basic facts necessary to recover.[21]

- In the *Abilify* MDL, over **19 percent** of cases were dismissed. In this six-year MDL (which began in 2016 and was closed in 2022 after being resolved through settlement), there were approximately 2,812 cases total,[22] with 534 cases dismissed for failure to prosecute or failure to comply with court orders[23] and 14 voluntary dismissals.[24]

- In the *Juul Labs* MDL, approximately **17.5 percent** of the cases were dismissed. This MDL began in 2019 and is currently in the process of settling. There are 5,108 actions pending now; but 7,068 historical actions.[25] The docket reflects approximately 1,207 dismissals with prejudice and 484 dismissals without prejudice based on failure to comply with Plaintiff Fact Sheet ("PFS") requirements or for non-communication (Dkts. 4074 & 4147)[26] and

[21] *See* Rules4MDLs, *Case Study: Vioxx MDL and Settlement*, https://www.rules4mdls.com/case-study-vioxx-mdl.
[22] United States Panel on Multidistrict Litigation, *JPML Multidistrict Litigation Terminated Through September 30, 2022*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-Cumulative%20Terminated%20MDLs_0.pdf.
[23] MDL No. 2734, Dkt. 1159 (119 cases dismissed); Dkt. 1170 (149 cases dismissed); Dkt. 1177 (120 cases dismissed); Dkt. 1185 (19 cases dismissed); Dkt. 1186 (32 cases dismissed); Dkt. 1189 (95 cases dismissed).
[24] MDL No. 2734, Dkt. 374; Dkt. 714; Dkt. 1143; Dkt. 1144; Dkt. 1172; Dkt. 1173; Dkt. 1187.
[25] United States Panel on Multidistrict Litigation, *JPML MDL Statistics Report – Distribution of Pending MDL Dockets by district (2/1/2024)*, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-February-1-2024.pdf.
[26] MDL No. 2913, Dkt. 1073 (dismissing 45 cases without prejudice for failure to submit PFSs); Dkt. 1119 (dismissing 53 cases without prejudice; Dkt. 1173 (dismissing 13 cases without prejudice); Dkts. 1373 & 1447 (dismissing 9 cases without prejudice); Dkt. 1474 (dismissing 83 cases with prejudice); Dkt. 1594 (dismissing 12 cases with prejudice); Dkt. 1596 (dismissing 11 cases without prejudice); Dkt. 1697 (dismissing 7 cases without prejudice); Dkt. 1960 (dismissing 53 cases without prejudice); Dkt. 1798 (dismissing 6 cases without prejudice); Dkt. 1960 (dismissing 53 cases without prejudice); Dkt. 1961 (dismissing 5 cases without prejudice); Dkt. 2094 (dismissing 39 cases without prejudice); Dkt. 2097 (dismissing 3 cases with prejudice); Dkt. 2260 (dismissing 10 cases with prejudice); Dkt. 2346 (dismissing 17 cases without prejudice); Dkt. 2347 (dismissing 48 cases without prejudice); Dkt. 2367 (dismissing 27 cases with prejudice; dismissing 5, 3, 10, and 3 cases without prejudice); Dkt. 2451 (dismissing 40 cases with prejudice); Dkt. 2508 (dismissing 8 cases without prejudice); Dkt. 2513 (dismissing 3 cases with prejudice); Dkt. 2583 (dismissing 3 cases without prejudice); Dkt. 2584 (dismissing 18 cases with prejudice); Dkt. 2855 (dismissing 3 cases without prejudice); Dkt. 2938 (dismissing 1 case without prejudice); Dkt. 2939 (dismissing 6 cases with prejudice); Dkt. 3053 (dismissing 2 cases without prejudice); Dkts. 3249 (dismissing 8, 10, 10, and 4 cases without prejudice); Dkt. 3293 (dismissing 3 cases with prejudice); Dkt. 3299 (dismissing 6 cases without prejudice); Dkt. 3306 (dismissing 14 cases without prejudice); Dkt. 3341 (dismissing 1 case with prejudice); Dkt. 3342 (dismissing 14 cases without prejudice); Dkt. 3377 (dismissing 3 cases without prejudice); Dkt. 3378 (dismissing 2 cases with prejudice); Dkt. 3471 (dismissing 5 cases without prejudice); Dkt. 3684 (dismissing 10 cases with prejudice); Dkt. 3685 (dismissing 15 cases without prejudice); Dkts. 3713 & 3738 (dismissing 9 cases without prejudice; and dismissing 13 cases with prejudice); Dkt. 3771 (vacating dismissal with prejudice as to 5 cases); Dkts. 3859 & 3862 & 3863 & 3864 (dismissing 765 cases with prejudice); Dkt. 3962 (dismissing 21 cases with prejudice); Dkt. 4041 (vacating dismissal without prejudice as to 11 cases); Dkt. 4074 (dismissing 192 cases with prejudice); Dkt. 4147 (dismissing 3 cases with prejudice). (Note there is overlap between the figures for "with" and "without" prejudice.)

approximately 34 voluntary and stipulations of dismissals,[27] not including the dismissals (stipulated or voluntary) as to certain defendants only.[28]

- In the *3M Combat Arms Earplug* MDL, approximately **15 percent** of cases have been dismissed. This MDL began in 2019, and a global settlement in principle was reached in 2023. As of 2022, 316,275 total cases were filed in the MDL, which was formed in 2019 and is still pending (255,151 cases still pending).[29] The 15 percent dismissal figure comes from 47,837 cases dismissed for failure to comply with court orders, failure to resolve overlapping representation issues or to transition from the administrative docket to the active docket, or failure to answer Initial Census Questions,[30] and 23 voluntary dismissals noted on MDL docket.[31] Late last year, the MDL judge observed that "[i]ssues of overlapping attorney representation and duplicate cases have plagued the MDL."[32] [33]

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[27] MDL No. 2913, Dkt. 248; Dkt. 305; Dkt. 635; Dkt. 699; Dkt. 783; Dkt. 831; Dkts. 834-844; Dkt 861; Dkt. 874; Dkt. 928; Dkt. 1006; Dkt. 1015; Dkts. 1053-1054; Dkt. 1790 (voluntary dismissal of proposed class reps; and 7 underlying cases); Dkt. 2728; Dkt. 3292; Dkt. 3433. After the entries at Dkts. 834-844, the clerk issued a note saying to "Re-file these documents in the underlying cases only." *See* July 29, 2020 Staff Text Entry. Similar notations are made at Dkts. 1053-1054.

[28] MDL No. 2913, Dkt. 1021; Dkt. 3256; Dkt. 3262; Dkt. 3719; Dkt. 3720; Dkt. 3850; Dkt. 4161; Dkt. 4162; Dkt. 4183; Dkt. 4184; Dkt. 4185; Dkt. 4186; Dkt. 4187; Dkt. 4188.

[29] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-12-9-22_0.pdf.

[30] MDL No. 2885, Dkt. 3076 (19,934 cases dismissed without prejudice); Dkt. 3077 (314 and 1,125 cases dismissed without prejudice), Dkt. 3340 (174 cases dismissed); Dkt. 3345 (1,222 cases dismissed without prejudice); Dkt. 3346 (1,569 cases dismissed without prejudice); Dkt. 3348 (11,004 cases dismissed without prejudice); Dkt. 3349 (267 and 254 cases dismissed without prejudice); Dkt. 3621 (1,592 and 10 cases dismissed without prejudice); Dkt. 3706 (7; 4,427; and 31 cases dismissed without prejudice); Dkt. 3727 (1,549 and 77 cases dismissed without prejudice); Dkt. 3752 (923 cases dismissed); Dkt. 3761 (32 cases dismissed without prejudice); Dkt. 3770 (18 cases dismissed); Dkt 3788 (123 cases dismissed); Dkt. 3796 (15 cases dismissed); Dkt. 3801 (27 cases dismissed); Dkt. 3802 (71 cases dismissed); Dkt. 3803 (11 cases dismissed); Dkt. 3835 (235 cases dismissed); Dkt. 3836 (48 cases dismissed); Dkt. 3916 (2,028 cases dismissed); Dkt. 3932 (1,672 cases dismissed); Dkt. 3943 (54 and 174 cases dismissed); Dkt 3962 (262 cases dismissed); Dkt. 3971 (303 cases dismissed); Dkt. 3972 (8 cases dismissed); Dkt. 3987 (3 cases dismissed); Dkt. 3990 & 3991 (169 cases dismissed); *but see* Dkt. 3120-1 (court reinstating 1,895 cases that were mistakenly placed on the delinquent plaintiff list).

[31] MDL 2885, Dkts. 723-736; Dkt. 756; Dkt. 762; Dkt. 792; Dkt. 794; Dkt. 2342; Dkt. 3280; Dkt. 3658; Dkt. 3664; Dkt. 3790. At Dkts. 737, 757, 764 (and more), the court noted that voluntary dismissals should be filed in the individual cases. Thus, the voluntary dismissal figure from the MDL docket does not capture all voluntary dismissals.

[32] MDL 2885, Dkts. 3925 & 3925-1. As of November 2023, news outlets noted the court order and exhibit showing that there were 3,548 "unresolved overlaps" where plaintiffs with the same name are shown to have different plaintiff ID numbers and law firms. *See* Collin Krabbe, *3M Earplug Judge Drops Over 3,5000 Claims in MDL* (November 6, 2023), Law360.

[33] In addition, in related bankruptcy proceedings, debtors cast doubt on the claims in the 3M Combat Arms litigation: "[N]early a quarter of plaintiffs in the Department of Defense data served in the military in the 1980s or 1990s (well before the Combat Arms earplugs were sold to the military) and nearly 40 percent of plaintiffs served in the military for 10 or more years. A significant number of plaintiffs also had elevated hearing thresholds in their baseline audiograms—i.e., any impairment indicated by their records was already evident before any possible use of the Combat Arms earplugs." *See In re: Aero Technologies, LLC, et al.*, S.D. Ind., Bankruptcy Court, Case No. 22-02890, Dkt. 1221, *Debtors' Motion For Entry Of An Order (I) Authorizing Estimation Of The Aggregate Value Of Combat Arms-Related Claims For The Purposes Of Establishing A Settlement Trust And Confirming A Plan Under Chapter 11; (II) Scheduling Claims Estimation Proceedings; And (III) Granting Related Relief, at p. 4.*

- In the *Mentor Corp. Transobturator Sling Products* MDL,[34] **75 percent** of the 850 cases filed were either dismissed by stipulation of parties (458 cases), dismissed voluntarily (74 cases), or decided against plaintiffs on summary judgment (100 cases).[35]

- In the California state court (JCCP) case involving *Cymbalta*, approximately **31 percent** of the cases were dismissed. The action began in 2015 and was resolved by settlement in May 2016. Out of the 1,325 plaintiffs total, 372 had their cases dismissed on August 16, 2019, for not responding at all or otherwise failing to comply with the CMO governing initial discovery of non-settling plaintiffs, and an additional 41 voluntarily dismissed their claims without payment.[36]

- The judge in the *Imerys Talc* bankruptcy threw out 16,000 votes cast by talc injury claimants on Imerys Talc America's Chapter 11 plan due to "zero diligence."[37] The judge said she "cannot – and will not – ignore" that the law firm that had submitted the claims never specifically asked any clients if they had been exposed to Imerys products or tried to distinguish between clients that were more likely or less likely to be exposed.[38]

The Committee should keep in mind that these numbers very likely understate the problem for several reasons, including that judges are not ordering information about claims, poor record keeping, multiple-plaintiff complaints, unfiled claims, and settlements of insufficient claims. Also, there is non-public data showing large numbers of insufficient claims in recent, large MDLs that has not been included here.

B. Insufficient Claims are Caused by a "Rules Problem"

Insufficient claims such as those described in Point A (above) result from a "rules problem" because the FRCP provisions that define the basic elements of a legal claim[39] in unconsolidated cases have proven impractical in MDLs with hundreds or thousands of claimants. As Judge M. Casey Rodgers explains, the usual procedural safeguards of claims sufficiency are "difficult to employ at scale in the MDL context, where the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands."[40] Many MDL courts regard the FRCP provisions as impractical.[41] MDL judges have said that if they used the same FRCP-based motions practice in mass-tort MDLs that they use in single-party cases, their time would be consumed with this one task. The principles behind Rules 3, 7, 8, 9, 10, 11, and 12 remain important and uncontroversial in all cases, including MDLs. They protect courts and

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[34] *In re Mentor Corp. Transobturator Sling Prods*., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, (M.D. Ga. Sept. 7, 2016).
[35] *Id*. at *1 n.2. *See also* Hon. Clay D. Land, *Multi-District Litigation after 50 Years: A Minority Perspective from the Trenches*, 53 Ga. L. Rev. 1237, 1242 (2019).
[36] *See In re: Cymbalta Drug Cases*, JCCP No. 4825, Defendant Eli Lilly and Company's Status Report and Request to Terminate JCCP 4825, dated January 30, 2020.
[37] *See* Rick Archer, *Judge Tosses 16K Talc Claimant Votes In Imerys Ch. 11* (October 13, 2021), Law360.
[38] *Id.*; *see also In re: Imerys Talc Amercia, Inc. et al.*, Case No. 19-10289 (D. Del., Bankruptcy), Dkt. 4239, at 25.
[39] Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."
[40] Judge M. Casey Rodgers, *Vetting the Wether: One Shepherds View*, 89 UMKC L. REV. 873, 873 (2021).
[41] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. Rev. 1669, 1674 (2017).

parties from insufficient claims by ensuring that every plaintiff has Article III standing and an actual case or controversy, which are constitutional requirements. The fact that these rules are not functioning in MDLs is a very important "rules problem."

C. The Insufficient Claims "Rules Problem" is Also an MDL Management Problem

The data in Point A (above) show not only that many insufficient claims are filed, but also that (1) absent a rule, getting rid of insufficient claims requires the judge's time and attention, and (2) when courts do order information about the basis of claims, claims get dismissed.

For example, in *In re: Zofran*, the court issued an early product identification order and an order requiring plaintiff fact sheets.[42] Specifically, as to the product identification order, the court concluded:

> that production of such information at a relatively early stage in the litigation may assist in the preservation and collection of additional evidence; is not likely to be unduly burdensome; is not likely to result in unfairness to any party; and may help resolve certain issues in this litigation in a timely manner.[43]

Following those orders, approximately 40 percent of the Zofran cases were dismissed.[44] Many of the dismissals were due to plaintiffs' failure to comply with the Court's procedural orders,[45] and many others were voluntary dismissals likely prompted by those orders.[46]

Similarly, in *In re: Abilify*, the over 19 percent dismissal rate occurred due to failure to comply with early court orders, failure to prosecute, [47] or voluntarily dismissals.[48] In *Juul Labs,* it was after PFS requirements were imposed that approximately 17.5 percent of cases were dismissed based on failure to comply with orders or otherwise communicate with the court.[49] In *In re: 3M Combat Arms Earplug*, many of the 47,837 dismissals were for failure to comply with early court orders, failure to resolve overlapping representation issues or to transition from the administrative docket to the active docket, or failure to answer Initial Census Questions.[50]

In other words, insufficient claims pose an MDL management problem—a problem that is worth avoiding—and case experience shows that solving that problem requires courts to issue an order early in the case requiring some basis that the claim belongs in the litigation. The earlier, the better; delay only invites more claims. Note that the *Zofran* case remained manageable (751

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[42] MDL No. 2657, Dkts. 251 & 252 (Orders No. 10 & 11).
[43] MDL No. 2657, Dkt. 251.
[44] MDL No. 2657, Dkt. 1656 at 4-5.
[45] *See, e.g.*, MDL No. 2657, Dkt. 387; Dkt. 550; Dkt. 551; Dkt. 552; Dkt. 655.
[46] *E.g.,* MDL No. 2657, Dkt. 261; Dkt. 266; Dkt. 292; Dkt. 298; Dkt. 330; Dkt. 444; Dkt. 459; Dkt. 467; Dkt. 509; Dkt. 523; Dkt. 528; Dkt. 529; Dkt. 728; Dkt. 974; Dkt. 1031; Dkt. 1050; Dkt. 1051; Dkt. 1054; Dkt. 1055; Dkt. 1087; Dkt. 1088; Dkt. 1089; Dkt. 1094; Dkt. 1137; Dkt. 1138; Dkt. 1624; Dkt. 1637; Dkt. 1639; Dkt. 1640; Dkt. 1652; Dkt. 1678; Dkt. 1809.
[47] *See* n.23, *supra*.
[48] *See* n.24, *supra*.
[49] *See* n.26, *supra*.
[50] *See* n.30, *supra*.

cases) because the court's order requiring information about claims came relatively early in the proceedings, no doubt dissuading others from filing insufficient claims.

Many other problems occur when courts ignore insufficient claims. Professor Bradt asked during the October hearing:

> What is the real practical problem of those cases being parked on the docket during the MDL process, where it seems to me that much of the discovery and litigation is over the common issues, and if those claims are truly meritless, you don't have to settle them? It's not a class action. You don't have to settle them all. You just don't pay them out on the back end. What's the real problem?"[51]

The answers include:

1. Failing to make basic inquiries as to the sufficiency of claims deprives the court and parties of information that could inform initial management decisions related to discovery, motion practice, and bellwether selection,[52] and causes problems on remand and after settlement;

2. Uncertainty about the number of insufficient claims on and MDL docket hampers the parties' ability to consider settlement and therefore delays resolution;[53]

3. Failing to uphold FRCP pleading standards violates courts' constitutional responsibility to examine standing and an actual case or controversy;[54]

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[51] October hearing, 116 (Prof. Bradt).

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

[53] Scott Partridge testified:

> What numbers should be shared with the financial analysts, the market analysts that love to opine about the health of a publicly traded company? What's shared with shareholders? How is it shared? What numbers and dollars are reported to insurers, the inflated number, which will potentially affect risk calculations for future coverage premiums, or an estimate which removes the percentage of unsupported claims? What warranties and representations are those insurers going to look for regarding unsupported claims? What communications are provided to employees, most of whom will own shares of the U.S. publicly traded company? For a product still in the marketplace with or without modification, what information about the volume and nature of claims is provided to customers in the industry? Importantly, what dollars, what dollar numbers does the company post as a financial reserve, the dollars that are extrapolated from a hundred percent, including the inflation, or the 70 percent that is an estimate of what will be compensable? In the event a settlement is advanced and funds are needed to be borrowed, what numbers will form the basis of those loans and what interest rate and what representations and warranties will lenders require?
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> These are just some of the issues that aren't transparent to MDL judges, but they need to understand the effect of unsupported claims and how complex it can make the decision-making process.

Transcript of Proceedings, *In the Matter of: Proposed Amendments to the Federal Rules of Civil Procedure*, January 16, 2024, https://www.uscourts.gov/sites/default/files/jan_16_hearing_transcript.pdf ("January hearing"), 150-51 (Partridge testimony).

[54] October hearing, 145-46 (Leventhal testimony) and 197-204, (Halperin testimony).

4. Ignoring FRCP standards and constitutional requirements deprives defendants of notice of the claims against them; and

5. Allowing unexamined claims harms plaintiffs whose lawyers fail to look into the factual basis of claims.[55]

D. Fixing the "Rules Problem" Would Not Impair MDL Management

The Preliminary Draft is written as a flexible menu[56] rather than a mandatory rule, so Section (c)(4), even if revised, will be a prompt for MDL judges to ask counsel for their views. MDL courts will retain complete discretion over whether to order disclosures for the purpose of preventing and managing insufficient claims early in the proceedings, and may well forego this in an MDL comprised only of two class actions, for example.

LCJ's suggestion for revising Section (c)(4) (see Section H., below) would prompt an order for early disclosures; it would neither force judges to spend time on unnecessary work nor slow the MDL proceedings. On the contrary, as Tripp Haston testified, "I don't think that there is a choice, a dichotomy, between having to … address a cross-cutting issue and also asking the plaintiff for the basic citizenship type of information they need to participate."[57] Ordering disclosure of basic information is not a decision to halt consideration of substantive motions or anything else. In practical effect, it could function like "a Rule 26 disclosure"[58] for the purpose of honoring the Rule 8(a)(2) standard.[59] In fact, the primary purpose of such an order is the prophylaxis that will reduce the burdens on judicial resources caused by insufficient claims. As Chris Guth explained, "we're not trying to figure out how to better litigate claims that don't belong here in the first place. We're trying to keep them from coming in."[60] The order would ask for a basic showing "of the nature of the claim, the product involved, and a compensable injury."[61] In Toyja Kelley's experience, such an order works because it "discourages the filing of unsupportable claims before they even become part of the MDL and, when they are filed, creating an avenue of disposing them as a more ministerial task rather than extensive motion practice."[62] If there is non-compliance with a disclosure order prompted by Section (c)(4), there will be a "one-line motion" to dismiss, and the effect of the order will be that "people won't file

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[55] *See* Burch, Elizabeth Chamblee and Williams, Margaret S., *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd* (Nov. 1, 2022) at 11 ("Shepherding thousands of cases through pretrial has also prompted judges to streamline pleadings, discovery, and motion practice in ways that further depersonalize plaintiffs' court experience and remove the Federal Rules of Civil Procedure's built-in protections."), https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2023/01/Burch-Williams-final-1.pdf.

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

[57] October hearing, 141 (Haston testimony).

[58] October hearing, 114 (Shepherd testimony).

[59] Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."

[60] October hearing, 135 (Guth testimony).

[61] January hearing, 153 (Partridge testimony) and 182 (Rothman testimony).

[62] January hearing, 230 (Kelley testimony).

these cases."[63] This is why LCJ's suggested language is the "rule-based solution that doesn't create some unintended consequence"[64] for which the Committee is searching.

LCJ's suggested language also holds an answer to Judge Jordan's important question: "[I]s there[] a way to frame this so it doesn't jam the system up in the same way that a 12(b)(6) motion could stop everything?"[65] Judge Proctor also raised this issue by observing that it is common practice in single-party cases to stay discovery while a motion to dismiss is pending.[66] Why should product liability MDLs not be handled in the same manner? This question reveals the discrepancy, not the harmony, between current practices. In a single-party case, a judge might suspend aspects of the litigation (typically discovery) while a motion to dismiss (typically based on Rule 12(b)) is resolved. MDL practice is the opposite: judges suspend motions to dismiss while the litigation (including discovery, other motion practice, and bellwether trials) proceeds. So if the goal were to treat MDL cases just like single-party cases, then MDL courts would suspend the litigation and focus on motions to dismiss—*but this is NOT the LCJ proposal*. Rather, the LCJ proposal seeks to *prevent* the insufficient claims problem from overwhelming the proceedings. It does so by prompting courts to order early disclosures in keeping with existing FRCP and constitutional standards—orders affecting the parties, not the court.[67] This prompt will offer judges and parties a means of deterring insufficient claims while not interfering with any judge's discretion to focus on whatever topics or issues are appropriate for the proceedings.

E. Plaintiff Fact Sheets are Not the Solution to the "Rules Problem"

Plaintiff fact sheets are not used to vet claims[68] because, as the MDL Subcommittee knows, they are "not really a screening method so much as a useful way to 'jump start' discovery…."[69] If fact sheets were an effective means of addressing insufficient claims, MDLs would not be suffering from an insufficient claims problem because fact sheets are widely used.[70] Plaintiff fact sheets have proven to be ineffective in dealing with insufficient claims because of the complexity, time, and expense involved.[71] In Harley Ratliff's experience, despite the use of fact sheets, one MDL is "seven years in and more than 80 percent of the inventory of, at one time,

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[63] October hearing, 114-15 (Shepard testimony).
[64] October hearing, 249-50 (Judge Proctor).
[65] October hearing, 115 (Judge Jordan).
[66] October hearing, 133-34 (Judge Proctor).
[67] October hearing, 195 (Guttman testimony).
[68] October hearing, 127-30 (Guth testimony).
[69] Agenda Book, Committee on Rules of Practice and Procedure, June 25, 2019 at 236, https://www.uscourts.gov/sites/default/files/2019-06_standing_agenda_book_0.pdf.
[70] Research by the Federal Judicial Center ("FJC") shows that plaintiff fact sheets ("PFS") are "already used very frequently in larger MDL proceedings, and used in virtually all of the 'mega' MDL proceedings with more than 1,000 cases." Agenda Book, Advisory Committee on Civil Rules, Oct. 29, 2019, at 192, https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf; Meeting Minutes, Civil Rules Advisory Committee, Oct. 29, 2019, Agenda Book, Advisory Committee on Civil Rules, April 1, 2020, at 74, https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf ("Plaintiff fact sheets … have come to be used in almost all of the largest MDL proceedings."). *See also* Paul D. Rheingold, *Plaintiff's fact sheets; use of a census*, *in* LITIGATING MASS TORT CASES § 8:9 (August 2023 Update) ("In recent years, the use of routine interrogatories for the plaintiff to answer has become replaced by a plaintiff's fact statement (PFS).").
[71] October hearing, 205-06 (Ratliff testimony).

16,000 cases have no proof that they have ever been injured."[72] This is typical of other MDLs, where the basic pleading and factual requirements may not be dealt with "for 18 months, two years, [o]r even longer down the road."[73]

During the Committee's hearings, questions were asked about why disclosures of basic information showing claim sufficiency should be required in MDL cases when they are not in single-party cases. The answers are (1) single-party cases do not suffer from an uncontrolled insufficient claim problem because the FRCP are working;[74] (2) the large numbers of plaintiffs in mass-tort MDLs make existing FRCP procedures impractical and overwhelming, according to MDL judges;[75] and (3) MDL practices already diverge from those of single-party cases because fact sheets are used in lieu of motions to dismiss and FRCP-defined discovery devices. All of which gets to the question that the LCJ proposal answers: What procedure would allow MDL courts to prevent and address the insufficient claims problem using well-accepted FRCP pleading standards without overwhelming courts with motion practice focused on individual claims? The LCJ proposal relies on early basic disclosures as the procedure that works "at scale" for preventing and managing claims that are insufficient under existing FRCP standards.

F. A Prompt to Avoid the "Whenever We Get to It" Approach to Claim Insufficiency Would Help Judges Adhere to Constitutional Requirements

The Supreme Court has established that federal courts are under an independent obligation to assess their jurisdiction, the most important element of which is standing.[76] The "first and foremost of standing's three elements" is an "injury in fact,"[77] and the second requirement is a "causal connection" showing the injury is "fairly traceable to the challenged [conduct] of the defendant, and not the result of the independent action of some third party … not before the court."[78] These standards undoubtedly apply to MDL cases.[79] The Sixth Circuit has explained:

> [T]he Supreme Court—again unanimously—has said that, subject to one exception not relevant here, the cases within an MDL "retain their separate identities." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413, 135 S.Ct. 897, 190 L.Ed.2d 789 (2015). That means a district court's decision whether to grant a motion to amend in an individual case depends on the record in that case and not others. Nor can a party's rights in one case be impinged to create efficiencies in the MDL generally. "Section 1407 refers to individual 'actions' which may be transferred to a single district court, not to any monolithic multidistrict 'action' created by transfer." *Id*.

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[72] *Id*.
[73] October hearing, 190 (Guttman testimony).
[74] In single-party cases, the existing FRCP largely prevent and, if necessary, provide a procedure for handling claims that do not comply. Also, unconsolidated cases are not driven by the strong forces that create insufficient MDL claims, including mass advertising, competition for lead counsel positions, and intense regulatory and public relations pressure on the defendants.
[75] October hearing, 53, 213 (Judge Proctor).
[76] October hearing, 145-46 (Leventhal testimony) (*quoting U.S. v. Hayes*).
[77] *Spokeo*, 578 U.S. at 338.
[78] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up, brackets removed).
[79] October hearing, 87-88 (Beisner testimony).

In re Nat'l Prescription Opiate Litigation, 2020 WL 1875174, at *3 (6th Cir. Apr. 15, 2020). At the outset of individual actions, it is likely known whether the plaintiff was exposed to the alleged cause of harm and suffered a subsequent injury.[80]

Delaying the inquiry into basic standing requirements until an uncertain point—perhaps years into the litigation—is not consistent with the Supreme Court's established standard. Moreover, it is "counterproductive … when people don't know before a case is filed what is going to happen and they don't know what the expectations are going to be of them and their clients."[81] Rules are particularly important for new lawyers, law clerks, and litigants.[82] The idea that a court cannot deal with the essential elements of standing at a reasonably predictable early point in the proceedings is at least a serious procedural problem if not a fundamental failure. The FRCP should provide MDL judges a practical procedural tool for timely action to ensure the jurisdictional requirements of standing.

G. No MDL Proceedings Benefit from Insufficient Claims

Even if there is some debate as to *when* insufficient claims should be dealt with in a particular MDL proceeding, there is no question about *whether*. As Judge Rosenberg said, "[n]obody's in support of unsupportable claims."[83] Indeed, no MDL proceeding has ever benefitted from insufficient claims. Rule 16.1 and the Note should reflect that it is good management to address the problem, and bad management to ignore it. Newly appointed MDL judges should know that an analog to Benjamin Franklin's famous adage that "[g]uests, like fish, begin to smell after three days," could be said about insufficient claims: "the longer they're in, the more complicated it makes administration of the MDL."[84] Insufficient claims cause a "chain reaction" of problems for the court and parties.[85] Defendants always want to know, and should be able to know, whether the claims against them are insufficient, even if there's a reasonable chance that a motion will eventually terminate the proceeding.[86]

H. Section (c)(4), as Drafted, is Not a "Rules Solution" and Needs Revising

Draft Section (c)(4) prompts a discussion of "how and when *the parties* will *exchange* information about the factual bases for their claims *and defenses*" (emphasis added). The word *exchange* connotes discovery, and including the word *defenses* guarantees that this language will be misread as prompting a discussion about mutual discovery rather than a procedure for ensuring that plaintiffs' claims meet their essential requirements.[87] The Draft Note conveys the sense that requiring claims to meet the most basic requirements of standing and stating a claim could be an "undue burden[]" and "unwarranted." This language undermines the purpose of Section (c)(4) by conveying that courts should often prefer to ignore the mass filing of

[80] January hearing, 183 (Rothman testimony).
[81] October hearing, 64 (Kaspar Stoffelmayr testimony).
[82] January hearing, 173-75 (Hampton testimony).
[83] October hearing, 208 (Judge Rosenberg).
[84] October hearing, 140-41 (Haston testimony).
[85] January hearing, 187-88 (Rothman testimony).
[86] October hearing, 132 (Guth testimony); January hearing, 237 (Kelley testimony).
[87] October hearing, 148 (Leventhal testimony) ("this doesn't have anything to do with an exchange of information, and it also doesn't have anything to do with defenses.").

insufficient claims—the Field of Dreams problem—because discovery will take care of it. Plaintiffs lawyers agree this is confusing.[88] The purpose of Section (c)(4) is to prompt judges to order disclosures. Such orders will curtail insufficient claims. Fewer insufficient claims will relieve courts and parties from dealing with this problem and allow more focus on important issues.

1. Eliminate "exchange" and "defenses" from Section (c)(4)

The words *exchange* and *defenses* should be deleted from Section (c)(4). Just as Rules 8(a) and 9(b), and the 12(b) standard, are focused on the sufficiency of plaintiffs' claims, so should Section (c)(4) concern a procedure for ensuring that plaintiffs disclose the basic information to show that their claim belongs in the litigation. In contrast, discovery obligations are the topic of Section (c)(6).

2. Use the language of claim sufficiency in Section (c)(4)

Because the purpose of Section (c)(4) is to provide a prompt for handling—and more importantly, averting—the problem of insufficient claims, the text of Section (c)(4) should be the language of claim sufficiency. A modest edit would serve that purpose and avoid confusion with Section (c)(6) by prompting transferee judges to require an early check into the most basic elements of the claims. A revised Section (c)(4) should look something like this:

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

3. The Note to Section (c)(4) should state that FRCP standards apply

The Note to Section (c)(4) should be revised to correct its misidentification of the insufficient claim problem as a discovery matter, and should explain why judges should issue orders that deter insufficient claims.[89] The Note to Section (c)(4) should state that the FRCP rules defining pleading standards, specifically rules 8(a) and 9(b), apply in MDL proceedings, as does Rule 11. Although this is nothing more than black-letter law,[90] the statement is necessary because Section (c)(4) should be a prompt for a procedure that drives compliance with those standards—and not a wink and a nod to an "MDL exception." This no-frills approach "would provide enough corroborating information to allow a party to determine whether the claim has the merit required by Federal Rule of Civil Procedure 8(a), 9(b) and 11."[91] It would make dismissal "almost a

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[88] February hearing (transcript not available), *** (Hazam testimony).
[89] *See* Lawyers for Civil Justice, supra n. 9.
[90] *See, e.g.*, *In re National Prescription Opiate Litigation*, No. 20-3075, 956 F.3d 838, 844 (6th Cir. 2020) ("[N] neither §1407 nor Rule 1 remotely suggests that, whereas the Rules are law in individual cases, they are merely hortatory in MDL ones.").
[91] Posted Comment by Bayer, Oct. 15, 2023, pps 4-5. *See also* Alan E. Rothman & Mallika Balachandran, *Early Vetting: A Simple Plan to Shed MDL Docket Bloat,* 89 UMKC L. Rev. 881, 885 (2021)(describing successful use of

ministerial task rather than the far more re-source-intensive motion practice" currently required.[92] "Two pieces of paper is what we're asking for."[93] LCJ offers a potential Note text in its public comment consistent with these suggestions.[94]

I. Neither the Designation of Coordinating Counsel Nor the Appointment of Leadership Counsel Presents a "Rules Problem" for which a "Rules Solution" Exists—and the Risk of Negative Consequences is Extremely High

The public comment period did not produce any argument or evidence that a "rules problem" exists in relation to the designation of coordinating or the appointment of leadership counsel. To the contrary, the record is replete with warnings from practitioners on both sides of the "v" that including these topics in Rule 16.1 would cause more problems than it would solve. The testimony reflects that, by and large, plaintiffs' lawyers are organizing themselves. Moreover, as John Beisner discussed[95] and LCJ wrote,[96] rulemaking on this topic would inevitably engage the FRCP in the complicated ethical mire that arises when courts purport to define lawyers' responsibilities in a way that overrides plaintiffs' choice of counsel. The Committee should jettison this topic and delete Rule 16.1(c).

J. Settlement Does Not Pose a "Rules Problem" for which a "Rules Solution" Exists

No one identified the facilitation of settlement discussions as a "rules problem" during the public comment period. In fact, the proposed note to Section (c)(9) and members of the Committee pointed out that Rule 16 already addresses this topic,[97] and both plaintiffs' counsel and defense counsel testified that there is no need to focus on settlement at an initial management conference.[98] No one offered empirical data or even anecdotal evidence that there is a need for more judicial attention to settlement. To the contrary, there is considerable concern that MDL courts overstep when they emphasize settlement, which may even be counterproductive.[99] Many federal judges would disagree with the Preliminary Draft's commentary that a court should be "regularly apprised of developments regarding potential settlement" of matters before them and should "make every effort" to supervise lawyers (on one side of the case) as to their settlement efforts. The Committee should delete any mention of facilitating settlement from Rule 16.1.

"shorter questionnaires at the outset of an MDL proceeding, well before the PFS process, to specifically target the bona fides" of allegations of "exposure to the product and/or a relevant injury" as a gateway function, citing *In re Zofran (Ondansetron) Prod. Liabl. Lit*., No. 1:15-cv-2657-FDS, 2016 WL 3058475 (D. Mass. May 26, 2016).

[92] DRI Center for Law and Public Policy Comment, *Summaries*, at 142-143 of 177.

[93] *Id*.

[94] LCJ Public Comment on Rule 16.1, 10-11.

[95] October hearing, 78-82 (Beisner testimony).

[96] LCJ Public Comment on Rule 16.1, 11-17.

[97] *See* Preliminary Draft Rule 16.1(c)(9) and accompanying advisory committee's note; January hearing, 142-43 (Professor Bradt).

[98] January hearing, 121, 123-24 (Acosta testimony) and 137 (Mickus testimony).

[99] LCJ Public Comment on Rule 16.1, 17-19 ("the over-emphasis on settlement at the initial conference is inappropriate because it fosters a presumption of liability, conveys that the judge has an agenda, is inconsistent with the MDL statute's boundaries as a pre-trial mechanism, and is counterproductive because it puts the "cart" of settlement well before "horse" of litigating claims, defenses, and liability."); January hearing, 138-39 (Mickus testimony).

K. Direct Filing Does Not Pose a "Rules Problem" for which a "Rules Solution" Exists

There was also no discussion—let alone empirical data—during the public comment period that a "rules problem" exists related to direct filing. On the contrary, all of the information provided by witnesses on this topic emphasized the negative unintended consequences that any FRCP provision concerning direct filing would cause.[100] Inserting the concept of direct filing into the FRCP would be a radical decision because direct filing may be inconsistent with the statutory framework, which mandates that MDL transfers "shall be made by the [JPML]."[101] Moreover, because several courts have held that MDL courts lack *subject-matter jurisdiction* over direct-filed claims,[102] subsection (c)(10) urges the filing of claims that MDL courts lack power to address. Section 16.1 (c)(10) and the accompanying Note should be removed.

L. The Appointment of Special Masters Does Not Pose a "Rules Problem" and Adding More Rules Would Only Create Confusion

No public comment or hearing witness said a "rules problem" exists relating to the appointment of special masters, and there is no empirical data or anecdotal evidence that MDL courts need new guidance on this topic. Rule 53 already requires that "the court must give the parties notice and an opportunity to be heard" before appointing a master,[103] and Rule 72 provides guidance and procedures for referrals to magistrate judges.[104] Adding subsection 16.1(c)(12) to the FRCP would cause confusion by communicating an explicit endorsement of appointing masters, contrary to the Committee Note statements that "appointment of a master must be the exception and not the rule" and "[a] master should be appointed only in limited circumstances" because "[d]istrict judges bear primary responsibility for the work of their courts." [105] When a court appoints a master to address pre-trial matters, "[a]ppointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge."[106] Section (c)(12) should be deleted.

M. Inviting Pleadings and Discovery Devices that are Not Allowed or Described in the FRCP would Engender Significant Adverse Consequences

The Committee also did not receive any comments or testimony that there is a "rules problem" whose solution is to refer to pleadings not allowed under Rule 7 or to discovery devices that are not defined by the rules. There has been no empirical or anecdotal evidence of a problem. In contrast, there are significant negative consequences that will occur if the Committee were to

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[100] LCJ Public Comment on Rule 16.1, 20-21.
[101] *See* 28 U.S.C. § 1407(a); *see also, In re Kaba Simplex Locks Marketing and Sales Practice Litig*., No. 1:11-MD-2220 (N.D. Ohio Aug. 1, 2012) ("no basis upon which [the court] has the legal authority to issue the requested direct filing order in the instant case.").
[102] *See, e.g.*, *In re Jan. 2021 Short Squeeze Trading Litig.*, 580 F. Supp. 3d 1243, 1253 (Jan. 10, 2022) ("The weight of authority further supports the conclusion that an MDL transferee court lacks subject matter jurisdiction over claims by new plaintiffs asserted for the first time directly in an MDL proceeding.").
[103] FED. R. CIV. P. 53(b)(1).
[104] *See* FED. R. CIV. P. 72. *See also* 28 U.S.C. §636(b).
[105] FED. R. CIV. P. 53 advisory committee's note to 2003 amendment.
[106] *Id.*

move forward with amendments that refer to documents that are not recognized by the FRCP.[107] The Committee should remove any mention of pleadings or discovery devices that are not allowed under Rule 7 or otherwise defined by the FRCP.

II. PRIVILEGE LOG PRACTICES PRESENT A "RULES PROBLEM" FOR WHICH THERE IS A STRAIGHTFORWARD AND MUCH-NEEDED "RULES SOLUTION"

Privilege logs present a "rules problem" because many courts and parties misconstrue Rule 26(b)(5)(A) to require document-by-document privilege logs in all cases—including cases involving massive amounts of data, and even for categories of documents that are highly unlikely to contain discoverable information, such as communications with outside counsel after the filing of a complaint.[108] Although the 1993 Committee Note correctly observed that detailed privilege logs "may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories,"[109] Rule 26(b)(5)(A) now effectively imposes these very burdens on litigants.[110]

A. The Burden of Privilege Logging Is Large and Disproportionate, and It Affects Both Big and Small Cases

Privilege review and logging is the single largest expense in civil litigation.[111] Robert Keeling, whose practice predominately focuses on handling privilege logs[112] testified that in one of his matters, "the contract attorney team spent a total of 21,378 hours on the single log," which is "the equivalent of an associate spending 11 years of their life to compose one log for one party on one matter."[113] Such disproportionate burdens are not affecting "just a big case or two," but rather, as Jonathan Redgrave explained, are "impacting the availability of the courts to smaller cases" as well.[114]

As technology progresses and the types of communication tools evolve, the volume of communications subject to discovery increases exponentially. Consequently, the number of documents subject to valid claims of privilege is also increasing. Although technology advances have aided the discovery review process, including through AI and TAR, it cannot replace the need to have attorneys review records withheld as privilege in the effort to prepare a log of every document when required. These logs, which can cost in excess of $1,000,000, rarely if ever

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[107] LCJ Public Comment on Rule 16.1, 19-20.
[108] *In re Imperial Corp. of America*, 174 F.R.D. 475, 478 (S.D. Cal 1997).
[109] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment ("The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.")
[110] Lawyers for Civil Justice, *The Direct Approach: Why Fixing the Rule 26(b)(5)(A) Problem Requires an Amendment To Rule 26(b)(5)(A)*, Oct. 4, 2023, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0007.
[111] October hearing, 220 (Rosenthal testimony); January hearing, 190 (Cohen testimony).
[112] October hearing, 16 (Keeling testimony).
[113] *Id*. at 6.
[114] October hearing, 91 (Redgrave testimony).

result in a meaningful change in information that impacts the merits issues in the case. Even if documents are inappropriately withheld, there are much better mechanisms available to identify these records in categorical logs that are designed to focus on key issues versus a log with over 100,000 documents that makes it much harder to find.

B. The "Rules Problem" Is that Courts and Parties Imbue Rule 26(b)(5)(A) with a Default to Document-By-Document Logging

The cause of the disproportionate logging problem is that courts and parties read Rule 26(b)(5)(A) to require document-by-document logging rather than—as the Committee intended in 1993—allowing more efficient and equally (or more) effective alternatives.[115] Judges, magistrate judges, and special masters "believe that's the de facto standard."[116] Although document-by-document logging may be appropriate for some withheld records, it is also important for courts and parties to consider that categorical logs may be more helpful.[117] Categorical logs with metadata are recognized on both sides of the "v" as a reasonable, efficient, and effective means of winnowing down the withheld documents that might be impactful to the case and should be specifically reviewed.[118]

C. The "Rules Solution" is to Amend Rule 26(b)(5)(A)

The "rules solution" is clear: The FRCP should clarify that document-by-document logging is not the default standard.[119] Putting this clarification in Rule 26(b)(5)(A) is the key[120] because that rule is the source the requirement to describe the nature of the documents withheld from production. The "rules package is incomplete if we don't address the actual 26(b)(5)"[121] because the current proposal to prompt early conversations on the topic cannot solve every problem, especially because "parties typically do not have the information they need to meaningfully discuss and negotiate privilege log issues at the outset of a case."[122] At very least, the proposed language offered by Judge Facciola and Jonathan Redgrave[123] is a necessary complement to the Committee's proposed amendments to Rules 16(b) and 26(f)(3)(D). [124] It is also important to include the concept of proportionality in a Rule 26(b)(5)(A) amendment because it is often inappropriately overlooked.

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[115] October hearing, 181 (Larson testimony); January hearing, 190 (Cohen testimony).
[116] October hearing, 224 (Rosenthal testimony).
[117] October hearing, 184 (Larson testimony); January hearing, 192 (Cohen testimony).
[118] *See* October hearing 24 (McNamara testimony) and 17 (Keeling testimony); January hearing, 247-48 (Myers testimony); February hearing, *** (Mosquera testimony).
[119] October hearing, 221 (Rosenthal testimony); January hearing, 197-98 (Cohen testimony).
[120] October hearing, 185 (Larson testimony) and 221 (Rosenthal testimony); January hearing, 198-99 (Cohen testimony).
[121] October hearing, 92, 97.
[122] October hearing, 7 (Keeling testimony).
[123] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023), https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.
[124] October hearing, 7 (Keeling testimony) ("if there is a change to Rule 26(b)(5) consistent with, for example, the proposed Jonathan Redgrave submission, then the proposed meet-and-confer requirements would, in my view, be beneficial.").

D. Suggesting "Rolling" Logging in the Note Will Cause Negative Unintended Consequences

The proposed Rule 16(b) Note language referring to producing privilege logs on a "rolling" schedule is not an appropriate "rules solution" because the unintended negative consequences will overwhelm any value. Robert Keeling testified:

> I can confidently say that rolling privilege logs are inefficient and ineffective. More specifically, they will lead to delay, increased costs, and lower-quality logs in large document cases. In turn, lower-quality logs will lead to more disputes between parties and increased judicial resources to resolve those disputes.[125]

Instead, if the Committee concludes that guidance about process would help achieve early dispute resolution, it should refer to "phased" or "tiered" logging, which are methods that focus the parties and the court on the "privileged communications that actually matter to the case."[126]

E. The Logging Burden is Asymmetric, and the Note Should Reflect This

Several commentators criticized the draft Note language for focusing more explanation on the burdens of producing privilege logs than on the burden of requesting documents and logs from the producing party. Although there are, no doubt, instances of frustration on the part of requesting parties, it would be inaccurate to equate the burdens. As one witness from the plaintiffs' perspective noted, it "would be bad faith" to say the burden is "symmetrical."[127]

F. Non-Parties Also Need a "Rules Solution"

The proposal to amend Rules 16 and 26 is not a "rules solution" to the problems that non-parties face in producing privilege logs because non-parties do not typically participate in early conferences or scheduling hearings. The Committee should amend Rule 45 to clarify that, just as with parties, there is not a default requirement for document-by-document privilege logs, and non-parties should tailor their logging processes appropriately and proportionately for the needs of the case.

CONCLUSION

The public comments and testimony about the Preliminary Draft have clarified that there are only two rules problems for which rules solutions exist without creating unwanted and unintended consequences. Those rules problems are (1) insufficient claims in MDL proceedings and (2) the highly burdensome default to document-by-document privilege logs. The rules solutions to both problems are grounded in well-established FRCP principles and therefore avoid unintended consequences. LCJ's proposal to improve Rule 16.1 seeks to *prevent* the insufficient claims problem from overwhelming MDL proceedings. It does so by prompting courts to order early disclosures in keeping with existing FRCP and constitutional standards—orders affecting

[125] October hearing, 7-8 (Keeling testimony).
[126] October hearing, 8-9 (Keeling testimony).
[127] October hearing, 176 (Keller testimony).

the parties, not the court. There are no "rules problems" supporting the proposed Rule 16.1 provisions focused on designating leadership counsel, facilitating settlement, managing direct filing, appointing special masters, or preparing pleadings that are not allowed by Rule 7—and rulemaking on these topics risks serious negative consequences. LCJ's suggestions for improving privilege log practices would help courts and parties find more efficient and equally (if not more) effective logging practices. Both of LCJ's proposals would lessen the burdens on judicial resources while protecting courts' discretion to manage each case.