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

BETTER INFORMATION AND AN EARLIER START: HOW MDL JUDGES WOULD BENEFIT FROM A NEW TOOL FOR INFORMING ORGANIZATIONAL DECISIONS AND REDUCING THE DELAY BETWEEN COORDINATION AND INITIAL DISCOVERY WHILE PRESERVING JUDICIAL DISCRETION

March 8, 2022

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

Introduction

Judges presiding over newly coordinated mass-tort MDL proceedings confront a problem they don't have the tools to solve: the inherent delay between receiving the case assignment and the ability to make informed organizational decisions. That pause has a domino effect, because it also delays the court's ability to designate leadership, set the course for discovery, and select bellwether cases for trial. During the months that pass between coordination and initial case management orders, counsel for claimants cannot effectively gather information for initial discovery because they do not know what tools will be implemented—whether a census, a plaintiff fact sheet (PFS), or something else. Unlike non-MDL cases, where plaintiffs' counsel typically conduct due diligence and initial factual discovery before and immediately after filing a complaint, mass-tort MDL proceedings often see no such work until months later—and those

[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 30 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.

months are consumed with negotiating the contours of a census order or PFS, initial procedural orders, and accompanying motion practice. The months that elapse as the proceedings take shape—and the lost opportunity for making good use of that time—explain one critical reason why a recent study of MDLs concludes that "MDLs last almost four times as long as the average civil case."[2] Products liability MDLs linger for an average of 4.7 years.[3]

The three census efforts the Subcommittee is monitoring[4] have shown some promise in reducing the lag time, but also demonstrate the inherent limits of the tools available to MDL judges. Prior to those efforts, an FJC study found that "the average time from Panel centralization to entry of a PFS order in the proceeding it studied was over 8 months."[5] All three census orders improved on that timing,[6] but in doing so have shown that courts face an built-in obstacle to getting an earlier understanding of the litigation in time to inform the initial organizational orders (the effects of which will not be known for months or even years to come). MDL judges—especially first-time MDL judges—learn by experience that early information is key to knowing how to set the course for the proceedings.[7] Although the census approach has provided MDL courts with some useful information relatively early in the litigation, it does not, and cannot, provide a mechanism for starting on "day one." Only a rule can do that.

The Federal Rules of Civil Procedure (FRCP) can provide an earlier start to MDL proceedings than any court can achieve with an order. Because the FRCP are in place on day one (and even before that, of course), they establish the basic expectations that allow parties to begin work even before a transferee judge has the chance to formulate an initial discovery/scheduling order, and in fact in some instances even before the MDL is created. In non-MDL cases, the discovery rules function as a general roadmap long before the court provides specificity, allowing parties sufficient direction for initial work-up prior to and immediately after commencement. Unfortunately, modern MDL practice has greatly reduced or even nullified this role for the FRCP; in the absence of any visibility into future expectations, counsel for MDL claimants now routinely hold off conducting basic due diligence or collecting supporting documents until the MDL court orders it and establishes a timetable for compliance. That is perhaps understandable

---

[2] Burch, Elizabeth Chamblee and Williams, Margaret S., *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd* (August 6, 2021) (hereinafter "Burch/Williams Survey") at 11. Cornell Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3900527 or http://dx.doi.org/10.2139/ssrn.3900527.

[3] *Id*. at 35.

[4] *In re 3M Combat Arms Earplugs Products Liability Litigation* (MDL No. 2885) (N.D. Fla.), *In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation* (MDL No. 2913) (N.D. Cal.), and *In re Zantac (Ranitidine) Products Liability Litigation* (MDL No. 2924) (S.D. Fla.).

[5] Advisory Committee on Civil Rules, *Agenda Book, April 2-3, 2019* (hereinafter "Civil Rules Agenda Book April 2019"), p. 209, available at *https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf*.

[6] The JPML ordered coordination of the *3M Earplugs* cases on April 3, 2019, and the census order was signed on October 22, 2019. The JPML created the *Juul* MDL proceeding on October 2, 2019, and the census order was signed on November 19, 2019. The JPML ordered coordination of the *Zantac* cases on February 6, 2020, and the census order was signed on April 2, 2020.

[7] For example, the introductory language to the census order in the Zantac MDL states: "The parties have worked diligently together to create a census program that enables the parties and the Court to have a robust and timely understanding of the scope and size of the litigation relating to Zantac and/or ranitidine in order to facilitate early case management decisions that match the contemplated nature of the litigation."

from an efficiency standpoint, as counsel representing plaintiffs in an MDL are generally reluctant to collect initial information, only to find out later that more, less, or different information is required. Amending the FRCP to establish initial disclosures would empower MDL judges by establishing expectations and maintaining their discretion.

A simple and flexible initial disclosure rule such as the attached Multidistrict Initial Limited Disclosure proposal ("MILD proposal")[8] would give MDL judges an earlier and better understanding of the type and scope of individual claims that will predominate in the litigation in time to inform the early organization of the proceedings—while still preserving the court's discretion, with the parties' input, to determine what evidence and deadlines meet the needs of each proceeding. In practice, it is more likely that parties will stipulate to those details via Rule 29, which would of course apply as it always does. Either way, the early disclosure of evidence demonstrating both exposure to the alleged cause of an injury and the resulting injury would be a significant improvement for MDL judges and parties alike; it would inform the course of the proceedings (including leadership determinations, initial procedural orders such as common benefit orders, census efforts, discovery plans, and bellwether selections), protect judicial resources, facilitate any later settlement discussions, and shorten the overall time to resolution.

For claimants, the MILD proposal would address a top complaint, often stated by MDL plaintiffs' leadership counsel themselves: that their lawyers never gather, and the court never considers, the facts of their cases.[9] It would do so by setting out a clear expectation that evidence of claimants' alleged exposure and harm will be required at the very start of the MDL, so that the information gleaned from that evidence can set the course of the proceedings. That expectation will spur meaningful due diligence and a reasonable, targeted document collection effort before filing or immediately thereafter—even if the MDL court decides later to clarify what type of evidence suffices in the particular proceeding and perhaps to modify the rule's presumptive time limits. For defendants, the rule would be a prophylaxis against problems caused by the mass filing of unvetted claims, which complicates defendants' ability to understand and resolve cases by hindering their ability to evaluate potential liability and settlement values. Meanwhile, for the Committee, an FRCP amendment like the MILD proposal would be an appropriate solution to what is, after all, a rules problem, because it would remedy the discovery rules' failure to provide in coordinated cases the same benefit they produce in all other cases with respect to due diligence, and because "the absence of any mention of MDLs in the Civil Rules seems a striking omission."[10]

---

[8] *See also*, Lawyers for Civil Justice, *Fixing The Imbalance: Two Proposals for FRCP Amendments that would Solve the Early Vetting Gap and Remedy the Appellate Review Roadblock in MDL Proceedings*, Sept. 9, 2020, at 1-9, available at: https://www.uscourts.gov/sites/default/files/20-cv-aa_suggestion_from_lawyers_for_civil_justice_-_mdls_0.pdf.

[9] Burch/Williams Survey at 11. *See also*, Lawyers for Civil Justice, *Common Ground: A New Survey of MDL Claimants Shows the Real Parties in Interest Agree* Ad Hoc *Procedural Shortcuts Intended to Reduce Discovery "Burdens" Undermine Fairness*, Sept. 29, 2021, available at: https://www.uscourts.gov/sites/default/files/21-cv-v_suggestion_from_lcj_-_mdl_litigation_0.pdf.

[10] Advisory Committee on Civil Rules, *Agenda Book, Oct. 5, 2021*, at 164, available at: https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_9.16_1.pdf.

I. MDL JUDGES COULD HAVE BETTER, EARLIER INFORMATION IF INITIAL DISCLOSURE OF EXPOSURE AND INJURY BEGAN BEFORE OR IMMEDIATELY AFTER COORDINATION, BEFORE COURTS HAVE AN OPPORTUNITY TO CONSIDER INITIAL SCHEDULING ORDERS

Judges who are newly appointed to preside over mass-tort MDLs are expected to make early case-management decisions that will have profound effects on the course of the proceedings—and to do so without knowing much if anything about the individual claims that will define the litigation. They have a "chicken or egg" problem because, without first having basic information about the individual claims, it is difficult to make informed decisions about census orders or other discovery procedures for understanding those claims. This is particularly problematic for first-time MDL judges because they are used to the common practices in non-MDL cases, where the expectation (derived from the FRCP) of prompt initial discovery and motion practice drives pre-filing due diligence that typically provides courts and parties an early understanding of cases. MDL judges' interest in getting the proceedings off to an early and appropriate start is thwarted by the inherent obstacle of timing. No census, registry, or PFS can take effect on day one. And because plaintiffs' counsel do not know what information might later be required by those otherwise useful tools, they often wait to see if, when, and what will be required before gathering supporting documentation from their clients. Meanwhile, months pass as counsel engage in give-and-take negotiations and compromise on early discovery processes, sometimes followed by litigation of contested issues. No matter how "early" they occur in the process—and realistically it will be months—census forms, registries, and PFSs cannot deliver information soon enough to inform an MDL judge's initial organizational decisions; and as a practical matter, they typically don't require the key information an MDL court needs to structure the proceedings: evidence of exposure to the alleged cause of harm and a resulting injury.

An FRCP disclosure provision would empower MDL courts by establishing "day one" expectations that plaintiffs' counsel will disclose evidence of exposure and injury very early in the proceedings. Plaintiffs' counsel thus would be incentivized to begin collecting this information even before the MDL is created or claim is filed, and certainly by the date of the initial conference before the transferee judge.[11] The rule would, of course, provide MDL judges with full discretion to define the specific types of evidence that suffice in a particular case[12] and to modify the rule's presumptive deadlines as appropriate.[13] The rule would enhance, not diminish, the judge's ability to control the case because MDL judges who have the benefit of

[11] Any argument that a large volume of claims prevents plaintiffs' counsel from gathering this basic evidence should be rejected as incompatible with a lawyer's responsibility. *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.") available at: https://www.uscourts.gov/sites/default/files/20-cv-hh_suggestion_from_shanin_specter_-_mdls_0.pdf.

[12] In many MDLs, this will be clear. In some MDLs, the question might require a judgment call. But knowing that early evidence will be required would focus the parties' attention on the options, and would likely result in the parties' agreement at least on the viable options if not the particular items.

[13] Statutes of limitations are unlikely to require a modification; as written, the MILD proposal provides 60 days to gather evidence after filing.

knowing the contours of the individual claims (types of products/exposures and scope of injuries alleged) early in the MDL will be better able to begin meaningful case management decisions months earlier than present practice, including decisions on leadership selection, common benefit orders, census efforts, discovery direction, and bellwether discovery and trial preparation.

The benefits of an early disclosure rule are especially valuable if the MDL court intends to gather more detailed information about the docket via a census, registry, or PFS. When lawyers negotiate such mechanisms, the court's order sets in motion an iterative process that will take many months if not years—including instances where plaintiffs (usually through their counsel) fill out forms but still do not collect the documentary evidence supporting their answers. Having the basic documents that support allegations of exposure and injury at the outset of an MDL will inform the scope, contours, and details of those case management efforts by focusing those efforts on information that matters to the litigation. A rule such as the MILD proposal would remedy a weakness of those mechanisms, which is that their timing can actually serve to excuse, rather than require or incentivize, pre-coordination and pre-filing due diligence.

Importantly, an initial disclosure rule like the MILD proposal would place no significant burden on MDL plaintiffs or their counsel. In most mass-tort litigations alleging that an exposure to a product caused an injury, the documents that would evidence the exposure and the injury are easily identified and collected. With prescription medications, prescription records are available from doctors or pharmacies. With medical devices, the "sticker page" that comes with the device, identifying its manufacturer and type, is almost always included in a patient's medical records. And of course there are many different medical records (often just a page or two) that could suffice as evidence of an alleged injury. In a non-MDL context, these basic records are collected as a matter of course before a plaintiff's lawyer even accepts a case, let alone files a complaint. In fact, when plaintiffs' lawyers in a mass-tort context seek an agreement tolling the statute of limitations for their clients' claims in order to have more time to evaluate the claims—which happens regularly—defendants require precisely this type of information, and plaintiffs' counsel have no problem collecting it quickly. A new rule would encourage this practice in MDLs as well.

II. THE SUBCOMMITTEE'S "SKETCH" RULES WOULD HINDER, NOT HELP, MDL COURTS IN OBTAINING EARLIER, BETTER INFORMATION

The Subcommittee's "sketch" rule amendments would not drive earlier gathering of key information that would assist in an MDL judge's initial orders. They would instead "codify" the very uncertainty that causes lawyers to take the wait-and-see approach to initial due diligence about individual claims. The Rule 16(b) sketch[14] says an MDL court "should consider" entering a scheduling order "directing the parties to exchange basic information about their claims and

[14] Advisory Committee on Civil Rules, *Agenda Book, Oct. 5, 2021*, p. 168-71, *available at* https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf

defenses at an early point in the proceedings." This provision unfortunately would be read by many counsel to say: Don't do anything yet to investigate claims and collect supporting documentation because the court may or may not enter an order months from now, with deadlines even further out, and no one knows yet what the order will require. Similarly, the Rule 26(f) sketch[15] calls for the parties' discovery plan to contemplate "*whether* the parties should be directed to exchange basic information about their claims and defenses at an early point in the proceedings" (emphasis added). These provisions would put the FRCP's imprimatur on the frequent mass-tort practice of "get a name, file a claim," which means delaying or even foregoing due diligence and thereby depriving MDL judges of the information they need to make early case management orders. The Committee should not weaken the FRCP by excusing MDL counsel from the FRCP's existing standards for basic due diligence consistent with good-faith pleading.

III. THE ZANTAC MDL CENSUS EFFORT DEMONSTRATES HOW A RULE IN EFFECT ON "DAY ONE" WOULD INFORM THE COURT'S INITIAL ORDERS AND ACCELERATE FACTUAL UNDERSTANDING

In the Zantac MDL, the census process has provided the parties with substantial information about pending individual claims and, via a registry, potential claims. That has been helpful given the large number of potential claims and the many different injuries alleged by claimants in the MDL. However, the Zantac census was not intended to provide, and therefore was not a substitute for, early disclosure of evidence showing use of the product or the alleged injury. Rather, both the initial census form and the "census plus" form required claimants simply to indicate whether they had ordered medical records, proof of use records, or other supporting documents. That structure may well have fit the Zantac MDL given the fact that Zantac came on the market in 1983 and locating usage records from that far back is quite challenging, if it can be done at all. Moreover, most of the plaintiffs/claimants used only an over-the-counter version of the product, which likewise can make obtaining proof of use more time consuming than in the ordinary case. But in typical pharmaceutical products MDLs—for example, involving a prescription medication that was used more recently—records evidencing use are far more readily obtained. And as to evidence of injury, it would have been relatively easy for claimants in the Zantac MDL to obtain a medical record showing the cancer they had or have. Instead, two years into the MDL, the bellwether selection process now underway is only now revealing that some claimants who alleged a certain cancer in their census form actually have a different cancer. The Court and the parties undoubtedly would have benefitted from having that information much earlier in the process, long before the bellwether selection order.

[15] *Id.* at 171-72.

IV. IN ADDITION TO EMPOWERING MDL COURTS WITH EARLIER AND BETTER INFORMATION, AN INITIAL DISCLOSURE RULE WOULD HELP CLAIMANTS AND DEFENDANTS

A. A Rule Requiring Early Investigation of Individual Claims Would Help Claimants by Ensuring the Facts of Their Cases Are Considered

The Burch/Williams survey of individual claimants whose personal injury cases were consolidated into multi-district litigation shows that claimants would have more confidence in MDL proceedings if the court were able to learn the information necessary for a fair adjudication on the merits.[16] Fifty-one percent of claimants in the Burch/Williams Survey "strongly or somewhat disagreed" that "the judge had the necessary case information to make informed decisions."[17]

MDL claimants' dissatisfaction with the court's lack of knowledge about their individual claims is reflected in their observations about their own lawyers. According to the Burch/Williams Survey, "nearly half disagreed that their lawyer considered the facts of their case."[18] One plaintiff reported that "after having her case for five years, her lawyers never obtained her medical records."[19] She said, "If they had bothered in getting my medical records they would have had all the proper knowledge of my case."[20] Another said: "To this day I have never spoken with the attorney …. I had absolutely no input into my own case."[21] As one claimant summed up her experience: "I was not given the chance to tell my story or what my injuries were…."[22] MDL practices that give MDL claimants' lawyers an exclusion from FRCP's due diligence standards leaves claimants feeling that "no one really wanted to take the time to confirm my story."[23] The Burch/Williams Survey concludes: "we found the procedural mechanisms that judges design to make MDLs easier for them are the very things that silence and pose barriers for plaintiffs. . . ."[24] Although these comments reflect the failings of individual lawyers, they also highlight how MDL courts would serve claimants better if a "day one" rule set the expectation that disclosure of the most basic evidence would be required soon after consolidation or filing.

Claimants would also benefit from the quicker time to resolution that would result from a rule empowering MDL courts to make earlier, more-informed decisions regarding the structure of MDL proceedings. Unsurprisingly, 73 percent of MDL claimants find the time it took to resolve

[16] Burch/Williams Survey at 52.
[17] *Id*. at 41.
[18] *Id*. at 24.
[19] *Id*. at 29.
[20] *Id*.
[21] *Id*. at 25.
[22] *Id*. at 32.
[23] *Id*. at 47.
[24] *Id*. at 4.

their cases unreasonable, and 60.8 percent find it "extremely unreasonable,"[25] according to the Burch/Williams Survey. A "day one" rule establishing expectations would help: "Managing thousands of cases with ad hoc procedures curtails voice and participation, and yet resolving cases still takes four times as long as the average civil suit,"[26] according to the Burch/Williams Survey.

B. Early Disclosure of Evidence Showing Exposure and Harm—Subject to the Court's Discretion and Definition—Would Help Defendants by Allowing an Earlier Evaluation of Risks and Deterring the Filing of Unvetted Claims

A rule requiring individual claimants to disclose evidence of exposure to the alleged harm and a resulting injury at the earliest stage of a new MDL would enable defendants to make quicker and more accurate conclusions about case valuation and litigation risks, while also saving defendants from the vexatious complications caused by the mass filing of meritless claims.

The FRCP discovery rules are failing to provide MDL defendants the same protections they give defendants in non-MDL cases. In non-MDL cases, Rules 3, 8, 9, 11, 12, and 56 have the effect of requiring early (including pre-filing) due diligence by defining the standards that courts are expected to apply to claims. The evidence gathered pursuant to that due diligence helps defendants make informed decisions about case risks and valuation. But in MDL cases, these rules are not achieving the same effect because neither plaintiffs' counsel nor anyone else (including the MDL judge) knows what, if any, standards will apply to individual claims until many months (or longer) after coordination, a situation that invites plaintiffs' counsel to "get a name, file a claim" without taking steps to learn whether individual claims have a basic factual foundation. Meritless claims have large ramifications to defendants, both in and outside the court.

Only a rule can solve this problem. If a census, registry, or discovery order issued months after coordination were the answer to the lack of information and the mass filing of unvetted claims, then we would see that result in the MDLs where those tools have been used—but we do not. Instead, even the most actively managed MDLs today suffer from very high numbers of claims that lack any supporting evidence of exposure and injury, years after the proceedings began. The solution is a rule because only a rule in place on day one can have the needed prophylactic effect. A rule such as the MILD proposal would help MDL judges address the defendants' critical need to evaluate the claims and to avoid the problems caused by mass filing of unvetted claims.

Conclusion

MDL judges would have more knowledge and control of their newly established mass-tort proceedings if the Committee provided a new disclosure rule providing a "day one" default requirement to provide evidence of exposure to the alleged harm and a resulting injury early in

[25] *Id*. at 37.
[26] *Id*. at 52.

the case. Without such a tool, even the most forward-thinking courts will continue to be constrained by having to wait months before a census order, registry, or PFS can be devised, entered, and complied with.

An amendment to Rule 26(a)(1) requiring MDL claimants alleging personal injury to disclose evidence of exposure to the alleged harm and a resulting injury would help courts begin the important work of organizing the litigation at a much earlier date. It would allow MDL courts to begin meaningful early case management much earlier than current practice and would provide MDL courts and parties with key information early enough to inform leadership decisions, discovery direction, and bellwether selection. Of course, like all discovery rules, this rule would preserve courts' discretion to modify the default rule and to accommodate case-specific variables including what constitutes proof and what timing is appropriate in each MDL—and would allow parties to stipulate to those details as well.

In addition to empowering MDL judges, the rule would also benefit both claimants and defendants. It would address claimants' desire to know that the court is considering the facts of their cases. It would help defendants by allowing an earlier and more accurate evaluation of litigation risks, while also protecting them from the serious consequences of rampant meritless claims. The rule would do so without imposing on judicial resources or creating any new or undue burdens on the claimants' lawyers; it would require only the most basic documentation already necessary to meet the FRCP's existing standards for good-faith pleading.

Multidistrict Initial Limited Disclosure Proposal

Rule 26(a)(1)

***

(F) *Multidistrict Initial Limited Disclosure*.

(i) In General. In any action alleging personal injury pending in a coordinated or consolidated pretrial proceeding established pursuant to 28 U.S.C. § 1407, each plaintiff shall, without awaiting a discovery request, provide to the other parties documents or electronically stored information evidencing:

(a) that plaintiff used or was exposed to any product, substance or service which allegedly caused injury; and

(b) that plaintiff suffered the injury alleged in the action.

(ii) Timing. Unless otherwise ordered by the court, a plaintiff must make the initial disclosure referred to in subparagraph (F)(i) within 60 days of:

(a) the transfer, removal or assignment of the action to the coordinated or consolidated proceeding; or
(b) the filing of the action directly in the district where the coordinated or consolidated pretrial proceeding is pending.