

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE¹**

- 1 **Rule 16.1. Multidistrict Litigation**
- 2 **(a) Initial MDL Management Conference.** After the
- 3 Judicial Panel on Multidistrict Litigation orders the
- 4 transfer of actions, the transferee court should
- 5 schedule an initial management conference to
- 6 develop a management plan for orderly pretrial
- 7 activity in the MDL proceedings.
- 8 **(b) Designating Coordinating Counsel for the**
- 9 **Conference.** The transferee court may designate
- 10 coordinating counsel to:
- 11 (1) assist the court with the conference; and
- 12 (2) work with plaintiffs or with defendants to
- 13 prepare for the conference and prepare any
- 14 report ordered under Rule 16.1(c).

¹ New material is underlined in red.

- 15 (c) Preparing a Report for the Conference. The
16 transferee court should order the parties to meet and
17 prepare a report to be submitted to the court before
18 the conference begins. The report must address any
19 matter designated by the court, which may include
20 any matter listed below or in Rule 16. The report may
21 also address any other matter the parties wish to
22 bring to the court's attention.
- 23 (1) whether leadership counsel should be
24 appointed, and if so:
- 25 (A) the procedure for selecting them and
26 whether the appointment should be
27 reviewed periodically during the
28 MDL proceedings;
- 29 (B) the structure of leadership counsel,
30 including their responsibilities and
31 authority in conducting pretrial
32 activities;

- 33 (C) their role in settlement activities;
- 34 (D) proposed methods for them to
35 regularly communicate with and
36 report to the court and nonleadership
37 counsel;
- 38 (E) any limits on activity by
39 nonleadership counsel; and
- 40 (F) whether and, if so, when to establish
41 a means for compensating leadership
42 counsel;
- 43 (2) identifying any previously entered
44 scheduling or other orders and stating
45 whether they should be vacated or modified;
- 46 (3) identifying the principal factual and legal
47 issues likely to be presented in the MDL
48 proceedings;

- 49 (4) how and when the parties will exchange
50 information about the factual bases for their
51 claims and defenses;
- 52 (5) whether consolidated pleadings should be
53 prepared to account for multiple actions
54 included in the MDL proceedings;
- 55 (6) a proposed plan for discovery, including
56 methods to handle it efficiently;
- 57 (7) any likely pretrial motions and a plan for
58 addressing them;
- 59 (8) a schedule for additional management
60 conferences with the court;
- 61 (9) whether the court should consider measures
62 to facilitate settlement of some or all actions
63 before the court, including measures
64 identified in Rule 16(c)(2)(I);
- 65 (10) how to manage the filing of new actions in
66 the MDL proceedings;

90 thus, the addition of Rule 16.1 is designed to provide a
91 framework for the initial management of MDL proceedings.

92 Not all MDL proceedings present the type of
93 management challenges this rule addresses. On the other
94 hand, other multiparty litigation that did not result from a
95 Judicial Panel transfer order may present similar
96 management challenges. For example, multiple actions in a
97 single district (sometimes called related cases and assigned
98 by local rule to a single judge) may exhibit characteristics
99 similar to MDL proceedings. In such situations, courts may
100 find it useful to employ procedures similar to those Rule 16.1
101 identifies for MDL proceedings in their handling of those
102 multiparty proceedings. In both MDL proceedings and other
103 multiparty litigation, the Manual for Complex Litigation
104 also may be a source of guidance.

105 **Rule 16.1(a).** Rule 16.1(a) recognizes that the
106 transferee judge regularly schedules an initial MDL
107 management conference soon after the Judicial Panel
108 transfer occurs to develop a management plan for the MDL
109 proceedings. That initial MDL management conference
110 ordinarily would not be the only management conference
111 held during the MDL proceedings. Although holding an
112 initial MDL management conference in MDL proceedings is
113 not mandatory under Rule 16.1(a), early attention to the
114 matters identified in Rule 16.1(c) may be of great value to
115 the transferee judge and the parties.

116 **Rule 16.1(b).** Rule 16.1(b) recognizes the court may
117 designate coordinating counsel -- perhaps more often on the
118 plaintiff than the defendant side -- to ensure effective and
119 coordinated discussion and to provide an informative report
120 for the court to use during the initial MDL management
121 conference.

122 While there is no requirement that the court designate
123 coordinating counsel, the court should consider whether
124 such a designation could facilitate the organization and
125 management of the action at the initial MDL management
126 conference. The court may designate coordinating counsel
127 to assist the court before appointing leadership counsel. In
128 some MDL proceedings, counsel may be able to organize
129 themselves prior to the initial MDL management conference
130 such that the designation of coordinating counsel may not be
131 necessary.

132 **Rule 16.1(c).** The court ordinarily should order the
133 parties to meet to provide a report to the court about the
134 matters designated in the court's Rule 16.1(c) order prior to
135 the initial MDL management conference. This should be a
136 single report, but it may reflect the parties' divergent views
137 on these matters. The court may select which matters listed
138 in Rule 16.1(c) or Rule 16 should be included in the report
139 submitted to the court, and may also include any other
140 matter, whether or not listed in those rules. Rules 16.1(c) and
141 16 provide a series of prompts for the court and do not
142 constitute a mandatory checklist for the transferee judge to
143 follow. Experience has shown, however, that the matters
144 identified in Rule 16.1(c)(1)-(12) are often important to the
145 management of MDL proceedings. In addition to the matters
146 the court has directed counsel to address, the parties may
147 choose to discuss and report about other matters that they
148 believe the transferee judge should address at the initial
149 MDL management conference.

150 **Rule 16.1(c)(1).** Appointment of leadership counsel
151 is not universally needed in MDL proceedings. But, to
152 manage the MDL proceedings, the court may decide to
153 appoint leadership counsel. This provision calls attention to
154 a number of topics the court might consider if appointment
155 of leadership counsel seems warranted.

156 The first is the procedure for selecting such
157 leadership counsel, addressed in subparagraph (A). There is
158 no single method that is best for all MDL proceedings. The
159 transferee judge has a responsibility in the selection process
160 to ensure that the lawyers appointed to leadership positions
161 are capable and experienced and that they will responsibly
162 and fairly represent plaintiffs, keeping in mind the benefits
163 of different experiences, skill, knowledge, geographical
164 distributions, and backgrounds. Courts have considered the
165 nature of the actions and parties, the qualifications of each
166 individual applicant, litigation needs, access to resources, the
167 different skills and experience each lawyer will bring to the
168 role, and how the lawyers will complement one another and
169 work collectively.

170 MDL proceedings do not have the same
171 commonality requirements as class actions, so substantially
172 different categories of claims or parties may be included in
173 the same MDL proceeding and leadership may be comprised
174 of attorneys who represent parties asserting a range of claims
175 in the MDL proceeding. For example, in some MDL
176 proceedings there may be claims by individuals who
177 suffered injuries, and also claims by third-party payors who
178 paid for medical treatment. The court may sometimes need
179 to take these differences into account in making leadership
180 appointments.

181 Courts have selected leadership counsel through
182 combinations of formal applications, interviews, and
183 recommendations from other counsel and judges who have
184 experience with MDL proceedings. If the court has
185 appointed coordinating counsel under Rule 16.1(b),
186 experience with coordinating counsel's performance in that
187 role may support consideration of coordinating counsel for a
188 leadership position, but appointment under Rule 16.1(b) is
189 primarily focused on coordination of the Rule 16.1(c)

190 meeting and preparation of the resulting report to the court
191 for use at the initial MDL management conference under
192 Rule 16.1(a).

193 The rule also calls for a report to the court on whether
194 appointment to leadership should be reviewed periodically.
195 Periodic review can be an important method for the court to
196 manage the MDL proceeding.

197 In some MDL proceedings it may be important that
198 leadership counsel be organized into committees with
199 specific duties and responsibilities. Subparagraph (B) of the
200 rule therefore prompts counsel to provide the court with
201 specifics on the leadership structure that should be
202 employed.

203 Subparagraph (C) recognizes that, in addition to
204 managing pretrial proceedings, another important role for
205 leadership counsel in some MDL proceedings is to facilitate
206 possible settlement. Even in large MDL proceedings, the
207 question whether the parties choose to settle a claim is just
208 that -- a decision to be made by those particular parties.
209 Nevertheless, leadership counsel ordinarily play a key role
210 in communicating with opposing counsel and the court about
211 settlement and facilitating discussions about resolution. It is
212 often important that the court be regularly apprised of
213 developments regarding potential settlement of some or all
214 actions in the MDL proceeding. In its supervision of
215 leadership counsel, the court should make every effort to
216 ensure that leadership counsel's participation in any
217 settlement process is appropriate.

218 One of the important tasks of leadership counsel is to
219 communicate with the court and with nonleadership counsel
220 as proceedings unfold. Subparagraph (D) directs the parties
221 to report how leadership counsel will communicate with the
222 court and nonleadership counsel. In some instances, the

223 court or leadership counsel have created websites that permit
224 nonleadership counsel to monitor the MDL proceedings, and
225 sometimes online access to court hearings provides a method
226 for monitoring the proceedings.

227 Another responsibility of leadership counsel is to
228 organize the MDL proceedings in accord with the court's
229 management order under Rule 16.1(d). In some MDLs, there
230 may be tension between the approach that leadership counsel
231 takes in handling pretrial matters and the preferences of
232 individual parties and nonleadership counsel. As
233 subparagraph (E) recognizes, it may be necessary for the
234 court to give priority to leadership counsel's pretrial plans
235 when they conflict with initiatives sought by nonleadership
236 counsel. The court should, however, ensure that
237 nonleadership counsel have suitable opportunities to express
238 their views to the court, and take care not to interfere with
239 the responsibilities non-leadership counsel owe their clients.

240 Finally, subparagraph (F) addresses whether and
241 when to establish a means to compensate leadership counsel
242 for their added responsibilities. Courts have entered orders
243 pursuant to the common benefit doctrine establishing
244 specific protocols for common benefit work and expenses.
245 But it may be best to defer entering a specific order until well
246 into the proceedings, when the court is more familiar with
247 the proceedings.

248 **Rule 16.1(c)(2).** When multiple actions are
249 transferred to a single district pursuant to 28 U.S.C. § 1407,
250 those actions may have reached different procedural stages
251 in the district courts from which cases were transferred
252 ("transferor district courts"). In some, Rule 26(f)
253 conferences may have occurred and Rule 16(b) scheduling
254 orders may have been entered. Those scheduling orders are
255 likely to vary. Managing the centralized MDL proceedings

256 in a consistent manner may warrant vacating or modifying
257 scheduling orders or other orders entered in the transferor
258 district courts, as well as any scheduling orders previously
259 entered by the transferee judge.

260 **Rule 16.1(c)(3).** Orderly and efficient pretrial
261 activity in MDL proceedings can be facilitated by early
262 identification of the principal factual and legal issues likely
263 to be presented. Depending on the issues presented, the court
264 may conclude that certain factual issues should be pursued
265 through early discovery, and certain legal issues should be
266 addressed through early motion practice.

267 **Rule 16.1(c)(4).** Experience has shown that in MDL
268 proceedings an exchange of information about the factual
269 bases for claims and defenses can facilitate efficient
270 management. Some courts have utilized “fact sheets” or a
271 “census” as methods to take a survey of the claims and
272 defenses presented, largely as a management method for
273 planning and organizing the proceedings.

274 The level of detail called for by such methods should
275 be carefully considered to meet the purpose to be served and
276 avoid undue burdens. Whether early exchanges should occur
277 may depend on a number of factors, including the types of
278 cases before the court. And the timing of these exchanges
279 may depend on other factors, such as whether motions to
280 dismiss or other early matters might render the effort needed
281 to exchange information unwarranted. Other factors might
282 include whether there are legal issues that should be
283 addressed (e.g., general causation or preemption) and the
284 number of plaintiffs in the MDL proceeding.

285 **Rule 16.1(c)(5).** For case management purposes,
286 some courts have required consolidated pleadings, such as
287 master complaints and answers in addition to short form
288 complaints. Such consolidated pleadings may be useful for

289 determining the scope of discovery and may also be
290 employed in connection with pretrial motions, such as
291 motions under Rule 12 or Rule 56. The relationship between
292 the consolidated pleadings and individual pleadings filed in
293 or transferred to the MDL proceeding depends on the
294 purpose of the consolidated pleadings in the MDL
295 proceedings. Decisions regarding whether to use master
296 pleadings can have significant implications in MDL
297 proceedings, as the Supreme Court noted in *Gelboim v. Bank*
298 *of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

299 **Rule 16.1(c)(6).** A major task for the MDL transferee
300 judge is to supervise discovery in an efficient manner. The
301 principal issues in the MDL proceedings may help guide the
302 discovery plan and avoid inefficiencies and unnecessary
303 duplication.

304 **Rule 16.1(c)(7).** Early attention to likely pretrial
305 motions can be important to facilitate progress and
306 efficiently manage the MDL proceedings. The manner and
307 timing in which certain legal and factual issues are to be
308 addressed by the court can be important in determining the
309 most efficient method for discovery.

310 **Rule 16.1(c)(8).** The Rule 16.1(a) conference is the
311 initial MDL management conference. Although there is no
312 requirement that there be further management conferences,
313 courts generally conduct management conferences
314 throughout the duration of the MDL proceedings to
315 effectively manage the litigation and promote clear, orderly,
316 and open channels of communication between the parties
317 and the court on a regular basis.

318 **Rule 16.1(c)(9).** Whether or not the court has
319 appointed leadership counsel, it may be that judicial
320 assistance could facilitate the settlement of some or all
321 actions before the transferee judge. Ultimately, the question

322 whether parties reach a settlement is just that -- a decision to
323 be made by the parties. But as recognized in Rule 16(a)(5)
324 and 16(c)(2)(I), the court may assist the parties in settlement
325 efforts. In MDL proceedings, in addition to mediation and
326 other dispute resolution alternatives, the court's use of a
327 magistrate judge or a master, focused discovery orders,
328 timely adjudication of principal legal issues, selection of
329 representative bellwether trials, and coordination with state
330 courts may facilitate settlement.

331 **Rule 16.1(c)(10).** Actions that are filed in or
332 removed to federal court after the Judicial Panel has created
333 the MDL proceedings are treated as "tagalong" actions and
334 transferred from the district where they were filed to the
335 transferee court.

336 When large numbers of tagalong actions are
337 anticipated, some parties have stipulated to "direct filing"
338 orders entered by the court to provide a method to avoid the
339 transferee judge receiving numerous cases through transfer
340 rather than direct filing. If a direct filing order is entered, it
341 is important to address matters that can arise later, such as
342 properly handling any jurisdictional or venue issues that
343 might be presented, identifying the appropriate transferor
344 district court for transfer at the end of the pretrial phase, how
345 time limits such as statutes of limitations should be handled,
346 and how choice of law issues should be addressed.

347 **Rule 16.1(c)(11).** On occasion there are actions in
348 other courts that are related to the MDL proceedings. Indeed,
349 a number of state court systems (e.g., California and New
350 Jersey) have mechanisms like § 1407 to aggregate separate
351 actions in their courts. In addition, it may sometimes happen
352 that a party to an MDL proceeding may become a party to
353 another action that presents issues related to or bearing on
354 issues in the MDL proceeding.

355 The existence of such actions can have important
356 consequences for the management of the MDL proceedings.
357 For example, avoiding overlapping discovery is often
358 important. If the court is considering adopting a common
359 benefit fund order, consideration of the relative importance
360 of the various proceedings may be important to ensure a fair
361 arrangement. It is important that the MDL transferee judge
362 be aware of whether such proceedings in other courts have
363 been filed or are anticipated.

364 **Rule 16.1(c)(12).** MDL transferee judges may refer
365 matters to a magistrate judge or a master to expedite the
366 pretrial process or to play a part in settlement negotiations.
367 It can be valuable for the court to know the parties' positions
368 about the possible appointment of a master before
369 considering whether such an appointment should be made.
370 Rule 53 prescribes procedures for appointment of a master.

371 **Rule 16.1(d).** Effective and efficient management of
372 MDL proceedings benefits from a comprehensive
373 management order. A management order need not address
374 all matters designated under Rule 16.1(c) if the court
375 determines the matters are not significant to the MDL
376 proceedings or would better be addressed at a subsequent
377 conference. There is no requirement under Rule 16.1 that the
378 court set specific time limits or other scheduling provisions
379 as in ordinary litigation under Rule 16(b)(3)(A). Because
380 active judicial management of MDL proceedings must be
381 flexible, the court should be open to modifying its initial
382 management order in light of subsequent developments in
383 the MDL proceedings. Such modification may be
384 particularly appropriate if leadership counsel were appointed
385 after the initial management conference under Rule 16.1(a).