TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
HEARING OF THE ADVISORY)
COMMITTEE ON CIVIL RULES)
)

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Tuesday,
February 6, 2024

The parties met remotely, pursuant to the notice, at 9:30 a.m.

COMMITTEE MEMBERS AND STAFF:

HON. ROBIN L. ROSENBERG, Committee Chair
PROF. RICHARD L. MARCUS, Committee Reporter
PROF. ANDREW D. BRADT, Committee Associate Reporter
PROF. EDWARD H. COOPER, Consultant
HON. CATHY BISSOON
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HON. R. DAVID PROCTOR
JOSEPH M. SELLERS, ESQ.
HON. MANISH S. SHAH
CARMELITA R. SHINN, ESQ.
ARIANA J. TADLER, ESQ.

HELEN E. WITT, ESQ.

WITNESSES TESTIFYING:

KELLY HYMAN
SETH CARROLL
BILL ROSSBACH
BRIAN CLARK
JONATHAN ORENT
ANDRE MAURA
REBECCA PHILLIPS
JESSICA GLITZ
ELLEN RELKIN
JENNIE LEE ANDERSON
AMY ZEMAN
ADAM POLK
ASHLEIGH RASO
KATE BAXTER-KAUF
SETH KATZ
DIMITRI DUBE
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ROBERT LEVY
AARON MARKS
PEARL ROBERTSON
DAVID COONER
WILLIAM CASH
MAX HEERMAN
MARIA SALACUSE
AMBER SCHUBERT
LEXI HAZAM

P R O C E E D I N G S

(9:30 a.m.)

CHAIR ROSENBERG: Okay. Well, welcome, everyone, and thank you to all of our Committee members, our witnesses, and our observers who are joining us on Teams for this public hearing on the proposed amendments to the Federal Rules of Civil Procedure.

The current published proposals out for comment include the privilege log amendments, Rules 16 and 26, and the proposed new rule on MDL proceedings, Rule 16.1. Today's hearing is the last of three hearings on these proposals.

So far, the Committee has heard from 50 witnesses across the first two hearings, and at today's hearing, we will hear from approximately 32 witnesses.

We appreciate all of you who have already testified or submitted public comments and those who plan to do so before the end of the public comment period on February 16. Your input is a vital part of the rulemaking process.

Today's witnesses, we want to thank you and look forward to hearing your testimony. Each witness today will have 10 minutes. We ask that you keep your

introductory remarks to three to four minutes so that the Committee members have ample opportunity to ask questions. We ask that you conclude all comments within 10 minutes so that we may continue with the next witness. Allison Bruff, counsel to the Civil Rules Committee, and I will be keeping time and will remind witnesses as needed.

Finally, please note that the times on the schedule are approximate and will be adjusted as needed.

For the witnesses, if you would leave your video off and your microphones muted until you are called on to make your formal presentation. And for Committee members, we welcome Committee members to have their videos on throughout the hearing if desired and to have their audio muted when not speaking. We ask that you use the Raise Hand feature or physically raise your hand in the video frame to indicate a desire to comment or ask questions.

This hearing is being recorded and a transcript will be made available publicly on the U.S. Court website. If you do get disconnected, use the original Teams link to rejoin or use the conference bridge number located at the bottom of the meeting invite to join by phone.

Lastly, I want to clarify something I said at the last hearing on January 16. I believe I mentioned that the stylists had reviewed the notes to 16.1. I want to clarify that the stylists have reviewed the proposed Rule 16.1 but not the notes.

So, with that, if we could begin with our first witness, Kelly Hyman, who will speak to us about Rule l6.1.

So, Ms. Hyman, you should feel free to turn your video on and commence your testimony.

MS. HYMAN: Thank you, Your Honor. Good morning. Thank you for the opportunity to address this Committee. My name is Kelly Hyman and I am the founder and managing partner of the Hyman Law Firm, P.A. I've been licensed to practice law over 19 years, with the last 10 years focusing on representing plaintiffs in mass torts and class actions. I have represented clients in regards to class actions involving data breaches and privacy violations against some of the largest tech companies, including Facebook, Inc., and Google, LLC.

Additionally, I have represented clients in mass tort litigation, hundreds of claimants in individual actions filed in federal court involving transvaginal mesh and bladder slings. I speak to you

today to provide my perspective as a solo plaintiff-side practitioner in mass torts and class actions and to offer comments on the proposed Rule 16.1 multidistrict litigation.

While this rule could be helpful to the courts in clarifying initial objections of parties, as it stands, the current draft will result in creating redundancies and potential even more complications with expenses in the initial formation of the MDL. The inclusion of the provision for appointment of coordinated counsel raises concerns to practitioners like me because the proposal rule text and Committee notes as written doesn't provide clear criteria for who should be selected for this rule. Rather, the Committee notes provides that the performance in the role may support consideration of coordinated counsel for a leadership position. So, without clear guidance, otherwise, courts maybe appoint the repeat players, people from big firms, and so small practitioners and solo firms will not potentially have the same leadership opportunities.

Moreover, the current draft does not require the court to appoint a lawyer with a stake in the litigation to the coordinated counsel position, which may indicate that the court should treat the role as a

special master. This doesn't favor efficiency or cost consciousness. Each MDL is different: distinct, complex claims, injuries, products, and parties involved. Thus, a neutral appointee may be subject to a steep learning curve and associated with costs and time could dilute the ultimate compensation available to the plaintiffs.

I'm also in agreement with the testimony of Attorney Jose Rojas, who testified on January 16, 2024. I support his proposal change to 16.1, which allows broadening the Leadership Committee in an effort to better represent the interests of the entire client pool and to serve to educate and empower trial lawyers who care deeply about the litigation outcome, as well as its procedure.

Rather than rely on repeat players from large firms, it's in the best interest of all parties to consider attorneys familiar with the litigation from smaller firms who could bring practical experience and real-world insight in the position.

In summary, the discretionary appointment of the coordinated counsel limits diversification of practitioners with specialized interests and experience in the litigation to assume leadership role. Unless the language is amended to specify the

distinction between coordinated counsel and the criteria for the leadership role in the litigation, my recommendation would be to eliminate this section of the rule completely as it unnecessarily leads to more questions and potential conflicts of interest for all involved.

I want to thank the Committee for the opportunity to speak to you today.

CHAIR ROSENBERG: Okay. Thank you so much, Ms. Hyman. I'm actually going to ask a question and then turn it over to our Committee members and reporters.

I'm understanding your testimony to be that you are recommending to the Committee that the provision relating to coordinated counsel -- coordinating counsel is removed. The Manual for Complex Litigation makes reference to a liaison counsel. What is your view, for example, hypothetically, if this was referred to as a liaison counsel and consistent with references in the Manual for Complex Litigation, which speaks to sort of administrative duties that the liaison counsel plays in assisting the court in whatever area the liaison counsel is appointed? In this instance, it would be in getting things coordinated to prepare for that

initial conference. Do you have any thoughts on that?

MS. HYMAN: I know, in litigation, they do have a liaison counsel for the case as well, but then I go back to my initial thoughts in regards to that of whether it's -- is that going to be the liaison counsel, someone just the court picks, you know, generally as well if that's going to be a switch-out for that and that's going to do that, is there going to be more kind of guidance. So just more general questions about what -- you know, is that going to go right in the beginning of the litigation that they're going to, you know, pick instead of using the coordinated counsel, have the liaison counsel that way as well. So that would be my only question or just basically stick with the liaison counsel, you know, as it is and currently used.

CHAIR ROSENBERG: In your experience, do plaintiffs' counsel generally self-organize prior to the initial conference such that any kind of counsel, liaison counsel, coordinating counsel, or whatever you want to call it, is universally unnecessary?

MS. HYMAN: Your Honor, it depends on the different type of litigations. You know, it may vary. In some litigations, there's multiple slates in it as well. In some litigations, the plaintiffs will get

together and have a recommendation for liaison counsel. It just depends on the different type of, you know, mass tort or class action. Sometimes I've, you know, seen it happen, and other times there's competing slates that go before, you know, the court as well.

CHAIR ROSENBERG: Okay. And then, lastly, before I turn it over, you place some emphasis on as a solo practitioner and repeat players and ensuring a broad pool of potential applicants or candidates for a leadership position. What are your thoughts on the notes to the Rule 16.1(c)(1) and (c)(2), various ways in which leadership counsel can be appointed and various things, criteria that transferee judges may want to take into account in appointing leadership counsel that is, from the plaintiffs' perspective reasonably and fairly representing plaintiffs, experience, skill, knowledge, geographical distributions and so forth? Do you think that that addresses that point that you made in reference to your colleague who made that at a prior hearing in terms of the broadening and diversity, if you will, of leadership pools?

MS. HYMAN: I think that it lists some, you know, important, you know, factors in it as well, but

I support Mr. Rojas's, you know, comment about considering people with the smaller firms and the practitioners that work on the litigation as well and to take that into account and start with, as him, starting on the litigation from the, you know, beginning.

CHAIR ROSENBERG: Okay. Thank you.

So it looks like we have Joe Sellers and Helen Witt. So Joe, then Helen.

MR. SELLERS: Good morning, Ms. Hyman, thank you for your very thoughtful comments.

I'm curious if I can tease out from what you've said whether your concern about the coordinating counsel is prompted by the lack of a need for coordinating counsel or the importance of ensuring that any selection of coordinating counsel take into account the kind of additional factors that you've identified to ensure it has a fully representative group of people for whom the coordinating counsel are selected.

MS. HYMAN: I think the vagueness of the coordinating counsel, I don't for clarity understand if that's going to be someone who's a special master; is that someone that has, you know, worked on the litigation, is that someone that the court is just

going to, you know, pick as well, someone that's, you know, worked on the litigation. So, because it's just so broad, that's my thought to eliminate it because it doesn't really explain, you know, who that role is or what that role entails. And I worry about it being a special master and the cost and expense in the litigation and the special master, you know, getting up to speed on the litigation and not knowing as well and, you know, a learning curve or someone that wasn't involved in the litigation and learning litigation as well and then is not involved in litigation or develop the litigation, depending on who this coordinated counsel is.

MR. SELLERS: So can I just follow up with a follow-up question? As I understood it, the purpose of the coordinating counsel was, given the importance of addressing these issues as early as possible, rather than letting a transfer case linger for a while without any real guidance and direction, my understanding was it would be -- and maybe we haven't said it as clearly as we should -- that it would be drawn from among the counsel, not a special master, and that it would be a very preliminary kind of organizing function that otherwise may be very difficult for a court to determine who should have

some responsibility for helping to get this case organized from at least the plaintiffs' side.

So I just -- that may or may not address your concerns, but I just want to explain my notion of what this involved.

MS. HYMAN: I understand that and I appreciate that. And I guess my initial instinct was instead of it lingering to, you know, set up a hearing right away on the litigation. And then it makes me ask more questions: how is the judge going to determine who they assign; you know, is it going to go back to the repeat players that, you know, looking at the people, oh, I know this person or I, you know, know this firm, that's -- you know, how is it going to be decided, how is it going to be, you know, fair.

MR. SELLERS: Okay. Thank you.

CHAIR ROSENBERG: Helen, then Ariana.

MS. WITT: I think -- yeah. Good morning. I think you largely answered my question with Joe's -- answers to Joe's question, but just to make clear that I'm understanding, it sounds like you're more concerned about the lack of specificity with respect to the coordinating counsel role rather than really a concern about lack of criteria in the comments for that selection. In other words, if the

role of the person was clearer in your mind, a list of criteria would not be as important.

MS. HYMAN: Well, I guess I'm just also concerned as, you know, I am a solo practitioner of how that's going to be decided. You know, is it just like going back to the repeat players? Is it going to be, you know, everyone that -- how does the judge make a determination, just, you know, looking at the complaints filed and then do it on that, or is it going to be like, oh, now you have to apply for, you know, apply for something as well and that, you know, creates more of a delay in the litigation and more of a potential, you know, expense as well? How is that going to be determined? So, you know, that's another concern as well just because, in my opinion, it's very, very vague and I think that solo practitioners are going to have a hard time or small firms getting an opportunity to be the coordinating counsel.

MS. WITT: Thank you.

MS. TADLER: Good morning, Kelly. How are you?

MS. HYMAN: I'm doing well. How are you?

MS. TADLER: I'm good, thank you. So I wanted to come back to a question that Judge Rosenberg posed to you about whether you would have less of a

concern or feel more comfortable with the concept of a liaison counsel in contrast to this coordinating counsel, and I have a more pointed question under that subject, which is, in your experience, is there already a liaison counsel often chosen by virtue of the jurisdiction, the specific court, where it's more like a local counsel that's appointed in that capacity such that do you feel like if we did liaison, there's going to be some conflation of this local presence versus somebody who's playing the role of what's being conceptualized under the coordinating counsel terminology that we're using now?

MS. HYMAN: Yes, that's a really good point. Yes. Generally, I've seen, whether a mass tort is in, say, you know, Pittsburgh, that the liaison counsel is, you know, from that area and selected to have that position.

MS. TADLER: And do those -- I mean, I'm wondering whether, if you are in a particular jurisdiction, is it not helpful to have them as a liaison, coordinating counsel, whatever we call this person or people or firm, is that not helpful because they're familiar with the rules of the court, the practices of the court, and to get things kind of launched at the get-go, to keep things moving along

until a greater set of appointments are made, or do you have concerns about that consistent with what you've articulated insofar as, you know, the solo or the smaller firm practitioner not perhaps having the opportunity to play a material role?

MS. HYMAN: It is concerning from the standpoint of a, you know, solo practitioner, you know, of having an opportunity to do that, but I've seen in other cases the liaison is usually from that jurisdiction and is familiar with the procedures of the court itself.

MS. TADLER: Thank you. Appreciate it.

CHAIR ROSENBERG: Okay. I don't see any other hands and I think we exhausted our 10 minutes with you, Ms. Hyman, so thank you for being the first witness and taking the heat. Good to see you.

MS. HYMAN: Good to see you, Your Honor. Thank you so much for your time.

CHAIR ROSENBERG: Okay. So our next witness is Seth Carroll on privilege logs.

MR. CARROLL: Good morning. Thank you. My name is Seth Carroll. I am a plaintiff civil rights lawyer in a relatively small plaintiffs firm in Richmond, Virginia. My civil rights practice focuses primarily on police misconduct cases and cases

involving correctional, constitutional violations.

The majority of my practice is in federal court, and I offer testimony today in support of the proposed privilege log amendments to Rule 16 and 26. In my experience, privilege logs are an important part of the discovery process, particularly from the prospective of a smaller plaintiff lawyer firm, where often we perceive an imbalance in resources and we are typically not the ones in possession of a large amount of information, and so it is important for us to be able to identify and address privilege concerns that may exist within documents on the other side.

Because of the nature of my practice, I find that we have widely variant discovery practices. Some cases involving single excessive force claim against a single officer may have a relatively small discovery burden and a relatively few, if any, significant privilege claims, cases involving conditions of confinement, for instance, that may implicate multiple municipalities, private contractors, obviously, certain government privilege concerns, and then individual healthcare providers and deputies obviously implicate a much broader discovery practice and many, many more privilege concerns.

And so it is important, I think, for the

rule to apply not only in sort of complex situations but to also have general applicability to the more routine cases in my experience, and I believe that the proposed rule does that.

Given the fact that the complexity of the proposed amendments here are not quite as extensive as they are in Rule 16.1, I do not want to waste a ton of time on opening comments, and, therefore, I will end those now and welcome any questions that you all may have.

CHAIR ROSENBERG: Well, thank you. No, it's never a waste of time. And if you just want to like pass over some of those nice comments to 16.1, you can do that too.

MR. CARROLL: Well, I just realized in listening to the first witness that I'm glad I don't have to offer any comments at some point to that.

CHAIR ROSENBERG: Okay. So let me see. I don't see any raised hands, but -- okay, I do actually. Judge Boal.

JUDGE BOAL: Yes. Thank you for your comments and your written submission. I had a question about the tiered logging. What do you mean by "tiered logging" and have you had experience with that and if you could tell us a little bit about that.

MR. CARROLL: I personally have not had any specific experience with tiered logging in my practice.

(Timer noise.)

MR. CARROLL: I'm sorry. That was my timer to be brief. I understand that a tiered proposal -- a proposal for tiered logging has been -- there's been a proposal that that be included within the comments in the rule. And this idea of categorical or tiered logging sort of goes hand in hand in my understanding. So my understanding of a tiered logging system would be one that starts with a more sort of general explanation of the potential privilege claims that would then allow opportunity for more specificity to sort of drill down within those categorical privilege log disclosures.

I think that there certainly are cases in which categorical, tiered and I know that the comments presently do include references to rolling logs are appropriate, particularly in complex cases involving lots of documents. However, I think that leaving those issues to the way the rule is currently written really allows the parties in Rule 26 to examine the parameters of what might be necessary with the particular document universe that exists and what type

of privilege claims are expected. And I think allowing that flexibility really promotes efficiency in the judicial process versus having the more specific references that are created to those sorts of things and that sort of give an anchor point for the idea that categorical logs or tiered logging might be implicitly something that all parties should participate in from the outset of the discovery process I think would create more problems with needing judicial intervention versus a more broadly applicable rule where the parties could discuss whether or not they felt like categorical, tiered, or rolling logs might be an appropriate need for the circumstances of that case and then, with judicial input in the Rule 16 conference and afterwards, can move that forward in the discovery process rather than trying to have to kind of get the toothpaste back in the tube with having those sort of concepts as a starting point.

I don't see the need for those things in the vast majority of my smaller civil rights cases. There's just no specific burden I think in the vast majority of those cases. I mentioned in the testimony Monell claims involve usually a much larger historical discovery practice. But, in an individual case or a

case involving relatively few actors in the civil rights arena, my concern would be that categorical logging or tiered logging could be used as a way to really prevent individual litigants from understanding exactly what documents there might be. When dealing with government entities, correctional institutions, and law enforcement agencies, there are already a lot of impediments to gathering information and there are legitimate security concerns, deliberative process concerns, and governmental interests in protecting certain information in those cases, and I understand that, but having a baseline of logging where it may be difficult to understand exactly what documents there may be would really pose a problem, I think, in many of the cases in allowing us to understand how to potentially challenge those claims of privilege.

JUDGE BOAL: Thank you.

CHAIR ROSENBERG: Rick?

PROFESSOR MARCUS: Thank you very much, Mr. Carroll. I wonder if you could educate us a little bit more about the kinds of privilege issues you encounter. Frankly, I'd say most of the people who have spoken to us have been maybe in commercial litigation focused on the attorney/client work product privileges. I suspect your cases involve other

privileges, and I wonder how you go about addressing that in privilege log and discovery of documents terms because, at least for myself, I don't know enough about that and you can teach us.

MR. CARROLL: Yes, thank you very much.

We see a variety of claims that are made and some of those aren't necessarily traditional privilege claims, I would think, that might be specifically contemplated by the rule, you know, outside of work product claims and attorney/client privilege claims, which everybody sees, I think.

We also see claims involving the joint defense privilege. That might occur when you have a municipality who owns a correctional facility. They have in our state a state constitutional officer, like a sheriff, running the correctional facility and then private contractors within that facility, all who have varying interests and aren't acting in concert with each other, but all have an interest in protecting information, and so they may claim a joint defense privilege in some instances if they have communicated with each other about certain aspects of the underlying facts of the litigation.

We also see a lot of self-evaluative privilege claims, particularly with correctional

medical providers who then attempt to shield root cause analysis investigations and other sort of quality assurance investigations from discovery on claims that they are evaluating themselves and therefore shouldn't have to disclose that information.

The problem is, in a correctional setting, there's relatively unilateral access to information from those entities that are within the setting. So correctional medical providers, those operating the jail, they already have a lot of protection from that information. It's literally sort of imprisoned within the correctional facility, and it's very difficult for us sometimes to understand the full scope of what happened without access to certain information. Certainly, there is legitimacy in self-evaluative privilege claims and quality assurance claims, but couching large, broad categories of documents under that umbrella presents problems for individual litigants in the discovery process.

And then we also see, you know, claims of security breach related to law enforcement procedures and correctional procedures and systems, which are a little bit different than traditional privilege claims but often are legitimate claims about disclosing information that may compromise some sort of law

enforcement practice or correctional security aspect, and we need to know what the documents are within those claims in order to determine which of those documents might need to be subject to a protective order or which ones might not be discoverable at all under certain circumstances.

CHAIR ROSENBERG: Okay. Thank you so much.

MR. CARROLL: Thank you.

CHAIR ROSENBERG: Seeing no other questions, we really appreciate it, Mr. Carroll.

MR. CARROLL: Thank you.

CHAIR ROSENBERG: Thank you, Mr. Carroll.

And next we'll hear from Brian Clark, also on -- no, I'm sorry. No, no. Bill Rossbach on privilege logs.

MR. ROSSBACH: Hello. Thank you very much. I think I'm on screen now. Again, thank you very much for giving me the opportunity.

My credentials are largely spelled out in my letter. Since law school, I've worked in a firm I founded that never had more than four lawyers. For the first half of my practice, our practice involved only single or several plaintiff science-based cases, medical negligence, automobile defect, toxic torts.

About 35 years ago, I was elected to several

national organizations to leadership in those organizations and I became more involved in national cases. As a result of those connections, and I've had now experience in a number of very large cases, the Exxon Valdez oil spill, a Colorado pollution case involving 5- or 600 families, 20 chlorine tank car derailment, diet drugs, and most recently I've been litigating on behalf of various attorney generals in pharmaceutical cases, such as opioids.

My role has always been as a science guy in these larger cases, and so I have not had the role of doing battle that I watched my colleagues do. But my experience is is that there are huge -- these huge resource commitments in these cases with privilege log disputes -- excuse me a second. I'm blocking my -- there. That these discovery disputes over privilege, when they are not dealt with initially, lead to literally years of disputes. In the Vioxx case, I think it took, I don't know, seven or eight years before we even got remanded and it was largely disputes about 18 million documents and went back and forth to the Fifth Circuit.

So even with the evolution of my practice, I've also remained a small firm with significant individual cases that often involve large volumes of

internal corporate documents.

So, for my personal perspective, handling the document side of these cases, the resource asymmetry that Mr. Carroll mentioned where the resources are on the side of the corporate defendant, small firms trying to do battle over thousands of documents, has been a very serious problem.

So particularly with when single -- when you have single issue -- single plaintiff cases, you generally have short trial dates, short discovery deadlines, fixed trial dates, and delayed privilege logs for individual cases. Fighting these satellite battles over privilege claims is a resource strain that often results in a small practice like mine having to forego the privilege dispute, and as a result, my view is, is that these changes in the rules are just as important to a small practice like mine as they are to a large practice that has been addressed by many of the other MDL mass tort lawyers who have already testified.

There are three major problems that I think have been identified, but I want to reemphasize delayed production of privilege logs, incomplete and inadequate description, and over-designation. These three elements, I think, are going to be very

effectively handled by the three essential changes that I see that these rules make.

One is the mandatory and early meetings under Rule 16 and Rule 26. I think these will go a long way towards improving the entire process and eliminating the burden on small practice and eliminate and clarify from the very beginning what needs to be done. I think this is absolutely essential and probably the most important thing that these rule amendments will give us.

The second is flexibility. I initially thought that I had some thoughts about needing more specificity in the rule, but as I thought more and read the comments, I thought that the Committee had done an excellent rule talking about the different factors that go into making these decisions and that I agree with Mr. Roberts and others that too much flexibility and too much -- I mean too much specificity within the language of the rules would result in the rules soon to be outdated.

As we know, the explosion of AI and large language modules is going to make a big difference in these kind of cases, but we're still -- you know, it's still in its infancy and how they are going to play out and when they're going to be available in these

cases, as I'm certain. So leaving flexibility available is key.

The other -- but even with flexibility, I think that there could be a role for guidance, and I would suggest that maybe in the comments, the comments cite to a couple of important treatises in this area particularly as examples that I have looked at is Judge Grimms' ABA publication, *Discovery Problems and Their Solution*, has some really good examples that courts and parties could look to.

The other item -- the other document that I've seen that could be really helpful is *The Sedona Principles*, particularly the Third Edition. Comments 10(g) and 10(h) I think have a lot of particularly good procedures that courts and counsel can follow.

So I think the rule -- because the rule has been in the works for several years and I've been watching the changes in the comments, I think the comments are generally extremely well done and I think address most of the concerns that you might have. But there are a couple of words, a couple of sentences, particularly at the first two paragraphs of the Rule 26 notes, which I think are somewhat unbalanced. The language, which I've quoted in my brief -- in my letter at page 3, suggests that the burden falls only

on the corporate defendants resisting disclosure. I think over-designation and inadequate description of withheld documents is a huge problem that imposes a burden on the parties seeking the discovery having to do these often year-long battles. When logs are inadequate and designations are untrustworthy, there's a huge burden imposed on the parties seeking discovery. I think --

MS. BRUFF: Mr. Rossbach, I'm so sorry to interrupt. If we might just pause for a moment --

MR. ROSSBACH: Yeah.

MS. BRUFF: -- I want to check with Judge Rosenberg and see if she wants to open the floor up for questions.

MR. ROSSBACH: That's fine.

CHAIR ROSENBERG: Thank you, Allison, and thank you, Mr. Rossbach.

Let me just survey the group to see if there is anybody who has a question of Mr. Rossbach and, if not, I'll let him make his last concluding remark before we move on to the next witness. Rick has a question.

PROFESSOR MARCUS: Thank you, Mr. Rossbach. Can you hear me now?

MR. ROSSBACH: Yeah, I can.

PROFESSOR MARCUS: I was muted. Sorry.

Something you mentioned I'd like you to follow up on, and here's what's on my mind, this rule change would command both sides to talk about this topic up front. My question from your experience is, have you ever encountered circumstances in which the other side said, no, we won't talk to you about that; you'll hear from us later when we're finished with what we are doing? And, if so, could you tell us a little bit about that?

MR. ROSSBACH: Well, I mean, I think that that has -- in my experience since 1993 in those cases that involve privilege logs, they're always delayed. There's no time frame for them. They answer discovery and say, we will submit a privilege log. We're holding back some documents, and the timing of the privilege log is always delayed. The time, when it comes, it's very -- it's inadequate. I think -- I can't remember. Maybe Judge Grimm had some examples of that. And then you have to go back and start -- and then it's a process of continual iteration of, well, here's your answers. They're not adequate. We can't quite tell because of inadequate descriptions.

It's kind of like not a rolling disclosure.

It's you need basically time after time keeping going back. And in the end, in a couple of cases, we were never able to get resolution, but before discovery closed the time for trial came. So we didn't have the benefit of those documents as we were litigating the case going forward, particularly being able to use those documents in discovery of corporate defendants.

The early the man -- see, what I think is hugely important is that this is mandatory. In both 16 and 26, it uses mandatory language that says this is what is required. And I think, if the courts impose that mandatory requirement on parties, we're going to get these kind of privilege log methods developed for those cases early on in the process and it will greatly eliminate many of the problems that the process has had so far. I think that is the key element here, mandatory early development and with court intervention at the Rule 16 conference if necessary.

CHAIR ROSENBERG: Okay. Terrific. Thank you so much for your comments. We really appreciate it.

MR. ROSSBACH: Yeah. Can I make one comment a little bit on categorical disclosure? I think it's -- my experience in three different cases that

was early on in this, they did -- the outside counsel were hired in product liability cases to do major document sweeps, go through every single corporate office, every engineer's desk, every place anywhere with counsel doing the selection of the documents.

They turned around and said, well, counsel selected these documents, therefore, they're privileged. And as a result of that, if you did categor -- that simple -- that type of disclosure was done, that type of privilege log was claimed where they used the name -- where you were searching categories by those witnesses -- by those lawyers' names, those lawyers -- those documents which were chosen by lawyers would be called privileged documents. I don't think they could get away with that these days with the kind of technologies that are available, but that's what happened in two pre-technology cases I had, and it took years of battles to get them, and in one case, we never got the documents and we never even got a privilege log.

CHAIR ROSENBERG: Okay. Okay. Thank you so much, Mr. Rossbach. Very helpful. We appreciate your time.

MR. ROSSBACH: Thank you.

CHAIR ROSENBERG: Mr. Clark is on, and you

can begin, also on privilege logs.

MR. CLARK: Thank you, Judge.

Members of the Committee, thank you for the opportunity to speak to you today. My name is Brian Clark. I am a partner at Lockridge Grindal Nauen in Minneapolis, Minnesota. I have practiced in the area of antitrust litigation for the past 15 years. I represent class plaintiffs in all of those cases and they're spread out across the country, so I find myself in federal courts basically across the country.

Most recently, most of my cases have involved a protein of one sort or another, whether that is peanuts or beef or chicken and many other types of protein.

I support the changes to Rule 26(f) and Rule 16(b) regarding privilege logs. It has been my practice for many years to have an early conference about this and, whether mutual or not, raising these issues at the 26(f) and raising them at the Rule 16 conference so they get addressed, because we typically say you do not get a do-over on this stuff without high cost. So, for that reason, I support these early conversations.

With that said, I do have some concerns on the notes and I think that kind of the basic issue I

see kind of coming through the notes, which I really think will -- anytime there's a rule change like this, people are going to pay very close attention to these notes, and I think the way in which they present the issues might not be quite balanced in the way I think is appropriate. So let me give you a couple examples.

There's two sides to the coin on these privilege issues. On the one side, you have the producing party and, certainly, they have costs to review and they also have a privilege, a benefit of withholding something they view as detrimental to their ability to give attorney/client advice to their clients and for many other reasons.

But, on the other side, you have the requesting party, which is usually me, and you have an inherent right to discover and seek the truth of what happened in the case you allege, so there is some type of balance that needs to happen there.

On the cost side, as far as the producing party, I think what's missing from the notes right now is the relevance of Federal Rule of Evidence 502(d). My understanding of this rule has always been that is a cost-savings measure for a producing party who might not want to do a document-by-document review, and they could focus on the most sensitive privileged documents

but then run the risk on less sensitive documents, producing potentially privileged ones. There's no recognition of that right now in the notes.

Number two, I think the last witness just referenced the requesting party, there are significant burdens on us here. When we get dumped with a 3 million entry privilege log, which has happened, that takes hundreds, if not thousands, of hours of time and hundreds of thousands of dollars of hard costs as well. And oftentimes we're seeing very high overturn rates. I referenced in my written testimony that most recently we had overturn rates between 35 and 63 percent in our beef case. So there doesn't seem to be a recognition in the notes that the cost issues go both ways.

Another place you might think about buttressing the existing notes is on categorical logs. Certainly, there can be a place for some categories of logs, but I'm worried about the way in which they're presented right now in the notes. I agree and I have used certain time periods and certain post-lawsuit involvement of outside counsel as triggers for a category when that makes sense. Those are a little less problematic to me.

The notes seem to open the door, though, to

something that's much more problematic, such as the involvement of inside, in-house counsel in communications. We frequently see copies to in-house counsel where there's no colorable claim or privilege and those documents are withheld until we spend hundreds of hours challenging them. We would have no ability to cancel those to the extent that people read into these notes that a category of in-house counsel or other categories that are problematic are okay to withhold.

With that, I'll stop my comments and I'm happy to address any questions. And, again, I appreciate the opportunity to speak to you.

CHAIR ROSENBERG: Okay. And we appreciate your comments and your testimony.

Any questions for Mr. Clark? Rick.

MR. CLARK: Rick, I can't hear you. I'm sorry, Mr. Marcus. I think you're muted.

PROFESSOR MARCUS: Oops. I thought I undid that. Okay. Sorry.

Quite a few people on what I'll call your side, the requester side, have expressed concerns about the Committee note, and I think you said, oh, those are bound to be read very carefully.

Well, on the other side, one of the things

we've been told repeatedly is, go look at the note from 20 -- from the rule as adopted in 1993. That expressed an openness to various methods of complying which, according to the other side, many judges have not followed and, instead, they've rigidly, we are told, insisted on document-by-document privilege logs.

I'm wondering, since I'm one of the old folks here, I remember when that rule came in. Do you really think that people pay that much attention to notes out there in the world? Sometimes it doesn't seem that rule changes even get the attention we were hoping they would get. So I'm interested in your experience in the use of notes in your practice -- our Committee notes, because disputes about whether a word, one word is used as opposed to another word in a note might seem relatively unimportant in the grand scheme of things. So what are your reactions to that reaction?

MR. CLARK: Yeah, thank you. I think when there is -- my experience, certainly, in the last decade is, when there's any type of rule change, proportionality would be another one, while the rule change is kind of above the line, the actual rule language might seem minor, those can be pitched in litigation in battles about the meaning of those as a

sea change and then people look to the notes to say, well, was this a sea change.

And I think what I would expect to see with the notes as drafted is the next time I'm fighting a privilege battle, certainly, the note itself says early conference. That's not a substantive change. Then the note will be cited that, well, this shows categorical logs were not being used enough. See the note. It says at least it should be for outside counsel and time period.

Certainly, the Committee wanted to encourage the use of these and, indeed, it probably should involve in-house counsel and those kind of things. I can see those types of arguments being used and I have seen them on past seemingly minor, above-the-line rule changes as I call them and then citing to the note. So that would be my experience there, Mr. Marcus.

CHAIR ROSENBERG: Okay. Thank you. Thank you so much, Mr. Clark. We appreciate your testimony and your comments on the rules.

MR. CLARK: Thank you.

CHAIR ROSENBERG: Okay. Jonathan Orent is going to speak now on 16.1.

MR. ORENT: Good morning.

CHAIR ROSENBERG: Good morning.

MR. ORENT: Thank you all very much for hearing me this morning. I'm going to be speaking about Rule 16.1. Well, first, I'm a partner at the law firm of Motley Rice, and my firm and I separately have shared multiple MDL leadership spots. Currently, my partner is co-lead counsel of MDL 3047. Another partner -- the social media MDL. Another partner of mine is co-lead of the national opioid litigation, MDL 2804. And I was lead counsel in MDL 2754. I submit this testimony today regarding Rule 16.1 focusing in on two provisions of the proposed rule.

First, proposed Rule 16.1(b) providing for the designation of coordinating counsel before the initial MDL management conference. I respectfully request that this provision be removed in its entirety. Although styled as a permissive change rather than a mandatory procedure, setting forth this requirement in a formal rule creates the likelihood that it would become standard practice. The risks of adding this to standard practice significantly outweigh its benefits, and that is because, in large measure, the rule doesn't define who this coordinating counsel is, how they're appointed, whether they have an interest in the litigation, i.e., represent one or both of the parties, and exactly what this person's

responsibilities are if there's disagreement among the parties.

What we've seen in actual MDL practice is an extraordinary ability for the plaintiffs to both self-organize and organize under guidance of the court following the first case management conference oftentimes to actually provide much of this information and work with defense counsel. So, largely, the creation of this new role serves nothing other than to add an administrative layer to what is already happening in MDLs.

Second, the proposed rule also runs counter to the MDL efficiency set forth in 28 U.S.C. 1407, and this is because, again, designating coordinating counsel is a leadership position and then underlying a large number of items, quite frankly, many of those items will likely need to be revisited once the parties actually have a selected lead counsel. So having someone who is an appointee going in and talking about items like motion practice, establishing criteria for cases, roles in settlement is very problematic if that person is going to have no future role in the litigation. That would create unnecessary duplication.

Finally, with regard to Rule 16.1(c)(4), I

find this section problematic in that it really doesn't define what it is seeking. Right now, the traditional discovery rules in MDLs generally have utilized a large number of procedures and practices to assure the provision of relevant and responsive information so that the parties in due course do, in fact, understand the nature of each others' claims.

What's problematic about this rule is it can be seen as a one-sided attempt to get plaintiffs who are injured in the litigation to provide information before discovery begins. And while it may be useful to engage in a census process or a plaintiff fact sheet process, there is a general order which those likely apply during the course of discovery or during the course of the development of the case where that information can be honed, where information can be decided to be relevant to the cause or action of the case, as opposed to some basic requirement seen prior to the first initial conference.

So, with that, I'll open up myself to questions. Thank you for your time today.

CHAIR ROSENBERG: Okay. Thank you so much, Mr. Orent. You mentioned that, for the most part, plaintiffs are able to self-organize. Did you say that they self-organize before the initial management

conference or after? In other words, going into the initial conference, so there is some structure, organization, certain issues are addressed, is that where your experience points in the direction of self-organization?

MR. ORENT: I would say both. It can occur and it starts very often even before the filing of the MDL petition. What we have often seen is that there is a loose affiliation of all of the stakeholders that begins from the inception of the litigation and will work its way through to the appointment of leadership.

Those people who self-organize do not necessarily find themselves in leadership positions, but often they are influential in guiding how the litigation shapes up at that early stage.

Typically, what then happens is we get some indication from the court what it's looking for, whether the court is looking for general applications, whether the court is looking for plaintiffs to self-organize and provide a recommended slate, and the plaintiffs generally organize themselves to meet what it is that the court is looking for.

CHAIR ROSENBERG: Mm-hmm. So I'll ask the same question we asked of Ms. Hyman. The Manual for Complex Litigation, Section 10.221, and I don't expect

you to know that by heart, but generally speaks about liaison counsel being charged with essentially administrative matters, such as communications between the court and counsel, and otherwise assisting in the coordination of activities and positions.

Is this self-organization and this person who may be self-organizing, is it akin to that kind of a role, administrative to just literally get things organized so there is not chaos at that initial management conference? And, if so, is it the fact that it just wasn't made clear in the rule or the comments that coordinating counsel is more akin to an administrative liaison counsel, and if it is made clear, does that become a useful tool?

MR. ORENT: So I guess the problem -- so let me back up and say generally, in litigation, MDLs that I've been a part of, there's always been liaison counsel who is a local counsel to the area, much like Ms. Hyman talked about.

I would also say that that individual is often trusted by court appointment with liaising between both the court and leadership on the plaintiff side but also the plaintiffs writ large across the country. That role in facilitating, it's essential that that individual be close physically,

geographically to the court and have a understanding, a crucial key understanding of the local rules.

I think, though, that there needs to be in any litigation when there is an appointment of a formal liaison counsel, that there needs to be some relationship, some working relationship with the lead counsel, and, generally, that spot can be a highly coveted position, the liaison counsel role. And so I think that whether there's one or multiple liaison, that normally works itself out during the course of plaintiffs self-ordering or in the context of complying with the court's order.

Quite frankly, the way I've seen plaintiffs self-organize for that first conference where there is generally no leadership, I've seen individuals sort of represent factions or groups within the plaintiffs' bar that share commonalities of interest so that everybody has someone speaking for their common interest but not necessarily one person, and having one person speak for everybody can be problematic. So you might see three or four people at that initial conference be representatives of larger groups and then coalesce and self-order or order how the court wishes.

CHAIR ROSENBERG: Okay. I see we have a

couple hands. I just wanted to, I guess, point out one thing and then ask one more question.

I don't think the rule or the notes say anything about the coordinating counsel speaking on behalf of anyone. If you look at it more as what I was analogizing it to the liaison counsel, it's really kind of that administrative coordination to bring organization but not to be a spokesperson on behalf of any one party.

With respect to subsection (c)(4), the exchange of information, it does say the factual bases for their claims and defenses. I don't think anywhere in the rule or the notes it points out that it is a one-sided exchange. And, you know, we know under Rule 26 that there are such things as initial disclosures. In other words, it's not coming out of thin air, that there's a contemplation that there be some initial exchange or disclosure of information before formal discovery begins.

In that light and perhaps with clarification, because I know that came up earlier in other hearings, that there seemed to be some confusion was this discovery or not. It is not. (c)(6) is discovery, but if it was clarified in the notes, what is it specifically that is problematic about (c)(4)?

MR. ORENT: Well, I guess the general concern is that this will be determined, again, based on the timing, that this would be set up and force a court to follow some sort of procedure that may or may not be appropriate for the litigation.

One of the things just parenthetically about MDL courts is that I've seen that the MDL judges tend to be extraordinarily creative and innovative in terms of problem-solving abilities, and, generally speaking, understanding that this rule is not a mandatory provision, I do think that there are enough resources out there that have provided guidance to courts on how to proceed.

My concern is, is that wording like this will inevitably be deemed to be (a) mandatory and (b) seen as something again akin to a Lone Pine or something like that that is typically entered at the end of litigation as opposed to being akin to a Rule 26 disclosure. And, generally, those are the concerns that I share or that I have.

I think that allowing the parties and the court to meet disclosures that are tailored to the case I think is crucial, and that is part of the discovery plan, and that's part of the role that lead counsel for both parties engage in with the court, and

I think trying to establish a formulaic method for it creates problems that actually deprive the courts of the flexibility that they have developed over the years.

CHAIR ROSENBERG: Okay. Well, I guess the last thing I'll say just in the interest of making sure there's clarity is that the whole rationale behind having this list in subsection (c) and having the report to the court is so that the court and counsel can engage in just this type of conversation so that if, in your personal experience, doing it this way is not a good way and doing it this way is a better way and doing it later on is the optimal way, that is exactly what's envisioned by this so that maybe a judge who hasn't had an MDL or hadn't had the benefit of any initial input at an initial conference might go off in that direction that you don't think is a proper one.

And lastly, built into the rule and the notes, but perhaps can be made even clearer, is that not all issues are appropriate to be figured out or resolved at that initial conference, that the lawyers have the ability to say it's premature to discuss this for this reason, so then the court will understand why. So I just wanted to offer that.

But we have, I think, Joe Sellers and Judge Lauck.

MR. SELLERS: Good morning. Thanks very much for your very thoughtful comments. I want to focus particularly on the (c)(4) concerns you've raised. I just want you to understand, and perhaps you already have been following these hearings in the past, that we've heard from some of the defense bar representatives grave concerns about the difficulty in ascertaining as early as possible even the most fundamental features of claims as to whether particular individuals might have even used a particular product that is the subject of the litigation. And I understand the concern you raise about this may be construed to impose requirements on the plaintiffs that they are not able to meet without additional fact-gathering through discovery or other means.

Isn't this something we can clarify in the notes so that it's clear that this is not intended to be a one-size-fits-all you have to do it a certain way, but rather it's to flag for the parties the value of information exchanged on both ends to facilitate as early as possible the ability to assess the value and value certain claims?

MR. ORENT: So I think that I understand exactly what you're saying, and the issue that I have is that all of these things are being done and prepared as part of a report that is being conducted by somebody who ultimately is not going to be the lead counsel in the litigation, and so what we're having is we're creating this process, this dialogue by somebody who is ultimately not going to have the authority to take the position on behalf of the plaintiffs.

So whether that individual is going to put their own view forward or whether they're going to take an amalgamation of views, there's not going to be a single voice that is going to operate on the plaintiffs' side of the bar. And I think that, quite frankly, that's the biggest single problem that this rule suffers from, is that you need to have buy-in from the plaintiffs, somebody who's going to negotiate fully and fairly on behalf of the interests of the plaintiffs, and that person should be the person who designs and who is responsible for guiding the litigation forward generally.

And so having somebody talk about what information is exchanged and when, well, that's a key litigation strategy and it's key to the development of the case, just like all of these other items are.

And I think your general point, though, is well taken that there should be at some point in the case, and I personally advocate sooner rather than later in a case, that there is information that is provided in the form of a fact sheet or census form that can be provided, but it should be negotiated by lead counsel, done in a way that provides sufficient notice for the parties if they can produce the records that support the information and done in an orderly fashion.

My concern going back to Rule 16.1 as it's currently written is it doesn't provide for somebody to articulate the concerns of the party, advocate that there be enough time to comply, whether that's 90 days, 120 days after the form comes out.

You know, there may be specific instances in a MDL. For example, if the government is the custodian of records, like we saw in the 3M earplug MDL, there, Touhy requests needed to be made of the government and getting that basic information was actually a very onerous task. So having a rule that applies across the board without that piece of information coming back would be a very dangerous thing to do and apply. So I think having a plaintiffs advocate is essential and to be able to speak on the

voice of all.

MR. SELLERS: Can I just add one follow-up question quickly? What I hear you saying is that while you don't have disagreement with the concept of the information exchange, you think it shouldn't be coordinated by a coordinating counsel. It should be left to the leadership counsel at a later stage. So I just want to ask you, on the assumption that there's a goal here of having an early coordination of some portion of the activities of an MDL as soon after the transfer as possible, how would you propose to do that if it's not through coordinating counsel?

MR. ORENT: I mean, to be -- and I do agree with your underlying policy, which is I think that in any litigation there needs to be a decision-maker in a lead on behalf of both sides as soon as possible.

And so what I've seen is I've seen some courts issue orders before the first case management conference that says submit leadership applications over your slate and we'll deal with that as Item No. 1 on the agenda. And so leadership gets dealt with first, and I actually would advocate at either a second or third case management conference that the newly appointed plaintiffs steering committee, both the leads and the steering committee, be given the

opportunity to thoughtfully formulate policies that meet the objectives of this rule and that it be the plaintiffs' leadership that works to advocate certain positions, perhaps reaching agreement with defendants on as many as possible, but at least then having a single voice from the plaintiffs bar that can be responded to with a single voice from the defendants bar. And I think, under that situation, you actually have the ideal for buy-in and true advocacy on behalf of plaintiffs.

MR. SELLERS: Thank you.

CHAIR ROSENBERG: Judge Lauck.

JUDGE LAUCK: I want to thank you also for your thoughtful comments. I want to address the fact that you keep talking about a leader, leadership counsel, a person. You need someone who’s going to lead the plaintiffs, and I’m sure you don’t mean just one person necessarily, of course, so I’m not presuming that.

But we are getting many comments that there are sometimes, if not consistently, groups who are not included in leadership counsel. We keep hearing the phrase "repeat players." And so, if there are law firms that specialize in MDLs and there is a solo practitioner who has brought one of the claims that

eventually become part of the MDL, we are hearing that often those folks are not considered for leadership and that some of the purposes of having an early meeting with not leadership set up is that those who are not known to the court or to MDL litigation might have a more significant impact or at least voice in the litigation itself.

And so I want you to please address that, because we hear obviously that we want folks who are expert in handling MDLs, but sometimes they're experts in the making and they also should have an opportunity. And maybe a single solo practitioner has a different view than a firm that has specialized in this, and maybe a fresh voice would be helpful to all the plaintiffs. So, if you could address that, I'd appreciate it.

MR. ORENT: Absolutely. And let me start with the premise of you're absolutely right. When I referred to perhaps in the singular, I meant a committee. I've served where there's three, sometimes four co-leads and a larger steering committee.

I also share your belief and personally, I believe in a big tent approach to litigation. That is, the more voices that can be heard, the better for the ultimate litigation and for the individual

plaintiffs.

I would note several solutions to the issue that you raise. Number one, I think that there should be a forum and the court is that forum that people who either are -- if the court accepts a slate of leadership, that the court accept applications from individuals outside the slate so that the court can be known to them, or if the court is inclined to do individual appointments, to have everybody submit separately. But I also think it's incumbent upon plaintiffs to publicize and to show that they have an open-tent policy prior to the organization of a litigation to actually look at the list of people who file cases.

And in any litigation that I've worked on, we actively seek input and collaboration with everybody who has a filed case or everyone who is known to have cases that are likely to be impacted and like to meet and understand what the view is of those individuals before case management conferences.

I would also add one other component to this, which is, because of the specialized practice of MDLs, I think that there is value in adding leadership development committees to MDLs, to MDL steering committees, so that you do actually go out and train,

whether it be younger lawyers or lawyers who are moving into the field of MDL practice or people who have otherwise not been given experiences, and create opportunities for them where you actually provide mentorship and guidance, not just a chair at the table but a meaningful way to grow into an eventual leader of litigations so that you can truly get diversity at the bar and really benefit everybody by doing so.

JUDGE LAUCK: So I just want to do one quick follow-up. I know we're short on time, but does that happen in MDLs? Do you have leadership development committees, and how often, and who appoints them, and do they participate in the actual discussions? I'd appreciate hearing about that too.

MR. ORENT: Sure. And this is a relatively new experience. There are two MDLs that I'm aware of that have used leadership development committees, so it's a relatively new phenomenon and they take a variety of shapes.

I will tell you that for the next MDL that I work on, my personal vision of what a leadership development committee would be is having it be a court appointment, but allowing anybody who meets certain general criteria, allowing them to come in so that it is not an exclusive club.

My thought on it would be that it would be a approach for individuals to gain mentorship from other court-appointed members, that they would have an opportunity not just to participate in certain decision-making but also be at the table for meet-and-confers and other sort of more closed conversation opportunities, but by providing mentorship and guidance along the way, actually building a leader out of that person, much like leadership academies do for other organizations, state bar leadership academies and the like.

I think that those are good working models where you take highly motivated people who have not been given a seat at the table previously and provide them not just the opportunity but additional skills to thrive and actually be leaders going forward.

CHAIR ROSENBERG: Andrew.

PROFESSOR BRADT: Sorry, I didn't hear you say in response to Judge Lauck's questions what the MDLs are that have these already. Do you know that off the top of your head?

MR. ORENT: I believe it was Zantac or it may have been Zantac, and, certainly, the hair relaxer MDL that's currently ongoing right now has one that I understand has been quite well received.

PROFESSOR BRADT: Thank you.

CHAIR ROSENBERG: Okay.

MR. ORENT: Thank you.

CHAIR ROSENBERG: Thank you so much.

MR. ORENT: Thank you.

CHAIR ROSENBERG: All righty. We'll hear next from Andre Mura on 16.1.

MR. MURA: Thank you so much. My name is Andre Mura. I'm a partner at Gibbs Law Group in Oakland, California, where I practice in class actions and mass torts. My recent appointments include in the social media MDL and the 3M earplugs MDL.

So I wrote about the list of considerations for appointing leadership counsel. I do think that Rule 16.1(c)(a)'s criteria is a welcome addition, but my suggestion was that the Committee notes could do a little more to address the process for appointing leadership counsel and perhaps provide some examples of different approaches that seasoned MDL judges have used as part of that process. And I think I know Mr. Orent provided some great feedback about that process, and I'll hope to do the same as well.

My comments, my first and second comments reflected a recent trend that I've seen. As part of the sort of written and oral presentations that are

often accompanied as part of this process for leadership appointments, courts often ask counsel whether there is any information about other counsel applying that might be useful to the court in selecting counsel for various committees. And my suggestion was that the Committee note expressly call that out and also suggest that that information be communicated ex parte, and I'll give two examples of where I think that's been useful and that's happened.

In the social media MDL, Judge Gonzalez Rogers, as part of her written application process, there was an opportunity to list counsel who supported an individual's application. My concern with that is what happened behind the scenes is you pick up the phone and you call a lot of people and you just get this list of names and no one's going to say no to you when you call. And as soon as you call, they're going to also support your application. So I'm not sure it has a lot of utility for courts because it sort of gets to be a popularity contest. Some attorneys don't like to do it, so they don't list any names because they want to seem very independent, so in terms of what the court is receiving, I'm not sure that that sort of approach is all that useful.

But Judge Gonzalez Rogers held a hearing in

which the attorneys were permitted a few minutes to provide additional information about their qualifications, and as part of that process, the court asked each attorney who was presenting to write down the names of two attorneys they thought should be in leadership. And so that was an opportunity for counsel to at least communicate some information to the court ex parte.

Judge Casey Rodgers in 3M received all her applications ex parte. So she had specific questions that she wanted, and as part of that application process, the court asked each individual to identify someone else who might be appropriate as a candidate for either leadership or for a committee. And that was really an excellent opportunity to call out especially younger lawyers who might have particular skills that would be useful to the MDL. For example, a younger lawyer might be very experienced in ESI or particular discovery or law and briefing or might be at a small firm where they've gotten to know some other counsel, but they really haven't had an opportunity to participate in large-scale multidistrict litigation. So that was an opportunity to communicate to the court and identify particular skills that attorneys might have. It was, I believe,

useful to avoid repeat players, to allow the court to identify fresh voices, and it promoted a candid conversation about who might be an appropriate individual to serve in an MDL.

My third comment related to the timing. I think Mr. Orent touched on this as well. I do think it's helpful to have leadership appointments to be dealt with first, although I do understand that in individual cases, there may be particular needs to move forward, and so it may be appropriate in those instances to appoint liaison counsel. I do think that there is some private ordering that happens behind the scenes when counsel is sort of investigating the case, filing cases. There are often conferences to discuss the ways in which a case is developing, the science behind it. All of that is useful, and I do think that our bar is quite good at providing open opportunities in those areas for different firms to participate, but I do think that's why I was suggesting the ex parte nature of communications with the court. That really is an opportunity for each individual candidate, and I know a lot of the MDL process is really focused on not law firms but individual candidates. I think that's useful as well, but it's really an opportunity for them to have that interview process.

My fourth comment related to the reassessment of leadership appointments. I do believe that the rule touches on this, and I was hopeful that the Committee note would say a little more. I think that that's something that I've seen more often in recent years, an attention to a re-appointment process. I think that could be incredibly helpful to the MDL in managing the litigation.

I've heard MDL courts talk about how the leadership appointment process is essentially the court hiring or creating its own law firm, and I do think it's helpful for the court, which is oftentimes periodically receiving information about billing, to know exactly who is actually doing the work behind the scenes. There are oftentimes appointments in the beginning and then there may be a need to readjust, especially as the case is progressing towards trial. There may be a need for different skills, different appointments.

It can also be an opportunity for individuals. There are oftentimes I see in MDLs that I participate in, there are wonderful associates and younger attorneys who are doing a lot of the work who don't have formal appointments, and so that might be an opportunity for a judge to notice that someone who

has really been doing the work, perhaps appearing at hearings, writing briefs, doing discovery, taking depositions, they will see those billable hours and it may be an opportunity to select that individual and provide them an appointment on a committee so that they're formerly recognized. And that really helps, because, once you start to get these appointments, there is a little bit of a snowball effect because you will just get these resumes with a long list of appointments. So I do think that's valuable. It will increase diversity in MDL appointments.

I'll stop there. I hope I didn't talk too much, but I'm happy to answer any questions.

CHAIR ROSENBERG: Oh, thank you so much.

So I guess, just for the benefit of everyone to some of your points, the notes do currently speak to courts have selected leadership counsel through a combination of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. So I think that that speaks to your issue. I suppose it doesn't say ex parte, and maybe that was primarily what you were trying to emphasize in the interest of getting candor.

And then, in addition, down below, the rule also calls for a report to the court on whether

appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding. I mean, this is a rule and these are notes. It is not a manual which, by the way, will be coming out shortly, an updated manual, so I think we all have to keep in mind that it can only say so much. And in the interest of flexibility and creativity, which so many of you have spoken about, we run the risk, I think, if we put too much in there, we're surely going to be overlooking other things, and so the question would be raised is this somehow an exhaustive list and we shouldn't be considering other things.

So I point that out to say that this is an example of where the Committee has endeavored to really highlight some key issues and it's, again, to prompt the lawyers to raise the issues with the judge at the initial conference, including, Judge, we think you should do an application process and we think you should do it ex parte at least in part as it relates to recommendations and here is why, because I've been in cases where that has worked. So that's exactly what we have envisioned with this type of language.

With that being said, we have Ariana and then Zach who want to ask questions.

MS. TADLER: Thank you.

Good morning, Mr. Mura. How are you? Nice to see you.

MR. MURA: Good morning. Nice to see you.

MS. TADLER: So two questions for you and Judge Rosenberg just touched upon the ex parte component.

In your experience, is the ex parte effort that you've seen in certain cases purely a matter of submissions being made individually to a judge and that's it, or is there additional follow-up by the judge with individual candidates ex parte such that there are communications with a judge and whoever the applicant is that are not otherwise sort of full disclosure, sunshine for others, whether it be across the plaintiffs' counsel who are seeking positions or also inclusive of the defense counsel?

MR. MURA: Yes. Thank you for your question. The processes that I've seen, the ex parte has been through written communications as part of the application, and then there has been a public hearing where there's been an opportunity for the court to ask questions of individual lawyers. I haven't seen an ex parte individual interview process.

MS. TADLER: Thank you. And then, with

respect to the opportunity, as you were suggesting, that perhaps over time a later review of a potential change-up, modification, supplementation of positions where perhaps certain junior lawyers or other lawyers who have had less experience prove to be particularly active and contributing to a case, how is it that you foresee those lawyers being highlighted or identified for purposes of modification, supplementation of a particular leadership setup?

MR. MURA: For that process to work, I do think there needs to be sort of an annual process for re-appointments that both allows individuals who have already been appointed to provide the court with information about the work that they have performed during their appointment and also an opportunity for an invitation for additional individuals to apply.

And so not all courts do that re-appointment process, or the re-appointment process is pretty automatic. If you send an email to the court on a certain date, you will get re-appointed. And so I take Judge Rosenberg's comments to heart that you don't want a rule that's too prescriptive. But I do think that's something that's a little lost in translation and it might be helpful to emphasize. And where I've seen greater attention to the re-

appointment process, it has really inured benefits both to the MDL and the opportunities for diverse and younger lawyers to become participants.

I know, in the Taxotere MDL, there was a great push by leadership to nominate individuals who had participated in trials, individuals who had done some of the work where they hadn't been appointed, and the judge did appoint them as part of the plaintiffs' steering committee or other committees, and so that was very useful.

But I think the re-appointment process typically is sort of an automatic process, and what I was trying to highlight was that there should be more attention to it.

MS. TADLER: Thank you.

CHAIR ROSENBERG: And Zach.

PROFESSOR CLOPTON: Thanks. I think we mostly covered what I wanted to get to, but just in case you have anything more to say, you know, I think a lot of people -- a lot of witnesses we've been hearing from have emphasized the need to have a more diverse set of representatives on the plaintiffs' side, and I guess what I wanted to just think more about is how that interacts with the timing question.

Should we expect that, say, the solo

practitioner will have a better chance of being appointed to a committee early in the process, or are they going to have more of a chance if we kind of push back in the litigation when certain appointments are being made?

MR. MURA: I think it probably won't happen as often in the re-appointment process if it doesn't happen initially just because, especially if you're a small firm and you're not part of the MDL itself, it's very hard to sort of work your way in unless you have a lot of clients, which is unlikely if you're a small firm.

There are a lot of financial pressures in terms of participating in multidistrict litigation. You have to pay assessments at the end of the day if you're not high up in leadership and, for example, the MDL is not achieving perhaps the results that everyone thought it might at the beginning. You know, there's a common benefit committee and so different people are treated differently. And so I think a small practitioner might be concerned about really trying to become involved in an MDL if they don't get involved right at the outset.

So I think, to increase diversity, there really needs to be attention at the initial

appointment process, and I think that's really the opportunity to get involved in the MDL.

CHAIR ROSENBERG: Okay. Thank you so much.

MR. MURA: Thank you.

CHAIR ROSENBERG: We very much appreciate your comments.

Did we fix the audio for Rebecca on behalf of Mark Lanier, the audio and video?

MS. BRUFF: Yes, we did.

CHAIR ROSENBERG: Okay. So, okay, Rebecca, we'll have you come on. I know we're running a little behind. We're supposed to have a break at 10:55. So let's hear from you, and it may be that we then take the break before we go to Jessica Glitz. So you are speaking on behalf of Mark Lanier about 16.1. Nice to see you.

MS. PHILLIPS: Wonderful. Thank you, Judge Rosenberg.

So, obviously, I'm not Mark Lanier, but I am a member of his law firm. My name is Rebecca Phillips. I am the mass torts director at Lanier Law Firm. I've been practicing for about 13 years since graduating Yale Law School. I have practiced on the defense side in complex litigation, including class actions, but for the past decade, I've been practicing

on the plaintiffs' side primarily in mass torts.

I have experience in the TVM litigation, the opioid litigation. I'm currently a co-lead of an MDL that is pending in the District of Arizona. And our firm has been lead counsel in over 30 multidistrict litigations. As mass tort director, I'm a little bit involved in all of the litigations that we're involved in. So that is my experience.

With respect to Rule 16.1, I think we need to start with the purpose, and my understanding of the purpose is that we're trying to give guidance to judges so that we can handle MDLs more efficiently and achieve justice for plaintiffs and defendants, right?

I think, with that goal in mind, I think it's very important that leadership be appointed first and I think that coordinating counsel complicates the process. Let me explain a little bit of what I mean, and I'm going to speak very plainly here because I think that's going to best communicate things.

Coordinating counsel reduces efficiency. Respectfully, the only individuals who really understand what goes into making plaintiffs' leadership work is the plaintiffs' bar, and it's a little bit like herding cats trying to get together that leadership committee that's going to run the

case. There are cases that are coming in from all over the country, different firms. You all understand that. But we all have to come together and we all have to work together for the life of this tort. That's for years. We have to create relationships, and that process is complex to say the least.

The Committee notes do a good job of acknowledging that there can be tension between approaches that attorneys are going to take, and because that is true, we really risk sacrificing justice on behalf of the plaintiffs when we're asking coordinating counsel or when we're asking all the attorneys who are participating to put together a joint memo before leadership has been appointed.

And I can give you a little bit of personal experience with this. There's been a tort that has gone forward where we were asked to put together a joint memo with defense counsel before leadership had been appointed, and it's always an arduous task to put together a joint memo with defense counsel, especially at the beginning of the case when everyone's feeling each other out, but I do think it's helpful. It's a good process to go through.

The problem mostly arose because there were competing leadership slates, and when you have

competing leadership slates on the plaintiff side who are trying to come together and tell the judge what the case is about in the joint memo or to tell the judge how discovery should move forward, the joint memo becomes an opportunity for these plaintiffs' leadership slates to try to differentiate themselves, and sometimes that may be appropriate when you're discussing leadership, but sometimes it's not. And putting together this joint memo before leadership has been appointed really just encourages diverse plaintiffs' slates to try to use it as an opportunity to differentiate themselves.

And, you know, I can't talk to you about the details of how that occurred in the particular case that I'm thinking of because it's still pending, and I think that the attorneys did a good job for the most part of trying to keep strategic issues that could have prejudiced the plaintiff out of the view of the court. But counsel who were competing in a more cutthroat fashion may not have considered the best interests of the plaintiffs and may have considered just getting themselves appointed and it really could have prejudiced the plaintiffs. Think things like, you know, attorneys are still trying to determine which defects exist in a product to go forward on or

which injuries are valid injuries to go forward on, and if these discussions happen in front of the court prematurely or in front of the defendants prematurely, that really risks prejudicing the plaintiffs.

Now I can tell you one thing where I think the conflict did prejudice plaintiffs in how this played out, it was the scheduling. And in my view, one group of attorneys trying to please the judge took a view on the scheduling order that the tort could be completed in a shorter time frame. That was their selling point to the judge. They could get this thing quicker. And in my view, another group of attorneys took a more reasonable position saying that, you know, they would get it done in a little bit longer time frame but in a time frame that was more reasonable considering the work to be done.

And so that conversation had to happen in front of the court. Before you had leadership appointed in the case, attorneys were trying to differentiate themselves on that basis, and it gave the court a skewed view of what was really possible, and we ended up with a shorter discovery schedule because of that, which I think is not good for the plaintiffs. So those are some of my thoughts.

I do want to say that there was a concern

about -- Judge Rosenberg asked a question about whether or not coordinating counsel is speaking for anyone, and I think that as the rule is currently drafted, number one, we think coordinating counsel should go. It's going to end up in a huge game of telephone.

But, number two, if coordinating counsel must stay, and we don't think it should, but if coordinating counsel must stay, it needs to be made clear that coordinating counsel does not speak for anyone because, as currently drafted, they're supposed to assist the court and they're supposed to assist with drafting the joint memo. And what does that mean? Does that mean that they're the ones who get to have final say over what's in the draft memo? I'm just not sure, and I just think things would be much more efficient and we would risk prejudicing plaintiffs less if we did away with the idea of coordinating counsel.

CHAIR ROSENBERG: Okay. Thank you so much, Ms. Phillips.

Anyone else -- anyone have questions?

Seeing no questions. Okay. We appreciate you stepping in for Mr. Lanier and providing us with your testimony.

We're going to take a brief break now. So, if Ms. Glitz can hold on, we ran just a few minutes over, so why don't we return at 11:15.

(Whereupon, a brief recess was taken.)

CHAIR ROSENBERG: Okay. Ms. Glitz, thank you for your patience. Sorry we're running behind, but let's turn it over to you for 16.1.

MS. GLITZ: Okay, Your Honor. Thank you so much for your time. Good morning.

CHAIR ROSENBERG: Good morning.

MS. GLITZ: My name is Jessica Glitz. I am senior counsel at Johnson Law Group in Houston, Texas, and I have been practicing in MDLs for over 10 years now, although I don't look like it, I'm sure.

I've had the opportunity of representing clients both on the defense side and now on the plaintiff side in complex litigations across the country. I wanted to briefly step back and all of my colleagues that have spoken today have spoken about the specific rules and I want to talk about the landscape a little bit about MDLs right now. In my brief testimony/statement, I actually provided just a table that the JPML provides each month and it's a little outdated. It's from January 2.

And so, as of February 1, not much have

changed. Only one more MDL has been consolidated. But the numbers have changed slightly, and that is that out of the 168 cases that are currently pending right now, 60.1 percent have a hundred plaintiffs or less. And while I understand in past testimony in other days there's been a lot of focus on large MDLs, what I want to make note of to this Committee today is out of all of the pending actions, as of right now, 72 percent of those pending actions are just in two MDLs, and that is in the 3M litigation that I know has been spoken about before that is right now in a global settlement, and the other one is the J&J litigation, the talcum powder litigation in New Jersey, which, as we all know, was stayed from October 2021 until July of this past year, and so there was a surge of filings after that stay was lifted. And while that may seem not important, I think it is very important when we talk about these rules as a whole.

I am extremely Type A and I have been in front of lots of judges and most of them are also Type A. So, when we're talking about a set of rules, while they are suggestions, they are still more likely to be followed more likely than not in the best way. And so, while I think some of these suggested rules are great, I do feel that they're overambitious for an

initial conference and they should be focused on as the litigation continues, but it's not feasible to focus on all of these suggested rules at a particular time. And having a checkbox, which is how I would feel that I was looking at these rules, just isn't feasible at the very beginning of a litigation, particularly when you don't have leadership assigned.

And I know many of my colleagues before have already talked about this, but one of the things I wanted to bring up in particular that Your Honor, Judge Rosenberg, had suggested is the difference between maybe semantics of liaison counsel versus coordinating counsel, and maybe we need to define that a little differently.

First off, because most MDLs are made of a hundred plaintiffs or less, coordinating counsel most of the time is obsolete. I have had the fortune of being a part of many of those MDLs, and one of the things that is important is that, number one, plaintiffs' counsel has gotten a lot better at coordinating themselves. We've taken a note as time has gone on in the last 10 years at least that I've practiced.

And, number two, when an MDL is formed and a court is defined, if someone that is not a part of

that case, which usually they are, is not in that jurisdiction, they will find someone and make sure that they will be educated on the local rules, the current case law, and how that judge forms the case.

And so it's not important for a court to appoint separate coordinating counsel or even liaison counsel. Plaintiffs' counsels knows that every court is different, every judge is different and, therefore, it is important to note that plaintiffs' counsel is smart and diligent and focused and wants to make sure they put their best foot forward because they're representing their clients, and so they will always reach out to make sure that they have what I think the terminology has gone to an idea of liaison counsel, someone who knows the court very well, someone that has the ability to speak to the court.

But that person also, whoever it is, whether they be appointed -- that they are being appointed to leadership knows the case just as well as the other parties that may not know that court or practice in that court on an ongoing basis and can't just step into the shoes for a little bit.

I know we talked a lot about that they just talk about administratively how the case works, but I particularly know working in separate MDLs the way

that one case administratively would work with some counsel in leadership wouldn't always work with other counsel in leadership, particularly with the number of defendants that are in the case, the number of plaintiffs, and the different number of injuries that are in the case.

One of the other things I wanted to focus on that they continue to talk about under Rule 16(c) about leadership is the different ways that leadership is defined and appointed. If we were talking about how large an MDL is and most of them are under those hundred plaintiffs, you're only looking at about at most 10 firms particularly, and so they have already coordinated very well. In those particular situations, I have very few scenarios where there's been a completely conflicting number of attorneys on each side in the vast majority of MDLs.

And so I wanted to make sure that that was clear. While there can be an application process and that may be good and right, in most -- right -- MDLs, if they are extremely large or there's this idea that they're large or there's a lot of counsel, in the most particular situations, because of the smaller group of cases that are filed, usually that counsel has already coordinated their experts or at least started

coordinating their experts and their discovery and how those cases want to be moved forward.

So I will leave the rest of the time for any questions that may be asked.

CHAIR ROSENBERG: Oh, thank you so much, Ms. Glitz.

So, to your point about leadership being appointed first possibly or it's just premature to tackle all of these issues in (c), hypothetically, if there was language along the following lines in the note relating to this topic that read something like some of the matters designated by the court, referring to the lists in subsection (c), the parties may report that it would be premature to attempt to resolve them during the initial conference, particularly if leadership counsel has not been appointed.

Rule 16.1(b)(8) or I guess it would be (c)(8) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed and that the initial management order would control only until the court modifies it, something along those lines. Does that clarify or address some of the concerns that you have raised about and, quite frankly, that we've heard from others that it just may be too early to address some

of them and also that maybe leadership counsel needs to be appointed first?

So, if you had clarifying language, given what you're saying as well that every MDL is different and so what might work for one might not work for another, and so, if you had that language, would it prompt the lawyers and/or the judge to sort of consider, hmm, maybe some of these should be considered now, not all? Let's tackle this in a management conference one month from now, let's tackle them after leadership counsel has been appointed. What do you think?

MS. GLITZ: Yes, Your Honor, I do. I think that to see where the -- all of these suggestions are completely correct, that these need to be focused on as the litigation continues and not one of them can be left alone. But I do agree with you, Your Honor, that if a judge could provide a roadmap of what's most important after leadership is appointed is extremely important to see the litigation move on in a very particular manner the way the judge always likes it, quick, concise, and the ability to get a resolution.

CHAIR ROSENBERG: Okay. All right. Thank you. Rick.

PROFESSOR MARCUS: Just to follow up on what

was just discussed, it strikes me that at least one of the things on the list in 16.1(c) probably needs very early attention and that is are there any scheduling orders or the like that ought to be modified, vacated, or something like that. Are you saying that that should all be postponed until a whole lot later in the case? That surprises me.

MS. GLITZ: Oh, I apologize, sir. No, sir. Actually, in my testimony -- and there's actually five different parts of the rule, I believe, or there might be four that I think in the first initial conference and the first couple initial conferences should be focused on. Number one is obviously the appointment of leadership. Number two is a schedule for additional management conference, as Judge Rosenberg already mentioned. Number three is the management of new actions, how they should be filed defining the local rules. Make sure as an attorney that practices all over the United States, I am not privy to every single local rule. I'm getting better but not great.

And then number four is the management of related actions. So to make sure that there's no scheduling order that has been defined that could put a case ahead of others or make it difficult for leadership later on to define a directed path

administratively or for discovery, et cetera, for those cases.

Does that answer your question, sir? Okay. Great, thank you.

CHAIR ROSENBERG: Okay. Thank you so much, Ms. Glitz. We appreciate it.

MS. GLITZ: Thank you. Have a good day.

CHAIR ROSENBERG: You too.

Ms. Relkin on 16.1.

MS. RELKIN: My camera. Okay. Am I there? Yes. Okay.

CHAIR ROSENBERG: There you are. Yeah.

MS. RELKIN: Yes. Good morning. Thank you for hearing from me. I will reiterate a couple of things I said in my written submission and then also, after hearing some of the discussions, just kind of impromptu address some of the questions I've heard.

So I agree with some of my colleagues you've heard from about that I do not think there's a need to appoint a coordinating counsel. It appears to me to be this extra step that can ultimately delay getting the litigation moving expeditiously. People are thinking about appointment of leadership the second the MDL is formed. And to have this extra step I think just can delay things. And, instead, it makes

more sense just to have the first conference to get to the heart of the matter with the judge laying out the criteria that they're looking for and the process for selection of counsel. And often, as I indicated in my papers, from my experience, it happens kind of organically. You know, sometimes there's those contested slates, but often the parties work it out. So that's point number one.

In terms of one section that I -- the other section I think really I think should be stricken from the proposed rules is (c), the role of leadership counsel regarding any settlement activities, to have that be discussed or actually denominated as settlement counsel. I really think that that is something that should happen at the appropriate time and, you know, your point co-leads, co-leads are running the litigation, but they also need to be intimately involved or at least cognizant of any settlement activities, and to have other people who aren't co-leads have this independent role of settlement can lead to dissension. It really can lead to dissension within the leadership team, so I think that's counter-productive. If the co-leads think that they have the perfect person who's very experienced in doing settlement, they can point to that. But to have

the court independently pick who's settlement and have independent separate leads I think just can lead to not having a coherent leadership team.

So separate from what I've written about, just a few other items really to quickly address. You know, we've heard the term "repeat player" as being this very disparaging term, but, generally, someone who's experienced, that's a good feature. Of course, you want to have -- you know, in medical practice, you have interns and residents, but if anybody on this Zoom or Teams was having hip surgery or knee surgery -- that's what I do most of my litigation about -- you don't want the resident doing your surgery. You don't want a general practitioner, orthopedic surgeon who mostly fix broken wrists. You want someone who does hip and knee arthroplasty every day, hundreds a year. Medical literature shows those are the most effective procedures, and I see that in my medical records I review, the random orthopedic surgeon who really doesn't do hip and knees as their training and primary practice don't have the best outcomes.

So I think we shouldn't just disparage because a law professor coined the term "repeat player" as being a negative. We shouldn't disparage

experience. These are the most complex litigations, and you need people who have experience and have the big picture. Of course, you need younger people too, and, of course, people should be welcomed into the fold. But to appoint high-level leadership, you know, with rookies, novices, it's just not productive. It's something defense lawyers would like. I don't think corporate counsel would want, you know, to be told who they get to have as their people at counsel table.

The good thing from what's happened from some of the discussion about repeat players and so forth is the plaintiffs' bar --

(Cell phone chimes.)

MS. RELKIN: Oh, my goodness. I'm sorry.

The plaintiffs' bar has listened and it is remarkable how many more diverse -- how much more diversity you see within some of the "repeat player" law firms. You know, they're not dumb. And, happily, everyone is hiring more diverse lawyers. So you're seeing even within those firms more diverse lawyers getting submitted for leadership roles. So it is happening in that context.

In terms of women, I mean, I've been -- I didn't introduce myself. I apologize, but I had my bio in there. I've been practicing for close to 40

years. I've been doing this type of work for decades and I've been co-lead counsel for four different MDLs, some very large, the ASR litigation, Depuy ASR litigation, and the Jewell litigation, and now I'm a co-lead of a smaller MDL with about 1500 cases, the Exactech hip MD litigation.

But what I was going to say is, when I was first appointed as co-lead in the Depuy ASR, there were very few occurrences where women were co-leads and it is just fabulous to see that now there's, you know, now women being appointed as co-lead or executive committee is no longer a novelty. It's common. So, you know, progress has been made.

The -- let's see. That's --

MS. BRUFF: Ms. Relkin?

MS. RELKIN: Oh, okay. Yes.

MS. BRUFF: I apologize. I might turn it over to Judge Rosenberg. I'm sorry to interrupt.

MS. RELKIN: Sure.

MS. BRUFF: I do see we already have one question.

MS. RELKIN: Sure. I didn't see it.

CHAIR ROSENBERG: Thank you so much, Ms. Relkin.

Ariana.

MS. TADLER: Thank you.

Hi, Ms. Relkin. How are you? Nice to see you.

MS. RELKIN: Hi.

MS. TADLER: So a question I have for you is you made a really interesting point, which is let's not disparage repeat players, and then you further noted that, you know, certain firms that may themselves have had lawyers that are repeat players have further diversified their ranks, they're bringing in more diverse candidates. How would you tackle the concept of, well, if there's a firm that's a repeat player versus there might be some lawyers that either have their own firms, maybe they've peeled off from one of the larger firms or maybe they're just new lawyers to the practice and they are with other firms and they too, you know, have a fairly large swath of plaintiffs that they're representing and, therefore, they bring some diversity.

I'm trying to understand where you see the limitations or maybe the opportunity to have just a broader slate where maybe you have some repeat player firms and there's diversity that's come through by way of example that you've provided, as well as to be inclusive of other lawyers that are elsewhere that may

not have been seen as prolifically as others.

MS. RELKIN: Certainly. I mean, I think the peeling off example that you gave of somebody was at a bigger firm and then they went off and created and that happens all the time, which is terrific. Those folks have experience too because they've been in that field. We're not just talking about, you know, a random firm that happens to have a client who walked in the door who had the product at issue and has the injury and wants to get involved in the MDL. I think Professor Bradt was asking a question about the solo practitioner. The peeling off and experience, that's great.

The solo practitioner who has the one case, I will give you an example that just happened. The present MDL I have, Exactech, I made an effort, we made an effort and we have, I think, a very nice diverse team, you know, gender, ethnicity, race, and also some smaller firms. But, when we were forming the committee, there was no contest, reached out to everyone. Maybe it wasn't the most popular MDL, so we didn't have, you know, the food fight of slates, but there was one lawyer who had one case who has practiced a lot in that in the Eastern District of District, and he came up to me and he said, I have a

case, I'd like to be involved. I said, okay, great. You know, send me your resume. We can put you in.

But one thing that needs to be understood is, to participate, people do need to make financial contributions. These litigations are incredibly expensive. So the amount that we had is the charge for anybody to be on a committee, not co-lead or executive or PSC, but the committee. That's a smaller number, it was 50,000. That's a lot of money. It's not as much as the higher levels, but you need the money to litigate. We're taking on big corporations and it's really, really expensive.

He decided, no, it's not worth his while. And so is that exclusionary? You know, he thought it would be nice, but when he realized, eh, I don't want to spend that kind of money, he stepped aside. So, you know, the idea of this, you know, solo practitioner who's being excluded, I don't think that that's necessarily accurate.

Another example is we do have some smaller firms on the committees, and one big thing we do is document review obviously. When we made document review teams, we asked anybody who's putting up a lawyer agree to commit 15 hours a week for document review. We've got to get through, you know, hundreds

of thousands of documents and you don't want someone doing it three, four hours a week. They forget what they review by the time they go to it the following week. And some of the smaller firms would not commit their lawyers to 15 hours a week.

So, you know, this is big litigation and it does require investment, so I just, you know, kind of the -- I think there's a little naivety to assume that a lot of solo practitioners can afford to time commitment and economically be in high level of leadership. If they can, great. But I think in reality that that's just not that realistic.

MS. TADLER: And just as a clarifying point, the $50,000 investment that you shared, that was at the outset of the litigation. To the extent that a litigation goes on for much longer, there may well be a further call for additional investment in the case. Isn't that true?

MS. RELKIN: Oh, absolutely. In this litigation, there's a parallel state court litigation in Florida. The MDL lawyers, we're working with the Florida lawyers. We're funding it. We are hiring experts. You know, those are hips in Florida. We're doing the knees in Brooklyn, and we're writing checks not to be believed because we're dealing with lots of

disciplines. We're dealing with orthopedic surgeons, design engineers, polymer experts.

CHAIR ROSENBERG: All right. Ms. Relkin, I'm going to --

MS. RELKIN: Thank you.

CHAIR ROSENBERG: -- jump in just because we're running tight on time.

MS. RELKIN: Thanks. Sure.

CHAIR ROSENBERG: We have two questions, Rick and then Judge Proctor.

MS. RELKIN: Sure.

PROFESSOR MARCUS: Thank you. I want to call back -- go back to your mention if I understood it about the proposal in 16.1(a) that the parties address the role of leadership in settlement activities. I don't think that says and I'm not clear why you seem to think that says, oh, pick somebody else who isn't in leadership at all and say you're the one to handle settlement. Isn't it possible that it's valuable for the court to consider whether leadership should now or when leadership should be dealing with settlement rather than just saying, oh, I'll deal with that with somebody else later and separately?

MS. RELKIN: Oh, maybe I misunderstood what that said, but my impression and maybe it's because

I've seen several litigations recently where the court appoints different people to be settlement counsel or a committee of settlement, and I kind of inferred that that was what this was referring to. And I think that that can be counter-productive for the reason I said and also because I think it can send the wrong message sometimes. You know, in this world of mass torts now, there are all these non-lawyers who are out there who observe MDLs and see what's going on. And if, oh, there's an order saying settlement counsel is appointed, the markets are saying, oh, the litigation is settling and things percolate out there that have no bearing on reality, so, you know, settlement is inherently usually early on a confidential concept. It's great. We love it when the judges encourage it.

Often my experience is it's done in chamber conferences, although not all MDL judges do chamber conferences. And there's sometimes things you don't want to say in open court about settlement that can result in, you know, counter-productive actions.

CHAIR ROSENBERG: Judge Proctor and then Judge Lauck.

JUDGE PROCTOR: Ellen, great seeing you. A question for you. I know you've been leadership in certain MDLs. I take it there's been other MDLs where

you applied for leadership and someone else was selected.

MS. RELKIN: That's correct. Yeah.

JUDGE PROCTOR: So one of the concerns I think the subcommittee had when this coordinating counsel issue was, you know, at least initially drafted, and I'm going to speak for myself, not the subcommittee, is, how do you deal with the lawyers who are not going to have a seat at the table eventually? How do they have input about the starting point of litigation? And would coordinating counsel or liaison counsel reaching out to everyone not bring more efficiency and more diverse ideas to the table that the judge should consider, transferee judge should consider, in plotting a course for the case, including how to go about selecting counsel because different courts handle that different ways.

So I've certainly heard all the push-back on coordinating counsel. You've not hit the dynamite charge on that completely, so I'm curious what your view is about, if we were not going to have the language in the rule we currently have, what could we do to make sure that every lawyer's voice gets to the court at the beginning of the stage, not just those who are either by slate or otherwise foisted on the

court as the spokespeople? And I'll hang up and listen.

MS. RELKIN: Thank you, Judge. That's an interesting question. And, I mean, from my experience, and I guess it depends on who's working on which litigations, is we do have meetings. Anyone who has a case that was filed before the JPML or early on before the court conference reach out if there's an informal coalition of presumed potential leadership, reach out and you hold a meeting everybody's invited to attend. I can't say that everybody else does that, but I think that's pretty customary, and we have often email listservs going where we'll do a Zoom. Zoom has changed a things a lot. It's made things a lot more accessible. Is someone missing because they didn't get the Zoom invite? I guess that's possible. But, I mean, gosh, what is this coordinating counsel going to do? Pretty much the same thing, look for the list of who the lawyers are and do that reach-out.

I think, generally, if someone -- I mean, at these initial conferences, if someone feels like they had a different view and they weren't sitting at counsel table, typically, the judge says, does anyone else have any, you know, thoughts, and they can stand up and say that if they didn't. People talk outside

of the courthouse and mill around and debate whatever issues they're going to say. So, I mean, I think it can be done without that role.

I just think, I mean, maybe it's a good idea, maybe. You know, I just think it's just this extra step that's going to delay moving the litigation along. Maybe liaison should be coordinating. Liaison is inherently usually the local, not that you need that proximity anymore because everything's electronic. It used to be the liaison counsel, you know, lugged the filings to court. So maybe just have a liaison counsel that has that role until the formal appointments are made. But it just seems like, otherwise, it's coordinating counsel presumed to be lead, you know, and how does -- I guess my question to Your Honor is how is that coordinating counsel selected to make sure you got the right person for that role since they need to be inclusive and on the ball.

CHAIR ROSENBERG: Judge Lauck.

JUDGE LAUCK: I'll try to be quick and I fear I may be misusing folks' time because I am new to this process, but what prevents leadership from allowing a solo practitioner to participate in leadership without the $50,000 contribution or the 20

hours a month in docket review? I'm not sure where that comes from. I don't think there's any rule governing it and so I'd be interested. Maybe there is, so I'd be interested to know.

MS. RELKIN: Sure. No, no, there is no rule. It's just expensive to run this litigation and someone's got to write the checks to do that. So for someone who's not making the contribution of sufficient time and/or -- and contribution for the war chest, so to speak, you know, wouldn't everyone like to just not have to pay money and get to take depositions? You know, you need skin in the game, so to speak. But there is -- it's custom. It's not rule. But then you don't --

JUDGE LAUCK: Right. So I think my -- I'm sorry to interrupt, but I think my question goes to what Judge Proctor was talking about, which is that you can have skin in the game in many ways and that if the coordinating counsel is trying to bring in folks who are not -- and I won't say repeat player, more experienced and have done it before, I'm not sure that the experienced lawyers wouldn't benefit from somebody who might have a slightly different perspective.

And so I think that's part of what is being considered with respect to this rule. And if the

other folks are going to put the skin in the game anyhow, why wouldn't they get essentially free advice?

MS. RELKIN: Well, I'll give an example. You have a litigation and it's some toxic component to the drug or the device or chemical and the medical literature is strong on a couple of serious injuries. But this new lawyer who had a very compelling client walk into her or his office and I was exposed to this device and I developed that, and this lawyer believes it and is hell bent on, you know, pursuing that litigation, and the science isn't there, and the experienced lawyers who have done the Daubert battles are like, no, we can't litigate this injury, the data is not there. And that lawyer who's not paying for experts because they're not making a contribution is requiring the leadership to pursue not a strong case that really shouldn't.

So you need kind of a financial investment, so to speak, in some part to make important decisions on, you know, what injuries are going to be pursued, how strong the case is with regard to different aspects.

CHAIR ROSENBERG: Okay. Thank you so much, Ms. Relkin. Very helpful. We appreciate it.

MS. RELKIN: Thank you. Thank you. Thank

you so much.

CHAIR ROSENBERG: Thank you.

Okay. Jennie Anderson, 16.1. Oh, you have to -- your mute button is on. There you go.

MS. ANDERSON: I should have that down by now. Good morning and thank you so much for having me here to speak to you about the proposed amendments --

CHAIR ROSENBERG: You might just want to -- your volume, just put it up a little bit so we can all hear you, or get maybe closer to the mic.

MS. ANDERSON: Is that better?

CHAIR ROSENBERG: I mean, I can hear you. It's just it's faint.

MS. ANDERSON: Okay. I'll try to speak up. I think that I just have to speak more loudly.

CHAIR ROSENBERG: Yeah, there you go.

MS. ANDERSON: Okay. I apologize for that. So good morning. Thank you for the opportunity for having me here. My name is Jennie Anderson. I am a partner at the San Francisco law firm of Andrus Anderson. I have been practicing complex litigation for more than 20 years, both in class actions and mass torts. I am probably one of these -- I'm probably one of the plaintiffs' attorneys from a smaller firm than you've heard from for the rest of the testimony and I

apologize for my voice. I am sick, so I will try to speak up, but I've been coughing all morning, so I apologize for that in advance.

So I'd like to talk a little bit today about 16.1(b) and 16.1(c)(1) proposals. I'll try to be brief because I know we're a little bit behind, and I'll try not to repeat what I've already submitted in writing.

First, I will join the many other plaintiffs' counsel you've heard from today in the opinion that adding an additional layer of coordinating counsel before leadership is appointed to work with plaintiffs or the defendants on things of such great importance as preparing the first case management report is ill-advised.

In my opinion, the first order of business should be to take applications for leadership and appoint leadership. It's not that much of a delay. We're talking about litigation that is going to be going on for years. So taking the time, a few extra weeks, for the judge to reach out, require applications and have that hearing in advance of requiring the first case management report does not cause much delay. And everyone's concern, as you've heard, is that having coordinating counsel in that

role where things may have to be undone if there wasn't agreement on who should be speaking for leadership on the plaintiffs early on is also problematic.

On that same note, I'm a big proponent of the individual application process as opposed to the slate or self-management -- or self-coordination models of leadership. I think it's gaining popularity with federal judges who are presiding over MDLs and it has increased diversity and, importantly, the pipeline of younger attorneys managing and having leadership in MDL roles. And it also is an opportunity for smaller firms like mine to come in and make an independent application for leadership where we may not have been included in the larger meetings with the larger firms who are known to have many, many cases on file.

So that kind of segues into my comments on 16(c)(1). As I mentioned in my written testimony, I do not think that any of the topics regarding leadership counsel should be the subject of a joint meet-and-confer or a report. I think that these are issues for the judge and for plaintiffs' leadership to work out. I don't think that defense counsel anticipates having a role in dictating what the duties of lead counsel will be and how lead counsel is

appointed. So, in my view, while these may be good checklists for the judge and for plaintiffs' counsel, it's not the subject of a joint report.

And I mentioned in my comments that in social media, Judge Gonzalez Rogers, after the appointment of leadership, the plaintiffs' bar put in a proposed order for the judge's consideration setting forth the duties of plaintiffs' leadership, and the judge made some adjustments and entered the order, but defense counsel was not invited to weigh in on the way plaintiffs' counsel intends to litigate the case.

And then, finally, I will just add that if those elements are maintained for the judge's consideration and for plaintiffs' counsels' consideration, I do think that having some mention of a procedure for periodic review is important. I've advised young attorneys for years that PSCs are not written in stone, and I have told many young attorneys and attorneys from small firms, go in to lead counsel, volunteer, do the work, and next year, tell lead counsel you'd like to put in an application for the PSC and put in an application to be added to the PSC. They are not set in stone. And I think that's a good thing for judges and practitioners to know and to keep in mind.

Now, of course, that has to be balanced with maintaining consistency. You know, to have a completely new leadership each year would be very disruptive, but I think judges already know that. So I just wanted to also give a plug for keeping something of that nature in there but in a different section that is not a joint statement.

With that, I'll take questions if there are any.

CHAIR ROSENBERG: Thank you so much. So I have a question. You seem to be a proponent of kind of an interview process. The rules speak -- the notes as drafted speak to that as being one method of appointment. Would it not behoove the judge to have some familiarity, if not as much familiarity as possible, about the case prior to making leadership appointment? And to that end, would it not then be helpful for the judge to receive some type of an initial report, whether all of the items listed in (c) are included or not, so that when the judge is interviewing candidates the judge has a context in which to know whether these people would be appropriate candidates?

MS. ANDERSON: Understood. I understand the question. Frequently the judge will ask for that

report and at the same time as ordering plaintiffs' counsel to put in their applications and that tends to be, you know, sort of a self-ordering type of role, although I heard another witness say that it can also be an opportunity for competing factions to put in competing information and turn that into sort of a pre-application part of the leadership application process.

So I really think that, you know, the judge could ask for joint or separate statements of the case. I think that the judges are pretty adept at understanding the general legal theories being advanced in the case and the size of the litigation as the cases are being transferred through the JPML. I think most judges who are of the level they are getting an MDL of a mass tort are experienced enough to have an idea of the case at the outset. But, certainly, it is always a judge’s prerogative to seek a report. I would just say that the report that’s being suggested here is extremely substantive and includes many strategic and important decisions that are going to set the tone for the litigation.

So, if it were a joint report, I would suggest that it be very basic, setting forth the allegations that have been made in the complaints in

general terms, the different parties that may be coming to the JPML. For example, there may be a class component, there may be a government entity component, and there may be individual components. So something of that nature that's very simple could be helpful.

The other thing that I've seen done, this was one thing that Judge Gonzalez Rogers did in the social media case was she asked the parties to the degree possible to come to that first meeting with a consensus on liaison counsel so that there would not be -- you know, if possible, come to a consensus and propose a liaison counsel that plaintiffs' counsel can endorse and would like to see act as liaison counsel so she could appoint that person on the spot even as she considered applications for other positions.

CHAIR ROSENBERG: Okay. Thank you. Rick.

PROFESSOR MARCUS: Thank you. I want to follow up on one thing you mentioned because I'm not sure how to interpret it.

As we have worked on this, on occasion, we have asked defense counsel, do you think you have any role in this method for content of selection of plaintiff leadership counsel, and at least defense counsel have said in those interactions, no, no, we have no role. And you are interpreting this as

directing that defense counsel have a role in the method of selecting leadership counsel. If it were clear that's not the objective, do you have a problem with having a joint report dealing with lots of the other things in 16.1(c), like are there scheduling orders that should be modified, what are the factual and legal issues, things of that nature. And would you be more comfortable if I just said each side should present a report of its view on these topics, with defense counsel not having a view on selection appointment of leadership counsel. I don't think this clearly -- the proposal clearly says only defense gets to pick its opponents, but, surely, the judge does need a starting point on all these other things. So what are your thoughts on how this should be handled and how it has been handled?

MS. ANDERSON: I think a joint report is appropriate but, ideally, after plaintiffs' leadership has been appointed. As far as criteria for leadership is concerned, I think that that is and has been very successfully the topic of judicial education. I find the judges I appear before have a very clear idea and have heard from their colleagues what has worked best and how they're going to manage the application of leadership.

So I don't know that the judge needs direction from the parties on what criteria the judge should be considering when appointing leadership. The judge will likely get feedback from the parties on the structure in the applications, for example, whether the parties believe that there should be co-lead counsel and then a PSC below co-lead counsel. The parties will express their views on that during the application process.

As far as the other items in subsection (c), I think that those are all good things to discuss but, again, with leadership in place because they're very important issues. And so to go through them before there is leadership that can speak with authority seems just inefficient in my mind. But, other than part one, I think that those are good topics for the first case management report to the court, which I think is ideally joint.

CHAIR ROSENBERG: Okay. Thank you so much, Ms. Anderson.

We'll hear next from Amy Zeman on privilege log.

MS. ZEMAN: Good afternoon, and thank you to the Committee. I am Amy Zeman. I'm a partner at Gibbs Law Group in Oakland, California. I represent

plaintiffs, and I practice primarily in complex litigation doing both class actions and mass torts. I really appreciate the opportunity to share my feedback today about the amendments to Rules 16 and 26 regarding privilege logs.

Overall, the proposed amendments are very well done. They're very appropriate to facilitate efficient and effective discovery. Most importantly, the amendments respond to a real and practical concern with a universal yet flexible solution that acknowledges that there really can be no plug-and-play approach that would work for every single case.

Second, ensuring that planning for privilege logs is addressed early in the litigation process is, in my mind, a very helpful improvement. Discovery in complex cases is itself complex. Yet, in case after case, we are able to work out a sensible discovery plan early in the process, and there really is no reason that incorporating privilege logs into that thought process, you know, can't work and doesn't make sense.

To give you an example, I'm being called upon now to assist in a case where logs were not discussed early on and there was no agreed protocol put in place. As I have now begun reviewing the logs

from defendants, I'm already foreseeing significant questions back to the producing party that are likely to result in a redo of those logs or at least a partial redo, and this inefficiency could have been avoided with early discussion and consideration as part of the parties' discovery plan in order to set expectations and parameters for those very logs.

My primary concern with the amendments is just the note to Rule 26. It places too much emphasis on the potential burden of creating privilege logs while giving insufficient recognition to the danger of over-designation, which does occur, whether it's intentional or inadvertent.

Privilege logs do critical work to ensure that properly discoverable, non-privileged material is not withheld and hidden. Privilege logs that provide meaningful information are really the only means for the propounding party to identify that improper withholding is happening and to then unravel it. With that in mind, I would very much like for the proposed note to provide a more balanced view of what the parties need to be considering big picture as they're negotiating the timing and method for their privilege logs.

Again, I thank the Committee for a

thoughtful and effective amendment, and I welcome any questions.

CHAIR ROSENBERG: Thank you, Ms. Zeman.

Are there any questions?

No. Seeing no questions. Okay. Thank you so much. We appreciate your comments.

MS. ZEMAN: Thank you.

CHAIR ROSENBERG: And Mr. Polk on privilege logs as well.

MR. POLK: Good morning. My name is Adam Polk. I'm a partner at Girard Sharp, a San Francisco law firm. We represent primarily plaintiffs in complex litigation nationwide. I myself do both class actions and mass torts, often in a leadership capacity. Like Ms. Zeman, I'd like to thank the Committee for the attention that they've given to the amendments to Rule 26 and 16. I think they reflect a lot of thinking.

And let me just say, you know, at the outset I come at this from the perspective when we're talking about privilege logs, really, the aim is to allow the receiving party to assess the claim of privilege. We need to have enough information to assess the claim, and through that lens, I fully support the amendments. Complex litigation is complex. It's true. In all the

cases, I think Ms. Zeman said there's no cookie-cutter approach. That's right. And the amendments underscore the need for flexibility, early engagement about a plan, and resolving in good faith differences early. They come up in every case. And I think discovery and privilege logging in particular, the conversation that is ongoing over the course of the case and information as to what is and what is not privileged is important for the parties to obtain early. It can reduce burdens and streamline the case.

I just want to make three points on these issues. I'll be brief. First, on early engagement, taking in the different comments and testimony outlines, I think most seem to agree that early engagement is good. Some take the position that it's premature. I practice primarily in the Northern District of California, though I also practice nationwide. In the Northern District, privilege is part of our ESI model order, so it kind of forces the parties to dialogue early in the case when you're negotiating those initial case management orders, and I've found that incredibly helpful. I have not run across a Northern District case where either side has been at a loss to identify the obvious categories of documents that there may be a dispute about. So clear

categories are communications with outside counsel that post-date the filing of the complaint. Other categories that I see coming up over and over again are, if there's a big incident, communications with investigators or other third parties, and, you know, the model order forces us to talk about it, and I've come up, you know, been able to kind of land on approaches that work with the other side.

So I think the upshot is it's good to come up with a plan and it avoids the situation that Ms. Zeman was talking about where you're stuck late in discovery, only then realizing that there's an over-designation problem.

Along those lines, the second point I'd like to raise is rolling logs. I think those are a good thing. I think that what I said at the top about each side obtaining information from the judge about what is and what is not properly withheld is important and it can ease burdens over the life of a case. You can resolve cross-cutting issues that affect broad swaths of documents early, get answers on what's properly withheld and what is not.

One real-world example that I'd like to share, I'll be very brief on it, is I had a large case actually with Ms. Zeman about an IVF tank holding

eggs, human eggs and embryos, that failed. It was big news in San Francisco. And one cross-cutting dispute there was whether communications post-incident pre-litigation between the IVF clinic and PR consultants were properly withheld as privileged or not. The presiding judge in that case had a standing order providing for rolling logs, so that issue was front and center early. We teed it up. We got an answer and it informed the rest of the litigation. So, you know, we were able to use that information in discovery versus only obtaining it later and then having to go back, ask witnesses questions, and obtain central evidence, you know, in hindsight basically.

And the last point I'll make is that I think that the comments and the proposed amendments to the rule both reflect the fact that flexibility is important in complex litigation. Every case is different. And, yo know, I think, again, taking in all the comments and notes, you know, there seems to be kind of a divide, categorical versus document by document. You know, I don't look at it in a binary way like that. I think that flexibility means, you know,, look at the case that you have and if it's appropriate, you know, you can implement those types of practices in a single case.

So, you know, one example, it's not appropriate in every case, but, you know, sometimes I've had opposing counsel ask for communications with house counsel that post-date the filing of a complaint to be logged categorically, and that's something that I have sometimes agreed with. But, you know, again, I think the parties need the flexibility to problem-solve in a cooperative way, and I think that the proposed amendments accomplish that goal.

So, again, I want to thank the Advisory Committee for the work and the thought that's gone into these proposed amendments and happy to answer any questions.

CHAIR ROSENBERG: Okay. Thank you, Mr. Polk.

Rick.

PROFESSOR MARCUS: Thank you. I'm hoping you can educate us about something that has come up with prior witnesses, and that's whether technology is going to be the yellow brick road to the solution of the problems we've been talking about. What's your experience been? Generative AI is a big deal not just in San Francisco but across the world. Where are we going and what can we expect?

MR. POLK: So, you know, my experience with

generative AI as it pertains to the law, it's really twofold. I don't think either has, you know, direct relevance to privilege logs. I think the first is, you know, continuous active learning. It's still coming up in cases. You know, TAR and TAR 2.0, you know, in the early days, I tried to fight and, you know, I was unsuccessful and now I've kind of dug down and engaged with the other side. I think it can be a useful tool if you have appropriate protocols to validate.

You know, the other use of generative AI that I have adopted in my practice is, you know, Westlaw has rolled out a very useful tool and it's called Westlaw Precision and you can basically query it and start your research there, as opposed to Boolean searching, and it will spit out a memo with footnotes that is scary detailed. So, you know, I think it means -- people who are using it, like I am, some of my partners are, they're going to be able to cover more ground. I think it's going to change the practice.

CHAIR ROSENBERG: Okay. Seeing no more questions, thank you so much.

MR. POLK: Thanks, all.

CHAIR ROSENBERG: Ashleigh Raso on 16.1.

MS. RASO: Yes, thanks, Your Honors. Thank you for allowing me to testify on this very important issue. My name is Ashleigh Raso, and I'm a founding partner at Nigh Goldenberg Raso & Vaughn. I currently serve on several MDLs, including acting liaison in three different MDLs. I'll rely mostly on my written testimony, but I want to respond to some questions that have been asked today.

First, there's been a question regarding if coordinating counsel will be the same as liaison counsel, and my answer would be that I hope it's not. This rule as written elevates the position of coordinating counsel and gives them more perceived power even if it's unintentional. This will make it a highly sought-after position.

Liaison is often a thankless job. It involves organizing many lawyers, documents, making sure everything runs smoothly. And as my colleague pointed out, it's essentially herding cats. It's essentially the janitor of the MDL on the plaintiffs' side. And giving this position more power may result in neglecting the janitorial duties given the additional responsibilities as written.

Second, is coordinating counsel or liaison counsel is necessary? In my view, a qualified liaison

counsel is absolutely necessary. As previously mentioned, it's a thankless job and is often overlooked, and it's important to appoint someone who is organized and willing to do the work. It should be chosen by her colleagues or someone who is familiar with their work organization or after judicial review.

There's been a question about whether liaison counsel should be located in the jurisdiction of the transferee court. I disagree with some of my colleagues here. I think that there was a time for that.

However, as you saw in my testimony, I'm located in Minneapolis, but my liaison positions have been in Massachusetts, New York, and Florida. And particularly in this post-COVID world, where many hearings are done virtually, it's more important to have a qualified person who wants this position than someone in the same ZIP code of the courthouse. This also furthers the goal of having diverse candidates and the MDLs usually go with larger cities. But there are amazing attorneys across the country that are qualified, including many in rural areas.

I also want to touch on self-organization. It absolutely happens all the time. It's helpful. It works. Unfortunately, I think this rule will rush

that process. The parties will be coordinated quickly in an effort to bypass a sua sponte coordinating counsel appointment. This will neglect some lawyers that would make great candidates. After coordination, more attorneys may file cases that are unknown to leadership and potentially leave them out of possible consideration.

There's also been a question about whether coordinating counsel actually further the goal of having diverse candidates. Unfortunately, I believe coordinating counsel will have the opposite effect. First, in (c)(1), having a coordinating counsel discuss how and if leadership will be appointed, if this person has that ability, there are likely folks to be left out.

Additionally, as discussed earlier, there will be a rush to make appointments that will eliminate some folks. The cure for this is just purely logistical. Everyone who has a filed case, even if it's a day before the first hearing, will get the notice of that hearing and have a chance to be heard.

On repeat players, I am in my twelfth year of practice, but I am on my fifth appointment, so I am arguably a repeat player at this point. I'd like to

think that the main reason I get liaison appointments is because my colleagues know my organization. But I also try to bring those up under me as plaintiffs have made huge strides in this area, as Ellen Relkin pointed out. This is also done through judges, not liaison or coordinating counsel.

Recently, an appointment came up in the CPAP litigation. I put forth my associate who has done a great job, and I wouldn't be able to do that if the judge had not expressed interest in developing an LDC committee, which is also another litigation that has this LDC committee, the CPAP litigation.

Judges play a huge role in this area of diverse commitments that have nothing to do with plaintiffs' counsel, in addition to plaintiffs' counsel making their own strides. They do this through requiring those who actually wrote the brief, often an associate, to present oral argument, presentations at the CNC on the committees, and other ways that judges have furthered the goal of diverse candidates.

I want to touch on the assessment issue that was brought up. This is governed by two things. First, the rule that governs, it's not really a rule, but the common benefit order, which will require

substance be paid and outline what kind of work is compensated and who is eligible for it. The way around this or to include diverse members can be done through a very low assessment on the LDC and sometimes they are excluded from follow-up cash calls. This just happened in the CPAP MDL for the LDC.

As I touched on my written argument, there are some instances where it may be particularly important to consider diverse candidates. As liaison counsel, I've been contacted by pro se clients. I work mostly in orthopedic device cases. However, if I had been appointed in the Uber sexual assault litigation, clergy abuse coordination, or hair relaxer litigation, certain considerations should be given to liaison counsel, and that was an important discussion to be had after at least one hearing.

If the goal of this rule is efficiency, I believe the rule should be centered around the judge's preferences, not any one coordinating counsel. The most efficient MDLs I have been a part of have nothing to do with the first report at the first hearing or liaison counsel, despite my best efforts, but everything to do with the judge keeping the parties on task.

Recently, in the hair relaxer litigation,

there was an order entered that required a joint weekly agenda. I've been part of other MDLs where that is absolutely vital in moving parties along.

So, instead of the one person at the first hearing having that efficiencies, it's really the judge who keeps the party on task at the appropriate time as the case develops.

On the coordinating counsel speaking on behalf of the larger group, I understand that's not what the rule intended. Unfortunately, I think it will be the impact felt. If coordination -- coordinating counsel may come to agreements with defendants in the topics on subsection (c), then there may be -- even if the agreement is that it's premature, that in itself is a decision that eventual leadership may not agree with and maybe leadership may be held to those agreements later.

I'm happy to talk about (c)(4), but I would just say that what information is exchanged early is more important than the quick exchange of irrelevant information. Coordinating counsel may not have a huge stake in the litigation or may not know what information is to be exchanged. For example, in Stryker Rejuvenate, it was very important to exchange the results of a cobalt and chromium blood test. In

the Exactech litigation, it's important to exchange the pre-revision X-rays and explant. Both of these litigations involve hip, but the important information to be exchanged is different. So it's important to agree which information should be exchanged than to rush to exchange just any information.

I also would rely on some of my colleagues' comments about it's actually the defendants who hold this information sometime. Anyways, I just want to touch on those, and thank you for allowing me to testify, and I welcome any questions.

CHAIR ROSENBERG: Okay. Thank you so much. That was very comprehensive.

Rick.

PROFESSOR MARCUS: Thank you. I want to ask about one thing I think you said because it surprised me a little bit.

One of the things with regard to selection of leadership that we address in the rule is whether and when to establish a means for compensating leadership counsel. I think you said that sometimes the judge has a role in determining what assessments participating counsel contribute, and I'm a little surprised by that. Can you elaborate, or did I just mis-hear what you said?

MS. RASO: No, Your Honor. I'm sorry if I was confusing. The judge does not have a role in assessments. What I meant by that is the judges have a role in diversity and including diversity. In the example of my associate, for example, I would not have the opportunity to appoint her to the CPAP litigation because she has no experience unless there was an LDC. And then, on top of that, the LDC keeps the assessment low, which allows them to be involved.

But you're right, Your Honor, the judge does not have a role in the assessment amount. That is on the plaintiffs' side. But, as that first step of expressing interest in having an LDC, it allowed her to be involved.

CHAIR ROSENBERG: Okay. That was actually Professor Marcus, but I'm sure he doesn't mind being called Your Honor.

MS. RASO: Oh, I'm sorry.

CHAIR ROSENBERG: Professor Bradt.

PROFESSOR BRADT: Nor would I. But I thought I heard you -- correct me if I'm wrong -- you mentioned appointing an acting liaison counsel. I wonder if you could elaborate on that. Is liaison counsel typically appointed with the rest of leadership, or is liaison counsel often appointed

first, or what is acting liaison counsel? Thanks.

MS. RASO: Yes, Your Honor. That was purely out of trying to be accurate. For example, in the Stryker LFIT V40, my role is considered administrative counsel. There is no liaison. I am the liaison, but Judge Talwani calls it administrative. In Exactech, it's plaintiffs' state liaison. So there's just different names for it, but no, they were appointed, with the exclusion of Exactech, which I was added on to later, they were appointed at the time the entire leadership group was appointed. And so I just wanted to be accurate and not call it liaison when, technically, some judges prefer to call it administrative or other names for it.

PROFESSOR BRADT: Thank you.

CHAIR ROSENBERG: All right. Thank you so much. We appreciate your comments.

Next, we'll hear from Kate Baxter-Kauf on 16.1.

MS. BAXTER-KAUF: Good morning. And my testimony is actually about privilege logs, which is what was submitted, so I hope that's okay.

CHAIR ROSENBERG: Oh, that must have really thrown you. Okay.

MS. BAXTER-KAUF: I mean, I can give you my

contemporaneous thoughts, but --

CHAIR ROSENBERG: No, no, no. We'll stick with privilege logs.

MS. BAXTER-KAUF: But good morning. Yeah, thank you so much for allowing me to testify. I'm Kate Baxter-Kauf. I'm a partner at Lockridge Grindal Nauen in Minneapolis, and I primarily represent plaintiffs in class litigation related to data breaches, data disclosures, and other privacy litigations. And I think the primary way that I can be helpful to the Committee is that I've spent the last seven years working with the Sedona Conference on drafting papers related to attorney/client privilege and work product in the cybersecurity context, and so we've been working to try to come up with a consensus on the application of those privileges in that specific context.

And as an initial matter, I agree with the previous commentors who have noted that the proposed amendments to the language of Rules 26(f) and 16(b) are helpful and likely to aid the parties in discussing privilege log completion and front-loading disputes.

In data breach and privacy cases, especially ones involving incident response or whether or where

there's an accompanying criminal investigation, i.e., the FBI is the one who discovered that there was a breach or some other law enforcement agency is involved, the contours of what you can withhold or what's attorney/client privileged likely influence the entirety of discovery in the case, and so resolving that early is really important for contributions to judicial efficiency and lowering time and cost for all the parties.

That conclusion, from my perspective, is based on two kind of fundamental competing principles. One of them is that the attorney/client privilege is sacred and it ought to be protected, and the second is that facts themselves are not privileged.

When you're talking about cases involving technology, i.e., systems, computer systems, that are breached and especially logs or other kinds of computer portions that might be ephemeral, what the facts are is often known at the time of incident response but might change over time, and so assessing whether an attorney was involved or what the contours are of whether something is privileged is going to be really important in determining how the parties move forward.

There are two points I wanted to make and

I'm then happy to answer any questions. The first is that any instruction which requires that privilege logs short-circuit the process of providing complete information under Rule 26(b)(5)(A) needs to acknowledge the asymmetrical information available to the parties.

This is a simple and possibly way over obvious point, but the requesting party, which is usually where I find myself but not always, can't look at the documents that are being withheld as privileged and they don't know the content of those documents. So that means that the only way that you can assess facial compliance is through making sure that the requesting party can properly assess the claimed basis for withholding communication.

That means that any version of kind of -- that rolling productions are helpful because you can get those things up front, especially like an earlier commentor talked about where there can be downstream effects, i.e., if we're going to discuss whether a forensic report that assesses how a data breach happened is privileged, knowing whether it is or not or whether it's a business communication versus a legal communication or whether there was waiver because it was given to third parties or something

like that will influence whether the public relations documents or the internal investigations are also privileged because, if they're not, then that claim will change. That means that can be really helpful.

But any kind of tiered approach or approach that requires assessing the importance of the documents, like how important they are to the claims or defenses in the litigation, is really hard for the requesting party because they don't know what's in the documents, so it's hard to know whether those documents are important to the claims that they're making. And the plaintiffs need to be in a position to determine the contours of their own case and what it is that they think the claims are going forward.

The second thing is that the inclusion of other forms of privilege or types of protection heightens the need for complete and facially compliant logs. And in earlier discussions with witnesses, there were a couple of questions about types of claimed privileges or protections beyond attorney/client privilege or work product.

Someone mentioned an earlier mentioned witness talked about the joint defense privilege, which sometimes is a common interest privilege and there's a robust academic and jurisdictional

discussion about whether or not that's a separate privilege or whether it's properly characterized as a form of waiver, which I'm sure you all -- I'm happy to discuss if you all are interested in, but -- and this comes up in my cases a lot. First, for because forensic companies are usually technology companies and they're not lawyers, who are not known for their ability to assess technical incident response, but also other types of waiver, right, are really, really important in these contexts, especially selective government waiver, which isn't acknowledged in almost any jurisdiction, and also other types of -- who constitutes an agent and those kinds of things.

But the other one that comes up a lot is privileges are protections based on the industry of the company that was investigated. So, in the Capital One litigation, which I was involved in the privilege disputes a lot for, the bank examination privilege was a really important part of that, which is one that not a lot of folks have experience with, and that meant that facially compliant logs were very, very important for two separate reasons, one of which was that a claim for -- if a withholding party is making a simultaneous claim that is that there's a privilege claim, a work product claim, and a bank examination

claim, the requesting party has to be able to assess all three of them.

And then the second is that in that case, in the Capital One litigation, the Office of the Comptroller of the Currency was also involved because they were doing their own separate investigation of the breach that had happened and they had their own separate bank examination privilege for the documents that they were potentially withholding, which means that it's going to be more efficient for the parties and especially for the court -- because I personally enjoy a six-hour-long hearing where we go line by line through an Excel spreadsheet, but I'm not sure that everybody else does -- that that means that being able to figure out which documents are the most important and which communications are the ones that we should assess that privilege claim for first and then use it to make other determinations can be really very helpful.

CHAIR ROSENBERG: Great. Let me just interrupt if I could.

MS. BAXTER-KAUF: Go ahead.

CHAIR ROSENBERG: Any questions?

MS. BAXTER-KAUF: Yep.

CHAIR ROSENBERG: We just -- okay, we have

two because we're trying to get down to the --

MS. BAXTER-KAUF: Perfect.

CHAIR ROSENBERG: -- lunch hour break, which is not going to happen at 12:30, but we have two more witnesses.

Rick and then Helen and then -- or, actually, it's Helen, then Judge Boal, and then -- well, Rick, you have your -- you had your hand up. Okay. I'm just trying to go in order of --

PROFESSOR MARCUS: Well, I just wanted to explore your cybersecurity background and your Sedona background by asking whether you or Sedona has a view on something I asked about before. Is technology going to save us from headaches, or is it going to -- will that be a way to deal with privilege logs that will be all different in three years from now, or is it going to be the same thing all over again?

MS. BAXTER-KAUF: That's a very good question. So, thus far, I think we are still at the point where, in my experience, the layer of technology up front makes things worse before it makes things better, which is to say we are not to the point where generative AI or technology can assess whether a communication is requesting attorney advice. Like, we're just not to that point. It can assess whether

it says attorney/client privilege on the email. You can give it a list of information of who's an attorney and that can be helpful.

But the actual assessment of whether something is privileged or protected still has to be done by human people who are attorneys who are trained in that. And I think that the Sedona Conference is going to keep talking about it. We have a conference in April that I'm on some panels for, but I think that right now the real question is there are still going to have to be human people involved and so how do you front-load that discussion to make it as efficient as possible.

CHAIR ROSENBERG: Helen.

MS. WITT: I'm going to try to do a Travis Kelce, two questions in one. You used the term --

MS. BAXTER-KAUF: Delightful.

MS. WITT: -- at one point, a "facially compliant log," which sounded to me like you were talking about a document-by-document log, but then, in some of your later comments, you referred to things that sounded to me like perfect opportunities for categories of things that could be tested and used to determine a whole range of documents that might fall into the same category.

So what did you mean by "facially compliant log" and what do you think about category logs in those kinds of circumstances? Thank you.

MS. BAXTER-KAUF: That's a great question. I really appreciate it.

So, in my mind, usually, when we do privilege disputes and when there's a long discussion about a privilege log, the first question is always is there enough information based on the list of categories in Rule 26(b)(5)(A) that you can determine whether a document or a kind of document is privileged, and in my mind, I don't know how to do that except for document by document. And so that's usually is there an attorney involved, you know, what is the communication about, what other people was this sent to, how many of them are there, what is the content, et cetera.

And then the second assessment is are there particular kinds of documents that we should be assessing together for a privilege discussion. And it is absolutely the case that usually, you know, we put together different kinds -- if you look at the two orders in the Premera data breach litigation, they're good examples of this, where it will be documents related to PR compliance or communications with the

public or the media, are those privileged or are they not. And in that situation, I do think that that's a helpful thing to discuss.

But the only way that you can do that up front is to make sure that whatever it is that the requesting party is looking at, we know which documents it would apply to, and we haven't figured out a better way to do that besides first figuring out document by document that the things in all the different categories are accounted for.

JUDGE BOAL: I guess I'm up next.

CHAIR ROSENBERG: Yeah.

JUDGE BOAL: Thank you for your testimony and also your written submission. I have two questions.

The first has to do with your discussion in the written document, in the written testimony, about tiered approach, and it seemed to me that you didn't yourself have a definition of a tiered approach, and I was wondering whether or not you'd actually experienced a tiered approach in the course of litigation and what your experience was.

The second question has to do with your proposals with respect to the comments in the notes. You had proposed deleting the two paragraphs, one that

talks about the suitability of a document-by-document listing and the other talks about the suitability of categories. Many of the folks on your side of the V have suggested instead of deleting those two paragraphs of beefing up the discussion of the document by document, and I was wondering why you had proposed deleting those two paragraphs altogether.

MS. BAXTER-KAUF: Thank you. Yeah. So, on the first question, the only times that I have done something that might be characterized as tiered logging are situations where there's phased discovery in the first place, so there's an attempt to produce only the most important documents up front and then logs that go related to those.

I don't think that there's a good -- my definition of it was just predicated on reading the comments where people had mentioned what it was. I haven't seen a court adopt that, and I don't think it's a particularly good idea because it requires an assessment of what are the most important documents categorically up front, which I think is just hard to know if you're not the requesting party, and, certainly, the requesting party can't know whether those documents are important before they review them. So that's my only experience with that is when it's

phased discovery and then rolling logs related to that, as opposed to this kind of a situation.

On the second question, I think I would be fine with either adding additional commentary or deleting things the way that I mentioned. I am more concerned about what my colleague, Brian Clark, mentioned, which is that if this is the only way the categorical logs are discussed, that it will be taken as evidence by courts that we're not trying them enough and we should see what should happen, as opposed to mentioning the parts, such as mechanisms for streamlining logs, i.e., beginning and ending dates and particular counsel who can be excluded or particular dates where information after it with certain parties would be presumptively privileged, where that is more helpful for the court than the particular type of log, which I think can be more flexible for the parties. But I would be fine with either approach. I just think this is potentially more streamlined for folks to get instructions.

JUDGE BOAL: Thank you.

CHAIR ROSENBERG: All right. Terrific. Thank you so much.

Yvonne Flaherty is not available now, so we'll move to our last witness before lunch break,

Seth Katz on 16.1.

MR. KATZ: Good morning or afternoon depending on where you are. Can everybody hear me okay? Great.

First, let me thank the Committee for their efforts and for allowing me to give my testimony. My name is Seth Katz. I am a shareholder at Burg Simpson Eldredge Hersh & Jardine based in Denver. For the last approximately 25 years of my practice, I have been focusing on mostly mass tort MDLs with some large class actions either in MDL or outside of an MDL. I've been appointed -- I've had the honor of being appointed as lead counsel in the Pradaxa MDL, MDL 2385, as well as served on many MDL committees, working my way up from steering committee to executive committee to the role of lead counsel as my hair got more gray and more thin, along with gaining the different experiences that's necessary to lead one of these massive cases.

The MDL rules in practice, while not perfect, is really a very efficient manner of running these cases. Nothing is going to be perfect, and as the Committee notes indicate, nothing can be one size fits all, including the rules that are being proposed in 16.1. But I also think it's important that we try

to improve this where possible but not look for a fix to something that is not truly broken.

You've heard from many people before me and I know I'm the last witness before lunch, so I will try to keep it brief and field questions.

I am fully in support of 16.1(a) and I strongly believe that holding an initial conference shortly after appointment by the JPML to the transferee court will speed things up and will allow for the foundation of the MDL that's so important to be established, and, in my view, perhaps addressing that quickly, where a leadership appointment is addressed might obviate the need for the coordinating counsel, and I have been listening.

And if the point of having the coordinating counsel was akin to a liaison counsel, I do say that that escaped me in reading the draft rule and the Committee notes. I do agree with my colleagues that have spoken before me that the role of coordinating counsel is unclear. It could cause a lot of confusion, a lot of chaos. And if it is intended to be a non-neutral position leveling for that coveted role, whereas appointment of leadership, including liaison counsel, which tends to happen early, will obviate that.

If that role was designed to be a neutral who would be able to have ex parte communications with the transferee court, as I kind of read the rule to assist the court, how do you assist the court if you can't have ex parte communication and know what the court wants. If that's the case, it almost can't be the plaintiffs' counsel.

So I think there's a lot of confusion where do those powers begin, where do they end, what's the actual selection method, and holding an early conference and appointing leadership I think obviates a lot of that.

Once leadership is appointed, and I don't think there's a need to handcuff a transferee court on how to select leadership, I've been involved in cases where it's been done by self-organization. I've been involved in cases where there's been no self-organization and it's been individual applications and interviews by the court and everything in between. I've been in cases where I've been the winner and the loser of those appointments. So it does run the gamut.

I do think the current rules allow the transferee court the flexibility to determine the best way to do that. So I think, if you do that and you

have the ability to then build the foundation of the MDL through the various CMOs that are needed up front, a lot of things fall into place. And trying to put some of the new items that are in 16.1(c) is almost akin to trying to build the roof before you have the foundation.

So, with that, I will cut my comments short so I can field questions and we can conclude the morning session.

CHAIR ROSENBERG: Okay. Thank you so much.

Are there any questions?

No. Seeing no questions. Okay. Well, thank you for your comments and your time.

MR. KATZ: Thank you.

CHAIR ROSENBERG: So we are going to break for lunch. We are going to return at 1:30, so the lunch is a little bit slightly less than the full hour. It’s actually closer to 45 minutes, so we’ll resume at 1:30, and we’ll have our first witness. I think we had Larry Taylor scheduled, but I believe somebody -- Dimitri Dube, if I’m pronouncing that correctly, may be substituting in for Larry Taylor, so that'll be at 1:30 on Rule 16.1. Feel free to just turn your camera and your audio off and keep logged in to make it easier once we get started.

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(Whereupon, at 12:42 p.m., the hearing in the above-entitled matter recessed, to reconvene at 1:30 p.m. this same day, Tuesday, February 6, 2024.)

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A F T E R N O O N S E S S I O N

(1:30 p.m.)

CHAIR ROSENBERG: Okay. Welcome back. It's just about 1:30, and we have Dimitri -- is it Dube? Did I pronounce that correctly?

MR. DUBE: You did. You did.

CHAIR ROSENBERG: Okay.

MR. DUBE: Thank you.

CHAIR ROSENBERG: We're off to a good start. You're standing in for Larry Taylor on 16.1?

MR. DUBE: Yes, I am.

CHAIR ROSENBERG: Okay.

MR. DUBE: As Judge Rosenberg stated, my name is Dimitri Dube. I am an attorney with The Cochran Firm. I work with Larry Taylor primarily in our Mass Torts Department, where I assist him in his various roles in leadership in the hair relaxer litigation, Bard PowerPort litigation, and also opioid as well.

I'm also a member of Shades of Mass, which is an organization founded by Ben Crump and Diandra Zimmermann which works to address the lack of leadership for minority attorneys and female attorneys in leadership in MDLs and other mass torts.

It's in those capacities that I'm testifying

to highlight the possible unintended consequence that the proposed Rule 16.1 may have on leadership in MDLs. Specifically, we think that, you know, one of the inherent problems with appointing a single firm or a single person with the role of coordinating counsel is that you automatically stifle diversity and not just, you know, diversity in terms of demographics like gender and race, also diversity of thought. There are a number of roles and responsibilities in subsection (c) that the coordinating counsel has, and in giving that power to a single person, a single firm, you eliminate or stifle the ability of, you know, other individuals with other viewpoints to weigh in on some of those important decisions.

As everyone knows, MDLs are comprised of cases filed all over the country brought by, you know, attorneys of, you know, different backgrounds, different experiences, and my personal experience has been that when the plaintiffs' bar is allowed to self-organize, they are able to bring in those various viewpoints, bring in those various, you know, perspectives in these decisions.

You know, I think my prior colleagues and especially Ms. Phillips and Mr. Orent from I think Motley Rice states that early appointment of a

leadership committee probably serves much of the role that a coordinating counsel could do while also reflecting the diversity in the plaintiffs' bar.

CHAIR ROSENBERG: Okay. Thank you so much. I'm curious what your thoughts are on the notes to 16.1(c)(1) as it relates -- putting aside coordinating counsel for a moment, just this topic that you speak about, about diversity, breath of background and experience that you suggest is beneficial to leadership. Do you believe the language in the notes strikes that balance when speaking about the transferee judge having the responsibility in the selection process to ensure lawyers appointed are capable and experienced, fairly represent plaintiffs, keeping in mind benefits of different experiences, skill, knowledge, et cetera, et cetera? Do you think that that addresses that in a productive way?

MR. DUBE: I think the note does address that in a productive way, but the issue, I think, is that it's hard for any single person or any single firm to be able to do that in the coordinating counsel's role. And so whereas where you let the --

CHAIR ROSENBERG: Right. No, no, I'm -- sorry. I don't want to -- yeah. Let's -- I'm just talking about leadership in general.

MR. DUBE: Yes.

CHAIR ROSENBERG: Let the lead team --

MR. DUBE: Yes. I think -- I do think that that language does serve that purpose.

CHAIR ROSENBERG: Okay. All right. And Professor Bradt.

PROFESSOR BRADT: Thank you. Thank you for being here. We've heard a lot today about self-organization and that self-organization can lead to all sorts of positive things. I wonder why that self-organization wouldn't persist and extend to coordinating counsel. If the parties can self-organize well enough to get a leadership slate together early on in the litigation, why should we be worried that coordinating counsel will make things worse?

MR. DUBE: Well, I think one of the previous panelists spoke in terms -- I guess it matters in terms of the decisions, right, who's making the ultimate decisions and whether or not those decisions are reflecting the views of coordinating counsel may hear from the slate from others. And there's no, I guess, limiting principles in the proposed rule to make sure that happens.

PROFESSOR BRADT: But, if the judge is going

to make the ultimate appointment with leadership and we can trust the judge to do that appropriately, why shouldn't we trust the judge to do that equally well with respect to coordinating counsel?

MR. DUBE: It's not about a matter of trusting the judge. I think it's just an inherent limitation of having a single person or a single firm, you know, to trust that with that power and that authority ultimately to make those decisions.

PROFESSOR BRADT: Thank you.

CHAIR ROSENBERG: Okay. Seeing no other hands or questions, thank you, Mr. Dube. We appreciate it very much.

MS. BRUFF: Judge Rosenberg, I'm sorry. I thought Professor Bradt had his hand raised.

CHAIR ROSENBERG: Oh, he did.

MS. BRUFF: Oh, he put it down? Okay.

PROFESSOR BRADT: Sorry.

CHAIR ROSENBERG: Okay.

PROFESSOR BRADT: That was vestigial.

CHAIR ROSENBERG: Okay. So now Adam Evans on 16.1.

MR. EVANS: Thank you to the Committee members for allowing the opportunity to testify today. My name's Adam Evans. I'm a partner at Dickerson

Oxton in Kansas City, and I direct the Mass Tort Department here.

And there have been a lot of valuable testimony on proposed rules, specifically subsections (c) and (d). I wanted to talk a little bit about a few arguments and implications that may get a little bit less coverage.

With regard to the proposed language appointing coordinating counsel, the main problem with that rule as written is the timing in which it occurs. And this follows on to the testimony and a question to Mr. Dube in that the early appointment of coordinating counsel is unmoored to all of the concerns that we think as a bar and the judiciary think are important in terms of not only diversity, capability, and leadership experience and things like that.

To respond to Professor Bradt's question, the reason that the coordinating counsel position can't carry out those same duties in an effective way as a appointed leadership counsel done even at the very first case management conference is that there's no context in order to make a decision to choose coordinating counsel.

And so, whether we like it or not, the appointment of coordinating counsel will have an

effect on the leadership that is ultimately appointed, and the judges, the transferee judges, they not only already have the power to issue orders appointing leadership counsel -- and that comes from Landis versus North American Company back in the '30s -- in that sense, the rule doesn't empower the courts to do anything that they couldn't do before. The suggestion of appointing counsel early on in the process, it will hamstring those judges so that they don't have the benefit of the input from all the stakeholders and future stakeholders in the litigation.

And one of the points that I wanted to focus on a little bit is how that particular provision would affect the incentive of members of the plaintiffs' bar. One thing that has been testified to and I think is true by both sides of the V is that these leadership positions, they are sought after. They do come with benefits to the individuals that seek them and that are appointed. This is going to affect the incentives of plaintiffs' counsel in the sense that whether it's true or not, there is and will be a perception that the coordinating counsel role will be, if not a direct path to a leadership position, it will be something close to it. And because a judge making that appointment without the benefit of having an

initial case management conference first will oftentimes be considering the filers of the JPML motion, the plaintiffs' attorneys that have filed the most cases, that is going to essentially incentivize premature JPML motions and filings of the types of perhaps unvetted, un-meritorious claims that some of the defense bar complains of.

And the other point that I wanted to make is that it goes again to a timing issue. Making an order after the first case management conference without the benefit of the insight of all the stakeholders, the potential -- the counsel representing all the breadth of the litigants is going to create orders that are essentially going to have to be substantially modified or undone once discovery gets underway and the scope of the litigation is more defined, and what that's going to lead to is additional unnecessary motion practice downstream.

And the same goes for raising the issues of things like vetting meritorious claims, statutes of limitations, as the defendants have brought up in different testimony, that what they're asking the courts to do and intend to seek the courts to do is engage in not only multiple state-specific analyses on things like statute of limitation but also case-

specific analyses at the front end of a case when those matters should be planned according to an order that comes after the case management conference where plaintiffs' leadership has already been appointed with the court soliciting submissions from interested counsel or even just ordering a manner in which those selections are made.

I'm happy to yield back and address any questions.

CHAIR ROSENBERG: Any questions from anyone? Rick.

PROFESSOR MARCUS: I think I have two questions. The second one is premised on my belief that your experience is on the plaintiff side. So my first question is you said that 16.1(b) will hamstring judges. I'm not clear on why it will do that. They would not be hamstrung if 16.1(b) were not there, but they are if 16.1(b) is there? I'm not clear on why that's true.

Second, you mentioned the concern expressed by some mainly on the defense side that there are unvetted claims sometimes included in MDLs. I wonder if I'm correct that you're speaking from the plaintiff side whether your experience is that there actually are a significant number of those and why you think

that happens, because we've been told a lot about why it happens but mainly by defense side folks.

So question one, hamstring; question two, vetting.

MR. EVANS: Yeah. I appreciate the questions and the prompts. The reason that a transferee judge would be at a disadvantage in the -- it would come in the selection of a coordinating counsel partially because that coordinating counsel is tasked with meeting and conferring and making representations about the positions of plaintiffs when that individual may not and likely does not have the input and the insight of other plaintiffs' counsel throughout the case --

PROFESSOR MARCUS: Well, why do you assume -- sorry to interrupt, but why do you assume judges would be hamstrung if we said they can appoint coordinating counsel but free to act if we don't say that? It doesn't say you have to do something. Why is this -- why are these handcuffs?

MR. EVANS: They would become handcuffs -- and your words, not mine -- but they would through the permissive language in the proposed rule, it's going to be adopted because, as you've observed, as the Committee notes have observed, there

are jurists that do want guidance as to these things.

The fact of the matter is the appropriate timing for selection of counsel. It doesn't have to be delayed. It can happen at the very first case management conference in light of the submissions of interested counsel that represent various viewpoints, as Mr. Dube pointed out, that not only do we have diversity among the -- you know, the personal diversity among the potential leadership firms but also what they perceive to be the scope of the litigation, what the applicable claims are.

And so making that selection early in the process is done in sort of a myopic way if it's done prior to the first case management conference because there won't be time in order to assimilate all of the input from the stakeholders in the litigation. Does that make sense to some extent?

And as to the non-meritorious claims, I'll call it an allegation. If it's put in the way that some of the witnesses put it, I reject the premise that these MDLs are even close to principally composed of cases like that, and it's impossible to determine at the outset of the litigation what case is un-meritorious and not. That has to be done through discovery and development and, frankly, the leadership

counsel learning about the parameters of the litigation.

The one thing that I will agree with to the extent that there are firms that file cases that should have been vetted better and sometimes those cases proliferate and it's not those cases that should drive the train as litigation progresses. And making the position of leadership -- of coordinating counsel one that's appointed early on would incentivize in some instances the filing of cases quickly, as opposed to filing cases that are thoroughly vetted and have gone through some measure of litigation prior to a JPML motion.

CHAIR ROSENBERG: Okay. Thank you so much.

Any other questions or comments?

No. Seeing no hands. Okay. Thank you so much, Mister -- is it -- it's Mr. Evans. Yes.

MR. EVANS: Yeah.

CHAIR ROSENBERG: Thank you so much and --

MR. EVANS: And thank you to the Committee.

CHAIR ROSENBERG: Yeah. We appreciate your comments.

Next, Roger Mandel on 16.1.

MR. MANDEL: Thank you for providing me this opportunity to testify before the Committee on

proposed Rule 16.1. As Judge Rosenberg said, my name is Roger Mandel. I'm a partner at Jeeves Mandel Law Group, a four-lawyer law firm with offices in Tampa, St. Pete, Florida, and Fort Worth, Texas. I've been practicing complex litigation for almost 37 years now, and almost a little over 30 of those have been with specialty and plaintiffs' class action work. And my testimony is informed today by my extensive class action experience and also by my experience as being both co-lead and participating counsel in class action only MDLs and participating in hybrid class actions involving both individual cases and class action cases. I think my testimony today is also informed by my recent experience at the beginning of the ongoing In Re: Philips CPAP MDL.

I have submitted to the Committee a proposed revised Rule 16.1 and Committee note, and what it does is it proposes a two-tiered approach to early management conferences in MDLs. First, there would be a preliminary management conference which would then be followed by a comprehensive management conference that takes place after the appointment of leadership counsel.

Now, at the prelim conference, the court and the parties would address only objective

information about the size, scope, and nature of the claims and defenses involved in the MDL and then any issues that need not or cannot await entry by the court of a comprehensive management order.

Now the issues at the preliminary management conference typically would include, number one, discussion of the need for appointment of leadership counsel and the process for appointing them; number two, whether to stay the actions in whole or in part pending entry of a comprehensive management order; and, number three, whether any scheduling orders in the transferred actions need to be set aside and stayed.

As necessary, the preliminary management conference might also address issues like, number one, the need for interim orders for the preservation of electronically stored information and other potentially relevant evidence and, number two, for acceptance of service of process by counsel for foreign defendants without the need for the plaintiffs to engage in time-consuming and expensive compliance with the Hague Convention or other processes but, again, without the defendants waiving any personal jurisdiction defenses.

Other topics for the initial -- for the

preliminary management conference would be anything that can't await -- that the court or the parties think can await the entry of a comprehensive management order.

Now the proposed version of the rule that I provided allows the court to appoint temporary counsel to assist it with the preliminary management conference, but I changed the title of that from coordinating counsel to administrative counsel, and this title change would emphasize the administrative, almost ministerial role that such temporary counsel will play, and the proposed revised Committee note would make very clear that the court should indulge no presumption that administrative counsel should be appointed leadership counsel.

Now the proposed Committee note that I've provided recommends appointment of leadership counsel as soon as possible, as reasonably possible, if leadership counsel will be appointed. After they're appointed at the comprehensive management conference, the court and the parties, by and through leadership counsel who have been authorized by the court to make binding agreements on behalf of the plaintiffs' side or the defense side, would address all the issues listed in the current version of the rule and any

other topics that the court and the parties believe necessary for management of the MDL.

And I believe that the proposed revised rule and Committee note would almost entirely alleviate the three principal concerns of the plaintiffs' bar that I think you heard back in January and you've heard today.

First, I think they alleviate the concern that most of the topics in the current version of the rule should await discussion until after leadership counsel have been appointed and can offer their binding input on those issues.

Second, I think it alleviates the concern that the appointment of coordinating counsel with undefined powers and responsibilities who have not been demonstrated through any deliberative process to have the expertise to well represent the plaintiffs, that allowing coordinating counsel to do too much may lead to increased costs because, if leadership counsel has to revisit what administrative counsel did, then we're going through the same hoops twice, and it also could lead to premature and ill-advised management orders.

Third, I think that the proposed rule and Committee note will alleviate the concern that the

current version of the rule and the Committee note focus overwhelmingly on product liability MDLs with huge numbers of individual plaintiffs and that they don't sufficiently address the many permutations of MDLs, particularly those involving class actions, which are necessarily subject to Federal Rule of Civil Procedure 23.

Finally, I have seen no comment or testimony by anyone on the defense side suggesting that almost all the topics a court needs to address for effective management of an MDL cannot await disposition until entry of a comprehensive management order following appointment of leadership counsel.

So I believe that the goals of achieving giving guidance to judges about how to effectively manage MDLs can be balanced with alleviating the overwhelming number of stakeholder concerns on the plaintiff side and without causing any undue stress on the defense side. So I thank you again for the opportunity to testify, and I welcome any questions about the proposal that I've made to the Committee.

CHAIR ROSENBERG: Okay. Thank you so much.

Andrew, did you have a question or comment?

PROFESSOR BRADT: Yeah, thank you very much. At the preliminary status conference, the first tier

one, whom does the judge speak to?

MR. MANDEL: Well, if --

PROFESSOR BRADT: I mean, I'm just trying to figure out how it looks because --

MR. MANDEL: Right. I --

PROFESSOR BRADT: -- a lot of it loops back on coordinating counsel. It seems somebody has got to be able to talk to the judge during the first status conference, so who is it? Is it self-appointed?

MR. MANDEL: Well, it depends. It could be easily self-organized. I was chief -- I was lead counsel years ago in an antitrust MDL and there were essentially eight or nine class actions that composed the MDL and it was easy enough for the plaintiffs' counsel to simply show up to the initial hearing and express their viewpoints. If you've got a much larger MDL, then I think the court would have some need to appoint administrative counsel.

But the most important thing about that is that it would be very clear that these administrative counsel have a very limited role, an almost ministerial role of providing objective information to the court about the size, scope, and nature of the MDL and then addressing only issues that need to be addressed, that can't wait for leadership counsel, and

then the further implementation in the note that, hey, there's no presumption that you're going to get leadership counsel if you get the position of administrative counsel. And I think, with those changes, the overwhelming concern you've heard about the appointment of coordinating counsel will largely be alleviated.

CHAIR ROSENBERG: Let's see. Judge Proctor and Ariana.

JUDGE PROCTOR: So is your assumption or proposal that in virtually every -- in every MDL there would be this two-tiered management conference approach?

MR. MANDEL: I think that in most of them there would because the first management conference, the primary purpose is to provide the judge with objective information, what's the size and scope of the MDL litigation, what are the types of claims and types of defenses and objective, informative approach. And then I think it's probably worthy in most MDLs for there to be a discussion of does there need to be leadership counsel and what's an appropriate selection process.

And I think, in almost every case, there's going to be this issue as what happens in these cases.

Are they stayed or are they going to continue moving forward while we're waiting for a comprehensive order and what do we do about case management orders that have already been issued and these other things.

So I think there's a few core preliminary issues that in the majority of class actions you're going to want to have an initial conference on. If you have something with five or six class actions and that's the entire MDL, maybe you don't need that.

But then the key thing is the court should expeditiously appoint leadership counsel, and then we move on to a representative group of attorneys who have been appointed through a deliberative process and not simply somebody the judge just happens to know and appoints as administrative counsel because they've had these lawyers before them. And then you've got people who have solicited a wide variety of inputs and who, you know, can make binding decisions.

I don't think defense counsel are going to like it if there's coordinating counsel who engage in this extensive discussion with them and then the court enters some sort of an order based upon that and then leadership counsel has to come back to the court and say, look, those administrative counsel didn't understand X, Y, and Z, they didn't get input from

these various groups, and we need to revisit the whole thing. And that would be --

JUDGE PROCTOR: Well, yeah, my reaction to this concern and most of the concerns I've heard about coordinating counsel is it just doesn't fit with the realities of what I think the proposed rule suggests and what would actually play out. So two reactions.

First, I sat on a panel for nearly seven years. I could tell you in most MDLs when they came on petition the demographic and statistical and other information about the MDL. It's only a handful of MDLs that came through that you didn't know those things, so that's the first reaction.

The second is what prevents counsel from saying at the management conference itself, the report that you received from coordinating counsel, liaison counsel needs to be tabled or addressed differently for these reasons. That's the point of the management -- that's the point of getting this information to the judge. And I just keep hearing this assumption built in all these questions that there's going to be -- the train is already going to be left the station before the management conference ever begins with the transferee judge, and I just don't think that's a reality that we're dealing with.

Now there may be other reasons we need to tweak or even revise substantially this coordinating counsel, but the fact that the judge is going to end up being in a management conference, transferee judge, and not have a handle on things and we're going to enter an order that's got to go back and get flipped around later just doesn't seem realistic to me, but I'd be glad to hear your defense of that argument.

MR. MANDEL: Well, I think it's two things. I think with an experienced -- a well experienced transferee judge, the probabilities of a significant problem may be lessened. But, as I recall, in some of the early meetings that you were kind enough to have with AAJ, there was an experience -- there was a perception on the part of the Committee that we have a whole lot of new judges who have never handled anything like an MDL and they need guidance.

And so I think there is that danger as expressed to me by the Committee and by us that this could happen, number one, and number two, that this rule is going to be taken as gospel and not implemented without the necessary flexibility. And I think the proposal of the two-tiered procedure makes more clear what comes first, what's chicken and what's egg, but then there's another opportunity beyond the

objective, what would the rule actually do, is I think the Committee has been commendably concerned about stakeholder perception and stakeholder buy-in to this rule. And as you've heard over and over, whether you agree with these concerns as an objective manner, there is an extreme concern about these issues among the plaintiffs' bar.

And so one of the goals with my proposed revised rule is to do something that achieves the goal of the rule of giving effective guidance to judges while alleviating stakeholder concerns and hopefully getting buy-in. And I think getting that buy-in is a worthy goal for the Committee, and I think that's something that this proposed rule could help do.

CHAIR ROSENBERG: Ariana.

MS. TADLER: Yes, thank you. And good afternoon, Mr. Mandel. Nice to see you.

Two questions, one piggybacking on what Judge Proctor was just chatting with you about. I think his question was do you foresee this administrative position happening in all MDLs or most of them, and I guess my sub-question for that would be you gave examples of cases where there might just be a select few. Maybe there's nine, 10 cases.

If the parties, the plaintiffs' counsel were

able to show up at the very first conference and say, look, we've already figured it out among ourselves, we've got a plan, does that obviate the need for the position that you're talking about under your proposal?

MR. MANDEL: I think it would. Here's the concern. The way to me the rule reads and the way it seems like everybody in the plaintiffs' bar has been reading it is that the court would appoint -- remember, it talks about appointing a administrative counsel to assist with the initial management conference and to confer with the defendants to prepare a report before the initial conference. So there's never going to be that initial conference where people show up and say, hey, we can work this thing out and we don't need any administrative counsel.

The way the rule reads to me and I think to almost everybody else is the court is going to unilaterally appoint administrative counsel before there's ever been a single hearing in front of the court at which people could express that there is no need for administrative counsel, and so I think that is the problem, and if that's the way that it's going to read, then I think we need these limitations on

administrative counsel. Otherwise, what needs to happen is to say that there needs to be a conference first before any appointment of administrative counsel and before anybody designated administrative counsel meets with defense counsel.

But, right now, the way the rule's written it appears to say go ahead and appoint these people before you've ever heard from anybody, and that's the problem that scares everybody.

MS. TADLER: So thank you. And then my main question was one I posed to a prior person, which is, do you have any strong sense one way or the other as to whether the administrative counsel should be somebody who is local, which we often see in these MDLs. Do you have a position on that one way or the other?

MR. MANDEL: You know, I don't think I have a position necessarily on who it should be, but I think your question points out the problem inherent in that position, which is, if the judge is just going to appoint these people before there's ever been any hearing to help with the initial hearing, what options does the judge have for picking these people.

And I think you're absolutely correct that the inclination of the judges is going to be to pick

somebody they're familiar with, who's appeared before them many times and who they feel is trustworthy, which is probably going to be somebody local.

But that isn't necessarily the type of person who would be picked as leadership counsel through a deliberative process which the court had come up with with the assistance of the parties and counsel. And so, if we're going to have administrative counsel before there's ever an initial hearing, then I think the limitations on their abilities in the two-tiered approach is the way to go.

MS. TADLER: Thank you. I just wanted to thank you also for coming up with something creative as an alternative. Thank you very much.

MR. MANDEL: You're welcome. I appreciate that.

CHAIR ROSENBERG: Has it ever been your experience that in an MDL where there's a slate -- that is, the slate process is utilized for appointment of leadership, that that happens before there's ever a hearing or a conference?

MR. MANDEL: Yes. And particularly in class action MDLs, I think it wasn't infrequent that people would start filing motions for appointment of interim counsel under Rule 23(g) before there was ever a

hearing, and then it was possible for the judge then to actually take those things up at the initial management conference. And that's one of the points I wanted to make in the Committee note that currently is not, which is that when you have class action counsel involved, Rule 23(g) needs to be controlling rather than some sort of a, you know, tabula rasa process come up with by the judge.

But I think that sort of thing gets a lot harder in a large hybrid class action with thousands of individual cases and, you know, perhaps you've got merchant -- you've got all these different sub-classes. It's a lot harder to do that before. And, again, that seems to be at odds with the way the rule is written, which seems to contemplate the judge immediately appointing some sort of administrative counsel before there's ever a hearing and perhaps before there's ever a motion filed.

CHAIR ROSENBERG: So the slate -- there's no hearing in the example you gave, but there's a motion, and so the concern here you're raising is that there would be neither a hearing nor a motion practice?

MR. MANDEL: Yes. I mean, that is exactly to me and I think to most of the plaintiffs' lawyers you've heard testify how the rule reads, and I don't

think that even having the motions -- having some motions would solve the problem because there needs to be a hearing and a chance for people to be heard. And if it were just class actions, you know, the interim -- the Rule 23(g) motions might be sufficient.

But, in other types of class actions, hybrid class actions with mass torts, I don't think that's going to be sufficient and there's going to need to be a substantive discussion of what's the process going to be.

CHAIR ROSENBERG: Okay. Judge Proctor, is this another question or from before? From before. Okay. And Rick.

PROFESSOR MARCUS: Mr. Mandel, thank you for these comments, and I'm picking up on your reference to interim class counsel under Rule 23(g), which I had a role in drafting 20-plus years ago, and I'm wondering, since that didn't really handcuff or direct judges on when and whether and how to do that, is it your experience that they've gone helter-skelter and just made interim appointments at the drop of a hat? Something in me says the worries about 16.1(b) could equally have been expressed about interim counsel appointments back 20-plus years ago, and maybe the experience suggests that the risks are not as great as

some people worried that they are. What are your thoughts?

MR. MANDEL: You know, Professor, I think it's exactly the opposite because what happened before Rule 23(g) was that -- Rule 23(g) sort of adopted a best practices version of what was already occurring, which was that people were filing motions for a position, you know, of class counsel or interim class counsel even though that hadn't been officially designated in the rule, but at least there was a motion practice going on.

But, here, where there's not currently such a thought process of going ahead and sua sponte appointing some administrative or coordinating counsel before there's been any motions or any hearing, that has not been the case in MDLs. But this rule seems to propose, you know, propose that as a fundamental part of the process that go ahead and appoint somebody to help you prepare for the initial conference. And who is going to be -- who is that going to be and what's the process going to be and what are the implications for that down the road for if there's disagreement between these people who have been appointed with no deliberative process other than whatever the judge came up with and who may not have as been well

qualified to formulate agreements.

And then there's the worry about does the judge want to keep these people in place because, if the judge keeps these people in place, there's less likely that some other leadership counsel is going to come in and try to redo something that the court has already ordered as a result of the advice of administrative counsel.

And I would think this would be a worry for defense counsel too that they're going to have to go through this thing twice, conferring with administrative counsel and then conferring with leadership counsel on some of the same issues. And, you know, I don't think there's any reason that you could have an initial conference and within, you know, 30 to 90 days, even if you have a very deliberative process with interviews, that you can't have leadership counsel appointed.

And so my question to the Committee is, what is so urgent that in most class action -- I'm sorry, most MDLs that the comprehensive management order or a significant management order can't await the appointment of leadership counsel? Why can't it wait?

And in case there are a few things that can't wait, that's why I've proposed the two-tiered

approach with a preliminary one first where the judge could take up issues that need not or cannot await a comprehensive management order. But the bottom-line question here is, why do we need to address all of these issues which ought to be addressed by leadership counsel before they can even be appointed? I don't see any reason for that level of hurry in a process in an MDL that's probably going to take years, why we can't wait 90 days or 120 days to get the right people in through a deliberative process that's fair, that honors diversity, and then have those people who have the mandate from the court to solicit input and to make binding decisions on the court weigh in on these issues so that the court can issue a well-thought-out comprehensive MDL order.

CHAIR ROSENBERG: I have a couple follow-up questions. Number one, would, in your view, it make more sense to consider if one were to consider a coordinating or administrative or liaison counsel that it not be a position designated by the court for purposes of getting organization before the initial conference but that perhaps in the note it makes reference to counsel for defense and plaintiffs may want to consider but must not whether they want to appoint an administrative or coordinating or liaison

counsel to help the parties organize and orchestrate their presentation to the court at the initial management conference? That's number one.

Does that make a difference? In other words, taking it out of court appointment and leaving it in the hands of the attorneys to decide whether that might be helpful or not since we're hearing a lot about that there's a lot that goes on with self-organization anyway.

MR. MANDEL: You know, I think that that might be helpful, but I think what you're doing is you're delaying the inevitable and you're duplicating process. That time that was spent in self-organizing for this temporary counsel might be better spent self-organizing trying to come up with the leadership counsel.

CHAIR ROSENBERG: Well, but it's not -- they're not mutually exclusive. One of the points of the rule is to get input from somebody as to whether leadership is needed and how leadership should be appointed. I mean, if this initial conference takes place two weeks after the case is transferred or one month and we do hear a lot that cases should be initiated by the judge early, so now I'm sort of hearing what's the harm in delay. I don't know.

Maybe everybody has a different definition of delay and speed, but let's just say you have a judge who wants to be responsive. She gets the transfer order. She's ready to have the conference. She knows a little bit but not a lot. She wants to hear -- let's say the first thing she wants to hear about is how leadership should be appointed. She's got to hear at an initial conference. Otherwise, how else would she or he hear that?

So is there anything wrong with that approach, which isn't really inconsistent with what the rule is saying. But let's just say it was reversed a little bit, that there's not the appointment of the leader, of coordinating counsel, maybe a suggestion in the note that the parties might want to consider that, but if they don't want to, show up in two weeks and, you know, here are some things that we're going to talk about. Give me your rough ideas about these 12 points, eight points, nine points and some of those rough ideas may be, Judge, we think the leadership counsel should be appointed first and, therefore, we would have a better idea then about a discovery plan and exchange of information.

But other smaller MDLs may be already so self-organized they come in and they say, Judge, you

know, there's a dispositive motion to dismiss on preemption. We think you need to get to that first, and if things don't go the way, you know, for the defendants, then we want to revisit discovery.

I mean, there's such a wide latitude of what can be brought to the court's attention in this report. Maybe that's being lost on people as if -- and you kept making reference to comprehensive management plan. I mean, I don't think any big MDL just has one order setting out discovery.

I mean, you know, there could be an order, this is what the motion to dismiss practice looks like, this is an order on depositions, this is fact discovery. I mean, it's just an iterative process. Do people actually think that what's intended by the rule is that the comprehensive plan that you refer to is set in stone, which, by the way, the language doesn't say that, and that every last line item of depositions completed by this date, which is two-and-half years down the road, I mean, if that's what's being understood, then I suppose I can understand the alarm of how can anyone two, three, four weeks, but particularly without leadership? This is a get the MDL off the ground, up and running, which we have heard for five years, if not longer, is important to

both sides of the V. Not to be hasty, not to be careless, not to make mistakes. Judges don't want to make mistakes any more than lawyers do. Judges actually bear a lot of the burden if mistakes are made, so I don't know that too many judges are going to hastily enter an order committing the parties and the court to something that they themselves don't fully understand. If they're not satisfied with the report, I don't think just because the rule says you might want to consider entering a discovery plan you're going to put pen to paper and put a plan in place that makes absolutely no sense to the judge.

MR. MANDEL: Judge, I think I heard really two different questions within what you just stated. The first was would it be better to have a Committee note that, I guess, prompts the judge in their order setting the initial conference to request the parties to try to organize and perhaps appoint somebody to speak on their behalf at the initial conference as opposed to having appointment by the judge of the administrative counsel. And the answer to that question is yes, that would be a preferable approach.

Okay. Second, what I heard was that people may be misreading the rule and thinking that what it requires is a comprehensive management order resulting

from either the initial conference or the second conference that addresses every single issue in great detail. And I think there is some concern about that, yes. In reading the rule, it has this, you know, list of topics that are suggested to be covered, and then it becomes -- and then it says an order about those topics and possibly other topics that are set forth in Rule 16 ought to be entered as a result of that conference. And I think the listing of all the topics and then the suggestion of an order addressing these and other things does tend to make people think that what is intended and what may happen with some judges is this very comprehensive rule which some judges may be reluctant to revisit as with enough flexibility going forward. So I think that is a concern among --

CHAIR ROSENBERG: Let me interject. So I posed a hypothetical to somebody else who testified and said what if language along the lines of the following were added, for example, to the note consistent with this point.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule

16.1(c)(8) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed.

Would language like that clarify a misperception that everything must in all circumstances in all cases be finalized, binding, not to be revisited at that first initial management conference?

MR. MANDEL: I think that language or something very similar would be helpful.

CHAIR ROSENBERG: Okay. All right.

MR. MANDEL: And I think it would help alleviate some concerns. I'm not sure it eliminates them, but I think it would help.

CHAIR ROSENBERG: Okay. All right. Well, seeing no other questions or comments, thank you so much, Mr. Mandel. We appreciate your time and your thoughtfulness.

MR. MANDEL: You're welcome. Thank you all for hearing me. I appreciate it.

CHAIR ROSENBERG: Lauren Barnes on 16.1.

MS. BARNES: Thank you, Your Honor. A hot bench. I hope to be less controversial. So my name is Lauren Barnes, and I'm a partner with the Boston office of Hagens Berman Sobol Shapiro. I very much

appreciate the work that the Committee has done, particularly looking at the issues that are animating this potential Rule 16.1, and I'm here to offer very brief testimony about proposed revisions to the rule to address the presence of class actions in MDLs.

I apologize, first of all, that my comments were only submitted this morning, so you may not even have them in front of you right now. Blame trial practice for that. It's been --

CHAIR ROSENBERG: Let me -- I'm sorry. Let me just interrupt. I think that we're having some audio issues. I'm not sure if it's on our end or your end. It's just breaking up a little bit, and I don't want to miss any of your testimony.

MS. BARNES: Certainly.

CHAIR ROSENBERG: Yeah, no, it's not.

MS. BARNES: Are folks about to hear me now?

CHAIR ROSENBERG: Now we are. Now we are.

MS. BARNES: Okay.

CHAIR ROSENBERG: Let's see if that works. Yeah.

MS. BARNES: I'll try to keep it -- maybe I was speaking -- I started racing. Maybe that was it. Okay. So I wanted to provide a little bit of context for my comments and I'll share that I've been

practicing for about 20 years now primarily as a class action litigator. Most of the cases that I have been involved in over the last decade or more have been pharmaceutical antitrust cases, which are primarily class cases alleging that direct purchasers or indirect purchasers often which were businesses suffered overcharges for prescription drugs.

Now members of my office or I have been involved in leadership in one way or the other of the vast majority of these cases that have been brought over the last 15 to 20 years, usually serving as lead counsel or co-lead counsel for one class or another in these circumstances.

There's a relatively discrete number of firms that do these --

CHAIR ROSENBERG: I'm sorry, Ms. Barnes. Yeah, you're freezing. Is everybody else hearing the breaking up, or is it -- oh.

PROFESSOR BRADT: That may just be on your end, Judge Rosenberg.

CHAIR ROSENBERG: Yeah, maybe it's on my end.

PROFESSOR MARCUS: Yeah, she's coming through clear, clear to me.

MS. BARNES: I'm not experiencing any

problem, Your Honor.

PROFESSOR MARCUS: Yeah.

CHAIR ROSENBERG: Okay. Okay. Sorry. Then maybe it's on my end. I'm going to look on my end. Okay. Continue.

MS. BARNES: Certainly. Sorry that the Judge isn't able to catch that.

So, as I was saying, there are a number of -- there are a relatively discrete number of firms that do these kinds of cases, and yet they're still, by my count, six MDLs of the current 168 that are pending that are these kinds of cases, these particular kinds of antitrust pharmaceutical cases. Sometimes these cases are formally consolidated into an MDL; sometimes they are not.

Usually, we are talking about somewhere between five and 30 cases that actually get filed. Most of those are class cases representing one class or another. There usually are two classes that end up in these situations, and we sometimes see opt-outs that file alongside, maybe businesses that want to individually litigate alongside the class but not inside the class.

I noticed in looking at this, I did the same thing that Ms. Glitz did earlier is in looking at what

the statistics are right now, and about half of the currently pending MDLs fall into this, you know, not that many actions category that I would be talking about. About 50 percent of the currently pending MDLs have never had more than 50 actions filed within them. Again, many of those kind of fall into this -- whether they're antitrust cases, they may be securities cases that are primarily proceeding along on a class basis, again, maybe sometimes in this hybrid MDL situation but, for the most part, involving class issues.

So, when we're talking about the fact that many of these MDLs have primarily class cases, that means Rule 23 is implicated. And Rule 16.1 as it's drafted right now seems to conflict with that in some ways. I think that there's a little bit of drafting tweaking that can be done that would help alleviate some of that maybe not quite getting in the same place.

As everyone here is very familiar, right, class counsel has obligations to represent the best interests of the class, and Rule 23(g) lays out explicit considerations for a court to consider in selecting class counsel. Those considerations, of course, are mandatory at the selection of final class counsel, for lack of a better word, and in practice,

they are realistically used for the selection of interim class counsel much earlier in the case.

I'm not wading into the thicket about the roles and responsibilities of coordinating counsel in the mass tort proceedings that I know has been discussed with a number of commentators today, but Rule 16.1 seems to add yet kind of another layer of leadership that's not contemplated by Rule 23 and that simply isn't necessary in the kinds of class cases that I'm talking about.

So I have proposed two suggestions in the alternative. One is that the Committee consider revising the rule and the note to say explicitly that it does not apply to MDL proceedings made up of exclusively or primarily class actions or, in the alternative, I've provided some written -- again, some tweaking primarily to Rules 16.1(b) and to 16.1(c)(1)(B) about the fact that coordinating counsel is not a substitute for class counsel and the requirements of Rule 23 and that coordinating counsel, to the extent that it's used in an MDL that includes class actions, the coordinating counsel role should be limited to the ministerial duties pending appointment of interim class counsel, so there are a number of things that they would not be addressing in that

context.

The suggestions that I've offered largely echo those that were offered by Dina Sharp and Norm Siegel earlier this month. And, with that, I will yield back and see if there are any questions.

CHAIR ROSENBERG: Okay. Thank you so much.

Are there any questions? Oh, Ariana.

MS. TADLER: Just a quick question, Ms. Barnes. Nice to see you this afternoon.

Is what you're proposing -- I haven't had an opportunity to read what you've submitted -- is what you're proposing in any way aligned with what Mr. Mandel has been talking with us about? He offered an alternative solution, and I don't know whether you had the opportunity to hear what he just shared with us or what he had actually submitted in writing.

MS. BARNES: I did listen to his testimony before this and I glanced briefly at what he had written, his written proposal. What I'm proposing is not in alignment with that. I think, you know, without going too far down that road, whether a two-tier is necessary or not, I think, depends in large part upon the size, the structure, what the issues are that may be impacted. I would say, from our perspective in the cases that we do, we typically come

into that first hearing with agreements, with having had discussions among the class counsel, even among the counsel who are representing different classes, about how we can coordinate what makes sense. And we are, frankly, at that point, ready to be out the door. Recognizing particularly the backlog that judges tend to have, it's sometimes hard to get one hearing, let alone two.

But I say that from the perspective of somebody who has been doing these kinds of cases for a very long time with a small number of firms, again, often in an MDL setting, but they don't raise the same kinds of issues that we might see in much larger ones where something else may be appropriate.

MS. TADLER: Thank you.

CHAIR ROSENBERG: Rick.

PROFESSOR MARCUS: Ms. Barnes, thank you again for your contributions. I'm pretty sure I remember seeing you at prior hearings on prior amendment proposals. And I'm going back to some priors also.

One of the things I remember the plaintiffs' bar saying about the Class Action Fairness Act is that it brought too many class actions into federal court. And one of the things going back 50 years with regard

to MDL practices is that the panel then would almost invariably transfer all the class actions if they were potentially overlapping to one judge for kind of consistent, organized treatment. And the question whether a class action is certified as a class action usually is not resolved right up front, I would think. It takes a while.

So, in terms of hybrid or multiple class action situations where some of the plaintiffs' bar said CAFA caused judges, federal judges, to deny class certification because it's just too complicated with 50 different state laws being presented -- I'm not going to debate that, I'm just saying that's a report -- how does an MDL transferee judge go about organizing without first deciding class certification, or is it mandatory that you appoint interim class counsel since I don't think that's what Rule 23(g) said when it was originally written? So how does this all work, and isn't it necessary that 16.1 has to apply to cases that include class actions and cases that don't include class actions because there's a whole lot of bumps in the road going forward?

So that's a collection of considerations that seem to address the kinds of situations you're talking about, and I'm interested in how you would

resolve those, particularly since you're interested in federal claim antitrust class actions, where you at least don't have the different state law problem.

MS. BARNES: You're right. Well, some of them don't have the different state law problem, right? In the indirect purchaser realm, you have -- often, right, we may have -- we have our injunctive relief claims, but the damages claims arise under state law, and so we still often have those issues that arise.

I guess what I'd say is that in practice, what I've seen over the years is that when -- and, again, I recognize that I'm speaking from the experience of a bar that is relatively small, relatively known players. Even though there are more coming up, they tend to be in the same firms. There are kind of barriers to entry to be bringing these cases in some ways. And so I think those structural issues lend themselves to earlier organization by plaintiffs' counsel than maybe some of these others.

I do think that interim class counsel needs to be appointed at a much earlier stage. We do have to have people who are helping lead the charge even in these hybrid situations, but that means it's interim class counsel for a particular class, right? They are

not speaking -- if I'm speaking on behalf of the direct purchaser class, I'm not speaking on behalf of the indirect purchaser class except to the extent that we have self-organized in a way, much as plaintiffs' executive committee, right? That's kind of the -- I guess that's the other way I would think about it, though we don't usually call them that, that we are aligning ourselves in a way to get through the discovery to address the issues that are coming up for the court.

Many of the things that I see on the Rule 16.1(c) list are things that do get addressed to some extent, whether it's through a judge's local practice or through, frankly, our Rule 16 and 26(f) reports. So, again, I'm not suggesting that these -- I think it's a -- I would encourage you to talk to people who are spending more time in these larger MDLs for the impact of what's been laid out for 16.1 on those cases.

In the setting in which I operate, which I do think reflects a not insignificant number of cases on the MDL docket, these things do get addressed and relatively early to some extent but I think without -- in the context of people who have put themselves forward as interim class counsel or are

seeking that appointment.

CHAIR ROSENBERG: Joe.

MR. SELLERS: Thanks for your remarks. I want to pose the following scenario, which sort of follows up on something Ariana asked, and that is, if you assume for the moment that we have a hybrid MDL where there are some class cases and some non-class cases, I recognize that 23(g) presumably governs appointment of at least liaison counsel, eventually class counsel, but they interact, have to interact, in some way with the rest of the case.

So I think an answer to the question Ariana asked before is whether you were in accord with Mr. Mandel's proposal and I think you said you were not. And I understand that to the extent you're being asked about whether it applies to class actions, your view is it does not, and I tend to agree with that.

But you would agree, wouldn't you, that in a hybrid-type case, you may have class claims and we have to make clear that those are governed by Rule 23, and then we have another mechanism to deal with coordination, whether it's coordinating counsel or administrative counsel, whatever the term is, for the remainder of the case. And there has to be some coordination amongst all the leaders of the individual

cases so we don't have 15 people getting up and all speaking on the same subject with different perspectives. How would you propose to deal with that?

MS. BARNES: Well, I think that often, even though you have leadership, you still get a lot of people standing up with different perspectives, Joe, but I guess what I would say on that front is I agree that the plaintiffs need to be coordinated in what they are doing. I don't know that I agree completely that there has to be some kind of coordinating or liaison or administrative counsel or whatever it's being called now in every MDL that includes something other than class actions. I think it is very case-specific.

So, in the cases that we do, typically, the non-class cases that are there, they can be large insurers or third-party administrators of healthcare benefits. Sometimes there may be a large -- that may bring direct purchaser claims or indirect purchaser claims, so sometimes, for example, United will show up in these cases by themselves or Humana might show up by themselves.

Sometimes we will have large companies, like CVS, Walgreen's, Rite-Aid, that opt out of the class

and have their counsel that they do it. But, in those situations, we're typically talking about two law firms that represent most of those additional individuals. So, again, in the cases that I'm talking about, I don't see a need for these, and so having language that makes perhaps a little bit clearer that Rule 23(g) is not being supplanted in some way and that what is being outlined by 16.1 may not apply in all settings, and I know that that kind of language is there. I'm just highlighting the class piece of this.

But I do take your point, Joe, that there may be in other settings, maybe when you have more, maybe when you have additional governmental actors who have also brought claims, that you may need some kind of coordinating counsel or liaison, whatever it is, alongside class counsel, but, again, I think that that's left to the discretion of the judge who is trying to figure what it is that he or she has before him.

MR. SELLERS: Okay. Thanks, Lauren.

CHAIR ROSENBERG: Andrew.

PROFESSOR BRADT: I'm sorry. I just -- excuse me. If I could follow up on that just slightly and wonder if you could say a little bit more practically about what the relationship is between MDL

leadership and those who represent putative classes because, as we know, as Joe said, MDL includes both, and so there is leadership and then there are also potentially folks who will be class counsel, and often we see MDLs transmogrified from non-class actions to a class action for settlement reasons.

And so I'm just wondering if you've ever encountered the issue of how practically lead counsel and class counsel interact with one another if they are, in fact, different people or are lead counsel tend -- do they tend to be the people who would be putative or interim class counsel? How do those things work in your experience?

MS. BARNES: Well, I think the answer, Professor, is, you know, it's a good lawyer answer. It depends and it depends -- so, in some of these circumstances where we're talking about kind of a hybrid MDL that I've been involved in, we have not had MDL lead counsel in the way that it's envisioned in mass torts, right, or in some of the larger cases. What we end up having is interim class counsel and eventually class counsel for the direct purchaser class, interim and eventually class counsel for the indirect purchaser class, and to the extent that there are additional opt-outs or maybe a couple of

governmental actors, there is no formal leadership that's set up among those. Instead, the firms that have been retained by those work hand-in-glove with class counsel on this front.

I do know that there are many other settings, again, with larger groups, maybe more disparate interests again because most of what I'm talking about, everybody's bringing an economic harm claim. When you were talking about something where you might have economic harm claims as well as personal injury claims as well as something else, then I think you are looking at a situation where you may have class counsel that's been appointed for the economic harm claims and you have leadership otherwise that's been appointed.

Often, I think you end up with this class counsel may be involved at a PEC level, right, but, again, or a plaintiff steering committee level and they sometimes may reside in the same person and sometimes they don't. Again, this is, I think, the difficulty with MDLs in general, is that it's a very -- it's a term that encompasses everything from something that has two cases up to something that has more than 300,000 cases filed and all the different kinds of claims that can fall inside.

CHAIR ROSENBERG: Okay. Thank you so much.

MS. BARNES: Thank you.

CHAIR ROSENBERG: We appreciate your comments, Ms. Barnes.

Now we are going to go to Anthony Mosquera, who is appearing by phone and no audio, and we just want to remind you, Mr. Mosquera, to hit 6, asterisk 6, to unmute yourself. Oh, we can't --

MR. MOSQUERA: Hello. Can everyone hear me?

CHAIR ROSENBERG: Yes, now we can hear you. Yeah, you're addressing privilege logs, and you may proceed.

MR. MOSQUERA: Yes. Thank you and good afternoon, everyone. My name is Anthony Mosquera, and I am a senior counsel at Johnson & Johnson, where I lead the company's discovery practice.

I want to thank the Committee for the opportunity to provide Johnson & Johnson's perspective over the topic of how we can update the rules governing privilege logging for the benefit of all parties.

I begin with sharing my unique perspective with this Committee. J&J has a diverse litigation portfolio that includes symmetrical and asymmetrical litigation and discovery, of course. Over the past

five years, J&J has drafted 250,000 individual privilege log entries across 52 matters. The company uses approximately 120 attorney reviewers a year to draft such entries.

Over the same period of time, J&J has worked to develop and introduce more efficient and modern approaches to privilege logging. Unfortunately, our litigation teams routinely litigate with parties that are inflexible or unwilling to engage to consider modern approaches to the format of privilege logs, and that's, in essence, what my testimony is about, is the format of privilege logs.

We continue to encounter presumption that the company must provide manually generated document-by-document privilege logs, this particularly in large product liability and consumer fraud matters. Frankly, the insistence on traditional logs with its associated burdens can be weaponized by non-producing parties in matters with more or less unilateral discovery. Moreover, while burdens continue to increase in step with growing volumes of data requested and produced, there's a low return on investment for the efforts creating traditional logs as particularly only a fraction of log entries is ever challenged, even cases with significant privilege

disputes.

My position is that the Committee should update the rules to establish a presumption of the sufficiency for alternate formats to generating privilege logs, what I would call modern logs.

The traditional practice of writing a description on a document-by-document basis is burdensome, it's inefficient, and it provides little, if any, value to the receiving party.

For the purpose of this testimony, I define modern logs as metadata logs, categorical logs, or hybrid approaches. Hence, updates to Rule 26 would allow for such formats.

Of course, changes should also presume that traditional logging is appropriate for certain scenarios. Modern logs have been enabled through advancements in technology and the evolving sophistication of supplier workflows. Modern logs represent a solution to logging burdens, which again balance against exponentially growing volumes of data that are requested, reviewed, and produced in litigation.

Importantly, a rule change should also allow for additional suitable approaches that will surely arise with advancements in technology, including as

technology evolves and can be validated.

To establish a presumption that alternate formats for privilege logs may be sufficient, I recommend that the Committee adopt something akin to what was submitted in the LCJ's August 4, 2020, letter for which I propose one additional final sentence, which would be information furnished may be delivered in a format sufficient to support the claim.

Acknowledgment within Rule 26(b)(5) of the sufficiency of modern privilege log formats would better enable parties to explore the fit of such logging methods for a particular matter without assuming, of course, at the beginning of negotiation a primacy of traditional logging methods.

I'd like to thank the Committee members for your time and for allowing me to share Johnson & Johnson's perspective.

CHAIR ROSENBERG: Thank you, Mr. Mosquera.

Are there any questions? Rick.

PROFESSOR MARCUS: Thank you. I'm wondering on a couple of levels what your feelings are. One is, does J&J presently raise, attempt to resolve and bring to the court if not resolved the question of how privilege logging is to occur in a given case right up front, or is that deferred until considerably later?

And then, secondly, you are endorsing a change also to Rule 26(b)(5)(A) which others have recommended to us. Do you think it would be enough and wouldn't it perhaps be enough to have just a cross-reference and maybe to quote what the Committee note said in 1993 about flexibility in designing logging methods? Particularly since, if we're going to be technology-neutral, we can't very easily say here's what to do because five or 10 years from now things will be done very differently.

So I'm interested in J&J's experience up front in discussing these matters with opposing counsel, and I'm also interested in what beyond a cross-reference to our published proposals should be added to 26(b)(5), which just says talk about this up front.

MR. MOSQUERA: Yes. Thank you for your question. The issue is not so much that the parties aren't talking about it. The issue is that the plaintiffs' bar and many courts incorrectly presume that traditional line-by-line logging is the standard or preferable methodology. That is really the crux of the problem we're encountering. And there are many reasons for that, right? In part, it could be tradition. Many judges are used to the format,

understand that from their own practices as attorneys.

But technology has moved forward, and I think that there is still a bit of our -- the parties we litigate against, an unwillingness to sit -- to put a -- you know, a willingness to put a stake in the ground and to, in essence, say, if you want to bring it to the court, bring it to the court -- at any given time is litigating across the country and, you know, in many districts in many jurisdictions. That's not a model that I think would be optimal, is to clog the courts and judges' time with these types of disputes, and that is really the basis for my recommended changes.

CHAIR ROSENBERG: Okay. If there are no other questions? Thank you so much, Mr. Mosquera.

And we'll turn to Kellie Lerner on privilege logs.

MR. MOSQUERA: Thank you.

MS. LERNER: I don't see myself.

CHAIR ROSENBERG: We can hear you, though.

MS. LERNER: I wonder what I've done wrong with my camera. Oh, you know what? Let's see. I think I may have two --

CHAIR ROSENBERG: Two devices?

MS. LERNER: Yep. Let me just see if I can

fix that quickly. I know there may be testimony fatigue by the panel, so I will try to fix this quickly.

CHAIR ROSENBERG: Do you want us to go to the next one and come back?

MS. LERNER: That's okay.

CHAIR ROSENBERG: Okay.

MS. LERNER: Let me just try it one more time. I think maybe if I switch here.

CHAIR ROSENBERG: Oh, there you go. Yeah, we can see you now.

MS. LERNER: Okay. So now just if I switch to my laptop you can see me. A little awkward, but I can make it work.

Well, good afternoon. My name is Kellie Lerner. I am a partner and co-chair of the antitrust practice at Robins Kaplan, and I also serve as president of COSAL, which is the Committee to Support the Antitrust Laws, and my testimony today is on behalf of myself, as well as COSAL. And I know you have heard a tremendous amount of testimony on your proposed Rule 16.1, so I'm going to keep my comments brief and focus on three main points.

The first is that there truly is no need for coordinating counsel in antitrust class actions. As I

stated in my written testimony, the average time for interim lead counsel to be appointed once an MDL decision is decided is approximately three months. And to a point made earlier in today's hearings, at least in my nearly 20 years of experience -- over 20 years of experience litigating almost exclusively antitrust class actions, I cannot think of a single antitrust MDL where lead counsel was not -- interim lead counsel was not appointed. When it's appointed, it's done under a clear set of criteria under Rule 23(g) and the process works.

My second point relates to the report contemplated by Rule 16(c) and, as I stated in my written testimony, that could lead to incredible inefficiency, and to provide some more color to that, I just want to walk through what that would look like in practice. And I have had the unfortunate experience a few times where lead counsel wasn't appointed right away, where the court either called in all the parties or required some kind of joint report with defense counsel, and what that leads to is a courtroom where you have plaintiffs' lawyers that not only fill up every seat in the courtroom, but they also have to use the jury box for places to sit. And on meet-and-confers, to create that joint status

report, you have roll call for plaintiffs' lawyers taking longer than the substance of the meet-and-confer. And all of that time gets charged to the class, and it's inefficient because all of this can be done by lead counsel, who importantly has the decision-making authority to make the final decision on these important points that would go into this report.

The other reason why the report is premature is because, in class actions, once lead counsel is appointed, there's a consolidated amended complaint. That's a critically important process for antitrust class actions because you could have dozens of complaints on file with different claims against different defendants with different class definitions, and then the consolidated amended complaint drafted by co-lead counsel, interim co-lead counsel, gets to make the final decision about what are the operative claims in the case.

If some coordinating counsel is responsible at the outset before lead counsel is appointed to put all of plaintiffs' positions in this interim report, it puts plaintiffs in this unenviable position of showing all of their differences and pitting them against each other to the benefit of the defendants,

and that process is eliminated if you have one consolidated amended complaint chosen by the lead counsel, and then, once that's on file, then you have a single set of decision-makers that lays with defendants to come up with the items that are in this proposed Rule 16(c) report.

My one last comment is that I do think that the concept of an early initial status conference could increase the efficiency of class actions, MDL class actions, if the premise of that initial conference was to focus explicitly on selecting lead counsel. I heard some comments earlier about, you know, well, who does the court speak to in these conferences, and I've seen that play out. Although it sounds like it can be very inefficient, it plays out very efficiently either because the court only has to hear from lawyers who -- or, you know, there's just a natural cropping up of lawyers as questions are asked and, you know, it's efficiently managed that way.

But to make it even more efficient -- can you hear me? I'm getting a poor network quality on my laptop. Okay. Good.

But, to make it even more efficient, if that initial status conference could be specifically dedicated to the selection of interim lead counsel on

class actions, it could expedite that already pretty reasonable three months to something even quicker.

So those are my comments, and I'm happy to answer any questions from the panel. Thank you again for the opportunity today.

CHAIR ROSENBERG: Okay. Thank you. Thank you so much.

Andrew.

PROFESSOR BRADT: Thank you so much. I asked this at the prior hearing of somebody who was making a similar point. Is it fair to say that the concern is not so much about MDLs that may have class actions in them but MDLs in subject matter areas that are primarily class actions, like antitrust?

MS. LERNER: So I'd like to hear -- I wasn't present for this earlier question, so I'd like to hear more of what you mean by MDLs that also have class actions in them. But, certainly -- because, in antitrust MDLs, for example, you similarly have -- you can have class actions, you can have individual actions, you can have opt-outs, et cetera, so there could be a variety of different types of plaintiffs.

But across the board, this idea of coordinating counsel, it would apply to the class action plaintiffs, who already have a system that

works for selecting lead counsel with decision-making authority, and so, for that, I would request a carveout.

PROFESSOR BRADT: Sure. It just seems to me that any MDL could include class actions as cases that are transferred into them.

MS. LERNER: Yes.

PROFESSOR BRADT: And so, really, the concern is that in antitrust there seems to be an established set of procedures among a relatively discrete bar that are understood and that you would prefer to see not loused up in some way by a new rule. It's not really about class actions per se entirely. It's about the particular practices and folk ways that have developed in antitrust.

MS. LERNER: I can't be sure that that's entirely the case because I have occasionally litigated plaintiff class actions in other spaces, and in those cases, the process worked very efficiently as well. Once there was an MDL transfer decision, the first order of business was selecting lead counsel.

So, while I don't have the breadth of experience as someone who does other types of class actions day in and day out, when I have practiced, it's been an efficient process.

PROFESSOR BRADT: So I guess my question is, is that if there is an efficient established process in antitrust cases that don't require coordinating counsel and coordinating counsel isn't made mandatory by the rule, why would -- is there anything in the rule that would prevent the attorneys from convincing the judge that coordinating counsel just may not be appropriate in antitrust cases?

MS. LERNER: I think that the confusion is what concerns us the most because there is -- it would be a new rule with a lot of -- with some ambiguity as to what the coordinating counsel does, and it leaves a lot of room for interpretation that could go awry with, you know, in particular, a new judge who's just not quite sure what to do.

And so, to eliminate that confusion, if there could just be an express carveout for MDL class actions, I think we would be in much better shape than going through this inefficient process of then trying to explain why coordinating counsel isn't necessary or, in even a worse case, you know, maybe there's some reason at some point that there's a disagreement of, you know, whether we need coordinating counsel, and then we're delaying what is already a pretty tried and true process of selecting interim lead counsel within,

you know, a mere matter of months once a transfer order is issued. So it just -- it creates an opportunity for dispute and confusion that could just be entirely eliminated with an added census, hopefully, to exclude class actions.

PROFESSOR BRADT: This is purely informational. Have you ever had any antitrust class action -- or antitrust MDL assigned to a first-time transferee judge?

MS. LERNER: I'm sure I have. You know, that is something that I think, you know, some MDL judges looked -- you know, the panel looked for, is to give a new judge an opportunity to have an MDL. Can I give you a specific example right off the top of my head? Probably not. But I could supplement my testimony with one if needed.

PROFESSOR BRADT: Thank you. I appreciate the testimony.

CHAIR ROSENBERG: Okay. Thank you very much, Ms. Lerner.

MS. LERNER: Thank you for the opportunity. Have a good day, everyone.

CHAIR ROSENBERG: You too.

Robert Levy is next from Exxon, and I think you're going to be addressing privilege logs, is that

correct?

MR. LEVY: Correct.

CHAIR ROSENBERG: Okay.

MR. LEVY: Can you hear me?

CHAIR ROSENBERG: We can. Thank you.

MR. LEVY: Great. Thank you for the opportunity to testify. My name is Robert Levy, and I'm executive counsel at Exxon Mobil, where I focus on legal policy issues and advise on e-discovery and information governance.

I wanted to give you a perspective of a party that spends considerable sums in preparing for privilege logs in federal court litigation, and much of that burden and expense really is wasted and unnecessary. The cost of preparing privilege logs is probably the most expensive feature of many of our larger cases, and it can approach a million dollars or more in an individual case.

And one comment that I wanted to offer is that our discovery system is built on trust and duties, particularly that the producing party will produce all of the responsive materials. There has been testimony by some of the witnesses as to why privilege logs are so important to avoid a situation where somebody might over-withhold. But, if

inappropriate withholding were really the issue here, the answer is not requiring a party to produce a privilege log because people, presumably, if they didn't want to disclose the document, they're not even going to log it. And, in fact, document-by-document logging really doesn't make compliance more likely. It might make it less likely.

The rules proposal discussing early engagement will not really address the underlying issue, which is that presumption that courts often apply, as mentioned by Anthony, that all withheld documents have to be logged. And while early engagement can be beneficial, it's really so early in the process that the proposed amendments provide that it's not going to give courts -- or, I'm sorry,, the parties, particularly producing parties, the opportunity to really understand the scope of the privilege issues because they're often done before discovery has been propounded and the producing party has a chance to review all the documents.

And there have been questions asked about the advent of new technology and the possibility that that will help reduce the costs of preparing privilege logs. One of the ironies is that the more technology that we have, the more records are created. In fact,

I was reviewing the issue of producing information about artificial intelligence and the requests that those will -- create technology might help, it --

CHAIR ROSENBERG: Is anybody else having difficulty hearing Mr. Levy?

FEMALE VOICE: Yeah.

CHAIR ROSENBERG: Okay.

MR. LEVY: One of the suggestions is that -- I'm sorry. You're having difficulty?

CHAIR ROSENBERG: You froze there for a moment, so I think --

MR. LEVY: Is that better?

CHAIR ROSENBERG: Yeah, I think you're freezing. Oh, okay.

MR. LEVY: All right. Apologies about that.

CHAIR ROSENBERG: Okay. That's better.

MR. LEVY: Is this --

CHAIR ROSENBERG: Yeah.

MR. LEVY: Great.

The suggestion has been offered that the rule should have a default standard that in certain categories of information you don't have to provide a log simply because it's almost never, but not never, a need to review that. And, therefore, we suggest that there should be this de facto standard that you don't

have to log communications with outside counsel or communications post-suit being filed.

There clearly have been points made earlier about where those documents might be appropriate and necessary, and that is perfectly fine, but those are the cases where the requesting parties should make a case for why they need those documents, but not in every case because, in, let's say, 90 percent of cases, those documents are never disputed.

We also have concerns about the amendments not being incorporated in 26(b)(5) versus in Rules 16 and 26(f) simply because 26(b)(5) is where parties go to understand their obligations about withholding and how they address that withholding. We also have suggested in the past through LCJ that Rule 45 should also be amended to address this issue, particularly because third parties that are required to produce information in a case are particularly prejudiced and have to deal with the cost and expense of the process when they have to produce a log, and there should be consideration to try to minimize the cost and burden to third parties wherever possible.

One of the other quick points that I'll mention is about the reference to rolling logs. The problem with rolling production and logging as you go

along is that if you do a rolling production simply by custodian, you might have Custodian No. 1 that has communications with Custodian No. 10, and so you're going to end up having to log all of those documents in the first instance and then you're going to have a problem in figuring out that you duplicated those documents on the log for Custodian No. 10.

So rolling logs really can create more problems, and that's why we suggest moving towards tiered logging or categorical loggings and even a suggestion has been made about metadata logging, which would be a way to kind of provide a broad overview of the information without having to provide details about each and every document. So we think that those steps will help make the process much more efficient.

I'm happy to answer any questions.

CHAIR ROSENBERG: Thank you, Mr. Levy.

Any questions? Judge Boal and then Rick.

JUDGE BOAL: Yes. Thank you for your testimony and your written submission.

On the tiered logging, how do you define "tiered logging"?

MR. LEVY: I think tiered logging really can depend on every case. And so the idea would be coming up with a plan to try to approach potentially issues,

the key issues in the case or the key timelines, or sometimes you can approach it dealing with key custodians, but you're focusing on broad parameters and you could look at narrowing where possible the types of documents that would be needed at least early on. And then, as the discovery process continues, you can address potentially expanding it to additional timelines or additional issues, additional parties. And as you deal with categorical logging in terms of the types of records, you can also use that as a way to create efficiencies.

JUDGE BOAL: And do you view that the tiered logging determination would be made unilaterally or in consultation with the opposing side sort of --

MR. LEVY: Oh, absolutely.

JUDGE BOAL: -- opposing -- sorry, go ahead.

MR. LEVY: Yeah. I apologize for interrupting you. Yeah. None of this would be done categorically. It's always presumptively based upon communication and agreement with the requesting party and, in fact, all parties in the case, and, hopefully, you know, if there are disputes, the judge can get involved as well, but this is always a collaborative process.

But the importance is that the presumption

in Rule 26(b)(5) is document-by-document logging. So the challenge for a producing party today is that you're going to have to fight against that presumption to get anywhere and oftentimes it's not successful.

JUDGE BOAL: Because the other side of the V has criticized the idea of tiered logging, and part of it has been I think they view it as a unilateral determination and that -- I'm quoting here from one of the other parties -- there's no explanation of who would make this subjective determinations or how. But I guess you're envisioning it as a collaborative one that may result in additional disputes, but you're previewing that with the other side first?

MR. LEVY: Correct, and collaborating to discuss what are the important issues. The requesting party is the one that's asking for the information, so you want to get them to the information that they need and do it the most effective and efficient way possible. But the proposal is that the rule itself or at least the Committee note should provide guidance on that determination.

JUDGE BOAL: Thank you.

CHAIR ROSENBERG: Okay. Rick, did you have a quick question?

PROFESSOR MARCUS: I think I have two quick

questions. One is about Rule 45, which, Mr. Levy, you mentioned, and we've seen you around the rulemaking process for a long time, and that is 26(f) calls for the parties to meet and develop a discovery plan. I'm not aware of anything in Rule 45 that says there's got to be some kind of get-together of that sort when a subpoena is served, so I'm wondering how do you create a parallel event under Rule 45.

And then I'll call it your side, the defense side has urged an amendment, as you just did, to 26(b)(5)(A). Some on that side have said the problem is people weren't paying attention to what the Committee note in 1993 said. So is there any -- if we were to do that, do we need any more than to say there's this new requirement in Rule 26(f) and here's a reminder of what was said in 1993 about 26(b)(5)(A)?

So I think those are two very specific questions. I wonder how you come back to answer them.

MR. LEVY: I'll start with the second question first and try to be quick.

I have a challenge with the Committee notes generally, particularly Rule 26, because, to find a Committee note in Rule 26, you have to know the year that that specific sub-part of 26 was adopted or amended and then go to the year to find the

appropriate Committee note. And it's just -- people are not effectively able to find the Committee notes. So I urge that the issue should be addressed in the rule and in Rule 26(b)(5) itself about this presumption.

The issue about Rule 45 is that the solutions in 16 and 26(f) that are proposed will not help you in Rule 45. I think Rule 45 should either in Rule 45 or 26(b)(5) include a presumption that producing parties, third parties, are not required to develop a log unless there's a specific finding by the court that a log would be necessary because creating a log de facto is going to be very expensive for a third party, and, therefore, they should not be required to log absent some finding that it's going to matter.

Apologies for the longer answer, Judge.

CHAIR ROSENBERG: Okay. No problem, Mr. Levy. Okay. Well, thank you so much, and we appreciate your comments.

We'll go to Aaron Marks next on privilege logs.

MR. MARKS: Thank you, Your Honor. Good afternoon. My name is Aaron Marks, and I want to thank the Committee for all of the thoughtful hard work that's gone into these proposed amendments and

for the opportunity to testify today.

I'm an attorney at the law firm Cohen Milstein, where I represent plaintiffs in federal antitrust litigation across the country. I also have several years of experience at a corporate defense firm and as a law clerk to a district judge, so I like to think that I have seen these issues from all sides.

I'm here testifying today not only for myself but also for the Committee to Support Antitrust Laws, COSAL, which is an organization of firms that practice antitrust law principally on behalf of plaintiffs across the nation. I'll be addressing the privilege log amendments.

With respect to the text of the rule, we commend the proposed amendment and support its adoption. Encouraging discussion of privilege log formatting and procedures during the time that the discovery plan is being formulated is beneficial. In my experience, these types of discussions happen already informally at this stage in the case, and codifying this in the rule is likely to have a laudatory effect.

I'm going to focus my testimony today on the proposed Committee note which, in our view, raises several concerns which could undermine the

appropriately balanced nature of the amendment to the rule itself.

First, the Committee note addresses burden several times, but the only burden that it addresses is that of a producing party that would seek to withhold otherwise discoverable information. It's black letter law that the burden is always on the withholding party to justify its assertion of privilege, and at the same time, we know from experience that the way logs are formatted, the way that the procedures around logs are set up can impose great burdens on requesting parties and on the court. I am happy to give my perspective on that having personally dealt with some of the burdens and issues that can arise from an inadequately presented log.

The Committee note also states -- the proposed Committee note, I should say, also states that document-by-document logs, traditional logs, are "often associated with very large costs." In our view, this is likely to be interpreted by courts as expressing a preference against traditional logs, but this would run counter to the flexible approach that the rule itself takes. Additionally, in my experience, document-by-document logs are not associated with very large costs.

Professor Marcus, you've asked today several times about the use of technology and how that is affecting things in practice. In practice, what technology does today is it enables the very quick generation of document-by-document logs. These logs are often populated with fields, such as the author of a document, recipients of an email, subject line, date. All of that is largely populated automatically these days using e-discovery software. I have an experience in a Southern District of New York case where the court ordered a party to produce such a log and it was able to create it for thousands of documents in a matter of I think it was two or three weeks. This is something that can be done very quickly through the use of technology even when there are large volumes of documents in the case.

Lastly, the concern we have -- the last concern we have with the proposed Committee note is that it will likely increase the use of alternative log formats.

And, Judge Boal, you were asking about tiered logging. There's been discussion today of categorical logging.

Our experience with these logs is that they suffer from very serious shortcomings that impose

substantial burdens on both sides of the case and ultimately on the court. That's for a few reasons.

First, a categorical log involves, rather than disclosing a document-by-document identification of the reason for the withholding, parties lump vast quantities of documents into categories. That makes it very difficult to actually assess the basis for privilege, which is what Rule 26(b)(5) requires. This hamstrings parties that have to scrutinize the privilege logs, and, ultimately, what it leads to is wide-ranging motions being filed with the court because the parties are not able to narrow issues themselves using the document-by-document log.

So, in our experience, document-by-document logs lead to narrower motions presented to the court. The motions that do end up before the court are better briefed because the requesting party has better information about what to challenge and why.

The other principal issue is that categorical logs lead to improper withholdings, and this is not only a deliberate withhold -- improper withholdings but also inadvertent withholdings. This is a pervasive problem. There's been some testimony today from my friends on the other side of the bar that only a fraction of log entries are ever

challenged. That's not been our experience. It's routine in our cases that hundreds of documents are challenged from privilege logs and are subsequently produced often without going to the court.

We will notice something on the log. It may have been inadvertent. A contract attorney or a junior attorney didn't understand how to categorize a particular set of documents. We challenge these and hundreds of documents are routinely produced. That becomes extraordinarily difficult to do in a categorical log regime. And so our concern with the proposed Committee note is that it really seems to put its thumb on the scale for a particular type of log when the rule itself encourages flexibility, which we think is entirely appropriate.

So, if the Committee were to reconsider the proposed note, I think the final two paragraphs reflect the flexible approach that is proposed in the rule itself, and we would suggest removing the earlier paragraphs, which seem to disfavor traditional document-by-document logs.

I know the Committee has heard a lot of testimony today. I'll stop there and would welcome any questions.

CHAIR ROSENBERG: Judge Boal.

JUDGE BOAL: Thank you for your testimony and your specific suggestions with respect to the Committee note. I'm going to go back to one sentence that you had raised concerns with. That's in the last sentence in the first paragraph that says compliance with Rule 26(b)(5)(A) can involve very large costs. And then you objected to the often including a document-by-document privilege log continuation of that sentence, which I took from your testimony suggests that we think that's the only basis that's driving up the costs or suggestion.

Would it satisfy some of your concerns just to take out the end of that sentence saying the "often including a document-by-document privilege log"? Actually, the costs on both sides is one of the reasons why this amendment is here.

MR. MARKS: Judge Boal, I think that really it would be a step in the right direction but would not address the overarching concern, which is that the only cost which is discussed in the proposed Committee note as of now is that of a withholding party when, in fact, what we've seen -- I had one recent case where I want to say hundreds of hours were spent resolving a problematic categorical log. Briefing the issue, meet-and-confers, argument before the court, I know

this because I argued some of these motions myself. All of that could have been avoided by sticking to a traditional document-by-document log. And I'll say that one -- so that one clause at the end of a sentence being excised would be a step in the right direction certainly, but there are other references in the proposed Committee note as well, for example, the third-to-last paragraph's reference in the first sentence to "relieve the producing party of the need to list many withheld documents." The reason that --

JUDGE BOAL: But the --

MR. MARKS: I apologize. Please.

JUDGE BOAL: No, no. So, from what I'm hearing you saying, if it said compliance with Rule 26(b)(5)(A) can involve very large costs on both sides, for both sides or something like that? Not really.

MR. MARKS: Well, I appreciate the suggestion. I think that again would be a step in the right direction. It would not address the other paragraphs which --

JUDGE BOAL: Got it.

MR. MARKS: -- also reference the burden on a withholding party, but I think that it's certainly a fair statement to say that substantial costs can be

imposed on requesting parties when privilege logs are not adequately detailed.

JUDGE BOAL: Thank you.

CHAIR ROSENBERG: Okay. Thank you so much, Mr. Marks.

MR. MARKS: Thank you.

CHAIR ROSENBERG: All right. We're going to have our last witness before the break, which we are running a little behind. I apologize.

Pearl Robertson is going to address privilege logs, and then we will take a short break and resume after that.

MS. ROBERTSON: Good afternoon. Can everyone hear me?

CHAIR ROSENBERG: Yeah.

MS. ROBERTSON: Looks like it. Okay. Hi. My name is Pearl Robertson. I'm a partner at Irpino Avin Hawkins Law Firm. Yes, I'm here today to talk about some privilege logs. Thankfully, my colleague, Mr. Aaron Marks, just pretty much covered nearly on the nose what my concerns are with the draft Committee note.

While I don't think the text, the proposed text, in the rule is not problematic in any way, I think it's largely what parties are already doing and

it's just consistent with our practices, it is the Committee note that I agree reads particularly one-sided. It seems to really kind of pick and maybe in a way give the defense bar a little -- or I guess I shouldn't say defense bar -- the producing party of a privilege log a little bit more ammunition to point to more things as to why it's so burdensome to create a log when ultimately it's a problem they create, right?

Like, I have been on both sides. The opioid litigation, we did producing party logs and we were the receiving party logs. I did both sides for the entire MDL litigation of my law partner, Anthony Irpino. When we made the privilege log for the plaintiff counties, it was tens of thousands of entries. It was not an insignificant number of privilege entries. What we did as any -- you know, you negotiate the search terms. You respond to the RFPs. You collect those documents. They go into the document platform. You then have them sifted out for privilege. When you're ready, within that document review program, you click the description, like, basically, I'll say attorney/client privilege, work product relates to this litigation with outside counsel, all of that information I'm clicking on gets exported into the log itself. No more is someone

going through and writing in individually a description each time. It's all done by technology. And there's no doubt that that's what the defendant in the MDL litigation for MDL 2804 did as well.

So I don't think that really the document-by-document privilege log is really the problem here. I think the bigger problem is, frankly, the alternative logs and the alternative unique ways it gets -- when we get into the issue of litigating privilege, you have the true problem of trying to tell the producing party, hey, this is your burden and you haven't supported the privilege. I can't do that without a document-by-document log because, by and large, what's going to happen is they're going to be like there's outside counsel on it. That's the end of the story.

Well, unfortunately or fortunately, depending on how you want to look at it, there are lots of big MDL litigations where consultants, PR firms, experts, non-litigating -- non-testifying experts are hired by outside counsel and sifted through outside counsel and, therefore, then a privilege is attached.

Well, thankfully for the MDL, MDL 2804 in the opioid litigation, we were able to see through

that, but we couldn't have done it without a document-by-document log if categorically it's like outside counsel, 50,000 emails. There's way to get after that, and then you're just stuck litigating and it really does hide a lot of the privilege that's asserted. I kind of went off on a tangent, but I just listened to like the last six people testifying, so I apologize. You know, I'm happy to answer any questions. To be clear, I do only do, like, MDLs. It's where I've been the last 11 years.

CHAIR ROSENBERG: Okay. Thank you so much.

We have Rick and then Helen.

PROFESSOR MARCUS: Thank you. We have heard repeatedly that not surprisingly, let's call it your side of the V is content with the rule but unnerved by the note, and I think you said that too. Let me read you the note from 1993 when the rule was adopted: "This rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege. Details concerning time, person, general subject matter, et cetera, 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."

Do you like that? And if you don't like that, how come the "traditional document-by-document method" has become traditional since that's what the Committee note said when 26(b)(5)(A) was adopted?

MS. ROBERTSON: Understood. I do think that there are -- as other colleagues have said, the technology has changed a little bit of the operation of the rule, and that's why the document-by-document approach perhaps could be a little bit more traditional.

I think we can agree in 1993, if you're looking at hard-copy documents and these collections and you have the file that's coming from the general counsel to the compliance officer, that those potentially could go in like that, like category. Companies were a bit more defined. Litigation was like a little bit smaller, but, certainly, in the present MDL space, when you have so many different departments that are going to touch and concern in-house counsel, outside counsel, consultants, auditors and et cetera, down the line, the categorical approach just is untenable because there's no way for a receiving party to understand or know exactly what is caught by that category.

Sure, we can meet and confer about it. We

can say, all right, well, all of these documents include the general counsel, but at the same time, there are multiple times where the general counsel isn't always operating with their "lawyer hat on" and may not be driven, predominantly driven by -- they may be predominantly driven by business instead of maybe part of the business function. And in order to get really at that, you have to see that pattern on the logs. I just think categorical logs in the present day just -- it just doesn't work with the volume of documents. And I think even the Exxon Mobil attorney talked about the volume of documents and, unfortunately, yes, we get more. Whether it's produced on a log or produced otherwise, you get more.

But, at the same time, you can still use the tools to go through more. It's just kind of the nature of the beast. But categorical logs at this juncture I think would really just unwind the case law that's already established out there. It would put a whole wrench in the side of really what is the predominant purpose test provided that jurisdiction adopts the predominant purpose test, and I think it does lead to a ton more litigation.

CHAIR ROSENBERG: Helen.

MS. WITT: I just wanted to ask about your

view that technology can do the vast majority of what's necessary for a document-by-document log. And maybe just to take the example of the last -- one of the examples you gave, in a situation where a lawyer is not acting with her lawyer hat on, don't you agree that at that point some lawyer has to add the description of the document on the log that describes why that document is nonetheless privileged?

In other words, I'm struggling with the piece of the log that isn't just author, recipient, subject line but is the essence of the reason for the privilege that still has to be done in the vast, vast majority of cases unless there's an agreement for metadata logs by a lawyer. But it sounds like you think that there can be all of the elements that you want to see in a log done mechanically.

MS. ROBERTSON: I think that largely you can do it mechanically. When we did it as a producing party, of course, you export all the metadata and we're really talking about the description or the basis for the privilege asserted.

When we have our reviewers set up to go through the documents, there is a review panel where there is -- I think we must have had like 50 different options to click on, you know, email and attachment

from in-house counsel describing compliance with the FDA regulations, for example, and you click on those documents. That gets exported and populates the privilege description on a privilege log and it's still considered a traditional privilege log, not a metadata log.

The reason that's -- I'm pretty sure the defense bar isn't too far afield from doing that same exercise because, as a receiving party and a challenger of privilege claims, I can go into a log that I've received that's a traditional log that has a privilege description, I can filter that privilege description column and get the same description based on certain types of documents anyway.

But what I don't -- what is better about that traditional log still than the categorical log is I'm getting exactly who is on the communication. I'm getting the dates of the communication. I'm likely getting the subject of the email or the title of the document. There is just simply more information in addition to just the description that you'll get out of the traditional log as compared to the categorical log.

CHAIR ROSENBERG: Okay. All right. Thank you so much. We don't have any other questions.

MS. ROBERTSON: Thank you, Your Honor.

CHAIR ROSENBERG: All right. We're going to take a break. I think we're going to keep it a little bit short. So it's 3:30. We'll come back at 3:35. I understand if some people don't want to turn their video on right away.

(Whereupon, a brief recess was taken.)

CHAIR ROSENBERG: Okay. David Cooner on 16.1.

MR. COONER: Are we ready? Should I start? Can you hear me?

CHAIR ROSENBERG: Hello. We're good to go. Yeah.

MR. COONER: Okay. Well, good afternoon. It's been a long day for you all and I understand this is not the first time that you've convened to talk with folks, so let me begin by just thanking you for taking the time to listen to me and to talk with me. And also, thank you also for your efforts here because I know that it's a lot of work, and it's really an important moment because it's a key time where we have to really express an opportunity to talk about some of these rules.

I'm here on behalf of PLAC, which I'm sure you're familiar with. It's Product Liability Advisory

Council. I'm also chief litigation counsel at Beckton Dickinson & Company. Beckton Dickinson is known as BD, so I've been with BD for three years. And before that, I spent more than 30 years at McCarter & English in New Jersey as a partner in the product liability group.

And I just want to really make two points and I'll try to make them very briefly. You have my statement and I will not go through all that. I'm assuming that that's part of the record.

But the two things that I want to really talk about is, one, really what I'll call the mandatory establishment of bona fides of a case in the MDL and how that is something that I think really needs to be added to the current rules, and two is really why the current landscape is inadequate.

So I'm speaking now primarily in the product liability space because that's the area where I have the most experience both as a private practitioner and also in my role at BD, and it is also something that is a challenge for many of the companies that are part of the PLAC organization. But we think the rule should really require three things at the outset, and they're proof of product use or exposure, proof of injury, and information as to date of injury.

Now we shouldn't just have this as proof of product use, but we really should have some kind of medical documentation to support this.

Do I already see a question, Richard?

PROFESSOR MARCUS: Well, I didn't mean to interrupt. I just put my hand up, but if I could ask this. PLAC attended and spoke at our discovery conference at Boston College in September 1997. One of the things we were told then was that we would get data about the burdens of document production. That's was what was being discussed then.

This time around, we have been told by someone, I think the PLAC side of the V, that we would get some hard data about the number of whether they're called unsupportable or something like that claims that you think should be identified earlier on, and I think that's what you're talking about.

I wonder if you know whether somebody's going to provide that data sometime soon because we've heard a lot of assertions, but we haven't seen very much hard data. So I apologize for popping my hand up too soon, but I'm remembering PLAC's offer 27 years ago and it prompts me to ask you about it today.

MR. COONER: Well, I can't speak of anything from 27 years ago for sure, and, as far as data today,

I don't have the hard data. I can try to get that for you if we've got it. I can tell you just it's been my experience in terms of dealing with cases that there's an enormous number in terms of raw number of cases and in terms of percentages on the order of 20 to 30 percent of cases that don't have any meaningful proofs as it relates to either the product, proof of injury, or even date of injury. I mean, I see that not just in my own experience but also in talking with MDL mediators who I've been dealing with, and they have frequently pointed to the fact that there is a significant bolus of cases that are being advanced by firms that are generally free riders in the process and they are not adequately vetted, they are not supported by medical records, medical evidence.

And, Andrew, do you want me to jump to you? I mean --

CHAIR ROSENBERG: You can finish, you know, your comments and then --

MR. COONER: Okay.

CHAIR ROSENBERG: -- everybody puts their hand up in the order to ask questions.

MR. COONER: Okay. All right.

CHAIR ROSENBERG: But we do like to get our questions answered, so we're trying to keep everyone's

comments to three to four minutes.

MR. COONER: Okay. Well, I will then just buzz through then with your permission.

CHAIR ROSENBERG: Yeah.

MR. COONER: So, I mean, all I would want is just some basic bona fides for cases, you know, medical records showing product use, medical record identifying an injury and its association with the product, information about a date when an injury occurred so I could see when it was diagnosed. And this is not some kind of oppressive discovery. To put it in like a college vernacular, these are the 101s of a case. This is beginner's level. These are the basics to have these kind of facts. And this kind of compliance to ask of the plaintiffs' bar is not something that is onerous in any sense of the word.

As a matter of fact, as compared to the defense, who are dealing with MDLs where the discovery startup costs are enormous, this is a very modest amount of investment on their part, and what we see here is that there are those who are the freest of the free riders not doing any of this kind of pre-case vetting.

And, again, I've seen estimates, 20 to 30 percent. I've seen MDL mediators acknowledging this.

I've seen it in my own experience, dubious claims being purchased from lead finders and thrown into court. I know that there's concern about Rule 26, but Rule 26 is generally not followed in MDLs. We've had several MDLs at this company where we have not had Rule 26, and we also have these profile forms and they're not uncommon in these litigations, but the profile forms are inadequate. They're largely toothless and they're frequently just checklists without backup, and there are deficiencies all over that are almost impossible to challenge.

On top of that, there's a cost to doing business the way we're currently doing it. There's a cost to the defendants in terms of discovery, litigation reserves, proportionality. Discovery is clearly triggered by volume. It's a cost to the plaintiffs also. We have legitimate claims being delayed. And it's also a cost to the courts where you have the transactional costs associated with filings of what I'll call thinly supported or unsupported cases.

So, in short, we urge a formalized mandatory process requiring claimants to establish the bona fides of their claims to alleviate the burdens on the courts, to thin the dockets of dubious claims, to

allow plaintiffs with supported claims to advance them in a more timely manner, and to permit defendants to better evaluate and address the claims asserted against them.

CHAIR ROSENBERG: Okay. Thank you.

Andrew, then Judge Proctor.

PROFESSOR BRADT: Thank you so much. I'm trying to understand a little better why mandatory disclosures under Rule 26(a) are not used in MDLs, and would you prefer a world in which both sides were held to the 26(a) obligations?

MR. COONER: Well, I think that in terms of our 26 obligations, the defense is engaged most often in the beginning of an MDL in an incredibly expensive undertaking. I'll speak from experience here at the company. We are in an MDL that was created a couple of months ago in the port MDL, and we have spent an enormous amount of money dealing with the discovery and putting up information and gathering information. Claims come in and we have scant information about the claims. So all I want is that there be better vetting of the cases so that way the energy of -- and this is not all firms.

PROFESSOR BRADT: Why don't -- I understand that, but my impression was that you just said that

many of those downstream costs are motivated by the number of claims that are asserted in the MDL. So I guess I'm trying to understand a little better why you don't insist on mandatory disclosures early on in the litigation if that will ultimately produce a significant cost savings.

MR. COONER: We have asked time and again to have additional information on cases. It's been our experience in prior litigations that that is not what is afforded to us, and it's not just us. I'm speaking not on behalf of BD alone but on behalf of PLAC member organizations, and that's the experience, broadly speaking, of the PLAC member organizations.

PROFESSOR BRADT: Can you tell me, is it the experience of the PLAC member organizations that the world would be better in MDL if both the plaintiffs and the defendants were required to comply with Rule 26(a) at the outset of the litigation? I guess what I'm trying to figure out is that if plaintiffs -- you're asking for more information from the plaintiffs. Are defendants prepared to engage in that reciprocally?

MR. COONER: The suggestion in the question is that the defendants aren't.

PROFESSOR BRADT: No, that's not the

suggestion. I'm just trying to figure out whether or not you think that would be better.

MR. COONER: Well --

PROFESSOR BRADT: I'm not making any insinuation that the defendants are or are not doing anything. I'm just trying to figure --

MR. COONER: Okay. Well, I'm going to -- I'll say the answer to that question is yes, but I want to put it through the lens of what is actually happening. What I see happening is I see cases being filed and I can't tell you a lot of information about the cases and I can't find medical support for them. I can't find information about statute of limitations. I can't find the basic information about a case, and that's happening on one side, whereas, on our side, I have been gathering with scores of custodians and outside vendors and the infrastructure and expense on our side has been enormous, and to me, the request to say, when you file your complaint, also provide this kind of basic, basic information I think is fundamental.

CHAIR ROSENBERG: Judge Proctor.

JUDGE PROCTOR: Yes. Thank you.

So twice during your opening remarks you referenced the responses or reactions from mediators

to this problem, and there's a view that it is incorrect to say that MDLs don't permit the testing of unsupported claims. We, of course, know that there's many opportunities in the MDL process to test an unsupported claim.

Now some of those may occur as late as a post-remand summary judgment motion. Right now, I just received cases from the panel on remand in Taxotere, and I've got three claimants that we're in motion practice on whether their claims survive. So there are exit ramps.

What I really hear your argument and the argument of others that we heard particularly in the first hearing is that we don't have that information in time to really have a meaningful opportunity to resolve these cases. And I guess my question is this. First, do you disagree with any of those points?

MR. COONER: I don't disagree with either. Certainly, the second one in terms of having adequate data to resolve cases for sure, but as to the first point that you made in that there is an off ramp as, for example, the post-remand summary judgment off ramp, I can't disagree with that because that's, in fact, the case.

But what I am saying is that that's way too

late to wait until I go through the entire cost of the MDL and deal with all that and then, finally, after a remand have an opportunity to really put the case's feet to the fire is I've already spent tens of millions of dollars, if not more, in terms of defending the cases, dealing with the cases. I've got SEC obligations in terms of reporting about litigation. It's just way too late for my docket to be --

JUDGE PROCTOR: Well, let me --

MR. COONER: -- larded up with things that don't belong there.

JUDGE PROCTOR: Way too late to resolve these claims, but not way too late to walk through the process that 1407 always contemplated and that is we deal with across the board general issues that affect everyone to some degree before we start diving into how we're going to treat each tree of the forest.

So I guess my question is this. Isn't that what the 1407 framers contemplated all along? That we were going to sacrifice individual attention to claimants and defenses, individualized defenses that defendants could raise because there may be plaintiffs who would be interested in defeating those out of the block but don't have the opportunity to do so because

we're dealing with structured data. We're dealing with Daubert issues. We're dealing with experts. We're dealing with general causation. We're dealing with all sorts of different things that each case uniquely brings to the table and the menu that that particular case or litigation delivers.

So I'm still struggling with the argument that we ought to create a rule that always requires a claimant to do X that would apply to an antitrust claimant or a patent claimant or a smaller MDL claimant or an airline crash claimant, and just I think that's the problem with the argument that I've struggled with all through, is we have given you every tool in the box, I think, if this rule passes, to go and make these individualized arguments about what you need in your particular MDL to the transferee judge and convince the transferee judge to do that in that case rather than convince the Committee that we ought to do that in every case.

So I'll stop talking and let you respond.

MR. COONER: Yeah. I mean, sacrificing individual attention is the phrase that really struck me there, Your Honor. And what I would say is I'm not looking to sacrifice individual attention. What I'm looking for instead is just the basics. I'm just

looking for the most rudimentary information about a case because what happens -- and this happens every day -- is that cases are thrown into the pool of the MDL and they are supported by a thin profile form often checklist and there they sit where they for all intents and purposes cannot be challenged, and that is I don't believe what 1407 was created to deal with.

True, let's deal with things in broad strokes and there is definitely going to be some sacrifice of the individual, but I'm talking about you should have to have a certain bona fides in order to even get into the litigation game, and what's happening is that too often that that's not there, and this is not asking, I don't believe, too much to just provide me with the basic medical records that support that you even used my product.

CHAIR ROSENBERG: Joe.

PROFESSOR MARCUS: Can't hear.

MR. COONER: I think, Joseph, you're on mute. I've left you speechless.

CHAIR ROSENBERG: Oh, no, I was saying, Joe, maybe you want to get off and get back on? We can't hear you. Can you hear us? Yes?

MR. COONER: Thumbs up if you can hear us.

CHAIR ROSENBERG: Well, what about language,

for example, in a note, let's just say, relative to 16.1(c)(4) hypothetically something along the lines of, in some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b) and suggesting that methods can be used early on when information is being exchanged between the parties?

In other words, highlighting maybe for the judges and the parties that there is this expectation that, well, first of all, that the Rules of Civil Procedure apply and that compliance with Rule 11(b) is expected.

MR. COONER: I think that that's a very good step in the way. I would, with respect, I would say we just need to go a slight bit further and just require that the bona fides be produced. I mean, I am responsible for literally tens of thousands of hernia cases and there are many that I am wholly lacking information about.

CHAIR ROSENBERG: I think Joe is back on. Let's see if we can hear you now. No? Oh, darn. Mm-hmm. Okay.

MR. COONER: So --

CHAIR ROSENBERG: Do you want to chat the

question? Maybe put it in the chat? No?

MR. COONER: Okay. Well, I mean --

CHAIR ROSENBERG: Yeah, okay.

MR. COONER: -- I don't think I'm speaking on a topic that you haven't heard before, and I hope that in either what I've said or in what has been submitted on behalf of PLAC that there's some kernel of newness or some different perspective that can maybe underscore the points that we've tried to make, and for that, I just thank you all for your consideration.

CHAIR ROSENBERG: And we very much appreciate your comments and give them very serious consideration, as we do all of the info we've been receiving.

MR. COONER: I appreciate it. It's a long day for you all, so thank you.

CHAIR ROSENBERG: Oh, wait, wait, wait. I can ask Joe's question, which is, why can't the flexible approach that has been proposed in the rule permit the bona fides to be requested at the outset of cases where it applies? In other words, we are, I think, universally in agreement. Everyone we've heard from, the judges, the lawyers, plaintiffs, defense, that no one size fits all. There needs to be

flexibility, and we're not going to be looking at separate rules for separate kinds of cases. This is a MDL rule.

So, given that not all MDLs are the same, no one size fits all, the intent behind this 16.1 is to raise precisely these issues early on. So (c)(4), how would information be exchanged? Is that not the perfect opportunity for you and your clients to stand up before the court day one, two weeks in, three weeks in with that initial conference and say, Judge, there appears to be 10,000 claims. It's very important to at least our client, maybe all the parties, that we have a vetting procedure in place early and active, this is what we propose, these three things are what we would like to endeavor to obtain. Then the judge can hear from the plaintiff why that's possible, why that's not possible. The judge can inquire of plaintiffs' counsel, can you do this, if not now, how long. I mean, isn't that exactly the kind of conversation that should take place, and doesn't the flexibility of 16.1, specifically (c)(4), raising that topic give you the opportunity to raise it?

So perhaps a step shy of what you're asking. We hear what you're saying, but does that not also achieve the goal?

MR. COONER: It moves the ball further down the court or down the field. Forgive my metaphor, but it doesn't close the deal. It doesn't make it mandatory, which is what I think that -- I mean, we spoke earlier about Rule 11. I mean, why can you file a lawsuit involving one of PLAC's company's products and not provide to the defendant some kind of documentation proof that, in fact, you used the product? I mean --

CHAIR ROSENBERG: Well, I mean, does that happen in your non-MDL single plaintiff and defendant case? Are complaints being filed with documentation? And if not, is the judge dismissing the case and saying, re-file when you have the documentation? Probably not.

MR. COONER: Right. I will say -- yeah. I will say this, that the -- I couldn't say to it being a null set that it never happens, but it is extremely, extremely rare and it is something that is addressed in the short run. Some MDLs go on years without that kind of core information.

CHAIR ROSENBERG: Right. But you get that in discovery in your single plaintiff, single defendant cases, correct? You get it in discovery, so a few months into the process, is that correct?

MR. COONER: Arguably, I would try to get it in in some of the initial disclosures, and it would be something in a Rule 16 conference with the court.

CHAIR ROSENBERG: So you're saying that's what you want?

MR. COONER: I'm going back to myself as litigator and lawyer with a firm, but that's what we would ask for.

CHAIR ROSENBERG: You would ask for.

MR. COONER: Yes.

CHAIR ROSENBERG: And so I guess just think of 16.1(c)(4) as that opportunity, as that's what you're asking the court for, and maybe, you know, you'd see it just from a slightly different perspective. But, in any event, we do need to move on.

MR. COONER: Yeah. I know you do and I appreciate everyone's time and attention.

CHAIR ROSENBERG: So thank you so much.

MR. COONER: Thank you.

CHAIR ROSENBERG: Okay. Thank you.

MR. COONER: Bye.

CHAIR ROSENBERG: We're not sure if William Cash is on. Can -- if William Cash -- oh, you are. Okay.

MR. CASH: Hi.

CHAIR ROSENBERG: I didn't see you earlier, so you are here to speak about 16.1.

MR. CASH: Yes, I am, and I want to thank everyone for allowing me to speak today. I'm Bill Cash. I am a member of Levin Papantonio Rafferty in Pensacola. We do a lot of MDL work. We are a plaintiff side firm. We focus a lot on prescription drug products and medical device cases. And so I submitted a comment on 16.1 and pretty much am willing to just focus my comments on the role of the coordinating counsel, but I'm happy to take questions on any part of my comment or anything else.

And I guess the only point I'd really like to make is, in our view, the coordinating counsel position seems a bit unworkable and it seems like it would be duplicative and it would, in fact, increase and not reduce some of the paperwork in an efficiency that our colleagues and our frequent opponents have complained about with MDLs.

One of the things that is not clear to us from the way the rule is read is how does the coordinating counsel position actually get selected. And under 16.1(c), the coordinating counsel would have a great deal of topics to discuss, but it looks like

the court would generally follow the rule's suggestion to appoint coordinating counsel and have all those discussions, including the sum that we just heard, before plaintiffs' leadership is selected. That really puts us at a disadvantage because defendants will have their leadership obviously in place. They're not going to change lawyers between the preparation of the report and the first real hearing in the MDL. But plaintiffs might because there's not a mechanism for the court to appoint final plaintiff leadership before the coordinating counsel. It's just not clear who is going to be coordinating counsel, how coordinating counsel is going to be selected.

And as I suggest in my letter, there's even a way to read the rule that coordinating counsel doesn't have to be an attorney in the case at all. It could be for the plaintiffs. There could be people who do not have a stake in the litigation. I don't think in practice that would happen, but I think that's a possibility.

So I think there's a concern that coordinating counsel be in the position to make the first presentation to the court speaking on behalf of plaintiffs but not be the people who ultimately have the stake in the case, and that concerns us.

You know, we were just talking about (c)(4) and fact sheets, you know, and there's a role for fact sheets and there's a reason we use them, but how much detail there should be is something that both sides have concern about. You know, the Committee's note would say the level of detail called for by such methods should be carefully considered to meet the purpose served and avoid undue burdens. Who will speak up for that if it's not leadership?

I think one of the things that the coordinating counsel role also is going to do is however the judge selects the coordinating counsel, if they're plaintiffs' lawyers, when those people then come to seek formal leadership positions, they're going to say, well, I was at the coordinating counsel discussions. I've already been part of this case. You already picked me.

So I think, to the extent that we're trying to promote transparency and fairness in selecting plaintiffs' leadership, you're just sort of shifting the problem around. So we now have a transparency issue in selecting coordinating counsel instead of selecting plaintiffs' leadership.

I'm also concerned that essentially you would have to redo some of the work that's been done

after leadership is selected if the people who are leaders are not ultimately -- were not the people who prepared the report from the coordinating committee. And, again, that puts us at a disadvantage because defense will not change and it will be the same defense lawyers.

As I wrote also, I'd be concerned that without a formal designation of who's in charge, defense will have an incentive to select the friendliest plaintiff lawyers, the worst plaintiff lawyers that they can work with, the easy ones, to get, you know, the report to be as favorable toward defense as possible, and I don't think that serves the goal in justice.

So that is what I would have to say about the coordinating counsel role, and I'd be happy to answer any questions from the Committee that you might have about this or about anything else.

CHAIR ROSENBERG: So are you of the view then, as some have put forth -- and I don't know if you've been on for what portion of the day -- that a model of self-organization is workable and to show up at the initial conference, the rule should contemplate not that there's a coordinating counsel or liaison counsel. We've talked about different terms today,

but leave it to counsel to self-organize and just make sure when you come to that initial conference it's not utter chaos and that that report gets submitted and there's some order to the process?

MR. CASH: Yes. And, I mean, I think, by and large, that's working.

CHAIR ROSENBERG: Okay.

MR. CASH: I think, you know, the lawyers who have been hired by the clients should be the people to self-organize and I don't think there's any shortage of MDL plaintiff lawyers in the world who are reluctant to step out when they feel they were not part of the self-organization process. I've been to many hearings where people say, look, I've got 200 clients and I'm a part of this case and they're squeezing me out, I'm not part of leadership on their slate and I don't like it. And I think judges are receptive to that and I think that's appropriate.

I also know there's a focus in the courts more and more every year on ensuring diversity of backgrounds, of experience. I think that's entirely appropriate. I think every MDL judge pays attention to that and that's effective. I think one of the knocks on plaintiffs essentially self-organizing is that it was a boys club and it helped the boys club

stick together, but I can't think of an MDL judge that doesn't push back on that role, and so I don't know that, you know, that's the concern that it used to be.

But, in any event, having the district judge sort of arbitrarily select the coordinating counsel without openness or scrutiny, it just sort of shifts the problem around. You're still ultimately having to have the court make these unilateral decisions. So the self-organization model I think does work, and when it doesn't, their squeaky wheels do know what to say and I think it works.

CHAIR ROSENBERG: Any other questions or comments? Seeing none. Okay. Thank you so much.

MR. CASH: My pleasure.

CHAIR ROSENBERG: Max Heerman on 16.1.

MR. HEERMAN: Yeah, good afternoon. Can you hear me?

CHAIR ROSENBERG: We can, thank you.

MR. HEERMAN: Yeah, great. Thank you and thank you for the opportunity. My name is Max Heerman. I'm with Medtronic. Medtronic is a member of PLAC and is also a member of LCJ. I'm not speaking on behalf of either of those organizations, but I certainly agree with most, if not all, of what other members of those organizations have said to the

Committee.

I wanted to limit my comments to Rule 16.1(c)(4) or proposed Rule 16.1(c)(4). I did submit written comments. I'm not going to read those. And I also want to agree with Mr. Cooner from BD and the position that he took just a few moments ago. And also, I want to endorse the proposed change to the rule that LCJ has made about requiring a proof of exposure and injury at the outset of an MDL in cases where exposure and injury is at issue.

There was a question raised when Mr. Cooner was before the Committee about, well, is there really evidence that there are a large number of unsubstantiated claims in the litigation. It's very challenging to produce that evidence in all cases. It may be possible to produce it in some.

But let me just provide one anecdote that might be helpful to the Committee. One of our subsidiary or affiliated companies is currently in an MDL involving hernia mesh, as Mr. Cooner's company is. And prior to the MDL being established -- bear with me if my numbers -- they may not be exactly precise because sometimes it depends on, you know, whether orders were with prejudice and people got to replead and things of that nature -- but I believe we had 32

hernia mesh cases that were filed in federal courts before the MDL. We filed motions to dismiss in all of those cases. In 17 of them, the motions were fully granted, and in two cases, the plaintiffs voluntarily dismissed the lawsuits with prejudice, so 19 out of 32 were dismissed, 60 percent.

We now have an MDL where there's 920 cases at my last count. So, if that same rate was applied to the MDL, it would be down to 546 cases. But we don't get that opportunity in the MDL because, essentially, Rule 12(b) is not applied in MDLs. So, at least, you know, based on that small sample size and that one example, I think it is apparent that some claims that certainly wouldn't survive as one-off claims in federal court do survive for a long period of time in MDLs, and, in my view, they distort the MDLs in ways that's to the detriment certainly of defendants but also to the detriment of the court system and even to the plaintiffs who might have meritorious claims.

CHAIR ROSENBERG: Okay. Thank you. We have Andrew and then Judge Proctor.

PROFESSOR BRADT: Thank you very much. I just want to know if you're prepared to say that that 19 out of 32 should be extrapolated to the full number

of claims in the MDL and on what basis you'd make that claim.

MR. HEERMAN: Well, I mean, that's a hard question to answer. Certainly, once there's an MDL, maybe it's the rules that change or maybe a better way of saying it is the process changes. But I do think it's an indication that non-meritorious claims, maybe it's not 60 percent. Maybe it's 40 percent. Maybe some of those are just inartfully pled by law firms, and if you had a better law firm that was a more artful pleader, they would survive.

But a large percentage of claims, you know, a federal district court judge thought did not have -- couldn't even be pled. They didn't even have a theory that belonged in federal court, and very similar claims are now proceeding in an MDL.

PROFESSOR BRADT: Can you elaborate on that because not having a theory that belongs in federal court sounds different to me from not having evidence to prove you took the product.

MR. HEERMAN: Well, primarily --

PROFESSOR BRADT: I guess one of the things that we're trying to drill down on is how many of these supposedly meritless claims are because the plaintiff can't prove that they took the product

versus other reasons that a claim might get dismissed, of which, of course, you know there are many.

MR. HEERMAN: The primary reason those claims were dismissed, if my recollection serves, is that the plaintiffs were pleading that they had a certain type -- that the product had a certain type of design defect that caused a certain type of injury and they didn't actually have that injury. So, for example, they might have pled that your design causes infection, but then, when they alleged their injury, they said they had chronic pain, not infection.

So they weren't tying their alleged -- the injury that was allegedly caused by the defect to their actual injury that they were pleading in the case. That seems like something that could be teased out early on in the litigation and should be so that claims that can't be substantiated do not muck up the litigation process for years and years and years on end.

CHAIR ROSENBERG: Judge Proctor.

JUDGE PROCTOR: Yes. Thank you for appearing today.

In the past, has Medtronic taken the position early in litigation that the plaintiffs' claims are preempted by federal preemption doctrine?

MR. HEERMAN: Yes, we do when we have pre-market approved devices that are at issue, but --

JUDGE PROCTOR: All right. When that occurs, what would be Medtronic's response while that motion was pending if the plaintiffs wanted to take discovery regarding the science or some other technical factual basis for their claims against Medtronic? Would Medtronic not say to the court, we need to stay discovery until our motion to dismiss based on preemption grounds is ruled upon?

MR. HEERMAN: Yes, but I'm not sure what you're getting at.

JUDGE PROCTOR: Well, what I'm getting at is there are reasons that a court may choose to order the litigation of legal issues ahead of the litigation of factual issues. And I would, in light of your answer, I would say it seems to me that a mandatory vetting process for want of a better term or a mandatory disclosure process doesn't make sense in every case for the reason you've just said. There are certain times when you would deny plaintiffs the right to do what would otherwise be straight for discovery under the rules because you want to have a legal issue teed up and ruled upon.

So why would it make sense for us to mandate

that every transferee judge do what you're asking to do if there may be situations in which even your position would be it doesn't make sense? And I'll hear your response. Thank you. Thank you again for appearing before us.

MR. HEERMAN: Thank you. Well, I certainly agree that you could not have a rule that is absolute in the sense that in all MDLs, no matter what the circumstances, the judge has no discretion and must require certain bona fides, as Mr. Cooner put them, be disclosed or the case will be dismissed.

But I do think a rule could be crafted that says that in cases where exposure and proof of injury will be necessary in order to substantiate a claim, the judge should, absent extraordinary circumstances, require that those be documented before the case can proceed, something of that nature.

CHAIR ROSENBERG: Okay. If there are no more comments or questions, thank you so much for your presentation.

MR. HEERMAN: Thank you.

CHAIR ROSENBERG: We'll hear from Maria Salacuse on the privilege log.

MS. SALACUSE: Good afternoon. My name is Maria Salacuse, and I'm the Assistant General Counsel

for Technology at the Equal Employment Opportunity Commission. EEOC's General Counsel, Carla Gilbright, has requested that I testify on behalf of EEOC consistent with the letter she previously submitted and the letter which was, of course, incorporated into the record.

Because I did not submit a bio or a bio was not submitted, I'll tell you a little bit about myself just for context. I serve as EEOC's lead e-discovery counsel and I advise senior leaders and I also provide strategic litigation advice on all sorts of e-discovery matters to trial attorneys across the country.

But prior to this, prior to assuming this position, I did litigate individual and systemic cases on behalf of EEOC for 20 years, so I am well familiar with the discovery battles dealing with privilege logs. I should also mention that I am a board member of the Maryland chapter of the FDA and a very active member in the e-discovery community, and I currently serve on the steering committee for the Working Group 1 of the Sedona Conference.

As you are probably likely aware, EEOC does have a very active litigation program and we enforce six employment discrimination statutes, including

Title VII, ADA, ADEA, the EPA, the Genetic Information Non-Discrimination Act, and now the Pregnant Workers Fairness Act. We have currently about 205 lawsuits across the country in 68 federal district courts, of which 90 are systemic, meaning they're pattern and practice cases or class cases. So these systemic and class cases is, you know, where we see heavy e-discovery and we probably see more of the battles regarding privilege logs.

We certainly appreciate the opportunity to comment on the proposed amendments. You know, I've sat through and I did hear testimony from other plaintiffs' counsel, and our testimony is fairly consistent with what has been said, so I'll just try and keep it short.

We think that the amendments as written, you know, providing for the -- or requiring the parties to discuss the timing, the means, and the format of the privilege logs will minimize discovery disputes and also ensure more of a timely and complete production of privilege logs.

Where we have concerns is dealing with more the notes, at least the language in the notes, and we have two primarily that we are focused on. And as you heard previously from witnesses, we believe that there

may be an unintended focus on the burden on the producing party as the sole basis for the amendment, even though there's been plenty of testimony talking about the burden on a receiving party to assess adequately the claim of privilege.

For that reason, we have proposed a modification just to balance it out. The first sentence really focuses on why the amendment is happening, and it talks about costs, and we propose that we add a sentence after that also acknowledging the burden on receiving parties, and we think that that would provide a really good balance for both producing parties and receiving parties.

The other issue is that throughout we just wanted -- we thought it would be important to note in the notes that whatever privilege log is ultimately agreed upon, the burden is still going to remain on the producing party or the one who's invoking the privilege, so we did provide certain language. We proposed some language to be added to that effect just to make sure that that is clear.

I did want to -- I heard earlier a question to I believe it was Brian Clark about maybe the importance of the advisory notes, and I just wanted to highlight that as a former law student of Judge Grimm,

as well as a lawyer who has practiced before him, I have certainly learned the importance of these notes, and I do find that they're often overlooked by lawyers and sometimes by courts and we do find them very useful.

One great example is with the 2015 amendments regarding proportionality. We do get arguments made by defendants in our cases, you know, proportionality arguments and, for example, if there's a small amount in controversy, things like that, and we will look at those Committee notes. There's great language in there regarding public policy-type cases, employment practices, free speech, things like that that may have importance beyond the monetary amount involved.

So I just point that out just to say that, you know, we do find these notes and we do look at these notes very carefully and we do think that they are important, and so that's why we look so carefully at what has been proposed. But thank you for the opportunity to testify, and I certainly welcome any questions.

CHAIR ROSENBERG: Thank you. Any questions or comments? No. I think you covered it all, so thank you so much. We appreciate it.

MS. SALACUSE: Thank you.

CHAIR ROSENBERG: All right. Amber Schubert on 16.1.

MS. SCHUBERT: Thank you. Good afternoon. My name is Amber Schubert. I'm a partner at Schubert Jonckheer & Kolbe. We're a small firm that specializes in consumer and data breach privacy class actions. And I really appreciate the Committee's hard work on Rule 16.1, much of which -- in fact, I think the bulk of which is helpful.

I'm testifying today in opposition to Section B in particular designating coordinating counsel. I believe Section B is unnecessary and counterproductive. By encouraging judges to designate coordinating counsel prior to leadership counsel, the rule would, as a practical matter, do one of two things. It would either create two separate overlapping leadership processes, one for coordinating counsel and the other for leadership counsel, or collapse that entire inquiry into just the coordinating counsel question. Get picked for leadership counsel and you've likely got a ticket -- or excuse me -- get picked for coordinating counsel and you've likely got a ticket for leadership counsel.

By making that selection so early, it wouldn't allow time for any self-ordering, a process that in recent years has been helpful to encouraging new lawyers as judges have promoted diversity and encouraged any self-organizing to include those concerns in the selections. And the proposed Rule 16.1(b) would create all sorts of new problems.

In my experience in MDL class actions, judges who designate coordinating counsel tend to select those same lawyers for positions as leadership counsel, so the inquiry really focuses on getting picked for coordinating counsel, and those lawyers who get picked in that initial selection tend to be repeat players whom they know.

Yet the rule provides no process, no criteria to judges as to how to select coordinating counsel. It's essentially silent on the method for doing so. So judges would be left to pick lawyers who they already know or have these two separate and entirely duplicative processes for selecting counsel, creating all sorts of new inefficiencies. Those processes could have separate applications or motions, separate hearings or interviews. There would be a lot of redundancy.

That would simply perpetuate the repeat

player problem in MDL leadership, which would also further hinder our efforts at diversity. As I explained in my written testimony, according to an ABA survey, men are three times more likely than women to be appointed lead counsel in MDLs and women made up just 16.5 percent of all plaintiffs' leadership appointments in MDL cases. People of color, disabled individuals, and LGBTQ lawyers fare even worse, not to mention those from small firms and those with less MDL experience.

The creation of a brand new coordinating counsel position appointed before the litigation even gets off the ground would create hurdles for younger diverse lawyers from smaller firms with fewer leadership appointments and it would enshrine repeat players. So, in my view, Section B simply creates too many unintended consequences and too many risks. I therefore ask the Committee to remove Section B, and I'm happy to answer any questions that you may have.

CHAIR ROSENBERG: Thank you. Any questions or comments?

Okay. Well, thank you so much.

MS. SCHUBERT: Thank you.

CHAIR ROSENBERG: We very much appreciate your comments and your testimony.

I believe Christopher Seeger is not presenting today. I'll just call his name out to be sure. And am I also sure that Yvonne Flaherty is not appearing and filling his slot. So that brings us then to our last witness, Lexi Hazam, who will speak on 16.1.

MS. HAZAM: Thank you, Your Honor. My name is Lexi Hazam. Can you hear me okay?

CHAIR ROSENBERG: Yes.

MS. HAZAM: Okay. Excellent. I am pleased to be here today testifying before the panel, and I appreciate the flexibility as to the timing of my testimony. I have just gotten out of court before the judge overseeing the social media addiction MDL, where I am co-lead counsel.

So I chair the mass torts practice at Lieff Cabraser Hyman & Bernstein and I have experience at all levels of MDL leadership, as do many of my partners, and we are leading some of the major mass tort MDLs today. We also have lawyers who are working in MDLs involving class actions, and I'm here to testify as to certain concerns I have with regards to the new proposed Rules 16.1(b) and 16.1(c)(4).

Before I do that, though, I'd like to thank the Committee for all of their amazing work to date,

and I think much of these proposals is called for and will be extremely helpful to the Bar going forward. My concerns have to do with Rule 16.1(b), as I indicated, and its provision that the MDL court may designate coordinating counsel prior to the initial case management conference. I have concerns relating to that on the level of it being premature and leading to a restricted pool for potential leadership. I also have concerns that it may be inefficient.

I do believe, as the person who testified just before me said, that it is likely to lead to courts most often appointing individuals with whom they are already familiar because they have not had the opportunity to conduct any fulsome vetting process and that that represents a lost opportunity to draw from a wider and more varied pool and achieve various kinds of diversity through that manner.

I also think it may, in effect, preempt some efforts among the Bar themselves to self-organize and present to the court in a unified or at least more informed manner as to leadership. On the front of the potential inefficiency to this proposed provision, I am concerned that you will inevitably have a situation where either the attorney who's appointed as the coordinating counsel will, in essence, automatically

carry over into leadership again without necessarily more fulsome vetting along the way or, if they do not, you'll have a challenging transition where you have one person who's been interacting with the court, interacting with opposing counsel, interacting with other counsel on their same side, and perhaps starting to take important steps in the case that will shape it going forward. Strategic decisions, the provisions called for in the initial case management report deal with very important and consequential topics, such as facilitating early discussion of settlement, a discovery plan, et cetera. And so you'll have one person who's headed down those roads only to need to pass the baton, and that, to me, sounds like it will be disruptive, potentially duplicative, cause I think an inefficiency and a potential change of course at that juncture.

I think the better route is the one that I see many MDL judges engaging in today, including in the social media MDL that I co-lead, which is for an MDL judge to issue an initial order setting up a leadership procedure and then devote some or all of the initial case management conference to addressing the issue of leadership, whether that be through taking presentations of counsel or any other manner,

and then have the report that is more substantive come thereafter once leadership is appointed and the next case management conference address those substantive issues in the report. I think that's a more efficient way to proceed and I think what's important is getting all of those steps on calendar quickly in an MDL.

The other provision that I've raised some concerns about is 16.1(c)(4), which says that the parties will address in the initial case management report exchanging information on the factual bases for their claims and defenses. The wording there struck me as rather vague and also potentially unnecessary or duplicative of the discovery provisions already in the Federal Rules and the other sub-part of the rule that says that the parties shall discuss a discovery plan and report on it to the court.

The comment has some language that suggests to me that this may be anticipating early attempts at dismissal of claims or we enter into the discovery process in the case where that would normally occur and is essentially a side track of litigation outside of the normal motion practice and discovery practice, which does often involve exchanges that start early on.

It also struck me as potentially burdensome

and unfair in cases where, if the defendants, who may have much more ready access to some of the evidence needed to prove plaintiffs' cases -- and that is the case in the MDL I currently co-lead, where the plaintiffs do not have access to all of the account data that the social media platforms do, and so that resides entirely with them, and having a early opportunity for dismissal might essentially cut the plaintiffs off at the pass in being able to access that information.

Thank you. I'm happy to take any questions.

CHAIR ROSENBERG: Thank you. Andrew.

PROFESSOR BRADT: Thank you so much.

Can I follow up with you about your position on mandatory disclosure and the degree to which it's used in MDL and, if not, why not?

MS. HAZAM: You're talking about initial disclosures under Rule 26, I assume? Thank you. It actually has come up in my case just last week. It's a very interesting situation. I think it varies. You'll see in some MDLs both sides may think it's appropriate to engage in initial disclosures. In other cases, it may be appropriate mainly for the defendants because the plaintiffs' initial disclosures generally come through a fact sheet kind of process.

That process may be staged such that there's a preliminary fact sheet that is much briefer and comes very quickly and then a more extensive one with more information. But it generally is duplicative of the fact sheet process to require every individual plaintiff in a mass tort MDL to do an initial disclosure. It may be a different situation in a class action context where there are a limited number of class representatives.

PROFESSOR BRADT: Can you help me understand, though, why it would be duplicative? It seems to me that what's required in 26(a)(1) to produce may go beyond what's typically required on fact sheets, although I know they vary quite a lot depending on the case. So I guess I'll ask you the same question I asked Mr. Cooner. Would you prefer a world in which the default was that plaintiffs and defendants would both just follow 26(a)(1)?

MS. HAZAM: Good question. What I would say to that is the plaintiff actually does almost always much more extensive than what initial disclosures would look like coming from each plaintiff. You know, a typical fact sheet in an MDL these days, at least in a mass tort context, it's 50 pages long or more than that, and when it's completed, it's definitely more

than that because you can't complete it in the space that's provided in the actual form, so you will be expanding and attaching things to it. It calls not only for all the people who have knowledge of your claim, whether they be healthcare providers or family members or other witnesses, but all kinds of information about your injuries and damages. It usually is much more extensive than what an initial disclosure would look like.

So, if I had to choose my worlds, I would probably choose a plaintiff fact sheet and a defense fact sheet that both happen relatively early on. That said, if an initial disclosure is happening at the beginning of a case, on the plaintiff side, it is going to be duplicative of what comes later.

PROFESSOR BRADT: Do the fact sheets typically require a copy of the documents --

MS. HAZAM: Yes.

PROFESSOR BRADT: -- that you would use to support your claims?

MS. HAZAM: Anything that is in the plaintiffs' possession they generally do require and, typically, these days a plaintiff fact sheet has a good two pages of document requests that encompass all kinds of relevant documents to the case, so not just

medical records but employment, education, other things. And then, on top of that, they usually require authorizations to potentially obtain even more of those records if the defendants so desire and the plaintiffs don't already have them in their possession.

PROFESSOR BRADT: So it's just odd to me that -- I mean, you've heard a lot of this today. You haven't heard very much of this today because I guess you've been in court, but it seems to me that we have two totally different planets that the plaintiffs' side and the defense side are coming from. The defense said there's never any documentation for these claims, 40 to 60 percent of them are meritless, and yet it sounds like from the plaintiffs' side that you're producing way more than would be required in a regular case under Rule 26.

Can you explain the discrepancy between the descriptions of the world that we're getting?

MS. HAZAM: I can try. I do think that there are different viewpoints on this obviously. I don't think -- I mean, it's easy enough to pull plaintiff fact sheets from any number of MDLs. You could ask, you know, either side of the Bar to provide you with any number of examples so you can see how

detailed they are. So I'm not sure that the debate is about how detailed a fact sheet is. I think that where the defense bar is coming from in large part on this is their belief that there may turn out to be what in their view is a significant number of plaintiffs who can't provide what they believe is the necessary level of support to ultimately proceed with their claims.

We believe that the fact sheet is designed precisely to accomplish that and it will demonstrate that. All courts that I've been in who work with these fact sheets allow for deficiency processes. I think they're actually often abused by the defense bar, but, nonetheless, there is that opportunity to seek additional information that they don't believe was adequately provided as part of that.

I also think part of what you're seeing from the defense bar is just an effort to back that process up to make it even earlier in the litigation. I would note, however, that PFSs -- that's our world of acronyms -- happen generally very quickly. I mean, they happen in the first months of an MDL and they happen generally about as quickly as they can for plaintiffs to gather that kind of information. They are meant to alleviate burden in the sense that they

generally substitute for interrogatories and for written discovery. Doesn't mean there can't possibly be any additional written discovery thereafter, usually if you're selected for bellwether treatment of some kind, so I do think they happen early. I do think they provide a lot of information that defendants can look to for vetting of claims purposes, and I think to push that aside with some kind of earlier process is likely to be duplicative, burdensome, and unfair to the plaintiffs' side of the equation.

CHAIR ROSENBERG: Is there another question? No. I didn't see.

How early did you say in your experience that the plaintiff fact sheets were completed and exchanged?

MS. HAZAM: So sometimes it's a two-stage process, but let's just take for a moment a one-stage process. This is the case I'm in right now.

So, in the case I'm in right now, we have an implementation order for the fact sheet that is going to require it to be produced together with all the records that are in the plaintiffs' possession and all the authorizations for potentially obtaining additional records within about 60 to 75 days. I

think that's generally a time frame you see. I think sometimes it's 90 or a little longer.

CHAIR ROSENBERG: From the inception of the case or from the initial conference?

MS. HAZAM: From the order being entered.

CHAIR ROSENBERG: Oh.

MS. HAZAM: You really can't do a PFS until an order is entered --

CHAIR ROSENBERG: Right. So --

MS. HAZAM: -- that has the time.

CHAIR ROSENBERG: -- how long -- what are you generally seeing? I mean, I'm just talk -- how far into the case?

MS. HAZAM: Right, right. So some judges don't want to do that until you've gotten through dispositive motions. That's very much up to the court. So, in my current MDL, our judge didn't want us to get there until we'd gotten past certain threshold motions under Section 230 in the first amendment.

But, in the absence of those kinds of early dispositive motions that result in a discovery stay, I would say you have an initial conference with the judge. You have initial orders. I would say within the next two months you get to a point of having an

order about these kinds of fact sheets approximately. The parties try to negotiate them. They sometimes have disputes as to what they should contain that the court then must resolve. But I would say that's usually a couple months and then that sets off the process of them needing to be completed, which is another couple months.

CHAIR ROSENBERG: So what do you say to the defense bar or a portion of the defense bar that says 20 to 30 percent of cases filed in products liability, why is it that they can't from the get-go just at least tell us the product they took --

MALE VOICE: I don't think she's like some golden child.

CHAIR ROSENBERG: I think somebody is talking.

MALE VOICE: But, at any rate, one of the things very --

MS. HAZAM: Sorry.

CHAIR ROSENBERG: Oh, somebody's got -- okay.

Proof of product, date of injury, what the injury is, how do you respond to that and that that creates an inordinate burden on the defense, a cost to the defense for public companies reporting

requirements of arguably non-meritorious claims? Why do they need to wait to post-dispositive motions? Why do they need to wait to remand to ferret out claims that maybe shouldn't have been there in the first place? If you were drafting a rule, how would you address that?

MS. HAZAM: So, personally, I think that the process that already exists that we've just discussed and described is key to being able to assess the basis for the claims and inform the defense about them, including whether there might be some that don't have a basis. If you fill out a plaintiff fact sheet and it turns out that you don't have proof of ever having used that product, they're going to know about it pretty quickly.

What then happens as a result of that is a matter of case management by the court. In other words, I have certainly seen cases where courts contemplate not only deficiencies but ultimately an order to show cause. That could be the case. I think that what I often hear from the defense is something more than this, which is the equivalent of what you may know and we sort of in our bar know as a lone pine order, which is not simply proof of use of a product, which is not obviously an issue in every MDL, but just

using that kind of more standard, say, drug or device case model. What they're looking for is more than that, not just that you used it but early expert reports supporting it, and there's a strong body of case law, including a recent -- as well as some recent law review articles that are very interesting about that.

I do not think that is appropriate at an early phase. I do think the fact sheet process is and that most MDL judges can exercise their discretion informed by the parties as to what should happen to PFSs where that basic level of proof does not seem to be provided.

CHAIR ROSENBERG: Do you find in your experience that there is often a dispute between the plaintiff and the defense in the case as to what "quickly" means? You mentioned we get to it quickly and that you say the fact sheet sort of accomplishes the purpose of this early exchange. How often, if at all, do you see a difference, a strong difference of view as to when that process should take place? And if you've seen it taking place sooner rather than later, what, if any, advantages have you seen?

MS. HAZAM: Right. Another good question. So I have been able to agree with the other side

ultimately on my cases as to what the schedule should be. That doesn't mean we didn't start from somewhat different places, but the orders I've had entered are ultimately by agreement as to the time frame. I do think that may at times be disputed.

I do think that, however, the defense bar also has an interest in these plaintiff fact sheets being done well. Sometimes it feels like a little bit of a catch-22 from the plaintiff side where it has to be determined very early on, and, yet, then, if we do things very early on, we get just a sea of, you didn't dot this I or cross this T. I'm sure they'd see it differently, but this deficiency process that often seems fairly pro forma, and so I think there is an interest in allowing enough time for that information to be gathered and those increasingly detailed because they are only growing, not shrinking, fact sheets to be completed.

CHAIR ROSENBERG: So doesn't (c)(4) allow for exactly that process? I mean, is it --

MS. HAZAM: We haven't -- oh, sorry. Excuse me.

CHAIR ROSENBERG: Oh, no. Yeah. I mean, doesn't -- isn't that exactly the opportunity for, in advance of the report to the court, when defense is

working with plaintiff, to discuss, not iron out the details necessarily that early on of the plaintiff fact sheet, but to present to the court we're thinking this is the kind of case that lends itself as far as an early exchange at least from the plaintiff of a plaintiff fact sheet. Of course, we need to go back and go to the drawing board and draft it and see if we can agree with the defense as to what goes in it and what amount of time is needed.

I mean, is there anything about (c)(4) that isn't conducive to exactly that process?

MS. HAZAM: So I wasn't -- to me, reading (c)(4) sounded like it was seeking to perhaps supplant what these practices often involve. And so, to answer your question, there's nothing strange about parties putting in one of their initial reports, you know, we anticipate that there will be PFSs in this case and we intend to engage in negotiations shortly. In some cases, maybe in that initial report, you can even get to the point of proposing a schedule or some level of additional detail. I think part of, for me, the confusion of (c)(4) is, is it proposing something earlier and different than that? It seems vague and potentially duplicative of those processes that I already see happening in my cases --

CHAIR ROSENBERG: But the note -- yeah, the notes make reference to some courts have utilized fact sheets or a census as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings.

I'm just wondering how can it be clearer that it's not the only way, but fact sheets are one of the ways in which this exchange of information can take place?

MS. HAZAM: I appreciate that and I do see that language. I think, for me, the confusing sentence is the whether early exchanges should occur may depend on a number of factors. It wasn't clear to me that early exchanges were essentially a reference to things like fact sheets and a census. I don't know if there's a way to make that clearer. I think that would be helpful in avoiding the ambiguity and potential duplication that I thought might be present here.

I would also just note that part of the concern about this is also that this report under these rules may be within the charge of that coordinating counsel who would be designated even before we have our initial case management conference. And so having -- the concerns I mentioned earlier are

kind of layered over this, if that --

CHAIR ROSENBERG: Yeah.

MS. HAZAM: -- if that is the way this would work.

CHAIR ROSENBERG: I guess I have one last question. We heard in one of the hearings that it was confusing to mention fact sheets and census in (c)(4) because that's usually done at discovery stage, and it was confusing to certain of the presenters as to what we meant by (c)(4) and how that is distinct from (c)(6). And do you have experience that it is more common that fact sheets are considered in the common parlance in the MDL world as discovery or as something different and perhaps earlier than discovery?

MS. HAZAM: They're absolutely considered discovery. I think that's true for both sides, and for the MDL judges I practice before, they are part and parcel of discovery. Discovery needs to be open for this to be happening and it needs to contemplate it being two ways. So, if you're doing fact sheets, then you would anticipate there be a defense fact sheet and other forms of fact discovery that have gotten underway. That doesn't mean it isn't an early phase of --

CHAIR ROSENBERG: It's an early phase of

formal discovery, but it's not its own thing. So, really, you don't see it as (c)(4) was envisioned as an early exchange pre-discovery. You see it and your experience is that it is discovery. But, if it's a tiered or phased discovery, it would be on the earlier side of the formal discovery as we know it under the rules of procedure.

MS. HAZAM: Exactly. And I think that's why (c)(4) was confusing to me.

CHAIR ROSENBERG: I understand. Okay. I know Rick's patiently had his hand up.

PROFESSOR MARCUS: Well, I have a very focused question that is not about the sequencing discussion you mentioned with regard to coordinating counsel. I think you said that one of the roles of appointed leadership counsel may be sometimes to facilitate early discussion of settlement. Our proposal calls for an order appointing leadership counsel to address the role of leadership counsel in settlement activities. Some have said, oh, that shouldn't be there.

I'm wondering if you have a view on whether it's inappropriate or premature for the initial appointment of leadership counsel to include some attention to prospective settlement activities.

MS. HAZAM: Thank you, Professor Marcus. I don't think it's inappropriate. I do have qualms about that being done by designated coordinating counsel put in place prior to an initial --

PROFESSOR MARCUS: Yeah. I'm trying to skip that. Skip that.

MS. HAZAM: Right. I want to make sure we're on the same page. Thank you.

When it comes to permanent -- I'll put it in quotes -- "permanent leadership" for the case, which I would also envision being put into place relatively early on, just not prior to this initial conference, I don't have qualms about it being part of their portfolio to have discussions about how early resolution could be facilitated.

MDL judges increasingly these days also appoint settlement masters, mediators, they're called various things, almost from the get-go, so that would be consistent with that practice also.

CHAIR ROSENBERG: I have one last question. So you want coordinating counsel out and you said, in your experience at least in this current case you're in, that the very first conference is really to set up leadership.

Have you ever had an experience in an MDL

where something other than appointment of leadership occurred at the very first conference? In other words, is it viable in your experience to actually have an initial conference and talk substance of some sort to get organized? I guess to start organizing the MDL along the lines of the checkpoints that are in subsection (c), in other words, talking about them, some can maybe be addressed in greater details than others before leadership has been appointed.

MS. HAZAM: It's a tough question. I think it's possible to start having conversations since I've seen judges do that artfully where they know they aren't necessarily talking to people on the plaintiffs' side who have authority, but they at least start putting certain things on the table. It's often effective as something that's judge-initiated. If the judge is communicating to the parties, these are some things that I would like to see, these are some questions I have, to me, that's not inappropriate.

But I think you do need on the plaintiff side, particularly in some of these larger MDLs where you will otherwise have many, many stakeholders and potential talking heads, to have leadership in place pretty quickly in order to really take positions, have the authority to do so.

So an initial conversation, for example, in my current MDL, we did have a very initial conversation about things like should we have phasing in the case given these defenses that were in the nature of claimed immunities, right, should we have a phasing where those motions are heard before discovery opens and before other matters are heard.

But it was done in a way that I think reflected the fact that we didn't have leadership appointed and then it was done in a much more fulsome way --

CHAIR ROSENBERG: Right. So --

MS. HAZAM: -- where people take positions.

CHAIR ROSENBERG: Okay. So you had that in an initial conference before leadership was appointed. You were actually discussing phasing of discovery and certain kind of motion practice because there were enough people who are organized enough, who at least knew enough at that early stage to raise that with the court and/or the court knew enough to ask those questions. Is that --

MS. HAZAM: The court knew enough to ask about it.

CHAIR ROSENBERG: To ask those questions.

MS. HAZAM: And we were organized enough

that it wasn't chaos in trying to respond to them, but we were careful, as was the court, to not take actual positions, and it was really phasing of motion practice to be clear.

CHAIR ROSENBERG: So, if 16.1 was understood as not taking positions, the attorneys aren't necessarily taking positions. They are raising issues. They are educating the judge through that report. And, therefore, the judge's order would reflect that, that whatever that order looks like it would be as committed or not committed to issues or positions as the input from the attorneys, one of those issues being, what does leadership look like? Is this a case that lends itself to leadership? What do you all think? Slates, interviews, what kinds of cases so that if one were to consider the judge appointing leadership, do you need personal injury leaders? If this is class action, should you have some representatives?

I mean, if 16.1 was looked upon in that light, not committing to positions but educating, does that change anything? Is it not understood that way? Is that why there is a fear that there is so much on the plate so early that there is this -- I think people have used the word "binding" and, you know,

things would be set in stone so early that couldn't be changed or won't be changed or otherwise, you know, whatever some of the other descriptions have been?

MS. HAZAM: So I am certainly not in the business of telling a judge who wants to discuss issues right off the bat that they shouldn't be discussed, so I don't have objections to doing that.

I think that some of these matters could certainly be discussed in the absence of a coordinating counsel, which I think builds in a tone of you are taking positions in something more authoritative. So I think some of these things could be part of a discussion. I think that the inevitable thing that happens is, if you don't have leadership in place, it is very preliminary and you have to come back to it right away, but that may not be a bad thing. At least there's an early, you know, surfacing of perhaps what some of the issues may be. It may be a courtroom where you've got different plaintiffs saying different things because you can't and don't have, I think, a well vetted leadership at that point.

Just as a matter of interest, what happened at our first hearing in the social media MDL is we spent the first hour and a half doing our leadership positions. Our applications, of course, had already

been in. She then appointed us and it was the second half of the hearing where we had the initial discussions on those topics. So we actually had essentially been appointed even though it happened a few minutes before.

CHAIR ROSENBERG: Understood. Okay. With that, any further comments or questions?

Okay. Well, Ms. Hazam, thank you so much for being our last witness and being patient with a lot of questions, so we really -- and also straddling this with your court obligations, so we appreciate it very much.

MS. HAZAM: No problem. Thank you.

CHAIR ROSENBERG: Okay. All right. Ladies and gentlemen, I think that concludes our day at 5:00 and our recording is showing that at least this has been recorded for a little over eight hours, so it has, indeed, been a long day. I want to thank all of the Committee members and members of the staff at the Administrative Office of the Courts, of course, the participants. It takes a lot of effort and energy and attention and focus and, quite frankly, concern that this process is done correctly, thoroughly, and we could not do it without everybody collectively.

So, on behalf of all of us, I want to thank

you. I'll remind everybody that the deadline for submission of any public comments, which, of course, we will continue to review, is February 16. At this point, there are no other public hearings scheduled, so this was the last one.

So, with nothing further, we will conclude the hearing for today. Thank you all so much.

(Whereupon, at 5:00 p.m., the hearing in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

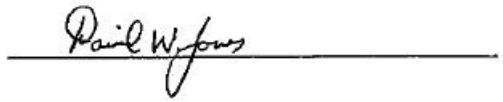
CASE TITLE: Hearing of the Advisory Committee on Civil Rules

HEARING DATE: February 6, 2024

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: February 21, 2024



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