RABIEJ LITIGATION

LAW CENTER

TRANSMITTAL TO THE ADVISORY COMMITTEE ON CIVIL RULES
PROPOSED REVISION OF NEW
RULE 16.1. MULTIDISTRICT LITIGATION MANAGEMENT

Submitted by the Rabiej Litigation Law Center with Input from
Plaintiff and Defense Lawyers and Judges
September 19, 2022

The independent, nonpartisan, and nonprofit § 501(c)(3) Rabiej Litigation Law Center is pleased to submit with input from lawyers and judges suggested edits to the Sketch of Rule 16.1. In particular, Don Downing, Gray Ritter Graham, is singled out for his critical insights and major contributions, which substantially improved the submissions.

Recent Developments Call for Immediate Action

The Advisory Committee on Civil Rules MDL Subcommittee is to be commended for its sketch of a new MDL Rule 16.1. It will remove some of the mystery shrouding mass-tort MDLs and help reduce inefficiencies and the growing length of MDLs.[1]

Courts have long recognized the need for special procedures in litigation involving multiple tort claims.[2] In 1983, Rule 16(c)(2)(L) was added to authorize a court to "adopt [] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." The provision was added to address among other complex litigation, mass-tort MDLs centralized under 28 U.S.C. § 1407. At that time, there was a total of 2,731 actions pending in all MDLs.

Then and now, there is a consensus that "flexibility and experience are the keys to efficient management of complex cases," so that no "particular techniques" nor rule requirements have been proposed.[3] But although little guidance on the Rule

[1] Many lawyers and all law-school students -- the next generation of MDL practitioners – have little understanding about how a mass-tort MDL is managed.
[2] MANUAL FOR COMPLEX LITIGATION, p. 308 (Third Edition 1995).
[3] Rule 16(c), 1983 Committee Note.

16(c)(2)(L) special procedures, other than a cross reference in the Committee Note to the MANUAL FOR COMPLEX LITIGATION, may have been reasonable in 1983, it no longer is adequate. The number of actions pending in all MDLs has risen to 426,495, and the "magnitude of new developments and the variety of experiences" since 1983 warrant the addition of a new rule singling out mass-tort MDLs, which would provide official guidance directly instead of a cross reference to an outside authority.[4]

The need for greater official guidance on the special procedures is now more acute to reduce disposition times. Mass-tort MDLs currently are taking longer to terminate, from a previous range of four-to-six years to six-to-eight and more years.[5]

MDL courts have traditionally held pretrial conferences to facilitate consultation between the parties and the court on types of special procedures that should be used in the litigation. Promulgating a federal rule that highlights this consultation will enhance the efficiency and fairness of the MDL process, which will help reduce disposition times.[6] It will also better inform the parties' decision making regarding alternative dispute resolution procedures, including bankruptcy. "Although most defendants prefer to avoid bankruptcy, the bankruptcy process appears to be used with increasing frequency to achieve and implement settlement in mass tort litigation."[7]

Rule 16.1 Should Mirror Existing Practices and Procedures Followed in Mass-Tort MDLs That Have Proven Effective

"Federal Rule of Civil Procedure 16 authorizes the court to hold pretrial conferences in civil cases…. The initial conference launches the process of managing the litigation…. The conference is not a perfunctory exercise, and its success depends on

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[4] See Fed. R. Civ. P. 23.1 (Derivative Actions), 23.2 (Actions Relating to Unincorporated Associations), and 71.1 (Condemning Real or Personal Property), as well as the Admiralty Rules for examples of stand-alone procedural rules for specific categories of actions.

[5] The median time from filing to disposition of civil actions terminated for the 12-month period ending March 31, 2022, was 29.8 months for actions going to trial and 18.7 months for actions during or after pretrial activity. The median disposition time for all civil actions terminated at any time was 9.2 months. Fifteen of the 43 mass-tort MDLs, which had at one time 1,000 or more actions, have at least 10% of their respective total number of actions pending after seven years. *See* data tables compiled by the Rabiej Litigation Law Center at <https://rabiejcenter.org/wp-content/uploads/2022/08/Duration-Combined-Tables.docx.pdf>. Like the universally decried asbestos-MDL "blackhole" of the 1990's, today's mass-tort MDLs are in danger of returning to the same state.

[6] Promulgation of the rule will promote "simplicity of procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay" consistent with the charge in 28 U.S.C. § 331.

[7] MCL, page 331 (Third Edition 1995). The filing of the bankruptcy petition in the *3M Earplug* MDL along with the two-step bankruptcy filing in the *Talcum* MDL may portend a resurgence in bankruptcy as a viable means of resolution in lieu of mass-tort MDL litigation.

establishing effective communication and coordination among counsel and between counsel and the court."[8]

The purpose for new Rule 16.1 is to provide an agenda of topics for the initial conference and an opportunity for parties to comment, which will set the stage for the ongoing MDL management process.[9] Such a rule would be consistent with the well-established practice of holding an initial conference for bench-bar collaboration in developing case-management procedures in mass-tort MDLs. The collaboration ensures that potential consequences of proposed practices and procedures are considered, including their burden and expense and the possibility of inadvertently favoring one side. Courts can continue their practice of issuing some pretrial orders before the initial conference, but Rule 16.1 will give the parties an opportunity to provide feedback and request modifications regarding them as well as suggest new procedures at the initial conference.

Holding an Initial Conference is a Well-Established Practice in Mass-Tort MDLs

The pretrial orders in 11 arbitrarily selected mass-tort MDLs (out of a total of 43) contain identical provisions, which schedule an initial case-management conference, typically within 40 days of the JPML transfer order.[10] These orders direct the parties to be prepared at the conference to discuss an agenda addressing specific topics under sections 22.6, 22.61, 22.62, and 22.63 of the 2004 *Manual for Complex Litigation* (*MCL*). These include the types of topics that Rule 16(c)(2)(L) envisioned as special procedures for managing difficult cases.[11] Following the initial

[8] MCL, § 11.21, page 36 (Fourth Edition 2004); "Every mass-tort MDL court "must promptly develop case management plans and orders, updating and modifying them as the litigation unfolds….The [pretrial] order should also take into account the proposals of counsel and encourage continuing collaboration among the counsel and the parties in the cases pending in different courts" at page 402.

[9] "The initial conference generally provides the first opportunity to meet counsel, hear their views of the factual and legal issues, and begin to structure the litigation and establish a management plan." MCL, § 11.21, page 36 (Fourth Edition 2004).

[10] *Vioxx*, MDL No. 1657; *Avandia*, MDL No. 1871; *Zoloft*, MDL No. 2342; *Syngenta*, MDL No. 2591 (referring other sections of the MCL); *Xarelto*, MDL No. 2592*; Proton Pump*, MDL No. 2789; *Zantac*, MDL No. 2924; *Elmiron*, MDL No. 2973; *Paraquat*, MDL No. 3004; *Tasignia*, MDL No. 3006; and *Taxotere*, MDL No. 3023.

[11] The original MANUAL FOR COMPLEX LITIGATION (1969) included a section providing "extensive guidance" (referred to in the 1983 Committee Note to Rule 16(c)(2)(L)) on special procedures to be considered at an initial conference in all complex litigation (§ 21.2 in the Third Edition (1995) and §11.2 in the Fourth Edition (2004)). The Third Edition (1995) added a new § 33.2 (27 pages) specifically addressing mass torts, which described an extensive list of topics that was discussed at the initial conference in the *Breast Silicone Gel* MDL, No. 926 (1992). The *MCL* Fourth Edition expanded the mass-tort sections to 128 pages, but in so doing, the Fourth Edition substantially truncated and renumbered the section dealing with agenda topics for the initial conference (currently § 22.6). The pretrial orders in most mass-tort MDLs from at least 2002 have used the same language scheduling an initial conference at which the parties are to address an agenda of topics based on sections in the *MCL*. Pretrial orders in mass-tort MDLs before 2005 referred to agenda topics described in § 21.2 of the Third Edition, which addressed all complex litigation. *See*, e.g., *Baycol* MDL No. 1431 (2002); *see also In Re Propulsid* MDL No. 1355 (2000). After 2004, mass-

conference, mass-tort MDL courts have developed management plans and issued pretrial and case-management orders, which address these topics, prioritizing, updating, and modifying them as the litigation progresses.[12]

Understandable concerns have been expressed, including by several JPML members, that the promulgation of any federal rule will adversely straitjacket a transferee judge. But Rule 16.1 bypasses these concerns. Mass-tort MDL courts have required lawyers to address the *MCL* topics for the court's consideration at an initial conference for decades. Far from straitjacketing a judge, this universal practice provides maximum flexibility and has not infringed the judges' discretion.

Center Suggests Adjustments to Conform with Mass-Tort MDL Courts' Practices

The Subcommittee's versions of Rule 16.1 stray from the universal practices and the pretrial orders of mass-tort MDLs and imply a one-size-fits-all solution, which will prove impractical in most MDLs. At the same time, the Subcommittee's versions capture some, though not most, of the *MCL* initial conference's agenda topics, creating possible confusion as to which topics should be considered at the initial conference.

Most mass-tort MDL courts want the input of leadership counsel before making case-management decisions because leadership is charged with implementing them, which likely will impose heavy burdens and expense on them. The median time for the appointment of leadership among the 11 mass-tort MDLs is 71 days. The Subcommittee's Rule 16.1(c) poses questions and seeks recommendations on specific procedures that cannot be meaningfully answered as a practical matter until leadership has been appointed, typically 30-60 days after the initial conference in a

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tort MDL pretrial orders began referring to agenda topics described in § 26.2 in the Fourth Edition, which addressed mass torts. The pretrial order in *Syngenta* (MDL No. 2591) is an exception. It cites the § 11.2 section, which applies to all complex litigation, instead of § 22.6, which applies to mass-torts. The *Syngenta* exception raises the question whether the appropriate *MCL* sections describing the initial conference agenda topics should be those sections applying to all complex litigation (§11.2 Fourth Edition) or to mass torts (§ 26.2 Fourth Edition) or to some hybrid alternative. At the time that the mass-tort MDL pretrial orders first began to switch their references from the *MCL* general complex litigation sections to the mass-tort sections (*see Vioxx* MDL pretrial order MDL No. 1657 (2005)), the bench and bar was just becoming aware of the Fourth Edition. There may have been confusion with those pretrial mass-tort MDL orders, which may have based their agenda of topics on an assumption that the extensive list of agenda topics described in the *Breast Silicone Gel MDL* had been retained, and not truncated, in the revised Fourth Edition mass-tort sections. *See also Phillips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Prod. Liab*. MDL No. 3014 (2021), which listed the specific topics to be addressed at the initial conference without reference to the sections in the Manual for Complex Litigation.

[12] Many case-management decisions are finalized only after the leadership counsel has been appointed, but many MDL courts have nevertheless sought input from counsel early in the litigation to begin planning management.

mass-tort MDL.[13] Accordingly, some of the topics raised at the initial conference might be considered for preliminary planning purposes, but any final decisions would need to wait until the appointment of leadership. Conversely, courts have issued orders addressing some of these topics before the initial conference and appointment of leadership. In either event, the parties' feedback on previously issued orders and input on procedures still under consideration will enhance the process.

The Subcommittee's versions also require the adoption of a single method of advising the court of the parties' views on these topics. Imposing such a requirement in all mass-tort MDLs may be unproductive for the reasons espoused by those objecting to a one-size-fits-all federal rule. Lastly, the Subcommittee's versions will cause confusion in non-mass-tort MDLs. Although an initial conference makes sense for all 186 pending MDLs, requiring all MDL courts to consider practices, which primarily target the management of larger MDLs involving scores of law firms, makes much less or no sense for the 143 MDLs that have fewer case-management challenges.[14] Only a few law firms may be involved in these MDLs, and there is no need to require them to report on topics that are infrequently relevant to them.

Center's Suggestions on the Approach Taken in Rule 16.1

The Center's suggestions strongly support the need for a Rule 16.1. The Center's suggestions build on the Advisory Committee's MDL Subcommittee's sketch with four main adjustments in approach, including:

(1) although an initial conference should be required in all MDLs, the provision directing the parties and court to consider the *MCL* topics described in subdivision (c) should apply only to mass-tort MDLs (arbitrarily set as 1,000 or more actions), while providing an option to the other MDL courts to consider them;

(2) no single method for presenting the lawyers' views on practices and procedures to the judge should be required nor should the list of topics for consideration at the initial conference be narrowed to a select few;

(3) instead of posing questions and seeking recommendations about specific practices and procedures in subdivision (c), the provision should only ask the

[13] The median time when an initial conference was held in these 11 mass-tort MDLs was 41 days after the JPML order. In several of these mass-tort MDLs, the first pretrial order scheduling the initial conference was issued after 1, 3, and 5 days of the JPML order. The initial conference was held 16 days after the JPML order in one and 23 and 30 days after the order in two other mass-tort MDLs.

[14] *MCL* Fourth Edition highlights the distinction -- §11.2 addresses procedures for all complex litigation, while § 26.2 addresses special procedures for mass-torts.

lawyers to discuss and share with the court their views on the topics to help the judge in the ongoing case-management process; and

(4) the subdivision (c) individual topics discussed in the four pertinent MCL sections, which are adopted in virtually all mass-tort MDLs as the agenda for the initial conference, should be addressed either in the rule or in the Committee Note as well as adding several important new topics updating the 1995 and 2004 MCL topics.[15]

Case-Management Challenges Primarily Affecting Mass-Tort MDLs

Every mass-tort MDL is different, and the Center's suggestions follow the Subcommittee's lead in rejecting a one-size-fits-all model that imposes mandatory requirements. The suggested revisions are intended to reflect existing practices of transferee judges in mass-tort MDLs, take no position on the merits of any specific practice or procedure, and provide maximum flexibility to the MDL court.

The case-management challenges presented in the 121 MDLs with 100 or fewer actions are much different from MDLs with 1,000 or more actions. Of the 186 current MDLs, 43 MDLs consist or had at one time consisted of more than 1,000 actions, which have accounted for 98.64% of all actions centralized as of July 15, 2022. These MDLs pose unique case-management challenges because they involve large numbers of law firms and parties, every one of which is entitled to due-process protections afforded to a party in the trial of a single action. These are the MDLs, which raise the unique case-management challenges that require rule attention.

Subdivision (a) of the Center's revised Rule 16.1 is consistent with the Subcommittee's general approach and applies to all MDLs. Under the subdivision, a judge in an MDL may schedule an initial conference to "facilitate the expeditious, economical, and just resolution of the litigation."[16] At the conference, the parties and court can discuss, among other topics, the special procedures that will make up the management plan.

Subdivisions (b) and (c) are intended to be used for the large mass-tort MDLs of 1,000 or more actions, while still leaving discretion for judges in the other MDLs, which consist of the remaining 1.36% of actions, to apply them in part or whole depending on the circumstances.[17] This framework answers the largely academic

[15] This outline of common mass-tort MDL practices and procedures will prepare the novice and remind the experienced, better informing them that will lead to more efficient and fairer litigation.
[16] *MCL* § 22.61, Initial Orders, refers to a composite of pretrial orders in MDLs set out in a sample order at § 40.52, which includes the task of being "prepared at the [initial] conference to suggest procedures to facilitate the expeditious, economical, and just resolution of this litigation," language that is used verbatim regularly in today's mass-tort MDL initial orders.
[17] The Subcommittee's version of Rule 16.1 would apply to all MDLs, creating a tail wagging the dog situation. Presumably, the approach is taken because of a fear that precisely distinguishing large

debate, which is skeptical about any attempt to project mass-tort MDLs of 1,000 or more actions at the outset. Subdivisions (b) and (c) are discretionary and can be applied in any MDL, even those falling below 1,000 actions.[18]

Choice of Reporting Method Should Be Reserved to the MDL Court

Unlike the Subcommittee's sketch, which designates coordinating counsel to present comments and suggestions from parties on selected case-management practices and procedures that the judge often will address early in the litigation, subdivision (b) leaves that decision to the judge. Discussion of available optional methods, which have been used by various MDL courts, is contained in the Committee Note. Each method has advantages and drawbacks. Each has its proponents and detractors. Reserving this decision for the MDL court, preserves the Subcommittee's overall preference against a one-size-fits-all solution.

Although subdivision (b) takes no position on which method is best, the Committee Note addresses concerns with each of them, including the strong reluctance of many plaintiff lawyers to the appointment of coordinating or interim counsel, which is seen as providing an advantage to an individual lawyer who is also vying for a leadership appointment, notwithstanding the disclaimer in the sketch of Rule 16.1 that no advantage is intended.[19]

Identifying the *MCL* Topics for Discussion at the Initial Conference

The purpose of Rule 16.1(c) is to describe the agenda of topics to be considered at the initial conference. The mass-tort MDL pretrial orders cite to *MCL* sections for the agenda topics. The Center's draft describes these topics in the rule text, which strengthens the likelihood that lawyers will pay attention to them but concededly adds significant wording.[20] Alternatively, the rule text can refer to general categories and explain specific topics in the Committee Note. There is a traditional inclination to prefer a shorter rule to minimize the unforeseen chance that some word may later be misinterpreted and result in unnecessary satellite litigation. But

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mass-tort MDLs from other MDLs would be futile. But as discussed *supra* and in footnote 9, these fears are unwarranted.

[18] The type and number of law firms involved at the outset and the insights of experienced lawyers and defendant(s) can provide reliable projections of MDLs likely to exceed 1,000 actions. Most of these large mass-tort MDLs involve products-liability claims (40 of these 43 mass-tort MDLs are products-liability MDLs) further narrowing the field and simplifying the definitional issue. Errors in projecting the future size of a mass-tort MDL will have little repercussion because subdivisions (b) and (c) can be adopted in any size MDL and no harm would befall the parties if, for example, only 500 or 600 actions were ultimately filed.

[19] *See* pretrial orders in *Paraquat*, MDL No. 3004, which include the later appointment of "interim counsel" as lead counsel.

[20] The Center's draft does not limit the topics to be considered at the initial conference to those in *MCL* § 22.6, which are cited in the mass-tort MDL pretrial orders. A court may also consider the more extensive and detailed list of topics in *MCL* § 11.2, which address all complex litigation.

because Rule 16.1 is mostly discretionary, the chances that any wording may cause untoward consequences is small.

Nonetheless, the Center is prepared to provide an alternative abbreviated version, which refers only to the general categories of practices and procedures to be addressed at the initial conference.

The more comprehensive version, which the Center recommends, specifies in the rule's text many of the individual topics covered by the pertinent four *MCL* sections, which are referred to in every first pretrial and CMO order of virtually every large mass-tort MDL. It also updates the topics as well to include census and registry orders, a shared on-line exchange information platform, lien-reconciliation practices, emphasis on diversity in selection of leadership, and consideration of the impact of privacy laws on discovery disclosures. Of course, a judge can consider topics not mentioned in the rule, including most importantly topics described in *MCL* § 11.2 as well as the general topics in Rule 16(a) and (b).

The attached rule and committee note include endnotes to the *MCL* sections addressing the specific practices and procedures.

Conclusions

Revised Rule 16.1 is consistent with the spirit of the 1983 amendment to Rule 16(c)(2)(L). It will help transferee judges in their ongoing case-management planning and place them in a better-informed position, understanding the potential burdens and expense and the possibility that a proposed practice and procedure might favor one side. Better informed decisions will lead to more effective and fairer procedures, reducing disposition times and strengthening the MDL process. The time is right for the Federal Rules of Civil Procedure to address actions that represent more than 65% of all civil actions pending in federal courts.[21]

[21] For the 12-month period ending March 31, 2022, there was a total of 636,264 civil actions pending in federal courts. As of July 15, 2022, there were 426,495 actions pending in MDLs or 67% of all pending actions, including 290,409 actions pending in the *3M Earplug* MDL. (There is a three-month disparity between the statistics, which are kept by the AOUSC and JPML.) These statistics show the impact of MDL filings in the federal courts, but they should not be confused with the annual docket of new-case filings. In 2022, there were 309,102 new actions filed. Filings in MDLs have represented 15%-25% of new annual filings, much lower than 67%, but still a very significant percentage of the federal civil-case docket. *See also*, John Rabiej, *As I See It*, 100 JUDICATURE No. 3 at 1 (Autumn 2017), urging the promulgation of a federal MDL rule.

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PROPOSED REVISION OF NEW
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Rule 16.1. Multidistrict Litigation Management

(a) INITIAL MDL MANAGEMENT CONFERENCE. As soon as practicable after the Judicial Panel on Multidistrict Litigation centralizes and assigns actions to a transferee judge under 28 U.S.C. § 1407, that judge should schedule an initial conference to address topics that will facilitate the expeditious, economical, and just resolution of the litigation.

(b) PARTIES' INPUT ADDRESSING COMMON ISSUES IN LARGE MASS-TORT MDLS. In an MDL that is likely to involve multiple law firms and large numbers of parties, the court should request the parties to address a range of topics at the initial conference, including issues under Rule 16.1(c).[1]

(C) COMMON ISSUES IN LARGE MASS-TORT MDLS. The following topics commonly arise in mass-tort MDLs with a large number of law firms and parties and often require the court's early attention:

(1) information governance and regular communications with all parties,[2] including developing a court website, maintaining and updating a service list,[3] and a shared online central-exchange platform;[4]

(2) leadership-appointment process,[5] including developing a structure,[6] establishing qualifications,[7] setting the number of members, choosing a selection method, and specifying responsibilities;

(3) common-benefit fund, including creating a fund, developing a method to determine the amount and distribution of the fund, and delineating compensable common-benefit tasks;

(4) filings and general pleading matters,[8] including developing a set of master pleadings,[9] fact sheets (which may include documentation of exposure or product

use and injury in personal-injury actions), considering census or registry orders and an inactive docket,[10] and providing for *Lexicon* waivers;

(5) discovery plan,[11] including confidentiality issues,[12] evidence preservation,[13] ESI procedures,[14] efficient and prompt discovery-dispute resolution methods, deposition guidelines, and the impact of privacy laws including international data-protection laws; and

(6) case-management procedures, including scheduling regular status conferences,[15] maintaining and updating corporate-disclosure statements,[16] categorizing the types of remand issues that are expected to be filed, designating a magistrate judge or appointing a special master or mediator to assist on specific tasks or on general management matters,[17] developing a method to select a pool of bellwether cases, setting deadlines for submission of new filings of actions (tag-along cases),[18] establishing realistic trial dates and reasonable deadlines for fact and expert discovery,[19] outlining Evidence Rule 702 motion practice and pretrial filings,[20] developing a process to facilitate state-federal coordination,[21] planning the selection of a claims administrator early in the litigation to manage information necessary to process claims as well as to facilitate and expedite later lien-reconciliation claims, and developing a trial package for transferor courts in the event of a remand.

COMMITTEE NOTE

Subdivision (a). The purpose of new Rule 16.1 is to provide lawyers an opportunity to discuss and share with the court their views on the topics the judge often must address early in MDL proceedings. The rule is derived from the initial pretrial orders issued in large mass-tort MDLs, which schedule an initial conference to address topics under Rule 16(a)-(c) as well as special procedures authorized under Rule 16(c)(2)(L). Under that rule, a court may "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."

Virtually all the initial orders in the largest mass-tort MDLs contain identical provisions, which schedule an initial case-management conference soon after the Judicial Panel on Multidistrict Litigation (JPML) transfers the actions under 28 U.S.C. § 1407. The orders of the transferee judge direct the parties to be prepared at the conference to discuss an agenda addressing specific topics under sections 22.6, 22.61, 22.62, and 22.63 of the Manual for Complex Litigation (2004 ed.) (*MCL*). These are the types of topics that Rule 16(c)(2)(L) envisioned as special procedures for managing difficult cases. MDL courts have consistently followed this practice for decades in mass-tort MDLs. They typically develop case-management plans, which address these topics, prioritizing, updating, and modifying them as the litigation progresses.

Under subdivision (a), a judge who has been assigned actions by the JPML may schedule an initial conference to consider management practices and procedures to facilitate the expeditious, economical, and just resolution of the litigation. The conference should be held within 30 days of the JPML order centralizing the actions.

Subdivision (b). Subdivision (b) applies to a mass-tort MDL, which likely will consist of more than 1,000 actions eventually. The case-management challenges presented in the 121 MDLs with 100 or fewer actions are much different from those in the 43 MDLs with 1,000 or more actions pending as of July 2022. These large mass-tort MDLs of 1,000 or more actions represent more than 98% of actions pending in all MDLs. These MDLs pose unique case-management challenges because they involve large numbers of law firms and parties, every one of which is entitled to due-process protections afforded in the trial of a single action. Although the eventual number of law firms and plaintiff parties are not known at the outset of an MDL, the likelihood that it will grow to hundreds of actions is usually apparent at the outset. Such large MDLs most often are products-liability actions, and the exposure or use of the product is wide. Subdivisions (b) and (c) are directed at these large MDLs, but they may be useful and applied in part or whole to other MDLs depending on the circumstances.

Under subdivision (b) a court has discretion to select optional methods available to manage the submission of comments and suggestions from the parties on case-management practices and procedures described in subdivision (c).

One option reflects the practice of most MDL courts, which directs the parties to seek consensus on their own and report at the initial conference. The practice has proven effective but concerns have been raised that not all lawyers in the litigation have had an opportunity to have their views considered. Requiring parties at the outset of the litigation to develop a consensus without providing further guidance can confer lawyers well experienced in mass-tort MDLs an advantage by taking early control of the course of the MDL, which can influence the court's leadership appointments before the court has had an opportunity to fully vet all candidates for leadership.

Under a second option, comments and suggestions about case-management practices and procedures are submitted to the court as part of the leadership-appointment process. MDL courts often want the input of the leadership before deciding on case-management procedures because the leadership is charged with implementing them. This option is most effective when the leadership appointments can be made before or at the same time as the initial conference.

Under a third option, the court may designate a specific judicial officer or individual lawyer to consult with the parties on their comments and suggestions about case-management procedures and report to the court. Individual lawyers have the best knowledge of the MDL and may have a good sense of what the MDL will entail, and which practices and procedures likely will be needed. But designating a magistrate judge or a special master for this task would avoid the appearance that would otherwise arise of providing an advantage to an individual lawyer who is also vying for a leadership appointment.

Under a fourth option, a court may request the parties to present comments and suggestions at the initial conference using a combination of methods, designating methods to address all or specific subject-matter topics under subdivision (c).

Subdivision (c). Subdivision (c) sets out six categories of practices and procedures that typically are adopted in mass-tort MDLs, which the court may address at the initial conference to begin its case-management planning. The parties' comments and suggestions are particularly relevant because multiple variations of practices and procedures are typically under consideration, many of which may impose heavy burdens and expense on

them to implement as well as inadvertently favoring one side. The categories are based on topics described in the 2004 *Manual for Complex Litigation* (4th Ed.) at § 22.6, § 22.61, §22.62, and § 22.63, which are cited approvingly and regularly in mass-tort MDL initial pretrial orders. The court may also consider other topics, including those described in § 11.21, § 11.211, §11.212, § 11.213, and § 11.214 of the *Manual* that address topics at initial conferences for all complex litigation as well as the general topics in Rule 16(a), (b), and (c).

Subdivision (c)(1) addresses information governance and regular communications with all parties in the MDL. Creating a homepage with links to all pretrial and case-management orders on the court's website is a common practice. Some courts link to PACER, which may unnecessarily burden some parties and the public. While other courts include a short descriptive label for each pretrial and case-management order on the website to facilitate easier recognition and access.

Establishing an electronic system for regular communications among the parties is critical. Such a process can communicate key events, deadlines, and other important information to all parties. An MDL court often appoints liaison counsel to oversee the communications. Electronic service of all papers requires an up-to-date service list. Again, the liaison counsel is often delegated the task of maintaining a current list.

Lastly, the parties and court need information about the individual actions as soon as practicable to assess the number and location of the plaintiffs involved, the levels of injury, the types of exposure, and other factors. Dynamic, shared on-line central-exchange platforms have been used in recent mass-tort MDLs, which store filings from all parties, including discovery, court orders, and other information in the litigation, so that every party has quick access to the litigation materials. Such platforms can facilitate the exchange, storage, access, search, and the analysis of voluminous data using artificial-intelligence techniques. The platforms can provide confidential access to designated parties or sides, plaintiff or defense.

Subdivision (c)(2) addresses the leadership-appointment process, which should be as transparent as possible. The structure of leadership varies significantly among mass-tort MDLs, depending on the circumstances. In addition to leadership counsel and a plaintiff steering or executive committee, courts have designated multiple committees to address specific topics, including attorney's fees and discovery. Courts have adopted an individual-application, a slate, and a hybrid-selection method to consider appointments to leadership. Under the slate-selection method, the lawyers propose a team, which can work together harmoniously. Under the individual-application selection method, the court instructs lawyers seeking leadership to complete a questionnaire regarding their qualifications and considers their applications separately. Under the hybrid-selection method, the court considers both types of applications submitted by slates and individuals.

The court must determine the number of lead counsel and members of the steering committee. Although the numbers vary, typically two or three lead counsel and 12-20 steering committee members are appointed. The court should also advise the parties of the qualifications for a leadership position, which often include the following; (i) willingness and ability to commit to a time-consuming litigation; (ii) current court-appointed legal commitments; (iii) ability to work cooperatively with others; (iv) professional experience in this type of litigation; (v) particular knowledge and expertise that will advance the litigation; (vi) involvement in the litigation to date; (vii) qualities that make them uniquely

situated to serve in a leadership capacity in this MDL; and (viii) access to sufficient resources to advance the litigation in a timely manner. Leadership appointments should provide for a well-balanced, diverse, and qualified team.

Subdivision (c)(3) seeks the parties' input on setting aside a portion of the expected monetary proceeds from a potential settlement to establish a common benefit fund for the purpose of paying reasonable attorney's fees, costs, and expenses from that fund. Plaintiff parties are assessed a certain percentage of their possible future settlement amounts and the proceeds of the fund are distributed at the end of the litigation. The ultimate cost of common-benefit work is difficult to estimate at the outset of an MDL. Nonetheless, courts have set a fixed percentage of a possible settlement amount immediately, but other courts have been deferring the decision until the expenses are actually incurred, advising the parties periodically of the expected percentage and any adjustments. These court orders typically delineate the compensable responsibilities, determine the method of compensation, specify what timekeeping records to maintain, provide guidelines for allowable fees and expenses, and require counsel to periodically submit detailed reports of their work.

Subdivision (c)(4) addresses filing and general pleading matters. MDL courts typically direct the parties to agree on and prepare a master complaint and answer. Courts have been exploring ways to screen complaints efficiently and fairly at an early stage, which identify actions that are potential candidates for early disposition. Plaintiff and defendant fact sheets can provide information useful for case management, including the identities of parties and their particular claims. Plaintiff fact sheets often require product identification and may require minimum evidentiary documentation of exposure or product use and injury in personal-injury MDLs, e.g., evidence of a prescription or receipt of a product purchase and a medical diagnosis.

Some mass-tort MDL courts have issued a census or registry order, establishing an inactive or administrative docket to register potential claims and toll the running of statutes of limitation, while deferring their consideration until any injuries become manifest. These orders can provide useful information on the potential scope of the MDL, the number of filings, the number and variety of injuries claimed, plaintiff jurisdictions, and the number and variety of plaintiff law firms. But concerns are raised that they can attract the filing of claims that should not be filed. *Lexicon* waivers are necessary for the transferee judge to handle bellwether trials of actions filed in other districts.

Subdivision (c)(5) addresses discovery. At an early stage, the parties and court should collaboratively develop a discovery plan, which addresses evidence preservation and privilege and confidentiality matters, including issuing an order under Federal Rule of Evidence 502(d), as well as deposition guidance. ESI subject to discovery in mass-tort MDLs usually involves tremendous amounts of data. Linear review of all discoverable documents is rarely practical, and parties often use some form of technology-assisted review (TAR) to narrow the volume of documents that is subject to linear review. Managing the extent of consultation between the parties in applying TAR is often an important consideration.

Individual states and countries have enacted privacy and data-protection laws that impose obligations on litigants, which may limit disclosure of protected information in discovery. Violations can be subject to severe penalties and compliance may entail significant burdens and expense, which should be considered. Efficient dispute-resolution methods are

necessary to handle discovery disputes that are likely to arise and can inform decisions on limiting the overall expense of discovery proportional to the needs of the MDL.

Subdivision (c)(6) identifies specific case-management procedures. MDL courts typically hold regularly scheduled status conferences, which may be more frequent at the start of the MDL. Parties have provided input to the court on the frequency of such conferences as well as on the mode, whether in person or remote. At these conferences, courts have also sought the parties' input to establish realistic deadlines for expert and fact discovery and trial dates.

MDL courts often face motions in individual actions at the MDL's outset to remand based on the absence of federal subject-matter jurisdiction. Early identification of the specific grounds for remand can facilitate expedited consideration and resolution of actions raising similar remand issues.

MDL courts commonly designate a magistrate judge, a special master, or a mediator to handle and oversee specific tasks, including discovery and attorney's fee reports as well as general management and settlement-negotiation responsibilities as assigned by the transferee judge.

In accordance with Rule 16(b)(3)(A), a "scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." In one-off actions, the rule contemplates that "at some point both the parties and pleadings will be fixed." The filings of tag-along actions are common in mass-tort MDLs. Several courts have imposed deadlines on filings of new actions in their MDL.

Evidence Rule 702 motion practice is often key in these mass-tort MDLs. Courts have relied on the parties' input to manage the number of experts and their depositions and avoid duplication, facilitating an orderly process. MDL courts usually require that the parties provide and update corporate disclosure statements so that the judge can determine any potential conflict issues.

MDL courts have developed practices to identify potential conflicts and disagreements early on between non-leadership counsel and lead counsel. Procedures for counsel to report on the existence, status, and progress of related state-court actions can facilitate effective coordination between federal and state courts in an MDL. The court may consider appointing liaison counsel to coordinate the reports.

MDL courts have developed processes to select actions for bellwether trials, which can facilitate settlement negotiations. Various methods, as well as combinations of methods, have been used to select the best pool of actions for bellwether trials that would provide information to the parties useful in their settlement negotiations. Courts have randomly selected actions, considered lists of bellwether candidates proposed by the parties, and considered hybrid-selection methods. Whatever method the court selects, many MDL courts have also developed prophylactic measures to address expected plaintiff dismissals of bellwether candidates and defendant settlements of other bellwether candidates late in the process. In some MDLs, summary trials, mediation, and have been used for the same purposes.

Early attention to administering the claims process can significantly expedite claim payments at the end of the litigation, which can add 12-24 months delay before distribution to individual plaintiffs. Plaintiff leadership usually selects a claims administrator after

consulting with the court on their expected responsibilities, which can include record-keeping, distribution of settlement funds to eligible parties, lien reconciliation, and investment of escrow funds. Courts have often established a Qualified Settlement Fund to handle ongoing claims resolutions. They also have instituted early procedures contacting state authorities to minimize substantial delays in distributing settlement amounts to individual parties until their liens have been reconciled, particularly Medicare and Medicaid liens.

Courts have developed and provided remand packages to transferor courts, which summarize the key activities and rulings made in the MDL. Transferor courts often follow the rulings in the MDL, especially those dealing with general discovery issues, which streamlines the process.

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[1] MCL § 22.61.
[2] MCL § 22.635.
[3] MCL § 22.61.
[4] MCL § 11.21.
[5] MCL § 22.61; § 22.62; and § 11.211.
[6] MCL § 22.62.
[7] MCL § 22.62.
[8] Fed. R. Civ. P. 16(c)(2)(A).
[9] MCL § 22.61; § 22.632; and § 11.211.
[10] MCL § 22.633.
[11] Fed. R. Civ. P. 16(b)(3)(B)(ii) and (c)(2)(F).
[12] Fed. R. Civ. P. 16(b)(3)(B)(iv); and MCL § 11.21.
[13] Fed. R. Civ. P. 16(b)(3)(B)(iii); MCL § 22.61; and § 11.211.
[14] Fed. R. Civ. P. 16(b)(3)(B)(iii); MCL § 22.61; and § 11.211.
[15] Fed. R. Civ. P. 16(b)(3); and MCL § 11.212.
[16] MCL § 22.61; § 22.631; and § 11.211.
[17] Fed. R. Civ. P. 16(c)(2)(H); MCL § 22.61; and § 11.211.
[18] Fed. R. Civ. P. 16(b)(3)(A); MCL § 22.61; § 11.631; and § 11.211
[19] Fed. R. Civ. P. 16(b)(3)(A).
[20] Fed. R. Civ. P. 16(c)(2)(D).
[21] MCL § 22.61; and § 11.211.