

213 **8. Proposed New Rule 16.1 on MDL proceedings – recommendation to publish for**
214 **public comment**

215 The MDL Subcommittee was originally appointed in 2017. It has had three chairs (two of
216 whom went on to become Chairs of the Advisory Committee). It has now reached a consensus
217 on the appropriate way to address MDL proceedings in the Civil Rules – adoption of new Rule
218 16.1, addressed particularly to those proceedings.

219 Because the process of development involved consideration of a wide variety of issues
220 and took a long time, it seems useful to introduce the current proposal with some background on
221 the evolution of the Subcommittee’s work. The initial submissions to the Committee raised a
222 wide variety of issues. At the Committee’s April 2018 meeting, the MDL Subcommittee made its
223 first report to the full Committee, listing ten discussion issues:

- 224 (1) The scope of any rule;
- 225 (2) The handling of master complaints and answers;
- 226 (3) Use of plaintiff fact sheets or requiring particularized pleading or requiring immediate
227 submission of evidence by plaintiffs;
- 228 (4) Requiring each plaintiff to pay a full filing fee, with possible effect on Rule 20
229 joinder;
- 230 (5) Sequencing discovery;
- 231 (6) Requiring disclosure of third party litigation funding;
- 232 (7) Handling of bellwether trials, and requiring consent to holding such trials;
- 233 (8) Expanding interlocutory review of certain decisions in certain MDL proceedings;
- 234 (9) Coordinating MDL proceedings with parallel proceedings in state courts or other
235 federal courts; and
- 236 (10) Formation of leadership counsel for plaintiffs and common fund arrangements.

237 A great deal of effort was spent examining the proposal to require disclosure of third
238 party litigation funding. Eventually, the conclusion was that this topic, while perhaps very
239 important, was not particularly salient in MDL proceedings. So TPLF remains on the
240 Committee’s agenda, and disclosure of such arrangements has been endorsed in some bills
241 introduced in Congress, but it is no longer a feature of the MDL Subcommittee’s work.

242 Even more effort was spent examining the possibility of expanded interlocutory review.
243 As it developed, the proposal was to emulate Rule 23(f) on immediate review of class
244 certification decisions. Very helpful submissions favoring and opposing such a rule change were
245 submitted, and Subcommittee members participated in a large number of conferences and
246 meetings with bar groups about this possibility. Eventually the decision was made that there was

247 not such a need for expanded review in light of existing methods (including certification under
248 28 U.S.C. § 1292(b)), and that idea was put aside.

249 Attention focused, instead, on adding provisions specifically calibrated to MDL
250 proceedings to Rule 26(f) and Rule 16(b), which were included in the agenda book for the full
251 Committee’s March 2022 meeting. By the time that meeting occurred, however, further outreach
252 by the Subcommittee (including a conference involving transferee judges, plaintiff attorneys and
253 defense attorneys organized by the Emory University’s Institute for Complex Litigation and
254 Mass Claims) had pointed out some difficulties with relying on Rule 26(f) as a vehicle for
255 managing MDL proceedings. In particular:

256 (1) It might often happen that a Rule 26(f) conference had already occurred in some
257 actions before a Panel transfer order centralizing them in the transferee court, and perhaps
258 that a schedule for activity in those actions had already been adopted in the transferor
259 court. There would ordinarily be no occasion under Rule 26(f) for a second planning
260 conference or report to the court. And after transfer by the Panel, there might not be any
261 Rule 26(f) conferences in actions in which they had not already occurred before transfer.

262 (2) It increasingly seemed valuable to provide the transferee court in MDL proceedings
263 with the opportunity to appoint “coordinating counsel” to oversee the initial organization
264 of the proceedings and assist the court in making its initial management order to guide
265 the future course of the MDL proceedings.

266 These issues prompted the idea of a new Rule 16.1 to address MDL proceedings. Such a
267 rule could assist the transferee court in addressing a variety of matters that often proved
268 important in MDL proceedings. It could also provide a substitute for MDL proceedings for the
269 Rule 26(f) meeting that is to occur in ordinary litigation. Initial sketches of such a rule, including
270 alternative versions, were appended to the agenda book for the Standing Committee’s June 2022
271 meeting.

272 After that Standing Committee meeting, these Rule 16.1 sketches were the focus of
273 several further conferences. Both the American Association for Justice and the Lawyers for Civil
274 Justice arranged for representatives of the Subcommittee to participate in conferences with
275 members of their organizations about the Rule 16.1 ideas. Importantly, three judicial
276 representatives of the Subcommittee also attended the transferee judges conference, put on by the
277 Judicial Panel. At that conference there was a special session with the transferee judges to
278 receive feedback about the Rule 16.1 sketches, including the question which alternative approach
279 seemed most suitable.

280 With this extensive information base, the Subcommittee went to work refining the Rule
281 16.1 proposal. This work included multiple meetings via Zoom and many more exchanges of
282 email about evolving drafts. Eventually, the Subcommittee reached consensus on a proposal to
283 recommend for public comment, which is presented below.

284 **Rule 16.1. Multidistrict Litigation Management**

285 (a) **Initial MDL Management Conference.** After the Judicial Panel on Multidistrict
286 Litigation orders the transfer of actions to a transferee court, the transferee court
287 should schedule an initial management conference to develop a management plan
288 for orderly pretrial activity in the MDL proceedings.

289 (b) **Designation Of Coordinating Counsel For Initial MDL Management**
290 **Conference.** The transferee court may designate coordinating counsel to assist the
291 court with the initial management MDL conference under Rule 16.1(a) and to
292 work with plaintiffs or defendants to prepare for any conference and to prepare
293 any report ordered pursuant to Rule 16.1(c).

294 (c) **Preparation Of Report For Initial MDL Management Conference.** The
295 transferee court should order the parties to meet and confer to prepare and submit
296 a report to the court prior to the initial MDL management conference. The report
297 must address any matter designated by the court, which may include any matter
298 addressed in Rule 16.1(c)(1)-(12) or in Rule 16. The report may also address any
299 other matter the parties desire to bring to the court's attention.

300 (1) Whether leadership counsel should be appointed, and if appointed:

301 (A) The procedure for selecting leadership counsel, and whether the
302 appointment should be reviewed periodically during the MDL
303 proceedings;

304 (B) The structure of leadership counsel, including the responsibilities
305 and authority of leadership counsel in conducting pretrial
306 activities;

307 (C) The role of leadership counsel regarding any settlement activities;

308 (D) Proposed methods for leadership counsel to communicate with and
309 report regularly to the court and non-leadership counsel;

310 (E) Any limits on activity by non-leadership counsel; and

311 (F) Whether, and if so when, to establish a means for compensating
312 leadership counsel;

313 (2) Identification of any previously entered scheduling or other orders and
314 whether they should be vacated or modified;

315 (3) Identification of the principal factual and legal issues likely to be
316 presented in the MDL proceedings;

317 (4) How and when the parties will exchange information about the factual
318 bases for their claims and defenses;

- 319 (5) Whether consolidated pleadings should be prepared to account for
320 multiple actions filed in the MDL proceedings;
- 321 (6) A proposed plan for discovery, including methods to handle discovery
322 efficiently in the MDL proceedings;
- 323 (7) Any likely pretrial motions, and a plan for addressing them;
- 324 (8) A schedule for additional management conferences with the court;
- 325 (9) Whether the court should consider measures to facilitate settlement by the
326 parties of some or all actions before the court, including measures
327 identified in Rule 16(c)(2)(I);
- 328 (10) How to manage the filing of new actions in the MDL proceedings;
- 329 (11) Whether related actions have been filed or are anticipated to be filed in
330 other courts, and whether to consider possible methods for coordinating
331 with any related actions; and
- 332 (12) Whether matters should be referred to a magistrate judge or a master.
- 333 (d) **Initial MDL Management Order.** After the initial MDL management
334 conference under Rule 16.1(a), the court should enter an initial MDL management
335 order addressing the matters designated under Rule 16.1(c), and any other matters
336 in the court’s discretion. This order controls the course of the MDL proceedings
337 until the court modifies it.

338 DRAFT COMMITTEE NOTE

339 The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the
340 Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or
341 consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The
342 number of civil actions subject to transfer orders from the Panel has increased significantly since
343 the statute was enacted. In recent years, these actions have accounted for a substantial portion of
344 the federal civil docket. There previously was no reference to multidistrict litigation in the Civil
345 Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial
346 management of MDL proceedings.

347 Not all MDL proceedings present the type of management challenges this rule addresses.
348 On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer
349 order may present similar management challenges. For example, multiple actions in a single
350 district (sometimes called related cases and assigned by local rule to a single judge) may exhibit
351 characteristics similar to MDL proceedings. In such situations, courts may find it useful to
352 employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling
353 of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the
354 Manual for Complex Litigation also may be a source of guidance.

355 **Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an
356 initial MDL management conference soon after the Judicial Panel transfer occurs to develop a
357 management plan for the MDL proceedings. That initial MDL management conference
358 ordinarily would not be the only management conference held during the MDL proceedings.
359 Although holding an initial MDL management conference in MDL proceedings is not mandatory
360 under Rule 16.1(a), early attention to the matters identified in Rule 16.1(c) may be of great value
361 to the transferee judge and the parties.

362 **Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel –
363 perhaps more often on the plaintiff than the defendant side – to ensure effective and coordinated
364 discussion during the Rule 16.1(c) conference and to provide an informative report for the court
365 to use during the initial MDL management conference under Rule 16.1(a).

366 While there is no requirement that the court designate coordinating counsel, the court
367 should consider whether such a designation could facilitate the organization and management of
368 the action at the initial MDL management conference. The court may designate coordinating
369 counsel to assist the court before appointing leadership counsel. In some MDL proceedings,
370 counsel may be able to organize themselves prior to the initial MDL management conference
371 such that the designation of coordinating counsel may not be necessary.

372 **Rule 16.1(c).** The court ordinarily should order the parties to meet and confer to provide
373 a report to the court about the matters designated in the court’s Rule 16.1(c) order prior to the
374 initial MDL management conference under Rule 16.1(a). This should be a single report, but it
375 may reflect the parties’ divergent views on these matters. The court may select which matters
376 listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may
377 also include any other matter, whether or not listed in those rules. Rules 16.1(c) and 16 provide a
378 series of prompts for the court and do not constitute a mandatory checklist for the transferee
379 judge to follow. Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-
380 (12) are often important to the management of MDL proceedings. In addition to the matters the
381 court has directed counsel to address, the parties may choose to discuss and report about other
382 matters that they believe the transferee judge should address at the initial MDL management
383 conference.

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

388 The first is the procedure for selecting such leadership counsel, addressed in
389 subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee
390 judge has a responsibility in the selection process to ensure that the lawyers appointed to
391 leadership positions are capable and experienced and that they will responsibly and fairly
392 represent all plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge,
393 geographical distributions, and backgrounds. Courts have considered the nature of the actions
394 and parties, the qualifications of each individual applicant, litigation needs, access to resources,
395 the different skills and experience each lawyer will bring to the role, and how the lawyers will
396 complement one another and work collectively.

397 MDL proceedings do not have the same commonality requirements as class actions, so
398 substantially different categories of claims or parties may be included in the same MDL
399 proceeding and leadership may be comprised of attorneys who represent parties asserting a range
400 of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims
401 by individuals who suffered injuries, and also claims by third-party payors who paid for medical
402 treatment. The court may sometimes need to take these differences into account in making
403 leadership appointments.

404 Courts have selected leadership counsel through combinations of formal applications,
405 interviews, and recommendations from other counsel and judges who have experience with
406 MDL proceedings. If the court has appointed coordinating counsel under Rule 16.1(b),
407 experience with coordinating counsel's performance in that role may support consideration of
408 coordinating counsel for a leadership position, but appointment under Rule 16(b) is primarily
409 focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the
410 court for use at the initial MDL management conference under Rule 16.1(a).

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

414 In some MDL proceedings it may be important that leadership counsel be organized into
415 committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore
416 prompts counsel to provide the court with specifics on the leadership structure that should be
417 employed.

418 Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another
419 important role for leadership counsel in some MDL proceedings is to facilitate possible
420 settlement. Even in large MDL proceedings, the question whether the parties choose to settle a
421 claim is just that – a decision to be made by those particular parties. Nevertheless, leadership
422 counsel ordinarily play a key role in communicating with opposing counsel and the court about
423 settlement and facilitating discussions about resolution. It is often important that the court be
424 regularly apprised of developments regarding potential settlement of some or all actions in the
425 MDL proceeding. In its supervision of leadership counsel, the court should make every effort to
426 ensure that any settlement process is fair.

427 One of the important tasks of leadership counsel is to communicate with the court and
428 with non-leadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report
429 how leadership counsel will communicate with the court and non-leadership counsel. In some
430 instances, the court or leadership counsel have created websites that permit non-leadership
431 counsel to monitor the MDL proceedings, and sometimes online access to court hearings
432 provides a method for monitoring the proceedings.

433 Another responsibility of leadership counsel is to organize the MDL proceedings in
434 accord with the court's management order under Rule 16.1(d). In some MDLs, there may be
435 tension between the approach that leadership counsel takes in handling pretrial matters and the
436 preferences of individual parties and non-leadership counsel. As subparagraph (E) recognizes, it
437 may be necessary for the court to give priority to leadership counsel's pretrial plans when they

438 conflict with initiatives sought by non-leadership counsel. The court should, however, ensure
439 that non-leadership counsel have suitable opportunities to express their views to the court, and
440 take care not to interfere with the responsibilities non-leadership counsel owe their clients.

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

446 **Rule 16.1(c)(2).** When multiple actions are transferred to a single district pursuant to 28
447 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts
448 from which cases were transferred (“transferor district courts”). In some, Rule 26(f) conferences
449 may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling
450 orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may
451 warrant vacating or modifying scheduling orders or other orders entered in the transferor district
452 courts, as well as any scheduling orders previously entered by the transferee judge.

453 **Rule 16.1(c)(3).** Orderly and efficient pretrial activity in MDL proceedings can be
454 facilitated by early identification of the principal factual and legal issues likely to be presented.
455 Depending on the issues presented, the court may conclude that certain factual issues should be
456 pursued through early discovery, and certain legal issues should be addressed through early
457 motion practice.

458 **Rule 16.1(c)(4).** Experience has shown that in certain MDL proceedings early exchange
459 of information about the factual bases for claims and defenses can facilitate the efficient
460 management of the MDL proceedings. Some courts have utilized “fact sheets” or a “census” as
461 methods to take a survey of the claims and defenses presented, largely as a management method
462 for planning and organizing the proceedings.

463 The level of detail called for by such methods should be carefully considered to meet the
464 purpose to be served and avoid undue burdens. Whether early exchanges should occur may
465 depend on a number of factors, including the types of cases before the court. For example, it is
466 widely agreed that discovery from individual class members is often inappropriate in class
467 actions, but with regard to individual claims in MDL proceedings exchange of individual
468 particulars may be warranted. And the timing of these exchanges may depend on other factors,
469 such as whether motions to dismiss or other early matters might render the effort needed to
470 exchange information unwarranted. Other factors might include whether there are legal issues
471 that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in
472 the MDL proceeding.

473 **Rule 16.1(c)(5).** For case management purposes, some courts have required consolidated
474 pleadings, such as master complaints and answers in addition to short form complaints. Such
475 consolidated pleadings may be useful for determining the scope of discovery and may also be
476 employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The
477 relationship between the consolidated pleadings and individual pleadings filed in or transferred
478 to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL

479 proceedings. Decisions regarding whether to use master pleadings can have significant
480 implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America*
481 *Corp.*, 574 U.S. 405, 413 n.3 (2015).

482 **Rule 16.1(c)(6).** A major task for the MDL transferee judge is to supervise discovery in
483 an efficient manner. The principal issues in the MDL proceedings may help guide the discovery
484 plan and avoid inefficiencies and unnecessary duplication, addressed in Rule 16.1(c)(11).

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

489 **Rule 16.1(c)(8).** The Rule 16.1(a) conference is the initial MDL management conference.
490 Although there is no requirement that there be further management conferences, courts generally
491 conduct management conferences throughout the duration of the MDL proceedings to effectively
492 manage the litigation and promote clear, orderly, and open channels of communication between
493 the parties and the court on a regular basis.

494 **Rule 16.1(c)(9).** Even if the court has not appointed leadership counsel, it may be that
495 judicial assistance could facilitate the settlement of some or all actions before the transferee
496 judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be
497 made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the
498 parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute
499 resolution alternatives, the court’s use of a magistrate judge or a master, focused discovery
500 orders, timely adjudication of principal legal issues, selection of representative bellwether trials,
501 and coordination with state courts may facilitate settlement. Should the court be called upon to
502 approve a settlement, as in any class actions filed within the MDL, or when the court is asked to
503 appoint a settlement administrator, the court should ensure that all parties have reasonable notice
504 of the process that will be used to determine the division of the proceeds, that the process of
505 allocation has integrity, and that monies be held safely and distributed appropriately.

506 **Rule 16.1(c)(10).** Actions that are filed in or removed to federal court after the Judicial
507 Panel has created the MDL proceedings are treated as “tagalong” actions and transferred from
508 the district where they were filed to the transferee court.

509 When large numbers of tagalong actions are anticipated, some parties have stipulated to
510 “direct filing” orders entered by the court to provide a method to avoid the transferee judge
511 receiving numerous cases through transfer rather than direct filing. If a direct filing order is
512 entered, it is important to address matters that can arise later, such as properly handling any
513 jurisdictional or venue issues that might be presented, identifying the appropriate transferor
514 district court for transfer at the end of the pretrial phase, how time limits such as statutes of
515 limitations should be handled, and how choice of law issues should be addressed.

516 **Rule 16.1(c)(11).** On occasion there are actions in other courts that are related to the
517 MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey)
518 have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may

519 sometimes happen that a party to an MDL proceeding may become a party to another action that
520 presents issues related to or bearing on issues in the MDL proceeding.

521 The existence of such actions can have important consequences for the management of
522 the MDL proceedings. For example, avoiding overlapping discovery is often important. If the
523 court is considering adopting a common benefit fund order, consideration of the relative
524 importance of the various proceedings may be important to ensure a fair arrangement. It is
525 important that the MDL transferee judge be aware of whether such proceedings in other courts
526 have been filed or are anticipated.

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

532 **Rule 16.1(d).** Effective and efficient management of MDL proceedings benefits from a
533 comprehensive management order. A management order need not address all matters designated
534 under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings
535 or would better be addressed at a subsequent conference. There is no requirement under Rule
536 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation
537 under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be
538 flexible, the court should be open to modifying its initial management order in light of
539 subsequent developments in the MDL proceedings. Such modification may be particularly
540 appropriate if leadership counsel were appointed after the initial management conference under
541 Rule 16.1(a).