February 1, 2024

COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Rule 16.1 Should Provide Concrete Guidance on Implementing the Merits-Driven Approach to MDL Case Management Embraced by the Proposed Rule

Dear Members of the Advisory Committee:

On behalf of Hollingsworth LLP, Robert E. Johnston* and Gary Feldon** submit this Comment in response to the Judicial Conference Committee on Rules of Practice and Procedure's ("Committee") Request for Comments on the proposed new Federal Rule of Civil Procedure 16.1 ("Preliminary Draft").

For over forty years, Hollingsworth LLP has focused its practice on complex litigation matters, handling dozens of nationally important federal multidistrict litigations ("MDLs") and analogous state proceedings. Hollingsworth LLP's decades of experience serving in leadership roles in federal MDLs provides us an additional perspective on the MDL system.[1] In addition to our unwavering advocacy for our clients, we are committed to furthering parties' and the courts' shared interest in the MDL system providing just and efficient resolution of claims.

With that shared interest in mind, we call for the Committee to include more concrete guidance to give substance to the modern, merits-driven approach to MDL case management endorsed by the new Federal Rule of Civil Procedure 16.1.

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The views expressed in this Comment are solely those of the authors.

[1] Hollingsworth LLP has served as defense national coordinating counsel and/or defense liaison counsel in, among other MDLs, *In re: Tepezza® Marketing, Sales Practices, and Products Liability Litigation*, *In re: Tasigna® (Nilotinib) Products Liability Litigation*, *In re: Aredia® and Zometa® Products Liability Litigation*, *In re: Welding Fume Products Liability Litigation*, and *In re: School Asbestos Litigation.* The firm has also represented MDL defendants in nationally important MDLs, such as *In re: Zantac® (Ranitidine) Products Liability Litigation* and *In re Fosamax® Products Liability Litigation*.

INTRODUCTION

MDLs exist to "promote the just and efficient conduct" of large-scale litigation in a centralized manner.[2] Historically, too many federal courts have conflated efficiency with global settlement and entirely disregarded justice. This "aggregated settlement" approach encourages plaintiffs to file claims that would never merit individual filing in the hopes that frivolous and questionable claims will be paid out when the defendant inevitably settles to bring an end to the otherwise perpetual litigation. Allowing spurious and otherwise meritless cases to remain on the docket delays resolution of potentially meritorious claims, imposes huge burdens on MDL defendants and courts, and prevents efficient resolution of the overall case inventory.

Fortunately, what we call the "merits-driven" approach has started to become the prevailing philosophy of MDL case management. Under this approach, transferee judges engage on the key legal and factual issues from the outset of the MDL, focusing on resolving cases on the merits of those issues as quickly and efficiently as possible.[3] Representative cases decided on their merits by motion or trial aid the parties in valuing the overall case inventory and therefore facilitate party-led settlement. Although the Preliminary Draft promotes this approach, it does not do enough to guide transferee courts.

The final Rule 16.1 should provide genuine direction to transferee courts—instructing them to engage with potentially dispositive factual and legal questions at the case management phase, guiding them in how to use the answers to most efficiently resolve cases, and encouraging them to continue this approach through the MDL's lifecycle. This Comment makes specific proposals to Rule 16.1(c) and (d) that would better implement the merits-driven approach to MDL management the Rule seeks to embody.

THE COMPETING PHILOSOPHIES OF MDL CASE MANAGEMENT

For at least a decade, judges have decried the once-ubiquitous judicial culture of transferee courts pushing parties toward global settlements and regarding remand of MDL cases for trial as failures.[4] Under this "aggregated settlement" approach, judges often view cases as largely interchangeable units to be settled instead of engaging with the factual distinctions in the case inventory. The failure to engage early with the key factual and legal issues also encourages the filing of spurious and meritless claims, compounding the problems of managing the litigation.[5]

Transferee courts applying the aggregated settlement approach encourage plaintiffs' attorneys to warehouse meritless claims in the hope that a bloated case inventory will increase settlement

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[2] 28 U.S.C. § 1407(a).

[3] *See* Bolch Jud. Inst., Duke L. Sch., *Guidelines and Best Practices for Large and Mass-Tort MDLs* 1-2, 96 (2d ed. 2018) [hereinafter *MDL Guidelines*], https://perma.cc/EX84-6FHC.

[4] *E.g.*, Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 144 (2013).

[5] *Id.* at 186–87 ("If We Build It, They Will Come[.] Regardless of the amount of judicial effort and resources, unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process…").

pressure.[6] This Committee's own 2018 report estimated that 20-50% of all MDL cases are entirely spurious, with plaintiffs lacking even *prima facie* evidence of an injury caused by the defendant's alleged tortious conduct.[7] It is impossible to quantify how many of the remaining claims have other, harder to spot legal defects that make them legally unviable. Using spurious and otherwise meritless claims to inflate a case inventory will remain a winning proposition so long as courts largely refuse to cull meritless cases without case-specific discovery workup.[8]

The aggregated settlement approach to MDL management undercuts both just and efficient resolution of claims, the two primary goals of the MDL statute.[9] Justice is not served by MDL defendants settling spurious claims under threat of ruinous liability from the sheer volume of warehoused cases.[10] Efficiency is not served by fixating on global settlement instead of acquiring key information early in the MDL and using it to resolve cases quickly on their merits.

The merits-driven approach has been gaining momentum in recent years. Transferee judges report that the JPML now sends a clear "message that they are to move as quickly as possible," and many believe "the ability to resolve cases efficiently [is] an important factor in JMPL selection[. J]udges who warehouse cases do not get selected."[11] Independent legal commentators recognize the

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[6] *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (aggregated proceedings "can unfairly 'plac[e] pressure on the defendant to settle even un-meritorious claims'" (citation omitted)); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 358 (5th Cir. 2017) ("The undeniable pressure on defendants to settle is a reality in these alleged mass tort cases."); *In re Gen. Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374, 392 (S.D.N.Y. 2019) ("[S]ettlement pressure is particularly acute in multidistrict litigation . . . ."); *see also* Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. Kan. L. Rev. 219, 257 (2017) (referring to the "*in terrorem* effect"); Lawyers for Civil Justice, *Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee* at 3 (Dec. 22, 2022), https://www.uscourts.gov/sites/default/files/22-cv-t_suggestion_from_lcj_-_rule_16_0.pdf ("The reason mass-tort MDLs attract voluminous unexamined claims is obvious: the FRCP are failing to create the same expectations for pre-filing due diligence in MDLs that they typically provide in other cases.").

[7] *See* Advisory Committee on Civil Rules, *MDL Subcommittee Report* 142 (Nov. 1, 2018) [hereinafter *Advisory Committee on Civil Rules*], https://www.uscourts.gov/sites/default/files/2018-11_civi_rules_agenda_book_0.pdf ("[I]n many MDL centralizations – perhaps particularly . . . [in] pharmaceutical products or medical devices [MDLs] – a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit.").

[8] *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 55 (2021) ("A previous study showed that nearly one-third of the MDL judges who presided over products-liability MDLs that ended in private settlement *had not ruled on a single merit-related motion* before the settlement occurred.").

[9] 28 U.S.C. § 1407(a).

[10] MDL Guidelines, *supra* note 3, at 2; *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (aggregated proceedings "can unfairly 'plac[e] pressure on the defendant to settle even un-meritorious claims'" (citation omitted)); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 358 (5th Cir. 2017) ("The undeniable pressure on defendants to settle is a reality in these alleged mass tort cases."); *In re Gen. Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374, 392 (S.D.N.Y. 2019) ("[S]ettlement pressure is particularly acute in multidistrict litigation . . . .").

[11] *Id.* at 2; *see also In re Seroquel Prod. Liab. Litig.*, 447 F. Supp. 2d 1376, 1378 (J.P.M.L. 2006) (proper MDL management requires "assigning all related actions to one judge committed to disposing of spurious claims quickly").

superiority of the merits-based approach.[12] And, now, the draft Rule 16.1 incorporates its principles.[13]

Courts applying the merits-driven approach engage with the key factual and legal issues of the MDL inventory from the start, then grapple with the merits of the key issues early in the litigation to promote resolution of cases within the overall inventory. This approach better embodies the MDL statute's twin goals of justice and efficiency.[14] Forcing the parties to grapple with the merits of the case inventory early provides information critical to weeding out frivolous cases before they overwhelm those claims that have at least *prima facie* validity. It also helps the parties and the court identify cases that are representative of plaintiffs' overall case inventory or discrete subsets of that inventory. Litigating representative claims early minimizes the expense, time, and burden to provide both sides the data needed to value plaintiffs' case inventory and efficiently resolve plaintiffs' claims through litigation or settlement.

As discussed below, the final Rule 16.1 should provide far more guidance to parties and transferee courts on how best to implement the merits-driven approach endorsed by the Rule. Otherwise, many transferee courts will continue to apply the unjust and inefficient aggregated settlement approach that has plagued the MDL system for decades.

COMMENTS TO PROPOSED RULE 16.1

As proposed, Rule 16.1(c) directs transferee courts to require the parties to meet and confer to prepare a report before the initial management conference that addresses any matters the transferee court wishes to be informed about and any matters the parties want to raise. There is then a non-exhaustive list of topics the transferee court may want to consider. The proposed Committee Note in the Preliminary Draft provides limited clarification of what falls under these broad topics. The draft Rule 16.1(d) would then direct the transferee court to enter an initial MDL management order addressing the topics in the report and any additional matters the court wishes to address.

The Preliminary Draft does not do enough to promote the merits-driven approach to MDL case management. As proposed, Rule 16.1 rightly encourages transferee courts to engage with the key factual and legal issues at the initial case management conference stage, consistent with the merits-driven approach. However, the lack of definitive instruction in the Preliminary Draft leaves the proposed Rule largely toothless to address the persistent problems in the MDL system.

Rule 16.1 should make clear that a transferee court's obligation from the outset is to find ways to efficiently resolve the case inventory. Rule 16.1(c) should do more to identify the most efficient means. Rule 16.1(d) should then instruct transferee courts to actually use these means throughout the litigation to promote the just and efficient resolution of the cases. Specific proposals to this effect are below.

[12] MDL Guidelines, *supra* note 3, at 2, 96.

[13] *See, e.g.*, Preliminary Draft Rule 16.1(c)(3) & Committee Note.

[14] *See* 28 U.S.C. § 1407(a).

I. Proposed Rule 16.1(c) Should Provide More Guidance to Parties and Transferee Courts

Rule 16.1(c) in the Preliminary Draft instructs the transferee court to order the parties to prepare an initial case management report addressing "any matter designated by the court" and any other matter the parties want to bring to the court's attention, including topics listed in Rule 16.1(c) or in Rule 16. If the parties' initial case management reports provide the transferee court with relevant information early in the litigation, the reports can be an invaluable tool for promoting efficient MDL management. However, neither the Preliminary Draft's Rule 16.1(c) nor the accompanying commentary in the Draft Committee Note provide nearly enough guidance in what information is relevant to efficient MDL management.

A. Proposed Rule 16.1(c)(3)

Existing Draft Rule: As proposed, Rule 16.1(c)(3) suggests "identifying the principal factual and legal issues likely to be presented in the MDL proceedings" as a possible topic for the initial case management report. Per the accompanying Draft Committee Note, the transferee court determines whether these "factual issues should be pursued through early discovery" or the "legal issues should be addressed through early motion practice."

Comment: While this support for the merits-driven approach would provide some guidance to transferee courts, it does not provide enough concrete direction to parties and the courts about what constitutes a principal factual or legal issue that can lead to early resolution of claims.

The principal legal issues under the merits-driven approach will include any issues that are dispositive and can be decided before trial. In products liability litigation, for example, general causation is a key legal issue that underlies any tort claim. Without competent evidence of general causation—typically expert testimony that complies with Federal Rule of Evidence 702—there is no need to litigate the other issues in the pending cases.[15] Addressing general causation as early as possible therefore best promotes efficient, merits-driven resolution of plaintiffs' case inventory. Even if a transferee court's ruling on general causation does not dispose of the MDL, it provides the parties important information about the relative strength of the plaintiffs' overall inventory, which facilitates possible party-led settlement.[16] Another potentially dispositive ruling that MDL courts can address early to promote efficiency in failure-to-warn claims—a very common MDL claim, particularly in pharmaceutical and medical device products liability litigation—will be a determination about the adequacy of the warnings. Resolving issues that determine the viability of a significant number of cases—like establishing that purported representatives of deceased

[15] Of course, there is no benefit to addressing general causation testimony early if the transferee court wrongly admits unreliable expert testimony. The harm from judges abdicating their role as gatekeepers is magnified in the MDL context, where an evidentiary decision can affect anywhere from dozens to hundreds of thousands of cases. Hollingsworth LLP therefore applauds the recent amendment to Rule 702 clarifying the rigorous standard governing expert testimony. *See* Eric Lasker, *The New Federal Rule of Evidence 702 and the Fight Against Scientific Skepticism*, Att'y L. Mag. (Dec. 12, 2023), https://attorneyatlawmagazine.com/legal/opinion/the-new-federal-rule-of-evidence-702-and-the-fight-against-scientific-skepticism.

[16] *See* MDL Guidelines, *supra* note 3, at 96 ("In many MDLs, meaningful settlement discussions are not possible until completion of discovery and extensive testing of the parties' contentions through decisions on dispositive and *Daubert* motions.").

plaintiffs' estates have legal authority to proceed[17] or determining the cut-off date for claims under the statute of limitations[18]—can also promote more efficient valuation of plaintiffs' case inventory.[19]

The principal factual issues will be those that either (a) immediately cull meritless cases or (b) identify representative cases for individual case work-up and possible early trial. A non-exhaustive list should include the basic factual showings to maintain the common claims in the MDL, including evidence showing that plaintiff had an injury within the scope of the MDL and, when applicable, was exposed to the product or substance at issue. For claims brought by the estate of a deceased plaintiff, the individuals pursuing the claims on the estate's behalf should additionally have to show they are the estate's authorized representative. Identifying these issues early permits early discovery focused on culling spurious claims as early as possible. That is the only way the parties and court can focus on the individual cases that are not *prima facie* meritless.

Without identifying these kinds of potentially dispositive issues (ideally early, as the Preliminary Draft proposes), the transferee court cannot make informed decisions about how best to promote efficient resolution of the litigation.

B. Proposed Rule 16.1(c)(4)

Existing Draft Rule: As proposed, Rule 16.1(c)(4) suggests as a possible topic for the initial case management report "how and when the parties will exchange information about the factual bases for their claims and defenses." Per the accompanying Draft Committee Note, "[e]xperience has shown that in MDL proceedings an exchange of information about the factual bases for claims and defenses," such as fact sheets or other forms of plaintiff census discovery, "can facilitate efficient management." The corresponding portion of the draft Committee Note then goes on to caveat away the endorsement of any specifics.

Comment: Rule 16.1(c)(4) in the Preliminary Draft does not go far enough to promote efficient use of early census discovery, such as plaintiff fact sheets. "Census discovery" is directed to all MDL plaintiffs, regardless of whether their case is being worked up in individual discovery and is separate from discovery available in individual litigation under the Federal Rules of Civil Procedure.[20] The information gathered in census discovery helps the parties and the court identify

[17] *See* Product Liability Advisory Council, Inc. ("PLAC"), *Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee* (2023), https://www.uscourts.gov/sites/default/files/23-cv-c_suggestion_from_plac_-_rule_16_0.pdf.

[18] MDL Guidelines, *supra* note 3, at 96 ("In some MDLs, a defendant's uncertainty about the statute of limitations or other limits on future suits can be a substantial hurdle to settlement; offering guidance on such issues may therefore help facilitate a settlement.").

[19] *See id.*

[20] Hollingsworth LLP shares other commentators' concerns that loose language in Rule 16.1(c)(4) of the Preliminary Draft may confuse the distinctions between these two forms of discovery and lead to misallocated burdens. *See* Lawyers for Civil Justice, *A Rule, Not an Exception: How the Preliminary Draft of Rule 16.1 Should be Modified to Provide Rules Rather than Practice Advice and to Avoid the Confusion of Enshrining Practices into the FRCP that are Inconsistent with Existing Rules and Other Law* 4-11 (Sept. 18, 2023) [hereinafter *Lawyers for Civil Justice*].

"candidates for expedited resolution through voluntary withdrawal, dispositive motions, or through a settlement process."[21]

The MDL Guidelines therefore encourage MDL courts to require "streamlined, cost-effective paper [census] discovery to the maximum extent possible" to facilitate early identification of representative cases (potentially including formal bellwether designations) and limit unsubstantiated claims.[22] Rule 16.1(c)(4) should similarly encourage census requirements for plaintiffs to identify the basic facts underlying their claims and to make *prima facie* evidentiary showings on dispositive issues. In product liability MDLs, for example, census discovery would require preliminary proof of (1) the specific product used by the plaintiff; (2) how the plaintiff used or was exposed to the product; (3) the plaintiff's alleged injuries or other consequences of use or exposure; (4) the date of plaintiff's alleged injury; (5) the date of the plaintiff's purported notice of the defendant's allegedly wrongful conduct, and (6) plaintiff's releases authorizing the defendant to collect relevant records from third parties (medical providers, employers, etc.).[23] In addition to promoting fairness and efficiency, census discovery helps courts to ensure they do not overstep their jurisdiction by adjudicating claims where plaintiffs lack Article III standing.[24]

The Rule should also make clear to transferee courts that plaintiff fact sheets and other census discovery should be "deemed a form of discovery governed by the relevant Federal Rule of Civil Procedure, requiring the same level of completeness and verification."[25] Per the MDL Guidelines, "[c]ase management orders should include procedures for dismissing claims due to substantial noncompliance with fact sheet requirements and deadlines."[26] Failure to comply may warrant dismissal of MDL plaintiffs' claims, just like a plaintiff in an individual case may have their claims dismissed for failure to comply with discovery obligations.

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[21] MDL Guidelines, *supra* note 3, at 10.

[22] *Id.* at 9. While census discovery is necessary to identifying potential bellwethers, either formally designated or *de facto*, some degree of randomness may be helpful to prevent gamesmanship by the parties. *See* Loren H. Brown, et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 Akron L. Rev. 663, 690 (2014). Transferee courts should consider the option of random selection of bellwethers from a pool of cases that meet certain criteria for representativeness.

[23] MDL Guidelines, *supra* note 3, at 11 (discussing pharmaceutical and medical device products liability cases specifically); *see also id.* (discussing personal injury and employment cases).

[24] *See* Lawyers for Civil Justice, *supra* note 20, at 4-5 (Sept. 18, 2023); DRI Ctr. L & Pub. Pol'y, *Separating the Wheat from the Chaff: The Need for a Rules-Based Solution to Address Unsupportable Claims in Context of MDL Proceedings* 6-7 (Oct. 11, 2023), https://www.dri.org/docs/default-source/center-law-public-policy/dri-center-comment-on-proposed-frcp-16-1_final2.pdf?sfvrsn=2#:~:text=In%20addition%2C%20DRI%20believes%20that,not%20cast%20aspersions%20on%20parties.

[25] MDL Guidelines, *supra* note 3, at 10; *see also id.* at 13 ("[T]imely and substantial compliance with fact sheet requirements, including completion of 'core criteria,' should be the norm.").

[26] *Id.* at 13; *see also In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 2007–MD–1871, 2010 WL 4720335, *1 (E.D. Pa. Nov. 15, 2010) (*Lone Pine* order entered three years into litigation because the court "share[d] Defendant's concern" that plaintiffs had failed to provide documentation in support of statements in their Plaintiff Fact Sheets and required "additional support" to "objectively identify which of the many thousand plaintiffs have injuries which can credibly be attributed to" using the allegedly defective product).

C. Proposed 16.1(c)(7)

Existing Draft Rule: As proposed, Rule 16.1(c)(7) suggests as a possible topic for the initial case management report "any likely pretrial motions and a plan for addressing them." The accompanying portion of the Draft Committee Note explains that "[e]arly attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery."

Comment: Rule 16.1(c)(7) in the Preliminary Draft once again fails to provide genuine guidance to transferee courts to assist them in efficiently managing the MDL docket. In the absence of early resolution, each MDL case will ultimately be remanded for trial. The motion for the transferee court to suggest remand to the JPML is thus the prime example of a likely pretrial motion in an MDL. Transferee courts should not abuse their discretion over the remand decision by having cases sit, warehoused in the MDL, when efficient remand for trial is possible.[27] As reported in MDL Guidelines, judge and counsel are increasingly recognizing that remand "may be on the table from the first days of the MDL, with judges setting end-dates for resolution and working backwards to set the case management schedule."[28] Even when the initial case management report does not set a remand date,[29] the court and parties should be focused from the outset on setting a schedule that efficiently pushes cases toward resolution by motion or trial.[30] When proposing the schedule in the initial case management order, the parties should have to provide the transferee court their proposals for the most efficient method of reaching this ultimate scheduling goal.

D. Proposed Rule 16.1(c)(9)

Existing Draft Rule: As proposed, Rule 16.1(c)(9) suggests as a possible topic for the initial case management report "whether the court should consider measures to facilitate settlement of some or all actions before the court." The Committee Note in the Preliminary Draft affirms that settlement is "a decision to be made by the parties" while also noting that "a court may assist the parties in settlement efforts."

Comment: Hollingsworth LLP shares other commentors' concerns that the Preliminary Draft identifying settlement as an issue to be addressed at the initial case management conference phase

[27] *See Hamer v. LivaNova Deutschland GmbH*, 994 F.3d 173, 180–81 (3d Cir. 2021) (Transferee courts should suggest remand as soon as remand is more efficient and must remand when no pretrial issues remain.); *see also In re Managed Care Litig.*, 416 F. Supp. 2d 1347, 1348 (J.P.M.L. 2006) (The JPML has sole authority to remand cases, but has "consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate.").

[28] MDL Guidelines, *supra* note 3, at 1; *id.* at 3 ("Both judges and counsel strongly supported the emerging practice of setting an end-date for the MDL, then working back into a trial schedule."); *id.* at 94 ("As a mechanism to keep counsel keenly focused on moving the cases forward, some transferee judges now set end dates for their MDLs, at which point any cases not resolved are remanded.").

[29] *Id.* at 3 ("This end-date should of course be set after the transferee judge has become educated about the case and consulted with counsel about their understandings and expectations.").

[30] *Id.* at 2 (describing the modern assigning practices of the Joint Panel on Multidistrict Litigation).

could lead transferee courts to mistakenly apply an aggregated settlement approach.[31] Transferee courts can best facilitate party-led settlement "by advancing the litigation so that factual and expert development occurs and the cases become ripe for settlement discussions."[32] That cannot occur until the transfer courts have engaged with the merits of the case inventory.

II. Proposed Rule 16.1(d) Should Instruct Transferee Courts to Promote Justice and Efficiency By Using the Information Provided on the Rule 16.1(c) Issues and Remaining Engaged with the Issues as the Litigation Progresses.

Existing Draft Rule: As proposed, Rule 16.1(d) provides that the transferee court "should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion." The proposed Committee Note identifies the goal of the Rule as the "effective and efficient management of MDL proceedings" and encourages courts to be open to modifying the management order when appropriate throughout the case.

Comment: Rule 16.1(d) is the Rule's sole direction to the transferee court to use the information provided by the parties' initial case management report, but it provides *no direction whatsoever* about how to use that information to efficiently resolve MDL cases. Indeed, the portion of the Draft Committee Note on Rule 16.1(d) even contradicts the lone instruction in the Preliminary Draft's plain language—the direction to the transferee court to address the matters designated under Rule 16.1(c). No reasonable person would argue that there is a one-sized-fits-all approach to most efficiently resolving MDL cases. But the proposed Rule 16.1(d)'s refusal to even specify the goals of a case management order—goals which are unique in the MDL context—makes it hard to see how enacting the proposed Rule would achieve anything at all. The plain language of Rule 16.1(d) should contain at least the goals and guidance contained in the proposed Committee Note.

First, Hollingsworth LLP agrees with other commenters that there is little point in the Potemkin exercise of creating a rule without content.[33] The draft Rule 16.1(d) does not actually instruct courts to follow the approach contemplated by Rule 16.1. The final Rule 16.1(d) should instruct transferee courts to use the information in the parties' initial case management report to determine the most efficient process for continuing the litigation, to identify potentially representative cases to develop for individual case work up and possible early trial, and to cull spurious claims from the docket.

Second, Rule 16.1(d) should instruct that the transferee "court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings," instead of relegating this guidance to the Preliminary Draft's accompanying Committee Note. Transferee courts should routinely revisit the Rule 16.1(c) topics with the benefit of the information obtained at earlier phases of the litigation and with the goal of identifying additional ways to efficiently

[31] Lawyers for Civil Justice, *supra* note 20, at 17-19.

[32] MDL Guidelines, *supra* note 3, at 96.

[33] *See, e.g.*, Lawyers for Civil Justice, *supra* note 20.

resolve cases within the MDL inventory.[34] Encouraging the continued use of the merits-driven approach beyond the initial case management phase would be a significant step toward giving Rule 16.1 real impact.

As the census discovery and case-specific discovery required under the initial case management order begins to identify the key factual issues in the litigation, transferee courts should act on that information to facilitate merits-driven case resolution. When a potentially dispositive issue is identified, transferee courts should amend case management orders to require at least *prima facie* evidentiary support on that issue in the relevant cases, regardless of whether those cases are in active discovery. Such orders can help significantly in preventing a flood of spurious claims drowning out potentially meritorious cases that deserve to be heard.[35] "*Lone Pine* orders [that] require each plaintiff in a mass-tort MDL to submit a report setting forth evidence sufficient to document the basis for his or her personal-injury claims" are a prime example, but certainly not the only one.[36] Courts are increasingly using such orders to screen cases where plaintiffs cannot produce readily-obtainable evidence necessary to prove causation, injury, or use of the allegedly defective product.[37] Courts have also used case management orders requiring offers of proof to address widespread failure to comply with discovery obligations.[38] When appropriate, transferee courts should use multiple orders "to streamline the litigation as needed at different stages throughout the pendency of the MDL."[39]

This approach benefits all legitimate parties to the litigation. Plaintiffs with non-spurious claims secure earlier decisions on the merits—including whatever damages they may ultimately receive—and defendants obtain rulings or verdicts that allow them to accurately value the case inventory

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[34] This proposal is fully in line with the draft Committee Note concerning Rule 16.1(c)(8), which notes that "courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote … communication between the parties and the court on a regular basis."

[35] *See* Robreno, *supra* note 4, at 186-87 ("unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process"); *see also Abbatiello v. Monsanto Co.*, 569 F. Supp. 2d 351, 353-54 (S.D.N.Y. 2008) (*Lone Pine* orders can help "protect defendants and the [c]ourt from the burdens associated with potentially non-meritorious mass tort claims").

[36] MDL Guidelines, *supra* note 3, at 104; *see id.* ("It has been recognized that the 'basic purpose of a *Lone Pine* Order is to identify and cull potentially meritless claims …. *Lone Pine* Orders can be issued at any time … to weed out truly meritless cases and cases that claimant and counsel are not prepared to pursue, and to ensure that the transferor courts receive only viable cases."); *id.* at 13 ("Especially as a proceeding matures, the transferee judge may consider the entry of *Lone Pine* orders requiring all plaintiffs to submit an affidavit from an independent physician. These orders are particularly important in an MDL proceeding involving disparate theories of causation—or when multiple alternative potential causes of the alleged injuries exist.").

[37] *Id.* at 95.

[38] *Id.* at 14 ("When fact sheets have been submitted with inaccurate information, the court should consider requiring that all individual parties submit some minimum quantum of evidence. If no such evidence is available, the court should provide individual an opportunity to explain the absence of the evidence."); *e.g.*, *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 2007–MD–1871, 2010 WL 4720335, *1 (E.D. Pa. Nov. 15, 2010) (*Lone Pine* order entered three years into litigation because the plaintiffs had failed to provide documentation to support their Plaintiff Fact Sheets, so additional support was needed to "objectively identify which of the many thousand plaintiffs have injuries which can credibly be attributed to" the product at issue).

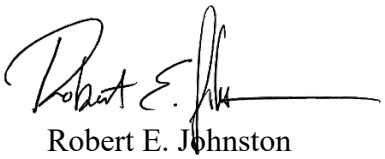
[39] MDL Guidelines, *supra* note 3, at 105.

without paying to defend the bogus claims that make up a staggeringly large proportion of the MDL inventory.[40]

CONCLUSION

The undersigned respectfully submit the foregoing comment in the hope it will aid the Committee in crafting the language of Rule 16.1 to promote the just and efficient resolution of MDL cases.

Sincerely,



Robert E. Johnston

Gary Feldon

[40] Advisory Committee on Civil Rules, *supra* note 7, at 3 (20-50% of all MDL claims lack even the basic elements of a viable claim).