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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Building, Room 7-240
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Re: Public Comment of John Rosenthal and Jeff Wilkerson, Partners at Winston & Strawn LLP, Regarding Proposed New Rule 16.1

The undersigned attorneys, partners at the law firm of Winston & Strawn LLP, respectfully submit this Comment to the Advisory Committee on Civil Rules (the "Committee"), which responds to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on the published draft of proposed new Rule 16.1 (the "Proposed Rule").[1]

I. Introduction

At the outset, we would like to thank the Committee for its hard work and attention to the matters addressed by the Proposed Rule. We have been engaged in this process throughout, including recent attendance at key events such as Duke Law School's McGovern Symposium in Durham and Baylor Law School's MDL Judicial Summit in Aspen. The Committee's engagement with these issues, not just through the rulemaking process, but also via discussion with the bench and bar, is commendable.

In our collective view, the importance of a fair and orderly approach to MDL case management cannot be overstated. Cases consolidated in MDLs dominate the federal civil docket, with recent data

[1] The authors of this letter have considerable experience in a wide variety of MDL litigation, including antitrust, mass tort, toxic tort, and consumer fraud/false advertising cases. We believed our collective experience permits us not only to understand some of the issues with conducting MDL litigation, but comment upon how and whether the proposed Rule 16.1 is likely to impact the conduct of MDL litigation going forward. With this said, this comment represents the views of the authors and not necessarily the views of Winston & Strawn LLP.

suggesting they comprise over 70% of the civil caseload.[2] And while the MDL process certainly has its virtues, the consolidation of thousands (sometimes tens of thousands) of cases into collective proceedings is upsetting fundamental precepts of how civil cases are supposed to move forward, including that cases should be filed only when there is a good-faith basis to allege an injury caused by the defendants' conduct. This problem is compounded by the onset of private litigation funding, which drives claim generation and aggregation and can skew incentives away from a focus on the validity of such claims—what some have called the "find a name, file a claim" problem. To that end, we have all been confronted with the endless barrage of advertising for personal-injury claims on television, radio, and social media. It should be no surprise that the person answering the phone calls those ads generate often is not an attorney, and prospective plaintiffs can be signed up to file a claim before even meeting an attorney, much less an attorney who conducts a reasonable investigation before a complaint is filed.

In the absence of rules, district judges assigned to MDLs have developed ad hoc procedures to address the significant management problems MDLs pose. Intended or not, however, those procedures are too often serve only two broad purposes: (i) coordinate discovery; and (ii) move the matters towards settlement. Short-form and consolidated pleadings, for example, though intended to ease the administration of the case, can also serve to eviscerate the typical Rule 12 motion process—already rendered extremely difficult by the sheer volume of cases. Appointment of plaintiffs' leadership—again, intended to address administrative difficulties—too often results in installing and funding a small set of repeat players as plaintiffs' leadership whose interests may be inconsistent with those of individual claimants. And increasing use of a relatively small group of go-to special masters to oversee large aspects of MDL litigation raises significant questions about whether their use steps into the territory appropriately reserved for Article III judges. In short, practices intended to address some of the problem posed by MDLs can, and often do, compound those problems.

With that said, we believe that the Proposed Rule, which functions largely as a checklist of things that courts *may* ask the parties to address and *may* address in an early case management conference, does not serve the typical function of a "Rule." The Proposed Rule provides suggestions as opposed to instructions. Equally important, the Proposed Rule does not acknowledge the central problem that animated the rulemaking effort in the first place—the substantial number of unvetted and, in many cases, factually baseless claims that are filed, and can persist for significant time periods, in many MDLs. As drafted, therefore, we believe the Proposed Rule does not move the ball forward with regarding to improving the management of MDLs. We do believe, however, that a Proposed Rule along the lines of Rule 16.1 can be beneficial, assuming the Committee adopts certain changes suggested herein to both the Rule and the associated Committee Notes.

II. Early Vetting

There is consensus—among judges, defense practitioners, and even many plaintiffs' lawyers—that mass filing of unexamined claims is occurring in large MDLs. The MDL Subcommittee has acknowledged this consensus in prior reports, citing estimates that as many as 40–50% of claims in some MDLs may

[2] Rules 4 MDLs, *70% of Federal Civil Cases are in MDLs as of Year End, FY21* (online at https://www.rules4mdls.com/copy-of-mdl-cases-surge-to-majorty-of#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%93%20April%2013%2C,cases)%20resides%20in%20Multidistrict%20Litigations%20) (last visited February 9, 2024).

involve "unsupportable claims."[3] This consensus comports with our own experience and observations in practice. In the Roundup® cases, for example, where we both have experience, Judge Chhabria established a much-needed "wave" process to move cases through the MDL. Yet we have seen many, many cases repeatedly moved back into later and later waves, and eventually voluntarily dismissed, often because the plaintiffs' counsel simply do not have any ability to show that the plaintiffs had either the relevant medical diagnosis or any meaningful exposure to the product. These cases were often pending in the MDL for *years* before dismissal. In another recent example, in the Zostavax Litigation, an order "designed merely to require each plaintiff to come forward with prima facie evidence" supporting their claims resulted in more than 1,100 claims being dismissed, but only after *four years* of litigation, during which the defendant had produced over 6,000,000 pages of documents and made nearly 40 witnesses available for deposition.[4]

Mass filing of meritless claims causes significant harms—imposing a tremendous burden upon the court and the parties. The existence of such unvetted claims increases the cost, and slows the pace, of discovery. It hampers defendants' (and for that matter, plaintiffs') ability to confidently assess the potential exposure, and thus renders settlement more difficult.[5] It interferes with the bellwether trial process, introducing cases into the pool that provide little to no information about the value of good-faith claims, and which may be worked up at significant cost before being dismissed.[6] Defendants forced to contend with thousands of meritless claims may feel pressure to settle in light of the extraordinary costs imposed, even knowing that a not-insignificant portion of the pool is not likely to make it to trial. And on the other side of the same coin, claimants who have more meritorious claims will find the value of those claims unfairly diluted. Finally, the filing and maintenance of such plainly meritless cases poses serious ethical

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[3] *See, e.g.*, Draft Minutes of the Civil Rule Advisory Committee, MDL Subcommittee Report, Oct. 16, 2020, at 17 (online at https://www.uscourts.gov/file/31448/download) (noting the "perception that MDL consolidations tend to attract a worrisome fraction of cases that would not be brought as stand-alone actions because there is no reasonable prospect of success.") (last visited February 9, 2024); MDL Subcommittee Report in Advisory Committee on Civil Rules Agenda Book at 142–43 (Nov. 1, 2018) (online at https://www.uscourts.gov/file/24803/download) (noting the "fairly widespread agreement among experienced counsel and judges that in many MDL centralizations … 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.") (last visited February 9, 2024).

[4] *In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.*, MDL No. 2848, 2022 WL 17477553, at *1, *4–5 (E.D. Pa. Dec. 6, 2022).

[5] *See* Duke Law School Center for Judicial Studies, *MDL Standards & Best Practices* 11 (2014) (online at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf) (last visited February 9, 2024) ("[S]ettlements talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weakness of the global litigation and examine the potential value of individual claims.").

[6] *See* Mark R. Ter Molen, et al., *Bellwether Trials: A Defense Perspective*, Law360 (2016) (online at https://www.mayerbrown.com/-/media/files/news/2016/04/bellwether-trials-a-defense-perspective/files/bellwethertrialsadefenseperspective/fileattachment/bellwethertrialsadefenseperspective.pdf) (last visited February 9, 2024) ("With unrepresentative bellwethers, the defendants and remaining plaintiffs might dismiss the outcome of a bellwether trial as an aberration.").

concerns—which can create doubts in the minds of the public, defendants, and individual claimants about the integrity and fairness of the process.[7]

The reasons for this problem are clear enough. In part, it arises from forces outside the scope of the Proposed Rule—third-party litigation funding and claim-aggregation are driving incentives to "find a name, file a claim."[8] Funders have increased risk appetite, and they are financing mass advertising campaigns designed to create a significant pile of claims, many of which receive little serious vetting prior to the filing of the claim.[9] Indeed, recent estimates are that plaintiffs' lawyers, lead generators, and third-party funders spend about $1 billion *per year* on advertising for prospective plaintiffs.[10] This estimate included, for example, $94 million in advertising for the Pradaxa® litigation, $103 million for the Roundup® litigation, and $122 million for the Xarelto® litigation.[11]

But the problem is also one of rules and procedure. While Rule 12 motion practice is still a critically important procedural tool in many MDLs (e.g., economic-loss class actions), the mass filing of claims in the largest MDLs can make the traditional Rule 12 process impractical and prohibitively expensive as a tool for challenging individual claims. Even where such motions are an option, processes designed to ease the administrative burden in an MDL—consolidated or short-form complaints with scant details on individual claimants—can make any meaningful challenge to such claims extraordinarily difficult. And the use of discovery techniques, such as plaintiff fact sheets ("PFS") or initial censuses, are often too little and nearly always too late—for example, PFS orders often are not adopted for months or years, after thousands of meritless claims may already have been filed. Nor does a discovery mechanism such as the PFS, as practice has shown, serve as a sufficient mechanism for removing meritless claims from MDLs. Discovery mechanisms cannot solve a problem that is fundamentally procedural—rules must be in place *ex ante*.

While the MDL Subcommittee repeatedly recognized the concern with unsupportable claims during the process of studying these issues and drafting the Proposed Rule,[12] the Proposed Rule does not set forth any requirements or procedures for addressing the problem of such meritless claims; indeed, it does not even provide relevant *guidance* on the nature of the issue. Thus, while the Subcommittee has stated on

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[7] Elizabeth Burch and Margaret Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835, 1843 (2022) (online at https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2023/01/Burch-Williams-final-1.pdf) (last visited February 9, 2024) ("Instead of acting as dependable gatekeepers, mouthpieces, translators, and counselors, some attorneys functioned as vacuums by indiscriminately pulling in claims and then bullying their clients into settling.").

[8] *See* John Beisner, et al., *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding a Decade Later* 12-17 (U.S. Chamber of Commerce Inst. For Legal Reform 2020) (online at https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf) (last visited February 9, 2024) (collecting instances in which third-party litigation funding drove filing of meritless claims).

[9] *See id.*

[10] Cary Silverman, *Gaming the System: How Lawsuit Advertising Drives the Litigation Cycle* 1 (U.S. Chamber of Commerce Inst. For Legal Reform 2020) (online at https://instituteforlegalreform.com/wp-content/uploads/2020/04/Lawsuit-Advertising-Paper_web.pdf) (last visited February 9, 2024).

[11] *Id.* at 2–4.

[12] *See, e.g.*, *supra* n.2.

more than one occasion that Subsection 16.1(c)(4) is aimed at addressing unvetted claims, a plain reading of that Subsection and the draft Advisory Committee Note do not bear that out. In the absence of any clarification in the Rule as well as the Advisory Committee Note, the Subsection will be read by at least some, if not a significant number, of judges and litigants as suggesting nothing more than bilateral discovery that would be called for even in the absence of the Proposed Rule—calling for consideration only of "how and when the parties will *exchange information* about the factual bases for their claims *and defenses*" (emphasis added).

The draft Committee Note not only suggests the problem is one simply of discovery, it does not even *mention* the concern or problem that is driving the Rule. Despite the MDL Subcommittee's repeated recognition in the past that the filing of unexamined and meritless claims is both prevalent and problematic, the draft Committee Note is silent on this issue.

We respectfully ask the Committee to clarify in both the language of the Rule as well as the Advisory Committee Note that the issue to be addressed is early vetting of claims, not simply discovery mechanisms. Without such edits, the Proposed Rule threatens to make the situation worse rather than better—solidifying the same practices that have allowed meritless claims to flourish thus far. We second the thoughtful recommendations set forth by LCJ on pages 6 and 10–11 of their September 18, 2023 comment as to specific language in this regard. And we emphasize that, absent such changes, it would be better not to move forward with a rule at all—at the very least, the rule should do no harm.[13]

III. Other Concerns

Outlined below are some additional concerns regarding the proposed Rule 16.1 and its draft Committee Note.

A. Appointment of Leadership Counsel

Section 16.1(c)(1) of the Proposed Rule calls for consideration of "whether leadership counsel should be appointed." We note that there is some debate about the role, responsibilities, or duties of leadership counsel.[14] As our colleagues from both sides of the "v" have aptly explained at recent conferences, there are important and unanswered questions about the authority of leadership counsel to represent plaintiffs who have not retained them, MDL courts' authority to shift representation to such

[13] During the October 16, 2023 Public Hearing, the Committee asked several witnesses whether the issue of concern is that plaintiffs fail to understand that an MDL does not excuse a party's obligations under Rules 8, 9 and 11, and whether the Committee should consider emphasizing that point in the Committee Note. While we agree that the MDL statute does not excuse a party's pleading obligations under Rules 8, 9 and 11 and there would be a benefit to the Committee Note emphasizing this fact, a revision to the Committee Note to that effect is not, in our view, sufficient by itself to address the underlying problem of unvetted claims. We do not believe simply reemphasizing attorneys' obligations will resolve the issue, especially given the financial incentives to stockpile claims. Only a mechanism to ensure the vetting of these claims early in the litigation will act as an appropriate gatekeeping function to deter the filing of meritless claims and/or remove such claims early from the MDL process.

[14] *See* David L. Noll, What Do MDL Leaders Do? Evidence from Leadership Appointment Orders, 24 Lewis & Clark L. Rev. 433, 465–66 (2020) (online at https://scholarship.libraries.rutgers.edu/esploro/outputs/journalArticle/What-do-MDL-leaders-do-evidence/991031567548504646) (last visited February 9, 2024).

counsel without claimants' consent, leadership counsel's ethical obligations to clients who have not retained them, and where responsibilities lie to keep nonleadership counsel apprised of developments in the litigation. Moreover, disputes between leadership and nonleadership counsel may require mediation by the MDL judge, but the possibility of *ex parte* discussions between the judge and plaintiffs' counsel on such issues would both be unfair to defendants and risk the appearance of impropriety. The Proposed Rule does not recognize or provide guidance on these thorny issues. We believe that if the concept of leadership counsel is to be enshrined in the federal rules, the Committee Note should, at the very least, recognize that such unsettled issues exist.

B. Consolidated Pleadings

Section 16.1(c)(5) of the Proposed Rule, which suggests consideration of "whether consolidated pleadings should be prepared to account for multiple actions filed in MDL proceedings," could create considerable confusion. It is unclear how such "consolidated pleadings" align with Rule 7(a), which sets forth the "only" pleadings allowed in federal court. It is also unclear whether or to what extent other rules' repeated references to "pleadings" would apply to such consolidated complaints. We especially fear that, without guidance on the legal effect and requirements for such pleadings, they will only further exacerbate the difficulties of challenging meritless claims in MDL cases. In our view, this section should be stricken from the Proposed Rule. At the very least, the Proposed Rule should make clear that such "consolidated pleadings" are subject to the same requirements as any other pleading.

C. Settlement Facilitation Measures

Section 16.1(c)(9) of the Proposed Rule suggests consideration of "measures to facilitate settlement," with the accompanying note suggesting "judicial assistance" to "facilitate the settlement of some or all of the actions." Several other sections of the Proposed Rule and the Advisory Committee's Note also refer to the court's role in facilitating settlement.[15] While reasonable actions and accommodations to facilitate a settlement the parties desire are appropriate and helpful, we believe that the Proposed Rule places undue emphasis on settlement and could suggest a presumption that settlement is an appropriate or expected outcome in all MDLs. To state the obvious, just because enough cases have been filed to warrant the creation of an MDL does not mean those claims have merit. Liability in MDLs can be hotly contested and, as discussed above, meritless and unsupported claims are well-recognized as an unfortunate feature of many MDLs. Moreover, an especial focus on settlement in the MDL context is unnecessary, because Rule 16(c)(2)(I) already calls for consideration of actions that could assist in settling the case when appropriate. We believe that a focus on settlement in the Proposed Rule thus only serves to further an incorrect belief that all MDLs should proceed to settlement as promptly as possible.

D. Special Masters

Section 16.1(c)(12) of the Proposed Rule suggests that MDL courts obtain the parties' views on "whether matters should be referred to a magistrate judge or master." We are concerned about the inclusion of this subsection in the Proposed Rule for several reasons.

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[15] *E.g.*, Proposed Rule 16.1(c)(1)(C), Advisory Committee's Note to Proposed Rule 16.1(c)(1)(C).

First, we do not believe the subsection is necessary, as there are already rules regarding the appointment and use of special masters. Specifically, Rule 53 requires that "the court must give the parties notice and an opportunity to be heard" before appointing a master, and Rule 72 provides guidance and procedures for referrals to magistrate judges.

Second, over the last decade, we have seen a broad expansion in the use of special masters in the MDL context. Of most concern, we have seen the scope of special masters' responsibilities expand dramatically—from specialists appointed to address highly technical (e.g., e-discovery) or collateral (e.g., settlement) issues, to now including cases where special masters are used as generalists, assuming broad responsibility for the pretrial conduct of the case. We believe the inclusion of this subsection could be read as an endorsement for appointing masters, which is contrary to the current Federal Rules stating that "appointment of a master must be the exception and not the rule" and "[a] master should be appointed only in limited circumstances" because "[d]istrict judges bear primary responsibility for the work of their courts." Rule 53, Advisory Committee's Note to 2003 amendment.

Third, as the Committee has previously stated, "[o]rdinarily a judge who delegates these functions should refer them to a magistrate judge acting as a magistrate judge." *Id.* We strongly agree with this proposition, and we are concerned that inclusion of Section 16.1(c)(12) of the Proposed Rule will erode the presumption in favor of the use of magistrate judges.

Finally, we are concerned about transparency regarding the appointment, referral, procedural processes followed, and costs of special masters. All too often, parties have a special master foisted upon them with little chance to suggest candidates, vet candidates, and/or object to their appointment. We have been involved in numerous cases, including those in the MDL context, where the description of special masters' duties is unclear and, in some cases, where their duties appear so broad as to essentially replicate the role of the district judge. Also, clear procedural mechanisms and rules for bringing issues before the special master are often lacking, including: (i) the requirements for written submissions; (ii) whether and to what extent the parties and special master can engage in *ex parte* contacts with not just the parties, but also the district court; (iii) whether special master proceedings should be transcribed; and (iv) the format and content of any special master findings or recommendations. The costs associated with a special master are also often enormous. Yet in many cases, there is little transparency regarding these costs, including the costs of staff the special master may retain to assist her or him in the matter.

With the above noted and to the extent that the Committee intends to retain Section 16.1(c)(12) as part of the Proposed Rule, we would respectfully suggest the draft Committee Note should be revised in a manner that strongly indicates:

- Appointment of special masters should be the exception, not the rule.
- A special master's referral should be clearly defined, limited in nature, and confined to specific technical and/or procedural tasks.
- More importantly, broad delegation of pretrial proceedings is not the appropriate use of a special master.

- The district court should enter a referral order upon which the parties have a full and fair opportunity to provide their input that addresses, among other items: (i) the process for suggesting, vetting and approving special masters (including a process to object to their appointment); (ii) a statement of a scope of referral that is consistent with the notion that special masters are to be the exception and not the rule; (iii) the procedural process for the submission, adjudication and recommendation of matters brought before the special master (including a prohibition on *ex parte* contacts with the parties and/or the district court); and (iv) details regarding the obligations of the special master to report his or her fees and expenses.

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At the October 16, 2023, hearing on the Proposed Rule, the Committee asked Alex Dahl from LCJ whether that organization would prefer no Proposed Rule at all or the current draft. His answer was clear—it is preferable to have no rule at all rather than the current draft. He went on to explain, though, that with the modifications suggested by LCJ and others, particularly as it relates to early vetting, the Committee could pass a rule that would have meaningful positive impact on the efficient and fair conduct of MDLs. We whole heartedly agree and ask the Committee to consider the changes suggested herein.

Respectfully submitted,

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