

IN THE MATTER OF: )  
 )  
PROPOSED AMENDMENTS TO THE )  
FEDERAL RULES OF CIVIL )  
PROCEDURE )

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## ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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PROCEDURE )

Suite 206  
Heritage Reporting Corporation  
1220 L Street, N.W.  
Washington, D.C.

Monday,  
October 16, 2023

The parties met remotely, pursuant to the notice,  
at 9:33 a.m.

**COMMITTEE MEMBERS AND STAFF:**

HON. ROBIN L. ROSENBERG, Chair  
 PROF. RICHARD L. MARCUS, Reporter  
 PROF. ANDREW D. BRADT, Associate Reporter  
 HON. JOHN D. BATES  
 PROF. CATHERINE T. STRUVE  
 H. THOMAS BYRON III, ESQ.  
 ALLISON A. BRUFF, ESQ.  
 HON. KENT A. JORDAN  
 HON. R. DAVID PROCTOR  
 HON. JENNIFER C. BOAL  
 HON. M. HANNAH LAUCK  
 JOSEPH M. SELLERS, ESQ.  
 ARIANA J. TADLER, ESQ.  
 HELEN E. WITT, ESQ.  
 PROF. EDWARD H. COOPER  
 CARMELITA R. SHINN, ESQ.

WITNESSES TESTIFYING:

ROBERT KEELING  
DOUGLAS MCNAMARA  
MARY MASSARON  
ALEX DAHL  
KASPAR STOFFELMAYR  
JOHN BEISNER (Virtual)  
JONATHAN REDGRAVE (Virtual)  
CHRISTOPHER CAMPBELL

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WITNESSES TESTIFYING: (Cont'd.)

JAMES SHEPHERD  
CHRISTOPHER GUTH  
FRED HASTON  
MARKHAM LEVENTHAL  
AMY KELLER  
LANA OLSON  
AMY LARSON  
JOHN GUTTMAN  
GREGORY HALPERIN  
HARLEY RATLIFF  
JOHN ROSENTHAL  
SHERMAN JOYCE  
DEIRDRE KOLE  
LEIGH O'DELL

# 1 P R O C E E D I N G S

2 (9:33 a.m.)

3 CHAIR ROSENBERG: Good morning, everyone.  
4 It's wonderful to see everyone here. Welcome and  
5 thank you to all of the Committee members, the  
6 witnesses, and the observers who are here in  
7 attendance both in person and virtually. Whether you  
8 are here in person or joining us remotely, we do  
9 appreciate your participation in the rulemaking  
10 process.

11 Today is the first of three scheduled public  
12 hearings on the proposed amendments to the Federal  
13 Rules of Civil Procedure. The current published  
14 proposals out for public comment include the proposed  
15 privilege log amendments, Rules 26 and 16, and the  
16 proposed new rule on MDL proceedings, Rule 16.1. We  
17 do look forward to hearing your testimony on these  
18 proposed amendments and the new rule.

19           Each witness's formal testimony will be  
20       limited to five minutes, followed by five minutes of  
21       questions from the Committee. Times on the schedule  
22       are approximate and may be adjusted as needed. A  
23       signal will be given when there is one minute left for  
24       each witness's formal testimony and when there is one  
25       minute left for questioning.

1           For those who are appearing remotely, just a  
2   few technical reminders. If you could leave your  
3   video off and microphones muted until you're called on  
4   to make your formal presentation. With respect to our  
5   remote Committee members if there are any, you may  
6   have your videos on throughout the hearing if you  
7   desire to, and we ask that you use the Raise Hand  
8   feature or physically raise your hand in the video  
9   frame to indicate a desire to comment or to ask  
10   questions. As for our in-person participants, please  
11   remember to use microphones when speaking and to  
12   switch them off during breaks and when not in use.

13           This hearing is recorded and a transcript  
14   will be publicly available on the U.S. Courts'  
15   website. If those of you who are appearing remotely  
16   get disconnected, please use the original Teams link  
17   to rejoin or use the conference bridge number located  
18   at the bottom of the meeting invite to join by audio.

19           So, with that, I'd like to call our first  
20   witness to the podium, Robert Keeling from Sidley  
21   Austin, and it's our understanding that based on your  
22   summary you'll be addressing privilege logs. So  
23   welcome and thank you for kicking us off this morning.

24           MR. KEELING: Thank you and good morning.  
25   My name is Robert Keeling, and I'm a partner at the

1 law firm of Sidley Austin, where I lead Sidley's e-  
2 discovery and data analytics group. I want to thank  
3 the Committee for the opportunity to speak to you  
4 today on this very important topic of how we can  
5 improve upon and modernize the privilege logging  
6 process.

7 My practice provides a unique perspective on  
8 these issues. I serve as discovery counsel on a range  
9 of matters where I manage all aspects of discovery for  
10 large corporations. The cases that I work on today  
11 typically involve the review and production of  
12 millions of documents or tens of millions of  
13 documents. Included in those millions of documents  
14 are tens of thousands of privileged communications as  
15 lawyers have followed their clients first to email  
16 and, more recently, to chat applications.

17 I have witnessed firsthand the incredible  
18 burdens of creating document-by-document privilege  
19 logs and the needless waste of resources that  
20 accompany current privilege logging standards. Just  
21 by way of example, since 2021, I have managed numerous  
22 reviews where document-by-document logs were required.  
23 Specifically, the number of log entries for each of  
24 those matters involved logging 22,000 documents,  
25 26,000 documents, 43,000 documents, 53,000 documents,

1 and one matter involving the logging of 135,129  
2 documents.

3 Composing these logs takes an enormous  
4 amount of time. For just one of the matters that I  
5 mentioned above, the contract attorney team spent a  
6 total of 21,378 hours on the single log, including  
7 redactions and QC. Outside counsel for the matter  
8 spent more than 700 hours on the log, bringing the  
9 total time on the log to over 22,000 hours. To put  
10 that in perspective, in big law, a common marker of a  
11 very busy associate is 2,000 hours a year. If you do  
12 the math, 22,000 hours, this would be the equivalent  
13 of an associate spending 11 years of their life to  
14 compose one log for one party on one matter.

15 As a practitioner who routinely deals with  
16 these issues, the need for privilege law reform is  
17 overwhelming and evident. The critical question for  
18 this Committee now is, what does that reform look  
19 like? Based off my many years of experience, I  
20 strongly believe that to change the privilege log  
21 burdens caused by the current language in 26(b)(5),  
22 the Committee will need to change the language of  
23 26(b)(5), particularly setting forth that privilege  
24 logs should be proportional to the needs of the case.

25 Regarding the proposed changes, I have two

1 observations. First, regarding the early meet-and-  
2 confer requirement, parties typically do not have the  
3 information they need to meaningfully discuss and  
4 negotiate privilege log issues at the outset of a  
5 case, as proposed Rule 26(f)(3) requires. Likewise,  
6 courts also will not have sufficient information  
7 related to the scope of privilege review at this time,  
8 making it impractical for courts to address  
9 substantive privilege log requirements in a scheduling  
10 order, particularly disputes relating to privilege  
11 logging.

12 Now, importantly, I believe the proposed  
13 meet-and-confer requirements make more sense if  
14 combined with meaningful changes to privilege log  
15 standards themselves. In other words, if there is a  
16 change to Rule 26(b)(5) consistent with, for example,  
17 the proposed Jonathan Redgrave submission, then the  
18 proposed meet-and-confer requirements would, in my  
19 view, be beneficial.

20 Separately, I am concerned with the portion  
21 of the Committee notes that call for the production of  
22 rolling privilege logs. I can confidently say that  
23 rolling privilege logs are inefficient and  
24 ineffective. More specifically, they will lead to  
25 delay, increased costs, and lower-quality logs in

1 large document cases. In turn, lower-quality logs  
2 will lead to more disputes between parties and  
3 increased judicial resources to resolve those  
4 disputes. I suspect this seems counterintuitive.  
5 After all, parties routinely engage in rolling  
6 productions. Why not engage in rolling logs? Well,  
7 logs are different, and in particular, the more  
8 requirements put on a privilege log, the more  
9 expensive it will be.

10 Resources are limited. A party can focus on  
11 either the document production or the privilege log  
12 but cannot do both in a high-quality manner at the  
13 same time. Also, rolling logs will increase the  
14 likelihood of the inadvertent production of privileged  
15 documents because a party will not have enough  
16 resources to do sufficient quality control on  
17 privilege while also trying to prepare ongoing  
18 document productions.

19 As an alternative to the Advisory Committee  
20 notes calling for rolling logs, it may be possible to  
21 achieve the Committee's goals of early dispute  
22 resolution of these matters by asking that privilege  
23 logs be tiered or, even better, phased so that  
24 documents relevant to threshold issues, such as  
25 whether preemption would apply in a case, could be

1       logged early, before resolution of those issues. This  
2       will have the benefit of focusing the parties and the  
3       court on privileged communications that actually  
4       matter to the case. Thank you for your time --

5               CHAIR ROSENBERG: That's about five minutes.

6               MR. KEELING: -- and for your continued work  
7       on these important issues.

8               CHAIR ROSENBERG: Okay. Thank you so much.  
9       Let me inquire as to whether there are any questions,  
10      and if you feel at the end that you have not been able  
11      to say something that you intended to say in your  
12      opening remarks, we'll give you that opportunity to do  
13      so.

14              Let me turn first to our reporters and see  
15      if there are any preliminary questions you may have,  
16      and then I'll turn to our Committee members for any  
17      questions.

18              PROF. MARCUS: Well, thank you. I guess my  
19      preliminary questions are for some background, and our  
20      Committee members probably have it more than I do, but  
21      I'll remember that 20 years ago in this room I was  
22      working on the e-discovery amendments, which included  
23      various things that we're talking about. The problem  
24      of identifying responsive materials in a terabyte,  
25      say, of data that's very large, the problem of

1       discerning whether those identified as responsive or  
2       privileged sounds like a big challenge.

3               So one thing I'm interested in is why  
4       logging is a big add-on. The second thing I'm  
5       interested in is, if it's too soon to talk about this  
6       up-front, when is it timely to talk about it and how  
7       would one go about telling people to address things  
8       then? And third, related to that, if you have phased  
9       or tiered or some other name of it instead of rolling  
10      production of documents looking at, say, preemption as  
11      a defense, would you agree -- this is kind of  
12      switching horses -- would you agree that it makes more  
13      sense to focus on that than what some people we'll  
14      hear from later call vetting individual claims in MDL  
15      proceedings? So those are three sort of overview  
16      questions that occur to me.

17             MR, KEELING: Sure. So perhaps taking them  
18      slightly out of order. As far as when I believe this  
19      issue could be better joined, to me, it's more  
20      appropriate in the Rule 34 process, after the parties  
21      have exchanged discovery. That's when they're  
22      negotiating about appropriate custodians, and,  
23      frankly, the number and type of custodians will have  
24      the biggest impact on privilege.

25             For example, at the extreme example, if in-

1 house counsel, for whatever reason, is a custodian,  
2 that will dramatically increase the number of  
3 privilege documents. Also, typically, the more senior  
4 a custodian, the more likely that custodian is to  
5 interact with counsel and a greater proportion of  
6 privilege documents in their files, and you only know  
7 that after receiving document requests and going  
8 through that process.

9 To your first question, yes, the terabytes  
10 of data is a huge problem. My first matter as a  
11 junior associate, storage was so expensive that our  
12 client actually printed out emails that they wanted to  
13 save and filed them. Obviously, we're no longer in  
14 that universe. Storage is cheap. Communications  
15 happen frequently. And it's the volume that is an  
16 issue, but despite that volume, the volume has a  
17 direct impact on the cost and burden of logging. We  
18 see logging can be -- on the one matter that I  
19 mentioned, it was roughly about 23 percent of our  
20 entire discovery costs for our contract attorneys was  
21 in logging, so separate from initial review,  
22 responsiveness review, that type of thing.

23 PROF. MARCUS: Sorry to interrupt, but  
24 follow-up on what you just said. So somebody has to  
25 make a determination this is possibly privileged,

1       somebody else has to review that to decide if that's a  
2       legitimate claim of privilege. And putting an entry  
3       on a log is the big deal, those other things are not?

4               MR. KEELING: It is a significant part of  
5       the cost of the overall process. So, as I mentioned,  
6       23 percent. And, yes, typically, you do have an  
7       initial review for responsiveness and privilege and  
8       then a separate review for logging. And for folks who  
9       might not do this all the time, you might think, well,  
10      why don't you do it all at the same time? I have  
11      written the world's most boring law review article on  
12      this very topic, where it's actually more efficient  
13      and less costly to segregate those reviews and have a  
14      specific review just focused on logging, but it adds  
15      an enormous cost.

16             And so the more requirements, for example, a  
17      document-by-document log, it forces an individualized  
18      determination, not just determination but  
19      describing the document and the privileged material in  
20      a way that doesn't provide enough detail that could  
21      risk waiver of the document, waiver of the privilege,  
22      and that's a complicated task. That takes a lot of  
23      time and money particularly at scale.

24             CHAIR ROSENBERG: Let me see if we have any  
25      questions from any of our Committee members.

1 Judge Jordan?

2 MR. SELLERS: You mentioned a concern about  
3 proportionality and said 26(b)(5) should be amended.  
4 Is there a reason that the proportionality rule in  
5 26(b)(1) doesn't cover your concern?

6 MR. KEELING: I wish it did. There's a  
7 significant line of cases where courts see privileges  
8 different and essentially apply a perfection standard  
9 to both the privilege call itself and to the logging  
10 entry. And I think, even if this Committee thinks  
11 that it should cover, my experience and my practice is  
12 that it does not, that there is a different and higher  
13 standard that courts are applying to both privilege  
14 review and privilege logging at this time.

15 MR. SELLERS: As a theoretical matter,  
16 there's nothing that prevents an attorney from saying,  
17 look, 26(b)(1) talks about proportionality, Your  
18 Honor, this is not proportional to the case, is there?

19 MR. KEELING: I don't think there's anything  
20 preventing a lawyer from arguing that. We just see a  
21 significant number still of document-by-document logs  
22 in big cases. And so despite perhaps the attorney's  
23 ability to argue that, we see the actual practice of  
24 cases and the decision of courts still requiring  
25 burdensome, expensive document-by-document logs on

1 cases, and so, therefore, some further clarification,  
2 I believe, is needed.

3 MR. SELLERS: I'm curious. I gather your --  
4 the cases you cite suggest that you are involved in  
5 cases involving very large document productions. You  
6 are obviously aware that the rules apply to cases with  
7 smaller volumes of production. Is there any reason  
8 why the meet-and-confer process that's been proposed  
9 wouldn't -- I realize you're frustrated, the rules,  
10 you don't think, work well, but with respect to the  
11 meet-and-confer, it's hard to design a one-size-fits-  
12 all rule for all the types of cases before the courts.

13 Is there a reason why the meet-and-confer  
14 process would not meet your concerns if parties were  
15 engaged in meaningful and reasonable compromise?

16 MR. KEELING: If parties were engaged in  
17 reasonable and meaningful compromise, I think, in most  
18 cases, the proposed amendments could work. The  
19 problem is my cases in asymmetric litigation, for  
20 example, there's no reason for the other side to  
21 compromise, and they propose burdensome privilege  
22 requirements either connected to ESI protocols or not,  
23 and you end up engaged in literally month-long  
24 negotiations over these, which is extensive and  
25 ultimately requires court involvement, and just the

1 current system is broken in that way and, in my view,  
2 requires some type of reform.

3 CHAIR ROSENBERG: Helen? And then I think  
4 Rick had another question.

5 MS. WITT: You mentioned that you think that  
6 the rolling production would be more inefficient.  
7 Putting aside the resource issue that you described,  
8 are there other reasons that you think that rolling  
9 privilege logging in whatever form as agreed for a  
10 particular case would necessarily be inefficient?

11 MR. KEELING: I think there are ways for  
12 rolling logs to be efficient, and the primary way is  
13 to put less requirements on them. Where you really  
14 get a problem is where the log is tied to, for  
15 example, a particular custodian and that you have to  
16 produce the log at the same time documents for that  
17 custodian is produced or let's say 21 days after. And  
18 so the more -- or you have to have a certain  
19 percentage of documents, so the more requirements that  
20 are put on rolling productions, the harder they are to  
21 meet and the more they lead to the problems that I  
22 mentioned, either increased costs and increased  
23 likelihood of the inadvertent disclosure of privileged  
24 documents.

25 CHAIR ROSENBERG: Judge Boal and then Rick.

1 JUDGE BOAL: Yes. In terms of the timing  
2 and method for complying with Rule 26(b)(5)(A), why do  
3 you think the current proposal is not flexible enough  
4 to address your concerns about the situation in the  
5 cases you've described? Where the parties don't know  
6 enough to make a meaningful suggestion, why couldn't  
7 you make a suggestion at the conference about when to  
8 deal with it?

9 MR. KEELING: Well, for example, through  
10 experience, and I should say I get hired by clients  
11 predominantly to help run privilege logs, which is an  
12 odd thing that I don't think existed, you know, even  
13 just a few years ago, and that shows the need, I  
14 think, for some type of reform as specialized counsel  
15 is now needed in big cases just for a privilege  
16 review.

17 But, to your point, in discussions, I'm  
18 being asked to justify why document-by-document logs  
19 are not burdensome, are not sufficient, and I respond  
20 with my experience, but if I'm going before the court  
21 at an early stage, I lack the specifics to justify the  
22 burden that you would normally have. For example, in  
23 opposing a motion to compel much later on in the  
24 process in response to the documents side, I'll lack  
25 the number of privileged documents that will be at

1 issue, the percentage of privileged documents, the  
2 estimated cost. I don't have any of that information  
3 at the beginning of the case, which makes my job in  
4 resisting calls for very burdensome document-by-  
5 document discovery very difficult.

6 CHAIR ROSENBERG: Rick?

7 PROF. MARCUS: Something that I think you've  
8 mentioned and I know the next speaker addresses is  
9 what's sometimes called categorical exclusions or  
10 something like that, and just as an inadequate one,  
11 suppose the category privileged or otherwise protected  
12 as litigation preparation materials therefore is  
13 excluded. I'm wondering, since I think the next  
14 speaker says something like his experience with  
15 categorical logging is categorically bad, what you can  
16 tell us about why it might be good?

17 MR. KEELING: So categorical logs along with  
18 metadata logs, I believe, are a reasonable alternative  
19 to document-by-document logs, and there are certain  
20 categories that should always be, I think, excluded,  
21 for example, in the vast majority of cases, such as  
22 privileged documents created after the filing of the  
23 complaint, communications with outside counsel.

24 In my view, the issue and the concern that  
25 was identified that perhaps categorical logs could

1 potentially lead to over-withholding, and while that  
2 is not my experience, I think that can be addressed by  
3 what is referred to as, like, a categorical-plus log  
4 or a metadata-plus log, which means you provide the  
5 categories in this instance or you provide documents  
6 via just an objective metadata log with the to, from,  
7 CC, things like that. And the other side then has the  
8 ability to focus in on either particular categories or  
9 particular parts of the log and then ask for more  
10 information, which could include, as appropriate,  
11 document-by-document entries.

12 But what you're doing there is you're  
13 limiting the document-by-document burden to documents  
14 that actually are more likely to matter. Like, the  
15 vast majority of privileged documents don't matter to  
16 the substance of the case, right? And so this  
17 categorical-plus approach is more likely to focus the  
18 parties on what matters and also, I think, will  
19 address the perceived issue of over-withholding by  
20 requesting parties.

21 CHAIR ROSENBERG: Okay. Well, thank you so  
22 much, Mr. Keeling, for starting us off this morning  
23 and for your responsiveness to the questions we've  
24 had. We appreciate your comments and the time you've  
25 taken to present to us.

1 MR. KEELING: Thank you.

2 CHAIR ROSENBERG: Thank you so much.

3 Mr. McNamara?

4 MR. MCNAMARA: Good morning.

5 CHAIR ROSENBERG: Good morning.

6 MR. MCNAMARA: Thank you very much. My name  
7 is Doug McNamara. I'm an attorney that specializes in  
8 consumer class actions, products cases, data breach  
9 cases, and I'm here because I support the proposed  
10 amendments. The sooner resolution on format and  
11 timing of logs can get done, the better. Rolling logs  
12 and document-by-document logs I have found in my  
13 experience are best to avoid over-withholding, in  
14 camera reviews, and re-depositions. And over-  
15 withholding is a real problem. It's been since when I  
16 started as an associate on the defense side at a big  
17 defense firm, I noted in their comment that DRI stated  
18 that if lawyers are going to cheat, they will do so in  
19 a log-by-log or categorical log basis.

20 Well, to me, it's not so much over-  
21 withholding is because of insincerity. It's because  
22 of insecurity. In the '90s, picture a room, a  
23 conference table, a bunch of 20-somethings around  
24 bankers boxes of papers and we have to look through  
25 these and figure out if they're privileged. We joked

1       this is where shaky relationships went to die and new  
2       ones were born. You'd spend eight hours with each  
3       other looking through these papers and if you saw a  
4       document and you're like I don't know if this is bad  
5       or not, I don't want to be the person that hands this  
6       over to the other side and gets fired or gets yelled  
7       at.

8                   And as Mr. Keeling alluded to, it's still  
9       that way. We still have contract lawyers and junior  
10      lawyers making this first call. They're the first  
11      line on this, and a lot of them don't know anything  
12      about the attorney-client privilege or attorney work  
13      product or deliberative privilege or any of these  
14      privileges. So they put it on a log and they let it  
15      rest there to kick the can down the road and go to the  
16      next person.

17                   The problem is, when that happens, you may  
18      have depositions go on, you may have discovery  
19      proceed, and then, all of a sudden, you get the log  
20      and it's like wait a minute, these documents, they  
21      should never have been privileged. And that's not me  
22      saying this as the plaintiff's lawyer. It's usually  
23      persons like Mr. Keeling, who then see the log come up  
24      to them and say, oh, I think folks were a little  
25      overeager here. And to give you an example, in 2023,

1 Judge Chhabria in the Facebook Cambridge Analytica  
2 case, where Facebook and Gibson Dunn gave a 180,000-  
3 document privilege log and, after some sampling, they  
4 deprivileged 63 percent of that log. And when Judge  
5 Chhabria at the sanctions hearing said what happened,  
6 the senior counsel at Gibson's response is that  
7 nervous associates overdesignated the documents to  
8 avoid waiving privilege.

9 And a lot has happened in the '90s,  
10 especially to me, but it has not changed with  
11 associates. Nobody wants to be the person responsible  
12 for doing that. The sooner you have logs that get  
13 done, that are kicked up to more senior counsel, that  
14 are given over to the other side, the quicker you're  
15 going to get to flesh this out and stop that.

16 I did notice that Mr. Keeling talked about  
17 categorical logs and meta logs, and, to me, they're  
18 very, very different. So a meta log, to me, and this  
19 is something we couldn't do back in the '90s, you can  
20 produce in a spreadsheet the to, the from, the CC, the  
21 subject matter of the document, and the date. So  
22 you're immediately seeing who got it, who wrote it,  
23 what the subject was, and when. You're already going  
24 to be able to answer certain important questions, like  
25 was this done in anticipation of litigation? Are

1       there any lawyers involved here? Is the subject one  
2       where we would think this probably was business  
3       advice? A lot of things are going to come right off  
4       the top from seeing that kind of a log that you won't  
5       see in a categorical log.

6               Let me then quickly turn to format. I don't  
7       believe there's a problem with 26(b)(5)(A) the way  
8       it's written, and the judges aren't misapplying the  
9       rule. And I also don't think you can change the rule  
10      to change what's going on. A party that produces a  
11      document that claims it's privileged has a burden  
12      under state law to meet that burden that this is a  
13      privileged document.

14             The judges are applying the law. That party  
15      has to show that they meet all the elements of that,  
16      and that means the judge has to look -- he or she has  
17      to look at the underlying elements. They have to see  
18      the to, the from, the what happened. And if they  
19      can't see that on a categorical log, they're going to  
20      do what even the Southern District of New York seems  
21      to do, which has a presumptive rule on categorical  
22      logs, they're going to ask for more information,  
23      they're going to do in camera reviews and send you  
24      back to do it again.

25             I don't think the producing party decides is

1 a good idea. I saw that LCJ and that Mr. Keeling had  
2 suggested that too. I don't think you can allow that  
3 party to have that right. Again, they have the burden  
4 to do it at the end of the day. So that's where this  
5 is not just asymmetric litigation. You have the  
6 burden, you're taking the extra step.

7 And then, finally, in terms of the Committee  
8 note, I think I agree also with DRI that some examples  
9 of adequate logs in the note would help. And I gave a  
10 few in my testimony that Judge Grimm had, of course,  
11 for the District of Maryland and also Judge Waxse  
12 included in a decision before. Thank you.

13 CHAIR ROSENBERG: All right. May I turn to  
14 our reporters to see if there are any questions of Mr.  
15 McNamara?

16 PROF. MARCUS: If I may, I think I'd like  
17 you to expand a little bit about what you called meta  
18 logs and tell us whether those are almost push-a-  
19 button items and also why that isn't good enough for  
20 you in a document-by-document sense or some other  
21 sense because maybe that's easy to do. And then,  
22 finally, in terms of rolling or tiered or phased  
23 production, have you found that that has worked well  
24 in terms of document production and privilege logging  
25 or privilege review in the cases on which you work?

1                   MR. MCNAMARA: Sure. So the meta logs are a  
2 great way of winnowing things down. You can imagine  
3 the spreadsheet, you'll have the to, the from, the  
4 day, all the recipients, the subject matter that's in  
5 electronic discovery, you have a lot of the things  
6 you'd see in the log except that last column where the  
7 lawyers are doing the analysis and saying privileged  
8 because it, you know, dealt with this issue. You can  
9 cut down a lot of the stuff that's going to be on it.  
10 You can basically get rid of the chaff because you  
11 realize, well, it went to too many people, there are  
12 no lawyers on it, et cetera.

13                   It's a good step. It actually can save time  
14 and money, but at the end of the day, if you're the  
15 party claiming the privilege, you got to do that last  
16 column, you have to say why it's privileged because  
17 you have to justify it. You don't get to just say I  
18 want to keep it. So you will have that column  
19 eventually. It might save some time and money to do a  
20 meta log first. Whether you call it a tiered log, I  
21 don't think we're that far apart with Mr. Keeling on  
22 that, on how to get to that point. But that is  
23 something you could discuss with the parties at the  
24 initial conference. You know, that's exactly why this  
25 is a great idea in the rule.

1                   PROF. MARCUS: And when you say the last  
2 column, attorney-client privilege, litigation  
3 preparation, what are the sorts of things one could  
4 enter in there that would help you?

5                   MR. MCNAMARA: Well, it's going to be  
6 exactly -- it's going to be -- well, unfortunately, a  
7 lot of times they just put ACP AWB and they treat them  
8 as the same. But, usually, you're going to see  
9 something substantive in that column will be withheld  
10 because litigation advice, withheld because question  
11 for a lawyer. There's going to be some information  
12 there that actually is a justification that the  
13 producing party is giving to why to withhold it, and  
14 they have to do that at some point.

15                  PROF. MARCUS: But isn't that part of the  
16 review process necessary to determine whether to  
17 withhold the document, not just to make a list?

18                  MR. MCNAMARA: Correct. But a lot of times  
19 with custodians, especially say you have -- as Mr.  
20 Keeling indicated, you may have an in-house counsel as  
21 a custodian. You might have a lot of documents there,  
22 but then, when you look at it and you realize, well,  
23 it went to the in-house counsel, but it also went to  
24 50 other people in the company, you know? It went to  
25 the in-house counsel, but it also went to everybody

1 doing the incident response in that data breach.

2           You can pretty quickly see this is going to  
3 be business advice. It went to the in-house counsel,  
4 but it went to the people who were answering questions  
5 for the PR. So you can do a sufficient -- significant  
6 amount, I should say, of winnowing down by doing a  
7 tiered log. And if you have folks that can discuss  
8 this early on in the process at the initial  
9 conference, it saves some time.

10           This also goes to the idea about the rolling  
11 log being one where -- and it has been for me a time-  
12 saver because the quicker you get the log, especially  
13 early on, you might say I'm seeing a lot of documents  
14 that involve this particular third party. I don't  
15 think it's privileged because they did, say, a  
16 forensic report. And you could have that fight in the  
17 beginning of the case instead of having that fight at  
18 the end of the case, when people have already been  
19 deposed and you have to do depositions again.

20           PROF. MARCUS: You mentioned depositions  
21 that occur before what we're talking about has been  
22 completed. Are you suggesting that we should say  
23 depositions should not occur until that process is  
24 completed?

25           MR. MCNAMARA: Absolutely not. No, no, not

1 at all. And that's part of the idea of seeking  
2 rolling logs, of seeking cooperation, seeking  
3 discussion with the other side about the format of the  
4 privilege log up-front. A lot of times, we would get  
5 a log a couple of months down the road, maybe right  
6 before the end of fact discovery, and, you know, it's  
7 a static document, doesn't have a lot of information,  
8 we have to go back and there's letters back and forth,  
9 and by the time you get the log, you know, you're  
10 almost done with fact discovery. So the sooner that  
11 this issue can get resolved, it's more efficient in my  
12 experience.

13 CHAIR ROSENBERG: Thank you.

14 Andrew?

15 PROF. BRADT: Thanks. This dovetails a  
16 little bit to what you were saying, but I wonder  
17 whether you could comment on Mr. Keeling's point that  
18 the -- or his assertion that the conference considered  
19 by the rule is too early to be productive in a lot of  
20 cases. Has that been your experience, or is there  
21 much you can do at the very outset of the case, you  
22 can accomplish?

23 MR. MCNAMARA: There's much you can do at  
24 the outset. First of all, you've got to just, you  
25 know, agree, is there going to be certain things that

1 categorically you don't have to log? Hey, this is a  
2 case where there's nothing you have to bother logging  
3 after the lawyers have been engaged and the litigation  
4 has started because there's not going to be any  
5 ongoing issue or that there's particular things that  
6 you can just forget about logging on both sides.  
7 Usually, also, at some -- as soon as the litigation  
8 starts, you have some idea of who the custodians may  
9 be and you could discuss those hand-in-hand.

10           These are going to be the key custodians.  
11 Let's do a metadata review of those and figure out  
12 from there, especially if they're the most important  
13 custodians, where we're looking at it, and we may get  
14 a pretty good idea of the landscape thereafter and  
15 also the format. You know, if there's going to be a  
16 privilege by a doc-by-doc or a categorical log and  
17 there's disagreement, bring it up sooner with the  
18 court so that nobody wastes their time down the road  
19 with invective letters about your log is terrible; no,  
20 my log is sufficient. So I think it definitely would  
21 save some anguish to do that up-front.

22           CHAIR ROSENBERG: Ariana?

23           MS. TADLER: How often are you finding that  
24 you and your opposing party are agreeing to a 502(d)  
25 order and bringing that to the court?

1                   MR. MCNAMARA: A hundred percent. A hundred  
2 percent. Well, I at this point don't have a case  
3 where I have an adversary who does not put a 502(d)  
4 either in the protective order or in the ESI protocol  
5 or somewhere else. And that should to some degree  
6 help with the fear of inadvertent production. You  
7 know, if they do produce too much because there is the  
8 emphasis on getting the production out there, it can  
9 be clawed back, and that does seem, I think, to take  
10 out some of the concern about a time-consuming and  
11 arduous log or else we end up waiving something. No,  
12 you don't waive it. Under 502(d), you can still get  
13 it back without having to worry about subject matter  
14 waiver.

15                   MS. TADLER: How familiar are you with other  
16 cases? I mean, this may be your practice in the types  
17 of cases that you're involved in. In other -- Mr.  
18 Keeling, I think, was often focused on asymmetrical  
19 cases during his testimony. Are your colleagues that  
20 you're aware of also agreeing to those and are they on  
21 their own promoting the inclusion of them?

22                   MR. MCNAMARA: I don't know any of my  
23 colleagues who have opposed a 502(d). Again, the goal  
24 on my side is I would like the documents as soon as  
25 possible so that I know what -- I have a Rule 16

1 obligation, I've got to prosecute my case. I've got  
2 to show I'm being due diligent. I want to get my  
3 documents. If it means that I have to agree to a  
4 502(d) so that I lose the chance of arguing waiver,  
5 I'm fine with that. I would like to see the document  
6 as soon as possible so I can make that assessment,  
7 know what to do next, know who to subpoena, get the  
8 depositions done and move quick as possible.

9 I don't know anyone who -- if they don't  
10 understand what a 502(d) is, then that's something we  
11 should probably do a better job on my side of the "v."  
12 to educate them, but I don't know anyone who really  
13 objects to them.

14 MS. TADLER: And I should have asked the  
15 question to Mr. Keeling also about 502(d) and how that  
16 impacts practice, so we might want to come circle  
17 around on that with some others. Thanks.

18 CHAIR ROSENBERG: Okay. Thank you.

19 And Ed?

20 PROF. COOPER: All of these discussions  
21 invariably focus on attorney-client privilege or trial  
22 preparation. Is that because other privileges seldom  
23 arise or because they are more easily identified?

24 MR. MCNAMARA: They do -- I have seen,  
25 especially with folks that have deliberative -- that

1 deal with the government and have regulatory  
2 interactions, those do come up as well, and those will  
3 often -- those are easier usually identified because  
4 of the number of parties involved. There's  
5 specialization at that particular firm, so you might  
6 see it real quick.

7           Whereas, with work product and attorney-  
8 client, unfortunately, some corporations, people got  
9 the idea, if I slap the word "privileged" on an email,  
10 it's automatically privileged, or if I CC the in-house  
11 counsel, it's automatically privileged. And I think  
12 that also has exacerbated the amount of privileged  
13 documents that persons like Mr. Keeling have to go  
14 through because they're just -- they're not really  
15 privileged. But you don't get that as much. People  
16 don't usually say deliberative process on an email  
17 because they're afraid of turning it over, so it  
18 doesn't come up as often.

19           CHAIR ROSENBERG: Okay. Thank you so much,  
20 Mr. McNamara. We appreciate your time.

21           And Ms. Massaron? And as I understand it,  
22 you'll be addressing Rule 16.1.

23           MS. MASSARON: Yes, that's correct. Good  
24 morning.

25           CHAIR ROSENBERG: Good morning.

1                   MS. MASSARON: I want to thank the Committee  
2                   for allowing me to appear. I'm Mary Massaron. I'm an  
3                   appellate lawyer at Plunkett Cooney in Michigan. I've  
4                   been practicing appellate law for a little more than  
5                   30 years. So my vantage on the Federal Rules of Civil  
6                   Procedure comes from my experience in a law firm with  
7                   the firm's clients, my clients, and my partners coming  
8                   to inquire of me what's allowed and what's not allowed  
9                   as litigation proceeds.

10                  And I've had an abiding faith in our Federal  
11                  Rules since my civil procedure class in which  
12                  Professor Lombard started the day, my first day in law  
13                  school, holding up the Federal Rules and saying,  
14                  listen to the rules, there shall be a complaint and an  
15                  answer, it's almost biblical. And he had a passion  
16                  for the rules which he certainly communicated to me.  
17                  I commend you for the hard work you do, particularly  
18                  in the MDL area, where this question of rules is  
19                  difficult and where I think it's widely agreed that  
20                  there are problems, but finding a solution is not  
21                  easy.

22                  A few years ago, I represented a Greek  
23                  entity that was litigating in this country and, again,  
24                  they had tremendous faith in our judicial system,  
25                  which was really quite inspiring to me, and they

1     wanted to know, though, in our initial meetings, how  
2     these rules worked, what will the process be, what can  
3     we do, what can the other side do, how will the judge  
4     approach this. All of that requires rules.

5             And so I thought it might be helpful to sort  
6     of set a kind of foundation about something that I  
7     think we all know but that I think is important to  
8     keep in the front of our minds as we think about what  
9     to do about the problem of meritless claims which  
10    exist in the MDL context. Certainly, our rules were  
11    initially adopted because there was this what one  
12    scholar called a chaotic and complicated condition  
13    caused by the lack of rules. And I think we've heard  
14    people talk about the MDL context as being sort of  
15    like the Wild West because of the absence of specific  
16    rules for that context, which now, after all, is an  
17    overwhelming proportion of the litigation in our  
18    federal courts.

19            And one description of what is a rule is or  
20    a rule of law system that Ronald Katz talked about  
21    that I think is sort of a touchstone, when you have a  
22    rule-based system, you have principled predictability,  
23    derived from valid authority, external to the  
24    government decision-maker. That would be the judge in  
25    litigation. And so the touchstone is, does how these

1 cases are proceeding satisfy that definition from  
2 Ronald Katz or some other comparable definition?

3 And I thought it might be helpful, because I  
4 understand there's been a great deal of discussion  
5 over many years, to talk a little bit about rules and  
6 flexibility because I know that the MDL context,  
7 there's a great concern about having flexibility  
8 remain and how will rules work with that.

9 One thing that I think about a lot when I  
10 think about rules and that I talk about in briefs that  
11 I write about how to interpret rules or how a court  
12 should think about a rule that's under dispute is the  
13 difference between three categories.

14 One category is a sort of bright-line rule.  
15 And, of course, some of our Federal Rules of Civil  
16 Procedure are very bright line, although even there,  
17 where there is specific timing, often the specific  
18 timing is preceded by the words in general, and then  
19 there's an opportunity with that bright-line rule to  
20 build in flexibility on a showing of good cause for  
21 some different option. But, nevertheless, the  
22 standard, the default, is a bright line, and  
23 everybody, a new person to the system, a company from  
24 another country, an associate just learning how to  
25 practice law, can look at that bright line and

1 understand in the ordinary case in this context this  
2 is what's going to happen, and on a showing of good  
3 cause, some other thing will happen.

4 A second kind of rule includes a standard,  
5 and our Federal Rules have standards as well. One  
6 good example, I think, is also under Federal Rule  
7 12(4)(e), which allows a motion for a more definite  
8 statement, and that rule has a standard for when that  
9 motion should be granted. The standard is, is the  
10 pleading so vague or ambiguous that a party cannot  
11 reasonably prepare a response? That gives you a very  
12 firm notion of what's required even though it allows  
13 for flexibility in the particular circumstance.

14 And then there are ad hoc. I don't think ad  
15 hoc decisions are rules. We don't know about them in  
16 advance. They're not something that give guidance.  
17 There's no standard that anybody could look at, no  
18 bright line that anybody could look at after the fact  
19 to say whether that ad hoc decision conforms or  
20 doesn't conform, and, to me, that's a problem in the  
21 current situation.

22 CHAIR ROSENBERG: If you could just maybe  
23 wrap up, and then we'll see if we have any questions.

24 MS. MASSARON: Sure.

25 CHAIR ROSENBERG: Sure.

1                   MS. MASSARON: Really, the only other point  
2     I had was simply to say, if you look at our Federal  
3     Rules, and I read them again yesterday actually on the  
4     plane, parts of them, they're brilliant at having a  
5     bright line or a standard while allowing for  
6     flexibility. It seems to me that the pleading  
7     requirement, and I want to focus specifically on the  
8     LCJ proposal to modify the disclosures, it seems to me  
9     that if that were to be adopted, it would be a start  
10    of trying to deal with the enormous problems that I  
11    think everybody recognizes of meritless claims that  
12    are not addressed until at the back end of the  
13    litigation, which cost enormous amounts of time and  
14    resources for the courts and the parties.

15                  CHAIR ROSENBERG: Thank you so much.

16                  Rick?

17                  PROF. MARCUS: Thank you. I think I have  
18    one generalized question or two really about your list  
19    of categories of rules. One is the ad hoc rule  
20    authority perhaps included in our 16.1 is really  
21    pretty similar to what's already and has for 40 years  
22    been in Rule 16, which says the judge must set  
23    schedules and so on. And I wonder if you think that's  
24    a rule.

25                  And I also wonder about something else

1       that's raised by LCJ, I think, and others, which is  
2       that -- well, a rule can also say, Judge, you have  
3       authority to do X, and one X that might be filled in  
4       there is appoint leadership counsel. Would that be a  
5       rule if it clearly gave a judge authority to do that  
6       where there's some doubt about it?

7               MS. MASSARON: I'm not at all sure that the  
8       rules can give a judge the authority to appoint a  
9       leader of lawyers for parties before the case.

10              PROF. MARCUS: Oh, no, no, I'm not talking  
11       about that. I'm just saying that would be a rule,  
12       wouldn't it?

13              MS. MASSARON: I'm sorry, I'm not  
14       understanding your question.

15              PROF. MARCUS: Well, that's another -- a  
16       rule can also grant authority. You could debate  
17       whether it should be granted. But that's a rule also  
18       which doesn't seem to be in one of your other  
19       categories.

20              MS. MASSARON: That's a sort of enabling  
21       rule. I guess my comments are directed more toward  
22       those rules that are designed to provide the roadway  
23       for a lawsuit and to urge you to adopt rules that make  
24       that roadway and the procedural mechanisms by which  
25       the parties lead their litigation on each side clear

1       so that lawyers and judges who don't know that from  
2       the get-go can look and get a picture of how it's  
3       supposed to proceed.

4               And litigation, I don't have to tell you or  
5       anyone in this room, can be very complex. So not  
6       every litigation follows the same path. But, if you  
7       think about it as a decision tree, there's a  
8       complaint, there's an answer, then there are various  
9       procedural mechanisms that govern the next steps. One  
10      of the things, and this goes again to the disclosures  
11      and the problem of meritless claims, and I think it is  
12      strongly related to the idea of the rules, is that our  
13      Federal Rules historically have provided very bright-  
14      line procedures for weeding out meritless claims at  
15      the outset. The lawyer who files a complaint has an  
16      obligation. We understand that, for a variety of  
17      reasons, that obligation to know that there's standing  
18      and to have done some preliminary review isn't  
19      happening in the same way in the MDL context, and  
20      that, to me, is a serious problem.

21             Then the rules provide for motions to  
22      dismiss, but, because of the volume, those have been  
23      perceived and have not been the answer one might have  
24      thought. So the LCJ modification of the proposal in  
25      16(4), I think, is an effort to make that work better

1 in this context so that everybody knows how it's going  
2 to work and so that it avoids this problem of these  
3 meritless claims sitting, making it hard to settle,  
4 making it hard to process, adding to the discovery  
5 costs, and really contravening the fundamental  
6 philosophy of the rules, which is to allow for an  
7 early elimination of meritless claims.

8 CHAIR ROSENBERG: So let me just interrupt  
9 to see if there are any -- and I know Mr. Dahl is  
10 speaking next for the LCJ proposals. Any questions  
11 from our Committee members?

12 Andrew, did you have a question?

13 PROF. BRADT: Yeah. I guess I'll just  
14 follow up on Rick's question about Rule 16(c) and the  
15 laundry list of things that a judge may consider at a  
16 pretrial conference and why, if that rule is  
17 acceptable, why not this one? And also, why doesn't  
18 this rule enhance the ability to lay out a roadmap  
19 better for those who are uninitiated in the LCJ  
20 process or in the MDL process?

21 MS. MASSARON: And here's my answer to that.  
22 I think that laundry list is something that really  
23 belongs in the manual for complex litigation. It  
24 belongs in judicial training. I don't think it's the  
25 kind of rule that helps the parties know the roadmap

1 for the case and it's not the kind of thing that has  
2 historically been in the Federal Rules.

3 It seems to me our system has been an  
4 adversarial system. And I understand there's maybe  
5 debate, certainly debate about how much the judiciary  
6 should be managerial versus how much the judges should  
7 be deciding matters as brought and litigated between  
8 the parties. But wherever that line is, it seems to  
9 me incorporating all of that here as a way to deal  
10 with the MDL problem is not the answer. The answer is  
11 to try to make these rules in a much more rule-like  
12 fashion apply in the MDL context, and that's what I  
13 would hope that the Committee would be able to try to  
14 do. I understand it's difficult.

15 CHAIR ROSENBERG: Thank you. We so  
16 appreciate your comments and look forward to further  
17 discussion on some of these issues.

18 Mr. Dahl on behalf of Lawyers for Civil  
19 Justice, and I know you're going to try to address  
20 both privilege logs and Rule 16.1, so good luck doing  
21 that in five minutes.

22 MR. DAHL: Thank you. It's a great honor to  
23 appear before the Committee. The Committee has  
24 identified two very serious rules problems in the MDL  
25 context, that the FRCP are allowing a very large

1 number of claims that do not belong in cases and do  
2 not belong in our courts, causing avoidable management  
3 problems and fundamental questions about well-accepted  
4 legal standards and basic fairness.

5 In the privilege logs, an overwhelming  
6 burden caused by a misunderstanding of the rule and  
7 the comment to Rule 26(b)(5)(A). One commonality  
8 between these two rules problems is that they are well  
9 defined already in the rules and they have been  
10 changed by practices that have changed the meaning of  
11 the rules in unexpected ways and now need fixing.

12 Another commonality is that the Committee's  
13 proposals address these two rules problems only  
14 indirectly, without directly fixing the rules'  
15 problem. I'll address MDLs first. It is highly  
16 needed in the FRCP to have rules governing MDLs, just  
17 like all other cases, and to keep the FRCP true to  
18 fundamental legal requirements. As I understand, the  
19 Committee's purpose in 16.1 is to help identify issues  
20 that should be addressed early in order to avoid  
21 problems later. 16.1(c)(4) is meant to address the  
22 well described phenomenon of unexplained, unexamined  
23 claims hampering judicial management. A new MDL judge  
24 needs to know this: the FRCP rules about claim  
25 sufficiency are likely to have no effect in your new

1 MDL. Many, even most, of the claims do not belong in  
2 the litigation and have no relationship to the case.  
3 The claimants never used the product or suffered any  
4 injury within the scope of the case.

5 This problem provides management problems  
6 and opportunities. Ignoring the problem will impair  
7 the judge's ability to understand and manage the case,  
8 while taking action on the problem will inform the  
9 decisions about discovery, motion practice, bellwether  
10 trials, and other matters. Ignoring the problem  
11 prevents parties from reaching resolution, while  
12 addressing the problem can accelerate the parties'  
13 understanding of what needs to happen to resolve the  
14 case.

15 Kicking the can down the road does not save  
16 any effort or time. You will eventually have to  
17 figure this out. I point your attention to the recent  
18 order in the 3M case: "Where, as here, counsel failed  
19 to adequately organize and manage their inventories, a  
20 domino effect develops, resulting in the disruption of  
21 hundreds of thousands of other MDL cases." The order  
22 says this stops now.

23 Well, it's a good thing that this stops now.  
24 Now, in that case, is years after the largest MDL has  
25 been proceeding through the court system. Now is not

1 the right time to deal with whether those claims  
2 belong in that case. It should happen first. And  
3 this is a central concept of our comments to the  
4 Committee to pay attention to the prophylactic effect  
5 of a rule. A rule can create compliance with the  
6 well-accepted pleading standards and due diligence  
7 requirements. Only a rule can be effective because  
8 waiting for each judge to decide whether there is  
9 going to be enforcement and how that enforcement will  
10 go and negotiating it is only an invitation to file  
11 meritless unexamined claims.

12 The notion that such a rule would constrain  
13 judges in the management of the cases is false. Such  
14 a rule would liberate the judges from having to deal  
15 with the problem in the first place because it would  
16 prevent the filing of unexamined claims.

17 This relates to the fundamental reason why  
18 this is a rules problem. The rules that govern the  
19 pleading standards and due diligence in all other  
20 cases are not working. Rules 3, 7, 8, 9, 11, and 12  
21 ask this existential question, do the FRCP define  
22 pleadings and pleading standards and discovery tools,  
23 or do they only do so in 30 percent of cases, the 30  
24 percent that are not consolidated into MDLs?

25 In MDLs, there is effectively no guidance,

1 as if there were no Federal Rules of Civil Procedure.  
2 You will hear more from other people today on these  
3 topics, but ignoring the rules should be unacceptable  
4 to courts, and leaving the rule problem unfixed should  
5 be unacceptable to the Committee.

6 I refer to the comment where we've proposed  
7 changes to Section (c)(4) and also to describing why  
8 the note should explain why the Committee is  
9 proceeding with this rule, what the problem is, what  
10 the problem you're trying to solve is, and, also, I'll  
11 touch on the other topics in the rule that we mention  
12 that are not rules problems and therefore should not  
13 be included, and in fact, some of them are going to  
14 create new rules problems.

15 I'll switch quickly to privilege logs.

16 CHAIR ROSENBERG: Maybe take a minute or so  
17 and let me see what questions we have. That's been  
18 your five minutes, but I do understand you're covering  
19 two proposed rules and many other witnesses have  
20 referred to your filing, so why don't we give you  
21 another minute or so.

22 MR. DAHL: Okay. I'll make it very brief.  
23 Again, as in the MDL context, the Committee got this  
24 right in 26(b)(5)(A) describing what the privilege log  
25 responsibility is, that it does not include a

1 document-by-document in every case. The rule is meant  
2 to be flexible and allow discretion. The problem is  
3 that an overwhelming number of courts don't understand  
4 the rule as saying that anymore.

5 It is creating enormous inefficiencies. I  
6 adopt the comments of the people who are more  
7 experienced than I am in this topic. It is causing a  
8 great deal of time and money down the drain for no  
9 purpose. It is inviting gamesmanship and satellite  
10 litigation. The Committee's proposal will no doubt  
11 help by encouraging people to discuss the problem.  
12 However, no one who turns to the source of the logging  
13 obligation, 26(b)(5)(A), is going to see these  
14 amendments because they are amendments to other rules.

15 It is clear from the proposal that it is  
16 meant to fix the problem of 26(b)(5)(A). There are a  
17 dozen references to (b)(5)(A) in the Committee's  
18 proposal to amend other rules. A better solution  
19 would be to address the problem in the source of --  
20 where the source exists in (b)(5)(a) or, at the very  
21 least, make a reference in that rule to the new  
22 amendments and define the standards of what  
23 sufficiency means in a comment and a note to  
24 (b)(5)(A). Thank you.

25 CHAIR ROSENBERG: Thank you so much.

1 Rick, do you have any questions?

2 PROF. MARCUS: I think I have mainly about  
3 the MDL, but let me go backwards with the last thing  
4 you mentioned. You would like to see something as a  
5 beacon in 26(b)(5)(A) that says you should go look at  
6 26(f), which presumably is where people will look if  
7 they're complying with 26(f), and that's a long time  
8 before they have to do the privilege log, so I'm not  
9 clear why that's useful. But I gather you think a  
10 cross-reference would be valuable there. And I think  
11 from the position of, say, the plaintiff's side, maybe  
12 a question is whether there's any downside to that.

13 Several of the submissions we've received,  
14 I'm switching to MDL now, in terms of what sometimes  
15 is called vetting, urge that evidence must be  
16 presented up-front, facts must be presented up-front,  
17 and so on. Why isn't it enough to call the attention  
18 of the parties in the court to how that should be done  
19 in a given case rather than trying to prescribe how it  
20 ought to be done? Because that should vary. That  
21 probably varies a great deal with different kinds of  
22 cases. That's one question Shouldn't we leave that  
23 for attention with individual specifics?

24 The other question on that is something I  
25 raised with someone else earlier. If there's a

1     preemption issue or something like that which might  
2     clear the board, shouldn't the court deal with that  
3     before doing the difficult, challenging, and expensive  
4     process of individual scrutiny of cases, particularly  
5     if you think no motion is required and the court has  
6     to do this all by itself? So I think, basically, the  
7     point is why doesn't this put the responsibility where  
8     it can be addressed most effectively?

9             MR. DAHL: The answer, Professor, I believe,  
10    is that a rule that describes the standards will have  
11    that effect without the need for judicial involvement.  
12    If the rule says that compliance with the well-  
13    described pleading standards and burdens of going  
14    forward will be addressed early in the MDL, what will  
15    happen is that people will act accordingly, and just  
16    as with the other rules, by and large, people are  
17    going to follow that.

18            There will, of course, still be room for and  
19    a need for courts to define what that requirement will  
20    be in a particular case. But the point of it, that it  
21    will happen, should be a rule, because only that is  
22    going to communicate to all parties, future parties  
23    day one of the case, even before day one of the case,  
24    what is an MDL? How does an MDL work? Well, early on  
25    in an MDL, claimants are required to make a very basic

1 showing that they have a claim, that their claim  
2 belongs in the case. That will be defined by the  
3 judge early in the matter. That will address -- that  
4 will avoid the management problem of having to address  
5 the unexamined claim problem.

6 And it will also answer your second point  
7 about prioritizing what the judge has to do first  
8 because these problems, by and large, aren't going to  
9 come to the judge's desk if the rule prescribes that  
10 there will be a process for eliminating the meritless  
11 claims, so don't bring them.

12 CHAIR ROSENBERG: Andrew?

13 PROF. BRADT: Thanks. I have a question  
14 about the unvetted or unsupported claims piece. And  
15 what I noticed in your submission in this initiative,  
16 others who are taking a similar view, is that the  
17 citation to that is either anecdotal or to language in  
18 a 2018 subcommittee report of this Committee. My  
19 question is, are you aware of any empirical data that  
20 we can cite to about the extent of the unsupported  
21 claims problem?

22 In an article earlier this year in the Texas  
23 Law Review, Professor Ray says he's not aware of any  
24 empirical study of the number of meritless claims in  
25 MDLs or the extent of the problem. So I just wonder,

1 is there something new or something you can point us  
2 to that would go in that direction?

3 MR. DAHL: I believe there are studies on  
4 that topic, but I am not fluent with them, so I don't  
5 know. I do think that part of the problem perhaps is  
6 that, to some extent, we don't know what we don't  
7 know. There is not vetting of unsupported claims  
8 until very late in the process, if ever, and that  
9 information may exist with claims administrators and  
10 others rather than easily known. I mean, that's the  
11 problem at the beginning of an MDL. The time of the  
12 16.1 conference, nobody has any idea how many of the  
13 claims are unsupported, but it's widely understood  
14 that it's a large number, half or more in a lot of  
15 these big cases.

16 PROF. BRADT: And is there -- you say half  
17 or more. Can you point to something that would  
18 substantiate that in any particular case?

19 MR. DAHL: I believe that's the general  
20 understanding. I don't know that there are studies on  
21 that. I don't know it's possible for studies to be on  
22 that. But I do think there's literature on the topic.

23 CHAIR ROSENBERG: Judge Proctor?

24 JUDGE PROCTOR: Thank you. Back to the  
25 first sentence of Section 1407(a), "When civil actions

1 involving one or more common questions of factor are  
2 pending in different districts, such actions may be  
3 transferred to any district for coordinated or  
4 consolidated pretrial proceedings."

5 Okay. It seems to me what you're proposing  
6 is that these actions be transferred to a transferee  
7 judge for individualized proceedings, which would look  
8 no different than where they were where the good Lord  
9 flung them. And so my question is I think a fair  
10 pushback on your position would be I think your  
11 assertion is you haven't heard us, and I think we  
12 would say, as the subcommittee, oh, no, we have heard  
13 you and we have provided in Subsection 4 a provision  
14 that allows the transferee judge to say you're exactly  
15 right, we have to dig in right now to these  
16 individualized actions and see if there's a basis for  
17 their filing.

18 But, as Professor Marcus said, there may be  
19 other cases where there's an across-the-board issue,  
20 whether it's preemption, general causation, an  
21 arbitration provision, or some other across-the-board  
22 dispositive issue that should be prioritized in  
23 coordinated proceedings, and why wouldn't Subsection 4  
24 permit that flexibility that would actually inure to  
25 the benefit of the clients and lawyers you're

1       representing, where they wouldn't be spending tons of  
2       money on individualized matters when there's a  
3       potential TKO at the beginning of the pretrial  
4       proceedings?

5               MR. DAHL: The operative word of the  
6       sentence you quoted from the statute is "actions."  
7       And I don't think that it is appropriate to presume  
8       the actions exist where people do not have Article III  
9       standing or any claim or entitlement to the claim.

10              And, secondly, I think, as a management  
11       issue, your second point, I urge you to keep in mind  
12       the prophylaxis of what a rule would mean. It's not a  
13       matter of whether the judge has flexibility to manage  
14       the case. It's whether or not that the problems that  
15       land on the judge's desk are going to include all of  
16       these unexamined claims or not.

17              JUDGE PROCTOR: Let's put you in a  
18       conference room with your client in a big MDL and  
19       you're talking to your client about litigation  
20       strategy and you're saying, you know, we have a motion  
21       we're going to file on general causation or preemption  
22       that we think has an 80 percent chance of knocking  
23       each one of these cases out, but what I'm going to  
24       propose is that our law firm immediately start looking  
25       at each tree in the forest while we're doing that,

1 even though we think there's only a 20 percent chance  
2 that's going to have to be done eventually. What do  
3 you think your client's going to say in response to  
4 that?

5 MR. DAHL: Are you presuming that a rule has  
6 already taken effect of not filing --

7 JUDGE PROCTOR: No, I'm just talking about  
8 in a vacuum. I'm talking about in a vacuum. I'm  
9 talking about what is the smart management of  
10 litigation practice even from a defendant's  
11 standpoint?

12 MR. DAHL: Well, Your Honor, I take your  
13 question very seriously, but I think that the point  
14 really has to be what a rule would mean about changing  
15 that dynamic in the first place with no judicial  
16 involvement by creating the expectation and creating  
17 the standard that claims that are filed into the MDL  
18 belong in the case, have some relationship in the  
19 case. I think that a motion of -- you know, it may be  
20 the most efficient way to deal with the case, but you  
21 can do that without having thousands of meritless  
22 claims pending or having no idea what those claims are  
23 until they've been --

24 JUDGE PROCTOR: I'll end with this. Would  
25 you agree with the Committee today, following up on

1 Professor Bradt's point, that if there are studies  
2 that pinpoint some of these empirical issues that  
3 you're contending, because there's a difference  
4 between a widely accepted assertion and a widely  
5 accepted set of data, that you would share that with  
6 us? Because we have not received that to this point.  
7 I think that's why Professor Bradt was asking about  
8 it.

9 MR. DAHL: Of course, that would be helpful,  
10 but the problem is that we may not know what we don't  
11 know, that because of these -- because there is not  
12 vetting in this way, we don't know. That's the  
13 problem that arrives on the desk of the newly  
14 appointed MDL judge in the initial conference.

15 JUDGE PROCTOR: But, if we did vetting in  
16 these cases instead of consolidated or centralized  
17 proceedings, it would grind the MDL process to a halt,  
18 wouldn't it?

19 MR. DAHL: No, I think that's exactly the  
20 point that I'm trying to get at with the prophylactic  
21 effect of a rule. Perhaps this thought experiment  
22 would work. What if we didn't have any traffic rules  
23 in our community and we convened this meeting and the  
24 proposal was made, let's put a stop sign at the  
25 intersection so that everybody knows they have to stop

1 every time they enter the intersection, and somebody  
2 says, no, no, no -- the chief of police, no, no, no,  
3 we can't make it illegal not to stop at every  
4 intersection because we would have to put a police  
5 person at every single intersection and arrest every  
6 single person --

7 JUDGE PROCTOR: I think your analogy, quite  
8 fairly, is, if we need a stop sign at every  
9 intersection, then the pushback would be no, at some  
10 intersections, we need a traffic light so that you get  
11 the green light to go. Some we need a yield sign.  
12 Some we need a four-way stop. That's the flexibility  
13 of intelligent development of a traffic pattern, it  
14 seems to me.

15 MR. DAHL: But I think this one is different  
16 because what the flexibility argument is, is there may  
17 be circumstances where someone should be able to run a  
18 stop sign. They're on the way to the hospital. It's  
19 the middle of the night. No one's around. They have  
20 a great field of view. Why would you make it so they  
21 have to stop?

22 What I'm getting at, though, is the effect  
23 of rules is that they largely create compliance and,  
24 in this case, create compliance with something that  
25 the rules already describe and everyone accepts that

1     you have to have some basis to file a claim in court  
2     before you do it. That is the rule's problem because  
3     it exists -- it is taken care of by the existing rules  
4     in all other cases, but that rule is not having the  
5     effect in MDLs. That is the MDL rule problem that I  
6     think this Committee has identified and should solve,  
7     and solving it with a rule, creating that expectation  
8     that there will be a process to enforce the standards  
9     early in an MDL, will largely make the problem not  
10    here.

11                 JUDGE PROCTOR: That's the key point, right?  
12    We have -- the MDL process has methodologies, rules,  
13    procedures for dealing with meritless claims. You  
14    just want those bright lines to be put at the  
15    beginning of the case, not upon remand, not upon  
16    summary judgement, not upon a 12(b)(6) motion,  
17    correct?

18                 MR. DAHL: I would urge that if the rule  
19    made it clear that that is what is going to be  
20    required in each case, that it would make the problem  
21    largely go away, it would keep the judge's discretion  
22    of how and when to deal with that problem, but the  
23    flip side is this, that if you don't make that a rule,  
24    then what everyone understands is that each judge in  
25    each MDL is going to make that decision later, and in

1 the meantime, the only answer for the practitioner is,  
2 well, go ahead and file all of your claims because we  
3 don't know what's going to happen in the case.

4 PROF. MARCUS: Mr. Dahl, can I -- Judge  
5 Lauck has a question, but this is switching gears a  
6 little bit. It seems to me one of the things we have  
7 been told is that Rule 26(b)(5)(A) and the attendant  
8 Committee note didn't create an expectation to do what  
9 you wish would have happened if that had been  
10 followed. So do rules really create these  
11 expectations that you're talking about? In that  
12 instance, apparently not. Why would this one do what  
13 you want in a way that avoids the pitfalls that Judge  
14 Proctor's talking about?

15 MR. DAHL: You're talking about the note to  
16 the privilege log rule?

17 PROF. MARCUS: Well, yes, I think you say,  
18 well, gee, courts are not following what you told them  
19 to do. Well, neither are litigants. So why should we  
20 expect 16.1 to have this socialization effect that you  
21 are urging upon us?

22 MR. DAHL: No one has commented more  
23 carefully and insightfully about the difficulties of  
24 writing rules and causing their effects than you,  
25 Professor, so I hardly dare to address it, but I do

1 think that the Committee shouldn't throw up its hands  
2 and think that this is an unsolvable problem. Again,  
3 the commonality is the principles that we're talking  
4 about here already exist, already exist in the rules.  
5 This Committee has developed those standards.  
6 Practices have overtaken them in these two areas. And  
7 it is a small thing for the Committee to address the  
8 problems with the existing standards.

9 And perhaps this addresses Professor Bradt's  
10 question as well, that if this were a revolution,  
11 maybe more studies and more empirical data is  
12 required. But this isn't a revolution. It's not even  
13 an evolution. This is applying the concepts that are  
14 already in the rules in contexts that have changed due  
15 to unexpected things that have nothing to do with this  
16 Committee. But, nevertheless, the standards have  
17 changed and the rules need to be fixed to accommodate  
18 those practices in both of these instances.

19 CHAIR ROSENBERG: Joe, then Judge Lauck.

20 MR. SELLERS: I'm curious whether you think  
21 the proposed rule erects any barriers for courts,  
22 transferee courts to make the kind of assessments  
23 early or whenever it's appropriate that you are eager  
24 to have done. It seems to me that every transferee  
25 judge has an interest in ensuring as quickly as

1 properly possible to whittle down the claims that are  
2 merit -- to those that have merit and exclude those  
3 that are meritless and that part of the plan behind  
4 the rule as proposed is that process may vary from MDL  
5 to MDL depending on the size and nature of the  
6 evidence and the like, and at least as I have viewed  
7 the proposed rule, it's identifying tools in the  
8 judicial toolbox to be able to address these.

9 So I'm curious whether you think there's  
10 some barrier in the rule as it's currently drafted to  
11 achieve the goal that you're proposing.

12 MR. DAHL: There is a barrier that is not in  
13 the rule and there is a tool that is not in any  
14 judge's toolbox, which is to set that expectation and  
15 standard before day one of a rule that you can read in  
16 law school and know about before you file the case or  
17 before the case is filed against you. What is an MDL?  
18 Well, an MDL is a procedure that includes, among other  
19 things, an early showing that you have enough support  
20 to go forward with your claim in the case.

21 No judge can do that. A judge who gets a  
22 newly assigned MDL, taking on that topic, it would be  
23 months before the judge could make that decision,  
24 communicate it, describe it, and give it effect. And  
25 if there's not a rule, one judge can't create the

1 expectation that that's what all MDLs will require,  
2 and that's the problem that only a rule can solve and  
3 why a rule would help all future MDL judges manage  
4 their cases.

5 MR. SELLERS: So I understood your written  
6 comments to recognize that the proposed rule is not  
7 intended to displace all the other rules of civil  
8 procedure. They continue to have application in these  
9 proceedings. So wouldn't you agree with me that the  
10 rules that already exist that put counsel on notice  
11 that they have to file complaints that satisfy Rule 11  
12 and satisfy other portions of the rules will still  
13 apply to them and give them the guidance that you're  
14 seeking? And I don't see why that is not sufficient.

15 MR. DAHL: I absolutely agree that those  
16 rules apply, and the problem is that they're not  
17 having the effect and the reason is, and I'm  
18 channeling what transferee judges have said, that  
19 there is something about MDLs that's different. I  
20 don't read in the statute that what's different is  
21 that there are no pleading standards or no requirement  
22 of Article III standing to allege an injury. What's  
23 different about MDLs? Multiplicity of parties.

24 So the system under the current rules that's  
25 designed perhaps for one-on-one, one-party cases, two-

1 party cases, that involves a pleading and a review, a  
2 motion to dismiss, and allowance to file an amended  
3 complaint and another review times 20,000 is where you  
4 get to Judge Proctor's point of a judge would do  
5 nothing else.

6 And so the idea, how do you solve for that?  
7 How do you enforce the well-accepted and documented  
8 pleading standards in a case with 20,000 claimants?  
9 And this is our attempt to help the Committee do that,  
10 which is require from the get-go some information we  
11 have proposed evidence of exposure and harm that would  
12 satisfy all those pleading burdens and standards  
13 without bogging down the court and the parties or  
14 even, frankly, creating a new burden. I mean, the  
15 burden to have that information going forward exists  
16 in all other cases under the rules today.

17 CHAIR ROSENBERG: Okay. Thank you.

18 Judge Lauck, you do not have a question?

19 Ariana?

20 MS. TADLER: So, Mr. Dahl, in your  
21 September 18 submission or LCJ's submission, you have  
22 a proposal with specific language. Are you continuing  
23 to promote that language at this time?

24 MR. DAHL: Yes, yes. That language or  
25 something close to it.

1 MS. TADLER: So my question to you is, is  
2 this language really intended to focus more in the  
3 personal injury and mass tort arena because MDLs are  
4 not exclusively mass torts?

5 MR. DAHL: Correct. Most of the problems of  
6 big MDLs exist in the mass tort arena, as you well  
7 know, and so, yes, it has -- with that problem, with  
8 the rules problem in mind, that's where the language  
9 comes from.

10 MS. TADLER: Okay. Because, obviously, you  
11 know this because you've read the rules for so long  
12 and we've talked about this so frequently, that the  
13 rules really do need to be so that they don't focus on  
14 any one type of case. And so I'm just wondering, are  
15 you contemplating that this would somehow have a  
16 carveout?

17 MR. DAHL: I contemplate that just as with  
18 all of the other rules that when they don't make  
19 sense, they don't -- or they are just not so  
20 prescriptive in cases, I mean, as you well know, it is  
21 very common practice for parties to agree and judges  
22 to agree to different practices when needed. So we do  
23 not intend the rule to be any sort of barrier or cause  
24 any more extraneous or inapplicable work in MDLs as  
25 any other rule would.

1 MS. TADLER: Thank you.

2 CHAIR ROSENBERG: Mr. Dahl, are you going to  
3 be spending the day with us today, or did you intend  
4 on leaving after your presentation?

5 MR. DAHL: I intend to stay here for the  
6 duration.

7 CHAIR ROSENBERG: Okay. So we may have  
8 additional questions if that's all right. We're going  
9 to move on to the next witness, but as long as we know  
10 you're going to be here, I want all of our members to  
11 know that there could be follow-up. And I say that  
12 because you're trying to cover two important -- both  
13 rules, well, three, and many people did reference your  
14 submission, so it thus follows that there may be more  
15 questions directed to you. So thank you so much.

16 MR. DAHL: Thank you, Your Honor.

17 CHAIR ROSENBERG: Okay. And, Mr.  
18 Stoffelmayr, if you could come forward, and it appears  
19 as if you're addressing 16.1. And, you know, to the  
20 extent that some of the points have been made,  
21 obviously, in the interest of time, no need to repeat  
22 certain points unless one of our members actually has  
23 a follow-up question and they refer back to any  
24 earlier comments, but we'd like to hear anything that  
25 we haven't heard. And that goes for all of the

1 witnesses. So welcome.

2 MR. STOFFELMAYR: Yeah. Thank you very  
3 much. My name is Kaspar Stoffelmayr. I practice at  
4 Bartlit Beck in Chicago. And I've submitted a not  
5 long but longer comment and just want to highlight  
6 maybe a few points. I appreciate the opportunity to  
7 do so in person.

8 The first thing I want to say is just, you  
9 know, how thankful I think many of us are that the  
10 Committee has drafted and is talking about a rule for  
11 MDLs. A lot of us have thought that's long overdue at  
12 this point. I had a conversation with some colleagues  
13 last week when they said, you know, we've got this  
14 case, we think it's going to be swept into this MDL,  
15 what should we expect to happen? What should we be  
16 telling the client is going to happen?

17 And I thought, well, if it was a normal case  
18 and someone said we've been sued, what's going to  
19 happen, you'd say, well, we'll look at the complaint.  
20 If we think there's a legal issue, we'll file a motion  
21 to dismiss. If not, we'll file an answer. Here's  
22 what goes in an answer. Then there's going to be some  
23 discovery. When the question was what should we  
24 expect to happen in the MDL, you know, my answer is,  
25 well, first off, who's your judge? And then there's

1 four or five things that can happen, and if this judge  
2 has a track record, we can use that as a guide. If  
3 not, you know, all bets are off.

4 And there's a view that that's a good thing,  
5 that, I think -- I mean, I've been in many  
6 conversations with parts of this group. There's a  
7 view that, you know, more flexibility is always a good  
8 thing. And I hope this is not too much of an  
9 unpopular view in this room, but there are concerns  
10 there are times that judicial flexibility is not just  
11 a one-way good thing. And I don't want to repeat  
12 everything Mr. Dahl said, but one really, really  
13 important way in which flexibility is  
14 counterproductive is, when people don't know before a  
15 case is filed what is going to happen and they don't  
16 know what the expectations are going to be of them and  
17 their clients, they will adjust their behavior  
18 accordingly and not in helpful ways.

19 So that's maybe, you know, sort of the big  
20 and that gets to -- you've heard plenty about this  
21 unsubstantiated claims problem, there are many people  
22 after me. I'm not going to repeat what has been said  
23 and what will be said. But I do just want to  
24 emphasize that that is not independent. That problem  
25 is not independent from the more general problem that

1     when we don't have rules people will adjust their  
2     behavior.

3             More generally, I mean, coming back to the  
4     draft rule, like I said, you know, many of us have for  
5     years been saying MDLs are in some ways too ruleless  
6     in ways that we think have all sorts of unhappy  
7     consequences. And so, you know, when we see a draft  
8     rule for MDLs, everyone gets excited and thinks that's  
9     a great thing. But this particular rule, my question  
10    is, what problem is it trying to solve? Because none  
11    of the problems I've ever heard really anyone express,  
12    whether a plaintiff's lawyer, a defense lawyer, a  
13    party themselves, a judge, it doesn't seem to me that  
14    any of those problems would be solved by this rule.  
15    What this rule does is says here are some things -- I  
16    mean, I'm really talking about Subsection C. What  
17    this says is here are some things you might want to  
18    think about, and that's the way people will read it.

19            Here are some things that judges might think  
20    about, they might not think about. And doesn't  
21    provide anything that you would describe as standards  
22    for how to address any of these issues. So, you know,  
23    if it's -- you know, whether it's what we call early  
24    vetting, whether it's, you know, consolidated  
25    pleadings, it doesn't provide any guidance to the

1 judge or, more importantly from my perspective, the  
2 parties about what any of that means and what  
3 standards a judge should use. And in that sense,  
4 there is a real risk of, I think, an unintended  
5 consequence that a rule of this nature simply invites  
6 and encourages even more of the sort of ad hoc  
7 rulemaking that, you know, many of us find very  
8 troubling already in MDLs.

9 CHAIR ROSENBERG: Okay. Thank you so much.  
10 From our reporters?

11 PROF. BRADT: I guess I'll ask the same  
12 question I asked before, which is, doesn't Rule 16(c)  
13 already and has already for the last 40 years provided  
14 what you describe as ad hoc rulemaking in the rules?  
15 And are you suggesting that that rule is problematic?  
16 And I guess I'll ask the follow-up question already,  
17 which is, doesn't the list of things to consider make  
18 it more clear what may happen in an MDL to clients who  
19 don't have experience in it?

20 MR. STOFFELMAYR: So a couple things. A  
21 certain amount of ad hoc rulemaking has always gone on  
22 and always will. That's, yeah, absolutely. And Rule  
23 16 I guess you could say contributes to that perhaps.  
24 That's fine. I mean, the rules are not written to  
25 address every situation. They are meant to allow a

1 certain amount of flexibility.

2           What concerns me about this draft is it  
3 takes a number of very controversial subjects, you  
4 know, consolidated pleadings, direct filing, things  
5 like that, it takes a number of very controversial  
6 subjects and says here is something for you to  
7 consider kind of making it up as you go. There's no  
8 standards, you know, no suggestion that the Rules  
9 Committee has come to any conclusions about whether  
10 these are proper or what they would look like, but it  
11 just says here's an opportunity to, you know, do your  
12 own thing.

13           And especially when it comes to these  
14 controversial topics, which is unlike regular Rule 16,  
15 that's a real -- there is a real risk that it invites,  
16 you know, an expansion of this kind of ad hoc  
17 rulemaking, which, like I said -- and MDLs are  
18 already, you know, sort of -- whether you like it or  
19 not, well, it's a defining -- it is for many people, I  
20 would say, a defining feature. And, you know, when  
21 you say there's a list of four things, does that help  
22 people to know what might happen in an MDL? Those  
23 four things are in the manual. They're in any number  
24 of best practices.

25           You know, nobody has trouble -- well, I

1       shouldn't say nobody. It's not hard to figure out  
2       things that might happen in an MDL. What's impossible  
3       to figure out is what will happen in an MDL. And a  
4       list of four, five, 10 things that might happen  
5       doesn't give you any better predictability about what  
6       actually will happen unless maybe you know who the  
7       judge is and that judge has a track record you can  
8       look at.

9                   CHAIR ROSENBERG: Rick?

10                  PROF. MARCUS: Well, I think I'm going to  
11       steal Judge Proctor's question. You think there  
12       should be a -- I think you think there should be a  
13       rule that calls for pretty immediate, let's say,  
14       individual scrutiny of individual claims, that's early  
15       vetting? Is that always true, even if there's an  
16       across-the-board objection to the legal foundation of  
17       all these claims, preemptions, whatever it may be?

18                  MR. STOFFELMAYR: Absolutely 100 percent.  
19       There is no reason anyone should ever think it is in  
20       their interest, a good idea to file a claim if they  
21       have no idea if that claim --

22                  PROF. MARCUS: Okay. So, if you're in the  
23       room with the client that Judge Proctor described, you  
24       are going to urge that client to spend large amounts  
25       of money for individual scrutiny of cases even though

1       there's an across-the-board legal argument that could  
2       put this all to an end?

3               MR. STOFFELMAYR: I don't know. I guess I  
4       don't understand the hypothetical because here we are  
5       in the current world. Okay. In the current world, I  
6       can say to the client, I am fairly confident that one  
7       day we will find out somewhere between 20 and 60  
8       percent of these cases never should have been filed.  
9       There is no way for us to figure that out today. We  
10      will ask the judge for an order. We may or may not  
11      get it. We'll be told to negotiate, and we'll end up  
12      negotiating what will probably look like a fact sheet  
13      that will not address this issue. It'll give us names  
14      and addresses and things like that, but it won't  
15      address this issue.

16             In the meantime, let's file our preemption  
17      motion. I wish that I had ever seen a preemption  
18      motion that I felt like I could advise the client had  
19      an 80 percent chance of success, but it could happen,  
20      obviously. But, you know, we'll say, well, meantime,  
21      we'll file our preemption motion and if that gets  
22      granted, the case is over. If it doesn't get granted,  
23      you know, we'll slog along.

24             If the rule were amended, the anticipated  
25      effect, this was Mr. Dahl's point, is sitting in that

1 conference room, I would say there's nothing -- you  
2 know, it's nothing we have to do, but I'm pretty  
3 confident, like it or not, client, most of these cases  
4 probably are people who really were injured by your  
5 product. That's now, and we have a preemption motion,  
6 but we're not devoting enormous resources to anything.  
7 All we're saying is you need to provide this sort of  
8 information up-front. And if people have to do that,  
9 they won't file the cases where they can't, obviously,  
10 and, you know, there is nothing we need to do.

11 CHAIR ROSENBERG: Any further questions?  
12 Judge Proctor?

13 JUDGE PROCTOR: There are cases where you  
14 have a dispositive motion and you ask the court to  
15 hold off discovery under rule -- until a 12(b)(6)  
16 motion's litigated, right?

17 MR. STOFFELMAYR: Sure.

18 JUDGE PROCTOR: That happens. Is there a  
19 rule, is there a current rule in Rule 16 that says the  
20 court must do that in every situation?

21 MR. STOFFELMAYR: No. Many judges don't in  
22 my experience. It's less a problem then.

23 JUDGE PROCTOR: So because -- and they may  
24 have reasons one way or the other for it, but what I'm  
25 wondering is you're asking for an individualized rule

1 in 16.1 and centralized proceedings that you don't  
2 even have present in Rule 16 in a single plaintiff  
3 versus a single defendant case, am I right?

4 MR. STOFFELMAYR: And the reason is we don't  
5 have this problem in single-plaintiff, two-plaintiff  
6 cases. If somebody sues my client and it's, you know,  
7 a plaintiff and a spouse with a derivative claim and  
8 they lay out and say, you know, here's exactly what  
9 happened in a complaint, you know, I used the  
10 medication, whatever it is, I got a prescription from  
11 Dr. So-and-So, I used the medication. Two weeks  
12 later, I had this adverse event and, you know, for  
13 such and such reasons, I believe your product was the  
14 reason for the adverse event.

15 I almost never am going to look at that and  
16 say, what are the odds they really had a prescription?  
17 What are the odds they really had a heart attack?  
18 It's never going to come up. The problem is a problem  
19 we have in multi -- you know, large multi-plaintiff  
20 cases where a hundred percent of the time I'm looking  
21 at a short form complaint probably or a long complaint  
22 that is a hundred percent boilerplate, uses the  
23 plaintiff's name once, and I'm looking at that and I'm  
24 saying there is probably a 20 to 50 percent chance  
25 this person never had a heart attack, but we may never

1 find that. It's a completely different kind of case  
2 the way that it's evolved.

3 JUDGE PROCTOR: So give me your three top ad  
4 hoc rules that MDL transferee judges implement that  
5 you would say we should address.

6 MR. STOFFELMAYR: With an actual rule -- I  
7 mean with a --

8 JUDGE PROCTOR: Yeah. Well, you've said the  
9 problem --

10 MR. STOFFELMAYR: Yeah.

11 JUDGE PROCTOR: In your submission, you said  
12 one of the problems this rule is going to foster and  
13 permit and allow to continue is ad hoc rulemaking by  
14 transferee judges. Give me your best three examples  
15 of that.

16 MR. STOFFELMAYR: So, I mean, the one we've  
17 all been talking about, a rule, you know, fact sheets  
18 plus, something that actually had the effect on  
19 people, that there is an expectation that you can't  
20 file this this case if you can't provide enough  
21 evidence to show that there is some there there. That  
22 would be one.

23 Two, consolidated pleadings. Nobody today  
24 knows what -- we see them all the time. No one can  
25 tell you ahead of time for sure what are these and

1     what legal effect do they have. I would love a rule  
2     that said either no pleadings other than those  
3     recognized in Rule 7 or said, in addition to the  
4     pleadings allowed in Rule 7, these two, three, four  
5     pleadings and explained what legal effect they have.

6             JUDGE PROCTOR: Can you repeat that last one  
7     again, please?

8             MR. STOFFELMAYR: Sure. I said I would love  
9     a rule that either said there will be no pleadings  
10    other than those allowed by Rule 7 and explained  
11    whether a master complaint is or isn't a complaint for  
12    purposes of Rule 7, I guess, because nobody, you know,  
13    I think, knows the answer to that question. So either  
14    said there's no such thing as master complaints, short  
15    form complaints, there's just Rule 7, or  
16    alternatively, a rule that said, in addition to the  
17    pleadings allowed by Rule 7, here are two, three,  
18    four, you know, additional types of pleadings, maybe a  
19    master complaint would be one, maybe a short form  
20    complaint, a master answer, you know, so it's parallel  
21    and explained what the force of those pleadings is,  
22    you know, what legal effect does the master complaint  
23    have because, right now, in different cases, it can  
24    mean something very different. It can simply be an  
25    administrative device. It might be a binding pleading

1       that everyone is tied to. You might be able to file a  
2       motion to dismiss it. You might not be. That would  
3       be a rule that, you know, everyone can read ahead of  
4       time and know what that means rather than each judge  
5       will sort of start fresh.

6               And you asked for three. Direct filing is  
7       the other one that I think is a source of huge  
8       confusion. And there is a sense among some judges  
9       anyway that, you know, defendants, come on, you've got  
10      to agree to this, you know, don't be difficult.  
11      What's the big deal? This saves everybody a lot of  
12      problems.

13             JUDGE PROCTOR: There's a rule that permits  
14      you to object to that, the venue rules, in personam  
15      jurisdiction rules, so I don't understand that.  
16      Direct filing only comes into play when both sides  
17      agree to it or else there's a litigated issue about  
18      whether direct filing is appropriate. Unlike our  
19      Criminal Rules of Procedure, in the Civil Rules, the  
20      parties can agree to anything they want if the court  
21      permits it, so I'm at a loss to understand why the  
22      direct filing has gotten so much traction on your  
23      side.

24             MR. STOFFELMAYR: Because there are  
25      agreements and then there are, you know, we better

1     agree to this or bad things are going to happen,  
2     because I have a case where the judge ordered us to  
3     waive service. That's the opposite of a waiver if  
4     you're ordered to do it. Now fine, nobody cares,  
5     everybody was going to waive service anyway. So,  
6     obviously, it doesn't get litigated. But there is a  
7     dynamic in these cases where everyone is expected to  
8     kind of do what the judge wants on something like  
9     that, and at the beginning, at the outset, who wants  
10    to pick a fight over direct filing, because you're  
11    thinking how much difference does it really make.

12           PROF. MARCUS: So you think a rule should  
13    say judges must not do -- accept direct filing, even  
14    if the parties accept it?

15           MR. STOFFELMAYR: Again, I mean, my -- I  
16    think someone else can address whether direct filing  
17    is a good or a bad thing. My point is we would all be  
18    better off if we had a rule on direct filing. The  
19    rule might say it is always permissible and when it  
20    happens, here is the impact on choice of law  
21    questions, here's the impact on statutes of  
22    limitations, depending on the jurisdiction, may or may  
23    not follow substantive choice of law principles, here  
24    is the impact on personal jurisdiction arguments, et  
25    cetera, et cetera.

1           You know, if the Committee concludes that  
2     direct filing, you know, is a good thing, we need a  
3     rule that explains what it is and how it works and  
4     what the consequences are rather than the parties  
5     being told draft a direct filing order and I'll sign  
6     it.

7           PROF. MARCUS: And so that rule ought to  
8     handcuff the judge to do anything different.

9           MR. STOFFELMAYR: I'm not a -- I mean, so  
10    maybe this is an unpopular view in this room, but I  
11    don't think that's always a bad thing. But most rules  
12    are written with a certain amount of discretion,  
13    right? And I think, in my comment, I never really  
14    focused on this before, I always sort of thought that  
15    if someone doesn't serve timely, you know, the judge  
16    kind of always let it go. It's actually really  
17    interesting. If you read I guess it's Rule 3(m),  
18    there are a lot of guardrails around what a judge can  
19    and can't do when someone didn't file a -- didn't  
20    serve a complaint on time. Virtually all of the rules  
21    work that way. So I don't know that, you know, when I  
22    say we need a rule that that rule would have to be any  
23    more of a straitjacket than virtually all of the other  
24    rules or handcuffs to use your term.

25          CHAIR ROSENBERG: Okay. Thank you so much.

1 Are you going to be staying? Are you staying for the  
2 duration of the day?

3 MR. STOFFELMAYR: I was going to stay until  
4 3 or 4 if that's okay.

5 CHAIR ROSENBERG: Okay. Okay. No, that  
6 sounds good. If we have some additional questions, we  
7 have time at the end, I know we'd be anxious to ask  
8 you. Thank you so much for your presentation. We  
9 appreciate it.

10 Next, we're going to move to Mr. Beisner,  
11 who is appearing remotely. We see him on the screen,  
12 and you may proceed, Mr. Beisner. You're here to talk  
13 about 16.1. And you're on mute right now. Let's see  
14 if -- frozen and muted. Have we unmuted everybody for  
15 purposes of being able to speak? Yeah. There's an  
16 issue with his connection? Okay.

17 So I think, Mr. Beisner, if you can hear us  
18 and given that we're a little off schedule, but we  
19 knew that, so that was all planned, we're going to  
20 take -- you want to take -- we'll take our break now,  
21 our 10-minute break. This way, Mr. Beisner, we can  
22 work on making sure the technology works when we  
23 return from the break. So it's 11:17. We'll be back  
24 at 11:27. We'll begin with Mr. Beisner and then we'll  
25 go to Mr. Redgrave. Thank you.

1 (Whereupon, a brief recess was taken.)

2 CHAIR ROSENBERG: To get started now, did we  
3 work out our technology issues?

4 MR. BEISNER: I believe we did.

5 CHAIR ROSENBERG: Okay. So just sit tight,  
6 Mr. Beisner, we can hear you, see you. I'm just  
7 waiting for everybody to be seated, and we will get  
8 going, so just give us a minute or so.

9 MR. BEISNER: And to be clear, the  
10 technology issues were all of my making.

11 CHAIR ROSENBERG: The record so reflects.

12 MR. BEISNER: Yes, blame me.

13 CHAIR ROSENBERG: Okay. All right, Mr.  
14 Beisner, let's have you proceed. And I think we'll  
15 give you the one-minute warning, but you'll monitor  
16 yourself as well.

17 MR. BEISNER: Okay. Thank you for the  
18 opportunity to appear before the Committee today to  
19 provide comments on the proposed rule, 16.1. I  
20 apologize for not appearing in person, but,  
21 unfortunately, circumstances required me to be away  
22 from Washington today. My comments this morning are  
23 limited to one element of the proposed rule, that's  
24 Subsection 16(c)(1), which would prompt courts and  
25 parties to consider at the initial MDL status

1 conference the question, quoting the rule, proposed  
2 rule, whether leadership counsel should be appointed.

3 In recent years, the MDL leadership counsel  
4 concept has undergone substantial change. Not long  
5 ago, MDL plaintiffs' counsel simply organized  
6 themselves and courts essentially confirmed their  
7 plans, sometimes subject to adjustments. For example,  
8 I recall that when the HMO MDL was commenced in the  
9 Southern District of Florida back in 2000, there was a  
10 well-publicized spat among plaintiffs' counsel about  
11 who should take the lead role. At the initial status  
12 conference, counsel asked Judge Moreno for two weeks  
13 to sort out their differences. The court reluctantly  
14 agreed but with an admonition that if counsel couldn't  
15 agree on a leadership plan, the court would make the  
16 picks.

17 In more recent years, we've migrated toward  
18 transferee courts taking applications for lead counsel  
19 roles and making selections without much, if any,  
20 input from plaintiffs or their counsel. But partly as  
21 a result of that evolution, I think the leadership  
22 counsel concept has become rather muddled. In a 2020  
23 Law Review article, Rutgers Law Professor David Noll  
24 examined the counsel leadership orders from over 200  
25 MDL proceedings. He concluded that while the lead

1 counsel notion is among many ad hoc MDL  
2 improvisations, counsel leadership orders, as he put  
3 it, constitute the most extreme level of ad hocery in  
4 the MDL realm. By the professor's reckoning, the  
5 contents of counsel leadership orders vary widely.  
6 And, to me, that raises a question whether we should  
7 be dropping into our federal procedural rules a  
8 concept that's seemingly so ill-defined.

9 Perhaps the greater concern, however, should  
10 be the myriad judicial authority and ethical questions  
11 raised by counsel leadership orders. Those orders  
12 typically designate a few lawyers to run an MDL  
13 proceeding on behalf of all the plaintiffs therein.  
14 Thus, without anyone's consent, the counsel actually  
15 hired by most individual plaintiffs are more or less  
16 replaced with different attorneys picked by the MDL  
17 court. According to Professor Noll, this sidelining  
18 of non-leadership counsel is explicit in 22 percent of  
19 the counsel leadership orders he reviewed.

20 For example, one order states, and I'm  
21 quoting now, "Counsel for plaintiffs who disagree with  
22 lead counsel or who have individual or divergent  
23 positions may not act separately on behalf of their  
24 clients without prior authorization of this court."  
25 Other leadership orders are less explicit, but they

1 generally make clear that the court-appointed  
2 attorneys are running the show and imply that non-  
3 leadership counsel may not represent their clients in  
4 the manner that they normally would.

5 The source of an MDL court's authority to  
6 essentially override plaintiffs' choice of counsel in  
7 this matter is far from clear. Some suggest the  
8 authority exists because a mass tort proceeding  
9 resembles a class action in which lead counsel are  
10 normally appointed under Rule 23(g).

11 But our appellate courts see it differently.  
12 In its Fosamax decision several years ago, for  
13 example, the Third Circuit stated that in mass tort  
14 proceedings, plaintiffs each retain the right to  
15 develop their own cases because, and I'm quoting now,  
16 "A mass tort MDL is not a class action but rather a  
17 collection of separate lawsuits coordinated for  
18 pretrial proceedings."

19 This concern is heightened by the fact that  
20 some MDL courts have ruled that the court-appointed  
21 lead counsel do not owe standard fiduciary duties to  
22 plaintiffs in an MDL proceeding with whom they do not  
23 have a formal retention agreement. That presumably  
24 means that lead counsel are not obtaining informed  
25 consents from such plaintiffs regarding key strategic

1 decisions, and it's unclear who should be conferring  
2 with such plaintiffs about their claims when their  
3 retained counsel have essentially been barred from  
4 active participation in the litigation.

5 Because of these concerns, I fear that  
6 counsel leadership orders being issued in some MDL  
7 proceedings could be challenged by plaintiffs  
8 dissatisfied with the outcomes they obtain. And with  
9 that in mind, I respectfully submit that before we  
10 enshrine the MDL leadership counsel concept in our  
11 federal rules, it would be prudent to develop a  
12 stronger consensus about how that concept should be  
13 defined and about how to craft leadership orders to  
14 ensure that they neither exceed judicial authority nor  
15 infringe on plaintiffs' individual due process rights.

16 CHAIR ROSENBERG: Thank you, Mr. Beisner.  
17 From our reporters? Rick?

18 PROF. MARCUS: John, thank you very much.  
19 This is Rick Marcus. I am assuming that you would  
20 agree with the notion that having a thousand lawyers  
21 doing a thousand things that they each individually  
22 want to do is inconsistent with the 1407(a) objective  
23 of structured, orderly pretrial proceedings.

24 MR. BEISNER: Yeah. I do not want to be  
25 heard to say there should not be leadership counsel in

1 MDL proceedings. I agree that would be a nightmare,  
2 but I think that the shift away from -- and there are  
3 reasons why this happened that are valid, but I think  
4 the shift away from counsel sort of selecting their  
5 own leadership, there being a participation in that,  
6 to the court sort of stepping in and saying these are  
7 going to be leadership counsel to the exclusion of the  
8 active role of other counsel is where the problem  
9 comes and I think probably needs some softening.

10 PROF. MARCUS: John, just a footnote on  
11 that. Do you recall the fine paper controversy in the  
12 early 1980s concerning that class action leadership  
13 Tammany Hall situation as was described? You're  
14 saying the court should not have the major role, but  
15 rather, the organizational and political skills of the  
16 plaintiffs' bar should be determinative?

17 MR. BEISNER: No, I'm not saying that at  
18 all. And that's why I'm saying the move away from the  
19 total self-selection is a sound basis. I think there  
20 were abuses under that approach as well. But I think  
21 there's a happy medium that could be struck under  
22 which there is more participation by counsel in  
23 selecting. The notes do not say anything about  
24 consulting with the plaintiffs in the proceeding or  
25 with the counsel who are not aspiring to be non --

1       that are not aspiring to be leadership counsel.

2               And there is that specific provision in the  
3       rule itself that talks about, you know, should there  
4       be some restriction on the participation of non-  
5       leadership counsel in the proceeding. I think all  
6       those sorts of things are going to invite challenges  
7       from plaintiffs who don't like the outcome of these  
8       cases and, you know, perhaps upset the applecart after  
9       people have invested a lot of time in these MDL  
10      proceedings.

11             CHAIR ROSENBERG: Andrew?

12             PROF. BRADT: Thanks. Thank you. Thank you  
13      for being here. I just want to clarify the link  
14      between what you described as the changes in  
15      appointment of leadership counsel and reduced input by  
16      those who aren't in leadership. It would seem to me  
17      it would be the reverse, that if leadership is  
18      organizing themselves as a slate and presenting it to  
19      the judge with a rubber stamp, then that would be more  
20      exclusive to the other attorneys in the case than what  
21      you're describing now. I guess I just don't see the  
22      linkage between the change in practice and the  
23      problems you're identifying.

24             MR. BEISNER: I think what happened before  
25      in a lot of cases is there were multiple slates

1 presented, different people offered candidacy, and  
2 there was a lot more consultation by the courts about  
3 who is supporting whom. I agree with you that there  
4 probably is need for greater court involvement in that  
5 process, and I'm not returning to those days where the  
6 biggest person in the room in terms of power and  
7 political might is selected. I think the court needs  
8 to look out for that. But I think there are ways to  
9 soften this process so that the court is open to input  
10 from the counsel about who they would like to see in  
11 these leadership roles, and that's not contemplated by  
12 the current draft.

13 CHAIR ROSENBERG: Judge Proctor?

14 JUDGE PROCTOR: Hello, John. A question.  
15 What should we make of the fact that most leadership  
16 appointments are on the plaintiffs' side and we're  
17 hearing this from defense counsel generally, not  
18 plaintiffs' counsel?

19 MR. BEISNER: Yeah. And the reason that  
20 you're hearing from me on that is I am fearful that we  
21 as defendants could go through MDL proceedings, have  
22 the results that we like, and then have plaintiffs'  
23 counsel turn around and say, I was denied my due  
24 process in that proceeding because my counsel was sent  
25 to the bench, didn't participate, was not able to

1 participate in a particular strategy decision that  
2 resulted in an adverse ruling. Or, when we get cases  
3 remanded in the discovery process, you could have  
4 people say, well, my attorney wasn't able to  
5 participate in that and so discovery decisions that  
6 were made by the MDL court should be ignored because,  
7 now that we're remanded, we want to do it differently.

8 I think that's the reason I'm here making  
9 those concerns, raising those concerns. And, indeed,  
10 you know, let me be very specific about this, and,  
11 Judge Proctor, this kind of goes to the question that  
12 you raised earlier as well. You know, in the Fosamax  
13 case that I mentioned, which was a preemption case and  
14 it ultimately went to the Supreme Court and the Third  
15 Circuit's decision was vacated in that case, but one  
16 of the arguments there was that not enough attention  
17 was given to the individual claims in that case with  
18 respect to the preemption motion and that the sweeping  
19 ruling that the court issued was therefore improper.

20 And so this -- the sort of challenge I'm  
21 talking about, although it was a little bit different  
22 there, was made in that case and was accepted by the  
23 Third Circuit, and so that's why I'm concerned,  
24 because there was a bit of a challenge to the lead  
25 counsel not giving adequate attention to the

1 individual claims.

2 Judge Proctor, going back to another issue  
3 that you raised earlier about I think when Mr. Dahl  
4 was up before then, I know I'm off topic here, but I'd  
5 also note that case, I think, gets at the reason why  
6 you need to look at claims individually even where you  
7 have a sweeping motion, because there, you know, the  
8 court was was critical of the lack of information  
9 about the individual claims and, you know, it said you  
10 need to look at these claims individually. They need  
11 to be accounted for in that way.

12 And if you look at the recent rulings of the  
13 Third Circuit, the Sixth Circuit, and so on, you know,  
14 I think they really stress the notion that these  
15 claims, under the MDL statute, must be viewed as  
16 individual claims, must be treated as such. And, you  
17 know, this notion that you kind of go to this sweeping  
18 motion first without doing anything else, I think  
19 these cases really undermine that proposition.

20 JUDGE PROCTOR: Going back to your original  
21 point, though, of lack of due process, doesn't the  
22 fact that the rule permits the parties to submit a  
23 report about counsel's selection or counsel leadership  
24 and on top of that is agnostic on how the leadership  
25 structure should look, doesn't that create more

1 opportunities for there to be a tailored solution for  
2 each case in terms of selection of leadership?

3 MR. BEISNER: I guess I didn't recognize  
4 that in there. As I read it, it talks about the court  
5 consulting with recommendations of other judges and so  
6 on, but there really isn't a clear -- and maybe I just  
7 missed it, but there isn't a clear idea that the court  
8 should confer in some manner or consult in some manner  
9 with counsel who have decided to play a back-bencher  
10 role in the proceeding.

11 JUDGE PROCTOR: Well, 16(c) says, in  
12 preparing a report for the conference, transferee  
13 courts should order the parties to meet and confer or  
14 meet and prepare a report to be submitted to the court  
15 before the conference begins, and that's one of the  
16 subjects in the report, is whether leadership counsel  
17 should be appointed and, if so, how.

18 MR. BEISNER: Understood. I'm talking about  
19 the actual selection of the counsel, though. I see  
20 what you're saying is that they can propose a  
21 mechanism for that, but there's certainly nothing in  
22 the notes that encourage a court in making its  
23 appointments to be conferring with the parties'  
24 counsel.

25 CHAIR ROSENBERG: Andrew? Or, no, nothing?

1                   PROF. BRADT: I return it to you.

2                   CHAIR ROSENBERG: Okay. Okay. All right.  
3           Mr. Beisner, thank you so much. As always, very  
4           helpful comments and we appreciate it.

5                   We'll move on now to Mr. Redgrave, who also  
6           is appearing remotely, and he's going to address  
7           privilege logs.

8                   MR. REDGRAVE: Good morning. Are you able  
9           to see and hear me?

10                  CHAIR ROSENBERG: We can.

11                  MR. REDGRAVE: Excellent. I appreciate the  
12           opportunity to appear remotely. I apologize I could  
13           not myself be in D.C. for the meeting in person. But  
14           I want to kind of cut to the chase on the privilege  
15           log. And, again, appreciate the efforts of the  
16           Committee to work through the issue. You've obviously  
17           received a couple submissions that I have made, along  
18           with Judge Facciola, a retired magistrate judge from  
19           the District of Columbia.

20                  I think, to focus my remarks, I'm going to  
21           go first to a question Professor Marcus asked to Mr.  
22           Keeling that was kind of going to the cost,  
23           complexities, and issues here, and I wanted to note  
24           two things. First, there is a significant level of  
25           nuance and inquiry required. Obviously, when you do a

1 document-by-document log, that detail that you have to  
2 do for every entry and the QC and everything else,  
3 it's enormous. But doing any level of logging, of  
4 course, is expensive and deeply, you know, vexing in  
5 some ways for those of us that do it a lot.

6 But I think the reality is modern practice  
7 really requires us to have a rule that kind of matches  
8 better the reality and doesn't create pitfalls for  
9 those in different jurisdictions or in locations where  
10 people aren't aware of best practices or aren't  
11 following them, and that's the reason for urging a  
12 rule change. And I would say that what the Committee  
13 has put forward is very much an important set of  
14 changes in terms of the Rule 26 conference and the  
15 Rule 16 conference, but more is necessary with respect  
16 to an actual change to 26(b)(5), and I'll get to that.

17 But the burdens that are involved, the  
18 complexities, you have multiple privileges, including  
19 not just the attorney-client and the attorney work  
20 product consideration, you can have the spousal. I  
21 was looking at that, just a case in the Southern  
22 District for a Rule 45 subpoena. You can have joint  
23 defense considerations, common interest  
24 considerations. There's just a lot there. Then  
25 you've got get waiver, privilege breakers and the

1 rest. So getting an early conference as the Rules  
2 Committee suggests and what we suggested in our  
3 proposal is important because it kind of tees up what  
4 cases are going to have more complex issues and what  
5 cases can you actually dispense with issues.

6 But the second thing I want to make a point  
7 here is that it's not just a big case or two. You  
8 talk about large expenses on privilege logs even in  
9 small cases, which is actually a greater impact on  
10 proportionality of the cases, which is why I think a  
11 holistic change in the rule, including a Rule 26(b)(5)  
12 change, is important so that those cases can benefit  
13 because, while maybe a large company can be very  
14 dissatisfied with a disproportionate impact, which is  
15 wasteful, and I think we all agree we don't want that  
16 for any parties, if in a small case you're spending a  
17 disproportionate amount, that could be a gate-closing  
18 impact, in other words, really impacting the  
19 availability of the courts to smaller cases if that  
20 party gets swamped by some sort of burden on  
21 privilege.

22 The second point I want to just jump to, as  
23 Judge Jordan I believe it was asked Mr. Keeling in the  
24 context of why we need a rule, I will stand by what  
25 Judge Facciola and I submitted that the changes to the

1 meet-and-confer and the conference rules are not  
2 enough. 26(b)(5) itself is really the source of kind  
3 of the de facto standard of document-by-document  
4 whether we like it or not.

5 I was just reading a case from the Northern  
6 District of Illinois from August 11 and the court  
7 there, in resolving an issue on an interrogatory  
8 points to and you've got to comply with 26(b)(5)  
9 footnote to cases from 1987 and thereafter, all about  
10 you have to go statement by statement, document by  
11 document, just boom, done.

12 I did an informal poll at a recent  
13 conference with people that served as clerks, and I  
14 asked them what their experience was with the rules  
15 and Advisory Committee notes and I know this group  
16 will probably be sad to know that most parties cite to  
17 the rules, not the Advisory Committee notes. Not that  
18 many people are geeks like me that read every single  
19 Advisory Committee note upside down and backwards.  
20 And I think we have to realize that when we can have  
21 the balance between what's in a note and what's in the  
22 rule. And I think, here, the rules package is  
23 incomplete if we don't address the actual 26(b)(5).  
24 We, meaning Judge Facciola and I, did submit some  
25 proposed language. I won't pretend that that's the

1 best language. I used the word "accord" in the  
2 drafting, not pursuant to, but the Lawyers for Civil  
3 Justice submission also picked up on that.

4 I do submit that what we tried to do in that  
5 proposal that we put forth on January 31 of this year  
6 is to create something that's just neutral but gets it  
7 in the rule and not just the Advisory Committee note.  
8 And I'll say one of the salient benefits could be, if  
9 the Committee were to go down that route and do that  
10 simple change, that same change could then be  
11 implemented in Rule 45.

12 And I will note that the Lawyers for Civil  
13 Justice's October 4 submission pointed out that Rule  
14 45 is kind of untouched, and that's a critical  
15 component because the non-party subpoena recipients  
16 aren't necessarily in the meet-and-confers or anything  
17 else, but they should get the benefit of the same  
18 level of proportionality and reasonableness being  
19 applied to what they have to log and how they have to  
20 log it and when. So I'd submit, if the same change  
21 was made to Rule 45 as it relates to the same language  
22 for Section (b)(5) on the logging, that could really  
23 knock that out in an efficient way.

24 The third thing I wanted to raise is Ariana  
25 Tadler raised a question, I think, to Mr. McNamara

1 with respect to 502(d) orders. I simply have to  
2 report that in a very major significant matter that  
3 I'm involved in right now, well-known plaintiffs  
4 firms, a multiple of them, all refused to agree to a  
5 502(d) order, one to put the party to the test on the  
6 other side to have to go through all the traps of  
7 502(d), really taking away any possible safety net.  
8 The judge refused. Well, the judge agreed with the  
9 plaintiffs and entered their order and so no  
10 protection there in a world where it's not really  
11 mandatory.

12 And even if you do have a 502(d) order, I  
13 will submit that that doesn't really address the  
14 potential challenges in the excessive costs and really  
15 pointlessness of logging things where people could  
16 agree up-front.

17 Now the fourth point I want to make, and  
18 this is kind of teeing off of Mr. McNamara's comments,  
19 which I thought were very good, back to the need to  
20 have issues addressed up-front and the value of that,  
21 that mirrors what Judge Facciola and I submitted. But  
22 I think one of the things that's teased out of the  
23 Lawyers for Civil Justice submission and Mr. Keeling's  
24 testimony that I'd like to tie into is the concept of  
25 rolling, and that's the language that the Committee

1       used in the proposed draft Committee note.

2               I think that's not quite getting to what you  
3       need because rolling has a unfortunate meaning that  
4       people are like, well, it just means you have a log  
5       that trails or just all the production is rolling,  
6       you're just going. It's like no, it's more it's a  
7       deeper meaning. Judge Facciola and I submitted that  
8       it's a tiered or a phased concept that just like Mr.  
9       McNamara said, if you can get some key issues on  
10      privilege addressed at the front end, like are we  
11      dealing with a situation where someone's going to  
12      claim there's a waiver? I mean, someone's going to  
13      raise a crime-fraud argument? Is someone going to --  
14      you know, we don't really need to log anything after  
15      the complaint was filed or after a particular event in  
16      the past, all sorts of things -- or you know what?

17             We will agree that there are people in your  
18      law department that are all litigation-related, they  
19      don't have two hats. We get it, don't even log  
20      anything going to them. Or you could say that if it's  
21      a direct communication versus CC's, treat them  
22      differently. Let's talk about that up-front  
23      conceptually, but then we have to have an iteration, a  
24      continued dialogue as perhaps other things come up in  
25      in the litigation.

1                   So I think that's what the Committee was  
2     getting at to front issues early when you can, but  
3     then also, and this is reflected in the January  
4     submission Judge Facciola and I put forward, is we  
5     have to recognize it is evolution, things will happen,  
6     so we don't have a one and done, you've got to come up  
7     at the front of the case with all the issues. So I  
8     recognize that's a little bit of a nuance there, but I  
9     think the Committee's onto the right idea. I think  
10    that the word "rolling" is the problem, I should say.

11                  CHAIR ROSENBERG: Mr. Redgrave, let me  
12    interrupt just for a moment to see if we have any  
13    questions from our reporters, from Rick, from Andrew,  
14    any of our Committee members?

15                  (No response.)

16                  CHAIR ROSENBERG: Okay. So, Mr. Redgrave,  
17    we have no questions, so did you want to finish your  
18    thought?

19                  MR. REDGRAVE: No, I apologize for that.  
20    That was really at the end of it because I think I was  
21    trying to just kind of touch on the issues. I don't  
22    want to repeat what others said or what we had in the  
23    written submissions. I will say that Judge Facciola  
24    and I are considering a final sort of note on this  
25    since both of us have kind of been like tilting at a

1 windmill of privilege logs for 20 years or so  
2 together. We really do believe that there's a need  
3 for better practice across the country and with  
4 uniformity, again, to mend where you've gone.

5 I see what the Committee did with respect to  
6 truncation of the Rule Committee notes. I think the  
7 biggest thing here is we really believe two things, or  
8 I should say I should really believe because I'm  
9 speaking here by myself.

10 The Rule 45 point is something that we  
11 missed, we didn't put in there, I think it should be  
12 addressed, that non-parties all must show up if  
13 they're having to do privilege logging. It needs to  
14 be proportional and we need to watch for what's  
15 proposed by the non-parties and assess, number one.

16 Number two, we really need to have the rule  
17 change in 26(b)(5)(A). The submission we had, I  
18 think, is on point, and I think the law, the  
19 experience that people talk about later today ties in  
20 with that.

21 And then the third thing is this, you know,  
22 in the Committee note on rolling, if that can be  
23 adjusted to better reflect the concept, as I explained  
24 earlier. But, other than that, I don't want to drone  
25 on. I appreciate what the Committee has done on the

1 privilege logging rule and am very, very happy with  
2 the process but would urge that we go a little  
3 further.

4 CHAIR ROSENBERG: All right. Thank you so  
5 much, Mr. Redgrave.

6 Oh, Judge Bates?

7 JUDGE BATES: I just have one question that  
8 may be borne of ignorance in terms of the difference  
9 between rolling and tiered. Would rolling allow for  
10 production of documents and logging before all the  
11 documents have been reviewed for privilege purposes,  
12 whereas tiered by categories, would that require that  
13 you have finished the review of all documents so you  
14 know what fits in that category and whether you're  
15 claiming privilege?

16 MR. REDGRAVE: Appreciate the question. It  
17 would not necessarily mean that because you can have a  
18 tiering as a concept, as an agreement as to what  
19 issues are more important, which ones will be fronted,  
20 do you want to have certain individuals or certain  
21 issues, you know, addressed earlier, like I mentioned,  
22 if there's some allegation of crime-fraud, for  
23 instance. But that's kind of a unique situation.

24 But there could be some issues where someone  
25 says, you know, all the work that these lawyers were

1       doing were really business hat, not lawyer hat. It's  
2       not legal advice, can you -- you know, let's talk  
3       about that first. And then you have some sample  
4       documents to go to a judge to say, you know, call  
5       balls and strikes, and that'll guide what the rest of  
6       the logging will be.

7               So the concern I have with rolling, and this  
8       will put it better in context, I hope, is that in the  
9       nomenclature of most discovery folks, rolling is just  
10      like, okay, we need a rolling production, don't wait  
11      until you have all the documents, you know, gathered  
12      until you start producing and you haven't reviewed it  
13      all until you start producing and, by the same token,  
14      when you have the privilege logs trail that, so  
15      they're rolling too.

16             That is just a mechanical kind of concept,  
17      and I'm afraid that that would kind of miss the point  
18      that I think the Committee and others are endorsing  
19      here, and that is do it as a tiered or a phased, but  
20      that doesn't mean that you have to, you know, wait for  
21      everything to be concluded either because you should  
22      be able to intellectually separate the issues, advance  
23      things for consideration, and even get additional  
24      guidance on some sticky privilege issues, like which  
25      particular law, especially if you have foreign

1 privileges involved. I mean, so there's a lot of  
2 things here where early judicial involvement can be  
3 very helpful, and that's the point, I think, that  
4 needs to be driven home.

5 CHAIR ROSENBERG: Okay. Thank you so much.  
6 And, next, we'll hear from Mr. Campbell on  
7 16.1.

8 MR. CAMPBELL: Thank you, Judge Rosenberg.

9 CHAIR ROSENBERG: Good morning.

10 MR. CAMPBELL: Good morning to the  
11 Committee. Thank you for letting me speak. My name  
12 is Chris Campbell.

13 CHAIR ROSENBERG: Oh, do you have your mic  
14 on? Green light.

15 MR. CAMPBELL: Where's the green light?

16 CHAIR ROSENBERG: There you go. Thanks.

17 MR. CAMPBELL: My name is Chris Campbell. I  
18 am a partner at DLA Piper, where I'm the chair of the  
19 product liability and mass torts group at the firm. I  
20 have two points to make. First is to applaud the  
21 Committee for putting forward a rule on MDLs where  
22 they are badly needed. My second point is to reduce  
23 my applause to a very polite golf clap for Rule 16.1,  
24 which seems to do very little.

25 With regard to my first point, MDLs lack

1 structure today. They lack predictability. And,  
2 particularly important, they lack accessibility. Put  
3 yourselves in the shoes of a young lawyer who is new  
4 to MDLs. There are very little places they can go to  
5 find out how an MDL proceeds given all this  
6 variability. There are no local rules. There's not  
7 even really Westlaw that can provide guidance. The  
8 best resource a young lawyer has is probably an older  
9 lawyer who can sort of pass down the process of an MDL  
10 to that younger lawyer in the way that people handed  
11 down word-of-mouth information back when we were  
12 living in caves.

13 We can do better than this. I think Rule  
14 16.1, unfortunately, is not doing better. It is a  
15 weak and frail and feeble rule. It is more of a  
16 suggestion than a rule. And I would submit that by  
17 basically not requiring anything it promotes the  
18 rulelessness of MDLs. It also has some specific  
19 challenges that I would highlight for the Committee.

20 First of all, because you've set out now a  
21 specific rule, 16.1 on MDLs, it raises the question,  
22 are all the other rules not applicable to MDLs? And,  
23 as you've heard from other members today, other  
24 witnesses, that is a problem. It seems to be very  
25 inconsistent whether the other rules are applied in an

1 MDL setting or not.

2 And I think Rule 16.1 misses a crucial  
3 opportunity to highlight what Judge Proctor was  
4 mentioning earlier, which are those key moments where  
5 an MDL can actually find a dispositive issue early on  
6 in a case and address that dispositive issue early  
7 before the parties have engaged in extensive discovery  
8 that may be unrelated and to really decide if that  
9 issue allows the case to go forward or not.

10 Judge Rosenberg, you've done that  
11 effectively yourself in the Zantac MDL, and others  
12 have certainly done it as well.

13 And, thirdly, I think 16.1 promotes MDL  
14 esoterica, some of it which is controversial. Things  
15 like the leadership counsel that Mr. Beisner talked  
16 about is built into the rule, the concept of putting  
17 forward special masters, which is a little bit  
18 controversial, I would suggest in MDLs, and the  
19 reference to early settlement talks, which are also in  
20 the new proposed rule.

21 So, again, while I applaud the effort to put  
22 forward a rule, we certainly need rules in the MDL  
23 side of things, this doesn't seem to do it. And my  
24 applause diminishes to sort of a tepid applause for  
25 Rule 16.1. Those are my comments. Thank you very

1 much.

2 CHAIR ROSENBERG: Okay. Thank you so much.

3 Rick or Andrew? Ed? Any of our Committee  
4 members? Okay, Andrew has a question.

5 Professor Bradt?

6 PROF. BRADT: I have a question, and it  
7 relates to your written submission rather than to your  
8 comments here today, but one of the things that you  
9 suggest shouldn't be enshrined in the rules, direct  
10 filing stipulations, and in that, you say it conflicts  
11 with Rule 3 and the MDL statute. I'm just interested  
12 in how direct filing stipulations violate Rule 3 or  
13 the MDL statute.

14 MR. CAMPBELL: So I would certainly defer to  
15 others to talk more in more detail about direct  
16 filing. I think, from my perspective, what I'm hoping  
17 to avoid in the MDL setting is the inconsistency of  
18 allowing direct filing or not allowing it. And the  
19 fact that practitioners aren't really clear on that  
20 going in, that's the issue that I would raise.

21 PROF. MARCUS: How does one forbid it?

22 MR. CAMPBELL: How does one forbid direct  
23 filing, Professor?

24 PROF. MARCUS: Well, if a plaintiff files in  
25 the MDL transferee court and the defendant does not

1 object, that's a direct filing, right?

2 MR. CAMPBELL: Right.

3 PROF. MARCUS: So would you say that should  
4 be forbidden by rule?

5 MR. CAMPBELL: I'm more concerned that there  
6 be a specific rule that governs the issue than the  
7 content of that specific rule. My message here is  
8 really that rules are important. They provide a  
9 baseline, they provide a default to all the  
10 practitioners, and, to me, it's more important that  
11 they exist than the specific content, and direct  
12 filing would be one where I would probably defer on  
13 that.

14 CHAIR ROSENBERG: Judge Proctor?

15 JUDGE PROCTOR: Are you familiar with any  
16 multidistrict litigation of any size where leadership  
17 counsel was not appointed?

18 MR. CAMPBELL: No.

19 JUDGE PROCTOR: That's a reality that we  
20 deal with on a day-in, day-out basis. I've heard not  
21 just you but others say we're enshrining the practice  
22 when we mention it as something that the transferee  
23 judge should receive a report about and discuss with  
24 the parties. But it seems to me it's just a reality.  
25 And it's a prompt for the transferee judge to discuss

1 with the parties whether and it doesn't presume -- the  
2 rule does not -- the draft rule does not presume  
3 leadership counsel be appointed, but it also creates  
4 the opportunity to discuss how that appointment  
5 process should look. What is the evil of that?

6 MR. CAMPBELL: I don't think there's an  
7 evil. There's no evil to it. And I think I would  
8 really raise the same issues that Mr. Beisner raised,  
9 which are we need a clear process governing how  
10 leadership are appointed. I think the current draft  
11 of the rule references to non-leadership attorneys  
12 having limited roles, which I question whether that's  
13 something that is really fair and viable or not.

14 JUDGE PROCTOR: Are you familiar with any  
15 sizable MDL where non-leadership counsel have the same  
16 role as leadership counsel? It just wouldn't work,  
17 would it?

18 MR. CAMPBELL: It would work, but it just  
19 strikes me as something that needs to be clarified and  
20 I think addressed and also building in the concept of  
21 how the actual plaintiffs' lawyers work together and  
22 do this organically on their own. I think that all  
23 has to be built into the process. And it doesn't feel  
24 to me like that has been done in the current rule.

25 CHAIR ROSENBERG: Andrew?

1           PROF. BRADT: Thanks. And I don't want to  
2     sound like a broken record on this, but you discussed  
3     the concern about enshrining judicial involvement in  
4     facilitating settlement as one of the things that  
5     shouldn't be in the rule. But, of course, that's  
6     already in Rule 16.

7           MR. CAMPBELL: Correct.

8           PROF. BRADT: And Rule 16.1 mirrors that  
9     language. So isn't any enshrinement concern  
10    effectively non-unique in the sense that it's already  
11    there?

12          MR. CAMPBELL: That's the one question I  
13    predicted I would get, so I'm so glad you asked that.  
14    Thank you. So I think what I would say is I think  
15    it's fine that it's there as a concept, but I think  
16    the corollary concept should be there as well, which  
17    is the early dispositive issue Judge Proctor raised.  
18    I think that has to be in there. You could argue that  
19    that's there in (c)(7), but it really just says legal  
20    and factual issues. I think I think there should  
21    actually be a specific call out for early dispositive  
22    issues, such as general causation, preemption, and  
23    others that many on this Committee are aware of. I  
24    just think that has to be balanced against the  
25    settlement issue.

1                   PROF. MARCUS: So settlement discussions  
2 should be forbidden by rule until those other  
3 decisions are made?

4                   MR. CAMPBELL: I'm not saying that at all.  
5 I'm saying, if you're giving a laundry list of topics,  
6 I think that settlement has to be balanced with the  
7 early dispositive motion idea.

8                   CHAIR ROSENBERG: Okay. Thank you so much.  
9 We appreciate your comments.

10                  Mr. Shepherd will now address 16.1 as well.  
11 Welcome.

12                  MR. SHEPHERD: Thanks. My name is James  
13 Shepherd. Thank you for the opportunity to speak  
14 today. I'm a partner at the law firm of Shook, Hardy  
15 & Bacon in Houston, Texas. I'm a trial lawyer with  
16 over 20 years experience in MDLs. I'm currently  
17 serving as national counsel in my sixth product  
18 liability MDL. I've been in the trenches in MDLs my  
19 entire career. I've personally witnessed the  
20 inefficiencies that exist in MDLs because of chaos  
21 that's caused by meritless claims.

22                  I've designed and executed strategies that  
23 have resulted in the dismissal of thousands of these  
24 meritless claims, and I'm here to tell you that we  
25 need a better way, and, as currently drafted, Rule

1 16.1 is not it. Legal scholars have appropriately  
2 cited, and you guys have heard it many, many times,  
3 the *Field of Dreams* axiom, if you will build it, they  
4 will come when describing MDLs.

5 PROF. MARCUS: Do you have statistical data  
6 concerning the proportion of claims that are  
7 groundless? You mentioned dismissal or something of  
8 thousands in your experience. Where is the data on  
9 that?

10 MR. SHEPHERD: Well, I mean the data is in  
11 the dismissals that happened. I will talk to some  
12 specific numbers in one of the MDLs as an example in  
13 my comments. And then, obviously, for the MDLs that I  
14 have been involved with, I can provide numbers of  
15 cases that have been dismissed that were meritless  
16 going back to the Bay Call MDL, which was the first  
17 one I did in the early 2000s.

18 The axiom from the *Field of Dreams* is  
19 apropos when it comes to meritless claims and MDLs,  
20 and your judges are essentially powerless to do  
21 anything about it. Safeguards that normally exist to  
22 prevent meritless claims often are just not practical  
23 in MDLs. Judges don't have the time or the resources  
24 to deal with hundreds or thousands of Rule 12(b)(6)  
25 motions in an MDL. Consequently, what you have is

1 attorneys who often in a -- it's a callous moneygrab  
2 is what it is, file legally insufficient claims, many  
3 of which omit basic information that's required to  
4 establish that the plaintiff actually used the product  
5 at issue -- I'm a products lawyer, so I'm talking  
6 about products -- and/or suffered the alleged injury.

7 As you know, the MDL Subcommittee has  
8 observed that judges and litigators agree on this  
9 point. These meritless cases and claims --

10 PROF. MARCUS: I think I wrote what you just  
11 referred to, and I think we ought to reserve  
12 judgment on whether the plaintiffs and the defendants  
13 agree on those points. We may hear from some  
14 plaintiff lawyers who don't.

15 MR. SHEPHERD: Sure. But the agenda book on  
16 the Advisory Committee states, "A significant number  
17 of claimants, ultimately, often at the settlement  
18 stage, drafts have unsupportable claims, either  
19 because the claimant did not use the product involved  
20 or because the claimant did not suffer injury."  
21 Right?

22 And I think -- I know that there are  
23 plaintiff attorneys that agree with that because I  
24 deal with them all the time on the PSC, and when it  
25 comes time to deal with the end of an MDL, those

1 attorneys do not like having to deal with meritless  
2 claims either. It's very difficult for them to make  
3 them go away and to end the MDL.

4 CHAIR ROSENBERG: Judge Proctor has a  
5 question.

6 MR. SHEPHERD: Sure.

7 JUDGE PROCTOR: And I think you just hit on  
8 what I think the constant friction and rub in all this  
9 is: you want a rule that would have these meritless  
10 claims identified at the settlement process.

11 MR. SHEPHERD: Before the settlement  
12 process, I'd like it to happen very early.

13 JUDGE PROCTOR: Okay. Before the settlement  
14 process, exactly.

15 MR. SHEPHERD: Right. Yes.

16 JUDGE PROCTOR: Because you think that would  
17 help with settlement discussions to know what -- but  
18 the problem is it seems to me that that makes sense in  
19 some cases but not every case. And the fact of the  
20 matter is there may not ever be cases -- there may be  
21 cases where there's not going to be a settlement  
22 process because the defendant or the plaintiffs are so  
23 far apart on valuing the claims or because of some  
24 protected golden holy grail of a product.

25 We can't build a rule and force lawyers and

1 judges to engage in a practice every time when there  
2 makes no sense to engage in the practice every time.  
3 And so what I would say is it is a complete  
4 fabrication to say that MDLs do not permit termination  
5 of meritless claims. The process -- that's built into  
6 the process. It may be later when settlement  
7 discussions occur or when the lawyers want to have  
8 settlement discussions or their clients.

9 But the point is there are terminating  
10 points in every MDL for meritless claims, 12(b)(6)  
11 when we get to that, Rule 56 when we get to that, on  
12 remand sometimes when those things are reached, but  
13 when you have centralized proceedings, the transferee  
14 judge is not worried about whether 5 percent of the  
15 trees are dead. The transferee judge has to be  
16 concerned with moving the forest along, right?

17 MR. SHEPHERD: Well, obviously, the  
18 transferee judge does have to move the forest along.  
19 I don't think there is ever a time where allowing the  
20 meritless cases -- in a product setting, a case where  
21 a plaintiff cannot give a shred of evidence that they  
22 used the product or that they suffered the injury, I  
23 can't imagine a situation in which the judicial  
24 system, the MDL process, the transferee court would  
25 want those cases pending.

1 JUDGE PROCTOR: We don't, but there are  
2 points when we get to deal with those. But the point  
3 that I think you're -- and I think you've been the  
4 most candid on this, and that is you want it dealt  
5 with by the time you begin settlement discussions, and  
6 that's not always practicable.

7 MR. SHEPHERD: I mean, I do, but that's not  
8 the only time. I mean, these cases have -- they  
9 create chaos. I mean, chaos is the word. Throughout  
10 the process, starting from day one, there are filings.  
11 There's paper. There's things that the judges and the  
12 parties have to look at. In the Mirena MDL, it was in  
13 the Southern District of New York, it was Cathy Seibel  
14 was the judge, great judge, by the way. We had a case  
15 management conference every month for three years.  
16 These conferences lasted at least two hours, sometimes  
17 they would go a half a day. We dealt with substantial  
18 issues that were brought about by meritless cases in  
19 every single one of those case management conferences  
20 for years.

21 We shouldn't have to do it. It would be so  
22 much easier for the court and for the parties, but  
23 really for the court, if there were thousands of cases  
24 that just weren't in the system that shouldn't be  
25 there, that just shouldn't be there.

1 CHAIR ROSENBERG: Judge Jordan has a  
2 question.

3 MR. SHEPHERD: Sure.

4 JUDGE JORDAN: Yeah. I'd like to get you to  
5 focus on the practicability point that was made by  
6 Judge Proctor's question, and this has come up in the  
7 testimony of several people.

8 MR. SHEPHERD: Sure.

9 JUDGE JORDAN: I know you don't speak for  
10 everybody. but take a crack at it. Is there something  
11 in the rule as currently proposed -- well, let me  
12 change that. Is there something in the rule as you  
13 would like to see it that would prevent people from  
14 bringing a dispositive motion that would cover  
15 everything at once? In other words, there are  
16 preemption issues that have been raised. Like,  
17 you've got a rule in mind.

18 MR. SHEPHERD: Yeah.

19 JUDGE JORDAN: Would the way you've got the  
20 rule in mind prevent somebody from bringing a  
21 preemption motion to, Judge Proctor's metaphor, move  
22 the forest along? Or is there -- yeah. Is there  
23 something that would make it impracticable to do what  
24 you're saying and still give a judge the opportunity  
25 to say, I'm going to look at this fully dispositive

1 motion first?

2 MR. SHEPHERD: No, I don't see a reason why  
3 they can't happen at the same time.

4 JUDGE JORDAN: Well, I mean, maybe they  
5 can't happen at the same time because you got one  
6 judge and you've got tens of thousands of claimants  
7 and thousands of lawyers.

8 MR. SHEPHERD: No, I understand that. But  
9 the way -- and I've heard this in the comments, and  
10 the way that I processed this would work, this is  
11 nothing different than a Rule 26 disclosure, right? A  
12 claimant files a case in the MDL, or it gets  
13 transferred to the MDL. Within 30 days, they have to  
14 make a disclosure. That disclosure is going to be  
15 some proof. Maybe it's the prescription records that  
16 they used a product. Maybe it's a receipt that they  
17 used a product. And if there's an injury, maybe it's  
18 a medical record. Two pieces of paper is what we're  
19 asking for.

20 If they don't give me those two pieces of  
21 paper, as a defendant, I'm going to file a one-line  
22 motion in the court to dismiss. The court's going to  
23 dismiss it because the plaintiff is not going to  
24 respond to it. That will happen in the beginning, and  
25 after it happens enough times, people won't file these

1 cases.

2 JUDGE JORDAN: So your point on  
3 practicability is there's a way to frame this so it  
4 doesn't jam the system up in the same way that a  
5 12(b)(6) motion could stop everything if the judge  
6 said stop it?

7 MR. SHEPHERD: Right. Right. This is a  
8 self-executing instrument where they provide two  
9 pieces of paper, and if they don't, the case is going  
10 to be dismissed. They know it going in because it's  
11 in the rule. All the judge has got to do is sign the  
12 order. They'll have an opportunity, of course, to say  
13 I've got some reason why I can't do this or I didn't  
14 do this. But those are not going to be -- that's not  
15 going to happen often. That's going to be an  
16 exception. I mean, we know from looking at these  
17 cases and I've been in MDLs now -- we have hundreds of  
18 thousands of these cases. These people, they call a  
19 phone number, put her name on a piece of paper, a case  
20 gets filed, and they disappear into neverland. And  
21 those are the cases that we're dealing with.

22 Still, PFSSs have to go out. We have to  
23 collect information on them. We have to get medical  
24 records on them. Getting those things are very, very  
25 difficult. If the case is moving forward as Judge

1 Proctor says, we have to continue to prepare our case,  
2 so we have to do those things. We have to follow the  
3 procedure that's necessary for us to defend our  
4 clients. But we're doing it so many times for people  
5 that they probably don't even know they have a case.

6 CHAIR ROSENBERG: Andrew?

7 PROF. BRADT: Yeah. I'm grateful for your  
8 testimony because I'm eager to understand the real  
9 problem here with these cases. These are not cases  
10 that are meritless because of something complicated.  
11 They're meritless because of, say, they don't have the  
12 receipt or the proof they used the product. What is  
13 the real practical problem of those cases being parked  
14 on the docket during the MDL process, where it seems  
15 to me that much of the discovery and litigation is  
16 over the common issues, and if those claims are truly  
17 meritless, you don't have to settle them? It's not a  
18 class action. You don't have to settle them all. You  
19 just don't pay them out on the back end. What's the  
20 real problem?

21 MR. SHEPHERD: I can give you three that  
22 come to mind. One, the PFS process is a process that  
23 is now ingrained in the MDL. It begins in the  
24 beginning and it goes out, there's a questionnaire  
25 that they have to fill out. They have to give us

1 certain information, medical records and certain  
2 information, execute releases that we can use. There  
3 is -- you would not believe how much time and effort  
4 is invested in those PFSs. That has to happen in  
5 these meritless places. Oftentimes, judges set up a  
6 system that if the plaintiff doesn't fill out the PFS  
7 or doesn't fill out core criteria on the PFS, there's  
8 a system in place that'll allow the court to  
9 eventually dismiss the case.

10 In the Mirena MDL, the plaintiffs were given  
11 eight different opportunities to fix their PFS before  
12 the court actually dismissed the case. That takes a  
13 huge amount of time .

14 Two, a lot of these cases, the amount of  
15 discovery that's done on the defense side is  
16 gargantuan. You're talking millions and millions and  
17 millions of pages of documents. Often, the reason  
18 that that level of discovery is allowed is because the  
19 number of cases that are out there, there's a  
20 proportionality rule and an argument that plaintiffs  
21 get to make that say, hey, there's so many people  
22 here, they should have to give us everything they  
23 have.

24 PROF. MARCUS: So, if you cut 10,000 to  
25 5,000, that argument goes away?

1                   MR. SHEPHERD: The nuance, Professor, it  
2 doesn't go away. But I will tell you, because I've  
3 stood in front of judges and argued this, if there are  
4 less cases, there will be less discovery. And I can't  
5 tell you how much difference it would make, but it  
6 will make a difference and there will be less fights  
7 because of it.

8                   And then the third thing goes to settlement.  
9 I know it's long in the process. The rule as it's  
10 currently stated talks about early discussion of  
11 settlement or settlement early, early, early. Listen,  
12 defendants, nor plaintiffs, really, are going to  
13 settle early with all these meritless cases.  
14 Plaintiffs don't -- the defendants are not interested  
15 in making inventory settlements of meritless cases.  
16 And plaintiffs' attorneys, at least in my experience,  
17 hold out for more money in settlements and make it  
18 much more difficult to settle because they need to  
19 make sure that the claims of the plaintiffs with  
20 colorable claims actually are not underfunded because  
21 they've got to pay out meritless claimants that are  
22 also in that pool. So I think there are three  
23 practical reasons right there.

24                  PROF. BRADT: Doesn't that mean there's an  
25 incentive for them not to file those claims at all?

1 MR. SHEPHERD: Say that again, I'm sorry.

2 PROF. BRADT: Doesn't that mean there's a  
3 built-in incentive for them not to file those claims  
4 at all if they're concerned that the better claims  
5 aren't going to get paid out?

6 MR. SHEPHERD: I mean, as you sit and think  
7 about it, yeah, but it doesn't make a difference.  
8 They're getting -- they're doing it.

9 MALE VOICE: Is it really the case that they  
10 have that incentive? I mean, I guess I'm talking to  
11 Henry here, right? It's not like one person is filing  
12 these claims. You can have somebody with great claims  
13 and somebody with lousy claims. The person with lousy  
14 claims has an incentive to have lousy claims because  
15 they think they're going to get some money out of it  
16 and it doesn't make a difference to them that it's  
17 going to intrude on somebody else's, or at least that  
18 occurs to me might be a problem. Am I thinking about  
19 that wrong?

20 MR. SHEPHERD: No, you're not thinking about  
21 it wrong at all.

22 CHAIR ROSENBERG: Okay. Thank you so much.

23 MR. SHEPHERD: You're welcome.

24 CHAIR ROSENBERG: Okay. Thank you so much.

25 MR. SHEPHERD: I do have numbers if people

1 are interested and have asked about numbers, I can  
2 give you the numbers. I have a set of them today for  
3 the Mirena litigation, and I'm happy to try to provide  
4 the same sort of information for any other MDL.

5 CHAIR ROSENBERG: Will you be staying for  
6 the day?

7 MR. SHEPHERD: I will be here probably to  
8 about 4:00.

9 CHAIR ROSENBERG: Okay. .

10 PROF. MARCUS: Those numbers are about  
11 outcomes or showings that these people right up front  
12 would have been excluded? Don't answer that question.  
13 That would be useful to know when you submit the  
14 numbers.

15 MALE VOICE: Well, and also what would be  
16 useful is not the numbers with respect to a particular  
17 product in a particular case because that's not what's  
18 being presented to us. What's being presented to us  
19 is there's this generalized across-the-world problem,  
20 right, that in every MDL of any size, you're going to  
21 have frivolous claims that are included in that.

22 So what I'm interested in hearing and I  
23 think what Professor Bradt started this conversation  
24 wanting to hear is what empirical data supports that  
25 because we're told by the other side of the aisle

1       that's just not so. It's not true. That doesn't mean  
2       there aren't a few here and there. But, as a general  
3       problem, they say that's not a problem. And so what  
4       we're -- you understand we're the neutrals.

5               MR. SHEPHERD: No, I understand. When they  
6       say that, are they talking about specific types of  
7       cases? So my focus is really going to be in products  
8       cases, and in products cases, it is something that we  
9       see all the time. I understand that MDLs are not  
10      always about products liability cases. And in that  
11      context, I can't speak to the empirical data. I can  
12      just do it within my world.

13             JUDGE PROCTOR: But we have to develop a  
14      rule that deals with products cases --

15             MR. SHEPHERD: I understand.

16             JUDGE PROCTOR: -- antitrust cases, sales --

17             MR. SHEPHERD: That's why you all get paid  
18      the big bucks.

19             JUDGE PROCTOR: -- obscured practices cases,  
20      so all right. Thank you.

21             MR. SHEPHERD: Okay. You're welcome.

22             CHAIR ROSENBERG: All right. Thank you so  
23      much.

24             Mr. Guth will address 16.1.

25             MR. GUTH: Hi. I'm Chris Guth. I am

1       senior --

2                   CHAIR ROSENBERG:  Sorry, I mispronounced  
3       your name.

4                   MR. GUTH:  No problem.  General -- senior  
5       assistant general counsel at Bayer.  I manage our  
6       litigations.  In my time at Bayer, I have managed at  
7       least seven MDLs with tens of thousands of cases in  
8       those MDLs and hundreds of thousands of cases in the  
9       litigations overall.

10                  I had some nice remarks that I think were  
11       going to flow really well.  I want to instead try to  
12       answer some questions that have been raised here from  
13       the client perspective.  I think I'm surprised at this  
14       point that we are debating whether this problem  
15       exists.  I thought we had gone beyond that.  I have  
16       never been in a room like this in meetings, where  
17       plaintiffs are also around, where we've been  
18       discussing the rule process, where I have met a single  
19       plaintiff attorney who has challenged the idea that  
20       there are unsupportable claims in every product  
21       liability MDL.

22                  Now those attorneys have different ideas  
23       about whether those claims belong there, about why  
24       they are there in the first place, and about how to  
25       handle them.  But, again, I have never heard a

1 plaintiff attorney challenge the idea that there are  
2 significant percentages of cases in MDLs that simply  
3 do not belong there. And so it's a bit concerning to  
4 me, who has been working on this process for the last  
5 six, seven years, where I thought we started six or  
6 seven years ago with a global understanding that this  
7 is a global product liability mass tort issue and now  
8 we seem to have been taking a few steps back from  
9 that.

10 That being said --

11 CHAIR ROSENBERG: Can I interject for a  
12 moment maybe to recalibrate us and not have you feel  
13 as if you're taking multiple steps back. Why don't  
14 you take a look, as I know you have, at (c)(1)(4)?  
15 Maybe tell us why that provision, separate and apart  
16 from I know --

17 MR. GUTH: Sure.

18 CHAIR ROSENBERG: -- points that were made  
19 by LCJ about maybe it's confusing as it relates to the  
20 discovery process, but assume that's not the discovery  
21 process. Assume that is up-front, early, the  
22 attorneys are to meet. They are to discuss many  
23 things. This isn't exhaustive, but many things, many  
24 things that likely are things that all of you have  
25 experienced in your MDL years and years and years of

1 experience. I'd be surprised if you haven't gone  
2 through most, if not all, of these issues in the  
3 checklist.

4 So (c)(4) speaks about not whether but how  
5 and when the parties will exchange information about  
6 the factual bases for their claims and defenses. Is  
7 that not going to the issue of the merits of the  
8 claims? Is that not going to the concept of initial  
9 disclosures? What about that provision? And why  
10 isn't that to some extent, maybe not perfectly, maybe  
11 not in mandatory language, why does that not go at  
12 least a few steps forward toward the very issue that  
13 most of us have been or most of you have been bringing  
14 to our attention today?

15 MR. GUTH: First of all, because it doesn't  
16 mention or address the issue at all, not in the rules  
17 section, not in the comments section. We here all  
18 understand that (c)(4) deals with unsupported claims.  
19 There's nothing about unsupported claims or even an  
20 allusion to unsupported claims in the note or the rule  
21 so far as we see.

22 CHAIR ROSENBERG: But, if you understand it  
23 is unsupported claims, but you don't see the word  
24 "unsupported claims," wouldn't you then be prompted to  
25 bring that to the judge's attention if the judge, for

1     some reason, was out of the loop and didn't understand  
2     what you all understood? So let's say the judge  
3     didn't read that as unsupported claims. You've just  
4     said you do. Wouldn't that be the very thing you  
5     would bring to the court's attention at the first  
6     hearing so that the court can say, what do you all  
7     think we should do about unsupported claims, and then  
8     form an opinion about actually how to address  
9     unsupported claims? How does this preclude addressing  
10    unsupported claims?

11           MR. GUTH: It doesn't preclude it at all.  
12    And you're absolutely right, we would go into the  
13    first case management conference as we do right now  
14    and seek some sort of method to deal with that issue.  
15    Here's the problem. Without a rule mandating that  
16    these -- that support for belonging in the litigation  
17    is actually required from the plaintiffs as they walk  
18    in the door, what you're going to end up with when I  
19    walk into a case and my outside counsel walk into a  
20    case management conference and say, this means we have  
21    to figure out a way to deal with these claims, you're  
22    going to have plaintiffs' counsel walking into that  
23    same conference and saying, oh, no, we don't need a  
24    really hard rule. These cases wouldn't have tens of  
25    thousands of plaintiffs filed in them that don't

1 belong in them if there wasn't some benefit or  
2 incentive on the plaintiffs' side to do that. So they  
3 would walk in and say, defense wants us to put forward  
4 all this stuff that we're never supposed to put  
5 forward and we're not supposed to do it this early in  
6 the litigation and it all comes out in the wash, why  
7 don't we go with the PFS system.

8 I guarantee, once forced to do something,  
9 it'll be why don't we go with the PFS system because  
10 that works so well. If the PFS system worked well, we  
11 wouldn't be having this conversation right now. We  
12 wouldn't have been having this conversation --

13 CHAIR ROSENBERG: Sorry to interrupt. So  
14 the existing rules, Rule 8, kind of doesn't mean  
15 anything to plaintiffs' lawyers in MDLs?

16 MR. GUTH: No.

17 CHAIR ROSENBERG: Rule 11 doesn't mean  
18 anything to lawyers in MDLs?

19 MR. GUTH: No.

20 CHAIR ROSENBERG: The potential for Rule 12  
21 motions doesn't mean anything for lawyers in the MDL  
22 context? Is that --

23 MR. GUTH: Yes. If it did, we wouldn't be  
24 here. If it did, we wouldn't have thousands of cases  
25 in every MDL where people literally have not used the

1 product, literally do not have the injury, literally  
2 do not pick up the phone for god knows what reason,  
3 whether they're alive, whether they're not real  
4 people, I don't know, but plaintiff lawyers can't get  
5 a hold of scores of, of hundreds of, of thousands of  
6 plaintiffs who have been filed in these litigations.

7 So the evidence shows that those rules don't  
8 matter or they would be used --

9 PROF. MARCUS: That's why there's no PFS  
10 response from those folks?

11 MR. GUTH: Right. And that's why --

12 PROF. MARCUS: Then why doesn't that solve  
13 your problem?

14 MR. GUTH: Because the PFS system is --  
15 okay, to Judge Proctor's question about what if we can  
16 deal with -- and I'm using this to answer your  
17 question, Professor, what if we can deal with  
18 dispositive motions to take care of this issue? We  
19 did that in a case. We did that in the Mirena case  
20 that Mr. Shepherd talked about, 702 motions excluded  
21 plaintiffs' experts. Summary judgment was granted on  
22 behalf of the company, case over. During that time,  
23 the PFS system was going through -- while the judge  
24 was handling dispositive motions, the PFS system was  
25 going through its stages.

1           This is worth -- this is the best PFS system  
2 I've ever seen, and I think, if it could be done  
3 better, it would have already been done. Plaintiff  
4 files a case. The plaintiff lawyer has 60 days to  
5 provide a PFS. If it's not provided on time, they  
6 have 30 days to cure it. If there's no cure, bearer  
7 has to give notice to the steering committee. Then  
8 they file a motion without prejudice at the next case  
9 management conference.

10           Then, if there's no cure, we file a motion  
11 to dismiss without prejudice. Then the motion to  
12 dismiss is argued before the court. Then there's a  
13 show cause order. This is all in the comment. And  
14 then we have to go back with another chance for them  
15 to cure it. And then we go back to the court. Now  
16 one second. We go back to the court for a motion to  
17 dismiss with cause. That's the PFS system because  
18 it's negotiated. Because it is negotiated, you're  
19 going to have 17 steps of cure and fixing, these  
20 people never show up.

21           I think we have a handful, literally a  
22 handful -- if Mr. Shepherd's still here, you can ask  
23 him -- a handful of the hundreds and hundreds of  
24 plaintiffs who are dismissed who ever fought back on  
25 anything, who ever responded to anything, which is

1       why, if we institute a rule that mandates it, we're  
2       not litigating this forever, it will be prophylactic.  
3       They're not going to file these cases. It will make  
4       the MDL world so much simpler because they will be  
5       gone.

6                PROF. MARCUS: And in that case you just  
7       described, was that prophylactic effect noticed? Did  
8       people stop filing those claims?

9                MR. GUTH: In the PFS world? They just  
10      didn't respond to the PFS. They had nothing to --  
11      they didn't lose anything.

12               PROF. MARCUS: No, my point is, if the goal  
13      of doing this is that the claims will not be filed,  
14      does that experience show that's what happened?

15               MR. GUTH: I don't know. I don't know the  
16      kind of temporal relationship between -- the PFS --  
17      the answer is I don't know because I'd have to look at  
18      when they were dismissed versus when they were filed,  
19      which firms' cases were dismissed and filed. So it's  
20      a fair question. I don't know the answer to it.

21               JUDGE JORDAN: Can I ask a question --

22               CHAIR ROSENBERG: Judge Jordan and then  
23      Judge Proctor.

24               JUDGE JORDAN: -- because I don't  
25      understand. I thought your assertion, Mr. Guth, was,

1 if we had a rule that required something up-front that  
2 would screen these, that would be a prophylaxis  
3 because that would stop people from doing this going  
4 forward. I'm not understanding your question, Rick,  
5 because your question seems to be, well, the PFS  
6 system was operating in this case, didn't that make it  
7 better? And if I'm understanding the point that's  
8 being made, it's the PFS system doesn't work. That's  
9 why we want the other system. So maybe I might be  
10 missing something.

11 PROF. MARCUS: Judge, I can clarify. I know  
12 I've heard MDL recipient judges report on the  
13 avalanche of claims they kept getting. Now, if this  
14 prophylaxis works, the avalanche should stop

15 MR. GUTH: The PFS system is a -- it  
16 actually is a discovery tool. It truly is. I know  
17 you've heard us say that, but we're not pretending --  
18 we're not turning the PFSs into something they're not.  
19 PFS is our discovery tool. We end up having to use  
20 them. Those sheets are intended to get information  
21 about actual plaintiffs to help us move the actual  
22 plaintiffs' cases forward, seriously. They're not  
23 meant to vet claims. They're meant for us to get  
24 names and addresses and family members who saw them  
25 use the product and medical records so that we can get

1 cases ready for trial. That's our expectation.

2 CHAIR ROSENBERG: Let me --

3 MR. GUTH: But then what happens is --

4 CHAIR ROSENBERG: I'm sorry. We're running  
5 a little low on time and I want to just make sure  
6 Judge Proctor's question is answered.

7 JUDGE PROCTOR: Yeah. I just wanted to  
8 clarify. No one is suggesting this isn't a problem.  
9 When we ask for empirical data, we're trying to  
10 determine is it a problem in every single MDL no  
11 matter what. And that's my point, is you've just  
12 given us a prime example of how this rule could work.  
13 In the MDL you referenced, you got in front of the  
14 judge; you said you needed this procedure. It was  
15 negotiated and approved by the court and there was a  
16 process in place.

17 Let me take you back. You're now the client  
18 in the hypothetical room I talked about and your  
19 outside counsel is saying we would like to incur  
20 hundreds of thousands, if not millions, of litigation  
21 dollars litigating whether or not everybody who's  
22 filed in this MDL is properly in the MDL. At the same  
23 time, we're filing what we think should be, odds on, a  
24 successful across-the-board TKO. Do you give them the  
25 green light to go spend millions of dollars that may

1 end up being wasteful at the end of the day, as  
2 opposed to --

3 MR. GUTH: Every time. Every time.

4 JUDGE PROCTOR: Every time?

5 MR. GUTH: Every time.

6 JUDGE PROCTOR: Well, okay.

7 MR. GUTH: And I am the client --

8 JUDGE PROCTOR: Let me ask you this. Is it  
9 reasonable for general counsel not to do that every  
10 time?

11 MR. GUTH: No, because these cases --

12 JUDGE PROCTOR: I'd say you're going to have  
13 some disagreements there.

14 MR. GUTH: Absolutely not. I don't think  
15 you will find a single defense corporate counsel here  
16 who will say that it is not hugely important to fight  
17 against the unsupported meritless claims that are  
18 being filed because, even if it was a bifurcated case,  
19 and you, Judge, put a stay on everything happening in  
20 that case --

21 JUDGE PROCTOR: Let me ask you this.

22 MR. GUTH: May I?

23 JUDGE PROCTOR: Okay. You've answered.  
24 You've answered.

25 MR. GUTH: Just one thing.

1 JUDGE PROCTOR: But I'm the judge. Well,  
2 hold on. I'm the judge. Why should I and my staff  
3 have to devote thousands of hours, hundreds of hours,  
4 even dozens of hours doing something that may be  
5 unnecessary in the end?

6 MR. GUTH: So, Judge, I lost the point I was  
7 going to make when I rudely kept talking while you  
8 were talking, so I guess that's what I deserve by  
9 doing that. So I guess I would respond with a bit of  
10 a question to -- or an actual question back to you,  
11 which is, if you were dealing with a summary judgment  
12 or a preemption motion, and a summary judgment motion  
13 would require discovery to begin with, and so my  
14 question to you is, are you really going to put a stay  
15 on the entire litigation while you handle the  
16 preemption motion is really the only --

17 JUDGE PROCTOR: Oh, we do it all the time in  
18 single plaintiff versus single defendant. Ironically,  
19 as we were in this meeting, one of my law clerks sent  
20 me a text order staying proceedings so the parties can  
21 accomplish another task they've asked to accomplish by  
22 their agreement, but we do it on qualified immunity.  
23 We do it on motions to dismiss. In securities  
24 litigation, as you know, you're not even allowed to  
25 start discovery until motions to dismiss are decided.

1           We do it across the board in all sorts of  
2 other cases. And I don't see why product MDLs should  
3 be different. You can get in front of a judge and  
4 make all your arguments that you're making here in  
5 that case, but I don't think you can make these  
6 arguments that we should impose as a Committee  
7 or a subcommittee, we should impose on each transferee  
8 judge an obligation when it doesn't make sense in a  
9 particular case that we can't even envision right now.

10           CHAIR ROSENBERG: Let me see if Andrew has a  
11 quick question. Then I think we're going to move on.

12           PROF. BRADT: Yeah. My only question is a  
13 spin on Judge Proctor's. He's concerned about the  
14 scope of the problem across all different kinds of  
15 MDLs. I don't think anybody would dispute that there  
16 are meritless cases filed in MDLs. There's meritless  
17 cases filed in all other contexts as well.

18           What I'm concerned about is the extent of  
19 the problem. I've heard you cite that tens of  
20 thousands of cases were dismissed, and then you moved  
21 to thousands, and then, in your most recent comment,  
22 you said hundreds and hundreds. And so I guess I'm  
23 trying to figure out, it's like how many communists  
24 are in the State Department? I'm trying to figure out  
25 what the real numbers are.

1           MR. GUTH: Well, it depends on how big your  
2 litigation is, right? And so, if we had a litigation,  
3 I had a litigation, that was an MDL. Back in the days  
4 when we talked about claim numbers like 500 and 600,  
5 you're obviously only going to have a handful. In our  
6 Xarelto litigation, we had a thousand cases. I mean,  
7 this is a perfect example of what happens when you  
8 don't have a rule that is a front stop to all of this.

9           Judge, I hear you about the work that you're  
10 concerned about you and your staff having to do. I  
11 think we probably disagree on the ultimate amount of  
12 work having to be done due to the prophylactic effect  
13 that I hope would happen. And, frankly, if we don't  
14 think there's going to be a prophylactic effect, then  
15 I think the rule has failed because we're not trying  
16 to figure out how to better litigate claims that don't  
17 belong here in the first place. We're trying to keep  
18 them from coming in.

19           But, in Xarelto, we had over a thousand  
20 cases dismissed on the PFSS that's remedy-able. Over  
21 the entire course of the litigation, right, the court  
22 and the parties are dealing with those PFSSs. We had  
23 500 additional cases dismissed out of 1200 that were  
24 picked to get worked up for trial. So now it's again  
25 infecting the entire process of the litigation, right?

1 Now we're at trial selections and 40 percent of 1200  
2 gone the first time the plaintiff lawyers had to look  
3 at them.

4 Then, in settlement, so now we're at the  
5 tail end of the litigation, another 2,700 cases gone  
6 because they never belonged there. So there's, I  
7 don't know, 5,000 -- no, 4,000, Professor, in Xarelto,  
8 for example. So tens of thousands was probably  
9 flippant by me. I don't have any of my cases where  
10 tens of thousands have been dismissed. But there is  
11 four plus thousand in Xarelto. And the judge had to  
12 deal with it and the parties had to deal with it in  
13 the entire process.

14 CHAIR ROSENBERG: We have one quick question  
15 from Joe.

16 MR. SELLERS: I just want to -- it would  
17 help me at least to know when you talk about 4,000,  
18 for instance, you haven't given us -- what's the  
19 universe? Four thousand out of 100,000, 30,000?

20 MR. GUTH: Out of 30 -- I think there were  
21 32 in the MDL, so, like, 11 percent or something. I  
22 think that's right, but we had a much larger  
23 litigation in state court too, but that's about right.  
24 In Mirena, I don't know, it was 20 percent-ish. And I  
25 hope I'm not putting words in Mr. Shepherd's mouth, so

1 out of maybe 5,000, a thousand. I mean, percentages  
2 are nice to look at, but the raw numbers can be  
3 disconcerting too. It's there.

4 CHAIR ROSENBERG: Question from Judge Lauck.

5 JUDGE LAUCK: So, when you say they were  
6 dismissed at different times as meritless, was it for  
7 all the same reason?

8 MR. GUTH: I don't know. I mean -- well --

9 JUDGE LAUCK: Well, that actually could  
10 matter because, of course, as litigation goes on,  
11 things may be deemed meritless for reasons that  
12 occurred during the litigation.

13 MR. GUTH: I hear you, Judge. I get what  
14 you're saying now. That's the danger. We haven't yet  
15 figured out a good single word to describe this stuff.  
16 I don't mean lack of legal merit, like we win because  
17 the product didn't deserve to have a warning. We did  
18 that at trial. I mean cases where they literally  
19 didn't use the product. I guess I don't know why a  
20 plaintiff lawyer dismisses their claims, but if a  
21 plaintiff lawyer fails to fill out their PFS, there  
22 could be any bunch of things. But the point is it  
23 should have never been filed in the first place  
24 because all a PFS asks you to do is give me your name,  
25 number, tell me where you got your prescription from

1 and what your injury is. That's the basis of a  
2 lawsuit. It's literally the basis of a lawsuit. And  
3 when they don't do that, that's meritless or  
4 unsupported or whatever. That's the vast majority of  
5 those dismissals. When a case gets picked to be  
6 worked up for trial in an initial trial pool and the  
7 plaintiff finally sees their case, finally sees their  
8 case and maybe finally talks to their client and says,  
9 no, I'm out of here, pick another case to go to trial,  
10 I don't know really why that plaintiff lawyer for the  
11 first time in five years decided to let it go, but  
12 that's what I mean by meritless.

13 CHAIR ROSENBERG: All right. Thank you so  
14 much. As you can see, we're not eating lunch now at  
15 12:30, but we're going to do that at 1 so we have time  
16 for at least one and maybe two. Let's see what Mr.  
17 Haston has to say about 16.1. Thank you so much.

18 MR. HASTON: Good afternoon, Judge Rosenthal  
19 and fellow Committee members. I'm sorry that I'm the  
20 one standing between you guys and lunch. I will try  
21 to have something original to say for the group.

22 My name's Tripp Haston. I'm a partner at  
23 the Bradley Arant Firm in Birmingham, Alabama, and I'm  
24 pleased to appear today on behalf of the International  
25 Association of Defense Counsel, or the IADC,

1 concerning proposed Rule 16.1. The IADC is a 103-  
2 year-old invitation-only organization of more than  
3 2500 attorneys who have varied practices in civil  
4 litigation and international arbitration. We've been  
5 a leader on civil justice reform issues as the founder  
6 of DRI in 1960 and as one of the three founding member  
7 organizations of Lawyers for Civil Justice in 1987.

8 Many of our members, including myself, have  
9 served in leadership and supporting roles for numerous  
10 clients in multidistrict litigations as outside  
11 counsel and as well as corporate counsel. Together  
12 with my fellow IADC members, over the last 20 years,  
13 we've witnessed exponential growth on the MDL dockets.  
14 We're convinced the primary cause of this growth and  
15 the burden on the court system is the absence of  
16 adequate measures to prevent the meritless filing of  
17 lawsuits and MDL proceedings.

18 Now that concludes about the original  
19 comments that I have to make because most of what  
20 you've heard today were the things that I had planned  
21 to talk about today, because the three things that I  
22 had planned to address that are in my outline that you  
23 have in front of you are the need for what I call a  
24 fair filter in 16.1(c)(4).

25 Judge Rosenthal, you talked about the --

1 Rosenberg -- you talked about the existing rule, and I  
2 think one of the reasons that you're hearing so much  
3 from all of us about this is this is the first time  
4 we've had a rule on MDL litigation truly, right. And  
5 so I appreciate no one being defensive about hearing  
6 so much about it because there's a lot of concern and  
7 care about what you actually say, and that's what  
8 today is really about. I'm delighted that we are  
9 getting really good questions about the focus.

10 And, Professor Bradt, there is a bright  
11 young associate in Birmingham, Alabama, who doesn't  
12 know this yet, but they're going to be tasked with  
13 developing the empirical data that you and other  
14 Committee members are so desperate for because that  
15 data does exist. And Mr. Guth, who's a client, I was  
16 involved in leadership in the Xarelto litigation. He  
17 stole my thunder, about 4200 cases going out.

18 Just to sort of say it one more time, for  
19 us, I think this is the issue. If you're going to  
20 receive the benefit of an MDL as a plaintiff, I don't  
21 think it is too much to ask to show up and provide the  
22 factual basis for your claim at the very beginning  
23 before you're allowed citizenship into that MDL. The  
24 longer you're in, the more complicated -- the  
25 meritless claims, the longer they're in, the more

1 complicated it makes administration of the MDL.

2           There have been a lot of questions about  
3 that from the panel. And I would cite you to Judge  
4 Casey Rodgers' Law Review article that is found at  
5 Footnote 14 in LCJ's note, where she talks about in  
6 her Law Review article that was published in 2021 that  
7 the high volume of unsupported claims interfere with  
8 the court's ability to establish a fair and  
9 informative bellwether process.

10           So it has an impact on the court, not to  
11 mention the millions of dollars that are spent by the  
12 defense in getting meritless cases out that should  
13 never have been there in the first place if they just  
14 showed up and provided the most basic information to  
15 allow them to be citizens in the MDL.

16           The other two comments I had were -- and  
17 Judge Proctor raised this as well -- I think it would  
18 be terrific if more judges embraced cross-cutting  
19 issues at the very beginning. But I don't think that  
20 there is a choice, a dichotomy, between having to sort  
21 of address a cross-cutting issue and also asking the  
22 plaintiff for the basic citizenship type of  
23 information they need to participate because what  
24 happens is, as everyone knows, is that MDLs get  
25 rolling, they get involved, they roll down the road,

1 and it takes some time to get a motion up before the  
2 court to address the court and resolve it. And so --

3 JUDGE PROCTOR: You realize most citizens  
4 are born, not naturalized?

5 MR. HASTON: I'm sorry, Judge?

6 JUDGE PROCTOR: Most citizens are born, not  
7 naturalized.

8 MR. HASTON: Yeah. Well, a fair point. But  
9 I think all we're asking for is, you know, the MDL  
10 vehicle has made things very easy to participate in  
11 litigation. And I think that from the defense side,  
12 if we could just make sure we have the right people in  
13 the litigation from the beginning, not four or five  
14 years down the road, it would be better for everyone.

15 The other comment I have is about direct  
16 filing orders, and I think this goes to the point that  
17 whatever this Committee says and puts out in your  
18 commentary will be cited and held up and used. I  
19 think several of us are very troubled about direct  
20 filing orders. Mr. Stoffelmayr addressed that with  
21 us. And so we're not saying prohibit direct filing  
22 orders. We're just saying there's no need to mention  
23 them. If the parties agree to it, great. But there's  
24 often situations where we are strongly encouraged to  
25 agree to this because it just makes everything easier

1 for administration. But it will require defendants to  
2 waive some fundamental rights to get there. And so  
3 that's why we're saying there's no need to be explicit  
4 about it because of that reason.

5 CHAIR ROSENBERG: Thank you.

6 MR. HASTON: You're welcome.

7 CHAIR ROSENBERG: Andrew?

8 PROF. BRADT: So, on that direct filing  
9 point, I just want to ask the same question I asked to  
10 Mr. Campbell. You say in your outline that they  
11 violate Rule 3 and the statutory framework of MDL.

12 MR. HASTON: Yes.

13 PROF. BRADT: I guess I'm curious as to why  
14 because I haven't heard the answer to that yet. And  
15 second, direct filing orders, it sounds like you're  
16 concerned that they're strong arming to get stipulated  
17 to. But is there a circumstance where defendants are  
18 actually unable to raise personal jurisdiction and  
19 venue considerations if they come up later, after a  
20 case has been direct filed? They don't waive them for  
21 the whole case, they waive them just for the purpose  
22 of pretrial, right?

23 MR. HASTON: Right. So let me answer the  
24 first question. I think what the LCJ note says is  
25 that direct filing orders are inconsistent with Rule

1 3, which talks about that it governs the commencement  
2 of actions by filing in the correct court, right,  
3 venue, jurisdiction, and the like. And --

4 PROF. BRADT: No, it's the filing of the  
5 complaint that commences the action.

6 MR. HASTON: Can I answer the second part of  
7 your question about statutory framework? It mandates  
8 that MDL transfers shall be made on a JPML, not that  
9 something is to go directly to the court. It's  
10 supposed to go through the JPML. And so that's our  
11 point on direct filing orders.

12 CHAIR ROSENBERG: Okay. Thank you so much.

13 MR. HASTON: Thank you.

14 CHAIR ROSENBERG: We really appreciate your  
15 comments.

16 Mr. Leventhal on 16.1?

17 MR. LEVENTHAL: I guess I can't say good  
18 morning anymore. In any event, thank you for having  
19 me. My name's Markham Leventhal. I'm a litigation  
20 partner at Carlton Fields, a class action defense  
21 lawyer. Consistent with my letter that I submitted on  
22 October 5, I believe I'm going to address subject  
23 matter jurisdiction, and what I mean by subject matter  
24 jurisdiction is, in particular, Article III standing.

25 So some basic principles that we're all

1 familiar with. Number one, standing as a  
2 constitutional requirement comes from Article III,  
3 Section 2 of the Constitution, and it's derived from,  
4 of course, the case or controversy requirement. In  
5 Spokeo, one of the -- I guess it's a 2016 Supreme  
6 Court case, the Supreme Court, citing Raines v. Byrd,  
7 which is an older standing case, said no principle is  
8 more fundamental than the judiciary's proper role in  
9 our system of government and the constitutional  
10 limitation of federal court jurisdiction to actual  
11 cases or controversies.

12 And, of course, the Supreme Court has  
13 repeatedly emphasized that every district court judge,  
14 whether an MDL judge or not, has an obligation to  
15 supervise and police constitutional standing. And I  
16 think in my letter I cited to U.S. v. Hayes. The  
17 quote is, "The federal courts are under an independent  
18 obligation to examine their own jurisdiction, and  
19 standing is perhaps the most important of the  
20 jurisdictional doctrines." And it goes without  
21 saying there is no Article III exception to MDL  
22 proceedings. So the court needs to ensure that it  
23 receives from the plaintiffs all the essential  
24 information to ensure there's constitutional standing.  
25 So what are the requirements of constitutional

1 standing? I think we all know what they are, but,  
2 basically, three elements. Number one is injury-in-  
3 fact. Secondly, that injury-in-fact has to be  
4 traceable, traceability to a particular defendant  
5 that's named in the proceeding. And third is  
6 redressability.

7 So traceability, of course, is a causation  
8 concept. And the Duke Power case was framed as the  
9 plaintiff has an obligation to establish a substantial  
10 likelihood that the defendant caused the injury.  
11 That's traceability. So we've got three  
12 constitutional requirements, and the plaintiff bears  
13 the burden of establishing those three elements and  
14 that burden applies at every stage of the proceeding.  
15 So also in Spokeo, the Court said at the pleadings  
16 stage, the plaintiff must clearly allege facts  
17 demonstrating each element of standing. And then, in  
18 TransUnion, the famous quote, "Standing is not  
19 dispensed in gross. Rather, plaintiffs must  
20 demonstrate standing for each claim that they press  
21 and for each form of relief."

22 But, unfortunately, in many of the MDL  
23 proceedings, particularly those that we've been  
24 talking about, the larger ones, thousands or hundreds  
25 of plaintiffs, the transferee judges are just simply

1 not being provided with the information that they need  
2 to ensure that all the plaintiffs have standing. As a  
3 result, you have heard improper claims, some people  
4 referring to them as meritless claims, but I'm  
5 focusing on the constitutional obligation to ensure  
6 that there is standing.

7 So let's turn to the proposed rule. Section  
8 C talks about the transferee court should order the  
9 parties to meet and prepare a report to be submitted  
10 to the court before the initial conference. And  
11 that's a great idea. But then there is a list of  
12 essentially things that are, I guess, discretionary,  
13 not mandatory, but, in any event, standing is not  
14 mentioned anywhere.

15 So I looked at (c)(4) and I guess that seems  
16 to be the place in the proposed rule where this would  
17 most likely be addressed. And so the suggestion that  
18 I have is that (c)(4) should be revised so that the  
19 report shall address, not may address but shall  
20 address, number one, whether the parties agree or  
21 disagree that the plaintiffs have established  
22 standing.

23 And there may be some cases -- there are  
24 other MDLs, small MDLs, not everything is a massive  
25 product liability, where there could be no issue of

1 standing. You could have a pension plan litigation,  
2 you might have insurance policies or whatever. And  
3 the parties will agree in the report we don't have an  
4 issue of standing, we don't anticipate. In others  
5 though, if that's not the case, then the report should  
6 state how and when. And this is sort of a takeoff on  
7 the rule that's there but more specific and more tied  
8 into the LCJ's suggestion. If not, how and when  
9 sufficient information will be provided by each named  
10 plaintiff to establish injury-in-fact and traceability  
11 and, of course, redressability.

12 And we could talk -- there are volumes  
13 written on each one of those requirements, but that's  
14 the basic suggestion that in the report, do you agree  
15 there's standing? If not, how and when will the basic  
16 information for standing be prevented -- be provided  
17 to the transferee judge.

18 CHAIR ROSENBERG: So about five minutes to  
19 reserve final comment, and then I'll see if there are  
20 any questions.

21 MR. LEVENTHAL: Okay. One final comment on  
22 the existing Subsection (c)(4). So this doesn't have  
23 anything to do with an exchange of information, and it  
24 also doesn't have anything to do with defenses. So I  
25 would strike both of those words, "exchange" and

1 "defenses," from (c)(4). I agree with the LCJ's  
2 proposal, except, again, I think it should be  
3 mandatory in every initial report.

4 CHAIR ROSENBERG: Okay. Thank you so much.  
5 Ed?

6 PROF. COOPER: There's two preliminaries,  
7 then the question. First, the Supreme Court also says  
8 regularly that standing is a question separate from  
9 the merits. Second is you have sketched the burden as  
10 to standing depends on the stage of the litigation in  
11 which the question is raised: pleading, summary  
12 judgment, trial. And the question against that  
13 background is, suppose the plaintiff adequately pleads  
14 a claim for relief to whatever standard of pleading  
15 applied, can you get the case dismissed for lack of  
16 standing?

17 MR. LEVENTHAL: Well, of course, you can get  
18 the case dismissed. You can move for lack of subject  
19 matter jurisdiction.

20 PROF. COOPER: Yes. And why does a  
21 plaintiff who has adequately pleaded a claim for  
22 relief -- you're now talking, you know, all these  
23 MDLs, as far as I know, a claim to recover damages.  
24 When does that plaintiff who has a claim for relief  
25 not have standing to pursue the claim?

1                   MR. LEVENTHAL: Well, that could very well  
2 be the case. But there are a lot of situations where  
3 the plaintiffs have not established a right to damages  
4 and --

5                   PROF. COOPER: Yeah. Well, but that's the  
6 whole point. What is difference between proving the  
7 claim, pleading it, defeating summary judgement,  
8 establishing it at trial, what is the difference  
9 between that and standing that says, yes, you have a  
10 claim, you can prove it at trial, you can recover  
11 damages, but you do not have standing to pursue that  
12 relief?

13                  MR. LEVENTHAL: Okay. So I would answer it  
14 this way. You're absolutely right that the issue of  
15 standing goes through phases, and the burden, so-  
16 called burden of proof heightens as you go through.  
17 At the trial stage in TransUnion, the court said,  
18 nobody can get damages awarded under Article III  
19 unless they prove standing. At the summary judgment  
20 phase, maybe an affidavit or whatever is sufficient.  
21 At the pleading stage, however, you have to have  
22 established the basic facts of standing. And it's an  
23 independent obligation of the court to look at that.  
24 It's not an obligation. It's an obligation,  
25 obviously, of the plaintiffs to provide that

1 information, but the court has its own obligation to  
2 supervise and police subject matter jurisdiction.

3 So I think that both things can happen at  
4 the same time. I mean a pleading requirement is  
5 different, and that could be tested later on on Rule  
6 12 or whatever, summary judgment. But my point is  
7 that at the inception of the litigation, at the  
8 pleading stage, there is a constitutional requirement  
9 to establish basic information, provide it to the  
10 court so that standing exists. And that, I believe,  
11 if it was in the report and a requirement, would go a  
12 long way to eliminating what we've heard so much about  
13 so many meritless claims.

14 PROF. COOPER: One last variation in  
15 response, and then I will desist for others. At the  
16 pleading stage, the question of subject matter  
17 jurisdiction can be treated as a question of fact, as  
18 you say, and the court can inquire into it. Does that  
19 mean that the court should be able, without a jury at  
20 a hearing not described as a trial, decide whether the  
21 plaintiff has proved its claim on the merits, has  
22 proved that I used the product, the product injured  
23 me, the product was defective, but still say you do  
24 not have standing?

25 MR. LEVENTHAL: I think that that would

1       probably be unlikely. It's not something that I've  
2       seen before. And, of course, at the pleading stage,  
3       you know, that's not going to be the ultimate  
4       requirement. So I'm just suggesting that at the  
5       pleading stage, there should be a mechanism in MDL  
6       proceedings such that the plaintiffs are providing the  
7       court with the basic essential elements of standing,  
8       injury-in-fact and traceability being the most  
9       important.

10               CHAIR ROSENBERG: Judge Proctor?

11               JUDGE PROCTOR: So, if I'm a brand-new  
12       transferee judge taking over a 200,000 claim MDL, your  
13       expectation would be that on day one I should start  
14       looking at 200,000 claims to see if each one of them  
15       has standing?

16               MR. LEVENTHAL: My expectation would be, at  
17       the initial conference, you would get a report and you  
18       would see either the plaintiffs and defendants agree  
19       that standing's not a big issue here or that the  
20       defendants say standing is a big issue and why and  
21       what's going to be done. The how and when of what is  
22       in (c)(4) now, how and when is that going to be  
23       addressed.

24               JUDGE PROCTOR: How does 16.1 not permit  
25       exactly that?

1 MR. LEVENTHAL: How does it not?

2 JUDGE PROCTOR: Yeah, 16.1 says prepare a  
3 report, give it to the transferee judge. Tell them  
4 what legal and factual issues need to be discussed and  
5 a process for assessing those. But I think you're --  
6 I thought -- maybe I misunderstood your point, but I  
7 thought your point was I've got an independent  
8 obligation, even if parties don't raise it, to make  
9 sure everybody has standing, and that means I'd have  
10 to go through 200,000 claimants to see that each one  
11 of them has standing?

12 MR. LEVENTHAL: I'm not asking you to do  
13 that. What I am asking you to do, though, is to  
14 ensure that there's a mechanism in place where that  
15 information is before the court, and if the defendant  
16 wants to raise that issue, it can.

17 CHAIR ROSENBERG: I'm sorry to interrupt.  
18 That's what (c)(3) is. I mean, that's what (c)(3) is.  
19 You see, this list is not exhaustive and it doesn't  
20 require that the parties agree about what the issues  
21 are, as they often don't through counsel, so we could  
22 have a conference and the plaintiffs could say, judge,  
23 we see these as the paramount legal issues. And the  
24 defense could stand up and say and we see these and  
25 highlight standing, right?

1 MR. LEVENTHAL: Yes, but there's no  
2 requirement specific to standing, and that's what I'm  
3 getting at.

4 CHAIR ROSENBERG: Yeah. Okay. Are there  
5 any other questions on -- no. Okay. Thank you so  
6 much.

7 MR. LEVENTHAL: Thank you.

8 CHAIR ROSENBERG: So I have a question for  
9 Ms. Keller because you've waited patiently. We could  
10 take you now, at 1:03, or, because I know you  
11 anticipated going at 12, so if you otherwise were  
12 planning on having lunch, we could take you as the  
13 first witness after lunch, which would be about --  
14 we're going to shorten lunch a bit. Are you under a  
15 time constraint?

16 MS. KELLER: I am not, and it's whatever you  
17 prefer.

18 CHAIR ROSENBERG: Okay. I think then let's  
19 pause for a lunch break now, and thank you for  
20 accommodating us. So we have -- we're almost on  
21 schedule if we go with a half-hour lunch and Ms.  
22 Keller has kindly agreed, so we're really only one  
23 witness behind. So let's try to eat lunch in a half-  
24 an-hour. So that's like 1:34 if that's comfortable  
25 for everyone. So look to reconvene in about 30

1 minutes. And, again, we appreciate it. It's a  
2 balance of making sure you've been heard but keeping  
3 to a schedule. We're planning on adjourning at 3:30,  
4 but if some of you are still here and some of us are  
5 still here, we may want to further engage. So thank  
6 you so much.

7 (Whereupon, at 1:04 p.m., the hearing in the  
8 above-entitled matter recessed, to reconvene at 1:34  
9 p.m. this same day, Monday, October 16, 2023.)

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

2 (1:35 p.m.)

3 CHAIR ROSENBERG: I just want to, you know,  
4 tell everybody how appreciative we are for you all to  
5 be here. I know we've lost half the group. I hope  
6 that wasn't due to anything other than scheduling and  
7 that they've already said what they wanted to say.  
8 This is just incredibly valuable, and the Committee  
9 members and reporters have spent an inordinate amount  
10 of time reading I think it came to over 150 pages  
11 worth of summaries that you all submitted. I don't  
12 know if you saw that among all of yourselves. So this  
13 is really our first opportunity to ask questions of  
14 the astute remarks that you've given us.

15           So I certainly don't want anybody to walk  
16 away viewing the questions as anything other than  
17 that, inquisitive minds among people who have spent  
18 years now studying this issue and just wanting to make  
19 sure, even though we've heard from many of you many  
20 times before, that we fully understand the issues and  
21 can appreciate fully the input that you're giving us.

22           So I know I speak on behalf of all of us in  
23       saying thus far we have found it to be very helpful,  
24       and we know this is time away from your primary  
25       positions, and the time you put into preparing your

1 summaries and to come here today is not lost on us.

2 So thank you so much.

3 I think we're going to go a little bit out  
4 of order because I think there is a flight or two and  
5 we want to make sure that nobody is delayed. So, if  
6 I'm understanding correctly, Lana Olson will go next  
7 on privilege logs.

8 Is that okay with you, Amy Keller, who was  
9 promised to come up first after lunch? So as long as  
10 you're okay.

11 Lana, let's hear from you, if we could, on  
12 privilege logs, and thank you for your patience, and  
13 we look forward to hearing from you.

14 MS. OLSON: Thank you so much. And I  
15 appreciate you accommodating me and hated to make a  
16 big mess out of the schedule, but I do appreciate it,  
17 as will my daughter.

18 CHAIR ROSENBERG: I made the mess, so you're  
19 helping us clean it up.

20 MS. OLSON: Good afternoon. And thank you  
21 so much to the Committee for considering this  
22 important issue. My name is Lana Olson and I am a 25-  
23 year practicing lawyer in Birmingham, Alabama, and for  
24 about a week-and-a-half longer, I am the president of  
25 DRI, not that I'm counting at all. I'm appearing

1 before you today on behalf of DRI, which is the  
2 largest legal association representing the interests  
3 of business individuals in civil litigation, as well  
4 as DRI's Center for Law and Public Policy, DRI's  
5 national policy and advocacy arm.

6 I am here today to discuss the proposed  
7 amendments to Rule 16 and 20 --

8 (Technical interference.)

9 MS. OLSON: DRI believes that the parties'  
10 planning conference should include a substantive  
11 discussion about how claims of privilege and trial  
12 preparation materials best be handled by the parties  
13 in a particular case. That means specific discussions  
14 between counsel about both the timing and the method,  
15 which can ultimately be reflected in the case  
16 management order. I have seen firsthand what happens  
17 when such early discussions and decisions do not take  
18 place. For example, a party undertakes its work to  
19 provide relevant documents to the other side,  
20 sometimes flagging those privileged materials in order  
21 to get the documents out as quickly as possible  
22 without focusing on what the format will ultimately  
23 look like for disclosing items withheld for privilege.  
24 Then, all of a sudden, late in the discovery  
25 period, that party receives a demand for a document-

1 by-document privilege log to be produced in the next  
2 10 days. At that point, it is much more difficult to  
3 suggest categorical limitations, carveouts, or  
4 alternative solutions to the document-by-document log.

5 Alternatively, a party might start logging  
6 privileged documents from the beginning and in  
7 fairness try to group together entities by family or  
8 category, only to find out months or years later that  
9 the other side objects to such an approach, which  
10 means potentially redoing large parts of the privilege  
11 log.

12 In my experience, this isn't a one-size-  
13 fits-all issue, which is why making this part of the  
14 Rule 26(f) conference and ultimately part of the  
15 formal case management plan would be a welcome and  
16 much-needed change. Indeed, alternative solutions for  
17 the timing and method for addressing claims of  
18 privilege in trial preparation materials is a topic  
19 that's received relatively little focus today but is  
20 ripe for creative lawyers to work together to identify  
21 ways to do this better. Knowing early on where there  
22 are agreements or areas of dispute and having them  
23 addressed and resolved early, before burdensome and  
24 potentially unnecessary work is undertaken, would be a  
25 vast improvement over what's currently taking place in

1 many cases today.

2 Providing a clear path to prompt the parties  
3 to consider how to manage the review and disclosure of  
4 privileged materials is certainly in line with the  
5 overall purpose of the rules, to secure the just,  
6 speedy, and inexpensive determination of every action.  
7 I can say without hesitation that in my practice,  
8 there's not a single time I can recall when having  
9 this discussion and resolving disagreements earlier  
10 would not have been a better approach. Without that  
11 early discussion and the ability to craft a bespoke  
12 plan that makes sense in the context of a specific  
13 case, a cascade of inefficient, uselessly expensive,  
14 and distracting results can occur that benefits no  
15 one, neither party on either side or the court.

16 Importantly, in addition to the proposed  
17 amendments to Rule 16(b) and 26(f)(3)(D), DRI also  
18 support the proposal from LCJ to amend Rule  
19 26(5)(b)(A) to make clear that the rule does not  
20 require document-by-document privilege logs but rather  
21 allows parties to create categorical logs or agree to  
22 other alternatives.

23 While the current proposals before you  
24 certainly improve the situation and while we  
25 understand that the Committee has previously looked at

1 the issue of amending Rule 25 -- 26(b)(5)(A) as well,  
2 we do agree with the LCJ that an amendment to  
3 26(b)(5)(A) is also important and necessary, and we  
4 sincerely hope that you're open to reconsidering that  
5 additional amendment to the rules regarding privilege  
6 laws. Thank you so much for your time, and I'm happy  
7 to answer any questions.

8 CHAIR ROSENBERG: Thank you. From our  
9 reporters? Rick?

10 PROF. MARCUS: Well, two things. Thank you  
11 very much. This has been very helpful. One is if you  
12 could say a word about what a categorical log is and  
13 what categories you have had experience using to good  
14 effect. And I thought I had another question, but  
15 perhaps I don't. Oh, and the second is, am I correct  
16 in understanding, which I think is different from what  
17 someone said this morning, that you think postponing  
18 this issue and this problem until after documents are  
19 collected, et cetera, would not be a good idea? I'd  
20 just make sure that I'm correct about that. I'm  
21 interested also in categories.

22 MS. OLSON: Sure. Let me answer in reverse  
23 order because that may be more helpful. So I think  
24 having the discussion earlier is better. What that  
25 discussion consists of may be an agreement to

1     postpone privilege discussions until, you know, after  
2     the first set of documents are produced or agree that  
3     we will exclude a certain category of documents, which  
4     I'll talk about more in a minute, up-front and then,  
5     you know, carve out timing for when certain things  
6     will happen.

7             I think that's the most important point. It  
8     is something that the parties need to talk about and  
9     need to agree about. It may be that you can say this  
10    is a case where we know we can carve out A, B, C, D;  
11    there's Categories F, R, W and we know that those  
12    aren't going to be required to be logged individually.

13            And so everybody starts out on the same  
14    page. That doesn't mean there may not be issues that  
15    are raised later on, but at least starting out,  
16    everybody has an expectation of what to do as they  
17    begin reviewing and producing documents.

18            On the categorical log, that's a term I  
19    think people can use sort of having different  
20    meanings, but, to me, and I have a case right now,  
21    it's a large toxic tort case, where we did this. We  
22    talked early on and we agreed for categories we would  
23    not require logging of communications between a lawyer  
24    and their client after the retention of the lawyer.  
25    So we knew that neither side had to worry about post-

1 retention logging, which some people have sort of done  
2 and understood, but some people don't necessarily  
3 approach it that way.

4 We also were able to exclude a couple other  
5 categories, timing-based categories, so things that  
6 occurred after the filing of the complaint. We were  
7 able to include certain documents with regulatory  
8 agencies. Everybody agreed we are going to require  
9 logging if you're going to hold anything back on  
10 privilege because we don't think those are actually  
11 privileged.

12 So the categorical discussion is really  
13 something that is case-specific. It's counsel-  
14 specific and jurisdictional-specific. But I think it  
15 makes great sense, as opposed to spending thousands  
16 and thousands and thousands of dollars on the front  
17 end or the back end going down a path that you don't  
18 necessarily have to go down.

19 PROF. MARCUS: Can I ask sort of a follow-up  
20 question?

21 MS. OLSON: Sure.

22 PROF. MARCUS: We've been urged to say  
23 something in 26(b)(5) as well. Do you think that's  
24 desirable, important, since we're talking about the  
25 26(f) meeting and 26(f) as it is amended going to say

1 talk about this?

2 MS. OLSON: Right.

3 PROF. MARCUS: Why is it useful to say  
4 something over in 26(b)(5)(A) also?

5 MS. OLSON: I think it's the icing on the  
6 cake to make everything as clear as possible. I think  
7 that specifying you have to talk about the timing and  
8 method without that accompanying change to the role  
9 could lead to the result, for example, okay, so we're  
10 talking about the timing and method, I want a  
11 document-by-document log and I need it within 30 days.

12 That's not the spirit, to me, of what the  
13 amendments to the rule was intended to do. I think  
14 having that very clear counterpart would help parties  
15 understand and give them a clearer path on not only  
16 what they need to do but what they don't automatically  
17 have to default to.

18 CHAIR ROSENBERG: Any Committee members?

19 (No response.)

20 CHAIR ROSENBERG: Okay. Well, thank you so  
21 much. I hope you make your flight.

22 MS. OLSON: Thanks.

23 CHAIR ROSENBERG: And we appreciate your  
24 testimony here today.

25 And, Amy Keller, thank you again for your

1       patience, and we'll hear from you now on privilege  
2       logs.

3                   MS. KELLER: Thank you so much, everyone.  
4       It is an honor to provide my thoughts to you today.  
5       My name is Amy Keller. I'm the managing partner of  
6       Dicello Levitt's Chicago office, and I'm also the  
7       chair of the privacy, cybersecurity, and technology  
8       practice group of that law firm. I am one of the  
9       dreaded plaintiffs' lawyers that you've heard about  
10      earlier today, but I do take my Rule 8, 11, and 12  
11      responsibilities very seriously.

12                   I enthusiastically support the proposed  
13      amendments regarding privilege logs that the Committee  
14      has proposed, and the reason why I support them is  
15      because of my experience litigating a lot of these  
16      large multidistrict litigation cases. When we talk  
17      about MDLs, there's quite a few different varieties of  
18      MDL. I primarily work in class action cases. So,  
19      when we talk about plaintiffs' fact sheets, I don't  
20      really have plaintiffs' fact sheets in my cases. I  
21      abide by Rule 23 and we do discovery based upon that.

22                   So some of these concepts don't really cross  
23      over when it comes to MDLs, and as I think about that,  
24      I think about how one size fits all doesn't really  
25      work for litigation, how imposing one thing upon, you

1 know, folks who are working in complex litigation  
2 doesn't work because there's so many different  
3 varieties and styles of litigation. And I think the  
4 way that the rule has been crafted and is proposed, it  
5 does lend itself to flexibility among the parties and  
6 among the court to really come up with a privilege log  
7 proposal that meets the needs of the litigation, as  
8 well as the concerns of both sides of the aisle.

9 Now I've heard a lot of facts and figures,  
10 you know, coming from some of the folks providing  
11 testimony today without a lot of citations to those  
12 facts or figures. So that's why I really wanted to  
13 draw upon experience from a real-world example case,  
14 and this is the In Re Marriott data breach litigation  
15 that's pending in the District of Maryland, and in  
16 that case, I serve as co-lead counsel.

17 Now this case really demonstrates why having  
18 these discussions at the front end of litigation is so  
19 vitally important. We had very accomplished ESI  
20 counsel negotiate a whole host of orders at the outset  
21 of the litigation, orders that were entered in July of  
22 2019. Now, in one of those orders in the ESI  
23 protocol, the parties agreed that a party withholding  
24 documents based on one or more claims of privilege  
25 will produce a privilege log in accordance with a

1 mutually agreed upon or court-ordered time frame,  
2 right? But, beyond that, we hadn't agreed upon  
3 anything because, from plaintiffs', you know,  
4 perspective, we hadn't really had a situation where we  
5 had that much agreement with defendants before or met  
6 that much disagreement with the defendants before.

7 Fast-forward, you know, several months  
8 later, and all of a sudden, the defendant is proposing  
9 a categorical log. And, you know, I'm not necessarily  
10 opposed to a categorical log, and I agree with the  
11 folks from DRI that there are some things that you can  
12 agree don't have to be logged. I agree, you don't  
13 necessarily have to log communications with counsel  
14 after you file litigation. That doesn't make any  
15 sense. I don't want to have to log the communications  
16 with plaintiffs, right?

17 But there are some things when it comes to  
18 the actual merits of the litigation where having a  
19 categorical log just doesn't make a whole lot of sense  
20 because, you know, the rule, as it's written right  
21 now, of 26(b)(5)(A) says you have to describe the  
22 nature of the documents, communications, or tangible  
23 things not produced or disclosed and do so in a manner  
24 that without revealing the -- and this is where my  
25 writing has failed me -- without revealing the actual

1 information that's privileged or protected, will  
2 enable other parties to assess the claim, right?

3 It doesn't say anything about a log. It  
4 just says gives the other party enough information to  
5 actually assess the claim of privilege. So, if you  
6 want to give me a long, lengthy memo with a bunch of  
7 case law citations and describe the documents, fine.  
8 But, really, what the log is, it enables the parties  
9 and the court to sort through the documents and really  
10 efficiently look at that information.

11 Okay. So, when we were negotiating with  
12 Marriott, you know, we wanted to get some really  
13 baseline things before we agreed upon any kind of  
14 categorical logging, right? We were willing to  
15 consider categorical logs and we wanted that -- we  
16 wanted to agree on the categories being used, have an  
17 attestation by an attorney to provide reasonable  
18 context as to the role of the person making the  
19 privilege assertion, the applicability of the  
20 privilege and how the review was conducted, specific  
21 data points for categorical logs, and then, finally,  
22 distinct data points for document-by-document logs,  
23 you know, very reasonable high-level rudimentary  
24 stuff, and the defendants didn't want to do that, so  
25 here we are many years into the litigation and we

1 don't have a log that we can actually look at to  
2 assess the claim of privilege. And there are a lot of  
3 issues in this litigation where defendants may think  
4 that they have a good assertion of privilege that we  
5 can't test.

6 So, for example, in data breach litigation,  
7 right, after you have a data breach, you might have  
8 some kind of post-breach assessment that provides the  
9 party with a business side analysis of how it happens  
10 so they can remediate things, but then sometimes  
11 that's also used as litigation work product, right?  
12 And that is a very contested issue. But class  
13 counsel, we have to know so that we can test the  
14 privilege. This kind of categorical logging would not  
15 have allowed us the insight to really understand what  
16 was being withheld.

17 Judge Facciola was our special master in  
18 that case. He did a brilliant job. And we had so  
19 many conferences with him, I think, you know, he  
20 finally lost his patience because he said, if I had  
21 known that categorical logging would be this difficult  
22 for the parties to agree upon, I never would have  
23 suggested it. And I thought that was a pretty  
24 powerful statement by someone who had been working to  
25 say, hey, maybe categorical logging actually will save

1 the parties some resources. So anyway, he said do a  
2 document-by-document log, okay. I've had it with you  
3 two. Actually, do a document-by-document log. And  
4 we've heard a lot about overdesignation over the  
5 course of today. Because they had to do a document-  
6 by-document log, counsel actually had to look at the  
7 documents that they were going to put on that  
8 categorical privilege log, and they de-designated  
9 13,000 documents, 13,000. And I'm not casting  
10 aspersions. I'm not saying anyone acted in bad faith.

11 But what I'm saying is, when you do the  
12 initial review, you have to do a follow-up review to  
13 make sure that the privilege assertion can actually  
14 stand up, that it actually has a basis, right? And  
15 only because we insisted on more information being  
16 provided so we could actually test the claim of  
17 privilege were we given more documents. The problem  
18 is, because we didn't agree upon this at the outset,  
19 we had to redo two depositions, right? We had to get  
20 more information on interrogatories. So it actually  
21 was inefficient and didn't go along with Rule 23.

22 CHAIR ROSENBERG: Thank you, Ms. Keller. So  
23 I think we probably have a couple of questions, so we  
24 want to make sure those get answered as well.

25 MS. KELLER: Sure.

1 CHAIR ROSENBERG: Rick, did you have a  
2 question?

3 PROF. MARCUS: One thing we have heard,  
4 including from Jonathan Redgrave, is that it would be  
5 a good idea, as Judge Facciola thought also, to say  
6 something in Rule 26(b)(5)(A), and I'm wondering if  
7 that would trouble you? And if it said something  
8 about the possibility of categorical log agreements,  
9 whether that would trouble you? And, finally, with  
10 your experience of reviewing millions of -- you began  
11 by saying --

12 MS. KELLER: Lines, yes.

13 PROF. MARCUS: Millions of log entries, how  
14 much help can technology provide for preparing a log  
15 and/or for doing the review process to identify  
16 potentially privileged documents? So, since we've  
17 heard much from one side, I'm interested in what you  
18 might say if you're sort of on the other side.

19 MS. KELLER: I appreciate that question.  
20 With regard to the comment about categorical logs, my  
21 concern is that that might be viewed as an  
22 encouragement to do them, and I don't want to  
23 necessarily say this is the way to go because some of  
24 the issues that we faced in Marriott might be the  
25 issues that litigants face in the future.

1           Another one of the issues with categorical  
2 logs is ,if plaintiffs are challenging them and  
3 saying, this doesn't give me enough information to  
4 actually challenge the claim of privilege, it shifts  
5 then the burden on the courts because now the courts  
6 have to do an in camera review of the documents that  
7 would be covered under the categorical privilege  
8 designations because we can't see them. And if  
9 opposing counsel isn't going to give us more  
10 information, I think that's just putting more burden  
11 on the courts.

12           I think it's okay to say the parties can  
13 consider, you know, different things to save time,  
14 save resources, et cetera. But I don't think we  
15 should necessarily encourage categorical logging  
16 because I do think it creates a burden on the courts.

17           To your second point --

18           PROF. MARCUS: But saying something in  
19 26(b)(5)(A) referring over to what you are talking  
20 about would be okay with you?

21           MS. KELLER: Yes. If you say 26(b)(5)(A),  
22 you know, we said that the parties should meet early  
23 and come up with a game plan as to how to litigate the  
24 case at the outset, you know, and consider X, Y, and  
25 Z, yeah, I don't see how that's necessarily an issue.

1           With regard to your other question about  
2    technology, right? When, you know, first-year  
3    associates and second-year associates are doing a  
4    privilege review of electronically stored information,  
5    there's going to be metadata associated with those  
6    documents. So, when they click the button that  
7    something is privileged, it can create a log with to,  
8    from, subject line, date. That basic information is  
9    very helpful for plaintiffs from the outset because  
10   what it will do is it'll enable us to see was a lawyer  
11   involved at all in this communication.

12           And if a lawyer was involved at all in the  
13   communication, did opposing -- I'm sorry, did  
14   defendant also send the communication on to a bunch of  
15   other third parties, destroying the privilege? These  
16   things, from the outset of the litigation, from the  
17   outset of the document production, they can be done  
18   efficiently, very quickly, and can help us assess  
19   things and, as my colleague, Mr. McNamara, was  
20   referring to, sort of cull down the number of  
21   challenges that we have, right? Ultimately, it still  
22   remains the producing party's burden to establish  
23   privilege, but what this can do is it can help us get  
24   to it pretty quickly.

25           CHAIR ROSENBERG: Thank you.

1                   Any other questions from our members? Judge  
2                   Jordan?

3                   JUDGE JORDAN: I'd asked one of the lawyers  
4                   speaking from the defense side whether (b)(1)  
5                   proportionality under Rule 26 was sufficient and was  
6                   told no because it's not happening. People are  
7                   treating this -- judges and case law coming out of the  
8                   courts say that this has to be document by document  
9                   and held to a high standard. Is that your experience?  
10                  And if that is your experience, then why wouldn't we  
11                  put something about proportionality into (b)(5)?

12                  MS. KELLER: Well, when you look at -- so  
13                  the concern being that because they're producing so  
14                  many documents, the creation of a privilege log is  
15                  burdensome and that's not proportional? Is that the  
16                  argument?

17                  JUDGE JORDAN: I think the argument as I  
18                  understood it was relative to the size of the case,  
19                  the amount of time, money, effort put into it is  
20                  disproportional. It's disproportionate. It should  
21                  not -- it shouldn't cost 22,000 attorney hours to  
22                  produce a privilege log relative to the case that was  
23                  being discussed or maybe relative to any case, but  
24                  I'm trying to get a feel from your side of the "v.",  
25                  is it, in fact, the case that privilege logs end up

1 being a disproportionate burden on the parties? And  
2 if they are, should 26(b)(5) be amended to make sure  
3 that the proportionality principle, which was at some  
4 serious cost, expense, and effort on behalf of the  
5 judicial conference, put into the rule, be made  
6 explicit as it pertains to privilege logging?

7 MS. KELLER: Well, and I'm going to answer  
8 your question by saying I think that issue would be  
9 resolved by the rule that you are all proposing right  
10 now, where you talk about these things from the outset  
11 of the litigation. Like I was referring to, no one-  
12 size-all-fits answer is going to necessarily help in  
13 all instances of litigation, and --

14 JUDGE JORDAN: Well, let me press you, Ms.  
15 Keller, because I'm trying to get an answer to this  
16 question.

17 MS. KELLER: Yes.

18 JUDGE JORDAN: Is it your experience from  
19 the plaintiff's side that privilege logging can  
20 sometimes be disproportionate in terms of the value of  
21 the litigation, that it's costing too much in time,  
22 money, and effort for people?

23 MS. KELLER: From my perspective, no. And  
24 the reason is because I have learned now to have  
25 negotiations early on to carve out things, right, from

1 logging and to have agreements, right, so that  
2 addresses the concerns about time and expense, et  
3 cetera. It also helps me because, on the plaintiff's  
4 side, we're producing more and more and more documents  
5 as it relates to causation. So, in a lot of my data  
6 breach cases now, I'm having to produce notification  
7 of every single data breach that plaintiffs have  
8 received from the last 10 years, which involves  
9 culling through, you know, emails, et cetera.

10 So, I mean, in terms of proportionality,  
11 we're starting to see that even out. And in my  
12 experience, because --

13 JUDGE JORDAN: So are you saying it's pretty  
14 much symmetrical?

15 MS. KELLER: I'm not saying it's  
16 symmetrical, no. I think that would be bad faith for  
17 me to say it's symmetrical. Just by nature of  
18 litigation, right, individual plaintiffs are not going  
19 to have a full set of documents on the design schema  
20 of a product or product testing or cybersecurity, but  
21 they will have their individual circumstances, right,  
22 which I have an obligation to go through and produce.

23 But what I'm saying is adopting this rule  
24 and having those discussions from the outset, as I am  
25 doing now, can address those concerns that defendants

1 have because you can carve out from the logging  
2 certain things. And if you have discussions with  
3 defendants, you can agree on certain principles that  
4 can accelerate certain review, like, for example,  
5 producing metadata logs, right, that help you look at  
6 these documents and do review. And then I can follow  
7 up with the defendants and say, I need more  
8 information on these documents, you know, you're going  
9 to have to give me this log a little bit faster so I  
10 can actually determine, you know, what's the privilege  
11 and how it's being asserted.

12 My concern is, if you put proportionality  
13 into the rule, that's all of a sudden going to  
14 foreclose those conversations from occurring because  
15 defendants are going to say proportionality.

16 JUDGE JORDAN: Let me make sure I understand  
17 because I thought I heard you saying it's already in  
18 there in what you're suggesting, but you're afraid  
19 that if we actually say proportionality in 26(b)(5),  
20 that that will do damage?

21 MS. KELLER: It will foreclose, I think, the  
22 discussions that you all are envisioning at the outset  
23 of the litigation to talk about the concerns that the  
24 defendants have and the plaintiffs have and to develop  
25 a privilege log protocol that would address those

1 concerns.

2 JUDGE JORDAN: So do you agree that 26(b)(1)  
3 is not being treated, that principle of  
4 proportionality is not being treated as pertaining to  
5 privilege logging?

6 MS. KELLER: I'm saying it is in my  
7 experience because I do have these conversations.

8 PROF. MARCUS: Can I -- I think this is in  
9 keeping with what Judge Jordan was just asking. One  
10 thing we have been told several times is that some  
11 plaintiffs' lawyers take the position that document-  
12 by-document logging is absolutely required by  
13 26(b)(5)(A). I think you'd probably agree that is  
14 disproportionate in some cases, so maybe saying that  
15 in 26(b)(5)(A) would be a good idea?

16 MS. KELLER: But, again, I think, if you say  
17 it in the rule, what it's going to do is defendants  
18 are just going to say -- they're going to point to  
19 that and say, it's disproportionate for me to do a  
20 document-by-document log; therefore, I must do  
21 categorical logs and you might miss out.

22 PROF. MARCUS: But, if the current 26(b)(1)  
23 rule provision permits them to say this, I'm not clear  
24 on why saying it also in 26(b)(5)(A) would produce bad  
25 results.

1 MS. KELLER: Well, 26(b)(5)(A) doesn't  
2 necessarily say that you have to do category or that  
3 you have to do a document-by-document log anyway. You  
4 can have these early discussions per the rule that you  
5 all drafted and that I am supporting to have  
6 discussions from the outset as to how to develop  
7 things to -- really in keeping with Rule 1, right?

8 And my concern is, if you put that principle  
9 into 26(b)(5)(A), what's going to happen is a party  
10 may point to that and say, in no instance is it  
11 appropriate for me to do a document-by-document log  
12 because I have to produce over a million pages and  
13 that's not fair to me. What your rule is saying is  
14 the parties should have these discussions and, you  
15 know, you can bring it to the court if you're having a  
16 disagreement, you can resolve these things from the  
17 outset; you can resolve things very early on.

18 But putting that language in there may  
19 foreclose what you're actually trying to do with your  
20 proposed rule, which is have the discussions early,  
21 talk about ways to save time, effort, and resources,  
22 and come up with something that works for your  
23 specific litigation.

24 CHAIR ROSENBERG: Thank you so much.

25 MS. KELLER: Thank you.

1 CHAIR ROSENBERG: Thank you.

2 Ms. Larson, who will also address privilege  
3 logs.

4 MS. LARSON: Good afternoon, Committee  
5 members. It's a privilege to be here in front of you  
6 today and I appreciate the opportunity to address you.  
7 My name is Amy Larson, and I'm a litigator at BSP Law.  
8 We are a boutique litigation firm with offices in  
9 Troy, Michigan, and Houston, Texas. And my practice  
10 is focused almost exclusively on product liability  
11 defense. And since I started practicing in 2003, I  
12 and others at my firm have served in some capacity as  
13 national discovery counsel for various auto  
14 manufacturers. While not all cases I handle involve  
15 large document productions, the vast majority do.

16 Unfortunately, despite the 1993 Committee  
17 notes advising that detailed privilege logs "may be  
18 unduly burdensome when voluminous documents are  
19 claimed to be privileged or protected, particularly if  
20 the items can be described by category," a detailed  
21 document-by-document privilege log is the default  
22 format in almost every matter that I handle.

23 I appreciate that the Committee recognizes  
24 the burden and inefficiency imposed by document-by-  
25 document privilege logging, and I commend the

1 Committee for turning its attention to this issue. It  
2 isn't a particularly interesting issue to most people  
3 inside or outside the law. In fact, when I tried to  
4 explain this to my husband, he told me he was  
5 struggling to stay awake after two minutes, and this  
6 was particularly telling given that my husband has a  
7 Ph.D. in accounting.

8           So, nevertheless, the Committee has rightly  
9 recognized that, boring or not, this is an issue that  
10 is worthy of attention. So, in my comments today, I  
11 want to focus quickly because I can see that the  
12 Committee is focusing on things that I think are  
13 important as well. My first point is that to correct  
14 the privilege log problem, the privilege log rule  
15 itself, Rule 26(b)(5)(A), and its accompanying  
16 Committee notes must make clear that detailed  
17 document-by-document privilege logs are not required  
18 in most cases.

19           The real issue today is that this is  
20 default. And I'm going to vary a little bit from what  
21 I have written here because I think it's important to  
22 give some context. This is happening while large  
23 document productions are happening. We are getting  
24 document requests, we are going through thousands,  
25 tens of thousands, sometimes hundreds of thousands of

1 documents, and in the process of doing that, we are  
2 identifying privileged documents.

3           It is very difficult to convince or even  
4 advise a client that in the middle of a case like  
5 this, we should go and bother a judge, who hates  
6 discovery disputes more than anything that -- that I  
7 can assure you, I have sometimes as national discovery  
8 counsel had a judge say either out loud or in every  
9 other way, oh, no, here she comes again, right,  
10 because they don't want to deal with discovery  
11 disputes. So you are left with the default document-  
12 by-document privilege log, or you have to go to the  
13 judge and say, hey, I think there's a better way.

14           Now the Committee's recommendations, I  
15 think, are great because they put that issue to the  
16 front. But, as Mr. Keeling pointed out, at the  
17 beginning of a case, you haven't started searching for  
18 those documents, you don't know what those documents  
19 look like. So, while it's helpful to bring it to the  
20 judge's attention early because at least you don't  
21 seem like such a gnat later on in the case, you've got  
22 to have something expressed when you say, judge, we  
23 should consider a different approach to privilege  
24 logging, this is what we suggest. The judge is going  
25 to turn to Rule 26 and say remind me, what are these

1       supposed to look like?

2               And instead of us having to argue there's a  
3       better way to do it from what really is the default,  
4       and I think LCJ laid that out well, we are able to say  
5       let's work together to come up with something that  
6       works. And I thought there was a great question about  
7       what categories can look like. And I think the  
8       flexibility is great. Mr. Keeling gave an example of  
9       how metadata can be easily identified, but I have  
10      offered that before. I have said I'll give you a  
11      metadata log because I'll tell you what's particularly  
12      burdensome in privilege logging, is having to give  
13      that detailed description of the document without  
14      giving away the contents of the document and waiving  
15      privilege.

16             And that's something -- I don't know if the  
17      technology question was answered, but that's something  
18      technology can't do, right? You need a thinking mind  
19      to go, we have a claim of privilege, and we say the  
20      type of privilege. So you can give to, from, you know  
21      it's attorney-client privilege. That's pretty easy to  
22      do. Then you have to have someone, a human, say how  
23      do I describe this document. It could be a long chain  
24      in an email. It could be an entire internal  
25      investigation.

1                   So, if we were able to go to counsel and  
2     say -- to opposing counsel and to the judge and say,  
3     hey, we don't know yet what we're going to get, but we  
4     may have an idea, right? Some of us do this a lot and  
5     we may have an idea of at least the types of  
6     documents. We can come up with a plan. And we may  
7     say, hey, we will give you metadata logs only with a  
8     very general description. If you have questions, then  
9     we can go into further detail, because I'll tell you I  
10    had a recent case, we had 120,000 documents we  
11    produced; our privilege log was 35,000 entries. And  
12    what I got, which is what I often get, to be honest,  
13    was like a dartboard approach.

14                  I had plaintiff's counsel call me and say,  
15    tell me a few things about a few of these documents  
16    that you've claimed privilege on, no discernible  
17    pattern, and I think that talking about a way to  
18    produce privilege logs that's not document-by-document  
19    is helpful to both sides. It allows for focused  
20    inquiries from opposing counsel because they can see  
21    categories, which, in my estimation, are much more  
22    helpful to them than to see -- and, again, the  
23    categories can mean a lot of things, but much more  
24    helpful to them than 35,000 entries.

25                  So, if you have any questions, I'm happy to

1 answer those.

2 PROF. MARCUS: Well, I guess I'm asking this  
3 of many people. You think 23 -- the addition of some  
4 cross-reference, I take it, in 26(b)(5)(A) would be  
5 desirable? Am I right about that? That's sort of an  
6 intro.

7 MS. LARSON: Yes, yes. Absolutely.

8 PROF. MARCUS: Do you recognize that  
9 categories vary a lot depending on the kind of case?  
10 So I'm guessing that you wouldn't think a rule could  
11 say here are the categories or anything like that. Am  
12 I right about that?

13 MS. LARSON; I think it could perhaps be  
14 difficult, and I've listened in on some of the  
15 comments today and I'm very well aware that these  
16 rules have to be crafted not just for those doing MDLs  
17 or individual product liability cases but for a lot of  
18 different kinds of cases. I've certainly been  
19 involved in cases where I've had, you know, a five-  
20 entry log. But I do think just giving the flexibility  
21 and, again, emphasizing, as the 1993 Committee notes  
22 said so clearly, that this is not the default and, in  
23 fact, the more voluminous your production is, the more  
24 you must, for efficiency, because the time and money  
25 that is spent on these logs that I can tell you I can

1 count on maybe the addition of a second hand in my  
2 career how many times I've even had substantive  
3 inquiries from the other side. And yet I am billing  
4 my clients hours and hours to comply with the rule as  
5 it is default put into place by most courts. So I  
6 think it would be efficient and beneficial to both  
7 sides.

8 CHAIR ROSENBERG: Judge Jordan?

9 JUDGE JORDAN: I'm assuming you wouldn't be  
10 opposed to a reference to proportionality in  
11 26(b)(5)(A), right?

12 MS. LARSON: Not at all.

13 JUDGE JORDAN: Then would you speak to Ms.  
14 Keller's objection to doing that, and I may not do  
15 justice to how she put it, but you were here when she  
16 was speaking, right? She said that that would -- if I  
17 understood her correctly, that would prompt or cause  
18 there to be a proportionality objection in virtually  
19 every case. So, instead of facilitating cooperation  
20 between counsel, it would actually be a hindrance to  
21 it and be problematic. Do have a response to that  
22 objection?

23 MS. LARSON: My response is I think the fact  
24 that she supports the other amendments makes her much  
25 more reasonable than a lot of opposing counsel, so I

1 look forward to maybe having her on the other side  
2 sometime because she's saying, if we have early  
3 discussions, we can come up with ways that are not  
4 document-by-document privilege logs. So I don't  
5 think -- I think whether it is by the use of the word  
6 "proportionality" or some other method, some other  
7 wording that the rule makes clear in either addition  
8 to 26(b)(5)(A) or in a note that the default is not  
9 document-by-document privilege log.

10 Whether the word "proportionality" is used,  
11 I would like that, but it's like the Committee note  
12 said in the 1993 Committee notes, it may be unduly  
13 burdensome to have a document-by-document privilege  
14 log when voluminous documents are claimed to be  
15 privileged, especially if they can be described by  
16 categories.

17 CHAIR ROSENBERG: Okay.

18 MS. LARSON: Thank you.

19 CHAIR ROSENBERG: Judge Boal?

20 JUDGE BOAL: And as the rules are currently  
21 constituted, you don't feel that you're able to argue  
22 proportionality if you had a dispute over the  
23 privilege logs?

24 MS. LARSON: I mean, in reality, since it's  
25 the default, we can certainly do that, but, again, in

1 reality, it's a little bit of a waste of any goodwill  
2 that we have with the judge. So most clients and,  
3 again, it puts me in a tough position even as  
4 sometimes discovery-only counsel to say we should  
5 really go to the judge because this privilege log is  
6 taking so much time and it's not helpful. And,  
7 honestly, it's a tool sometimes for delay and burden  
8 that the other side uses for us.

9 I mean, that's just the way that it is. So,  
10 as it's written right now, I suppose we could and we  
11 have, but as you can see, I think the LCJ did a great  
12 job documenting this, it's very unevenly applied, and  
13 in some jurisdictions, they'll just say no, our  
14 default and our rule is that we do document-by-  
15 document, if that answers your question.

16 CHAIR ROSENBERG: Okay. Thank you so much.

17 And Mr. Guttman, who will address 16.1.

18 MR. GUTTMANN: Thank you. Good afternoon,  
19 and thanks for giving me the time. My name is John  
20 Guttman. I'm a principal at Beveridge & Diamond in  
21 our Washington office, and like everybody in our firm,  
22 my practice is environmental and toxic tort  
23 litigation. That's pretty much all we do. In  
24 addition, I am Vice Chair of DRI's Center for Law and  
25 Policy. Lana Olson gave a brief description of the

1 center as well earlier. We're basically the think  
2 tank, if you will, for DRI.

3 I'd like to begin by going back to the  
4 beginning to the statute, 28 U.S.C. § 1407. The  
5 statute says that the purpose of multidistrict  
6 litigation, and I'm paraphrasing obviously, is to  
7 promote the just and efficient conduct of the actions  
8 that are in an MDL. So any rule that the Committee  
9 proposes should be a step in that direction,  
10 increasing the just and efficient conduct of the  
11 litigation that's in an MDL.

12 Part of that, it seems to me, is to reduce  
13 the burden on the courts, and another part of it is to  
14 promote overall efficiency for the parties as well.  
15 In terms of reducing the burden on the courts, as  
16 opposed to increasing that burden, my suggestion is  
17 that the rule should put clear obligations on the  
18 parties, which is to say on their counsel, as opposed  
19 to requiring additional steps at the outset of the MDL  
20 from the court.

21 The proposed rule, 16.1, implicitly  
22 acknowledges, I think, that there is a problem with  
23 unsupportable claims in MDLs. Now I know there was  
24 discussion this morning about give us data that will  
25 support that and that will be provided to you. But my

1 point is to say this, that in an individual case,  
2 questions related to standing -- standing can be  
3 addressed at any point, obviously, but the initial  
4 inquiry, was there an injury-in-fact? If there was,  
5 is it fairly traceable to the conduct of the  
6 defendant? And is the claim plausibly at least within  
7 the statute of limitations? Those questions are  
8 typically dealt with at the outset of an individual  
9 plaintiff case.

10 It's a different situation in an MDL because  
11 they may not be dealt with in terms of particular  
12 cases in the MDL for 18 months, two years, even longer  
13 down the road, depending upon how the MDL moves, and  
14 some of them move at glacial paces. They are very  
15 difficult for the courts to manage. But there must be  
16 standing for each plaintiff and for each claim brought  
17 by each plaintiff just as there is in an individual  
18 plaintiff case. That's obviously the law, which I  
19 don't need to tell this group the precedent for that.

20 So why are unsupportable claims being filed?  
21 And the data will show that they are. There are  
22 multiple reasons why that can happen. One of them,  
23 plain and simple, I think, is lack of care on the part  
24 of the lawyer filing the claims. A second is -- and  
25 in that regard, let me just say, you know, we do live

1 in an era where you turn on your television and you  
2 see ads soliciting plaintiffs to file lawsuits.  
3 Claims get filed. Do they get the diligent  
4 examination pre-filing that they should get? The data  
5 will show that not necessarily.

6 Also, there's an incentive in many instances  
7 for a lawyer to file as many claims as possible. If  
8 you've got a lot of claims, you are more likely to end  
9 up as the lead counsel, liaison counsel, the  
10 terminology varies from MDL to MDL obviously, or on a  
11 plaintiff steering committee. In addition, the more  
12 claims there are filed in an MDL affects what might  
13 happen in the pot, to get right down to it, in an  
14 early settlement.

15 So there are reasons, I submit, to, right at  
16 the outset, assess whether or not claims are even  
17 plausible. The rule should provide a mechanism for  
18 the parties and the court to assess the scope of the  
19 MDL, and that means to assess the viability of claims,  
20 and that will enable the transferee court to decide on  
21 approaches to discovery. It enables the court and the  
22 parties both to have a good sense of, is there a  
23 possibility of an early settlement in this case? What  
24 would that involve? Getting your arms around the size  
25 of the thing is an essential predicate to having that

1 kind of conversation.

2 I know you heard earlier about MDL 2885.  
3 That's the 3M earplugs, hearing protection MDL, so I'm  
4 not going to go into that at length except to say  
5 this. That MDL was established in 2019. We're just  
6 about at the end of 2023, we're in the fall. There  
7 have been 16 trials in that MDL, I think, at least as  
8 of the last time I checked. But we're still seeing  
9 the court threaten sanctions against lawyers for the  
10 fact that there are claims that are baseless sitting  
11 there on the docket.

12 I'd also point the court to MDL 2873.  
13 That's the aqueous film-forming foam litigation, the  
14 firefighting foam litigation. That one was filed in  
15 2018. And we're involved behind the scenes, we're not  
16 out front in that one for a variety of reasons. But I  
17 talked to somebody on Friday who's working on it, who  
18 said, you know, we're getting five, six dismissals a  
19 day now of claims that were brought some time ago and  
20 have been kicking around, influencing the size of this  
21 MDL.

22 I've been involved in MDL 1358, which is the  
23 MTBE litigation, since it was filed in 2000. That's  
24 now, I believe, the second oldest MDL in the federal  
25 courts. Only asbestos is older. We have different

1 kinds of cases than we had in kind of the first half  
2 of it chronologically. Now it's all cases brought by  
3 states, they're very different. But there was a  
4 period where it was all cases brought by people with  
5 wells, public water providers, individuals with  
6 private wells, and there was a painstaking process to  
7 sort out who's got a real claim as opposed to simply  
8 feeling threatened.

9           If you have a claim and you're bringing a  
10 claim on behalf of multiple well fields, are they all  
11 really contaminated? Or are some of them not  
12 contaminated? And if they're not, why are they in  
13 this case? Because they influence the dynamics when  
14 you start talking about settlement. In a lot of these  
15 cases that we deal with in the environmental area,  
16 it's not just how many plaintiffs are there but how  
17 big is the contaminated area or how many wells are  
18 contaminated. Those kinds of things are very, very  
19 significant in terms of influencing the parties' and  
20 the court's assessment of how big the whole thing is.

21           CHAIR ROSENBERG: Mr. Guttman, let me pause  
22 and just see if we have any questions from our  
23 reporters.

24           PROF. MARCUS: Well, I'd like you to  
25 elaborate on what we've been urged by folks in

1       medical -- in pharmaceutical and medical products is  
2       to insist on certain things. Would the same things be  
3       applicable in a toxic tort situation that might be  
4       applicable there? Is there an across-the-board  
5       requirement that would fit the cases you work on?

6               MR. GUTTMANN: Yes, but I think it's all  
7       MDLs. So, if we have a consumer fraud case, it seems  
8       to me the same issues might be present. And so my  
9       suggestion to you is that any requirement imposed on  
10      the parties, imposed on the counsel filing the claim  
11      has to be generally worded and really boils down to  
12      this, do you have a -- is there a good-faith basis  
13      that you as the lawyer have for asserting that your  
14      client is injured, for asserting that the injury is  
15      traceable to the conduct of one or more of the  
16      defendants, lots of times there's multiple defendants,  
17      and that it falls within the statute of limitations.

18             Now I know that when filing a complaint, a  
19      lawyer is subject to Rule 11, obviously, but the fact  
20      of the matter is, if the rule and the comment were to  
21      have something that specific and in the comment a  
22      reference to this filing, just like everything else is  
23      subject to Rule 11, there ought to be a deterrent  
24      effect that would lessen, at a minimum, the number of  
25      bogus claims that are filed in some of these MDLs.

1 CHAIR ROSENBERG: Anyone else have  
2 questions? Judge Proctor and then Andrew.

3 JUDGE PROCTOR: Yes. As said before, thank  
4 you. Is there something we can do that would  
5 communicate the importance of this issue without  
6 putting everyone in the same box and the law of  
7 unintended consequences for creating this fabric of  
8 litigation that's unnecessary in some, if not many,  
9 cases? And I'm wondering about maybe particularly  
10 with respect to the comment language.

11 MR. GUTTMANN: I think, at a minimum, it  
12 would advance the ball if the comments were to  
13 reference the attorney's obligation before filing to  
14 conduct a preliminary investigation in all cases in  
15 the MDL. The tricky part is the second piece of my  
16 argument is it helps everybody if those issues are  
17 addressed early, right at the outset of the MDL. And  
18 that's where anything more than imposing on the  
19 lawyers an obligation to file something in the MDL at  
20 the outset, it makes it hard because anything else  
21 imposes obligations on the court. And I think that  
22 these cases are incredibly burdensome for judges, so  
23 that's why I'm focused on trying to impose a burden,  
24 an obligation on the parties, not on the court.

25 JUDGE PROCTOR: I picked up on that.

1 CHAIR ROSENBERG: Andrew?

2 PROF. BRADT: Thank you very much. You  
3 raised a point that I don't think has been raised  
4 earlier about the unsupported claims issue, and that's  
5 that it may have an effect on who's appointed as  
6 leadership counsel. And I just wanted to know if  
7 there's evidence of that that you could show because  
8 often what we hear is that you have repeat players who  
9 are lead counsel, and those don't seem like the kind  
10 of folks who you're describing, who would increase the  
11 number of claims filed in order to get that  
12 appointment. So I'd be interested if you could  
13 demonstrate that causal link.

14 MR. GUTTMANN: Well, I certainly don't want  
15 to, you know, cast aspersions on particular lawyers,  
16 but I can say this, that I have seen in MDLs cases  
17 where lawyers filed claims that ultimately were  
18 dismissed for lack of standing with that attorney  
19 having, prior to the dismissal, served as the lead  
20 voice for the plaintiffs.

21 CHAIR ROSENBERG: Any further questions?

22 (No response.)

23 CHAIR ROSENBERG: All right. Thank you so  
24 much.

25 MR. GUTTMANN: Thank you for your time.

1 CHAIR ROSENBERG: Much appreciated.

2 Mr. Halperin, who will address 16.1 as well.  
3 Welcome.

4 MR. HALPERIN: Good afternoon. My name is  
5 Greg Halperin, and I'm a partner at Covington &  
6 Burling in our product liability and mass torts  
7 practice group. Although much of the discussion of  
8 Rule 16.1 today has been focused on (c)(4), I'd like  
9 to focus on (c)(5) and ask the Committee to, at a  
10 minimum, clarify two things in the notes: first, that  
11 master and short form complaints taken together must  
12 satisfy Rule 8 and, where applicable, Rule 9(b), and  
13 second, that defendants must be afforded an  
14 opportunity to seek dismissal of the master complaint  
15 under Rule 12.

16 Now Rule 8(a)(2) applies to all civil  
17 actions and proceedings in federal court and it  
18 requires all complaints to allege facts showing that  
19 the pleader is entitled to relief. Because the master  
20 complaint necessarily lacks allegations about any  
21 particular plaintiff, the short form complaint must  
22 contain sufficient individualized allegations that  
23 taken together with the general allegations in the  
24 master complaint provide defendants fair notice under  
25 Rule 8.

1           But, in my experience, as my experience in  
2 MDLs has shown, this is rarely the case. To make sure  
3 my experience was not an outlier, I pulled the short  
4 form complaints in the 10 largest MDLs pending as of  
5 last month, which collectively represent 91 percent of  
6 all MDL master complaints -- all MDL member cases  
7 anywhere in the country. Nine of those MDLs use short  
8 form complaints, and most of them, in my view, do not  
9 meet basic pleading requirements.

10           In the talcum powder MDL, the second-largest  
11 active MDL today, although the master complaint  
12 alleges that plaintiffs were diagnosed with various  
13 forms of cancer of the female reproductive system, the  
14 short form complaint simply requires a plaintiff to  
15 allege that she experienced a "talcum powder products  
16 injury, without any specification of what that injury  
17 actually was." This basic 8(a)(2) requirement is  
18 reserved for a plaintiff profile form that was not  
19 ordered until three-and-a-half years into the  
20 litigation and, even then, initially for only a subset  
21 of plaintiffs.

22           In the 3M earplug MDL, the largest active  
23 MDL today with over 240,000 member cases, the short  
24 form complaint provides no information about when the  
25 plaintiff allegedly used 3M earplugs. In the Bard

1 hernia mesh and IVC filters MDLs, the third and  
2 seventh largest MDLs, respectively, the short form  
3 complaints do not identify the date of injury.

4           This basic timing information precludes  
5 assessment of whether cases were timely filed within  
6 applicable statutes of limitation and repose, and in  
7 six of the 10 largest MDLs, the court permitted  
8 plaintiffs to plead fraud claims via short form  
9 complaint by simply checking a box to opt in to the  
10 fraud allegations in the master complaint. Such an  
11 approach cannot be squared with Rule 9(b), which  
12 necessarily requires individualized allegations  
13 substantiating that a plaintiff heard and relied upon  
14 the alleged fraudulent or fraudulent statements.

15           So, if Rule 16.1 is going to expressly  
16 authorize consolidated pleadings, which as folks have  
17 indicated today are not listed in Rule 7, I ask the  
18 Advisory Committee notes to provide guidance that  
19 master and short form complaints are collectively  
20 subject to the same pleading requirements as Rule  
21 7(a)(1) complaints. This is especially needed, I  
22 submit, in light of (c)(4), which could be read to  
23 suggest that it is okay for plaintiffs to avoid  
24 providing the factual allegations in their claims in  
25 their complaints and instead do so later.

1                   That takes me to the second point.

2       Consolidated pleadings should not prevent defendants  
3       from moving under Rule 12 to dismiss master complaints  
4       that fail to state a claim. Without guidance in the  
5       federal rules, courts have taken varying approaches to  
6       motions to dismiss consolidated pleadings. Some have  
7       interpreted them only as administrative devices and  
8       barred defendants from filing motions to dismiss them.

9                   Others have permitted motions to dismiss but  
10       expressly ruled that the sufficiency of the claims set  
11       forth in the master complaint are to be viewed with,  
12       "substantial leniency." And, finally, some courts  
13       have treated motions to dismiss the master complaint  
14       no different from a motion to dismiss in any other  
15       case. In light of Rule 1 and in light of the purposes  
16       of MDL proceedings to promote the just and efficient  
17       conduct of civil actions pending in different  
18       districts, I believe the third approach is the right  
19       one.

20                  The first approach requires defendants to  
21       file identical motions to dismiss in hundreds or  
22       thousands of individual cases, which is neither just  
23       nor efficient. And nothing in the federal rules  
24       supports putting the court's thumb on the scale  
25       against dismissal, as the second approach does, simply

1       because lawyers have recruited hundreds or thousands  
2       of plaintiffs to bring the same claims.

3               If the federal rules are going to go into  
4       encourage consideration of consolidated pleadings, the  
5       Advisory Committee notes should clarify that those  
6       consolidated pleadings are not immune from challenge  
7       under Rule 12(b)(6) or subject to a standard of review  
8       that is different from any other complaint filed in  
9       federal court.

10              Thank you. I welcome the panel's questions.

11              CHAIR ROSENBERG: Thank you. So can I -- I  
12       think your comments are very straightforward. I want  
13       to make sure I understand them. Primarily, are you  
14       suggesting that there should be additional language in  
15       the notes, one, to address the fact that the short  
16       form complaint, in conjunction with the master  
17       complaint, to the extent short form and masters are  
18       used, must meet Rule 8 and Rule 9(b) pleading  
19       requirements, mention of that in the notes? And,  
20       secondarily, in the notes, that to the extent the MDL  
21       is going to provide for consolidated complaints, that  
22       motions to dismiss under 12(b)(6), allowing for master  
23       complaints does not preclude the ability to file  
24       motions to dismiss under 12(b)(6) or something along  
25       those lines? I mean, is that, in essence, your two

1 main points?

2 MR. HALPERIN: Absolutely. I defer to  
3 others' testimony on other aspects of 16.1. But I  
4 think those two additions to the Advisory Committee  
5 notes on (c)(5) would go a long way towards making  
6 (c)(5) more administrable and short form complaints  
7 solve a lot of the ambiguity about those issues that  
8 are percolating in the courts today.

9 CHAIR ROSENBERG: And you think (c)(4)  
10 arguably is ambiguous insofar as it might suggest or  
11 lead one to believe that you don't need to comply with  
12 Rule 8 or 9(b) but rather exchange it so that maybe a  
13 note along (c)(4) to clarify that that is not in lieu  
14 of a pleading requirement?

15 MR. HALPERIN: I think that's important as  
16 well. (c)(4)'s when language, I think, could be read  
17 to mean that you don't have to allege the stuff in the  
18 complaint because it's going to come later.

19 CHAIR ROSENBERG: Okay. Thank you.

20 Judge Proctor?

21 JUDGE PROCTOR: Yes. I'm just curious, how  
22 do you think your approach or suggestion squares with  
23 Footnote 3 in the Bank of America opinion, where the  
24 Supreme Court said there's really two purposes these  
25 master complaints can serve. One is to essentially

1 consolidate the pleadings into a single document, or  
2 the second approach would be more of an administrative  
3 summary of the claims that doesn't have legal effect  
4 but advances just organization of the claims that way.

5 MR. HALPERIN: Sure. With respect to the  
6 Supreme Court, I don't understand the administrative  
7 purpose of a master complaint. I think, if a document  
8 is going to be out there setting forth what the claims  
9 are in the litigation, it has to have some effect in  
10 the litigation, it can't just be an administrative  
11 device. You know, if you were taking an individual  
12 complaint, they can number in the hundreds or even  
13 thousands of pages for a single plaintiff and there's  
14 no summary administrative complaint to have non-  
15 binding, helpful summary effect of that complaint. So  
16 I don't see the purpose of an administrative complaint  
17 in an MDL any different from any other case.

18 CHAIR ROSENBERG: Andrew?

19 PROF. BRADT: Thanks. I'd just like to  
20 clarify the 9(b) part of it. So 9(b) says in alleging  
21 fraud or mistake, a party must state with  
22 particularity the circumstances constituting fraud or  
23 mistake. And so, if the gravamen of the fraud is in  
24 the master complaint, I guess my question is, are you  
25 saying that the individual short form complaints have

1 to include more than that?

2 MR. HALPERIN: No, and I'm not saying they  
3 have to -- you know, the fraudulent statements should  
4 be in the master complaint. What's missing from the  
5 master complaint is, did the individual actually hear  
6 those statements? Did the individual rely on those  
7 statements to their detriment? And that information  
8 can't be in a master complaint because it requires  
9 individual facts. So that's what I think needs to be  
10 in the short form complaint tying into the allegations  
11 of the master.

12 CHAIR ROSENBERG: Any other questions?

13 (No response.)

14 CHAIR ROSENBERG: Okay. Thank you so much.

15 MR. HALPERIN: Thank you.

16 CHAIR ROSENBERG: And next, John Rosenthal,  
17 who will address privilege logs. Oh, no, no. Mr.  
18 Ratliff, sorry. Sorry about that, Mr. Ratliff, who  
19 will address 16.1. And then Mr. Rosenthal, who will  
20 address privilege logs, and then we will take a break.

21 MR. RATLIFF: Good afternoon. I guess,  
22 first, my name is Harley Ratliff. I'm a partner at  
23 Shook, Hardy & Bacon. Second, I appreciate the time  
24 to speak before you and the effort that has been put  
25 on by the Committee in addressing these rules. Third,

1 going this late in the day, what I've learned is my  
2 pre-prepared comments have been thrown in the trash  
3 and I'm going to try to answer some of the questions I  
4 heard earlier, which is, one, talking about (c)(4).  
5 Is there some sort of empirical data as it relates to  
6 unvetted, unexamined claims?

7 I think trying to put that data together  
8 across multiple MDLs is difficult, but I do want to  
9 point out an MDL that I think is illustrative of the  
10 issue. So I am currently in an MDL that is going to  
11 in one month hit its seven-year mark. What we know  
12 and what is undisputed from plaintiffs' fact sheet  
13 data is 80 percent of the inventory of the, at one  
14 time, 16,000 cases, 80 percent have never seen a  
15 doctor for the injury they allege and 80 percent have  
16 never been diagnosed with the injury that they allege,  
17 an injury that is claimed to be a signature injury and  
18 one that is diagnosed. We are seven years in and more  
19 than 80 percent of the cases have no proof that they  
20 have ever been injured. We also know through the fact  
21 sheet process that another 3,000 cases have been  
22 dismissed through a show cause process either because  
23 they did not have product ID or because they didn't  
24 even fill out the fact sheet itself.

25 And the cost there has been a federal judge

1 who has worked tirelessly for the last four years  
2 having a show cause process every single 90 days,  
3 which means we have to put people on deficiency  
4 notices, they have to respond, and then she sits down  
5 and goes through the cases one-by-one every 90 days  
6 for either a half-day, full-day, or two-day hearings.

7 That is a cost on our clients and it's a  
8 cost on the federal judiciary. And so, to kind of put  
9 things into perspective, if the proposed 16.1 Rule was  
10 more of a gatekeeping function, like I think my  
11 colleague, Mr. Shepherd, talked about, do you have  
12 just these basic elements of proof? Or what LCJ  
13 recommended, which I think is general enough to cover  
14 all MDLs? Had that been in place seven years ago,  
15 what kind of MDL would we be looking at now?

16 CHAIR ROSENBERG: Do you think -- may I  
17 interrupt?

18 MR. RATLIFF: Sure.

19 CHAIR ROSENBERG: Mr. Halperin's suggestion,  
20 do you think if there was language in the notes that  
21 made it clear that the expectation was that the master  
22 and/or short form or in combination must comply with  
23 Rule 8 and Rule 9(b) applicable pleading standards,  
24 that that would address this problem you're raising?

25 MR. RATLIFF: I think, candidly, Your Honor,

1     it would help. I don't think of it as a panacea in  
2     the sense of having some type of 16.1 that does have a  
3     gatekeeping element to it. So, when it comes to the  
4     notes, what I think would be helpful, because I've  
5     heard concern about how do we draft something that's  
6     generally applicable not just to mass tort or products  
7     MDLs but to all MDLs, I do think there is a place in  
8     the notes to say this problem or this issue may arise  
9     or may be more acute in these types of litigations  
10    than in other litigations.

11           And I think it's also fair perhaps in the  
12    notes to say this is something that the parties, maybe  
13    it's an antitrust litigation, maybe it's an airplane  
14    MDL, this is something the parties can waive or  
15    discuss because they may not need this. But I think,  
16    when we're talking about mass tort product liability  
17    MDLs, the practical reality to me is there is not only  
18    a huge cost to our clients, but there is a huge cost  
19    to the federal judiciary. And I think the other  
20    reality that gets lost in this is -- and I put this in  
21    my comments -- is all of these volume of claims, they  
22    overshadow the claims where there might actually be a  
23    controversy to litigate. Now we may disagree, but if  
24    you're talking about litigating 350 claims or 350  
25    lawsuits, where everyone has been diagnosed with the

1 injury and they've taken the product, versus 16,000,  
2 well, now we're litigating the real issues and we can  
3 really get to the bottom of things.

4 CHAIR ROSENBERG: But aren't the -- I'm just  
5 curious -- and I don't necessarily disagree with  
6 anything that anyone has said about -- and I think  
7 that has been, you know, a comment we've heard on our  
8 speaking and listening tours over the past several  
9 years that nobody's in support of unsupportable  
10 claims. The plaintiffs aren't -- at least the  
11 plaintiff attorneys from whom we've heard and the  
12 defense isn't, but, I mean, the legal issues are the  
13 legal issues, aren't they? So whether you have 16 or  
14 1600 or 16,000, if sort of preemption is an issue, is  
15 that really going to affect the briefing of the issue  
16 and the judge's ruling on the issue on a legal issue?

17 Again, it's not -- they're not necessarily  
18 mutually exclusive. There could be insurmountable  
19 unsupportable claim problems, but I just want to make  
20 sure we're not conflating the two. I mean, at the end  
21 of the day, you just need, you know, maybe one viable  
22 plaintiff's claim to generate, you know, a preemption  
23 argument and it's going to be equally necessary and  
24 applicable whether it's to one, 16, 1600, or 16,000,  
25 right?

1                   MR. RATLIFF: Yes, Your Honor. I think that  
2       presupposes that I'm going to win every preemption  
3       argument that I bring before the court, which I think  
4       is unlikely. And so the --

5                   CHAIR ROSENBERG: Okay. So you're talking  
6       about if you're -- so you're not precluded from  
7       raising the argument and you're not precluded from  
8       winning the argument, but if you don't win the  
9       argument, now you're facing now this problem of am I  
10      facing 16, 1600, or 16,000?

11                  MR. RATLIFF: Correct. I think you're  
12      facing the black box problem, which is what is in  
13      here?

14                  CHAIR ROSENBERG: Right. But summary  
15      judgment and Daubert, that actually -- those are also  
16      legal issues that don't necessarily relate to how many  
17      claims, which I think goes back to Judge Proctor's  
18      question a little bit, which is, is this more of an  
19      issue for when defendants are being asked to settle  
20      claims and it's very frustrating for defendants, we're  
21      hearing, to be asked to settle the claims, when many,  
22      some claims aren't supportable, and maybe the  
23      defendants don't feel armed to know which ones are  
24      supportable and which ones aren't. And so we should  
25      put something in the rule to either prevent them from

1 ever being filed, which raises a question, can we  
2 actually -- is there such a thing? Or second, like  
3 you judges need to do something. But then we've gone  
4 down that path of, well, do you want us to go claim by  
5 claim by claim? And would you all want to file 16,000  
6 motions to dismiss? Would you want to do that?

7 MR. RATLIFF: Well, we try and address that  
8 sort of in turn. I mean, I think, if you had some  
9 sort of gatekeeping 16.1. on the front end, you're not  
10 talking about 16,000 motions for summary judgment.

11 CHAIR ROSENBERG: So the gatekeeping,  
12 meaning like something in the notes that says you've  
13 got to comply with Rule 8 and 9(b) and the implication  
14 is, if you don't, like, anytime you don't comply with  
15 the rule, you may be subject to sanctions?

16 MR. RATLIFF: Do you have the product? Did  
17 you take the product? Do you have the injury? That  
18 should be a threshold issue that should be how do you  
19 get into this MDL? You know, it's in --

20 CHAIR ROSENBERG: Is that synonymous with  
21 Rule 8, though? Do you think Rule 8 would require  
22 somebody to say I have an injury, I took this product  
23 and my injury is a result of this product? Is that  
24 another way of saying comply with Rule 8?

25 MR. RATLIFF: Correct.

1 CHAIR ROSENBERG: Okay.

2 MR. RATLIFF: Correct, Your Honor, as it  
3 relates to the resolution problem. And I think one of  
4 the questions or comments I heard is, well, is there  
5 really a practical problem of having these cases  
6 unexamined, unvetted, however you want to describe it,  
7 parked in these MDLs? The answer to that is  
8 unquestionably yes. And when you talk about the  
9 resolution piece, so I have had, and I hate to be  
10 anecdotal about it, but it's factual, and I think  
11 everyone in this room has had the same experience, is  
12 you go and you say, look, we're going to try and get  
13 out of this litigation. We're kind of at an endpoint.  
14 We'd like to talk about resolution, you have X number  
15 of cases, we've looked at 20 of them. These have no  
16 value.

17 And the comment we get back time and time  
18 again is you're correct; these have no value. These  
19 are dog cases, if you will, to use a little  
20 colloquialism. But they say, I've already put \$3,000  
21 into this case because I had a filing fee and I  
22 collected some medical records. I'm getting that  
23 money back. And so this case, which I acknowledge to  
24 you is worthless, we're eye-to-eye here, it's going to  
25 cost you something, and then it becomes an economy of

1 scale.

2 So maybe you pay a few grand to get rid of  
3 one worthless case. But, when you're talking about  
4 12,000 of them, 20,000 of them, 50,000 of them, that  
5 becomes real money. And I think, at the end of the  
6 day, that obscures the ability to potentially resolve  
7 and compensate individuals who may actually have the  
8 injury and took the product. And you say this is a  
9 case that perhaps we want to get out of.

10 CHAIR ROSENBERG: Judge Proctor, do you --

11 JUDGE PROCTOR: Yeah. I just think what  
12 you're saying makes a lot of sense. I understand  
13 particularly when you get into the exponential  
14 multiplying of these cases. I guess what we've been  
15 struggling with for five-plus years now is the  
16 different ways even the defense bars approach this.  
17 We've heard from the defense bar there should not be  
18 any encouragement by an MDL judge to settle cases.  
19 That doesn't make a lot of sense because settlements  
20 save the bench and the bar and the courts time and  
21 money and headaches. That's straight from Newburg.

22 We've heard also, hey, we need to have some  
23 rules set in place where we can figure out what these  
24 claims look like so we can tackle settlement. And I  
25 think that's kind of what you're getting at here is we

1 shouldn't be expected to settle these frivolous  
2 claims.

3           So, you know, I tried to raise this point  
4 previously, I don't know that it fell on listening  
5 ears, but it seems to me there are points along even  
6 the MDL spectrum where frivolous claims can be dealt  
7 with. It's just -- it's not always conducive to  
8 handling those right off the bat in the first 60 days  
9 of a case is what our transferee judges push back and  
10 tell us. That's not to say there aren't cases where  
11 they aren't willing to do that, but I think they've  
12 been -- you know, when we met with them last year and  
13 the year before at the transferee judges conference,  
14 they said please don't put that burden on us to do it  
15 in every single case. So how do we navigate that?

16           MR. RATLIFF: So, Your Honor, I think you're  
17 correct in some respects. There is obviously an  
18 avenue to do that. In my experience, we have had a  
19 comprehensive fact sheet process, we have gone through  
20 a show cause process, we've gotten lots of cases  
21 dismissed. The question to me, though, becomes, yes,  
22 there is that avenue, there's also dispositive motion  
23 practice. But the practical reality is, when you have  
24 that many cases, I haven't had a judge allow us to  
25 file summary judgments or motions to dismiss in every

1 single individual case, and now that burden is going  
2 to be taken back to the remand courts to address all  
3 of those, and I've been in front of remand courts that  
4 say, why wasn't this -- what am I -- why do I have  
5 this case? Why are we addressing this now?

6 And so I think it's kind of maybe two-  
7 pronged, which is, yes, there are mechanisms, but I do  
8 think there is certainly a procedure or -- and maybe  
9 this is something that gets negotiated with the court,  
10 but if they have the encouragement from Rule 16.1 to  
11 say at some point early in the litigation, there needs  
12 to be, whether you want to call it a lone pine,  
13 whether you want to call it a show cause process, you  
14 need to come forward with just the basic elements of  
15 information that you should be in this court  
16 altogether because it is not like what you see in one-  
17 off litigations or one-off cases, where oftentimes  
18 you're contacted by the plaintiff's attorney and they  
19 say here is the injury; here's the product, we have  
20 proof of all of this, would you like to talk  
21 resolution now or would you like to litigate it? That  
22 just does not happen in MDLs.

23 And to talk about the resolution piece and  
24 that's one other part that I wanted to mention very  
25 briefly as it relates to (c)(9). I know Rule 16 talks

1 about facilitating settlement, and I think that is a  
2 worthy goal certainly in individual cases. I know my  
3 home district, the Western District of Missouri, there  
4 is a mandatory early settlement conference. I think  
5 that has value there.

6 I do think there is a problem, and if you'd  
7 give me just a second to explain, with making the idea  
8 of resolution in these big MDLs paramount right from  
9 the get-go that sometimes can be very  
10 counterproductive and why I think maybe it should be  
11 excised from the proposed rule, which is this. In our  
12 MDL at the very beginning, the very first status  
13 conference, the presiding judge, and I think it was  
14 well-intentioned and well-thought-out, said I'm going  
15 to have a settlement committee for both sides and it  
16 can't be people in the trenches. We're going appoint  
17 settlement committees. That was the very first thing  
18 we did. Once that order came out, if you Googled the  
19 next day our product and settlement, all you saw were  
20 advertisements saying settlement committee appointed,  
21 settlement imminent, and we track the data very  
22 analytically at our firm and what we saw was hundreds  
23 and hundreds and hundreds of cases being filed in  
24 seriatim over the next several months.

25 So I do think there is value in the

1       judiciary and MDLs being involved in the resolution  
2       piece unquestionably. I do have some concern about  
3       the way the rule is drafted, and maybe it's just the  
4       way I read it, of making it something that is  
5       paramount from the get-go. I think it's something  
6       that maybe a little more water under the bridge needs  
7       to happen before the presiding MDL judge starts to  
8       address that with the parties.

9               JUDGE PROCTOR: So one quick follow-up.

10              MR. RATLIFF: Yeah.

11              JUDGE PROCTOR: I can't count on all the  
12       fingers that are in this room the number of times I  
13       heard this while I sat with the panel: we're going to  
14       send this case off to X district to Judge Y and Judge  
15       Y doesn't have to do everything in this case, Judge Y  
16       can be surgical, deal with the centralized issues, the  
17       coordinated proceedings, deal with discovery, deal  
18       with this general causation issue, deal with the  
19       Daubert issues, whatever the case may be for  
20       deficiency, and then the other issues can be sent back  
21       to the transferal courts, we'll remand them back for  
22       that.

23              I think that's part and parcel of what's  
24       been built into the MDL statute from day one. And  
25       maybe some criticism is MDL judges try to do too much,

1 try to handle everything, but how do you square a one-  
2 size-fits-all, we have to deal with purportedly  
3 unsupportable claims in the beginning of a case in a  
4 case where the panel just sends it for a particular  
5 surgical reason to deal with things in a centralized  
6 proceeding and then everybody expects that it's going  
7 to be remanded back?

8 MR. RATLIFF: That is a fair question. And  
9 I think the practical reality is, because I've heard  
10 those same arguments before the panel, I have not made  
11 them myself, but I probably drafted those types of  
12 comments to people who have made those comments before  
13 the panel, is that I think there is sort of an ideal  
14 world where that would happen, but I think the  
15 practical reality is that MDLs are messy and judges  
16 are trying to wrap a lot of these cases up in a bow  
17 because I think there is a feeling that -- and this is  
18 a perception -- that if cases do get remanded, that  
19 it's somehow seen as a failure of the MDL.

20 I don't think that to be the case. Where I  
21 think there is maybe a shortcoming is what cases are  
22 being remanded and should those cases have been there  
23 in the first place? And we shouldn't be letting cases  
24 come in in 2013, sit parked for eight years, 10 years  
25 and then be unleashed out into the wild and then, all

1 of a sudden, you have remand courts saying what is  
2 this case and we're starting from ground one. That  
3 would be my response to that.

4 JUDGE PROCTOR: And that's a fair response  
5 to a question. Thank you.

6 MR. RATLIFF: Okay.

7 CHAIR ROSENBERG: To a fair question. Thank  
8 you so much. Oh, Judge Bates. Don't go yet.

9 JUDGE BATES: I have one little question.  
10 Your concern about settlement seems to be a timing  
11 question more than anything else. If (c)(9), which  
12 currently says whether the court should consider  
13 measures to facilitate settlement, et cetera, simply  
14 said whether and, if so, when the court should  
15 consider measures to facilitate settlement, would that  
16 take care of the concern you have?

17 MR. RATLIFF: I think that would certainly  
18 help. My concern, and I only speak for myself here,  
19 is that coming out hot at the outset at the initial  
20 case management conference and saying, well, let's  
21 talk about resolution now, let's get this going, I  
22 think, is counterproductive. And there's a feeling on  
23 my side that sort of feels like, wow, liability has  
24 already been a little bit presupposed. And then,  
25 also, I think it perhaps sets unrealistic expectations

1 for the attorneys who have filed these lawsuits until  
2 we've had a little bit more time to see how all of  
3 this is going to shake out. So, yes, I think that  
4 would be a helpful step.

5 CHAIR ROSENBERG: We might let you join the  
6 drafting committee. No, thank you. You probably  
7 don't want to.

8 MR. RATLIFF: No, it sounds great. I'd be  
9 happy to.

10 CHAIR ROSENBERG: Okay. Thank you so much.  
11 And, Mr. Rosenthal, if we can hear from you  
12 before our mid-afternoon, we'll call it late afternoon  
13 break, on privilege logs.

14 MR. ROSENTHAL: Good afternoon. Thank you  
15 for the opportunity to speak to the Committee. Also,  
16 thank you for your tireless efforts and dedication to  
17 help improve our judicial system through rules reform.  
18 In order to put my comment in perspective, I'm 30  
19 years out as a complex class and MDL litigator. I  
20 also chair our e-discovery and information management  
21 practice group, where we do about 250,000 hours of e-  
22 discovery, a significant portion of which has to do  
23 with privilege review and privilege logging.

24 Beyond that, I'm a former steering committee  
25 member of the Sedona Conference, and while there, I

1 was editor-in-chief of the Sedona Conference's  
2 commentary on the protection of privileged ESI. In  
3 2016, the Sedona Conference wrote procedure and  
4 process for protecting privileged ESI from production  
5 is broken. We went on to say that privilege logging  
6 is arguably the most burdensome and time-consuming  
7 task in litigation. We also went on to say that  
8 modern privilege logging is as expensive as it is  
9 useless. Those statements are true in 2023.

10 The single largest cost component in any  
11 civil litigation is privilege review and logging.  
12 Let me say that again. When you break down all the  
13 expenses of litigation, the single largest cost  
14 component, and this is across all litigation -- I  
15 handle MDLs to landlord-tenant cases within our  
16 group -- it's the single largest cost component, and I  
17 think it's broken. I think the current proposals go a  
18 long way in helping that, but consistent with Judge  
19 Facciola, Jonathan Redgrave and LCJ's position, I  
20 would advocate we need to do more. Some of what I am  
21 advocating is consistent. Some is a little further.

22 So the first thing is that document-by-  
23 document logging has become the de facto. I go into  
24 meet-and-confers, the other side doesn't want to even  
25 discuss other types of logging processes. You even go

1 to court. We have many standing rules and local rules  
2 that say, if you do not produce a log that has X, Y,  
3 and Z document-by-document, there is a presumption of  
4 waiver.

5 I think and I would humbly suggest that we  
6 need to revise in addition to the proposed amendments  
7 26(b)(5)(A), and I think we should revise it  
8 consistent with the language suggested by Judge  
9 Facciola and Jonathan Redgrave. Moreover, I think we  
10 should revise the Committee note to make it abundantly  
11 clear what was already in the rules in 1993 but seems  
12 to have been lost by many practitioners in many  
13 courts, that document-by-document logging is not the  
14 de facto standard.

15 I would also encourage the Committee to put  
16 in the Advisory Committee note an encouragement that  
17 the parties look to other means to log documents, and  
18 a few examples: categorical logging, metadata logging,  
19 and what I'd call categorical logging plus. A lot of  
20 times, and you've heard it here today, well, if we get  
21 categorical logs, that's really an effort to hide  
22 documents, we don't get the information that we need.

23 And that could be a fair comment. But I  
24 have used, over the years, as early as 2009, where  
25 Judge Facciola endorsed in Redgrave surcharge, kind of

1     a categorical log plus, where in the first instance,  
2     we produced categorical logs, or metadata logs, or  
3     what we call objective logs. And then based upon a  
4     good faith basis, the other side, the receiving party  
5     has the right to come back and say well, that's great,  
6     but for this category, or this subcategory, I need  
7     document-by-document. I think if the Committee would  
8     about in the Advisory Committee notes, these different  
9     options, it would move the ball forward.

10             In terms of other things that I would  
11     suggest should be in the 26(b)(5)(A) comments, one is  
12     a rebuttable presumption that certain kinds of  
13     information need not be logged, such as information  
14     after the date of the complaint. I would suggest  
15     there should also be some guidance as to what should  
16     be in a log. The case law is all over the place. The  
17     majority of the case law does spell out the categories  
18     that need to be in there. But I can't tell you the  
19     number of times I have to meet and confer and then  
20     litigate what should actually be on the log.

21             The next issue is that discovery is  
22     transforming from emails to chats. And the volume of  
23     information subject to discovery in most litigation is  
24     either email or chats. And there is a huge, huge  
25     fight going on between whether top level logging is

1 appropriate. And most receiving parties are pushing  
2 back and saying you should not do top level logging.

3 So if I have an email with 40 parts in the  
4 chains, they want 40 entries in the privilege log. I  
5 would I would suggest the Committee could add a  
6 provision endorsing the use of top level logging, or  
7 what I would call top level logging plus, the same  
8 kind of issue. You can get a top level log and then  
9 it's based upon good faith.

10 The last one is a novel thing. I believe  
11 that 502(d) has been underused in many respects. And  
12 I've written extensively on that and talked  
13 extensively on that. But I would encourage the  
14 Committee to put into the advisory committee note an  
15 encouragement that the parties should consider, and  
16 the court should enter, a 502(d) that says the  
17 contents of a privilege log cannot be used as a basis  
18 of where. I think 502(d) allows for that and part of  
19 the issue is on the defense side or producing parties,  
20 we're concerned that if we put too much in a log,  
21 that'll be used as the argument is waived.

22 So I think we can improve the quality of  
23 logs and the dialogue around this issue by encouraging  
24 broader use of 502(d) for this purpose. Happy to  
25 answer any questions. I'm also happy to answer the two

1 questions that have been posed on technology and  
2 proportionality.

3 CHAIR ROSENBERG: Okay, thank you. Let me  
4 check.

5 Rick?

6 PROF. MARCUS: I'm not sure if you said this  
7 at the beginning, I was out of the room. I know in  
8 earlier events that we've attended, you've emphasized  
9 that some of your opposing counsel adamantly insisted  
10 on document-by-document without regard to any other  
11 considerations. I wonder if you haven't dealt with  
12 that fine, but otherwise, could you elaborate on the  
13 importance of making it clear in 26(b)(5)(A) that  
14 that's not required, going back to the 1993 note,  
15 which sort of said that? I think that's a point worth  
16 pursuing a bit further.

17 MR. ROSENTHAL: Yes. I don't -- further, I  
18 don't think it's just practitioners, I face that with  
19 judges, magistrate judges and special masters all the  
20 time. They believe that's the de facto standard.  
21 And, in fact, there's a waiver if you don't. I think  
22 it would allow a lot more leeway in the meet and  
23 confer if it's clarified that that is not de facto;  
24 that's not a requirement under the rules. And I think  
25 the Facciola Redgrave language, in addition with some

1 revisions to the note, would get us there.

2 CHAIR ROSENBERG: Judge Bates?

3 JUDGE BATES: Perhaps with respect to the  
4 502 issue, but certainly with respect to the  
5 rebuttable presumption that you suggest with respect  
6 to some items, aren't those more statements of  
7 substantive law that you would be asking to insert  
8 into a rule of practice and procedure as to what is  
9 privileged, for example?

10 MR. ROSENTHAL: Well, I'm not advocating it  
11 -- it could be construed that way. I'm not advocating  
12 it to put it in the rule, I'm advocating it to put it  
13 into the Advisory Committee notes. I think that what  
14 we've seen since --

15 JUDGE BATES: That makes it even worse.

16 (Laughter.)

17 MR. ROSENTHAL: It could be, but I think  
18 what we've seen since 2006, is that the comments in  
19 advisory committee notes have gone a long way in  
20 changing actual practice on the ground.

21 CHAIR ROSENBERG: Okay, thank you so much.  
22 We really appreciate your comments. So let's take a  
23 mid-afternoon break. It's 3:06. Let's be back at  
24 3:16 for our final three commenters, from whom -- or  
25 witnesses from whom we are very interested to hear

1 from.

2 Keep in mind, obviously, we've heard from 19  
3 people, so if you could hone in on anything you think  
4 hasn't been said or a response to what someone else  
5 has said that you will either agree or don't agree,  
6 that would really help. You could kind of think of  
7 yourselves as sort of the wrap up. It's not to take  
8 anything away, but that would be very helpful and I  
9 think good use of our time. So we'll see you back in  
10 ten minutes.

11 (Whereupon, a brief recess was taken.)

12 CHAIR ROSENBERG: Rule 16.1. Oh, you're  
13 just gonna speak about 16.1. Okay. We're looking  
14 forward to hearing.

15 MR. JOYCE: Okay. Thank you. Well, thank  
16 you to the Committee and I appreciate very much the  
17 opportunity to be here. My name is Sherman Joyce.  
18 I'm president of the American Tort Reform Association.  
19 Let me just say at the outset, this is a new forum for  
20 me. My organization frequently testifies for before  
21 legislatures and Congress. We often filed amicus  
22 briefs before the federal and state courts, but this  
23 is a confluence of events that we're here, and I'm  
24 delighted to have the opportunity to present some  
25 thoughts and I will adhere to your admonition to be

1       brief.

2               No one's ever complained when I've been too  
3       short, so I will attempt to do that. But to focus on  
4       some key issues and not sort of cover ground that's  
5       been much more effectively covered than I. Just at  
6       the outset, again, I'm not here to talk about our  
7       personal experience in litigation, but to offer our  
8       perspective on these issues and how we look at it  
9       within the broader legal reform community.

10              At the outset, I would just say that we do  
11       associate ourselves and endorse the perspective  
12       presented by Lawyers for Civil Justice, an  
13       organization we work closely with. In particular the  
14       issue of claim sufficiency, we see as central, not  
15       just to the issue for you, that you're considering in  
16       this process, but to us as well because we think that  
17       this is -- the whole mass torts issue is creating a  
18       broad issue, and it's of great interest to the  
19       membership of my organization. I appreciate the  
20       opportunity to talk about that.

21              I think Mr. Guttman talked about the fact  
22       that the data will be furnished to you about the  
23       actual number of cases that don't -- that shouldn't be  
24       brought in the context of MDL litigation. I can just  
25       attest that from the input that we get from our

1 members who are involved in these cases, that seems  
2 like a very solid piece of data. And obviously, it's  
3 what was reflected in the work, not just of your  
4 subcommittee on MDL, but also some of the observations  
5 that other members of the federal bench have made in  
6 public statements, again, which we look to implement  
7 in terms of our perspective.

8 As I said, our member companies, those that  
9 we work with closely believe that a very, very  
10 powerful force in the impact of litigation is simply  
11 the volume of the litigation. And that's why we think  
12 it's so important that you're doing what you're doing.

13 What I thought I would do is spend a few  
14 minutes just providing a little bit of a different  
15 perspective. And that's from the external factors  
16 that I think are often in play. They're not directly  
17 relevant to your jurisdiction, but we think that  
18 they're important from the perspective of what's  
19 actually some key factors in driving the litigation.

20 The reality is from where we sit, that  
21 there's really a very active and growing external  
22 industry that's grown up around the mass torts  
23 litigation, certainly, if you contrast it to  
24 litigation back when the MDL statute was enacted in  
25 1968, it's very visible to us. You've heard some

1 reference to it today. An estimate that we prepared,  
2 my organization, between 2017 and 2021, nearly \$7  
3 billion was spent on advertising. And that's probably  
4 --

5 PROF. MARCUS: What was that number again?

6 MR. JOYCE: The correct number is \$6.8  
7 billion. It's in a reference in my statement. I will  
8 submit the full statement in a report that my  
9 organization prepared. That's overall advertising to  
10 promote litigation. But in the mass torts world, I  
11 think it's important to look also specifically at some  
12 of the more significant cases, \$131 million on Round-  
13 Up, \$122 million on Xarelto, \$111 million on talcum  
14 powder.

15 Why does this happen? I actually had an  
16 interview recently, someone asked why is this done,  
17 and the answer is simple, it works. It generates  
18 claimants, and that's the important part. Lead  
19 generators, as you know, you've heard a little bit  
20 have call centers that collect medical information,  
21 they sell that information to the lawyers. That's the  
22 way it works. That's the business side of this.

23 Another key component of this is the  
24 litigation finance world. I'm old enough to remember  
25 my older son graduated from law school a couple of

1 years ago, we've contrasted sort of the difference in  
2 different theories about who should and can have a  
3 role in litigation. I know it's an important issue,  
4 not right before the court or right before this  
5 committee now, but it is an important consideration.

6 The fact is that you have these litigation  
7 finance companies taking a stake in these lawsuits,  
8 actually having a role in them. And they obviously  
9 are, it's been clearly demonstrated, providing capital  
10 to underwrite the advertising that I was just  
11 mentioning. One data that I saw, as we were doing  
12 some research on this, is a company Westby Advisors  
13 has estimated that between 2019 and 2022, the  
14 litigation funding industry increased by 44 percent.  
15 So those are external factors that I think as you  
16 consider your role, and this important work that  
17 you're doing with Rule 16.1, is something to keep in  
18 mind. This is not -- they are, we believe, responding  
19 to the opportunities. Your subcommittee talked about  
20 the Field of Dreams, if you build it, they will come.  
21 They are responding to that field of dreams.

22 CHAIR ROSENBERG: Thank you. Let me see if  
23 there are any -- take a pause, see if there's any  
24 questions.

25 Rick?

1                   PROF. MARCUS: I don't see the \$6.8 billion  
2 figure in your submission.

3                   MR. JOYCE: I can I can get that to you. We  
4 have submitted that.

5                   PROF. MARCUS: Is that the measure of pay  
6 outs by defendants, total cost of litigation, the  
7 finance --

8                   MR. JOYCE: It's the cost of the  
9 advertising.

10                  PROF. MARCUS: Okay, so --

11                  MR. JOYCE: I'll get that to the Committee.

12                  PROF. MARCUS: The specifics you offered us,  
13 Round-Up and to other case, don't look like they are  
14 readily going to add up to that much money. Is the  
15 advertising exceeding the amount of the pay outs?

16                  MR. JOYCE: No. The \$6.8 billion is total  
17 advertising.

18                  PROF. MARCUS: Right.

19                  MR. JOYCE: And so this is a subset of that  
20 advertising.

21                  PROF. MARCUS: But this is litigation  
22 promotion advertising?

23                  MR. JOYCE: Yes.

24                  PROF. MARCUS: And but I'm asking if that's  
25 way up here and the pay outs are down here, it seems

1 backwards to me.

2 MR. JOYCE: No, I'm not referring to pay  
3 outs. I'm referring to --

4 PROF. MARCUS: No, no, I understand that.  
5 So in order to make that worth your while, you'd have  
6 to have more than \$8 billion dollars worth of pay outs  
7 to spend almost \$8 billion on advertising, right?

8 MR. JOYCE: Well, I'd have to -- we'd have  
9 to line those up. What I'm referring to are these  
10 external forces that are helping to generate the  
11 claimants, not the actual pay outs.

12 JUDGE JORDAN: Can I ask the question to --

13 CHAIR ROSENBERG: Judge Jordan and then  
14 Judge Bates.

15 JUDGE JORDAN: Yeah. This almost \$7  
16 billion, that's total, not on an annualized basis, but  
17 total over some period of time? Or are you saying --

18 MR. JOYCE: Yes. It was between --

19 JUDGE JORDAN: Over what period of time?

20 MR. JOYCE: 2017 to 2021.

21 JUDGE JORDAN: And I believe Professor  
22 Marcus' question that's mine, too, is there must have  
23 been more than \$7 billion in pay outs over that period  
24 of time. Otherwise, we'd to say that the folks doing  
25 the advertising and running these businesses are

1 economically irrational, right?

2 MR. JOYCE: Well, the overall figure that I  
3 gave you referred to all litigation.

4 JUDGE JORDAN: Right, so the question is, in  
5 all litigation, all mass torts, all MDLs that you're  
6 concerned about, you're saying that the payout is in  
7 excess of \$7 billion?

8 MR. JOYCE: Yes.

9 JUDGE JORDAN: Am I right about that?

10 MR. JOYCE: Well, I think we've seen  
11 definitely studies we've done, US Chamber of Commerce  
12 has done and others on the total cost of the civil  
13 justice system. We can share those with you. But  
14 you're --

15 JUDGE JORDAN: It can't just be the total  
16 cost of the civil justice system, we're talking about  
17 MDLs. Do you have -- maybe you don't have it. Do you  
18 have a number of what the total payout over that same  
19 period of time?

20 MR. JOYCE: I do not. But we could probably  
21 find some examples of some individual cases, such as  
22 the Xarelto case paid, I think it was \$775 million.

23 JUDGE JORDAN: Whatever the figures are, I  
24 understand that that might relate to whether MDLs are  
25 a good idea, but connect it in some way, if you would,

1 to the specific proposals that are set forth in Rule  
2 16.1. What does the size of the advertisement lead to  
3 in terms of what should be in 16.1? Or whether there  
4 should be a 16.1?

5 MR. JOYCE: Well, I think our perspective is  
6 that the advertising helps to generate an overall  
7 volume of more claimants. And our perspective is, as  
8 our friends at Lawyers for Civil Justice recommended,  
9 is that there be an effective and reasonable method by  
10 which we can judge individual cases -- individual  
11 cases within the MDL in same way if they were brought  
12 as an individual case.

13 CHAIR ROSENBERG: Judge Proctor?

14 JUDGE PROCTOR: Let me make sure I  
15 understand what you're saying and not saying.  
16 Obviously, these products that are being sued over  
17 are made known to consumers by advertisement, right?

18 MR. JOYCE: Yes.

19 JUDGE PROCTOR: And so there's not an  
20 improper -- it's not a, per se, improper purpose  
21 behind lawyer advertising. What you're saying,  
22 though, is that that is one of the factors that  
23 contributes to people signing up who really aren't  
24 injured and being signed up, even though they're not  
25 injured, for example?

1 MR. JOYCE: Yes, I think that's correct.

2 JUDGE PROCTOR: So that doesn't help us with  
3 the gross advertising dollars, but your point is, is  
4 the gross advertising dollars are indicative of  
5 how people end up in the system, even though they  
6 shouldn't -- you say they shouldn't be in the system?

7 MR. JOYCE: Or should be considered and  
8 evaluated at the front end the way they would be if  
9 they were bringing the case individually.

10 JUDGE PROCTOR: The opposite of a mass  
11 exodus. But the point is, is the average consumer  
12 doesn't know how to file a claim, even though they've  
13 been injured. Advertising, obviously, helps with  
14 that.

15 MR. JOYCE: Well, again --

16 JUDGE PROCTOR: Not to mention the fact the  
17 Supreme Court says you can do it.

18 MR. JOYCE: I'm sorry. The Supreme Court  
19 says you can do what?

20 JUDGE PROCTOR: Says you can do it, says  
21 lawyers can advertise.

22 MR. JOYCE: That's true. And I'm not here  
23 to suggest that they can't. What I am here to suggest  
24 is that the advertising helps to generate that overall  
25 claim number, which factors into the consideration

1       that your subcommittee highlighted with up to 50  
2       percent, in some cases, perhaps not being meritorious,  
3       that don't belong, that that number gets higher and  
4       higher.

5               JUDGE PROCTOR: I understand. Thank you.

6               CHAIR ROSENBERG: Okay. Thank you so much.

7               MR. JOYCE: Thank you.

8               CHAIR ROSENBERG: And if we can hear now for  
9       Ms. Kole regarding 16.1.

10              MS. KOLE: Good afternoon. My name is  
11       Deirdre Kole, and I'm assistant general counsel at  
12       Johnson and Johnson. I'm responsible for the  
13       management and oversight of a number of our product  
14       liability litigations against our companies. Prior to  
15       joining Johnson and Johnson, I was a partner at the  
16       law firm Drinker Biddle and Reath, where my practice  
17       focused on representing pharmaceutical and medical  
18       device companies, including in mass torts and MDLs.

19              I join with the others and thanking the  
20       Committee for allowing me to speak today and in  
21       commending the Committee's efforts to bring much  
22       needed change to the rules governing MDLs. It's been  
23       a long and, I hope, productive day. So without  
24       revisiting all of today's discussions, I do want to  
25       echo the concerns of many that spoke earlier about the

1       unprecedented numbers of unsubstantiated claims that  
2       are clogging the courts and overwhelming the MDLs.

3               Many of you have inquired about the  
4       articulated concern with unsubstantiated claims. To  
5       that point, empirical data is often difficult to  
6       obtain about the extent to which deficient claims are  
7       being filed in mass tort MDLs. The researchers who  
8       have looked at this question tend to focus on how many  
9       claims in MDL have been adjudicated to be bogus. But  
10      because individual claims are not typically challenged  
11      in the MDL courts, there's not much to glean from that  
12      particular metric.

13             Rather, the evidence lies in the extent to  
14      which claims disappear when vetting actually begins.  
15      So, for example, in Vioxx, upwards of 40 percent of  
16      the claims disappeared when claimants were required to  
17      provide proof of product usage, such as a prescription  
18      and/or proof of product injury to participate in the  
19      settlement. Now, some of you might say, but you don't  
20      know why those cases disappeared at that point in  
21      time. But it stands to reason that if the claims only  
22      disappeared at point of settlement, that the claims  
23      never should have been filed in the first place.

24             Similarly, when a random sample of claimants  
25      in the 3M --

1                   PROF. MARCUS: Can I interrupt? I'm sorry.

2                   MS. KOLE: Yes, of course.

3                   PROF. MARCUS: Why does that stand to  
4 reason?

5                   MS. KOLE: Because at that point in time,  
6 the claims were going to be paid out, so only those  
7 who actually were able to come forward with proof of  
8 product usage and proof of injury would qualify for  
9 the settlement and get paid.

10                  PROF. MARCUS: I'm not sure I'm following  
11 the logic, but go ahead.

12                  MS. KOLE: Okay. Similarly, when a random  
13 sample of claimants in the 3M Combat Arms Earplug  
14 litigation were ordered to produce evidence to  
15 substantiate their claims, the vast majority could  
16 not, 126 out of 500 Wave 1 plaintiffs, so 25 percent,  
17 reportedly produced no evidence and dropped out of the  
18 case. And nearly three quarters had no record of ever  
19 using the product at issue.

20                  Notably, in the MDL involving at Ethicon's  
21 pelvic mesh devices, 46,511 cases were filed against  
22 Ethicon which is a J&J company. Out of these cases  
23 24,695, more than half, were ultimately dismissed for  
24 basic factual shortcomings or inability to establish a  
25 recognizable injury.

1           Another proponent of early gatekeeping along  
2     the lines of what Rule 11 requires -- as many of you  
3     know in many MDLs, the initial CMO typically suspends  
4     all pleadings, motions and discovery practice pending  
5     further order of the court. So there's no mechanism  
6     that guards against the filing or substantiating  
7     claims.

8           I think that something like an explicit  
9     reference to Rule 8, 9 and/or 11, could bolster in the  
10    MDL context and serve as a critical reminder that  
11    parties due process safeguards should still apply in  
12    the MDL context. For that reason, I believe that  
13    something along the lines of the (c)(4) amendment as  
14    suggested by LCJ, or language along the lines of how  
15    and when the parties will exchange information about  
16    the factual basis for their claims and defenses,  
17    including initial disclosures that demonstrate  
18    compliance with Rules 8, 9 and 11, to confirm that  
19    each case is properly before the MDL would help to aid  
20    in this effort.

21           CHAIR ROSENBERG: Thank you. What are your  
22    views on some of the earlier comments we heard, and  
23    you touched on it that you thought -- referenced 8, 9  
24    and 11 would go a long way. One suggestion was  
25    making explicit what I would think would be implicit

1 as to the pleadings in an MDL, whether it's the master  
2 or the short form, or the two of them in conjunction,  
3 that they comply with all applicable rules, including  
4 but not limited to 8, 9 and I guess 11 is separate,  
5 but I mean do you think that would address what you're  
6 saying?

7 MS. KOLE: I think it would be a marked  
8 improvement than where we are right now. I think,  
9 right now, the MDL practice is very ad hoc and is  
10 subject to the preferences of the individual judge  
11 presiding over the MDL proceeding, to the extent that  
12 the rule could remind practitioners the rest of the  
13 rules of procedure actually still apply in these  
14 proceedings, that would be very helpful in guarding  
15 against some of these issues.

16 CHAIR ROSENBERG: And do you think there's  
17 confusion that people actually think they don't apply?  
18 Or is it we all know, they apply, but we need to  
19 remind people with that, whether it's lawyers and  
20 judges alike, or is there confusion as to whether they  
21 apply or not and whether 16.1 would somehow mean other  
22 rules don't apply?

23 MS. KOLE: I think, Your Honor, that many  
24 people believe MDLs are different, you know, there is  
25 a special place for MDLs because we don't do

1 individual motion practice in those cases. We don't  
2 look at each case on its individual merits. And  
3 because of the totality, we have to look at everything  
4 in this sort of conglomerate fashion that doesn't lend  
5 itself necessarily to how the original rules were  
6 designed and applied.

7 CHAIR ROSENBERG: Thus, the reminder would  
8 be helpful.

9 MS. KOLE: Yes.

10 CHAIR ROSENBERG: Okay. Joe, did you have a  
11 question? Did I see your hand reaching for the  
12 microphone?

13 MR. SELLERS: Sure. I think my question may  
14 have been superseded by your recommendation, which I  
15 think is a sound one, but I was a little questioning  
16 when you gave us some quotes about numbers and  
17 dismissal of claims. Some of these, I gather, might  
18 be claims that were dismissed after discovery or some  
19 other steps in the process, rather than claims that  
20 necessarily should never have been brought to begin  
21 with, that is that they didn't even -- with a little  
22 bit of due diligence, they would have never been  
23 brought?

24 MS. KOLE: I think that's true, but I also  
25 think that part of the problem we face is that cases

1 are filed, partly because of issues like the mass tort  
2 aggregators and lawyer advertising, that should not  
3 have been brought in the first place. And so why do  
4 the parties have to invest the time and effort,  
5 resources and money in going through discovery, in  
6 going through the PFS processing, in getting medical  
7 records? Because it's an undue burden on us for  
8 something that shouldn't have been filed in the first  
9 place.

10 MR. SELLERS: Right. But I assume, and I  
11 guess what I'm saying is, there may be and your  
12 reference to Rules 8, 9 and 11 might help encourage  
13 lawyers and aggregators and others to be engaged in  
14 more due diligence. There'll be some screening that  
15 would be warranted, it could be done at the outset.  
16 But there may be other ways in which some of these  
17 claims get dismissed because in the course of  
18 discovery, it's clear that they can't prove causation  
19 or they can't do something else that might not have  
20 been quite as clear at the time of filing. And that's  
21 partly what litigation and discovery is about.

22 MS. KOLE: Absolutely. I mean there's  
23 alternate causation. There's all sorts of other  
24 things that could --

25 MR. SELLERS: Right.

1 MS. KOLE: -- take place during discovery,  
2 but only for appropriate claims.

3 MR. SELLERS: Right. And I just want to  
4 make the distinction between those for which it ought  
5 to have been evident before filing that they shouldn't  
6 have been filed, as opposed to those that were filed,  
7 but eventually dismissed because they couldn't meet  
8 some evidentiary standard that only emerged in their  
9 failure in the course of discovery.

10 MS. KOLE: Right. We're on the same page.

11 CHAIR ROSENBERG: Ariana and then Judge  
12 Boal.

13 MS. TADLER: I just want to further pick up  
14 on that. And I think Joe and I are thinking about the  
15 same thing, perhaps. So isn't it the case, though,  
16 and in terms of some of these numbers that you've  
17 shared, that it might well be that you get to the  
18 point of settlement and perhaps there are -- there may  
19 be claimants who never -- they didn't have the product  
20 or the pharmaceutical or whatever -- but aren't there  
21 instances where there are specifics like product ID  
22 and those claimants simply are incapable of providing  
23 that information and for that reason, they are  
24 excluded?

25 I'm trying to understand the scope of the

1 figures so that we make sure that we understand,  
2 really, the applicability and not get lost in what are  
3 large numbers, but perhaps the numbers are not as  
4 large as being quoted because they might be including  
5 people who never purchased or never used or never had  
6 the device implemented versus causation issues, like  
7 Joe and you have just touched upon; also, there may be  
8 specifics that they simply cannot provide because they  
9 just don't have that information and they are  
10 excluded?

11 MS. KOLE: But isn't your point that they  
12 ultimately never should have filed?

13 MS. TADLER: Not necessarily, not  
14 necessarily.

15 MS. KOLE: Actually, I think that I have a  
16 follow on from these very, Ariana Tadler's (phonetic)  
17 question because if, and obviously, you know, the mesh  
18 cases much better than I do, but it may be that there  
19 are higher dismissal rates in the mesh cases because  
20 they were a device that was inserted surgically, as  
21 opposed to a prescription and a person may know that  
22 they had a mesh, but they didn't know which kind of  
23 mesh from or the product number for the mesh. So it's  
24 a little harder to get that information up front,  
25 especially if there are statute limitations issue. So

1       that may be why there's a higher percentage of those  
2       types of dismissals in the mesh cases.

3               MS. TADLER: That could be true, but in  
4       naming a defendant, shouldn't you know who the  
5       responsible party is? And if it's available in your  
6       medical records, shouldn't you do that due diligence  
7       on the front end?

8               MS. KOLE: Sometimes it's not always clear  
9       in the medical records, the product number -- I mean,  
10      that was true in that case I had, it was not what the  
11      device was.

12              CHAIR ROSENBERG: Rick?

13              PROF. MARCUS: On Page 4 of your submission,  
14      you say something -- well, one of the things we've  
15      heard today and before is cases in an MDL should be  
16      handled the same as case individual cases. The bottom  
17      of Page 4, you say what you think a rule should  
18      require is that within 30 days of being filed in MDL,  
19      the plaintiff must produce evidence, medical records,  
20      identifying the product, documenting the injury, and  
21      that if that doesn't happen, the MDL court must  
22      dismiss with prejudice and impose sanctions. Is that  
23      what happens in ordinary one-on-one cases?

24              MS. KOLE: I mean it's a Rule 11  
25      requirement, though.

1                   PROF. MARCUS: It is --

2                   MS. KOLE: It's akin to --

3                   PROF. MARCUS: Rule 11(c) says you can't do  
4 anything until you serve a motion, the other side gets  
5 21 days to back off; the court may impose sanctions on  
6 finding a violation of the rule.

7                   MS. KOLE: Right.

8                   CHAIR ROSENBERG: And it's not the  
9 attorney's fees of the defendant, but something else.

10                  MS. KOLE: No, I understand that, but I  
11 think part of what this proposal is designed to  
12 safeguard against is the deterrent effect for the  
13 pervasive practice of filing unsubstantiated claims.  
14 So to the extent that this would be required, this  
15 could be something along the lines of a Rule 26  
16 disclosure, where at the outset of the litigation, you  
17 file your complaint, within 30 days, you provide proof  
18 of injury, proof of use of the product at issue. And  
19 then you get to pass go. If not, you shouldn't get to  
20 pass go and we shouldn't have to incur the cost of  
21 defending against meritless claims.

22                  CHAIR ROSENBERG: Do you find that in MDLs,  
23 defense counsel wants to proceed with the initial  
24 disclosures under Rule 26 but someone is saying that  
25 shouldn't be, whether it's the judge or plaintiff's

1 counsel objecting to them? I mean, what does that  
2 look like, the discussions about initial disclosures?

3 MS. KOLE: So I think, as I mentioned  
4 earlier, typically the first CMO in an MDL, the judge  
5 orders that all discovery pleadings and motion  
6 practice shall be suspended until further order of the  
7 court. And then the parties meet with the judge; they  
8 have their Rule 16 conference or whatever the  
9 equivalent is in the current MDL context. And they  
10 talk about the issues that they want to go forward  
11 with and I think because everybody's so focused on  
12 getting to Bellwether trials, a lot of things fall by  
13 the wayside. So the focus becomes on plaintiff fact  
14 sheets and defense fact sheets, and how are we going  
15 to get to the trial pool? And how are we going to get  
16 the first case out there so that we can assess the  
17 merits of the litigation?

18 So the focus shifts from are there viable  
19 claims here to how are we going to get to the first  
20 Bellwether trial? That's been my experience, at  
21 least.

22 CHAIR ROSENBERG: But so I mean what is your  
23 position on initial disclosures? I mean are defense  
24 counsel part of the fact that it falls by the wayside?  
25 Do you affirmatively want those required disclosures

1 or is that consistent with how you think and MDL  
2 should be that you don't do that and you move forward  
3 with preparing for Bellwether and fact sheets?

4 MS. KOLE: In some MDLs, there has been an  
5 equivalent of this type of disclosure, like a  
6 plaintiff profile form, which requires certain  
7 biographical information about the plaintiff, who the  
8 surgeon was in a medical device case, and the proof of  
9 product you use and proof of -- for a qualifying  
10 injury or revision, perhaps. So they would have to  
11 provide that as akin to an initial disclosure. It's  
12 just typically a negotiated CMO that the judge can  
13 enter as opposed to something that's prescribed by the  
14 rules.

15 CHAIR ROSENBERG: Judge Proctor?

16 JUDGE PROCTOR: Yes. Thank you. And you're  
17 probably our last speaker from this perspective, so I  
18 just wanted to mention, you cited our agenda book from  
19 November 1, 2018. So I went back to look, just to  
20 review that again, because I was actually not on the -  
21 - in 2018, I was on the panel, not on this committee.  
22 And it seems to me, and this address is not just to  
23 you, but to the others remaining in the room that have  
24 already spoken, it seems to me that we have been  
25 struggling with this issue and known about this issue

1 for five years now.

2 We referenced all the problems, the get a  
3 name, make a claim problem; the aggregators angling  
4 for leadership problem; the aggregators wanting a seat  
5 at the table problem; the aggregators building up  
6 inventory for settlement purposes. We referenced the  
7 fact that sometimes people don't do due diligence on  
8 the claims that they file on behalf of clients, but  
9 there are product ID problems. Sometimes clients  
10 don't know which hip implant was put in them.

11 We talked about the difference between how  
12 easy it is to track down a prescription versus an  
13 over-the-counter purchase in terms of product use.  
14 I'm gonna butcher this, but Judge Dao (phonetic) and I  
15 think Judge St. Eve used to say there are three tests  
16 for a rule. Is there a problem? Is there a rules-  
17 based solution to the problem? And is there some law  
18 of unintended consequences that we need to be careful  
19 about?

20 To be clear, we know there's a problem. We  
21 understand there's a problem. Now, that doesn't mean  
22 we always -- it doesn't mean everybody agrees on the  
23 size of the problem and the problem shows up in every  
24 single products liability MDL, but I'm gonna to accept  
25 for purposes of our hearing today in hearing from you

1       that that is the case. Just so you understand, we're  
2       focused on is there a rules-based solution that  
3       doesn't create unintended consequences?

4               So I think we -- the lion's share of what we  
5       dealt with today is, is there a problem? I'm still  
6       searching for the right answers to is there a rules-  
7       based solution that doesn't create some unintended  
8       consequence for, not just the parties, but also the  
9       transferee judges who handle these cases. So I don't  
10      know if you wanted to respond to that, but I felt I've  
11      got to say it because we tested hard a few of the  
12      assertions made earlier today, but that was why. We  
13      were trying to figure out, okay, but what would a rule  
14      look like that would solve this problem?

15             MS. KOLE: And I'm glad we agree that there  
16      is a problem. And I do think that there is a rules-  
17      based solution in that if people vet their cases more  
18      proactively than they currently do and part of the  
19      problem is that because of how lawyer advertising is  
20      functioning, plaintiffs or claimants are signing up  
21      with multiple law firms. And both are filing on  
22      behalf of the clients. They don't know. We get to  
23      the end of the cases and we realize that there's  
24      multiple firms involved, and we don't know who the  
25      case belongs to. So there's a lot of unintended

1 consequences, I think, by virtue of the advertising  
2 itself.

3 Having said that, I do think that if we use  
4 or at least pay reference to the rules that already  
5 exist and try to apply them in this context, we can  
6 try to make a measured inroads into alleviating the  
7 problem that currently exists. As to unintended  
8 consequences, I'm not sure how applying Rule 11 or  
9 Rule 8 or Rule 9 would really impede claimants'  
10 rights.

11 CHAIR ROSENBERG: Judge Jordan?

12 JUDGE JORDAN: Following up on something the  
13 Judge Proctor has asked, and maybe I should have been  
14 asking this directly throughout the day, although I  
15 think a lot of the questions were going around this.  
16 For those who have been opposing Rule 16.1 as it's  
17 drafted, do you think that it's better than nothing?  
18 Or is it worse than nothing?

19 MS. KOLE: I think it's better than nothing.

20 JUDGE JORDAN: So 16.1, as drafted, you'd  
21 say, doesn't go far enough, but you wouldn't say this  
22 is actively going to do harm?

23 MS. KOLE: I don't think it's actively going  
24 to do harm. I think that, from my perspective, the  
25 chief problem that we face in MDLs are the number of

1 claims and if we can do more in (c)(4) to alleviate  
2 that we'll be better served.

3 JUDGE JORDAN: Okay. Understood, thanks.

4 CHAIR ROSENBERG: Judge Boal.

5 JUDGE BOAL: So I appreciate all the  
6 comments that we've had today, but I'd particularly  
7 like to thank you and the other corporate  
8 representative because I do find it helpful to hear  
9 from the parties, so thank you.

10 MS. KOLE: My pleasure. Thank you for  
11 having me.

12 CHAIR ROSENBERG: Thank you so much. Okay.  
13 Last, but by no means least, but by no means least,  
14 carrying the mantle for maybe the plaintiffs, we  
15 haven't as much from the plaintiff side as the defense  
16 side today, but Ms. O'Dell to address Rule 16.1.

17 MS. O'DELL: Thank you, Your Honor. Thank  
18 you all. Thank you for your efforts and for the  
19 opportunity to have a chance to speak to the rule. My  
20 name is Leigh O'Dell. I represent plaintiffs. I  
21 currently serve as co-lead counsel in the Johnson &  
22 Johnson talcum powder MDL. I have seen at the street  
23 level, if you will, a lot of these problems and relish  
24 the opportunity to talk with you. And I want to focus  
25 on the actual substance of the rule and the focus on

1 the initial conference and trying to set the stage for  
2 the initial conference once an MDL is created.

3 And first, I think there absolutely should  
4 be an initial case management conference, and I would  
5 go farther than the rule does to require that that  
6 happen. And then as to the topics themselves, and I  
7 want to focus on Subsection C, the report for the  
8 initial management conference, as described, should be  
9 more focused on preliminary matters. And as I  
10 appreciate those, it should be an opportunity for the  
11 parties to apprise the court of the factual basis of  
12 the claims, the legal issues, the status of the  
13 litigation in the federal courts and any orders that  
14 have been previously been entered prior to  
15 consolidation.

16 It also should be an opportunity for the  
17 parties to tell the federal court about what's been  
18 happening in state court litigation. It should be an  
19 opportunity to discuss whether there should be  
20 leadership appointed, the process and the timing.

21 I heard from my friend, Mr. Beisner this  
22 morning, my friend on the other side of the "v." I  
23 don't share his concerns about the appointment of  
24 plaintiff's counsel as leaders. In fact, I would  
25 commend to you, Professor Bradt and Professor Baker's

1 article on MDL myths and what they discuss in terms of  
2 the potential -- the lack of ethical concerns between  
3 leadership counsel and non-leadership counsel and how  
4 that is addressed. I think they absolutely nailed it  
5 as it's worked out over my 20 year career in MDLs.

6 I think limiting the report in the initial  
7 conference to the shortened list of topics reflected  
8 in proposed Rule 16.1(c)(1), (2), (3) and (11) focuses  
9 the court on the matters most important at the  
10 beginning of the case. These topics allow the court  
11 to become informed, but they do not require  
12 substantive decision making that will affect the  
13 direction of the MDL prior to the appointment of  
14 leadership.

15 I want to talk a little bit about leadership  
16 and coordinating counsel. Rule 16.1(b) suggests that  
17 the court may appoint coordinating counsel. I would  
18 urge the committee to delete this provision. There  
19 are no qualifications for this position. While  
20 there's not a requirement that this counsel be  
21 appointed, the fact that it's suggested in the rule  
22 means that more likely than not a coordinating counsel  
23 would be appointed. If appointed, there's no  
24 requirement that the coordinating counsel have  
25 knowledge of the case, have a stake in the litigation,

1 if you will, know the parties involved in order to be  
2 able to do that coordinating job effectively.

3 Should it be a neutral? Should it be a  
4 plaintiff's lawyer, if you're talking about  
5 coordinating the plaintiff side? There's so many open  
6 questions. We believe adding this step into the  
7 process would be inefficient. It's not necessary, and  
8 it's likely unproductive. And then when you think  
9 about leadership itself. And let me just speak to  
10 this because this primarily affects the plaintiff  
11 side, leadership appointments will affect the  
12 direction of the case, the theories that are pursued,  
13 the injuries that become a part of the MDL, the  
14 discovery, the scope.

15 Leadership is absolutely critical on the  
16 plaintiff side. And it's extremely important for  
17 lawyers who represent clients who've been injured,  
18 that leadership be appointed as quickly as possible.  
19 My colleagues on the other side of the "v.", they have  
20 a client that hires them, they have a strategic plan  
21 right away. They hit the ground running in the  
22 initial conference. Plaintiffs don't have that  
23 capacity. We find ourselves in a place where we're  
24 still trying to organize ourselves. We don't know  
25 who's going to be involved and who the players are

1 going to be.

2 And I would say moreover, coordinating  
3 counsel, despite their best efforts, if they had a  
4 report that touched on every topic in Subsection C,  
5 what would end up happening is the defendants have all  
6 their leadership in place, the plaintiffs do not and  
7 what's in that report very likely would prejudice the  
8 plaintiffs going forward, particularly if the  
9 leadership that's appointed does not agree with the  
10 points made in that initial report. I think that is  
11 very important.

12 And truly, my experience is most experienced  
13 counsel on both sides are able to come together,  
14 submit a report to the court without coordinating  
15 counsel. And I've found that to be true in every MDL  
16 that I've been a part of.

17 Now, let me talk about a few of the topics  
18 listed in 16.1(c) that I feel, frankly, are not ripe  
19 for consideration during the initial status  
20 conference. We've heard a lot today about claims and  
21 whether they're supported or unsupported, Subsection 4  
22 and how parties should exchange information. Let me  
23 say from the plaintiff's perspective, I believe the  
24 rules apply equally in MDLs, including Rule 11 and  
25 those are requirements that we have as lawyers and

1 officers of the court. I believe that.

2 I believe there is a process that can be  
3 worked out where fact sheets or something similar to  
4 that can be instituted very soon after leadership is  
5 appointed in order for plaintiffs who file a claim to,  
6 in an appropriate time period, provide evidence. I  
7 believe that that is absolutely important, and that  
8 claims that are adjudicated should be claims that are  
9 supported with product ID or appropriate evidence or  
10 evidence of injury.

11 But it shouldn't be that to have a  
12 citizenship, you've got to have a green card at the  
13 first day you file a complaint. We heard that earlier  
14 and that should not be the case. Let me also say, as  
15 it applies to consolidated pleadings, and particularly  
16 master complaints and short form complaints, they work  
17 together to present the claims of an individual  
18 claimant. And we heard some discussion about the  
19 talcum powder MDL earlier, and since I happen to be  
20 very familiar with that, let me just point out a  
21 couple of things.

22 There is a 200-page master complaint with  
23 specificity as to fraud and every other aspect of the  
24 litigation, including the injury. And a talcum powder  
25 injury is defined as epithelial ovarian cancer, so if

1 an individual plaintiff on the shortform complaint  
2 checks she has a talcum powder injury, it means she  
3 has epithelial ovarian cancer, and obviously, she's  
4 going to have to put forward evidence of that injury  
5 as the time goes on.

6 CHAIR ROSENBERG: Can we just take a pause  
7 for just some questions? And then if you haven't had  
8 a chance to cover what else you wanted to say, we'll  
9 circle back.

10 I think just Judge Jordan had a question.

11 JUDGE JORDAN: Yes, I do you. Well, two.  
12 One of them is you said you were concerned about  
13 coordinating counsel, there's no authority for that,  
14 but then you are in favor of leadership counsel. Is  
15 there authority to appoint leadership counsel that's  
16 anymore grounded than the authority to appoint  
17 coordinating counsel?

18 MS. O'DELL: I may have misspoken, Your  
19 Honor, and not been clear. What I was saying is  
20 there's no criteria for that. There's no description  
21 in the rule of what would be intended? Who would be  
22 the appropriate person to fulfill that role? What  
23 would be the scope of the role? Would it be a  
24 neutral? Would it be one for defense and one for  
25 plaintiffs and what --

1 JUDGE JORDAN: But you're not relying on an  
2 authority or lack of authority?

3 MS. O'DELL: No, Your Honor. I just said  
4 it's not clear and from my perspective, I think what  
5 could occur is that you would end up having two rounds  
6 of appointments and all the ancillary activity that  
7 goes on in terms of leadership appointments, if you  
8 had a coordinating counsel for plaintiffs, for  
9 example, you would have a competitive process among  
10 lawyers for that. And then that individual, I'm  
11 assuming would be -- their job would end after the  
12 appointment of leadership and you'd have a second  
13 process, creating a lot of inefficiencies.

14 JUDGE JORDAN: Okay. And maybe more  
15 importantly, at some point in your presentation, you  
16 said, in effect, there shouldn't be early vetting or  
17 at least that's what it sounded like to me. That, you  
18 know, let this stuff come out later. But that isn't  
19 the way it works in one-on-one litigation. We don't  
20 say you can just file whatever you want and then down  
21 the road in discovery, we'll figure out whether your  
22 pleading was adequate or not.

23 There are rules about pleading. And so one  
24 of the things, of course, we've heard again, and again  
25 and again today is it is as if the rules were

1       suspended in MDS because people are coming to court --  
2       they're not -- you know, and it may be that in a  
3       wonderful 100-page or 200-page master complaint,  
4       there's a definition of what a injury is. And by  
5       checking a box, somebody can say yeah, but they meant  
6       that because if you look on Page 87 of the complaint,  
7       that's what that meant. And surely that's what this  
8       person meant when they checked that and sent it into  
9       their lawyer. Maybe that happens in some cases, but  
10      we're hearing from a lot of these folks on the other  
11      side of the "v.", that there's just nothing resembling  
12      ordinary pleading, where somebody says in a mass tort  
13      case, I took the medicine or I used your product and I  
14      used it within the statute of limitations, and I got  
15      to injured, give me money.

16                There's nothing close to that. So are we  
17      are we getting the wrong information from them? Is it  
18      or do you have some different thing to tell us? I've  
19      heard a lot about give us the facts or the numbers.  
20      Do you have some facts or numbers that tell us this is  
21      kind of an unfounded concern that we've been hearing  
22      all day?

23                MS. O'DELL: I think there are two sort of  
24      topics within your question, Your Honor, if I could  
25      take them in turn. The first thing is the pleading,

1 the actual complaint itself and whether it's  
2 sufficient. And that's what I was speaking to in  
3 regard to a master complaint and the short form  
4 complaint, basically that Rule 7(a) pleading that  
5 begins the action. And in this context, where there's  
6 a master complaint for administrative purposes, it  
7 seems perfectly appropriate that a plaintiff should be  
8 able to have it. There should be an agreed upon form,  
9 and I can say in the talcum powder MDL, it was agreed  
10 upon, and a plaintiff could indicate the claims that  
11 she was asserting, as well as the injury. And there  
12 were definitions that were understood by the parties  
13 without any real confusion on that point.

14 There's a separate issue as it relates to  
15 facts supporting an individual claim, as they might be  
16 put forward in a plaintiff fact sheet process. I am  
17 for vetting of claims. I am for the appropriate  
18 timing. I do believe that 30 days is too short, but  
19 in most MDLs, you have to put forward a plaintiff fact  
20 sheet that has information about what you're  
21 asserting, including the specific injury and the  
22 medical records showing your injury. And if you have  
23 a pharmaceutical, for example, a proof of use  
24 document, like a pharmacy profile form, within 60 to  
25 90 days. If you're unable to do that, and you can't

1 show cause why there's a good faith reason you can't  
2 do it, then that case should be addressed.

3 I would not -- I am not advocating that  
4 claims not be vetted. I've vet my own claims. That's  
5 something that we feel very strongly about. And I  
6 believe all lawyers should vet their claims. And I  
7 have said that publicly at seminars. I've said it to  
8 all the lawyers in the talcum powder MDL multiple  
9 times. So please don't understand me to say I'm not  
10 in favor of that. What I am in favor of is a fair  
11 process --

12 JUDGE JORDAN: I didn't misunderstand you  
13 and think you're saying let's all violate Rule 11. I  
14 did not --

15 MS. O'DELL: I know.

16 JUDGE JORDAN: I did not think that that's  
17 what was going on.

18 MS. O'DELL: Good.

19 JUDGE JORDAN: What I am trying to press a  
20 little bit on is there seems to be like a real chasm  
21 here with folks on the defense side saying over and  
22 over again, there is a dramatic number, not a few, but  
23 a very sizable percentage of these cases, which should  
24 never be brought. It's not, as Mr. Seller was saying  
25 earlier and Ms. Tadler was questioning that, it's not

1       that they had some adequate basis to start with and  
2       then in the course of discovery, you'd see it or they  
3       can't make a certain level of proof or something.  
4       It's just they never had a claim. They saw the number  
5       on the screen while they were watching a Matlock  
6       rerun. They called. All of a sudden, they're getting  
7       a cut of this, and there's some lawyer there who's  
8       only too happy to have a paralegal or a phone  
9       answering person, bring it in and say, I got another  
10      number, man, give me my money. And then that builds  
11      on itself.

12               And then it is a force that has momentum on  
13      its own. And that starts driving litigation. That's  
14      the theme or the story that we're getting to over and  
15      over and over again. And you are the last person  
16      today who's speaking from the other side, so I'm  
17      asking you to tell us something that would help us  
18      understand that the story about the avalanche, the  
19      little pebble that starts coming downhill and then  
20      it's more and more and more and now the boulders are  
21      falling and crushing justice underneath them, that  
22      that's just not -- we shouldn't be worried about that.  
23      That's much ado, if not about nothing, it's overblown.

24               Take the crack at it.

25               MS. O'DELL: Thank you for the opportunity.

1 I'd love to. I mean there are a number of issues at  
2 play in terms of the increase in the number of claims  
3 that are being put forward. Partially, it's because  
4 we have litigations recently that are dealing with  
5 consumer products, and they are used by millions of  
6 people, millions of people. So if you're talking  
7 about Round-Up, or talcum powder, or Zantac, for that  
8 matter, or other cases, then you've got millions of  
9 people have been exposed. If they those products  
10 cause injury, you're going to have a greater number of  
11 potential claimants. That's one thing.

12 Second thing as to claims not being vetted,  
13 I believe, it's that if a lawyer gets a claim that  
14 they have a duty to vet that claim prior to filing it,  
15 it is not a if somebody comes to my law firm, to give  
16 you a practical example, and they say Leigh, I believe  
17 I was injured by X product, my duty as a lawyer is to  
18 vet that case before I file it. I believe that is the  
19 right approach, even if somebody came to me because  
20 they were referred or a person who advertises sent  
21 that case to my firm, I still have a duty as a lawyer  
22 to be a lawyer and to substantiate that claim before  
23 filing.

24 Having said that, are there claims filed in  
25 MDLs that are not supported by your product use or

1       they don't have the right injury? I would not say,  
2       no, there are, but is it the problem that we've heard  
3       about today? I'm not sure that it is, very frankly.  
4       Are there reasons lawyers sometimes have to file a  
5       case before they're prepared fully? Yes, whether it  
6       be statute of limitations or other issues.

7               So I would just say, is it as -- you've  
8       gotten the full throated view today, and I appreciate  
9       everyone's perspective that they brought. I don't  
10      believe that actually is accurate from what I see, or  
11      is there some percentage, yes. Is it 30 percent? No.  
12      Is it 60 percent, which I heard earlier? Absolutely,  
13      no, I don't believe that to be the case.

14             CHAIR ROSENBERG: A few more questions. So  
15      we have Judge Bates, then Judge Proctor, then Rick and  
16      then we'll go from there.

17             JUDGE BATES: A little more specific follow-  
18      up on that, I understand part of your issue with  
19      respect to (c)(4), the early vetting, if you want to  
20      call it that, is that it's premature before there's a  
21      leadership counsel appointed. Tell us why you think  
22      it's premature to even have it as an issue of  
23      discussion at that initial conference, before  
24      leadership counsel is appointed?

25             MS. O'DELL: Thank you. The reason is this,

1       because leadership -- we don't even know who's going  
2       to be speaking on behalf of plaintiff, since its  
3       coordinating counsel or what their involvement in the  
4       litigation is. I do believe it's necessary to have  
5       knowledge of the case individually; what injuries are  
6       going to be within the scope of the MDL? What type of  
7       use is going to be required? What are the relevant  
8       tools in order to exchange information? That really  
9       should be something that is a part of the meet and  
10      confer process with the plaintiff steering committee  
11      and the defendant, not -- it could be mentioned, but  
12      in terms of the substance of it, I believe it must  
13      wait until after leadership. And if that's the case,  
14      why would you spend the court's time on it in the  
15      initial conference? You could mention it. It's got  
16      to be addressed and we all agree on that.

17               JUDGE JORDAN: That seems to be true of  
18      virtually every one of the matters listed, all 12 of  
19      them really would benefit or need someone to speak to  
20      them. So why isn't what you're saying that you can't  
21      do any of this until there's a leadership counsel?

22               MS. O'DELL: Your Honor, and I don't -- I'm  
23      not arguing that there shouldn't be any of this  
24      mentioned. In fact, I believe there are some very  
25      important things to mention. I think the court needs

1 to understand generally about the facts of the case  
2 and some of the legal issues. I think that can be  
3 done. I think that you can inform the court and  
4 apprise them of what's happened in federal court and  
5 state courts. I think you can talk about leadership,  
6 that's a fulsome conference.

7 But, for example, I don't think settlement  
8 is an appropriate topic for the initial status  
9 conference for many reasons, some of which I share the  
10 views of my friends on the defense side about that  
11 being too soon. Whether you refer matters to a  
12 magistrate judge or a special master, I think it's far  
13 too soon to understand what will be needed at that  
14 point in time. And so what I'm suggesting is that the  
15 rule essentially narrow the group of topics that I  
16 think are very important, set aside those that really  
17 should be addressed after leadership, maybe even put  
18 them in another subsection of the rule, but not make  
19 them a part of the initial conference because,  
20 frankly, the people that will be speaking at that  
21 time, if it's coordinating counsel, will really not  
22 have authority from the plaintiff's perspective.

23 JUDGE JORDAN: So effectively, you would  
24 take the list of 12 and reduce it down to a list of  
25 about four or five subjects?

1 MS. O'DELL: Correct.

2 JUDGE JORDAN: And eliminate a lot of these  
3 items that are listed?

4 MS. O'DELL: Or segregate the other issues  
5 to another subsection after leadership is appointed.  
6 I do think they're very important, all, it's just a  
7 matter of timing.

8 CHAIR ROSENBERG: Judge Proctor?

9 JUDGE PROCTOR: So the way we've drafted the  
10 proposed rule is that the parties are to meet and  
11 confer. And it strikes me that that may be the best  
12 opportunity for the transferee judge to hear from  
13 everyone on all these issues, because after  
14 appointment of -- there is going to be leadership  
15 counsel appointed after appointment of leadership,  
16 it's not necessarily all the communications, but  
17 probably substantially most of the communications to  
18 the court on behalf of the plaintiff side would be  
19 through leadership or steering committee members. And  
20 so we were concerned with, well what happens with  
21 everyone else who isn't in leadership? It seems to me  
22 that preparing a report for the conference gives all  
23 the parties a chance to weigh in.

24 And I think you referenced sometimes there's  
25 a difference in leadership about which theories to

1       pursue, how to sequence the litigation, all those  
2       things. If the court is waiting to hear those things  
3       from just a select -- the group the court selects,  
4       wouldn't that limit the court in terms of having a  
5       more fully orbbed understanding of the different  
6       perspectives on the case?

7               MS. O'DELL: I think that the initial  
8       conference can be that opportunity, Judge Proctor, I  
9       agree. I think my pause and concern relates to  
10      coordinating counsel and sort of what that does, but  
11      the parties, I believe, could come together, create a  
12      report from the plaintiff's side and the defense side,  
13      and present that to the judge. And potentially they  
14      could hear -- the judge could hear from a number of  
15      parties on the plaintiff side and get a broader  
16      perspective. I would disagree with that.

17             JUDGE PROCTOR: Yeah. Perhaps we need to be  
18      more clear in maybe the commentary, I'd be interested  
19      to hear what my colleagues and friends on the  
20      Committee think. But the idea was, it's hard to hear  
21      -- we want to hear all the voices, but it's hard to  
22      hear in organized presentation of all the voices.

23             Not surprisingly, the focus of this entire  
24      day has been on pharmaceutical or other mass tort  
25      cases. I want everyone to bear in mind, we're trying

1 to draft a rule for all MDLs. We weren't tasked with  
2 being the products liability MDL subcommittee, we were  
3 tasked with being the MDL subcommittee. So when you  
4 have, for example, dueling patent cases that come in,  
5 it probably makes sense to have them walk through  
6 these issues and perhaps, the more that are unique to  
7 patent litigation.

8 If we have an antitrust case that rolls in  
9 and there's, for example, in my situation, 90-some odd  
10 class actions filed around the country challenging the  
11 same or some Venn diagram of the same practices, how  
12 do you fashion a rule that lets the transferee court  
13 get a head start hearing from the parties and  
14 designing a litigation plan that's going to advance  
15 the Rule 1 purposes of the MDL?

16 So that's just my final thought is, I think  
17 we've been really focusing on, obviously, what is the  
18 largest number of cases on the MDL docket, but not the  
19 largest number of MDLs on the docket.

20 MS. O'DELL: Understood, Judge. Thank you.

21 CHAIR ROSENBERG: Did you have a question?

22 PROF. MARCUS: Well, I think I want to  
23 follow up or say something along the lines that Judge  
24 Jordan was addressing. And we have heard repeatedly,  
25 and we asked for specifics about ill-founded,

1 unfounded, inappropriate, call it what you will claims  
2 that show up seemingly in large volume, just in  
3 absolute numbers, not perhaps as percentages. And  
4 also, just a personal note, I've never used Round-Up  
5 or Zantac to the best of my knowledge, but I've  
6 received several automated robo calls asking me if I  
7 have and telling me to push number one to speak to  
8 someone. So I've done that and I've gotten a person  
9 and I asked is this a law firm. And no, it isn't.  
10 We're a referral agency.

11 Something we heard a long time ago, but  
12 haven't heard as much more recently, but maybe had  
13 discussed today is I thought some on the plaintiff  
14 side actually thought that getting the chaff out of  
15 the way early on would be beneficial to those with  
16 valid claims. And I'm wondering is the plaintiff side  
17 resistant to some kind of minimal showing up front?

18 I don't think it necessarily has to adopt  
19 Rule 11 and take an off with your head approach, but  
20 is the plaintiff side really that reluctant? Are they  
21 all resistant to this sort of inquiry because I would  
22 think somebody who does what you do might be upset  
23 that somebody else waltzes in with 1,000 alleged  
24 claims that are just cluttering the landscape of your  
25 MDL.

1 MS. O'DELL: You know, when you ask a  
2 question to speak for all plaintiffs lawyers for all  
3 times, there's no real right perspective on that.

4 PROF. MARCUS: Yes, I understand.

5 MS. O'DELL: I don't know what some of my  
6 brothers or sisters would say about that issue. I  
7 will say for myself and what I believe to be the  
8 general consensus is that plaintiff's lawyers are not  
9 against an appropriate vetting of claims at an  
10 appropriate time. And I'm not saying years, I'm just  
11 saying not the day you file your case. I mean we're  
12 talking a matter of degree, there's not an -- there is  
13 not a firm belief that that's somehow improper.

14 That's appropriate. That's how cases are  
15 put forward. I will say there are concerns on the  
16 plaintiff side that relate to a process. It's onerous  
17 and really sucks the life out of the leadership team.  
18 I think secondly, there's concern on the plaintiff  
19 side that sometimes when it does come down to the  
20 settlement process, that there is an approach that  
21 deals with claim averages, and so they are concerned  
22 about only having pristine claims and somehow being  
23 disadvantaged at the settlement process.

24 I don't necessarily share that view, but I  
25 think it requires discipline on the defense side to

1       only pay claims that are actually viable claims. And  
2       so, to answer your question, Professor, I mean, there  
3       isn't resistance on the plaintiff side to the concept  
4       or to it being early in the case, what we are  
5       resistant to is something that's so onerous in terms  
6       of timing and the amount of material that would need  
7       to be put forward.

8               CHAIR ROSENBERG: Judge Boal and then  
9       Ariana.

10              JUDGE BOAL: I had a question about your  
11       comment that Section 12 should be eliminated and  
12       that's the part that talks about whether matter should  
13       be referred to magistrate judge or a master. I know  
14       some of the written submissions took issue with a  
15       master at this stage, but my question is focused on  
16       the reference to a magistrate judge. And I'm  
17       wondering why you think it might not be helpful at  
18       this stage for a reminder to both the parties and even  
19       the district judge, that use of a magistrate judge  
20       might be an efficient use in preliminary matters to  
21       expedite and help the parties resolve case issues?

22              MS. O'DELL: I agree that magistrates are  
23       extremely helpful. And so I wasn't commenting that  
24       that aspect of the proposed rule should be eliminated.  
25       What I was suggesting is it might not be right for

1 discussion in the initial conference, but that as to  
2 -- as it reads whether matters should be referred and  
3 what matters, it not might not be -- the litigation  
4 might not be mature enough to understand what those  
5 matters are and when they should be referred.

6 That was my only comment. I definitely  
7 believe magistrates play a huge role and I appreciate  
8 all that they do to make the litigation reform.

9 MS. TADLER: So Ms. O'Dell, I'm going to  
10 pick up on Judge Proctor's last round with you when he  
11 was talking about the extent to which perhaps, given  
12 the fact that we use the word parties in that initial  
13 conference, do you have any thoughts, concerns about  
14 whether that initial conference might somehow go off  
15 the rails or become a bit of some chaos with lots of  
16 people popping up?

17 Do you have any concern about that? Or is  
18 it your sense that at that point in time before  
19 leadership is appointed, that's an appropriate time if  
20 somebody is representing clients, they should be  
21 heard?

22 MS. O'DELL: There's always concern that  
23 something could go off the rails, particularly at that  
24 early stage, but I do think it's an opportunity,  
25 particularly for those who are going to be in

1 leadership, those that are investing in their time and  
2 their energies or resources into a litigation, that  
3 they'll be a part of a process to, at least on the  
4 plaintiff side, make that as coordinated as possible.  
5 It certainly could. I think if I weighed my concerns,  
6 I have a little greater concern in and having a  
7 competition for coordinating counsel at the beginning  
8 of a case. And if it -- what my position is, I'd  
9 rather take that, put that to the side, let  
10 plaintiff's lawyers organize themselves for that  
11 presentation to the court. And it's in everyone's  
12 best interest that that be an appropriate, cogent  
13 presentation.

14 So I'd rather have that situation than have  
15 a situation where you've got coordinating counsel  
16 that's going to be appointed by the court and, all of  
17 a sudden, you have another sort of leadership  
18 competition round.

19 MS. TADLER: Thank you.

20 CHAIR ROSENBERG: Any more questions?

21 Andrew?

22 PROF. BRADT: Just to circle back on Judge  
23 Jordan's initial line of questioning and your  
24 discussion about fears the coordinating counsel might  
25 unfairly or inappropriately bind leadership. That

1 sounds somewhat similar to what we heard from your  
2 friend on the other side of the "v.", Mr. Beisner,  
3 earlier today about leadership counsel with respect to  
4 individually appointed attorneys. And so I wonder if  
5 you could speak to his argument about the potential  
6 problems with leadership counsel and why those are --  
7 the arguments made coordinating counsel don't apply to  
8 leadership?

9 MS. O'DELL: You know, as I heard Mr.  
10 Beisner's argument, what I heard him saying is  
11 leadership does set the direction of the litigation;  
12 leadership does bind the party, the plaintiffs, if you  
13 will, on the direction. And he has a concern about  
14 that from an ethical standpoint. I don't share that  
15 concern because just because leadership is appointed  
16 and you have a plaintiff steering committee or a co-  
17 lead counsel, doesn't mean you refuse to listen to  
18 counsel that are not appointed to leadership. I spend  
19 a tremendous amount of my time having forums for non-  
20 leadership counsel to hear from them so they can have  
21 input into the process.

22 They're invited to do work if they would  
23 like to, it's not just the plaintiff's steering  
24 committee. So I don't have that concern. I do think  
25 it's incumbent on leadership in carrying out their

1 duties in an effective way, to create a process where  
2 that happens, that we're communicating sort of  
3 outbound communication, but we're also hearing from  
4 them and we're also inviting them in. I think that's  
5 critical and that's why I'm not as concerned about  
6 what Mr. Beisner had to say.

7 CHAIR ROSENBERG: Joe?

8 MR. SELLERS: Since you were talking about  
9 leadership counsel, let me ask a different kind of  
10 question. I assume you heard earlier today, I think  
11 it was, again, Mr. Beisner's questions about the  
12 extent to which the appointment of leadership counsel  
13 might encroach on the relationships of the counsel for  
14 representing individual members of the of the MDL.  
15 Are there steps that are normally taken to address  
16 that, protect against it or is that a common problem?

17 MS. O'DELL: I don't view leadership as  
18 impinging on non-leadership counsel in their  
19 fundamental duties to their individual clients. I  
20 don't see that at all, you're still required to comply  
21 with all the court's orders. You still are  
22 responsible for recommending to your client, whether  
23 they -- for example, in terms of settlement, whether  
24 they accept a settlement or not, I mean there's not an  
25 interference with that individual client's lawyer and

1       their duty, and there shouldn't be.

2               Once a settlement is either accepted or  
3       rejected, it's up to the individual counsel to take  
4       the necessary steps for that client, so that's not  
5       something that I find to be a concern. And, frankly,  
6       it's sort of in the papers for this meeting was sort  
7       of a new concern, as I read about it. That's not  
8       something that I've seen be a problem.

9               MR. SELLERS: So would you agree that one of  
10      the prerogatives of a court in and appointing  
11      leadership counsel might be to establish the  
12      boundaries of the responsibilities of the leadership  
13      counsel visa vie the individual client claimant  
14      counsel?

15              MS. O'DELL: I think the court often does  
16      that with the appointment order as to what the role is  
17      of leadership and what it's not, I think that's often  
18      very well defined. And it's focused on those common  
19      issues where you get economies of scale and  
20      efficiency, whether it be discovery, whether it be  
21      experts, whether it be some of the briefing that is  
22      involved. And very frankly, I think that if an  
23      individual lawyer representing clients is invited into  
24      the process, and you have leadership doing their job  
25      appropriately, it really works quite well and they're

1 happy to have some lawyers, particularly, some lawyers  
2 that are very skilled at certain areas, and they may  
3 not have that skill. And so it's a good synergistic  
4 relationship if it works correctly.

5 CHAIR ROSENBERG: Judge Lauck?

6 JUDGE LAUCK: So I don't want you to take  
7 time to answer this question if I'm only asking it  
8 because I'm a neophyte, we can speak later. I want to  
9 understand what the role of leadership counsel is now  
10 with respect to vetting cases. So what we're hearing  
11 from the other side is that we can get nine months  
12 into this or two years into it or five years into it,  
13 and we have these meritless cases. And what I hear  
14 you saying is that we just need a reasonable amount of  
15 time, so the other side is suggesting 30 days. You  
16 mentioned 30 or 60 or 90 days. And a gentleman  
17 speaking about a case earlier said they had a monthly  
18 status conference, during which they went through  
19 several cases and got rid of them.

20 So if folks know exactly how this works, I'd  
21 like to know, but is it part of the role of leadership  
22 counsel to get rid of those cases?

23 MS. O'DELL: It's not to get rid of them,  
24 but it's a great question. I mean what the focus of  
25 leadership counsel should be on discovering the case,

1 not only the liability, but there are aspects of  
2 liability discovery that impact on the causation case,  
3 what is a claim that should be put forward as part of  
4 the criteria of the of the MDL? And so these things  
5 are inextricably intertwined in many instances. And  
6 so leadership has the role of doing that discovery,  
7 particularly as it relates to causation. When we  
8 think about vetting, I'm thinking about causation, and  
9 then also developing experts for the general causation  
10 case that will really be bringing that evidence for  
11 the overall MDL.

12 And so, from my perspective, our leadership  
13 group, we had that responsibility. We did those  
14 activities. We came to a conclusion about what was  
15 supported by the science and the liability in the  
16 particular case that I'm involved in --

17 JUDGE LAUCK: Can I interrupt you just a  
18 second because --

19 MS. O'DELL: Can I just say one really quick  
20 -- no, please, I'm sorry, Your Honor.

21 JUDGE LAUCK: You can finish about causation  
22 later. I understand the issue of causation. That is a  
23 longer term concern. What I'm talking about getting  
24 rid of obviously wouldn't be those cases that require  
25 some kind of discussion. I'm talking about the cases

1       that these folks are complaining about where they say  
2       they never had the prescription. They never took the  
3       drug and that isn't a causation issue. That's just a  
4       basic factual pleading foundation.

5               MS. O'DELL: Understood.

6               JUDGE LAUCK: And so that's what I'm trying  
7       to ask you about.

8               MS. O'DELL: I'm sorry. I misunderstood.  
9       And that issue of whether they've used the product or  
10      they've been prescribed the drug, from a leadership  
11      standpoint, all I can do or other leaders can do is  
12      say this is what's required, you must have used this  
13      product, and there may be many products involved, and  
14      you must have this proof to establish it. That's the  
15      best I can do. And I have to communicate that loudly  
16      and often. And then it's incumbent upon that lawyer  
17      to work with their clients to establish that proof.

18              I'm sorry, I went to another place, but it's  
19      equally important in the vetting process. And that  
20      is, what's your injury? You know, there could be  
21      numerous injuries alleged, and, at some point, the  
22      leadership has to put forward what are the experts  
23      going to support? These injuries. And then that, it  
24      seems to me beyond that, if you had an injury that  
25      didn't fit within that criteria, then what would need

1 to happen is that individual lawyer would need to put  
2 up an expert to support that case, or there'd need to  
3 be a process for that case to be dismissed.

4 PROF. MARCUS: That would not mean it's a  
5 groundless case, it's just there's been learning since  
6 the case was filled.

7 MS. O'DELL: Absolutely not. There could be  
8 things learned in discovery, new science that's  
9 published. That's a totally different case. I just  
10 would be remiss if I didn't say this before I sat  
11 down, too, there was a lot of discussion about you  
12 can't find the client. You can't talk with them. You  
13 know, I represent ovarian cancer victims, and very  
14 frankly, a lot of my clients have died. Sometimes I  
15 might be able to reach them for a little while.

16 There are a lot of very valid, credible  
17 reasons that there might be a breakdown in  
18 communications. And then, frankly, there are reasons  
19 that can't be justified, but you cannot put everything  
20 in the same bucket. And I think that's important.

21 CHAIR ROSENBERG: Thank you so much, Ms.  
22 O'Dell.

23 MS. O'DELL: Thank you, Judge.

24 CHAIR ROSENBERG: You fielded a lot of  
25 questions, so --

1 MS. O'DELL: Thank you. My pleasure. Thank  
2 you.

3 CHAIR ROSENBERG: Thank you. So a couple of  
4 obvious points. We're not 3:30, at the adjournment  
5 time, just in case anyone hasn't checked their watch,  
6 it's 4:30. But I think we did pretty well,  
7 nevertheless, even though we skimmed on lunch.

8 But this has been incredibly valuable. Now  
9 I know I asked a couple of you in the beginning  
10 whether you were going to still be here. It didn't  
11 mean we wanted to call you back up, but I did confer  
12 with a couple of our committee members and there may  
13 be a question or two that we do have. I am going to  
14 ask Mr. Dahl to come back up. That is the only person  
15 I have identified. I'd reiterate that Mr. Dahl, in  
16 his work on behalf of the LCJ, was referenced  
17 repeatedly by many, many, many other witnesses. And  
18 so that likely is one reason why he is being called  
19 back up now and he also came in the very beginning.  
20 So I think there is a question or two directed to him  
21 that we'd just like to conclude with.

22 So thank you for staying around, Mr. Dahl,  
23 for the duration of the day, as with all of the  
24 others. We so appreciate it. So Mr. Dahl, if you  
25 could come forward, and I'm just going to open it up.

1 I'll begin with Judge Jordan, if you have a question  
2 that wasn't previously asked, so we can hear that from  
3 Mr. Dahl. And then if anybody else has a question,  
4 please let me know.

5 JUDGE JORDAN: Thanks. I'm going to ask you  
6 the better than nothing or worse than nothing  
7 question. As drafted, not as though you would have it  
8 in your ideal world, but as drafted, is Rule 16.1 --  
9 well, A, is it a rule? Because you seem to have  
10 expressed some disagreement with that, and B, whether  
11 it's a rule or not, is it better than nothing? Or  
12 would you rather see nothing than this, on behalf of  
13 the LCJ?

14 MR. DAHL: Thank you, Judge. I appreciate  
15 the question and it's a little difficult to answer,  
16 but I'd say at very least, it's a close call. I think  
17 that as written, the utility, particularly on the  
18 unvetted claim problem, is not where it needs to be  
19 and that some of the discussion -- in particular, some  
20 of the discussion in the notes is more likely to cause  
21 confusion than to clarify.

22 JUDGE JORDAN: But I'm going to push you,  
23 right? I'm asking you, like if you say I just can't  
24 answer it, I'll accept that. But this is like an on-  
25 off switch, not a rheostat. If it was up to you,

1       would you say look, this isn't what I want, but it's  
2       better than nothing and I can build on it? Or would  
3       you say this is actually going to cause more trouble  
4       than it's going to be a benefit? We shouldn't do this  
5       at all and it should be back to the drawing board  
6       completely or forget it, just do best practices?

7               MR. DAHL: Oh, I thought I was going to be  
8       to answer until you changed the question like that.  
9       If it's a stark question of something or nothing, I  
10      just think that's different. I very much believe that  
11      there needs to be further definition in the rules.  
12      And that the committee should go forward and write  
13      better rule and it's very important to do that. But  
14      if you asked me today --

15             JUDGE JORDAN: Yes, go ahead. If you're  
16      getting to the yes or no, that's what I'm waiting for.

17             MR. DAHL: All right. I mean I didn't want  
18      you to push me like this, but since you did, I would  
19      probably say no, that as written, it's not going to  
20      provide more clarity than problems.

21             CHAIR ROSENBERG: Any other questions? I'll  
22      just ask one question. I asked it of a couple of the  
23      witnesses, the addition to the notes -- well, no, let  
24      me ask the question first. Do you think that there is  
25      confusion in the bar as to whether the rules of

1 procedure apply in MDLs?

2 MR. DAHL: Yes.

3 CHAIR ROSENBERG: There's confusion?

4 MR. DAHL: Yes.

5 CHAIR ROSENBERG: Some people think they  
6 don't apply? I'm not saying that they actually --  
7 what happens in practice, but is there actually  
8 confusion as to whether Rule 8 applies to what you do  
9 in a Rule 12 in an MDL?

10 MR. DAHL: Yes. And I think that, you know,  
11 I didn't invent the phrase MDL exception, I heard  
12 that. And I think people have used it. And I think  
13 there is some sense that MDLs are so much different,  
14 that the rules don't apply. But let me give this a  
15 huge asterisk. If pushed, probably people would say  
16 the rules do apply, but what we're trying to engage  
17 with and where we think the Committee is in solving  
18 this problem, there are some rules that work in non-  
19 MDL cases that don't seem to be working in MDL cases.

20 Why is that? What is the difference? And  
21 can there be a different rule definition or rule  
22 framework that brings those same principles that  
23 already exist in the rules for other cases into the  
24 MDL context? That's the basis of our proposals,  
25 particularly on the claims efficiency issue.

1                   CHAIR ROSENBERG: Do you think that some of  
2                   the comments that Mr. Halperin made about  
3                   adding to the notes to make clear that -- I think he  
4                   was the one and some of the others that Rule 8, and  
5                   this was also raised, I think, by others, but that  
6                   that Rule 8 applies, that Rule 9(b) applies, that Rule  
7                   11 applies. In other words, whether it's the master  
8                   or the short form or the combination of the two, does  
9                   that -- would that help? Would that clarify that the  
10                  rules of procedure are alive and well and they apply?  
11                  And oh, by the way, so does Rule 12 and motions to  
12                  dismiss, to make clear what maybe some think is not  
13                  clear?

14                 MR. DAHL: Yes.

15                 CHAIR ROSENBERG: Would that help in terms  
16                 of that gate-keeping, that sending the message out to  
17                 those potential frivolous filers, beware, don't file  
18                 if you don't have a Rule 8 claim?

19                 MR. DAHL: Yes.

20                 CHAIR ROSENBERG: Would that send a message  
21                 to the defense that you've got that Rule 12 capability  
22                 to seek dismissal?

23                 MR. DAHL: Yes. I think all of that would  
24                 be very helpful.

25                 CHAIR ROSENBERG: So with that modification

1 to a note, hypothetically, would you answer Judge  
2 Jordan's question differently?

3 MR. DAHL: Yes. The reason I didn't want to  
4 answer directly is that I think that there is a lot of  
5 good things in the rule, in the draft, and that it can  
6 be easily edited to change my answer and to be a rule  
7 that provides much more clarity than unintended  
8 consequences. And that is a very important principle  
9 that I think would help a great deal.

10 CHAIR ROSENBERG: Thank you. Any other  
11 questions? Okay. Thank you, Mr. Dahl. We appreciate  
12 you coming back up.

13 Well, on behalf of all of us, and for those  
14 of you who have stayed with us throughout the day, and  
15 those of you who are appearing remotely and anyone  
16 else who will ultimately read the transcript and read  
17 the next agenda book where some of this will be  
18 published, as you know, we have two more sets of  
19 hearings, but this was the first. And, as of right  
20 now, this was the only one scheduled in-person.

21 So this was highly important for us, and I  
22 want all of you to know how much we appreciate the  
23 time that you put in, just as all of us put in time,  
24 time away from what we do day-to-day, so have you, not  
25 just appearing here today, but all of the comments

1       that you have submitted. But not just the comments  
2       for today because most of you have been meeting with  
3       us for five years. So we really appreciate it, and to  
4       the extent that any question appeared as if we weren't  
5       listening, or we were pushing back, or minds were made  
6       up, that is absolutely not the case.

7               We're just all so invested in this and we  
8       want to get it right. And so it's a collaborative  
9       process that we couldn't do without you. So thank you  
10      for helping us start this notice and comment period  
11      off on such a -- what I think is a successful note, a  
12      helpful note, and we really appreciate it. So I think  
13      without anything further, that does conclude our  
14      hearing for today.

15             (Whereupon, at 4:40 p.m., the meeting in the  
16      above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A  
CASE TITLE: Proposed Amendments to the  
Federal Rules of Civil Procedure  
HEARING DATE: October 16, 2023  
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: October 30, 2023

A handwritten signature in black ink, appearing to read 'Angela Brown', with a large, stylized flourish extending to the right.

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