

AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS AND AN ADDITION TO THE FEDERAL RULES OF
CIVIL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SU-
PREME COURT, PURSUANT TO 28 U.S.C. 2072.



APRIL 24, 2025.—Referred to the Committee on the Judiciary and ordered
to be printed

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WASHINGTON : 2025

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 23, 2025.

HON. MIKE JOHNSON,
*Speaker, United States House of Representatives,
Washington, DC.*

DEAR MR. SPEAKER: I have the honor to submit to the Congress amendments and an addition to the Federal Rules of Civil Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and additional rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 17, 2024; a blackline version of the rule with committee note; an excerpt from the September 2024 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2024 report of the Advisory Committee on Civil Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 23, 2025

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Civil Procedure are amended to include amendments to Rules 16 and 26, and new Rule 16.1.
[See *infra* pp. _____.]
2. The foregoing amendments and addition to the Federal Rules of Civil Procedure shall take effect on December 1, 2025, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.
3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Management.

* * * * *

(3) *Contents of the Order.*

* * * * *

(B) *Permitted Contents.*

* * * * *

(iv) include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after

information is produced,
including agreements reached
under Federal Rule of
Evidence 502;

* * * * *

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 16.1. Multidistrict Litigation

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

(b) **Report for the Conference.**

(1) ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

(2) ***Required Content: the Parties' Views on Leadership Counsel and Other Matters.*** The report must address any matter the court designates—which may include any matter in Rule 16—and, unless the court orders otherwise, the parties' views on:

(A) whether leadership counsel should be appointed and, if so:

- (i) the timing of the appointments;
- (ii) the structure of leadership counsel;
- (iii) the procedure for selecting leadership and whether the appointments should be reviewed periodically;
- (iv) their responsibilities and authority in conducting pretrial activities and any role in facilitating resolution of the MDL proceedings;
- (v) the proposed methods for regularly communicating with

and reporting to the court and nonleadership counsel;

(vi) any limits on activity by nonleadership counsel; and

(vii) whether and when to establish a means for compensating leadership counsel;

(B) any previously entered scheduling or other orders that should be vacated or modified;

(C) a schedule for additional management conferences with the court;

(D) how to manage the direct filing of new actions in the MDL proceedings; and

(E) whether related actions have been—or are expected to be—filed in other

4 FEDERAL RULES OF CIVIL PROCEDURE

courts, and whether to adopt methods for coordinating with them.

(3) *Additional Required Content: the Parties'*

Initial Views on Various Matters. Unless the court orders otherwise, the report also must address the parties' initial views on:

- (A) whether consolidated pleadings should be prepared;
- (B) how and when the parties will exchange information about the factual bases for their claims and defenses;
- (C) discovery, including any difficult issues that may arise;
- (D) any likely pretrial motions;
- (E) whether the court should consider any measures to facilitate resolving some or all actions before the court;

- (F) whether any matters should be referred to a magistrate judge or a master; and
- (G) the principal factual and legal issues likely to be presented.

(4) **Permitted Content.** The report may include any other matter that the parties wish to bring to the court's attention.

(c) **Initial Management Order.** After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

**Rule 26. Duty to Disclose; General Provisions
Governing Discovery**

* * * * *

**(f) Conference of the Parties; Planning for
Discovery.**

* * * * *

(3) *Discovery Plan.* A discovery plan must state
the parties' views and proposals on:

* * * * *

(D) any issues about claims of privilege
or of protection as trial-preparation
materials, including the timing and
method for complying with
Rule 26(b)(5)(A) and—if the parties
agree on a procedure to assert these
claims after production—whether to

ask the court to include their
agreement in an order under Federal
Rule of Evidence 502;

* * * * *



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROBERT J. CONRAD, JR.
Secretary

October 17, 2024

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Robert J. Conrad, Jr. *Robert J. Conrad Jr.*
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure and new Rule 16.1, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amended rules and new rule be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments and new rule, I am transmitting (i) clean and blackline copies of the rules and new rule along with committee notes; (ii) an excerpt from the September 2024 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2024 report of the Advisory Committee on Civil Rules.

Attachments

00116

(13)

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹

1 Rule 16. Pretrial Conferences; Scheduling;
2 Management

3 * * * * *

4 (b) Scheduling and Management.

5 * * * * *

6 (3) *Contents of the Order.*

7 * * * * *

8 (B) *Permitted Contents.*

9 * * * * *

10 (iv) include the timing and method
11 for complying with
12 Rule 26(b)(5)(A) and any
13 agreements the parties reach
14 for asserting claims of

¹ New material is underlined; matter to be omitted is lined through.

15 privilege or of protection as
16 trial-preparation material after
17 information is produced,
18 including agreements reached
19 under Federal Rule of
20 Evidence 502;

21 * * * * *

22 Committee Note

23 Rule 16(b) is amended in tandem with an amendment
24 to Rule 26(f)(3)(D). In addition, two words—"and
25 management"—are added to the title of this rule in
26 recognition that it contemplates that the court will in many
27 instances do more than establish a schedule in its Rule 16(b)
28 order; the focus of this amendment is an illustration of such
29 activity.

30 The amendment to Rule 26(f)(3)(D) directs the
31 parties to discuss and include in their discovery plan a
32 method for complying with the requirements in
33 Rule 26(b)(5)(A). It also directs that the discovery plan
34 address the timing for compliance with this requirement, in
35 order to avoid problems that can arise if issues about
36 compliance emerge only at the end of the discovery period.

37 Early attention to the particulars on this subject can
38 avoid problems later in the litigation by establishing case-
39 specific procedures up front. It may be desirable for the
40 Rule 16(b) order to provide for "rolling" production that

41 may identify possible disputes about whether certain
42 withheld materials are indeed protected. If the parties are
43 unable to resolve those disputes, it is often desirable to have
44 them resolved at an early stage by the court, in part so that
45 the parties can apply the court's resolution of the issues in
46 further discovery in the case.

47 Because the specific method of complying with
48 Rule 26(b)(5)(A) depends greatly on the specifics of a given
49 case there is no overarching standard for all cases. In the first
50 instance, the parties themselves should discuss these
51 specifics during their Rule 26(f) conference; these
52 amendments to Rule 16(b) recognize that the court can
53 provide direction early in the case. Though the court
54 ordinarily will give much weight to the parties' preferences,
55 the court's order prescribing the method for complying with
56 Rule 26(b)(5)(A) does not depend on party agreement. But
57 the parties may report that it is too early to settle on a specific
58 method, and the court should be open to modifying its order
59 should modification be warranted by evolving
60 circumstances in the case.

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹

1 **Rule 16.1. Multidistrict Litigation**

2 (a) **Initial Management Conference.** After the Judicial
3 Panel on Multidistrict Litigation transfers actions,
4 the transferee court should schedule an initial
5 management conference to develop an initial plan for
6 orderly pretrial activity in the MDL proceedings.

7 (b) **Report for the Conference.**

8 (1) **Submitting a Report.** The transferee court
9 should order the parties to meet and to submit
10 a report to the court before the conference.

11 (2) **Required Content: the Parties' Views on**
12 **Leadership Counsel and Other Matters.** The
13 report must address any matter the court
14 designates—which may include any matter in

¹ New material is underlined.

15 Rule 16—and, unless the court orders
16 otherwise, the parties' views on;
17 (A) whether leadership counsel should be
18 appointed and, if so:
19 (i) the timing of the
20 appointments;
21 (ii) the structure of leadership
22 counsel;
23 (iii) the procedure for selecting
24 leadership and whether the
25 appointments should be
26 reviewed periodically;
27 (iv) their responsibilities and
28 authority in conducting
29 pretrial activities and any role
30 in facilitating resolution of the
31 MDL proceedings;

32 (v) the proposed methods for
33 regularly communicating with
34 and reporting to the court and
35 nonleadership counsel;
36 (vi) any limits on activity by
37 nonleadership counsel; and
38 (vii) whether and when to establish
39 a means for compensating
40 leadership counsel;
41 (B) any previously entered scheduling or
42 other orders that should be vacated or
43 modified;
44 (C) a schedule for additional management
45 conferences with the court;
46 (D) how to manage the direct filing of
47 new actions in the MDL proceedings;
48 and

49 (E) whether related actions have been—
50 or are expected to be—filed in other
51 courts, and whether to adopt methods
52 for coordinating with them.

53 **(3) Additional Required Content: the Parties'**

54 *Initial Views on Various Matters.* Unless the
55 court orders otherwise, the report also must
56 address the parties' initial views on:

57 (A) whether consolidated pleadings
58 should be prepared;

59 (B) how and when the parties will
60 exchange information about the
61 factual bases for their claims and
62 defenses;

63 (C) discovery, including any difficult
64 issues that may arise;

65 (D) any likely pretrial motions;

66 (E) whether the court should consider any
67 measures to facilitate resolving some
68 or all actions before the court;
69 (F) whether any matters should be
70 referred to a magistrate judge or a
71 master; and
72 (G) the principal factual and legal issues
73 likely to be presented.
74 (4) **Permitted Content.** The report may include
75 any other matter that the parties wish to bring
76 to the court's attention.
77 (c) **Initial Management Order.** After the conference,
78 the court should enter an initial management order
79 addressing the matters in Rule 16.1(b) and, in the
80 court's discretion, any other matters. This order
81 controls the course of the proceedings unless the
82 court modifies it.

83

Committee Note

84 The Multidistrict Litigation Act, 28 U.S.C. § 1407,
85 was adopted in 1968. It empowers the Judicial Panel on
86 Multidistrict Litigation to transfer one or more actions for
87 coordinated or consolidated pretrial proceedings to promote
88 the just and efficient conduct of such actions. The number of
89 civil actions subject to transfer orders from the Panel has
90 increased since the statute was enacted but has leveled off in
91 recent years. These actions have accounted for a substantial
92 portion of the federal civil docket. There has been no
93 reference to multidistrict litigation (MDL proceedings) in
94 the Civil Rules. The addition of Rule 16.1 is designed to
95 provide a framework for the initial management of MDL
96 proceedings.

97 Not all MDL proceedings present the management
98 challenges this rule addresses, and, thus, it is important to
99 maintain flexibility in managing MDL proceedings. Of
100 course, other multiparty litigation that did not result from a
101 Judicial Panel transfer order may present similar
102 management challenges. For example, multiple actions in a
103 single district (sometimes called related cases and assigned
104 by local rule to a single judge) may exhibit characteristics
105 similar to MDL proceedings. In such situations, courts may
106 find it useful to employ procedures similar to those Rule 16.1
107 identifies in handling those multiparty proceedings. In both
108 MDL proceedings and other multiparty litigation, the
109 Manual for Complex Litigation also may be a source of
110 guidance.

111 **Rule 16.1(a).** Rule 16.1(a) recognizes that the
112 transferee judge regularly schedules an initial management
113 conference soon after the Judicial Panel transfer occurs. One
114 purpose of the initial management conference is to begin to
115 develop an initial management plan for the MDL

116 proceedings and, thus, this initial conference may only
117 address some of the matters referenced in Rule 16.1(b)(2)-
118 (3). That initial MDL management conference ordinarily
119 would not be the only management conference held during
120 the MDL proceedings. Although holding an initial
121 management conference in MDL proceedings is not
122 mandatory under Rule 16.1(a), early attention to the matters
123 identified in Rule 16.1(b)(2)-(3) should be of great value to
124 the transferee judge and the parties.

125 **Rule 16.1(b)(1).** The court ordinarily should order
126 the parties to meet to submit a report to the court about the
127 matters designated in Rule 16.1(b)(2)-(3) prior to the initial
128 management conference. This should be a single report, but
129 it may reflect the parties' divergent views on these matters.

130 **Rule 16.1(b)(2).** Unless the court orders otherwise,
131 the report must address all of the matters identified in
132 Rule 16.1(b)(2) (as well as all those in 16.1(b)(3)). The court
133 also may direct the parties to address any other matter,
134 whether or not listed in Rule 16.1(b) or in Rule 16.
135 Rules 16.1(b) and 16 provide a series of prompts for the
136 court and do not constitute a mandatory checklist for the
137 transferee judge to follow.

138 The rule distinguishes between the matters identified
139 in Rule 16.1(b)(2)(B)-(E) and in Rule 16.1(b)(3) because
140 court action on a matter identified in Rule 16.1(b)(3) may be
141 premature before leadership counsel is appointed, if that is
142 to occur. For this reason, 16.1(b)(2) calls for the parties'
143 views on the matters designated in (b)(2) whereas 16.1(b)(3)
144 requires only the parties' initial views on those matters listed
145 in (b)(3).

146 Rule 16.1(b)(2)(C) directs the parties to suggest a
147 schedule for additional management conferences during

148 which the same or other matters may be addressed, and the
149 Rule 16.1(c) initial management order controls only until it
150 is modified. The goal of the initial management conference
151 is to begin to develop an initial management plan, not
152 necessarily to adopt a final plan for the entirety of the MDL
153 proceeding. Experience has shown, however, that the
154 matters identified in Rule 16.1(b)(2)(B)-(E) and
155 Rule 16.1(b)(3) are often important to the management of
156 MDL proceedings.

157 **Rule 16.1(b)(2)(A).** Appointment of leadership
158 counsel is not universally needed in MDL proceedings, and
159 the timing of appointments may vary. But, to manage the
160 MDL proceedings, the court may decide to appoint
161 leadership counsel and many times this will be one of the
162 early orders the transferee judge enters. Rule 16.1(b)(2)(A)
163 calls attention to several topics the court should consider if
164 appointment of leadership counsel seems warranted.

165 The first topic is the timing of appointment of
166 leadership. Ordinarily, transferee judges enter orders
167 appointing leadership counsel separately from orders
168 addressing the matters in Rule 16.1(b)(2)(B)-(E) and
169 16.1(b)(3).

170 In some MDL proceedings it may be important that
171 leadership counsel be organized into committees with
172 specific duties and responsibilities. Rule 16.1(b)(2)(A)(ii)
173 therefore prompts counsel to provide the court with specific
174 suggestions on the leadership structure that should be
175 employed.

176 The procedure for selecting leadership counsel is
177 addressed in item (iii). There is no single method that is best
178 for all MDL proceedings. The transferee judge is responsible
179 to ensure that the lawyers appointed to leadership positions

180 are able to do the work and will responsibly and fairly
181 discharge their leadership obligations. In undertaking this
182 process, a transferee judge should consider the benefits of
183 geographical distribution as well as differing experiences,
184 skills, knowledge, and backgrounds. Courts have considered
185 the nature of the actions and parties, the needs of the
186 litigation, and each lawyer's qualifications, expertise, and
187 access to resources. They have also taken into account how
188 the lawyers will complement one another and work
189 collectively.

190 MDL proceedings do not have the same
191 commonality requirements as class actions, so substantially
192 different categories of claims or parties may be included in
193 the same MDL proceeding and leadership may be comprised
194 of attorneys who represent parties asserting a range of claims
195 in the MDL proceeding. For example, in some MDL
196 proceedings there may be claims by individuals who
197 suffered injuries and also claims by third-party payors who
198 paid for medical treatment. The court may need to take these
199 differences into account in making leadership appointments.

200 Courts have selected leadership counsel through
201 combinations of formal applications, interviews, and
202 recommendations from other counsel and judges who have
203 experience with MDL proceedings.

204 The rule also calls for advising the court whether
205 appointment to leadership should be reviewed periodically.
206 Transferee courts have found that appointment for a term is
207 useful as a management tool for the court to monitor
208 progress in the MDL proceedings.

209 Item (iv) recognizes that another important role for
210 leadership counsel in some MDL proceedings is to facilitate
211 resolution of claims. Resolution may be achieved by such

212 means as early exchange of information, expedited
213 discovery, pretrial motions, bellwether trials, and settlement
214 negotiations.

215 An additional task of leadership counsel is to
216 communicate with the court and with nonleadership counsel
217 as proceedings unfold. Item (v) directs the parties to report
218 how leadership counsel will communicate with the court and
219 nonleadership counsel. In some instances, the court or
220 leadership counsel have created websites that permit
221 nonleadership counsel to monitor the MDL proceedings, and
222 sometimes online access to court hearings provides a method
223 for monitoring the proceedings.

224 Another responsibility of leadership counsel is to
225 organize the MDL proceedings in accordance with the
226 court's initial management order under Rule 16.1(c). In
227 some MDL proceedings, there may be tension between the
228 approach that leadership counsel takes in handling pretrial
229 matters and the preferences of individual parties and
230 nonleadership counsel. As item (vi) recognizes, it may be
231 necessary for the court to give priority to leadership
232 counsel's pretrial plans when they conflict with initiatives
233 sought by nonleadership counsel. The court should,
234 however, ensure that nonleadership counsel have suitable
235 opportunities to express their views to the court, and take
236 care not to interfere with the responsibilities nonleadership
237 counsel owe their clients.

238 Finally, item (vii) addresses whether and when to
239 establish a means to compensate leadership counsel for their
240 added responsibilities. Courts have entered orders pursuant
241 to the common benefit doctrine establishing specific
242 protocols for the management of case staffing, timekeeping,
243 cost reimbursement, and related common benefit issues. But
244 it may be best to defer entering a specific order relating to a

245 common benefit fee and expenses until well into the
246 proceedings, when the court is more familiar with the effects
247 of such an order and the activities of leadership counsel.

248 If proposed class actions are included within the
249 MDL proceeding, Rule 23(g) applies to appointment of class
250 counsel should the court eventually certify one or more
251 classes, and the court may also choose to appoint interim
252 class counsel before resolving the certification question. In
253 such MDL proceedings, the court must be alert to the relative
254 responsibilities of leadership counsel under Rule 16.1 and
255 class counsel under Rule 23(g). Rule 16.1 does not displace
256 Rule 23.

257 **Rule 16.1(b)(2)(B)-(E) and (3).** Rule 16.1(b)(2) and
258 (3) identify a number of matters that often are important in
259 the management of MDL proceedings. The matters
260 identified in Rule 16.1(b)(2)(B)-(E) frequently call for early
261 action by the court. The matters identified by Rule 16.1(b)(3)
262 are in a separate paragraph of the rule because, in the absence
263 of appointment of leadership counsel should appointment be
264 warranted, the parties may be able to provide only their
265 initial views on these matters at the conference.

266 **Rule 16.1(b)(2)(B).** When multiple actions are
267 transferred to a single district pursuant to 28 U.S.C. § 1407,
268 those actions may have reached different procedural stages
269 in the district courts from which they were transferred. In
270 some, Rule 26(f) conferences may have occurred and
271 Rule 16(b) scheduling orders may have been entered. Those
272 scheduling orders are likely to vary. Managing the
273 centralized MDL proceedings in a consistent manner may
274 warrant vacating or modifying scheduling orders or other
275 orders entered in the transferor district courts, as well as any
276 scheduling orders previously entered by the transferee judge.

277 **Rule 16.1(b)(2)(C).** The Rule 16.1(a) conference is
278 the initial management conference. Although there is no
279 requirement that there be further management conferences,
280 courts generally conduct management conferences
281 throughout the duration of the MDL proceeding to
282 effectively manage the litigation and promote clear, orderly,
283 and open channels of communication between the parties
284 and the court on a regular basis.

285 **Rule 16.1(b)(2)(D).** When large numbers of
286 tagalong actions (actions that are filed in or removed to
287 federal court after the Judicial Panel has created the MDL
288 proceeding) are anticipated, some parties have stipulated to
289 “direct filing” orders entered by the court to provide a
290 method to avoid the transferee judge receiving numerous
291 cases through transfer rather than direct filing. If a direct
292 filing order is entered, it is important to address other matters
293 that can arise, such as properly handling any jurisdictional or
294 venue issues that might be presented, identifying the
295 appropriate district court for remand at the end of the pretrial
296 phase, how time limits such as statutes of limitations should
297 be handled, and how choice of law issues should be
298 addressed. Sometimes liaison counsel may be appointed
299 specifically to report on developments in related litigation
300 (e.g., state courts and bankruptcy courts) at the case
301 management conferences.

302 **Rule 16.1(b)(2)(E).** On occasion there are actions in
303 other courts that are related to the MDL proceeding. Indeed,
304 a number of state court systems have mechanisms like
305 § 1407 to aggregate separate actions in their courts. In
306 addition, it may happen that a party to an MDL proceeding
307 is a party to another action that presents issues related to or
308 bearing on issues in the MDL proceeding.

309 The existence of such actions can have important
310 consequences for the management of the MDL proceeding.
311 For example, the coordination of overlapping discovery is
312 often important. If the court is considering adopting a
313 common benefit fund order, consideration of the relative
314 importance of the various proceedings may be important to
315 ensure a fair arrangement. It is important that the MDL
316 transferee judge be aware of whether such actions in other
317 courts have been filed or are anticipated.

318 **Rule 16.1(b)(3).** As compared to the matters listed in
319 Rule 16.1(b)(2)(B)-(E), Rule 16.1(b)(3) identifies matters
320 that may be more fully addressed once leadership is
321 appointed, should leadership be recommended, and thus, in
322 their report the parties may only be able to provide their
323 initial views on these matters.

324 **Rule 16.1(b)(3)(A).** For case management purposes,
325 some courts have required consolidated pleadings, such as
326 master complaints and answers, in addition to short form
327 complaints. Such consolidated pleadings may be useful for
328 determining the scope of discovery and may also be
329 employed in connection with pretrial motions, such as
330 motions under Rule 12 or Rule 56. The Rules of Civil
331 Procedure, including the pleading rules, continue to apply in
332 all MDL proceedings. The relationship between the
333 consolidated pleadings and individual pleadings filed in or
334 transferred to the MDL proceedings depends on the purpose
335 of the consolidated pleadings in the MDL proceeding.
336 Decisions regarding whether to use master pleadings can
337 have significant implications in MDL proceedings, as the
338 Supreme Court noted in *Gelboim v. Bank of America Corp.*,
339 574 U.S. 405, 413 n.3 (2015).

340 **Rule 16.1(b)(3)(B).** In some MDL proceedings,
341 concerns have been raised on both the plaintiff side and the

342 defense side that some claims and defenses have been
343 asserted without the inquiry called for by Rule 11(b).
344 Experience has shown that in many cases an early exchange
345 of information about the factual bases for claims and
346 defenses can facilitate efficient management. Some courts
347 have utilized "fact sheets" or a "census" as methods to take
348 a survey of the claims and defenses presented, largely as a
349 management method for planning and organizing the
350 proceedings. Such methods can be used early on when
351 information is being exchanged between the parties or
352 during the discovery process addressed in
353 Rule 16.1(b)(3)(C).

354 The level of detail called for by such methods should
355 be carefully considered to meet the purpose to be served and
356 avoid undue burdens. Early exchanges may depend on a
357 number of factors, including the types of cases before the
358 court. And the timing of these exchanges may depend on
359 other factors, such as motions to dismiss or other early
360 matters and their impact on the early exchange of
361 information. Other factors might include whether there are
362 issues that should be addressed early in the proceeding (e.g.,
363 jurisdiction, general causation, or preemption) and the
364 number of plaintiffs in the MDL proceeding.

365 This court-ordered exchange of information may be
366 ordered independently from the discovery rules, which are
367 addressed in Rule 16.1(b)(3)(C). Alternatively, in some
368 cases, transferee judges have ordered that such exchanges of
369 information be made under Rule 33 or 34. Under some
370 circumstances—after taking account of whether the party
371 whose claim or defense is involved has reasonable access to
372 needed information—the court may find it appropriate to
373 employ expedited methods to resolve claims or defenses not
374 supported after the required information exchange.

375 **Rule 16.1(b)(3)(C).** A major task for the MDL
376 transferee judge is to supervise discovery in an efficient
377 manner. The principal issues in the MDL proceeding may
378 help guide the discovery plan and avoid inefficiencies and
379 unnecessary duplication.

380 **Rule 16.1(b)(3)(D).** Early attention to likely pretrial
381 motions can be important to facilitate progress and
382 efficiently manage the MDL proceedings. The manner and
383 timing in which certain legal and factual issues are to be
384 addressed by the court can be important in determining the
385 most efficient method for discovery.

386 **Rule 16.1(b)(3)(E).** The court may consider
387 measures to facilitate the resolution of some or all actions
388 before the court. In MDL proceedings, in addition to
389 mediation and other dispute resolution alternatives, focused
390 discovery orders, timely adjudication of principal legal
391 issues, selection of representative bellwether trials, and
392 coordination with state courts may facilitate resolution.
393 Ultimately, the question of whether parties reach a
394 settlement is just that—a decision to be made by the parties.

395 **Rule 16.1(b)(3)(F).** MDL transferee judges may
396 refer matters to a magistrate judge or a master to expedite the
397 pretrial process or to play a part in facilitating
398 communication between the parties, including but not
399 limited to settlement negotiations. It can be valuable for the
400 court to know the parties' positions about the possible
401 appointment of a master before considering whether such an
402 appointment should be made. Rule 53 prescribes procedures
403 for appointment of a master.

404 **Rule 16.1(b)(3)(G).** Orderly and efficient pretrial
405 activity in MDL proceedings can be facilitated by early
406 identification of the principal factual and legal issues likely

407 to be presented. Depending on the issues presented, the court
408 may conclude that certain factual issues should be pursued
409 through early discovery, and certain legal issues should be
410 addressed through early motion practice.

411 **Rule 16.1(b)(4).** In addition to the matters the court
412 has directed counsel to address, the parties may choose to
413 discuss and report about other matters that they believe the
414 transferee judge should address at the initial management
415 conference.

416 **Rule 16.1(c).** Effective and efficient management of
417 MDL proceedings benefits from a comprehensive
418 management order. An initial management order need not
419 address all matters designated under Rule 16.1(b) if the court
420 determines the matters are not significant to the MDL
421 proceeding or would better be addressed in a subsequent
422 order. There is no requirement under Rule 16.1 that the court
423 set specific time limits or other scheduling provisions as in
424 ordinary litigation under Rule 16(b)(3)(A). Because active
425 judicial management of MDL proceedings must be flexible,
426 the court should be open to modifying its initial management
427 order in light of developments in the MDL proceedings.
428 Such modification may be particularly appropriate if
429 leadership counsel is appointed after the initial management
430 conference under Rule 16.1(a).

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹

1 **Rule 26. Duty to Disclose; General Provisions**
2 **Governing Discovery**

3 * * * * *

4 **(f) Conference of the Parties; Planning for**
5 **Discovery.**

6 * * * * *

7 **(3) *Discovery Plan.* A discovery plan must state**
8 **the parties' views and proposals on:**

9 * * * * *

10 **(D) any issues about claims of privilege**
11 **or of protection as trial-preparation**
12 **materials, including the timing and**
13 **method for complying with**
14 **Rule 26(b)(5)(A) and—if the parties**

¹ New material is underlined; matter to be omitted is lined through.

15 agree on a procedure to assert these
16 claims after production—whether to
17 ask the court to include their
18 agreement in an order under Federal
19 Rule of Evidence 502;

20 * * * * *

21 **Committee Note**

22 Rule 26(f)(3)(D) is amended to address concerns
23 about application of the requirement in Rule 26(b)(5)(A),
24 which requires that producing parties describe materials
25 withheld on grounds of privilege or as trial-preparation
26 materials in a manner that “will enable other parties to assess
27 the claim.” Compliance with Rule 26(b)(5)(A) can involve
28 very large burdens for all parties.

29 Rule 26(b)(5)(A) was adopted in 1993, and from the
30 outset was intended to recognize the need for flexibility. This
31 amendment directs the parties to address the question of how
32 they will comply with Rule 26(b)(5)(A) in their discovery
33 plan, and report to the court about this topic. A companion
34 amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the
35 court to include provisions about complying with
36 Rule 26(b)(5)(A) in scheduling or case management orders.

37 This amendment also seeks to provide the parties
38 maximum flexibility in designing an appropriate method for
39 identifying the grounds for withholding materials.
40 Depending on the nature of the litigation, the nature of the
41 materials sought through discovery, and the nature of the

42 privilege or protection involved, what is needed in one case
43 may not be necessary in another. No one-size-fits-all
44 approach would actually be suitable in all cases.

45 Requiring that discussion of this topic begin at the
46 outset of the litigation and that the court be advised of the
47 parties' plans or disagreements in this regard is a key
48 purpose of this amendment, and should minimize problems
49 later on, particularly if objections to a party's compliance
50 with Rule 26(b)(5)(A) might otherwise emerge only at the
51 end of the discovery period. Production of a privilege log
52 near the close of the discovery period can create serious
53 problems. Often it will be valuable to provide for "rolling"
54 production of materials and an appropriate description of the
55 nature of the withheld material. In that way, areas of
56 potential dispute may be identified and, if the parties cannot
57 resolve them, presented to the court for resolution.

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**Agenda E-19
Rules
September 2024**

REPORT OF THE JUDICIAL CONFERENCE**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE****TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE***Rules Recommended for Approval and Transmission***

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 16 and 26, and new Rule 16.1. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor changes to the proposed amendments to new Rule 16.1.

Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would

NOTICE

NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.

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provide that the court may address the timing and method of such compliance in its scheduling order.

After public comment, the Advisory Committee recommended final approval of the proposed amendments as published with minor changes to the committee notes.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings. After several years of work by its MDL subcommittee, extensive discussions with interested bar groups, consideration of multiple drafts, three public hearings on the published draft, and subsequent revisions based on public comment, the Advisory Committee unanimously recommended final approval of new Rule 16.1.

Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. An initial management conference allows for early attention to matters identified in Rule 16.1(b), which may be of great value to the transferee judge and the parties. Because it is important to maintain flexibility in managing MDL proceedings, proposed new Rule 16.1(a) says that the transferee court “should” (not “must”) schedule such a conference.

Rule 16.1(b)—a revised version of what was published as subdivision (c)—encourages the court to order the parties to submit a report prior to the initial management conference. The report must address any topic the court designates—including any matter under Rule 16—and unless the court orders otherwise, the report must also address the topics listed in Rules 16.1(b)(2)-(3). Rule 16.1(b)(2) directs the parties to provide their views on appointment of leadership counsel; previously entered scheduling or other orders; additional management conferences; new actions in the MDL proceeding; and related actions in other courts. Rule 16.1(b)(3) calls for the parties’ “initial views” on consolidated pleadings; principal factual and legal issues; exchange of information about factual bases for claims and defenses; a

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discovery plan; pretrial motions; measures to facilitate resolving some or all actions before the court; and referral of matters to a magistrate judge or master. Because court action on some matters identified in paragraph (b)(3) may be premature before leadership counsel is appointed, those topics are categorized separately from those in paragraph (b)(2). Rule 16.1(b)(4) permits the parties to address other matters that they wish to bring to the court's attention.

Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion. This order controls the MDL proceedings unless and until modified.

Following public comment, the Advisory Committee made some minor changes to the proposed new rule as published. In response to extensive public input, it removed a provision inviting courts to consider appointing "coordinating counsel." For the reasons noted above, it restructured the list of matters to be included in the parties' report into the "views" called for by Rule 16.1(b)(2) and the "initial views" called for by Rule 16.1(b)(3), and it revised those provisions to direct parties to address the listed topics unless the court orders otherwise (rather than obligating the court to affirmatively set out minimum topics to be addressed). It also made stylistic changes based on input from the Standing Committee's style consultants.

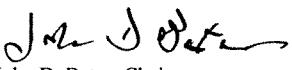
At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

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Respectfully submitted,



John D. Bates

John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	D. Brooks Smith
William J. Kayatta, Jr.	Kosta Stojilkovic
Edward M. Mansfield	Jennifer G. Ziggs
Troy A. McKenzie	
Patricia Ann Millett	

* * * * *

Excerpt from the May 10, 2024 Report of the Advisory Committee on Civil Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules*

DATE: May 10, 2024

Introduction

The Civil Rules Advisory Committee met in Denver, Colorado, on April 9, 2024. Members of the public attended in person, and public on-line attendance was also provided. * * *

In August 2023 proposed amendments to Rule 16(b)(3)(B)(iv) and 26(f)(3)(D) dealing with privilege log issues, and a new proposed Rule 16.1 on MDL proceedings, were published for public comment. The first hearing on the proposed amendments and rule was held in Washington, D.C. on Oct. 16, 2023. 24 witnesses signed up to speak at that in-person hearing.

* A copy of the full committee report can be found in the June 2024 Standing Committee agenda book publicly available on www.uscourts.gov.

Excerpt from the May 10, 2024 Report of the Advisory Committee on Civil Rules

Additional public hearings were held by remote means on Jan. 16 and Feb. 6, 2024, and presented the views of more than 60 additional witnesses. The public comment period ended on Feb. 14, 2024. At its April 9 meeting, the Advisory Committee unanimously voted to forward the “privilege log” amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to the Standing Committee for adoption. It also unanimously voted to forward Rule 16.1, as revised after the public comment period, to the Standing Committee for adoption.

Part I of this report presents these two action items. * * * The “privilege log” rule amendments remained exactly the same, but the Committee Note was shortened. The proposal of a new Rule 16.1 for MDL proceedings was revised by removal of the coordinating counsel provision and reorganized to focus on sequencing of management activities. As detailed in the notes of the MDL Subcommittee’s two online meetings considering the public comment, careful thought was given to these changes. After that subcommittee effort was completed, further style revisions were adopted on recommendation of the Standing Committee’s Style Consultants. Accordingly, the revised rule proposal * * * reflects the style consultants’ contributions as well as the Subcommittee’s revisions.

* * * * *

I. ACTION ITEMS

A. Privilege log amendments proposed for adoption

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv) were published for public comment. There was much comment, from both “producer” and “requester” viewpoints. * * *

After the public comment period, the Discovery Subcommittee met to discuss the comments. * * * There was no consideration of changing the rule amendments themselves, but considerable attention was given to the Committee Note to the Rule 26(f) amendment. The Standing Committee recommended during its January 2023 meeting that this Note be shortened, and the Subcommittee decided after the public comment period to shorten it further.

Though various proposals were made during the public comment period for Note language or rule language to prescribe what should be in a log, the Subcommittee’s view was that “no one size fits all.” Largely for this reason, it seemed that observations in the Note about burdens and methods of ameliorating those burdens are not likely to be particularly useful in individual cases. Nevertheless, there was extensive commentary about the Note. Some urged that it overly favored producing parties. Others urged that it be strengthened to support positions often adopted by producing parties.

The Subcommittee’s consensus was to avoid Note language that seems to favor one “side” or the other. Thus, although the burdens on the producing party of preparing a detailed log can be large, the burdens on the requesting party to make use (perhaps even make sense) of a privilege log are often very heavy as well. Much depends on the circumstances of a given case.

Another challenging aspect going forward is the potential role of technology. Whether or not the term “metadata log” has meaning, it seems clear that many say the term means different

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things to different people. And though some witnesses contended that pretty soon technological advances will supplant existing methods of dealing with logging and simplify (and speed up) the process, it is not possible to be confident about what technology will bring, or when.

Altogether, these thoughts pointed toward pruning controversial statements from the Note. Accordingly, the revised Note below sets the scene for early consideration of privilege log issues while avoiding taking positions on many of the issues raised by participants in the public comment process.

Rule 26(b)(5)(A) cross-reference amendment: There have been proposals that a cross-reference be added to Rule 26(b)(5)(A) itself. But the Subcommittee did not favor taking this additional step. Because it was proposed by several who testified at hearings or submitted written comments, some explanation may be helpful.

In the first place, though adding this change to the existing amendment package should not require republication, it really seems not to add anything. The published amendment directs the parties to address compliance with this rule in their 26(f) meeting. That being the case, it seems odd to add something to this rule to remind people that Rule 26(f) applies. Anyone interested in what must be done at a 26(f) meeting presumably should begin by consulting 26(f); checking 26(b)(5)(A) as well seems an odd effort.

It somewhat seems that proponents of an amendment to 26(b)(5)(A) (from the “producer” perspective) were hoping that the revision there would either disapprove judicial decisions calling for a document-by-document log and/or promote categorical logs. The Subcommittee does not favor taking these steps; the “chaste” draft discussed on Feb. 7 avoided taking such positions.

And there is a more general rulemaking point here: Making cross-references might well be avoided unless necessary. To take a tendentious example, one might think that a cross-reference to Rule 11 might be included in Rule 8(a)(2). Surely Rule 11(b) bears on what attorneys should do as they devise their allegations to satisfy Rule 8(a)(2). The cross-reference idea might lead to a slippery slope toward multiple additions to rules that do not do more than call attention to other rules.

In sum, the Subcommittee recommended adoption of the published rule amendments with a shortened Note, but no change to Rule 26(b)(5)(A) itself.

Rule 45 amendment possibility: During the public comment period, some urged that Rule 45 also be amended to address compliance with Rule 26(b)(5)(A) by nonparties subject to subpoenas. The Subcommittee discussed this possibility during its Feb. 7 meeting and decided it did not warrant action.

Putting aside the possibility that this change could call for republication, a major concern was that the current amendment package is keyed to the Rule 26(f) meeting, which does not involve nonparties who receive subpoenas. Moreover, though there have been many reports about the burdens on parties caused by privilege log requirements, there has not been a comparable level of comment about such problems resulting from subpoenas. In addition, Rule 45(d) already specifically commands those serving subpoenas to “take reasonable steps to avoid

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imposing undue burden or expense" on the person served with the subpoena, and also says that the court "must enforce this duty and impose an appropriate sanction * * * on a party or attorney who fails to comply."

* * * * *

B. New Rule 16.1 for adoption

The Rule 16.1 proposal received a great deal of commentary during the public comment period. * * * The MDL Subcommittee met twice after the public comment period to consider changes to the rule proposal and to the Committee Note. The first meeting was on Feb. 23, 2024, and the second on March 5, 2024. * * *

* * * * *

Here is a quick roadmap of the revised rule proposal * * *:

(1) Eliminating the "coordinating counsel" position: Proposed Rule 16.1(b) invited the court to consider appointing an attorney to act as "coordinating counsel." After the public comment period was completed, on Feb. 23 the Subcommittee considered whether this position might be retained as "liaison counsel," with invocation of the Manual for Complex Litigation (4th) use of the term in § 10.221 (referring to "liaison counsel" who would deal with "essentially administrative matters"). But discussion led the Subcommittee to conclude that the strong reaction against creation of this new position provided a reason for removing it from the rule entirely. It no longer appears in the rule.

(2) Providing that unless the court orders otherwise, the parties must address all the topics listed in the rule: The published draft made the parties' obligation to address certain matters depend on the court taking the initiative to order them to address those specific matters. But requiring affirmative action by the court to get a report on the listed matters seems unnecessary, particularly since the parties can tell the court that it's premature to address certain items. That is implicit in the breakout of certain matters listed in Rule 16.1(b)(3), on which the parties are directed only to provide their "initial views." And the rule continues to say the parties may raise whatever matters they wish to raise whether or not the court ordered them to do so. This shift in no way limits the court's discretion, but it may sometimes reduce the burden on the court and also perhaps suggest to the parties that they might suggest that the court excuse a report on certain topics. The goal is to prepare the court to make the most effective use of the initial management conference.

(3) Subdividing the topics listed in published Rule 16.1(c) into two categories, one directing the parties to provide their views on certain topics and the other calling for the parties' "initial views": These two categories of reporting responsibilities would be divided between Rule 16.1(b)(2) and Rule 16.1(b)(3). These groupings are:

Group 1, in Rule 16.1(b)(2) provides that the parties must provide their views on the following:

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- (A) Whether leadership counsel should be appointed, and if so address a number of matters bearing on the appointment of leadership counsel.
- (B) Previously entered scheduling or other orders that should be vacated or modified;
- (C) A schedule for additional management conferences;
- (D) How to manage the filing of new actions in the MDL proceedings;
- (E) Whether related actions have been filed or are expected to be filed, and whether to consider possible methods of coordinating with those actions.

Group 2 in Rule 16.1(b)(3) provides that the parties must provide the court with their “initial views” on the following unless the court orders otherwise:

- (A) Whether consolidated pleadings should be prepared to account for the multiple actions in the MDL proceedings.
- (B) Principal legal and factual issues likely to be presented;
- (C) How and when the parties will exchange information about the facial bases for their claims and defenses. The revised Note makes clear that this is not discovery, and mentions that the court may employ expedited procedures to resolve some claims or defenses based on this information exchange. It also provides that the court should take care to ensure that the parties have adequate access to needed information.
- (D) Anticipated discovery;
- (E) Likely pretrial motions;
- (F) Whether the court should consider measures to facilitate resolution; and
- (G) Whether matters should be referred to a magistrate judge or a master.

- (4) Initial management order: The court should enter an initial management order regarding how leadership counsel would be appointed if that is to occur and adopting an initial management plan that controls the MDL proceedings until the court modifies it.

* * * * *

ERRATA

April 2025: Before this package was sent to Congress, footnote 2 in Bankruptcy Rules 3002.1 and 8006 indicating that changes were made to the restyled versions of rules not yet in effect was removed. Corrections were also made to correct the following scrivener's errors:

- Appellate Rule 6 (blackline version) at line 217 a comma, shown as struck out, was added after “to appeal”;
- Bankruptcy Rule 3002.1 (blackline version) at line 179 the underlining from the period after (g)(3) was removed; and
- Bankruptcy Rule 3002.1(a) (clean version) at page 62 the “s” in “payments” was removed.

