

Revised Proposed New Rule 16.1 and Note¹
(Clean)

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Rule 16.1. Multidistrict Litigation

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(a) Initial Management Conference. After the Judicial Panel

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on Multidistrict Litigation transfers actions, the transferee

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court should schedule an initial management conference to

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develop an initial management plan for orderly pretrial

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activity in the MDL proceedings.

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(b) Preparing a Report for the Initial Management

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Conference. The transferee court should order the parties to

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meet, prepare and submit a report to the court before the

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conference. Unless otherwise ordered by the court, the report

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must address the matters identified in Rule 16.1(b)(1)-(3)

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and any other matter designated by the court, which may

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include any matter in Rule 16. The report also may address

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any other matter the parties wish to bring to the court's

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attention.

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(1) The report must address whether leadership counsel

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should be appointed and, if so, it should also address

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the timing of the appointment and:

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(A) the procedure for selecting leadership

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counsel and whether the appointment should

¹ This revised Rule 16.1 proposal reflects the changes made to the proposed rule and note following public comment.

- 1314 be reviewed periodically during the MDL
1315 proceedings;
- 1316 **(B)** the structure of leadership counsel, including
1317 their responsibilities and authority in
1318 conducting pretrial activities;
- 1319 **(C)** the role of leadership counsel in any
1320 resolution of the MDL proceedings;
- 1321 **(D)** the proposed methods for leadership counsel
1322 to regularly communicate with and report to
1323 the court and nonleadership counsel;
- 1324 **(E)** any limits on activity by nonleadership
1325 counsel; and
- 1326 **(F)** whether and, if so, when to establish a means
1327 for compensating leadership counsel.
- 1328 **(2)** The report also must address:
- 1329 **(A)** any previously entered scheduling or other
1330 orders that should be vacated or modified;
- 1331 **(B)** a schedule for additional management
1332 conferences with the court;
- 1333 **(C)** how to manage the filing of new actions in
1334 the MDL proceedings;

1391 after the Judicial Panel transfer occurs. One purpose of the initial
1392 management conference is to begin to develop a management plan
1393 for the MDL proceedings and, thus, this initial conference may only
1394 address some but not all of the matters referenced in Rule 16.1(b).
1395 That initial MDL management conference ordinarily would not be
1396 the only management conference held during the MDL proceedings.
1397 Although holding an initial management conference in MDL
1398 proceedings is not mandatory under Rule 16.1(a), early attention to
1399 the matters identified in Rule 16.1(b) should be of great value to the
1400 transferee judge and the parties.

1401 **Rule 16.1(b).** The court ordinarily should order the parties
1402 to meet to provide a report to the court about some or all of the
1403 matters designated in Rule 16.1(b) prior to the initial management
1404 conference. This should be a single report, but it may reflect the
1405 parties' divergent views on these matters, as they may affect parties
1406 differently. Unless otherwise ordered by the court, the report must
1407 address all the matters identified in Rule 16.1(b)(1)-(3). The court
1408 also may include any other matter, whether or not listed in Rule
1409 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of
1410 prompts for the court and do not constitute a mandatory checklist
1411 for the transferee judge to follow.

1412 Regarding some of the matters designated by the court, the
1413 parties may report that it would be premature to attempt to resolve
1414 them during the initial management conference, particularly if
1415 leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B)
1416 directs the parties to suggest a schedule for additional management
1417 conferences during which such matters may be addressed, and the
1418 Rule 16.1(c) initial management order controls only "until the court
1419 modifies it." The goal of the initial management conference is to
1420 begin to develop an initial management plan, not necessarily to
1421 adopt a final plan for the entirety of the MDL proceedings.
1422 Experience has shown, however, that the matters identified in Rule
1423 16.1(b)(1)-(3) are often important to the management of MDL
1424 proceedings.

1425 In addition to the matters the court has directed counsel to
1426 address, the parties may choose to discuss and report about other
1427 matters that they believe the transferee judge should address at the
1428 initial management conference.

1429 Counsel often are able to coordinate in early stages of an
1430 MDL proceeding and, thus, will be able to prepare the report without

1431 any assistance. However, the parties or the court may deem it
 1432 practicable to designate counsel to ensure effective and coordinated
 1433 discussion in the preparation of the report for the court to use during
 1434 the initial management conference. This is not a leadership position
 1435 under Rule 16.1(b)(1) but instead a method for coordinating the
 1436 preparation of the report required under Rule 16.1(b). Cf. Manual
 1437 for Complex Litigation (Fourth) § 10.221 (liaison counsel are
 1438 “[c]harged with essentially administrative matters, such as
 1439 communications between the court and counsel * * * and otherwise
 1440 assisting in the coordination of activities and positions”).

1441 **Rule 16.1(b)(1).** Appointment of leadership counsel is not
 1442 universally needed in MDL proceedings, and the timing of
 1443 appointment may vary. But, to manage the MDL proceedings, the
 1444 court may decide to appoint leadership counsel. The rule
 1445 distinguishes between whether leadership counsel should be
 1446 appointed and the other matters identified in Rule 16.1(b)(2) and (3)
 1447 because appointment of leadership counsel often occurs early in the
 1448 MDL proceedings, while court action on some of the other matters
 1449 identified in Rule 16.1(b)(2) or (3) may be premature until
 1450 leadership counsel is appointed if that is to occur. Rule 16.1(b)(1)
 1451 calls attention to several topics the court should consider if
 1452 appointment of leadership counsel seems warranted.

1453 The first is the procedure for selecting such leadership
 1454 counsel, addressed in subparagraph (A). There is no single method
 1455 that is best for all MDL proceedings. The transferee judge has a
 1456 responsibility in the selection process to ensure that the lawyers
 1457 appointed to leadership positions are capable and experienced and
 1458 that they will responsibly and fairly discharge their leadership
 1459 obligations, keeping in mind the benefits of different experiences,
 1460 skill, knowledge, geographical distributions, and backgrounds.
 1461 Courts have considered the nature of the actions and parties, the
 1462 qualifications of each individual applicant, litigation needs, access
 1463 to resources, the different skills and experience each lawyer will
 1464 bring to the role, and how the lawyers will complement one another
 1465 and work collectively.

1466 MDL proceedings do not have the same commonality
 1467 requirements as class actions, so substantially different categories of
 1468 claims or parties may be included in the same MDL proceeding and
 1469 leadership may be comprised of attorneys who represent parties
 1470 asserting a range of claims in the MDL proceeding. For example, in
 1471 some MDL proceedings there may be claims by individuals who

1472 suffered injuries and also claims by third-party payors who paid for
1473 medical treatment. The court may sometimes need to take these
1474 differences into account in making leadership appointments.

1475 Courts have selected leadership counsel through
1476 combinations of formal applications, interviews, and
1477 recommendations from other counsel and judges who have
1478 experience with MDL proceedings.

1479 The rule also calls for advising the court whether
1480 appointment to leadership should be reviewed periodically. Periodic
1481 review can be an important method for the court to manage the MDL
1482 proceedings. Transferee courts have found that appointment for a
1483 term is useful as a management tool for the court to monitor progress
1484 in the MDL proceedings.

1485 In some MDL proceedings it may be important that
1486 leadership counsel be organized into committees with specific duties
1487 and responsibilities. Subparagraph (B) of the rule therefore prompts
1488 counsel to provide the court with specific suggestions on the
1489 leadership structure that should be employed.

1490 Subparagraph (C) recognizes that another important role for
1491 leadership counsel in some MDL proceedings is to facilitate
1492 resolution of claims. Resolution may be achieved by such means as
1493 early exchange of information, expedited discovery, pretrial
1494 motions, bellwether trials, and settlement negotiations.

1495 One of the important tasks of leadership counsel is to
1496 communicate with the court and with nonleadership counsel as
1497 proceedings unfold. Subparagraph (D) directs the parties to report
1498 how leadership counsel will communicate with the court and
1499 nonleadership counsel. In some instances, the court or leadership
1500 counsel have created websites that permit nonleadership counsel to
1501 monitor the MDL proceedings, and sometimes online access to court
1502 hearings provides a method for monitoring the proceedings.

1503 Another responsibility of leadership counsel is to organize
1504 the MDL proceedings in accordance with the court's initial
1505 management order under Rule 16.1(c). In some MDL proceedings,
1506 there may be tension between the approach that leadership counsel
1507 takes in handling pretrial matters and the preferences of individual
1508 parties and nonleadership counsel. As subparagraph (E) recognizes,
1509 it may be necessary for the court to give priority to leadership

1510 counsel's pretrial plans when they conflict with initiatives sought by
1511 nonleadership counsel. The court should, however, ensure that
1512 nonleadership counsel have suitable opportunities to express their
1513 views to the court, and take care not to interfere with the
1514 responsibilities nonleadership counsel owe their clients.

1515 Finally, subparagraph (F) addresses whether and when to
1516 establish a means to compensate leadership counsel for their added
1517 responsibilities. Courts have entered orders pursuant to the common
1518 benefit doctrine establishing specific protocols for common benefit
1519 work and expenses. But it may be best to defer entering a specific
1520 order until well into the proceedings, when the court is more familiar
1521 with the proceedings.

1522 If proposed class actions are included within the MDL
1523 proceeding, Rule 23(g) applies to appointment of class counsel
1524 should the court eventually certify a class, and the court may also
1525 choose to appoint interim class counsel before resolving the
1526 certification question. In such MDL proceedings, the court must be
1527 alert to the relative responsibilities of leadership counsel under
1528 Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not
1529 displace Rule 23(g).

1530 **Rule 16.1(b)(2) and (3).** Rule 16.1(b)(2) and (3) identify a
1531 number of matters that are frequently important in the management
1532 of MDL proceedings. Unless otherwise ordered by the court, the
1533 parties must address each issue in their report. The matters identified
1534 in Rule 16.1(b)(2) often call for early action by the court. The
1535 matters identified by Rule 16(b)(3) are in a separate section of the
1536 rule because, in the absence of appointment of leadership counsel
1537 should appointment be recommended, the parties may be able to
1538 provide only their initial views on these matters.

1539 **Rule 16.1(b)(2)(A).** When multiple actions are transferred
1540 to a single district pursuant to 28 U.S.C. § 1407, those actions may
1541 have reached different procedural stages in the district courts from
1542 which cases were transferred. In some, Rule 26(f) conferences may
1543 have occurred and Rule 16(b) scheduling orders may have been
1544 entered. Those scheduling orders are likely to vary. Managing the
1545 centralized MDL proceedings in a consistent manner may warrant
1546 vacating or modifying scheduling orders or other orders entered in
1547 the transferor district courts, as well as any scheduling orders
1548 previously entered by the transferee judge. Unless otherwise ordered
1549 by the court, the scheduling provisions of Rules 26(f) and 16(b)

1550 ordinarily do not apply during the centralized proceedings, which
1551 would be governed by the management order under Rule 16.1(c).

1552 **Rule 16.1(b)(2)(B).** The Rule 16.1(a) conference is the
1553 initial management conference. Although there is no requirement
1554 that there be further management conferences, courts generally
1555 conduct management conferences throughout the duration of the
1556 MDL proceedings to effectively manage the litigation and promote
1557 clear, orderly, and open channels of communication between the
1558 parties and the court on a regular basis.

1559 **Rule 16.1(b)(2)(C).** Actions that are filed in or removed to
1560 federal court after the Judicial Panel has created the MDL
1561 proceedings are treated as “tagalong” actions and transferred from
1562 the district where they were filed to the transferee court.

1563 When large numbers of tagalong actions are anticipated,
1564 some parties have stipulated to “direct filing” orders entered by the
1565 court to provide a method to avoid the transferee judge receiving
1566 numerous cases through transfer rather than direct filing. If a direct
1567 filing order is entered, it is important to address other matters that
1568 can arise, such as properly handling any jurisdictional or venue
1569 issues that might be presented, identifying the appropriate district
1570 court for transfer at the end of the pretrial phase, how time limits
1571 such as statutes of limitations should be handled, and how choice of
1572 law issues should be addressed. Sometimes liaison counsel may be
1573 appointed specifically to report on developments in related state
1574 court litigation at the case management conferences.

1575 **Rule 16.1(b)(2)(D).** On occasion there are actions in other
1576 courts that are related to the MDL proceedings. Indeed, a number of
1577 state court systems have mechanisms like § 1407 to aggregate
1578 separate actions in their courts. In addition, it may sometimes
1579 happen that a party to an MDL proceeding becomes a party to
1580 another action that presents issues related to or bearing on issues in
1581 the MDL proceeding.

1582 The existence of such actions can have important
1583 consequences for the management of the MDL proceedings. For
1584 example, the coordination of overlapping discovery is often
1585 important. If the court is considering adopting a common benefit
1586 fund order, consideration of the relative importance of the various
1587 proceedings may be important to ensure a fair arrangement. It is

1588 important that the MDL transferee judge be aware of whether such
1589 proceedings in other courts have been filed or are anticipated.

1590 **Rule 16.1(b)(2)(E).** For case management purposes, some
1591 courts have required consolidated pleadings, such as master
1592 complaints and answers in addition to short form complaints. Such
1593 consolidated pleadings may be useful for determining the scope of
1594 discovery and may also be employed in connection with pretrial
1595 motions, such as motions under Rule 12 or Rule 56. The Rules of
1596 Civil Procedure, including the pleading rules, continue to apply in
1597 MDL proceedings. The relationship between the consolidated
1598 pleadings and individual pleadings filed in or transferred to the
1599 MDL proceedings depends on the purpose of the consolidated
1600 pleadings in the MDL proceedings. Decisions regarding whether to
1601 use master pleadings can have significant implications in MDL
1602 proceedings, as the Supreme Court noted in *Gelboim v. Bank of*
1603 *America Corp.*, 574 U.S. 405, 413 n.3 (2015).

1604 **Rule 16.1(b)(3).** Rule 16.1(b)(3) addresses matters that are
1605 frequently more substantive in shaping the litigation than those in
1606 Rule 16.1(b)(2). As to these matters, it may be premature to address
1607 some in more than a preliminary way before leadership counsel is
1608 appointed, if such appointment is recommended and ordered in the
1609 MDL proceedings.

1610 **Rule 16.1(b)(3)(A).** Orderly and efficient pretrial activity in
1611 MDL proceedings can be facilitated by early identification of the
1612 principal factual and legal issues likely to be presented. Depending
1613 on the issues presented, the court may conclude that certain factual
1614 issues should be pursued through early discovery, and certain legal
1615 issues should be addressed through early motion practice.

1616 **Rule 16.1(b)(3)(B).** In some MDL proceedings, concerns
1617 have been raised on both the plaintiff side and the defense side that
1618 some claims and defenses have been asserted without the inquiry
1619 called for by Rule 11(b). Experience has shown that an early
1620 exchange of information about the factual bases for claims and
1621 defenses can facilitate efficient management. Some courts have
1622 utilized “fact sheets” or a “census” as methods to take a survey of
1623 the claims and defenses presented, largely as a management method
1624 for planning and organizing the proceedings. Such methods can be
1625 used early on when information is being exchanged between the
1626 parties or during the discovery process addressed in Rule
1627 16.1(b)(3)(C).

1628 The level of detail called for by such methods should be
1629 carefully considered to meet the purpose to be served and avoid
1630 undue burdens. Early exchanges may depend on a number of factors,
1631 including the types of cases before the court. And the timing of these
1632 exchanges may depend on other factors, such as motions to dismiss
1633 or other early matters and their impact on the early exchange of
1634 information. Other factors might include whether there are legal
1635 issues that should be addressed (e.g., general causation or
1636 preemption) and the number of plaintiffs in the MDL proceedings.

1637 This court-ordered exchange of information is not discovery,
1638 which is addressed in Rule 16.1(c)(3)(C). Under some
1639 circumstances – after taking account of whether the party whose
1640 claim or defense is involved has reasonable access to needed
1641 information – the court may find it appropriate to employ expedited
1642 methods to resolve claims or defenses not supported after the
1643 required information exchange.

1644 **Rule 16.1(b)(3)(C).** A major task for the MDL transferee
1645 judge is to supervise discovery in an efficient manner. The principal
1646 issues in the MDL proceedings may help guide the discovery plan
1647 and avoid inefficiencies and unnecessary duplication.

1648 **Rule 16.1(b)(3)(D).** Early attention to likely pretrial motions
1649 can be important to facilitate progress and efficiently manage the
1650 MDL proceedings. The manner and timing in which certain legal
1651 and factual issues are to be addressed by the court can be important
1652 in determining the most efficient method for discovery.

1653 **Rule 16.1(b)(3)(E).** Whether or not the court has appointed
1654 leadership counsel, it may be that judicial assistance could facilitate
1655 the resolution of some or all actions before the transferee judge.
1656 Ultimately, the question whether parties reach a settlement is just
1657 that – a decision to be made by the parties. But the court may assist
1658 the parties in efforts at resolution. In MDL proceedings, in addition
1659 to mediation and other dispute resolution alternatives, the court's
1660 use of a magistrate judge or a master, focused discovery orders,
1661 timely adjudication of principal legal issues, selection of
1662 representative bellwether trials, and coordination with state courts
1663 may facilitate resolution.

1664 **Rule 16.1(b)(3)(F).** MDL transferee judges may refer
1665 matters to a magistrate judge or a master to expedite the pretrial

1666 process or to play a part in facilitating communication between the
1667 parties, including but not limited to settlement negotiations. It can
1668 be valuable for the court to know the parties' positions about the
1669 possible appointment of a master before considering whether such
1670 an appointment should be made. Rule 53 prescribes procedures for
1671 appointment of a master.

1672 **Rule 16.1(c).** Effective and efficient management of MDL
1673 proceedings benefits from a comprehensive management order. A
1674 management order need not address all matters designated under
1675 Rule 16.1(c) if the court determines the matters are not significant
1676 to the MDL proceedings or would better be addressed at a
1677 subsequent conference. There is no requirement under Rule 16.1
1678 that the court set specific time limits or other scheduling provisions
1679 as in ordinary litigation under Rule 16(b)(3)(A). Because active
1680 judicial management of MDL proceedings must be flexible, the
1681 court should be open to modifying its initial management order in
1682 light of subsequent developments in the MDL proceedings. Such
1683 modification may be particularly appropriate if leadership counsel
1684 is appointed after the initial management conference under Rule
1685 16.1(a).