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Judiciary Panel Clears 1st MDL Rule, Eyes 'Mouthpiece' Amici

By **Jeff Overley**

Law360 (June 4, 2024, 11:55 PM EDT) -- Top rulemaking gatekeepers for the federal judiciary Tuesday capped off seven years of strife in the defense and plaintiffs bars by backing a milestone measure aimed at optimizing multidistrict litigation, and then promptly greenlighted an entirely different war of words over new efforts to ferret out amicus briefs from "paid mouthpieces" masquerading as independent experts.

The Rulemaking Road for MDLs

The effort to craft a rule for management of multidistrict litigation may span nearly a decade by the time it concludes.

2017

MDL Subcommittee of the Advisory Committee on Civil Rules is established.

April 2018

Subcommittee issues first report to full committee.

November 2018

Subcommittee meets and identifies "winnowing unsupportable claims" as key area of focus.

March 2023

Full committee advances a draft MDL rule.

June 2023

Judicial Conference Standing Committee approves draft rule's publication.

August 2023

Draft rule is published in Federal Register.

February 2024

Six-month public comment period concludes.

April 9, 2024

Advisory committee approves a revised version of the rule.

June 4, 2024

The Committee on Rules of Practice and Procedure, also known as the Standing Committee, gave final approval to the rule.

May 1, 2025

Target deadline for adoption by U.S. Supreme Court and transmittal to Congress.

Dec. 1, 2025

Rule takes effect if requisite approvals occur, absent congressional action.

Source: Advisory Committee on Civil Rules; Law360 reporting.

The dual developments occurred at the Judicial Conference's main policy panel, which stamped its approval on **the first rule governing MDLs** — vast sets of comparable cases often alleging harm from products or practices — and separately endorsed publication of a proposal to require greater transparency and court permission for appellate amicus briefs.

With respect to MDLs, the panel — known as the Committee on Rules of Practice and Procedure, or simply the Standing Committee — unanimously gave final approval to Federal Rule of Civil Procedure 16.1, which started taking shape in 2017 and repeatedly evolved amid intense acrimony.

"A number of people have contributed to the long, hard work on 16.1," U.S. District Judge Robin L. Rosenberg, who chairs the Advisory Committee on Civil Rules and **famously obliterated a major MDL** involving the heartburn drug Zantac, said at Tuesday's meeting. "We heard from attorneys and others on both sides of the V, and from mass torts and class action attorneys, [and] each had their own positions and ideas."

Those positions and ideas ultimately came together into a largely optional guide for MDL management, and lawyers for both corporations and consumers characterized it Tuesday as a sensible compromise.

"I am impressed by the balance the committee tried to strike," Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein LLP, a panel member and one of the plaintiffs bar's top attorneys for MDLs, said at Tuesday's meeting. "I don't think it could ever be perfect … but I think it's sufficient in terms of trying to be flexible."

Sue Steinman, senior policy director at the American Association for Justice, which advocates for trial lawyers, echoed that comment, telling Law360 that the rule "prioritizes important MDL management issues," and that the AAJ "applauds the balance of flexibility and structure provided by Rule 16.1."

The rule's structure is essentially a template for how judges and lawyers can efficiently organize MDLs and steer them toward bellwether trials, settlements or both, depending on the circumstances. It recommends an initial management plan, advises parties to consider appointing leadership counsel, and urges the early creation of a report describing "how and when the parties will exchange information about the factual bases for their claims and defenses."

The information exchange provision was a major focus of the defense bar, which has portrayed MDLs — which often contain thousands of lawsuits — as **increasingly plagued by meritless claims** that piggyback on potentially legitimate cases in hopes of scoring a slice of settlements before facing scrutiny.

"There has been and will continue to be significant debate about the details of the [rule]," Kimberly Branscome, a partner at Paul Weiss Rifkind Wharton & Garrison LLP, told Law360 after Tuesday's meeting in Washington, D.C. "However, a [rule] specifically governing MDLs will be a key step forward in helping judges and practitioners navigate the complex landscape of mass torts."

Shook Hardy & Bacon LLP managing partner Phil Goldberg, who watched Tuesday's proceedings, told Law360 in a Tuesday interview that the outcome will facilitate early analysis under Federal Rule of Civil Procedure 11(b), which forces plaintiffs counsel to certify their "factual contentions have evidentiary support or ... will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."

"It's something that is important to us, and important to making sure that MDLs can focus on real claims affecting real people, and are not going to be places where claims are stockpiled regardless of whether they can even support the fact that they use the product or have the injury that the MDL is dealing with," Goldberg said.

Big business and BigLaw have fought vigorously to shape the MDL rule, with the campaign largely led by Lawyers for Civil Justice, which counts dozens of multibillion-dollar corporations and powerhouse law firms among its members.

Alex Dahl, general counsel of Lawyers for Civil Justice, reacted favorably to Tuesday's vote, saying in a statement that "if employed appropriately, the new rule will prevent meritless claims from being asserted in the first place and also give courts a new management tool for addressing any such claims that are filed."

Although the rule still requires approval by the Judicial Conference and the U.S. Supreme Court, Tuesday's vote all but ensures its adoption. And while it's not set to take effect until December 2025, its influence might be felt before it's officially on the books.

"There's no reason to wait for official adoption for MDL judges to look at this and be guided by it and make decisions as a result of this rule," Goldberg said.

As the Standing Committee on Tuesday steered the Rule 16.1 saga toward its final destination, it also hit the accelerator on a brand-new policymaking adventure. At issue are proposed amendments to Federal Rule of Appellate Procedure 29, which deals with the content and form of amicus briefs from individuals or organizations that want to share perspective on a case.

Many of the proposed amendments would require new or different disclosure of financial links, such as whether counsel or a litigant contributed 25% or more of an amicus filer's revenue, or whether someone earmarked dollars specifically to bankroll a brief. A committee note accompanying the proposal did not mince words about the impetus.

"Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor," the note said, adding that courts have an interest in "evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus."

Other aspects of the proposal would require nongovernmental parties to obtain a judge's permission before filing a friend-of-the-court brief. That idea generated widespread criticism at Tuesday's meeting from panelists who voiced worries about harming civic participation, straining overburdened courts and putting everyone through a pointless permission process.

"Even if [a brief] is not helpful at all, a lot of times, you just let it in, because it's a way for people to express their views to the court, which I think is a very important part of the openness of our process," U.S. Circuit Judge Patricia A. Millett of the D.C. Circuit, one of the proposal's most strident critics on Tuesday, said at the meeting.

That view was seconded by U.S. Circuit Judge William J. Kayatta Jr. of the First Circuit, who said, "I share the concerns of Judge Millett. … I don't see why we're having a requirement that people seek leave for something that's essentially going to be automatically granted all the time anyhow."

Panel member Louis A. Chaiten of Jones Day also pointed out that the U.S. Supreme Court, in a policy that took effect in 2023, **eliminated the consent duty** for amicus filings.

"I do think it's a little odd that this rule is going against the precedent that the Supreme Court set in their revision last year to allow amicus briefs without consent or motion," Chaiten said.

U.S. Circuit Judge Jay S. Bybee of the Ninth Circuit, who chairs the Advisory Committee on Appellate Rules, nonetheless encouraged panelists to authorize the proposal's publication, while also acknowledging that the associated public comment period is likely to be boisterous.

"It is clear that our proposal is going to generate a lot of public controversy," Judge Bybee said Tuesday. "[But] we're at that Goldilocks moment in which we have to decide whether we've gone too far, haven't gone far enough, or whether it's just right. And we think that we need to hear from the public."

After the panelists accepted Judge Bybee's recommendation, Lawrence S. Ebner of the Atlantic Legal Foundation, which frequently files amicus briefs, quickly validated the judge's prediction, telling Law360 that the leave requirement would "create uncertainty that may deter preparation of amicus briefs that otherwise would facilitate appellate decision-making."

"At a time when the federal judicial system needs to be more, not less, transparent, requiring a motion for leave is an inexplicable step backwards," Ebner said.

--Editing by Michael Watanabe.