

# **CIVIL LITIGATION MANAGEMENT MANUAL**

**The Judicial Conference of the United States**

**Committee on  
Court Administration and Case Management**

**2001**

**This manual is for the guidance of judges. It is not intended to be relied upon as authority, and it creates no rights or duties.**



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*of the*  
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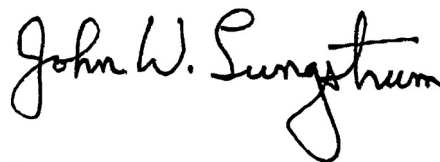
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The *Civil Litigation Management Manual*, which was approved by the Judicial Conference of the United States at its March 2001 session, was prepared under the direction of the Judicial Conference Committee on Court Administration and Case Management during the chairmanship of Judge D. Brock Hornby, with substantial contributions by the Administrative Office of the U.S. Courts and the Federal Judicial Center. The manual was written for United States judges to help them secure “the just, speedy, and inexpensive determination of every action.”

This manual has its origin in the Civil Justice Reform Act of 1990, which directs the Judicial Conference, with the assistance of the Administrative Office and the Federal Judicial Center, to “prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction.” It is one more response to a need frequently expressed by judges—that is, to learn about the case management practices of other judges. Thus, the manual reflects, in its text and in the forms included in Appendix A, the varied experiences of district and magistrate judges. We are grateful to the many judges and courts who provided models on which we could draw.

This manual is available in print as well as electronically on the judiciary’s Web site. We hope that access to the electronic copy will make the manual even more useful, particularly for judges who wish to adapt or use a portion of a form or order. Although the manual contains many forms and orders, the documents included reflect only a small portion of those available. We urge judges who are interested in seeing the forms and orders used by their colleagues, or who wish to make their own forms and orders available, to use the Web sites developed by the individual courts. We found many of these sites to be rich sources of information and relied heavily on them for the materials in Appendix A.

With every good wish that the manual will be helpful to our colleagues on the bench, and with grateful thanks to the Administrative Office and the Federal Judicial Center for supporting the committee in this project, the Court Administration and Case Management Committee offers this manual for your consideration and use.



John W. Lungstrum  
Chair, Court Administration and  
Case Management Committee



## Acknowledgments

The *Civil Litigation Management Manual* was prepared under the direction of the Committee on Court Administration and Case Management of the Judicial Conference. Two members of the committee, District Judge Harry L. Hupp and Magistrate Judge Jerry A. Davis, served as liaison judges to the manual's advisory group and the staff who drafted the manual. The committee is grateful to Judge Hupp and Judge Davis for their oversight of the manual's development. The committee is also grateful to the following judges who served on the advisory group for the manual: District Judges Marvin E. Aspen, Jean C. Hamilton, Wm. Terrell Hodges, Sim Lake, John R. Padova, and Claudia Wilken, and Magistrate Judge Patricia A. Hemann. Their careful scrutiny and thoughtful suggestions were most helpful and are greatly appreciated.

The first version of this manual, the *Manual for Litigation Management and Cost and Delay Reduction*, was published by the Federal Judicial Center in 1992. Its text was the starting point for the present manual and remains the core around which it is built. In writing the manual, staff turned to a number of other sources as well. Among these were materials prepared for judicial education programs sponsored by the Center. The committee acknowledges with thanks the judges whose lectures or course outlines provided case management techniques that have been incorporated into the manual: Judges Marvin E. Aspen, D. Brock Hornby, David W. McKeague, Loretta A. Preska, Fern M. Smith, and Ann C. Williams. The committee is also indebted to the judges and courts that have posted their forms, orders, and local rules on their Web sites; ready access to these materials made the task of assembling Appendix A considerably easier. Appreciation is given as well to court staff who assisted, when necessary, in retrieving court forms and orders.

Staff from the Administrative Office of the U.S. Courts and the Federal Judicial Center who were responsible for drafting the manual were, respectively, Fred Russillo and Donna Stienstra. Additional help was provided by the following staff. From the Administrative Office, Abel Mattos, Jeffrey Hennemuth, and Peter McCabe reviewed the manual at several stages during its development, and Katie Simon assisted with and reviewed Chapter VIII. From the Federal Judicial Center, Joe Cecil, Tom Willging, and Ken Withers drafted parts of Chapters III and VII and reviewed all or portions of the manual; Dean Miletich helped in identifying the forms cited throughout the manual; Roger Karr and Matt Sarago provided bibliographic help; Kristina Gill did cite checking; Jeannette Summers and Tyeika Hartsfield provided clerical assistance; and David Marshall and Martha Kendall prepared the manual for publication.

The committee also gratefully acknowledges any others who helped in creating this manual but may have been inadvertently excluded above.



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## INTRODUCTION

Is a federal judge an adjudicator or a case manager? The interplay between these two judicial roles has sometimes left confusion in its wake. Increasing caseloads, changing perspectives on the function of courts in our society, public demands for accountability in both resource use and performance in all branches of government, and the continuing reality of budget deficits have forced reappraisal of this question. In fact both functions—adjudication and case management—are critical judicial roles, the second used in service of the first. As was noted in the Judicial Conference’s *The Civil Justice Reform Act of 1990: Final Report*, “The federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation, and thus ensure the ‘just, speedy, and inexpensive’ determination of civil actions called for in the Federal Rules of Civil Procedure.”<sup>1</sup> Managed cases will settle earlier and more efficiently, and will provide a greater sense of justice to all participants. Even in the absence of settlement, the result will be a more focused trial, increased jury comprehension, and a more efficient and efficacious use of our scarcest institutional resource, judge time.

Beyond the rationale to act as case managers lies the question of the authority to do so: Do the national rules support this judicial role? Do the local rules and legal culture provide a basis for managerial interventions in the litigation process? Do judges have the authority to tell lawyers and litigants to do it *my* way, when zealous advocates want to do it *their* way? The answer is clearly yes. Look to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. They contain all the authority to do what has to be done.

### *Federal Rules of Civil Procedure*

- Rule 1: Rules shall be construed to secure the just, speedy, and inexpensive determination of every action.
- Rule 16: Judges are authorized to hold pretrial conferences and to enter scheduling orders.
- Rule 61: Courts at every stage of the proceeding must disregard errors or defects that do not affect the substantial rights of the parties.
- Rule 83: In all cases not provided for by rule, district judges may regulate their practice in any manner consistent with federal law and local rules of the district in which they act.

### *Federal Rules of Evidence*

- Rule 102: Rules shall be construed to secure elimination of unjustifiable expense and delay.
- Rule 403: Relevant evidence may be excluded for consideration of undue delay, wasted time, and needless presentation of evidence.

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1. Judicial Conference of the U.S., *The Civil Justice Reform Act of 1990: Final Report* 10 (1997) [hereinafter JCUS CJRA Report].

- Rule 611(a): District courts shall exercise reasonable control over presentation of evidence so as to avoid needless consumption of time.

So, ample authority exists in the rules—and as derived from judges’ inherent authority—for the judge to take charge of the case. In fact, the rules give the judge the responsibility to make sure cases are resolved expeditiously. In addition, the Judicial Conference specifically endorses a number of complementary case management tools, such as early and firm trial dates, differential treatment of cases, and early neutral evaluation.

The Judicial Conference has encouraged these practices in part from long experience but also in light of research conducted under the Civil Justice Reform Act (CJRA), which concluded that three specific case management principles, when used together, can reduce litigation costs and time: early judicial control of the case, reduction of the time permitted for discovery, and early setting of a trial date. Based on these findings, a RAND study<sup>2</sup> suggested a general approach to early management of civil cases:

- For cases in which issues have not yet been joined, monitor them to ensure that deadlines for service and answer are met, and begin judicial action to dispose of them if those deadlines are missed.
- For cases in which issues are joined, wait a short time after the joinder date (perhaps a month) to see if these cases will terminate; if they do not, resume active judicial case management.
- Include the setting of a firm trial date as part of the early case management approach and adhere to that date as much as possible.
- Include the early setting of a reasonably short discovery cutoff time tailored to the individual case. For nearly all general civil cases, this policy should foster judicial case management within six months or less after filing.<sup>3</sup>

Each of the above principles should be reflected in initial scheduling activities. The question for the trial judge is how best to approach these tasks, within the context of his or her own chambers, court, and local legal culture. Fortunately, over time judges and courts have developed numerous tested and successful prac-

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2. James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaina, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, Executive Summary 26-28 (RAND Institute for Civil Justice 1996) [hereinafter *RAND CJRA Report*].

3. The Judicial Conference, in the JCUS CJRA Report, noted the importance of setting a schedule, as authorized by Rule 16, and endorsed the RAND study’s finding that early judicial case management significantly reduced time to disposition (*see supra* note 1, at 31). The Conference is opposed, however, to establishing as policy a uniform time frame, such as eighteen months, within which all trials must begin. The Conference stated that “[a] standard time frame may be counterproductive and slow down cases that could be disposed of much more quickly. Prescribing a national rule with specific trial deadlines could also lead to the same difficulties in [civil] case management that are caused [in criminal cases] by the Speedy Trial Act.” *Id.*

tices and procedures, many of which we present in this manual. Those described here are derived from many sources, including judges' published writings, court orders, lectures, CJRA plans, and materials provided at Federal Judicial Center education programs for judges. In addition, we have borrowed heavily from an earlier FJC publication, *Manual for Litigation Management and Cost and Delay Reduction*.<sup>4</sup> Finally, and most gratefully, we have drawn upon the many years of experience of the judges who have generously donated their time and expertise to this project.

The discussion in the manual's first six sections generally follows the chronology of a civil case. Thus, we begin with techniques for monitoring service of process and conclude with management of trials. Sections seven through nine turn to more specialized matters, such as the management of special types of cases, personnel resources, and institutional issues in litigation management.

Management of criminal cases is not covered in this manual. The *Manual on Recurring Problems in Criminal Trials* (Federal Judicial Center 5th ed., 2001) contains a wealth of material judges will find helpful in the management of criminal litigation.

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4. *Manual for Litigation Management and Cost and Delay Reduction* (Federal Judicial Center 1992).





## I. EARLY AND ONGOING CONTROL OF THE PRETRIAL PROCESS

- A. Establishing Early Case Management Control
  - 1. In general
  - 2. Specific techniques
    - a. Initial scheduling orders and case management information packages
    - b. Early case screening
- B. Prompting Counsel to Give Early Attention to the Case
  - 1. In general
  - 2. The parties' "meet and confer" conference and mandatory initial disclosures
  - 3. Supplementing the "meet and confer" agenda

### A. Establishing Early Case Management Control

Establishing early control over the pretrial process is pivotal in controlling litigation cost and delay.<sup>5</sup> Early control includes effective use of rules, procedures, and discretionary authority that cumulatively establish your role in the progress and conclusion of the case before you. It is very important to view this as a continuing process that includes an ongoing interplay between prefiling instructions, counsel actions, counsel meetings, and case management plans, extending from filing to disposition in every case. It would be hard to overestimate the importance of your investments of time and thought into how you will use the case management tools central to the exercise of your authority. Your discretionary tailoring of these tools to each case and your maintenance of consistency in applying them will help ensure your success as a judge.

#### 1. In general

How early is "early," and how much control is necessary? The control issue was ably addressed by Judge Alvin Rubin:

[T]he judicial role is not a passive one . . . it is the duty of the judge alone . . . to step in at any stage of the litigation where intervention is necessary in the interests of justice. Learned Hand wrote, "a judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."<sup>6</sup>

This intervention cannot occur too soon; the process of federal case management, and the role accorded the assigned judge in its administration, argue for the *earliest* exercise of control and oversight to ensure that case resolution comes at the soonest, most efficacious, and least costly moment in every case. Control over

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5. See RAND CJRA Report, *supra* note 2, at 1, 11–16.

6. Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 136 (1978).

your cases will also help ensure that justice is not delayed and that you can give cases the kind of attention they need for a just resolution of the dispute.

## 2. Specific techniques

While individual districts may differ, cases are usually assigned to district judges, and in some districts to magistrate judges (see *infra* section VIII.B.5), immediately after filing. It is here, at this early juncture, that your first opportunity for judicial oversight and management control arises.

### *a. Initial scheduling orders and case management information packages*

An important early opportunity to assert judicial control and shape attorney expectations regarding every aspect of litigation practice and management arises at filing and assignment. In some districts, upon filing or shortly thereafter, an initial scheduling order is issued, setting out important early dates, such as deadlines for filing proof of service, for holding the Federal Rule of Civil Procedure 26(f) “meet and confer” conference, and for making disclosures. Such an order can also inform attorneys of the date for the initial Rule 16 case management conference. For examples of orders, see Appendix A, Forms 1–3.

Filing also provides an opportunity to give parties a case management information package tailored to the district and the chambers of the assigned judge. Such a package can outline the specific expectations for counsel and parties, including the judge’s administrative, case management, and courtroom procedures.<sup>7</sup> Alternatively (or additionally), this information can be posted on the court’s Web site. In addition to general pretrial practice tips, hard-copy or Web-site materials may include specific information regarding the form in which attorneys should submit the reports or joint statements required by Rule 16 or 26. Forms 4–9 in Appendix A provide several examples of the information provided by individual judges and courts to attorneys early in the case.

*Consider* creating a case management information package containing

- a statement or booklet outlining general rules of practice and procedure (including motions, continuances, decorum, and specialized standing orders or rules) for your court;
- an order setting out procedures to be followed, deadlines to be met, and topics to be covered in the parties’ first “meet and confer” conference under Rule 26(f);
- an outline (or exemplar/form/format), set of procedures, and topic list for submission of joint case management and discovery plans;
- an order detailing mandatory information and document exchanges or accelerated discovery under Rule 26;

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7. See *Changes in Compliance with the Civil Justice Reform Act*, in U.S. District Courtroom Deputies at Work 11–12 (Federal Judicial Center 1992).

- an order governing pretrial conferences; and
- a form for consent to proceed before a magistrate judge.

In the following chapters we discuss many of the procedures listed above, such as the attorneys' Rule 26 "meet and confer" conference, their joint case management statement, and the judge's scheduling and final pretrial orders. In each instance, citation is made to examples of forms in Appendix A.

Using such tools as an initial scheduling order or a case management information package, you can provide specific and early notice to the parties of all preparations you want them to make prior to your first status or scheduling conference. In addition, by structuring their initial planning meetings under Rule 26(f), you can ensure that all parties will subsequently make effective use of your limited, formal conference time.

*b. Early case screening*

Further early judicial control can be established through creative screening of the information contained in the initial pleadings and the civil cover sheet (JS-44). Some districts require additional information to facilitate early case screening.<sup>8</sup> Your regular, structured screening of new case assignments (or the delegation of this task with specific guidelines to a magistrate judge, law clerk, or courtroom deputy) can provide an early warning of potential case management problems. You can then address these problems through an early status conference, conference call, order, or other intervention before they deepen. You can look for potential service problems, potential proof problems, complex legal or factual issues, and early dispositive motions and address each according to your guidelines.

*Consider*

- if the plaintiff's case includes out-of-state defendants or factual and expert witnesses, issuing an order expediting a status or scheduling conference once key defendants have been served;
- in the event of inexperienced counsel handling novel cases or matters that present complex proof problems, making an early referral to early neutral evaluation (ENE) (see *infra* section V.B.3);
- in the event of an early dispositive motion, making a conference call to determine its ripeness for a ruling; and
- in the event of repeated discovery squabbles or claims of excessive discovery motions practice, making a conference call to establish parameters.

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8. See, e.g., U.S. District Court for the District of Oregon, Civil Justice Expense and Delay Reduction Plan 5–7 (1991); see also U.S. District Court for the District of Massachusetts, Expense and Delay Reduction Plan, Early Assessment of Cases 9–10, 15–16 (1991) [hereinafter D. Mass. CJRA Plan].

Early screening can be the “trip wire” of your case management: It allows you to head off problems as they develop, reinforce your authority, and adjust your case management posture as necessary to keep cases moving and on schedule.

## **B. Prompting Counsel to Give Early Attention to the Case**

### **1. In general**

While the responsibilities of a civil case are shared by and weigh on all participants, the primary responsibility lies with counsel, not the court. Federal rules and procedures have increasingly recognized the value of placing these responsibilities on the plaintiff and the defendant and the need to conserve the system’s most limited resource, judicial time. However, one of the more common observations of the civil justice reform movement has been that opposing counsel are often unacquainted at the time of the first Rule 16 conference. Subsection (f) of Rule 26 seeks to fill that gap by forcing counsel to meet and jointly prepare for the Rule 16 conference; informally exchange core case information; and adopt, to the extent possible, a joint plan for case management. The rule provides tools through which you can delegate significant discovery and case management responsibilities directly to the parties. Early preparation by counsel will minimize the need for your unscheduled case interventions and maximize the value of those interventions when they do occur. These results become especially important during your later Rule 16 and final pretrial conferences.

### **2. The parties’ “meet and confer” conference and mandatory initial disclosures**

Rule 26(f) requires that the parties in most types of cases meet and confer at least twenty-one days before the initial Rule 16 conference is held or the scheduling order is due. The purpose of this meeting is to discuss the nature and basis of their claims and defenses, develop a proposed discovery plan, discuss the possibility of settlement, prepare a joint case management report to the court, and exchange certain information or arrange for its exchange within fourteen days of the “meet and confer” conference (Rule 26(a)(1)).<sup>9</sup>

The parties’ Rule 26(f) conference presents an early opportunity for counsel to analyze their case and plan its subsequent development. Equally important are the relationships that can be developed between counsel and between counsel and the judge, which depend in part on how you convey your expectations regarding this meeting. The tenor of these relationships will color subsequent interactions between counsel, as well as between you and them.

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9. Rule 26 does not apply to those limited actions specified under subdivision 26(a)(1)(E). The rule requires each party to disclose the names, addresses, and telephone numbers of persons likely to have discoverable information to support its claims or defenses; to identify documents, data, and things that support its claims or defenses; to provide a computation of damages claimed, along with the documents and other materials on which the computation is based; and to provide for inspection and copying any insurance agreement that may satisfy all or part of the judgment.

Laying an appropriate foundation for this meeting can begin with the initial scheduling orders and information packages discussed earlier (see *supra* section I.A.2.a). By either of these means, you can set a date for the Rule 16 conference and key the Rule 26(f) meeting to it, or you can instruct counsel to ask chambers directly about appropriate dates and timing. An initial order or information package can also communicate your expectations for the “meet and confer” conference, the preparations and work products you expect to emerge from it, and the end results you want to achieve. The Rule 26 work products, such as the disclosures made and the joint discovery plan, are outlined in Rule 26 and its suggested format for the joint report, which is reproduced in Appendix A, Form 10.

It is helpful to make clear that the discovery plan and joint case management report prepared by the parties will play a central role in determining the subject matter of the subsequent Rule 16 conference. Some judges issue an order of general instructions, whereas others issue an order that will, with the judge’s signature at the Rule 16 conference, become the scheduling order for the case. See Appendix A, Forms 2, 11–15 for examples of orders concerning the Rule 26(f) meeting and the joint case management report and discovery plan.

### 3. Supplementing the “meet and confer” agenda

Although Rule 26(f) serves as a point of departure in establishing requirements for the “meet and confer” conference, you may wish to add other requirements particularly suited to your own case management practices, including agenda items for subsequent Rule 16 conference planning.

#### *Consider*

- requiring that the plaintiff submit to the defendants, no later than ten days before the Rule 16 conference, written settlement proposals to be exchanged (or discussed) at that conference;<sup>10</sup>
- requiring that the parties submit their views on the utility of any available ADR devices in enhancing early settlement prospects;
- requiring a proposed schedule for the filing of motions;
- establishing a timetable for filing and service of dispositive motions under Federal Rule of Civil Procedure 12 or 56;<sup>11</sup>
- identifying an anticipated date of trial (based on the discovery plan) and expected number of trial days;
- establishing a proposed agenda for the Rule 16 conference; and
- requiring that the joint case management plan (with dissenting addenda, as necessary) be filed with the court no later than two weeks before the Rule 16 conference.

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10. See, e.g., D. Mass. CJRA Plan, *supra* note 8, at 21.

11. See, e.g., U.S. District Court for the Eastern District of Pennsylvania, Civil Justice Reform Act Plan, Development of a Joint Plan (5), ch. VII, § 701 (1991).



## II. SETTING AND MONITORING A CASE MANAGEMENT PLAN

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The foundation of civil case management is the case schedule, which sets deadlines for *both* attorney and judicial actions leading to case disposition. Every civil case should be placed on a schedule, whether the case is an administrative matter, such as a Social Security review, or a complex, multiparty action. Scheduling is critical to effective litigation management for two reasons: (1) deadlines help ensure that attorneys will complete the work required to bring the case to timely resolution; and (2) unless a case is scheduled for an event (for example, a conference or filing of a motion), it may drop from sight.

Federal Rule of Civil Procedure 16(b) directs that a scheduling order be issued following the initial conference in every case (except those exempted by local rule) and that the scheduling order shall control the course of the action unless modified by a subsequent order (Rule 16(c)).<sup>12</sup> Even in cases exempted by local rule from Rule 16(c), a minimal but firm schedule should be set. At the other end of

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12. See generally Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525 (1992).

the scale are cases, such as some class action and mass tort cases, that require extensive management, numerous rulings, and periodic adjustments to the schedule as the case unfolds; for guidance in handling the special needs of these cases, see the *Manual for Complex Litigation, Third*.<sup>13</sup>

Your goal should be to set a schedule that is as tight as possible but also realistic in light of what you know about the case, the attorneys, the settlement posture of the parties, and the need to develop information necessary for a reasoned and principled resolution of disputed issues. Scheduling is an art form; although it benefits from the structure provided by rules, it does require you to exercise your best judgment in every case.

### A. Consulting with Lawyers and Unrepresented Parties

There are several approaches to setting a case schedule, including automatic issuance of a standard schedule for all cases of a certain type, review and approval of a schedule submitted by the lawyers, and preparation of a schedule in consultation with the lawyers at a Rule 16 conference. One question you may have is whether it is necessary or useful to consult with the lawyers to set the schedule.

Rule 16(b) provides that the judge shall enter a scheduling order after consulting with attorneys and unrepresented parties. Note that the rule specifically includes consultation with unrepresented parties. Consultation is important for two reasons: (1) consideration of the subjects listed in Rule 16(c) may be necessary or helpful in arriving at an appropriate scheduling order; and (2) the rule provides that the schedule shall not be modified except by leave of the court upon a showing of good cause. Orders therefore need to be realistic, taking into account the needs of the case, your calendar, and the lawyers' other commitments (see *infra* section II.D for discussion of the scheduling order). The District of Massachusetts has embodied these goals in its local CJRA delay reduction plan:

The most effectively managed cases often are those in which a relatively early scheduling conference is convened by the judge, and . . . a case-specific order is worked out with substantial input from the parties. Experience demonstrates that scheduling orders cannot be expected to work well if one or both litigants do not seriously believe that the order will be enforced. If a routine form order is issued, without . . . participation by the parties, it is quite likely that it will have to be modified later to suit the . . . [needs] of the case . . . .<sup>14</sup>

### B. Scheduling a Rule 16 Conference

When deciding whether to hold a scheduling conference, it is well to keep in mind the purposes Rule 16 seeks to achieve (Rule 16(a)):

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13. *Manual for Complex Litigation, Third* (Federal Judicial Center 1995) [hereinafter MCL, Third]. Note: The fourth edition is in process.

14. D. Mass. CJRA Plan, *supra* note 8, at 24.



- expedite the disposition of the action;
- establish early and continuing control so that the case will not be protracted because of lack of management;
- discourage wasteful pretrial activities;
- improve the quality of the trial through more thorough preparation; and
- facilitate settlement of the case.

Whether to hold a scheduling conference depends on what you want to achieve at the outset of the case. Do you simply want to set dates for the major events in the case? Such dates are likely to be more realistic—and the case better managed—if you consult with the attorneys. Once your goals move beyond scheduling to such matters as narrowing issues, controlling the scope of discovery, or exploring settlement, you will undoubtedly want to hold an initial scheduling conference with the attorneys or any unrepresented parties.

In deciding whether to hold a conference, you should look at the various characteristics of the case. For example, if the case involves many parties or potentially voluminous discovery, if you identify claims that are likely to be dismissed on a Federal Rule of Civil Procedure 12(b) motion, if you know the attorneys to be short on cooperation, or if the case might easily be settled with your intervention, you will probably want to hold a conference.

Many judges think a conference should be held in every case, either in person or by telephone. They see it as an opportunity to accomplish many things: narrow issues, assert control over discovery, attempt settlement, meet the litigants, find out who the attorneys are and what their relationship is, acquaint attorneys with specific procedures of your chambers, put a “face” on the judicial system for unsophisticated litigants, and show the attorneys who is in control of the case. Advocates of conferences also argue that an investment of time early in the case saves time later by eliminating the potential for disputes over discovery and other issues. Other judges have less faith in scheduling conferences; especially in routine cases, they believe early conferences are a waste of their and litigants’ resources. Certainly, conferences that are merely perfunctory are a waste of everyone’s time. You should hold a conference if you have specific purposes you want to accomplish and can organize your approach to ensure that they are accomplished.

In some courts, specified categories of cases are exempted from the conference requirement. These cases will still benefit from early judicial management of some kind, however.<sup>15</sup> For example, many courts exempt Social Security, government

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15. The Judicial Conference, in its final report on the CJRA, endorsed the use of tracking systems for these types of administrative and quasi-administrative cases: “The DCM concept may provide its greatest benefits by offering standardized case management procedures to those plaintiffs whose claims are the least amenable to more formal adversarial procedures and whose litigation dollars are the most limited.” JCUS CJRA Report, *supra* note 1, at 28. The Conference also warned, however, that tracking systems in some cases “can be bureaucratic, unwieldy, and difficult to implement.” *Id.*

collection, habeas corpus, and section 1983 prisoner cases and have adopted discrete management approaches or “tracks” appropriate for such cases in their courts. The tracks establish preset time frames and standardized, presumptive deadlines for significant case events. This prearranged format for managing these limited categories of cases allows a judge to keep such cases on a preset, or “autopilot,” management system, yet reserves the judge’s right to intervene at any time to change it. See *infra* section IX.B for a discussion of differentiated case tracking generally.

You have broad discretion as a judge, guided by the stated purposes of Rule 16, to tailor case management approaches and conferences to the needs and circumstances of the case. That discretion offers opportunities for innovation and creativity but also tends to introduce into the case a large element of unpredictability from the perspective of the lawyers and litigants. Lawyers can play their part in litigation management more effectively if they know what you expect. Consider, therefore, issuing written guidelines or instructions covering the pretrial process, including discovery and motions practice, as well as trial procedures. For illustrative guidelines about procedures generally, see Appendix A, Forms 4–9; for examples of forms and orders regarding preparation for the joint case management statement and case management conference, see Appendix A, Forms 3, 10–15. See also *supra* sections I.A.2.a and I.B.2.

### **C. Setting a Case Management Plan Through the Rule 16 Conference**

If you have decided that a scheduling conference is necessary, you still have many decisions to make about when, where, how, and by whom the conference will be conducted.

#### **1. Who should conduct the conference?**

To advance the purposes of the Rule 16 conference and to use it as more than a perfunctory exercise, a judge, not a law clerk, should conduct it. The Rule 16 conference is generally the first point of significant contact for establishing case management control. You have an unparalleled opportunity to set the pace and scope of all case activities that follow, to look the lawyers and litigants in the eye, and to set the tone of the case. You will also be in a better position to assess the personalities involved and the likelihood of early settlement.

If you are a district judge who assigns civil pretrial case management duties to a magistrate judge, consider conducting the initial scheduling conference jointly or at least attending part of the conference. Your presence will send a strong message to the attorneys and litigants that you are in control of the case. The magistrate judge and attorneys will also be able to coordinate their calendars more efficiently with yours. If rulings are needed on motions, particularly dispositive motions, you will be able to make them immediately, rather than waiting for a report and recommendation from the magistrate judge. Because of such consid-

erations, as well as a preference for remaining familiar with a case at all times, some judges do not assign the initial scheduling conference to magistrate judges.

## **2. When should the conference be held?**

The Rule 16(b) scheduling conference should precede issuance of the scheduling order so that the order can be informed by the discussion at the conference. Rule 16(b) requires that a scheduling order issue as soon as practicable but in no event more than 120 days after service of the complaint. Generally, the date of the scheduling conference can be generated or otherwise automatically established when the case is filed. The 120-day period provided by Rule 16(b) is usually long enough for all defendants to be served and for lawyers to complete any necessary preconference disclosure. Some judges hold the conference earlier to get a “feel” for the action, as well as the posture of the parties, as soon as possible. Under some circumstances—for example, when all parties have filed an appearance—an early conference may expedite the case; however, holding two conferences, the first one early in the case and the second after the defendant has been served, will increase the plaintiff’s costs, as well as your time on the case.

## **3. Where should the conference be held?**

Judges’ arrangements for holding Rule 16(b) conferences vary, but the basic choice is between the courtroom and the judge’s chambers. Several factors should be weighed when making that decision.

### *Consider*

- how many persons will attend;
- whether the case will attract public and media interest;
- the purposes of the conference and the items on the agenda (e.g., whether you will make rulings or orders);
- the character, experience, and attitude of the participants; and
- the nature of the issues.<sup>16</sup>

Holding a conference in the informal setting of your chambers can be more conducive to achieving the cooperation needed for narrowing issues, making stipulations, and discussing possible settlement. The formality of the courtroom setting, on the other hand, promotes orderly and controlled proceedings, leading to a better record if substantive rulings will be made. In cases of public interest, members of the public and media representatives may want to attend the conference; their presence is more easily accommodated in the courtroom.

## **4. Is teleconferencing appropriate?**

Whether teleconferencing is appropriate for the Rule 16(b) conference depends in part on what you wish to accomplish. Although a face-to-face conference is often

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16. See generally MCL, Third, *supra* note 13, §§ 21.1, 21.2.

the preferred approach,<sup>17</sup> there are cases in which such a conference is not necessary or feasible.

If the conference may be held by telephone or in person, *consider that*

- telephone conferences, especially with out-of-town counsel, save time and money, permit a conference on short notice, and can adequately address routine management matters, such as scheduling or discovery issues;
- face-to-face conferences facilitate the detailed discussion needed to clarify and narrow issues, analyze damage claims, explore settlement possibilities, and address contentious matters; such discussion may be sacrificed or minimized in a telephone conference; and
- a face-to-face conference in the courtroom may be advisable in a case with a nonincarcerated pro se litigant, to address concerns of the pro se litigant, to avoid misunderstandings that can so easily arise with such a litigant, and to enable you to emphasize the seriousness of the litigation.

## 5. Should the proceedings be recorded?

The parties are entitled to have all conference proceedings recorded on request, but absent such a request, you may exercise your discretion in deciding whether to record the scheduling conference.

*Consider that*

- counsel may speak more freely off the record, but in certain cases the attorneys or parties may be so contentious that it is advisable to record the proceedings to avoid disputes later about what was said;
- if the case involves a pro se litigant, it is wise to record the conference, whether held in person or on the telephone, to avoid misunderstandings and to have a record if disputes arise later;
- you should state at the outset of the conference whether you are having it recorded; and
- if you decide the conference should be held off the record, stipulations or rulings can be dictated to the reporter at the end of the conference.

## 6. Who should attend?

### a. Lawyers

The utility of the scheduling conference depends on the participating lawyers' understanding of their case, their authority to enter into binding scheduling arrangements and stipulations (see Rule 16(c)), and their familiarity with subjects the court will consider. Your expectations for the lawyers' participation depend on

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17. The Judicial Conference, in its final report on the CJRA, noted that “[c]onducting scheduling and discovery conferences by telephone, when appropriate, also saves time for the attorneys and the court as well as expense for the litigants.” JCUS CJRA Report, *supra* note 1, at 22.

your agenda for the conference, which you can communicate to the lawyers through your initial scheduling order, case management information package, or guidelines about the lawyers' Rule 26(f) "meet and confer" session (see *supra* sections I.A.2.a and I.B.2; see also examples of forms and orders in Appendix A, Forms 3–10 and 13–15). The lead trial lawyer as well as the lawyer in charge of preparing the case during the pretrial phases should attend the conference, since both are important for decisions made about the case and for coordinating calendars.

*Consider that*

- if you plan to work with the lawyers to narrow issues, reduce the amount of discovery, or discuss settlement, a lawyer with full authority over the case may be needed; and
- in cases in which the United States is a party, you must recognize the inherent limitations of settlement authority granted to individual U.S. attorneys.

***b. Litigants***

Some judges require litigants to attend the initial scheduling conference, but many do not consider it useful in routine cases. Some research suggests that having litigants at, or available for, settlement conferences is related to reduced time to disposition.<sup>18</sup> Litigant attendance had no significant effect, however, on cost as measured by lawyer work hours spent, leading to a conclusion that "[t]his policy appears worth implementing more widely because it has benefits without any offsetting disadvantages."<sup>19</sup> Sometimes it is helpful to have particular types of litigants present at the conference, such as insurance carriers who bear the major risk and exercise control in the litigation or litigants pressing civil rights or personal injury claims. In cases in which strong emotions may be a factor, an opportunity to "vent" to an impartial listener may help litigants become more open to early settlement. Moreover, attorneys do not always know the litigants' goals in these cases. If you intend to make settlement a central part of the initial scheduling conference, you will want the litigants there. In deciding whether litigants or their representatives should attend the scheduling conference, you should consider that litigant attendance may

- give litigants a better understanding of the case problems;
- give litigants an appreciation of the cost and time involved in litigating the case;
- facilitate making stipulations;
- bring to the surface potential disagreements between litigants and counsel; and

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18. See RAND CJRA Report, *supra* note 2, at 78.

19. *Id.* at 80.

- assist litigants in reaching a settlement.

Of course, litigants attendance may also

- cause attorneys to posture and to maintain positions on which they might otherwise yield;
- make litigants intransigent; and
- be costly for the litigants, especially if there is little movement as a result.

If litigants attend the conference, you can avoid problems by excusing them from time to time as needed. Whether the court has inherent power to compel attendance of represented parties or others with an interest may depend on the law of your circuit.

## 7. What can lawyers prepare?

As with so many other matters, what lawyers can prepare for the conference depends on what you want to accomplish at the conference. The more you want to do, the more information you may need from the attorneys. The greatest benefit in asking them to prepare materials for the conference is that it will force them to give attention to the case and talk to each other. Such a conversation is, in any event, required of counsel by Rule 26(f), which instructs them to meet and confer at least twenty-one days before the scheduling conference is held or the scheduling order is issued to discuss the case and the nature and timing of discovery in particular. Within fourteen days of this meeting, counsel must submit to each other the disclosures required by Rule 26(a). See *supra* section I.B.2 for a discussion of Rule 26 requirements.

The desirability of having counsel talk, not write, to each other about the case at the earliest moment cannot be overstated. Too often lawyers will not have discussed the case with opposing counsel and will have little understanding of the controverted issues, resulting in much wasted time and effort. To ensure that meaningful discussions will have occurred, and to provide a solid foundation for discussion during the conference, it is advisable to notify counsel of the agenda for the conference. You can send a statement describing the purpose of the conference and an attached order directing counsel to prepare formal submissions (either individually or jointly) on each of the conference topics (hereinafter referred to as the conference statement/order).

### *a. The conference statement/order*

To save time at the initial conference and maximize its utility, many judges prepare one or more standard forms of the Rule 16 conference statement/order and send the appropriate form to counsel in advance of the conference. The order accompanying the statement tells counsel what the judge expects and enables counsel to use the conference time better.

*Consider* issuing an order directing lawyers to

- meet and confer on all subjects that are to be covered at the scheduling conference and that are required by Rule 26(f) and to reach agreement to the extent possible;
- attempt to define and narrow issues;
- prepare, exchange, and submit Rule 16 conference statements (brief, non-argumentative statements, joint to the extent feasible, that summarize the background of the action and the principal factual and legal issues);
- make all disclosures required by Rule 26(a) and file them with the court by a specified date;
- outline a discovery plan or program; and
- address other appropriate subjects for the conference.

You should instruct counsel to file a written response to your statement/order ten days before the conference date. For illustrative forms and orders for the attorneys' joint report, see Appendix A, Forms 2, 3, and 10–15; for helpful checklists for the management of cases, see the *Manual for Complex Litigation, Third*.<sup>20</sup> See also the discussion at *supra* section I.B.2.

*b. Short-form conference statement/order*

While the longer, more formal Rule 16 conference documents referenced above may be necessary and helpful, their costs in attorney time, and thus fees, should be recognized. An alternative to a more formal conference statement/order that may be appropriate in less complex cases is a short-form version. Under this alternative, you may require the parties to submit a one- or two-page statement in reply to your order. Recognize, however, that the parties' responses may be of little benefit to you because of their brevity.

*Consider* issuing an order requesting submission of a statement containing

- one sentence on subject matter jurisdiction;
- one or two sentences on what the case is about (e.g., “an antitrust case for price-fixing”);
- one or two sentences on motions that are likely to be filed or that need your consideration;
- one or two sentences on kinds of discovery required and how long discovery will take; and
- one or two sentences on settlement prospects for the case.

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20. MCL, Third, *supra* note 13, § 40.0.

*c. Uniform orders*

Many judges have chosen to adopt a form order that is uniformly used throughout the district. Because a uniform order makes it easier for the attorneys to comply with the court's wishes, it is likely to make your job easier also.

A uniform order tells the lawyers which subjects will be discussed at the Rule 16 conference and the exact format of any conference statement or joint statement that counsel are required to submit before the conference. Such orders, while standardized in general format, usually provide spaces (blanks or lines for free-form entries) that permit the judge to tailor the requirements imposed on the particular case. Such an order will ensure that the information you want is there, in the same place, for both sides. Uniform orders serve other important purposes: To the extent they represent the consensus of the bench, they can influence the local legal culture and educate its practitioners and litigants about the court's expectations of those who come before it. For examples of a uniform approach, see Appendix A, Forms 8, 9, and 16.

**8. What subjects are covered at the Rule 16 conference?**

Rule 16(c) lists subjects for discussion at the Rule 16 conference, but that list is not exhaustive. As Rule 16 conferences may be held not only at the beginning of a case, when they serve as the scheduling conference, but also later in the litigation, appropriate subjects will depend on the stage of the case. As a supplement to your own ideas, you can ask counsel to suggest subjects and then determine which to cover at the conference. This kind of controlled discussion of the conference agenda can be most helpful in determining what is appropriate and useful to you and the attorneys. Moreover, through discussion, and accommodation when possible, of the attorneys' preferences, you can hold the attorneys to the commitments they make.

*Consider* the following topics and areas for discussion at the Rule 16 conference:

- proposals for identification, narrowing, and reduction of issues;
- preparation of a joint pretrial schedule or case management plan that includes a separate discovery plan covering all phases of case discovery;
- a schedule for filing all anticipated motions;
- certification by counsel and representatives of each of the parties that they have conferred with a view toward establishing a budget plan to cover the probable costs their litigation will entail;
- specific time limitations for the joinder of parties and amendment of pleadings;
- for district judges, referral to a magistrate judge for supervision of pretrial proceedings or, with party consent, for all aspects of the case;



- prospects for settlement and an assessment of the parties' present settlement posture;
- adoption of special procedures (e.g., for complex or patent cases, or class actions);
- control of, limitations on, or potential problems with discovery, including the possibility of phased discovery;
- setting the discovery cutoff date;
- motions management, including deadlines for filing dispositive motions;
- suitability and appropriateness of the case for ADR; ADR choices available (e.g., arbitration, mediation, ENE, judicial settlement conference); parties' preferred ADR option; parties' justification if no ADR option is chosen; and
- attorneys' estimates of the number of days a trial will take.

## 9. What can you do to monitor the scope of the claims?

### *a. Identifying and narrowing the issues*

One of the most important tasks in the initial case management conference is early identification of the issues in controversy (in both claims and defenses) and of possible areas for stipulations as provided by Rule 16(c)(1)(3).<sup>21</sup> Issue narrowing is aimed at refining the controversy and pruning away extraneous issues. This effort will provide you and the parties with an assessment of the resources that this case warrants, the likelihood of successful dispositive motions, and the issues to focus on at trial or in settlement.

*Consider* that issue narrowing

- forces the lawyers and their clients to analyze their claims and defenses, focus on the economics of the case, and define both the scope of the litigation and the amount of time and money they are willing to expend;
- is an educational process that enables you to learn the important facts and understand the legal principles; and
- is an educational process for the lawyers, who often know little about each other's case (and sometimes not much about their own) and who may discover that the dispute is narrower than they supposed, thus leading to stipulations or early settlement.

Do not blindly accept counsel's objections that they lack appropriate information for early issue identification. Federal Rule of Civil Procedure 11 requires inquiry prior to the filing of an action, and counsel should be held to their responsibilities. Moreover, the identification of even formative information is helpful. You can make it clear that information should be as specific as currently possible but that any information developed in this process is subject to later clarification.

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21. See also MCL, Third, *supra* note 13, § 21.3.

Thus, you will want to ask direct and leading questions, such as, “What **do** you expect to prove and how? How do you expect to defeat this claim? What are the damages?” If this process discloses issues apparently ripe for dismissal, counsel should be given adequate notice and an opportunity to be heard before action is taken on the merits.

*Consider* the following additional approaches:

- urging attorneys to reach agreement on the issues or to clearly identify areas of disagreement and narrow those issues remaining;
- addressing and resolving early any questions concerning subject matter jurisdiction, a fatal and nonwaivable defect (for an example of a jurisdictional checklist, see Appendix A, Form 17; for an illustrative order to show cause regarding removal jurisdiction, see Appendix A, Form 18);
- determining which issues are material and genuinely in dispute by pressing both sides on this matter in an attempt to avoid wasteful litigation activity (such as unnecessary discovery and motions) and facilitating settlement (for an order to facilitate issue definition in Racketeer Influenced and Corrupt Organizations Act (RICO) cases, see Appendix A, Form 19);
- determining how issues may be resolved, whether by motion (for example, motion for partial summary judgment or Rule 12(b) motion) or by special procedures (for example, a bifurcated trial or consolidation with other cases);
- determining what discovery is required for resolution of particular issues and putting that limited activity on an expedited track;
- identifying with specificity the amount and computation of damages claimed and other relief sought, the supporting evidence, and the basis for establishing causation; and
- determining whether there are indispensable parties to be added.

Remember that while counsel may feel that they lack the information needed for meaningful issue identification early in the case, such an objection should not be permitted to stall the process. Issue identification should proceed, always subject to later clarification or modification. Establishing what is at stake in the litigation (i.e., plaintiff’s likely gains and defendant’s likely exposure) facilitates settlement and gives both the parties and the court a sense of the resources the case warrants. It also serves to make parties and counsel much more realistic about the outcome of the case.

*b. Limiting joinder of parties and amendment of pleadings*

Changes in parties (by addition, substitution, or dismissal) and amendments to claims or defenses can affect the issues in the case and cause unnecessary or duplicative discovery and motion activity. Such changes and amendments can be avoided by setting a reasonably early cutoff date for amendments of any kind (see

Federal Rule of Civil Procedure 15; local rules may also apply). Rule 16(b) contemplates that such a date not be modified other than on a showing of good cause.

*Consider* the following:

- Leave to join parties and amend pleadings should be liberally granted but need not be open-ended.
- If the parties admit in conference that they may make amendments later, you should set a reasonable time limit for such amendments, usually not to exceed sixty days.

## **D. The Scheduling Order and Calendar Management**

### **1. Issuing the scheduling order**

Based on your discussion with counsel and their submissions, you can determine what should be included in your scheduling order. A firm and unambiguous order is critical to effective case management. Word processing makes it feasible to maintain several formats for different case management approaches, or “case management tracks,” which can be readily adapted to meet the needs of the particular case after consultation with counsel. Counsel can also be asked to submit proposed forms of the order in advance of the conference, as shown in some of the examples in Appendix A. For illustrative scheduling orders for general civil cases, see Appendix A, Forms 11 and 20–26; for orders for Social Security cases, see Forms 27 and 28.

*Consider* including the following items in your scheduling order:

- a deadline for joining parties and amending pleadings (Rule 16(b)(1));
- a date for completion of all discovery or particular phases or parts of discovery (Rule 16(b)(3)) by specifying cutoff dates for noticing depositions, for serving interrogatories and document requests, and for filing discovery motions;
- a deadline for filing dispositive motions (Rule 16(b)(2));
- a deadline for identifying trial experts and exchanging experts’ materials (Rule 26(a)(2));
- a date for further conferences as needed (Rule 16(b)(5));
- a date for a final pretrial conference (Rule 16(b)(5));
- a date for a settlement conference (Rule 16(c)(9));
- a date for an ADR process (Rule 16(c)(9));
- a trial date (Rule 16(b)(5));
- a reasonable length of time for the trial;
- ground rules for continuances; and
- a procedure for reconciling calendar conflicts with proceedings in state or other federal courts.

When possible, you should accommodate any needs for expedited resolution. Delay can be very costly in some cases, such as bankruptcy appeals.

Counsel should understand your position with respect to requests for continuances; false expectations can interfere with the progress of the case. Generally, requests for continuances should be discouraged.

*Consider*

- requiring that stipulated continuances be ruled on by the court; and
- requiring submission of an account of all prior requests for continuances with reasons given.

One of the techniques included in the Civil Justice Reform Act for this purpose was the “requirement that all requests for extensions of deadlines, for completion of discovery, or for postponement of the trial be signed by the attorney and the party making the request.”<sup>22</sup> The Judicial Conference, however, did not endorse this technique, noting its “almost universal rejection . . . by the bar and the courts.”<sup>23</sup>

## 2. Calendar management considerations

The ultimate effectiveness and utility of scheduling orders depends to a large degree on the state of your calendar. Your time is limited, and good case management depends on good time management. If you are a magistrate judge issuing the scheduling order on behalf of a district judge, make sure you confer with that judge to ensure that the order conforms to his or her schedule.

*Consider* the following:

- Overscheduling will be counterproductive; keep in mind your own (and staff’s) limitations and convenience.
- Multiple settings are often necessary to avoid loss of productive time but should be scheduled in ways that will minimize the resulting burdens on the parties and attorneys.
- Attorneys should learn to expect that deadlines will be firmly adhered to; you must set the example.
- Familiarity with the case and good communications with attorneys will enable you to arrive at reasonably accurate time estimates for hearings and trials.

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22. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103(a)–(b), 104 Stat. 5089, 5090–96 (amended 1991, 1994, 1996, 1997, 2000). Although other sections of the CJRA relevant to cost and delay reduction plans (previously codified at 28 U.S.C. §§ 471–475, 477–478 (1994)) have sunset, the statutory requirement for semiannual reporting remains in effect (see 28 U.S.C. § 476 (1994)).

23. JCUS CJRA Report, *supra* note 1, at 41.

- Matters such as hearings, conferences, or trials should be limited in time; the participants should understand that the business at hand should be done with dispatch.
- Time management is advanced by the judge's trying whenever possible not to handle a particular matter more than once; referral of dispositive motions to a magistrate judge, for example, should be carefully weighed (see *infra* section VIII.B.2).
- Parties must not be allowed to stipulate around deadlines or gain easy continuances.

A number of automated systems are available to assist you in managing your cases and your calendar. You should be familiar, first, with the systems your court uses to report on such matters as the number of cases pending, the number of motions pending, and the age of cases on the calendar (see *infra* sections IX.D and E). This information is usually available for each individual judge. For case management to be effective, you must maintain the credibility of the calendar by holding parties to agreed-on deadlines absent very good cause, as well as by ruling promptly on motions and maintaining trial dates. You should set your own goals (e.g., to rule on nondispositive motions in thirty days) and use automated calendaring aids to flag your deadlines (see *infra* sections IX.D and E).



### III. DISCOVERY MANAGEMENT

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Rule 26(b)(2) provides as follows:

The frequency or extent of use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery

in resolving the issues. *The court may act upon its own initiative* after reasonable notice or pursuant to a motion . . . (emphasis added)

Discovery influences both the length and cost of litigation.<sup>24</sup> Limiting discovery to that appropriate for the case at hand promotes efficiency and economy, enables you to avoid disputes by anticipating problems, and expedites the resolution of unavoidable disputes. A number of techniques can be implemented, both at the Rule 16 conference and subsequently, to advance discovery management. Effective, early management will reduce discovery problems. For illustrative procedures, see the *Manual for Complex Litigation, Third*;<sup>25</sup> examples of forms and orders are cited throughout this chapter.

### A. In General

Discovery management should be guided by an awareness that you know less about the case than the lawyers. This should not deter you, however, from management, based on your experience and after consultation with counsel.

*Consider* the following general approaches as a discovery management “platform” to be created before or upon your first discussion with counsel:

- directing counsel to make the initial disclosures required by Rule 26(a)(1);
- advising counsel of your expectations regarding the Rule 26(f) “meet and confer” conference and the discovery plan they must submit (see *supra* section I.B.2);
- arriving at an early (at least tentative) definition of the scope of discovery (subject matter, time period, geographical range, etc.) based on early identification of issues at the Rule 16 conference;
- setting a discovery cutoff date as soon as the needs for discovery can be assessed, preferably at the Rule 16 conference;
- evaluating the appropriateness of proposed discovery in light of the damages identified and the availability of less expensive and more efficient alternatives to conventional discovery (e.g., telephone depositions or interviews) (see Rule 26(b)(1));
- clarifying the extent of parties’ obligations to supplement and update prior and subsequent disclosures and responses (see Rule 26(e)); and
- establishing procedures for resolving discovery disputes (see *infra* section III.E).

For illustrative orders and forms for management of discovery, see Appendix A, Forms 8, 11, 13–16, 26, and 29–30.

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24. See RAND CJRA Report, *supra* note 2, at 67.

25. See MCL, Third, *supra* note 13, § 21.4.



## B. Specific Techniques for Managing Discovery

Various techniques for management and control are available to you and the attorneys. Many districts have adopted local rules based on their CJRA expense and delay reduction plans that impose detailed restrictions and requirements on discovery. In addition, control of discovery always involves issues of timing, such as whether particular discovery actions are likely to be productive earlier or later and in what sequence. Particular kinds of discovery may help in the early evaluation of the case (for example, early disclosure of the details of the damage claim will indicate the economic stakes of the lawsuit). Specific early discovery may also help you determine whether other discovery is needed; for example, an issue may drop out of the case or needed information may become available. Your careful sequencing of discovery may help you avoid unnecessary activity. Your success will depend on your ability to take the time to key your decisions to specific, subsequent case actions, or “next action” dates.

### *Consider*

- encouraging use of contention interrogatories and requests for admission to help define controverted issues and hence the limits of needed discovery;
- calling on attorneys early to prepare and present a proposed discovery plan (including the scope of written discovery and list of depositions), agreed upon by both sides to the extent feasible;
- using phased discovery to target particular witnesses and documents for the purpose of obtaining information needed for settlement negotiations or to lay a foundation for a dispositive motion, thereby deferring and possibly obviating other discovery;
- requiring, pursuant to Rule 26(a)(2), exchange of signed reports or statements of proposed testimony of experts in advance of their depositions;
- imposing, pursuant to Rules 26(b)(2), 30, 31, and 33, limits on the number of interrogatories, the scope of document requests, and the number and length of depositions (local court rules may contain or recommend such limits);
- restricting the use of form interrogatories;
- arranging depositions so as to avoid unnecessary travel; and
- in complex cases, having attorneys report via letter at crucial case junctures on the status of documents, depositions, and settlement prospects.

Requiring updates by letter has a number of advantages: It obviates the necessity of a conference; helps you maintain open, manageable channels of communication; keeps the case moving to subsequent decision-making points; is a simple, cheap, but critical case oversight and accountability mechanism; and keeps you informed. Because of the work it imposes on counsel, however, such an updating requirement should generally be used only in complex and protracted cases.

### C. Anticipating and Forestalling Discovery Problems

Discovery disputes sometimes develop into satellite litigation that takes on a life of its own. Case management should anticipate problems that may grow into disputes and deal with disputes so as to contain them rather than letting them expand.<sup>26</sup> Discovery problems can be reduced if attorneys know what you expect of them, what you regard as the limits of acceptable conduct, and how you deal with objections and other discovery disputes. It is therefore imperative for you to establish a clear practice, with which the bar can become familiar, and to indicate firmly and clearly your expectations of counsel. For examples of orders and guidelines, see Appendix A, Forms 4, 8, 16, and 29.

Some district judges routinely refer discovery disputes to magistrate judges, which permits the district judge to concentrate on matters that only an Article III judge may handle. Other district judges prefer to oversee pretrial matters themselves, in part to remain familiar with the case and in part because they feel they can exercise firmer control than a magistrate judge can.

#### *Consider*

- establishing ground rules for depositions: where they are taken; who may attend; how they are to be taken; who pays for which expenses; how to comply with Rule 30(b)(6) notices; and how to handle documents, objections, claims of privilege, and instructions not to answer;<sup>27</sup>
- allocating costs of compliance with costly discovery demands: issuing a protective order under Rule 26(c), specifying who bears the cost of certain expensive discovery, or conditioning certain discovery on the payment of expenses by the opponent (such as paying for computer runs or copying costs);<sup>28</sup>
- establishing informal procedures for protecting privileged and other confidential information against inadvertent disclosure or other unintended waiver;
- establishing procedures for claiming privilege, for issuing protective orders under Rule 26(c), and for the release of protected information, while

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26. A study of discovery practice in federal courts found that, of attorneys who reported some discovery in their case, 48% reported that they had experienced problems with discovery and about 40% reported unnecessary discovery expenses that were due to discovery problems. Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 532 (1997); also available as Thomas E. Willging, John Shapard, Donna Stienstra & Dean Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases* (Federal Judicial Center, 1997) [hereinafter FJC Discovery Study].

27. See MCL, Third, *supra* note 13, §§ 21.44, 21.45.

28. *Id.* §§ 21.43, 41.37.

keeping in mind that use of a protective order can be abused by the parties;<sup>29</sup>

- if you are a district judge and it is the practice in your district to assign pretrial matters to a magistrate judge, designating a magistrate judge to supervise discovery, particularly in litigious or complex cases; or in complex litigation, when the overall litigation costs justify it, appointing a special master (see *infra* sections VIII.B and C for a discussion of magistrate judges and special masters);
- requiring a pre-motion conference between counsel and a certification of good faith efforts to resolve the disputes (see 28 U.S.C. § 473(a)(5));
- requiring that counsel present the dispute to you by telephone conference before filing a written motion;
- setting page limits on motions papers and time limits for filing; and
- awarding costs to the party prevailing on a motion.

## D. Limiting Discovery

### 1. In general

Establishing control early and setting appropriate (even if only preliminary) limits on the timing, scope, and methods of discovery can help you to prevent excessive discovery activity, forestall disputes, and increase both fairness and the perception of fairness by not letting the “big guy” paper the “little guy” into submission.<sup>30</sup> In particular, setting an early and firm discovery cutoff date to fit the needs of the case encourages the efficient prosecution and defense of the case, reduces the need for judicial involvement, and is a way to shorten overall case disposition time.<sup>31</sup> In addition, setting limitations on the number of interrogatories has been found to measurably shorten overall lawyer work hours and overall time to case disposition.<sup>32</sup>

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29. *Id.* §§ 21.431, 21.432, 41.36.

30. A recent study of discovery practice in federal courts found that high levels of discovery problems and expenses were more likely to occur in cases that were complex, contentious, had high stakes, or had high volumes of discovery. Problems in these cases were not limited to a particular type of discovery, but occurred in all or most aspects of discovery. Attorneys in tort and civil rights cases were more likely to report problems than attorneys in other types of cases. FJC Discovery Study, *supra* note 26, at 554–55.

31. See RAND CJRA Report, *supra* note 2, at 16, 26.

32. See James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data 55–58 (RAND Institute for Civil Justice 1998) [hereinafter RAND Discovery Report].

*Consider*

- asking counsel to make a case for the discovery they expect to conduct;
- requesting a formal submission outlining the nature, scope, duration, and costs of the proposed discovery plan; and
- phasing discovery, aiming successive stages toward central, potentially dispositive issues, and asking counsel to report back on discovery progress, thus permitting you to assess trial and settlement prospects based upon the interim discovery findings that result.

In weighing proposed discovery plans or programs, you should apply the principle of proportionality underlying Rule 26(b)—that is, there should be a reasonable relationship between the costs and burdens of discovery and what is at stake in the litigation. Fairness in the application of discovery limitations connotes an individualized approach to each case. You should tailor discovery deadlines to the case; uniformity is usually not appropriate. Some cases need only three months; few need more than twelve. You can assert control by various means.

*Consider*

- setting overall time limits and incorporating them into the scheduling order;
- limiting the “frequency or extent of use of the discovery methods” under Rule 26(b)(2);
- stating a clear definition of the substantive scope of permitted discovery based on issue identification;
- if the parties propose early dispositive motions, phasing discovery and shaping it to serve these motions, staying other discovery until motions-related discovery is complete;
- requesting, if appropriate, the submission of a formal discovery plan; and
- in the most complex cases, phasing discovery by time period or issue and requesting accompanying status reports with the completion of each phase.

Remember that because most cases settle or are otherwise disposed of before trial, many attorneys make their fees on discovery. Only you can prevent abuse of the discovery process. For illustrative forms and orders setting limits on discovery, see Appendix A, Forms 2, 11, 20–22, and 29. The *Manual for Complex Litigation, Third* also provides useful advice.<sup>33</sup>

## 2. Document requests

Unnecessarily broad or burdensome document requests are among the most dreaded, expensive, and time-consuming tools employed in the discovery proc-

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33. MCL, Third, *supra* note 13, §§ 21.422, 21.423.

ess.<sup>34</sup> Often, however, by asking direct questions and making suggestions regarding the proposed exchange of documents, you can better focus the request and minimize its impact.

*Consider* the following approach:

- Ask the plaintiff, for example, at the Rule 16 conference, “What can we get without traditional discovery? What do you want from the defendant? List it.” With this approach you can usually get the defendant to give up what the plaintiff has requested without further discussion.
- After the plaintiff has responded, ask the defendant, “What do you want from the plaintiff?”
- The case manager (or other recorder present) can jot the agreements down quickly and subsequently place them in the final case management order: “Plaintiff has agreed to produce \_\_\_\_\_. Defendant has agreed to produce \_\_\_\_\_.”

You can persuade parties to turn over voluntarily much that would have been pursued through traditional discovery methods, and you can head off many discovery disputes. This approach, as illustrated in Rule 16(c)(3), (4), and (7), can also help determine the number and types of depositions requested and approved.

### **3. Depositions (who, how many, etc.)**

Although depositions are not the most frequent form of discovery, they account for by far the greatest proportion of discovery expenses.<sup>35</sup> You should be assertive in suggesting a course of action that will phase depositions to reach important decision-making junctures in a case (Rule 16(c)(4)) while avoiding unnecessary intermediate conferences or disputes. This planning should be an important part of your continuing efforts to refine the case into a triable or settlement-ready matter. Naturally, such suggestions must be tailored to the individual case. The following judicial guidance to plaintiff’s counsel may be suitable, for example, in a discrimination case (depending on counsel’s requests and the scope of the claims).

*Consider* the following instruction:

You may depose the defendant, the defendant’s supervisor, the defendant’s co-worker, and the following witnesses: \_\_\_\_\_. Then stop. When you have completed these depositions and if you believe you need additional ones, write a letter of no more than two pages, with a copy to the defendant, to inform me of your progress, where you feel you are in this case, and the settlement prospects at this juncture.

Alternatively, consider asking the plaintiff’s counsel to arrange a conference call with you and opposing counsel after completing the initial depositions.

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34. A recent study found that document production is not only the most frequent form of discovery but also the one that generates the highest rate of reported discovery problems. FJC Discovery Study, *supra* note 26, at 530, 532.

35. *See id.* at 540.

## E. Handling Discovery Disputes

### 1. Methods for reducing the number of disputes

Discovery disputes, if not controlled early and firmly, will constitute the most time-consuming, inefficient, and costly investment of judicial pretrial case management time. You should consider adopting a formal procedure for discovery motions that clearly states that, in general, discovery motions may not be submitted without a prior telephone conference requesting your permission to file them.

In implementing such a policy, *consider* the following:

- requiring counsel to notify the court, by telephone, immediately after their “meet and confer” conference if they have a dispute they cannot resolve;
- if you have referred discovery disputes to a magistrate judge, taking the first discovery dispute telephone call in any case in which you expect ongoing discovery problems; your initial reaction to the offending counsel that “You can’t be serious . . .” will often prompt counsel to work out the dispute themselves;
- if you cannot take the first telephone call when it comes in, having a backup district or magistrate judge who can take the call immediately (see *infra* section IX.A.4 for a discussion of discovery “hot lines”);
- if the dispute raises complex issues, requiring the attorneys to submit a letter, no more than two pages in length, describing their positions; and
- permitting the filing of a motion only upon court order.

It is important to remember that the 1993 amendments to several federal rules require attorneys to confer and to certify in good faith that they attempted to resolve their discovery disputes; these changes include those to Federal Rules of Civil Procedure 26(c), 37(a)(2)(A) and (B), and 37(d). Furthermore, the CJRA advocated “conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.” The Judicial Conference has endorsed this principle and has noted that the principle has been incorporated into the above-mentioned rules.<sup>36</sup>

By sending the message to counsel (1) that you will hear their disputes over the telephone, even during a deposition, (2) that you expect professional conduct, (3) that as a general rule only work product and attorney–client privilege are valid bases for objections, and (4) that discovery abuse will lead to sanctions, you will substantially reduce disputes. For an example of an order issued in response to discovery disputes, see Appendix A, Form 30.

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36. See JCUS CJRA Report, *supra* note 1, at 35 (citing to the 1993 amendments to Fed. R. Civ. P. 26(c), 26(f), and 37(a)(2)(A) and (B)).

## 2. Discovery motions

Many discovery motions are unnecessary and do not warrant the investment of client time and money required to support them. Sometimes, however, a fully briefed motion is the only way to resolve important discovery issues (for example, disputes over privilege).

When a fully briefed discovery motion is necessary, *consider* the following approach:

- Ask counsel to use a letter format of no more than three double-spaced pages with no more than five case cites. This format should suffice for the majority of discovery motions submitted, as long as they are docketed properly by the court.
- If you are concerned about the styling and docketing of a letter format, permit only three-page briefs with limited citations.

## F. Computer-Based Discovery

Discovery is changing in response to the pervasive use of computers. In more and more cases discovery now involves e-mail, word-processed documents, spreadsheets, and records of Internet activity. In most of these cases, computer-based discovery is routine and uneventful: Instead of exchanging paper documents, the parties exchange electronic files in an agreed upon portable format (e.g., disks). In some cases, however, computer-based discovery raises a number of case management issues and generates disputes that require judicial intervention.

You will seldom need to know how computer technology works to resolve the questions before you, but you will need to be confident that the attorneys understand the relevant computer technology. In many of the reported cases on electronic discovery, failure of the attorneys to understand their clients' computer systems, routines, capabilities, and limitations were at the heart of the problem. Therefore, early identification of potential computer-based discovery issues and focusing the attorneys' attention on early resolution of these matters are the keys to smooth case management. Discovery of computerized information can in some cases be costly, and some of the procedures described below for reducing problems in such discovery can also be costly. One of your roles will be to help counsel find the balance between the usefulness of these procedures and the time and expense involved.

### 1. Positive aspects of computer-based discovery

Computer-based discovery is not necessarily more costly or contentious than conventional paper-based discovery. In many cases, the exchange of electronic data, as opposed to paper, will greatly reduce cost and delay. The costs of photocopying and transport can be reduced dramatically or eliminated altogether. Software is now available, even to small firms and solo practitioners, to speed up review and analysis of documents through word searching and other operations. The cost of

using a litigation support system is reduced dramatically if the documents are in electronic form from the start and do not need to be scanned. Finally, electronic discovery leads logically to electronic evidence, and many of the set-up costs associated with electronic courtroom presentations can be reduced or eliminated.

Signaling to the attorneys and parties that computer-based discovery will be encouraged, and that the court is ready to deal with the challenges and maximize the benefits, will reduce many of the problems. As one computer forensics expert noted, the increased sophistication of judges in this field has “raised the bar” for attorneys appearing in computer-based discovery cases.<sup>37</sup> When the attorneys realize they cannot muddle, bluff, or stonewall their way through discovery, they begin to educate themselves and their clients and are forced to be more forthcoming and cooperative with their opponents.

## **2. Unique aspects of computer-based discovery**

Though beneficial in many ways, computer-based discovery raises issues that do not normally occur in conventional, paper-based discovery. Among the most common problems are the following.

### *a. Preservation of data*

Information stored on computers can be easily changed, overwritten, or obliterated, whether it is stored on a single desktop PC (personal computer) or an enterprise-wide network.

#### *Consider*

- asking the parties as soon as possible after litigation has commenced to take steps to preserve and segregate relevant data;
- requiring the attorneys to agree on the steps they will take to avoid later accusations of spoliation; and
- issuing a preservation, or “freeze,” order if the attorneys cannot agree on steps to preserve data.

### *b. Location and volume of data*

In the old days of paper-based discovery, most organizations had centrally located files or a limited number of file locations. In the new PC-based world, every employee of an organization may have a desktop computer, plus disks or other removable data-storage devices, a laptop computer, a home computer, and a handheld personal organizer, all containing potentially relevant data. In addition, larger organizations have network servers that connect and store data for many PCs, plus backup and archival data storage. Off-site data-storage facilities, Internet service providers, and other third parties may also have data subject to discovery.

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37. John Jessen, CEO, Electronic Evidence Discovery, Inc., Remarks at the Glasser Legal Works 3d Annual Conference on Electronic Discovery (Mar. 24, 2000).



The cost and complication of conducting discovery in a modern, distributed-business computing environment can be enormous.

In record-keeping systems that are based on paper, outdated records, papers with no business significance, and superfluous copies are routinely destroyed. Records managers maintain paper files in “business-record order.” In today’s business computing environment, there is seldom an equivalent electronic records management system. Copies of documents are made routinely, distributed widely, and seldom purged when outdated. Potentially discoverable records are stored according to computer logic, as opposed to “business record” logic, and can be difficult to locate and untangle from irrelevant and privileged records.

*Consider*

- requiring an early agreement between the attorneys on the scope of discovery or a plan for phased discovery; and
- asking the parties to give serious consideration to an agreement under which neither party waives privilege for inadvertent production of privileged material, if this would reduce the difficulty of screening computer-based material for privilege before production.

*c. E-mail as a unique phenomenon*

Electronic mail does not have a counterpart in the conventional paper-based world. Several characteristics make e-mail unique and particularly problematic. One is the volume, which can be staggering even for a small company or individual. Another is the usual lack of a coherent filing system, as e-mail systems are seldom designed for file management and retrieval. Perhaps the most important characteristic is the nature of e-mail, which is usually informal and riddled with slang, jargon, and jokes, even in the strictest business environments. These characteristics of e-mail combine to make retrieval of e-mail messages by topic difficult, even with computer-based word-searching. They also make e-mail a most attractive target for discovery.

*Consider*

- requiring the attorneys to develop a clear understanding of their own clients’ e-mail systems, the extent of data that may be subject to discovery, and the technological tools that may be available to assist in locating discoverable material; and
- then encouraging the attorneys to agree on a common search protocol to avoid future disputes over the adequacy of production.

*d. Deleted documents*

In the conventional paper-based world, once a document is shredded, incinerated, or buried in a landfill, it is no longer subject to discovery as a practical matter. The routine “deletion” of a computer-based document does not, however, actually destroy the data. Hitting the “delete” key merely renames the file in the computer,

marking it as available for overwriting if that particular space on the computer's hard disk is needed in the future. The data itself may remain on the hard disk or on removable storage media for months or years or may be overwritten only incrementally. It is a relatively simple task for a computer forensics expert to restore routinely deleted data, but it is expensive and the results are speculative.

At the earliest possible stage in the litigation, *consider*

- asking the attorneys whether they expect deleted data to be subject to discovery; and
- determining whether there is a need for an early data-preservation order or agreement.

*e. Backup tapes*

Most businesses, as well as many individuals, periodically back up their computer data onto tapes or disks for disaster recovery purposes. Often these tapes or disks are kept for months or even years. Data and documents that have been edited, deleted, or written over in the normal course of business may be recovered from these tapes or disks. The problem is that backup media are not organized for retrieval of individual documents or files. Special programs may be needed to retrieve specific information, and the process may be costly and time-consuming.

Early in the litigation, *consider* requiring that the attorneys discuss

- what backup data may be available;
- whether these data will be subject to discovery; and
- what the scope of such discovery should be.

*f. Archives and legacy data*

As businesses, institutions, and government agencies adopt new computer systems, the data from older systems may be archived in an organized, retrievable fashion, but most likely the data will be backed up on storage devices and filed in a vault. Years later, the data on these outdated tapes or disks will be unreadable without expensive conversion to modern media and formats.

Early in the litigation, *consider*

- requiring the attorneys to survey their clients' stored data holdings and retrieval capabilities; and
- requiring the attorneys to come to an understanding on whether discovery will be extended into archived material, how it will be conducted, and who will bear the costs.

*g. On-site inspection*

Computer-based discovery makes on-site inspections under Rule 34(b) problematic. On the one hand, it may be necessary to actually view the computer system in operation to make sure the discovery protocols are being performed properly, to

check the adequacy of security and chain of custody, or to ascertain the provenance of computer records. On the other hand, the nature of computer record storage and organization makes it virtually impossible to protect privileged or trade secret information in the context of an on-site inspection. In addition, any attempted manipulation of the computer data by the opposing party, counsel, or expert may compromise the entire process.

*Consider*

- directing the attorneys to guidelines that have been developed for conducting on-site inspections;<sup>38</sup> and
- requiring the attorneys to come to an agreement on whether on-site inspection is justified or necessary and, if so, what the protocol will be.

*b. Form of production*

In 1970, when Rule 34 was amended to include discovery of “data compilations,” the typical computer-based discovery response was a printout of the computer data. In those days, few, if any, law offices had computers, and the software necessary to translate data was not mass marketed. Today, producing printouts of computer data is so unnecessary that it might be considered an abusive tactic because it forces the recipient to reenter the data or spend long hours performing manual analysis. Many computer-based documents, such as relational databases and spreadsheets, are meaningless in printed form and must be viewed and manipulated on a computer using the appropriate software. Electronic exchange of electronic data is the preferred mode, but within that mode, there is plenty of room for dispute over the exact format.

*Consider*

- requiring the attorneys to agree on an appropriate form for the production of computer-based discovery before discovery gets under way, to avoid costly conversions and repeat productions later.

*i. Need for expert assistance*

If computer-based discovery will involve any of the technical issues outlined above, the parties very likely will need the assistance of computer experts. This is costly, but in the long run may save costs and time. Once the experts have had an opportunity to assess their respective parties’ computer systems and capabilities, they will be in a much better position than the attorneys to negotiate the technical

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38. For guidelines on conducting on-site inspections, see Andy Johnson-Laird, *Discovery of Computer Software in Patent Litigation*, 1998 Fed. Cts. L. Rev. 1; Joseph Kashi, *How to Conduct On-Premises Discovery of Computer Records*, L. Prac. Mgmt., March 1998, at 26; Computer Crime and Intellectual Property Section, Criminal Division, U.S. Dep’t of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (January 2001), available at <http://www.usdoj.gov/criminal/cybercrime/searchmanual.htm>.

aspects of conducting discovery, including search protocols, privilege and relevance screening, and production.

### **3. Management tools for computer-based discovery**

As a judge, it is not your role to dictate solutions to these thorny technical problems. Your role should be to make sure the attorneys on both sides face these issues squarely, negotiate solutions, and follow through. You have several tools available to help you manage computer-based discovery, limit cost and delay, and, when necessary, resolve discovery disputes.

#### *a. Early exchange of computer system information*

At the outset of litigation, before any document or computer-based discovery is initiated, the attorneys should be encouraged to exchange information about their clients' respective computer systems. The information each side needs to know includes which computer systems are in place at the moment, which computer systems were in place during the period of time relevant to anticipated discovery, the extent of the computerized information (including backups and archives) that will need to be searched in the course of discovery, the capabilities of each party to perform searches and produce material in a usable format, and the measures being taken to secure and preserve potential computer evidence.

##### *Consider*

- requiring the attorneys to arrange an informal meeting between the parties' most knowledgeable computer staff, with attorneys present, to help lay the groundwork for a workable discovery plan; or
- granting leave for each side to depose the other party's most knowledgeable computer staff under Rule 30(b)(6) prior to the start of formal discovery under Rule 26(d).

#### *b. Rule 16(c) pretrial conference agenda*

Perhaps the most important judicial management tool in computer-based discovery cases is the Rule 16 pretrial conference. Rule 16(c) lists several issues that may be addressed during the pretrial conference, but you may supplement that list with additional points on computer-based discovery and issue a memo to the attorneys well in advance of the conference, preferably at the outset of the litigation. See Appendix A, Form 31 for a list of topics that might be included in such a memo. The risk with such a procedure is that you may alert counsel to issues they had not considered, inadvertently expanding the scope of discovery, but given that computer-based discovery and its associated issues will become the norm in the future, this risk may be small.

#### *c. Rule 26(a)(1) initial disclosures*

Following the 2000 revisions to the Federal Rules of Civil Procedure, initial disclosure will most likely be the rule throughout the federal court system, except for

cases so small and routine that they involve little or no discovery of any type. The expected agenda for the Rule 16 pretrial conference sets the tone for the initial disclosures, the Rule 26(f) “meet and confer” conference of the parties, and the parties’ Rule 16 conference statement.

*Consider* issuing a memorandum to counsel stating your expectation that both sides will

- disclose the relevant aspects of their parties’ computer systems; and
- come to an agreement on computer-based discovery prior to the Rule 16 pretrial conference.

*d. Proportionality*

Under Rule 26(b)(2), you have the power to limit discovery “if the burden or expense of the proposed discovery outweighs its likely benefit.” If extraordinary efforts, such as the recovery of deleted data, are not justified by some showing that the efforts are likely to result in the discovery of relevant and material information, it is within your discretion to limit such discovery or shift the costs to the proponent.

*e. Cost allocation*

The normal rule in document discovery is that each side bears its own costs. Computer-based discovery may involve extraordinary costs, however, such as legacy data restoration or backup tape analysis. The court has the power to allocate costs equitably, balancing the needs of justice with the resources of the parties. In some cases, you may find it appropriate to condition extraordinary discovery on payment of part or all of the costs by the proponent.

*f. Rule 53 special master or Rule 706 court-appointed expert*

Under the Federal Rules of Civil Procedure and the Federal Rules of Evidence, you have the power to appoint a neutral expert to act as a special master (Fed. R. Civ. P. 53) or as an expert in computer-based discovery (Fed. R. Evid. 706).

If the parties cannot provide their own experts, or if the situation is contentious, *consider* appointing a neutral third party to

- break an impasse;
- supervise the technical aspects of discovery; or
- act as a secure custodian for sensitive or disputed data.

Even the suggestion of bringing in a neutral expert may help bring the attorneys to an agreement. See *infra* section VII.B.4 for a discussion of court-appointed experts and *infra* section VIII.C for a discussion of special masters.



## IV. PRETRIAL MOTIONS MANAGEMENT

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Motions practice is also a common and continuing source of avoidable cost, delay, and burden for the court and parties. Civil Justice Reform Act (CJRA) research confirms practical experience regarding civil motions practice in the federal courts: Motions practice increases in intensity as monetary stakes and the number of attorneys go up.<sup>39</sup> It is therefore important that you seize the initiative regarding motions practice in your court, especially in complex or large cases.

### A. In General

The Rule 16 conference provides an opportunity to set the tone and the limits of what is acceptable in both substantive and discovery-related motions in accordance with national and local rules, CJRA plans, and your individual preferences. Local custom and practice in the district also have a bearing; the bar's expectations and the benefits of consistency of practice within your district should be considered to the extent that they can be accommodated to the needs of effective case management. This means that the forms and procedures created to meet your

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39. See RAND Discovery Report, *supra* note 32, at 28–38.

specific needs should be designed to supplement the national rules and be consistent with local district rules and practice to achieve their maximum effect.

As in all other aspects of dispute resolution, your initiative in establishing the initial focus and tenor of your interactions with counsel is extremely important in maintaining control and direction over the motions process. Some routine matters do not require your intervention, nor do they benefit from a formal motions process (e.g., an attack on a technical pleading defect; joint requests for extensions that do not affect the overall case management plan or schedule; requests to proceed by videotape depositions). Submission of such motions should be discouraged, and counsel should be advised to work out such matters or respond to the court with joint stipulations or letters when possible. Requiring counsel to advise the opponent by a brief letter of any intended motion can be helpful. For substantive motions, the issue to be decided should be defined with precision, before filing if possible, to avoid obviously inappropriate motions and to focus the motion papers on that issue.<sup>40</sup>

*Consider*, as a general approach,

- requiring counsel to meet and confer before filing a motion to discuss the issues to be addressed, whether they can be resolved without judicial involvement, and, when appropriate, whether to consult with the judge in advance of filing;
- imposing page limits on briefs, memoranda, and other submissions, and allowing departures only for good cause;
- refusing submission of sur-reply briefs; and
- modifying the order of the filing of supporting and opposing papers to reflect the reality of the burden of persuasion for the particular motion.

In some cases, the basis for the motion will be so obvious that no opening memorandum by the moving party will be needed and the resolution will turn on the opposition and reply. In some situations, concurrent memoranda may be preferable to the usual motion–opposition–reply format.

*Consider*

- tailoring supporting documentation to the needs of the case; omitting affidavits on undisputed propositions; or limiting briefing to core issues;
- when oral argument is necessary, advising counsel of the particular issues on which you want argument; and

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40. *See, e.g.*, William W Schwarzer, Alan Hirsch & David Barrans, *The Analysis and Decision of Summary Judgment Motions* (Federal Judicial Center 1991); reprinted at 139 F.R.D. 441 (1992) [hereinafter *Analysis of Summary Judgment*]. For an update of case law on summary judgment, see William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 154 F.R.D. 311 (1994).



- barring live testimony except when clearly necessary to resolve issues of credibility.

Federal Rule of Civil Procedure 43(e) permits the court to hear a motion partially on oral testimony; that is, the court may call for or permit limited oral testimony to supplement written material and clarify complex facts. In lieu of oral testimony, however, the court may permit declarants to be deposed and relevant excerpts from their depositions to be submitted.

*Consider* the following approaches:

- Issue a tentative ruling (proposed or draft order) before the scheduled hearing. This practice, used in many state courts, expedites the motions calendar and may obviate the need for a hearing if the parties accept the ruling. If they do not, it can help focus oral argument and disclose potential errors in the tentative ruling, which, in turn, leads to more accurate minute orders at the hearing, a more accurate final ruling, and a savings of time to you and your clerks in the preparation of the final ruling and order.
- When possible, rule on motions from the bench at the close of a hearing, and, when this is not possible, minimize the time motions are under submission.

Many judges believe they should write no more than necessary. Your ruling and supporting reasons can often be stated orally on the record following the hearing; however, bear in mind that a clear and complete statement is necessary for the appellate record. Delays in issuing rulings are a major cause of public dissatisfaction with the courts, and most litigants would prefer a timely decision to a perfectly written one. Additionally, matters taken under submission rather than immediately ruled on can slip through the cracks; it may be difficult in the press of business to get around to making a ruling and time-consuming to become reacquainted with the matter. Moreover, your workload can become oppressive when submitted matters accumulate. For illustrative management procedures and orders, see Appendix A, Forms 4, 5, 22, 25, and 26.

## **B. Specific Techniques**

### **1. Pretrial motions conference**

Judicial time is often the least available element of the litigation process; many procedures have therefore been designed to use it efficiently. Toward this end, the recommended approach to controlling the timing, organization, and presentation of motions is to center initial motions planning on the Rule 16 conference (see *supra* section II.C.8). In complex or paper-intensive cases, or when an unexpected crush of paper threatens your pretrial schedule, a tailored investment of minimal time in a pretrial motions conference can get you back on track and reinforce both your authority and the certainty of your trial date.

*Consider* setting a pretrial motions conference to

- let each side know the other's general positions;
- narrow issues;
- prevent unfounded motions;
- discuss issues that preclude summary judgment; and
- regain control over motions activity in the case.

The amount of motions traffic and the kind of motions you are facing should determine whether you use this method. You might want to use the following cost-benefit analysis: Will your investment of time resolve issues, narrow issues, and prevent nonmeritorious motions?

## **2. Motions screening**

Ideally, motions can provide the impetus that moves the case beyond its initial pleadings toward more tailored judicial actions and speedier disposition. Unfortunately, the timing and purpose of motions (despite your initial efforts to plan motions practice at the initial Rule 16 conference) may not always coincide with this ideal. You must therefore be able to separate worthy, timely motions from those that are merely tactical, dilatory, or inopportune. Screening motions as they are filed is a technique that can help identify those motions you can decide without a hearing or by oral ruling. You can then promptly dispose of them so that they will not clutter your calendar, impose unnecessary costs, or delay the progress of the case.

Screening also provides an opportunity to make the initial decision to delay a filed (or prospective) motion to the point in the case when it will serve a more useful purpose. Although you may not be able to prohibit motions, you can refuse to entertain them until you feel the case management process is sufficiently advanced to address the question raised. As always, your decision to postpone consideration of a motion will be stronger and more easily understood if it is logical and keyed to particular case-activity stages.

You may wish to do this screening yourself, or you can establish screening guidelines for use by your law clerks. These guidelines can incorporate some or all of the considerations listed below.

*Consider*

- delaying (refusing to accept or entertain) a motion until discovery on relevant key questions or issues is complete (i.e., after critical discovery is completed);
- deferring summary judgment motions until the end of the discovery period;
- deferring sanctions motions until the end of the case; and

- establishing the general restrictions that Rule 11 and Rule 37 motions cannot be filed without leave of court.

### 3. Motions timing

Rule 16(b)(2) specifically directs the judge to limit the time within which motions may be filed. You can do this in discussion with counsel at the initial Rule 16 scheduling conference; the dates can then be incorporated into the scheduling order. The conference can also enable you and counsel to identify issues appropriate for resolution by motion, prevent the filing of pointless or premature motions, manage motions that are time sensitive, and establish an appropriate and efficient procedure for filing and hearing motions in the case. Local rules and general orders usually provide additional means for regulating motions practice at the Rule 16 scheduling conference.

#### *Consider*

- discussing contemplated motions with attorneys before they are filed;
- exploring the possibility of resolution of the issue without resort to motions;
- expediting the filing of motions ripe for early disposition, such as those directed at personal and subject matter jurisdiction;
- for motions that may remove a case from normal scheduling routines (e.g., motions to stay or to compel arbitration), adding a statement to the granting order that counsel shall inform the court every sixty days by letter of the status of the case;
- planning requisite discovery for summary judgment motions; and
- scheduling dispositive motions as early as feasible but not before a sufficient record for decision has been made.

With summary judgment motions in particular, sometimes the parties plan cross motions that one or both parties fully intend to be dispositive. In those instances, agreed-upon dates for motions submission should be carefully set. In the event a setting is premature from the standpoint of case progress, the parties can be required to meet and confer to arrive at dates and the order of presentation for your subsequent approval. Summary judgment motions should not await the completion of all discovery, however, if they are to serve to forestall needless expense and trial preparation time.

### 4. Limiting oral arguments on motions

Oral arguments can serve a variety of purposes for both judges and litigators; most are salutary, but not all serve the ends of effective and efficient justice. The need for oral argument is always your determination to make and should therefore be based on your needs in the particular case.

*Consider* whether oral argument will

- help you understand the law or facts;
- help you narrow the issues;
- open opportunities for settlement discussions; or
- help you rule.

In complicated cases, it might be useful to test your tentative conclusions during oral argument. The focus should remain on what information you will get out of oral argument. A rule of thumb is that if you cannot think of three things you wish to ask attorneys in oral argument, deny the request for it.

## C. Treatment of Specific Types of Motions

### 1. Motions for summary judgment

#### *a. In general*

Motions for summary judgment should not be filed unless they raise an issue that may reasonably be decided by summary resolution. Summary judgment motions should be filed at the optimum time. Motions filed prematurely can be a waste of time and effort, yet motions deferred until shortly before trial can result in much avoidable litigation effort. Summary judgment motions are best filed as soon as the requisite discovery supporting them has been completed and the issue is ripe.<sup>41</sup> They should also be set far enough in advance of the existing trial date to maximize the motion's case management and disposition potential. Beware of overbroad motions for summary judgment that are designed to make the opponent rehearse the case before trial.

*Consider*

- requiring a prefiling conference;
- incorporating any special procedures for summary judgment (or any other) motions into your district's Web site, prefiling information packet, or local rules;
- scheduling the filing of summary judgment motions for the appropriate time in the litigation;
- limiting the length and volume of supporting and opposing papers; and
- determining whether cross motions are appropriate.

Cross motions can convert a summary judgment motion into a bench trial on submitted papers, but only if the parties consent to it; in that event, the papers could be supplemented with live testimony as needed (e.g., when credibility becomes an issue).<sup>42</sup>

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41. Fed. R. Civ. P. 56; *see also* Analysis of Summary Judgment, *supra* note 40, at 441; MCL, Third, *supra* note 13, § 21.34.

42. *See* Analysis of Summary Judgment, *supra* note 40, at 500.

### *b. Specific techniques*

It is wise to set out for counsel the actual procedural framework you prefer for summary judgment motions. The process should provide you with all information, in the most efficacious form, necessary to support your decision-making routines. Notice to counsel of the process you prefer can be accomplished through a handout, a posting on the court's Web site, or inclusion in a more comprehensive handbook of chambers-specific rules and procedures.

*Consider* the following in setting out your summary judgment process:

- page limits on submissions by counsel;
- an instruction to state disputed issues of fact up front;
- an instruction to state whether there is a governing case;
- an instruction that all summary judgment motions be accompanied by a computer disk, in a chambers-compatible format that includes full pinpoint citations and complete deposition and affidavit excerpts to aid in opinion preparation;
- an instruction that all exhibits submitted in support of a motion, brief, or memorandum be tabbed at the right margin;
- an instruction that citations to deposition or affidavit testimony must include the appropriate page or paragraph numbers and that citations to other documents or materials with three or more pages must include pinpoint citations;
- an instruction that all such motions be accompanied by a form order with a brief statement of law to help in writing the decision;
- notification that you will issue a tentative ruling on the submitted pleadings, to which counsel will respond in oral argument;
- in lieu of a tentative ruling, a notice that if requests for argument are granted, a preargument order will be issued to let parties know what points you want addressed and what time limits will govern; and
- after oral argument, your dictation (from a memo prepared from the briefs) of a concise opinion or report and recommendation from the bench.

A concise bench opinion, based on a memo prepared from submitted briefs by your law clerk, can save both court and litigant time and costs. It is also generally sufficient for appellate review, but you should educate yourself about your circuit's preferences in this regard. If necessary, it can be supplemented by a written opinion at a later date.

## **2. Motions for injunctive relief**

Motions for injunctive relief require special attention because they demand prompt decisions on a limited record and have an immediate impact on the parties (see Federal Rule of Civil Procedure 65). The motions hearing presents op-

opportunities to achieve a number of important objectives, including deciding whether a temporary restraining order should be issued; setting dates for associated motions, depositions, and requested actions; and examining and resolving any matters relating to the issuance of surety bonds.

*Consider* the following in approaching these and other matters:

- Insist that a party seeking a restraining order notify the opposing counsel or party in advance, unless doing so would cause prejudice (Rule 65(b)).<sup>43</sup>
- Instead of issuing a conventional order to show cause, call an early conference with counsel to identify issues (for example, whether irreparable harm can be shown), address bond-posting requirements, schedule written submissions and a hearing date (see Rule 65(b) regarding time limits for show cause orders), and consider other procedural issues.
- If an injunction proceeding is required, avoid live testimony unless necessary. Most matters can be adequately presented in writing, so long as the declarant can be deposed on his or her declaration in advance of the hearing.
- Require counsel to submit proposed findings of fact, conclusions of law, and forms of order on computer disk in a chambers-compatible format (Rule 65(d)).
- Combine preliminary and permanent injunction proceedings when possible (see Rule 65(a)(2)). Separate hearings and proceedings can result in duplication and wasted time, whereas an expedited trial can resolve all issues in a single proceeding.

The wording of an injunction order can be critical to its enforcement and to its fate on appeal. You should ensure that counsel agree as far as possible on its form and state any objections clearly on the record. You should be cognizant of the valuable opportunity such a motion provides for settlement; in addition, many defendants will gladly agree to maintenance of the *status quo ante* to avoid the potential risks of the hearing itself.

### 3. Motions for remand

#### *a. In general*

A motion for remand is appropriate when the case that was the subject of the original removal action to federal court (1) fails to state a cause arising under the Constitution or federal law (28 U.S.C. § 1331); (2) is not an appropriate federal cause of action as a diversity case (28 U.S.C. § 1332); (3) is the subject of an abstention by the court under the inherent powers doctrine with regard to claims of equitable relief, discretionary relief, or other prudential actions; (4) is barred by

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43. *See also* Benchbook for U.S. District Court Judges § 3.08-1 (Federal Judicial Center, 4th ed. 1996) [hereinafter Benchbook].

statute; or (5) is an otherwise appropriate removal case whose original removal action was marred by procedural defects. The more common remand actions, for lack of federal jurisdiction or procedural defects, fall under 28 U.S.C. § 1447(c). Although you (or any party) may raise the jurisdictional issue sua sponte or entertain motions for remand on this basis at any time, motions based upon procedural defects related to the removal action itself (e.g., failure to join all necessary defendants or defective notice of removal) must be made within thirty days of removal (28 U.S.C. § 1447(c)).

*b. Specific techniques*

The two most common motions for remand are motions alleging lack of federal question jurisdiction (asserting the absence of a substantial federal issue arising under the Constitution or federal law) and motions alleging the absence of diversity of citizenship between the parties accompanied by a monetary claim in excess of \$75,000.00. These elements must appear on the face of the “well-pleaded complaint” to withstand challenge. Frequent arguments advanced in such remand motions involve attacks on the basis for federal court diversity jurisdiction (including claims of the fraudulent joinder of parties to create diversity) or on damage or monetary claims inflated to reach the monetary threshold for federal jurisdiction. You should also be mindful that although these questions should be addressed to the pleadings as they stood at the time of removal, legitimate interim changes may have arisen in the facts or parties of the case which may destroy or create diversity (e.g., the death of a party).

In addressing motions for remand, *consider that*

- little or no discovery effort should be required to address these issues;
- procedural defects are waivable or curable at the discretion of the court;
- you should be cognizant of state statute-of-limitations questions in the event of a remand so as not to foreclose relief;
- the pleadings themselves must speak directly to all jurisdictional issues (the “well-pleaded complaint” rule) as presented through briefs at a motions hearing; and
- the court has great power and discretion to retain, remand, or dismiss in part.

Partial retentions, remands, or dismissals should be avoided whenever possible owing to the potential burdens imposed on the parties to proceed in two separate forums. Dismissals, of course, may have terminal effects on parties’ claims in the state forum, whereas partial retentions risk inconsistent state and federal rulings. You should always address all motions for remand as soon as possible to avoid potentially duplicative, costly, and unnecessary federal proceedings.

#### 4. Motions to dismiss

##### *a. In general*

The Rule 12 motion is a common “suit killer,” and therefore you must safeguard the rights of the plaintiff, whose options for relief on any legitimate portion of the claim as filed will rest on your decision or recommendation. While a range of possibilities exist under Rule 12(b) for a motion to dismiss, the most common is that of subsection (6), failure to state a claim for which relief can be granted. Other common grounds are lack of subject matter jurisdiction (12(b)(1)) or personal jurisdiction (12(b)(2)). Venue questions may commonly be coupled with the primary motion under either Rule 12(b)(3) or 28 U.S.C. § 1404. If jurisdiction is lacking or venue is questionable, the parties must go elsewhere or reform their pleadings. Each of these latter two grounds have less potential impact on plaintiff rights but will generally appear earlier in the life of the case, as they constitute threshold questions for further court action in the case. Again, the most common ground is failure to state a cognizable claim for relief (Rule 12(b)(6)).

##### *b. Specific techniques*

Bear in mind that a motion to dismiss is often used by one party as a tactical delay weapon, as the defect it alleges is normally and most easily cured by amending the original pleadings. At your earliest opportunity, it pays to ask whether such motions will be filed, on what grounds, and whether such grounds are curable.

In addition, *consider* the following:

- A motion to dismiss is directed at the pleadings; you must assume the truth of the factual allegations in the complaint. You may not look at materials outside the complaint, unless attached or referred to in the complaint.
- You may, on notice to parties, convert the motion to dismiss to a summary judgment motion. Conversion may be appropriate (with proper notice) if you deem the motion to be substantively determinative and, in the interests of justice, think the claim would benefit from the wider pleading latitude summary judgment affords under Rule 56.
- You should bear in mind the statute of limitations and the 120-day rule as you contemplate a dismissal without prejudice. If they have run, your action may frustrate your intent and result in a bar to any further kind of relief.

A final caution: Because Rule 12(b) motions come early in the case, often before the answer is filed or the Rule 16 conference has been held, it may not be as easy to control them as it is to control later motions for which time frames have been established by your scheduling order. Resolution of Rule 12(b) motions as soon as possible will keep the litigation on track.



## 5. Motions raising qualified immunity

The affirmative defense of qualified immunity will most often be raised in a motion to dismiss or a motion for summary judgment, but it may also be presented as its own motion. Because qualified immunity should be pled in the answer, you should be aware of it as a potential issue in the case from the outset. If the issue has not already been addressed by the time you conduct the Rule 16 conference, you may want to discuss with counsel a schedule for briefing the issue. Cases involving allegations of qualified immunity often present factually complicated situations that require a lot of your time in the form of either reviewing deposition evidence or conducting a hearing. Outlining a schedule for handling these complexities may lessen the impact of these cases on your overall workload.

It is also important to note that if a motion based upon the defense of qualified immunity is denied, that denial is the appropriate subject of an interlocutory appeal. In this situation, only the qualified immunity issue will go to the court of appeals, leaving the remaining issues in the case on your docket. You or a member of your staff should pay close attention to the progress of the qualified immunity issue on appeal so that you will be aware of the ruling of the court of appeals as soon as possible. Early knowledge of the ruling on this issue will allow you to get the remaining issues in the case back on the appropriate litigation track and thereby achieve a faster resolution.

## 6. Motions that remove a case from the schedule set for it

When you grant a motion that removes a case from its schedule—for example, a motion to stay or a motion to compel arbitration—you run the risk that the case will quickly age if you do not require the lawyers to keep you informed about its status.

*Consider*, in orders granting motions that remove a case from its schedule, adding a statement that counsel must inform the court by letter every sixty days of the status of the case.

## 7. Motions for sanctions

### *a. In general*

Sanctions motions and the satellite litigation they may spawn can represent a large and nagging portion of the motions practice before your court. By establishing early control over the case and setting clear limits on acceptable behavior, you can limit the number of such motions you see and avoid their use as tactical tools for limited advantage in highly charged cases. Federal Rules of Civil Procedure 11, 16, 26, 37, and 41, as well as 28 U.S.C. § 1927, authorize the imposition of sanctions in connection with pretrial proceedings. Sanctions are not a basis for effective case management or a substitute for it; on the contrary, the need for sanctions often arises when case management has received insufficient attention, has been ineffective, or has broken down. It is equally true, however, that good case man-

agement cannot anticipate all problematic conduct of attorneys or parties, or always control it when it occurs. Sanctions may therefore be necessary, but you should maintain close control over the process to prevent the spawning of satellite litigation and the degradation of professional standards in the conduct of the litigation.

Sanctions can serve several purposes: to protect a party, to remedy prejudice caused, to deter future misconduct, to punish the offender, and to protect the efficiency of the court's docket. You should select the least severe sanction adequate to accomplish the intended purpose. Moreover, you should be aware that sanctions can have collateral effects, including the creation of a permanent shadow on the sanctioned attorney's record as maintained by state regulatory and bar authorities. Generally, the authority you use to sanction should be limited to the most precise sanctioning tool applicable.

*Consider*, for example, the following authorities and sanctionable conduct:

- Rule 11: pleadings unreasonably lacking support in rule, law, evidence, precedent, fact, or theory; or filed with frivolous or improper purposes;
- Rule 16: noncompliance with a pretrial order;
- Rules 26 and 37: violations, abuses, or impropriety in relation to discovery orders or processes;
- 28 U.S.C. § 1927: vexatious or unreasonable multiplying of proceedings in any case; and
- the doctrine of inherent judicial powers: contempt citations for any kind of sanctionable conduct.

More generally, sanctions can be contained in rulings in response to motions. Your sanctions, when imposed, should be tailored to the offense at hand, within the broad discretion granted to the judge. What should the punishment be?

*Consider* the following:

- If an attorney has failed to disclose an expert and there is no way to avoid prejudice to the opposition, prohibit the expert.
- If a false affidavit has been made, impose on the offending party the costs and fees incurred in the defense against it.
- If a frivolous pleading has been filed, strike the pleading.
- If specific remedial action will cure the harm, impose the remedy.
- To suit the specifics of the individual case, use a combination of sanctions (costs, strikes, punishments, and remedial actions).

The discretion invested in the judge, as well as the many specific remedies enumerated in the rules of procedure, provide the wide latitude you need to get your point across. But do remember your purpose—to secure just, speedy, and inexpensive dispositions; to stop rules transgressions; and to deter future violators.

*Consider* the following approaches:

- Set the guidelines for acceptable conduct at your earliest opportunity (printed rules of conduct can help).
- Deal swiftly and firmly with the transgressors, even if imposition of sanctions is to be delayed until the end of the trial (i.e., don't avoid or postpone challenges).
- Never make empty sanctions threats.
- Avoid being used by one side in technical, tactical violations contests.

It may be necessary, at first, to act aggressively in the area of rule administration, as a warning to other potential malefactors. In complex or multiparty cases (especially with out-of-state counsel), this is a small price to pay, early on, to establish and maintain order. Once developed, a reputation for fairness, responsiveness, and certainty in rule administration and motions management can be among your most lasting professional assets.

*b. Specific techniques*

When, despite your careful shaping of motions practice before your court, legitimate disputes and sanctionable conduct arise, consider the relevant threshold issues and give the parties an opportunity for a fair hearing. Remember that different statutes and rules authorize sanctions for different kinds of conduct and on different predicates; they are not interchangeable. You should make a record indicating clearly the authority relied on and the factual basis for the action.

*Consider* the specific conduct to be sanctioned, asking

- what prejudice was caused to the opponent;
- whether the act was deliberate or inadvertent;
- whether there were extenuating circumstances;
- what the impact was on the court and the public;
- whether the offending party has had notice and an opportunity to respond;
- what purpose is to be served by the sanction—protection, remedy, deterrence, or punishment—and the least severe sanction adequate for the purpose;
- whether sanctions should be imposed promptly or delayed until the end of trial;
- on whom the sanctions should be imposed—attorney, client, or both;
- under what legal authority sanctions will be imposed;
- whether the sanction is authorized by inherent authority or the court's local rules (distinguish between civil and criminal contempt);
- what specific sanction will be imposed; and
- whether the conduct requires reporting to the court's professionalism committee or the local bar association.

In situations in which you address sanctionable conduct, especially when acting *sua sponte*, use a show cause order with its accompanying process.

*Consider*

- letting counsel know you are considering sanctions and under which rule or statute;
- giving counsel an opportunity to show why any or all of the possible sanctions are not warranted; and
- letting counsel demonstrate why the show cause order is a good option instead of just imposing sanctions.

In short, give attorneys an opportunity to be heard. The process itself will insulate you from the danger of a precipitous response; provide time for the transgressors to reflect; and ultimately force them to help shape the remedy you adopt, ensuring a more memorable, larger sense of justice for all concerned. For further discussion of sanctioning, see the *Manual for Complex Litigation, Third*.<sup>44</sup> See also the *Benchbook for U.S. District Judges*.<sup>45</sup>

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44. MCL, Third, *supra* note 13, § 20.15.

45. Benchbook, *supra* note 43, § 2.08-1.

## V. JUDICIAL SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

- A. Judicial Settlement
  1. The judge's role
  2. The timing of settlement discussions
  3. Successful settlement techniques
  4. Recording the settlement
  5. Settlement in cases involving pro se litigants
  6. Ethical and other considerations in settlements
- B. Alternative Dispute Resolution Procedures
  1. Some terms to keep in mind
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  3. Deciding whether to refer a case to ADR and selecting an ADR process
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    - d. Summary jury trial
  4. Selecting and compensating an ADR neutral
  5. Issuing a referral order
  6. Managing cases referred to ADR

Only a small percentage of federal civil cases are resolved by trial.<sup>46</sup> Many of the remaining cases settle. Many of these settle without judicial or other third-party intervention, but some do not. Furthermore, many of these cases settle later than they should, unnecessarily absorbing both client and judicial resources. Early settlement is therefore one objective of effective litigation management.<sup>47</sup> It can also contribute substantially to the perception by litigants that the court has fulfilled its responsibility and has treated them fairly and respectfully.

Judges need to keep in mind, however, that settlement is not invariably the preferred disposition for every case. For a variety of reasons—for example, the need for a definitive ruling on a matter of law or for a decision on an issue of public interest—some cases should be resolved through adjudication.

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46. Although the trial rate varies from district to district, on average across the federal district courts only about 2%–3% of civil cases are tried. *See, e.g.*, Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2000 Annual Report of the Director 162 tbl.C-4A.

47. Federal Rule of Civil Procedure 16(c)(9) identifies “settlement and the use of special procedures to assist in resolving the dispute” as appropriate topics for discussion at pretrial conferences. Commentary to the rules identifies various ADR processes as acceptable special procedures.

How and when to assist the parties in reaching an early settlement depends on the circumstances of each case and the personalities involved. Likewise, who can best assist the parties and by what settlement techniques will depend on the nature of the case. You can provide settlement assistance yourself or turn to a variety of other neutrals (e.g., mediators, arbitrators, or early neutral evaluators) to assist you with this task. This chapter provides guidance on judicial settlement techniques and on the use of alternative dispute resolution (ADR) for resolution of civil cases.

## A. Judicial Settlement

Judge-hosted settlement conferences are a long-standing method for helping litigants resolve their cases. Nearly all judges play this role at least occasionally, and some judges play it frequently, if not routinely. Judges may serve as settlement facilitators in their own cases, or they may do so on behalf of other judges. In some districts, magistrate judges serve as the court's primary settlement neutrals. The extent to which you become involved in settlement discussions will depend on several factors, including whether you have time, whether other alternatives are available, whether you feel your involvement helps the parties, and, if you are a magistrate judge, whether the court or individual judges refer such matters to you.<sup>48</sup>

### 1. The judge's role

Opinions of expert commentators differ on whether, and when, it is appropriate for judges to participate in settlement negotiations in their assigned cases. Because doing so may jeopardize the appearance of impartiality and create a risk of recusal, many judges will not do so unless the parties specifically request it and waive recusal. Other judges believe their familiarity with the case makes them the most effective neutrals and best able to focus on the issues and evaluate the parties' positions. Some draw a distinction between bench and jury trials, feeling freer to participate in settlement negotiations when the facts in the case will be determined by a jury. Local custom and practice may provide guidance, but generally you should be cautious about participating in settlement discussions if you are the finder of fact unless the parties have asked you to and have waived recusal.<sup>49</sup> You

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48. See Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges 1–2* (American Bar Association 1985). In this study of litigating attorneys in four districts, Brazil found that 85% agreed that involvement of a federal judge in settlement discussions was likely to improve prospects for settlement and that a majority thought judges should involve themselves in settlement even when the attorneys did not ask for help. However, a substantial majority also preferred that the settlement judge not be the judge who will try the case, especially if the case is a bench trial.

49. See Comm. on Codes of Conduct, Judicial Conf. of the U.S., *Code of Conduct for United States Judges*, Canon 3A(4) as revised September 1992 (stating that a judge may, with both parties' consent, confer separately with parties and counsel to assist settlement but must disqualify

might also consider establishing a relationship with another judge for exchange of cases that would benefit from settlement assistance but in which you prefer not to be too close to the negotiations. Or you might refer the case to your court's ADR program (see *infra* section V.B).

In any event, you can always serve as a catalyst, by opening the door to negotiations and helping the parties evaluate the case. Because many attorneys and their clients are reluctant to make the first settlement move, fearing their overture may signal a weak case, you can be especially important in breaking down barriers to negotiation. You will be most effective if you develop credibility and a reputation for candor and fairness, giving counsel and litigants confidence that they will be fairly treated in the negotiation process.

## 2. The timing of settlement discussions

You should raise the possibility of settlement discussions early and often. Whether your first contact with the parties is a Rule 16(b) conference or issuance of a scheduling order, you should ask them to begin settlement discussions and offer, as appropriate, your assistance, the assistance of other judges, or the assistance of the court's ADR program.

Although conventional wisdom has held that productive settlement discussions cannot be held until substantial discovery has been completed, many cases defy this truism. Before counsel embark on extensive briefing schedules or extended rounds of discovery (i.e., before their clients have sunk large sums in the case and become hardened in their positions), you should open the door to settlement discussions. Try not to put yourself and the parties in the position of preparing for trial, with all the resources that requires, and then having the case settle.

You should raise the settlement question not only early but regularly, first at the initial conference with the parties, at subsequent conferences, after dispositive motions (which tend to change how parties view their case), and before attorneys start the task of preparing the final pretrial order. Just before trial is the worst time to raise settlement for the first time, but if you have not raised it before, by all means do so then. Moreover, some cases settle during trial. Raising the issue at that time may help the parties gracefully cut their losses. Generally you should not permit the attorneys to ask for delays of the trial date to settle the case. If you have encouraged and assisted settlement discussions all along, you should rarely, if ever, find yourself in this position.

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himself or herself if his or her impartiality might be questioned). *See also* Administrative Office of the U.S. Courts, 2 Guide to Judiciary Policies & Procedures, Published Advisory Opinions, Advisory Opinion No. 95 at ch. 4 (January 14, 1999) (“Judges must be mindful of the effect settlement discussions can have not only on their own objectivity and impartiality but also on the appearance of their objectivity and impartiality.”).

To help parties enter into serious settlement discussions, you might do a number of things in connection with the first or any appropriate Rule 16 conference.

*Consider*

- asking counsel for an oral or written report on whether settlement negotiations are in progress or contemplated, what the prospects are, and how settlement may be facilitated (for an example of a case management form requiring settlement certification, see Appendix A, Form 26);
- having counsel identify, and then complete, targeted discovery necessary to evaluate the case for settlement;
- assisting counsel, without participating in merits discussions, in developing a format or procedure for negotiations, including arranging for exchange of demands and offers through a neutral third party (preferably someone other than yourself if you are the fact finder);
- requiring counsel to discuss with their clients the anticipated costs of litigation;
- in fee-shifting cases, requiring counsel to disclose to you and opposing counsel any anticipated fees and costs;
- referring the case to a mediator, special master, settlement judge, magistrate judge, or, if all counsel request it, to yourself to conduct negotiations; and
- referring the case to ADR procedures provided by local rules or general orders or agreed to by the parties, such as arbitration, mediation, or early neutral evaluation (see *infra* section V.B).

As important as settlement is, you should not consider it necessary to delay the progress of the case for the sake of settlement. For example, you should not feel compelled generally to stay discovery or other pretrial proceedings, or to postpone the trial, because of settlement discussions. The momentum of the pretrial process can in itself be an important impetus to settlement. For an example of an order of referral to settlement conference, see Appendix A, Form 32.

### 3. Successful settlement techniques

If the parties agree that they want you to serve as the settlement neutral, or if you are serving as such on a case for another judge, you will need to decide how to conduct the discussions and how to lower barriers to settlement. Your choice of settlement techniques will be influenced by the setting of the negotiations, the character of the participants, and the nature of the case. There is no single way to conduct a settlement conference, but whatever techniques you use, two things are fundamental: be prepared and listen carefully. Much relevant information is communicated by the participants in subtle ways. Understanding the parties' thinking and feelings is as important as analyzing the issues; the parties' real ob-



jectives in the litigation may not always be what they seem to be on the face of the pleadings. The parties may also take a long time to reach settlement as they reluctantly come to grips with their case and their feelings. You can help them start this process by asking the plaintiff to state simply what he or she wants from the defendant.

Assisting in settlement can require great patience. Negotiating a settlement, however, may lead to a far better outcome for the parties and may take less time than trying the case.

You can facilitate settlement negotiations by your actions and decisions in setting up the process and by the steps you take during the settlement session itself.

In setting up the settlement process, *consider*

- asking the parties at the first opportunity what information they need to evaluate the case and to reach supportable damage estimates (e.g., personnel files in discrimination cases or the medical file in personal injury cases), ordering them to produce the necessary items, and asking them to write you about the results of subsequent settlement talks;
- directing attorneys participating in any settlement conference to be prepared regarding the factual and legal issues and their clients' positions;
- ensuring that the attorneys and other party representatives have adequate authority to settle the case or at least have immediate access to the final authority, including access to insurers, senior government officials, and top management when necessary;
- requiring the attendance of parties in any case in which you suspect the attorneys, rather than the parties, are standing in the way of settlement;<sup>50</sup>
- requiring the attendance of parties in any case in which you think the case cannot be resolved without giving the parties an opportunity to "tell their story" to the judge, such as discrimination and personal injury cases;
- suggesting, if counsel in the case are antagonistic or unskilled in negotiation, that one or more parties employ special counsel for the purpose of conducting settlement discussions;
- setting a firm and credible trial date to keep pressure on the parties; and
- having counsel submit confidential memoranda, outlining the pivotal issues, the critical evidence, and their settlement positions.

Over the years, judges have developed and refined a number of ways of helping parties settle their cases.

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50. Federal Rule of Civil Procedure 16(c) authorizes the court to require a party or its representative to be present or available by telephone at pretrial conferences "to consider possible settlement of the dispute."

To assist negotiations during the settlement conference itself, *consider* the following approaches:

- Discuss with the participants the issues and the probable risks each party faces, without taking a position on the merits.
- Ask the attorneys, in front of their clients, how much it will cost to litigate the case through trial and then suggest to their clients that they put this sum toward settlement.
- Help parties focus on their underlying interests (e.g., resuming a profitable business relationship) rather than disputed facts or legal principles.
- Meet separately with each side (parties and counsel) for candid evaluations of the parties' prospects and the costs of continuing the litigation. These meetings often become essential to the successful conclusion of settlement negotiations; however, you should have the parties' consent to them, or they may preclude you from presiding at trial.
- Suggest that the corporate principals meet without counsel to reach an agreement as businesspeople.
- Defer recommendation of potential settlement figures for the parties to consider until the outlines of a probable settlement become apparent.
- Delay having parties state their "bottom lines" so as to keep the negotiating positions flexible.
- Direct attention to damages, including possible tax consequences, instead of emphasizing liability issues. In many settlements, it is money rather than principle that ultimately matters; if it becomes clear to the parties that a settlement on financially acceptable terms is possible, there is little point in continuing to debate liability.
- Sever one or more issues for a separate trial if doing so will provide the basis for settlement of other issues.
- Look for imaginative and innovative solutions, such as structured payouts, payment in kind, future commercial relations, concessions, apologies or admissions, establishment of a training or recruiting program, or correction of a defect.
- Discuss settlement in the parties' language (e.g., with two business litigants, ask "How many widgets will the litigation costs buy? What are your daily profits against the costs of this case?").
- Provide a structure, when the parties are dug in, to help them exchange offers (e.g., ask the plaintiff to "come up with the next offer," ask the defendant to make a counteroffer, and ask them to continue exchanging offers until settlement or impasse is reached). This forces movement but takes the burden off the parties to make the first move.
- Inject realities, such as the difficulties of collecting a judgment from a financially strapped defendant and the risk of bankruptcy.

- Recommend or encourage the parties to exclude punitive damages as an element of the claim for settlement purposes.
- Encourage the defendant to make a Federal Rule of Civil Procedure 68 offer, carefully drafted to avoid later disputes. An offer of judgment can be helpful in cases in which attorneys' fees can be awarded by the court, since such an offer can cover all liability. The offer must be unambiguous to permit a determination whether the final judgment is more favorable.
- Settle only some issues in the case or the claims of some but not all parties.<sup>51</sup>
- Keep the negotiations going despite lack of agreement.

Some judges find they are most effective if they try to move the parties within range of settlement (i.e., if they establish a “ballpark”). To do that, you may need to remain noncommittal on the merits for some time. If you do not make a recommendation too soon, you may also find that your credibility and effectiveness are enhanced, and you may avoid having to backtrack later if discussions take an unanticipated direction. On the other hand, a study done some years ago found that many attorneys preferred a judge who was actively involved in settlement discussions, who knew the facts and law in the particular case, who offered explicit assessments of party positions, and who made specific suggestions for resolution—provided the judge was not going to be the fact finder in the case.<sup>52</sup> These preferences varied by location, which suggests that you should try to understand your local culture in deciding what approach you will take in settlement discussions.

#### 4. Recording the settlement

In the end, it is not the judge who settles the case, but the parties, and their decision does not ordinarily require your review or approval. To forestall future disputes over the settlement, it is generally wise nonetheless to record the settlement in writing. You should consider dictating the complete terms of the settlement into the record in the presence of counsel as soon as agreement is reached. If the agreement requires ratification or approval by a board of directors, the Attorney General, or some other higher authority, set a date certain by which counsel must file a written agreement with the court. If the agreement is to be filed later, it is wise to get at least an outline of the settlement terms on paper on the spot, particularly if individuals rather than corporations are involved. Ask both counsel and all parties to affirm, by signature or on the record, the terms of the agreement.

Even if the agreement is on the record, disputes may arise later about the form of the agreement. Therefore, have counsel state on the record that if there are arguments later about the form of their agreement, the form, not the underlying

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51. *But see* MCL, Third, *supra* note 13, § 23.21 for a discussion of the risks of partial settlements.

52. Brazil, *supra* note 48, at 1–2, 5–6.

settlement, may be discussed. Make it clear, in the record, that if the parties cannot agree on the form, the court will decide it.

If you have given counsel leeway to file the agreement by a specified later date, you will undoubtedly find that some parties are tardy in meeting that date. When you set a date certain and put it on the record, make certain counsel know you expect them to keep that date. When they do, you can dismiss the case (see Appendix A, Form 33, for an example of an order dismissing a settled case). If they do not, you can move to dismiss the case or, if you prefer, ask the parties to show cause why you should not dismiss the case (see Appendix A, Form 34, for an example of an order dismissing a case).

In some cases, such as class actions and some antitrust cases, you are required to review and approve the settlement. You can find a helpful discussion of this responsibility in the *Manual for Complex Litigation, Third*.<sup>53</sup>

## 5. Settlement in cases involving pro se litigants

Cases involving a pro se litigant seem to be obvious candidates for disposition by settlement, but there is one serious risk for the judge: Pro se litigants will very likely turn to you for advice, and you may be tempted by their sometimes extreme neediness to help them. Within bounds, it is your responsibility to ensure that justice is done for these litigants, just as it is for those who can hire the finest counsel, but you must also protect your impartiality on behalf of all litigants in the case. Because this is a difficult line to walk, some judges do not assist in settlement negotiations in cases on their docket with pro se litigants. This is unfortunate, as early settlement would benefit many of these litigants. These cases present a very good opportunity to turn to one of your colleagues for assistance.

### *Consider*

- referring cases with pro se litigants to another district or magistrate judge for settlement assistance; and
- establishing a regular exchange relationship with another district or magistrate judge to provide settlement assistance in pro se cases.

## 6. Ethical and other considerations in settlements

Whatever your approach to settlement discussions, you should ensure at all times that your impartiality and the court's credibility are not compromised. To preserve the integrity of the process, you may also have to monitor the conduct of counsel and their clients. Party efforts to seal documents as part of the settlement agreement, for example, will require your close attention, especially in cases that involve public safety. Counsel may also try to avoid additional discovery costs by seeking agreements that relieve their clients of further discovery. Or they may attempt to enter into side agreements that are not disclosed to other parties in the case. Ne-

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53. MCL, Third, *supra* note 13, § 23.14.

gotiations regarding attorneys' fees may also require your attention, especially in civil rights cases, in which the losing side is liable for the prevailing party's attorneys' fees. These and other problems are given careful attention in the *Manual for Complex Litigation, Third*.<sup>54</sup>

## B. Alternative Dispute Resolution Procedures

Using methods other than conventional adjudication to resolve cases is an important aspect of litigation management. These methods are sometimes collectively referred to as alternative dispute resolution (ADR), but no single label adequately describes the full range of alternatives. During the 1990s, many federal district courts established court-annexed ADR programs, through which they provide one or more procedures, such as mediation, arbitration, early neutral evaluation (ENE), or summary jury trial.<sup>55</sup> The first step you should take in considering whether and how to use ADR is to become familiar with your court's local rules on the subject.<sup>56</sup> These rules may, for example, define the types of cases eligible for ADR, establish procedures by which cases are referred, and state how the neutral is to be appointed; they may even require that certain types of cases routinely go to ADR.

### 1. Some terms to keep in mind

Although ADR has been used by the courts for some time, confusion persists regarding some of the key terms in ADR. Below is a short glossary.

- *Mandatory versus voluntary.* These terms describe how proceedings enter the court ADR process; they do not describe what happens during the process or the nature of the outcome. If ADR use is based wholly on the consent of the parties, the referral is voluntary. If participation in ADR is required by the court, whether by an individual judge's order or by a court rule that certain types of proceedings will go to ADR, the referral is presumptively mandatory. In courts with programs that automatically refer some types of cases to ADR, such as the mandatory arbitration programs,

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54. MCL, Third, *supra* note 13, §§ 23.22–23.24.

55. The first federal district court ADR program dates to the 1970s, when the Judicial Conference established three pilot arbitration sites. This program was expanded, by statute, to twenty courts in 1988. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. 9, § 901, Nov. 19, 1988, 102 Stat. 4663 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)). The greatest development of district court ADR was prompted by the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (1990; amended 1991, 1994, 1996, 1997, 2000). *See* Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers* (Federal Judicial Center and CPR Institute for Dispute Resolution, 1996) (summarizes history of federal court ADR developments and describes each district court ADR program) [**hereinafter ADR and Settlement Sourcebook**].

56. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (1998), discussed in *infra* section V.B.2, requires that each district court provide an ADR program and do so by local rule (§ 651(b)).

the court provides procedures for parties to seek exemption from the process.

- *Binding versus nonbinding.* These terms refer to the outcome of the ADR process. All federal court ADR programs are nonbinding, meaning the parties are not bound by any resolution unless they agree to it. For example, a mandatory arbitration program produces a nonbinding decision, which the parties can reject in favor of a trial de novo. A mediation, whether voluntary or mandatory, results in either a resolution agreed to by the parties or no agreement.
- *Court-annexed.* The term *court-annexed* generally refers to an ADR program authorized and managed by the court. Originally used to distinguish arbitration in the courts from private arbitration, the term is now sometimes used for all kinds of ADR programs based in the court. The terms *court-based* and *court-related* have the same meaning. Under the ADR Act of 1998, each federal district court must authorize the use of ADR and must devise and implement its own ADR program to encourage and promote use of ADR.<sup>57</sup> The court may arrange for an outside entity, such as a bar association, community mediation program, or state court ADR program, to provide ADR services to cases referred by the court.
- *Third-party neutrals.* Third-party neutrals are the individuals who conduct ADR sessions. Most federal courts have established panels of neutrals who have met qualifications requirements set by the court and encourage parties to use these neutrals. Most members of federal court panels have training and experience in the law. In addition to the panels, many courts rely on their magistrate judges to conduct settlement sessions, and a few courts employ mediators on staff.
- *Adjudicatory versus consensual processes.* Some ADR processes are adjudicatory, involving a third-party decision maker who renders a decision, albeit nonbinding, based on adversarial presentations. Others are consensual processes, in which the parties are the decision makers. Arbitration is the classic adjudicatory process, whereas mediation is the principal consensual process. Adjudicatory processes are dominated by the attorneys, focus on facts and rights, and result in a winner and a loser. Consensual processes give the parties the decision-making role, focus subjectively on needs and interests, and result in an accommodative resolution.
- *Interest-based versus rights-based processes.* Interest-based dispute resolution processes expand the legal discussion to look at underlying interests, enhance communications, deal with emotions, and seek inventive solutions or joint gains. The focus of these processes—of which mediation is the primary example—is on clarifying the parties’ real motivations or under-

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57. 28 U.S.C. § 651(b) (Supp. 1998).

lying interests in the dispute. Rights-based processes, such as arbitration, narrow issues, streamline legal arguments, and predict or render judicial outcomes based on assessments of fact and law. ADR processes may contain both interest-based and rights-based elements, depending on the structure of the process and the style of the third-party neutral.

## 2. Authority to refer cases to ADR

Twice during the past several years, the Judicial Conference has endorsed the use of ADR in civil cases. In the 1995 Long Range Plan for the Federal Courts, the Conference stated, “District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources . . . .”<sup>58</sup> The Conference reiterated this policy in 1997 when it reported to Congress on the courts’ experiences under the Civil Justice Reform Act of 1990: “The Conference supports continued use of appropriate forms of ADR . . . . [The Judicial Conference] recommends that local districts continue to develop suitable ADR programs . . . .”<sup>59</sup>

With passage of the ADR Act of 1998, all district courts must provide at least one form of ADR to litigants in civil cases.<sup>60</sup> Furthermore, the courts must require litigants to consider using ADR<sup>61</sup> and are permitted to order litigants to use mediation and early neutral evaluation.<sup>62</sup> These and other requirements of the Act, for example, that courts adopt procedures for making neutrals available and issue

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58. Judicial Conference of the U.S., Long Range Plan for the Federal Courts 70 (1995).

59. JCUS CJRA Report, *supra* note 1, at 37–38. The Conference’s recommendations were based on findings from two studies of ADR conducted pursuant to the CJRA. The first, a study by the RAND Institute for Civil Justice of six ADR programs, “provided no strong statistical evidence that the mediation or neutral evaluation programs, as implemented in the six districts studied, significantly affected time to disposition, litigation costs, or attorney views of fairness . . . .” The study found that participants were generally satisfied with the procedures, and it concluded that ADR was not a panacea nor was it detrimental. James S. Kakalik, Terence Dunworth, Lural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act xxxiv (RAND Institute for Civil Justice 1996). The second study, of three ADR demonstration districts, found a significant reduction in disposition time in one district (data were insufficient in the other two to make a determination); attorney-estimated cost savings across the three districts; and high attorney satisfaction in all three districts. Donna Stienstra, Molly Johnson & Patricia Lombard, A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990, at 16–19 (Federal Judicial Center 1997) [hereinafter FJC Demonstration Programs Report].

60. 28 U.S.C. § 652(a) (Supp. 1998).

61. *Id.* Implementation of this requirement may fall to the individual judge; see your local rules for your court’s approach to this requirement.

62. *Id.* The ADR Act expressly requires consent of the parties for a referral to arbitration, excepting ten courts authorized in 1988 to compel participation in arbitration in certain kinds of cases (28 U.S.C. § 654).

rules on disqualification of neutrals,<sup>63</sup> will affect how you use ADR. Again, you should make sure you know your court's local rules.

For an analysis of authority to refer cases to ADR, in both district and bankruptcy courts, see a manual written for federal judges, *Guide to Judicial Management of Cases in ADR*.<sup>64</sup> This source also examines judicial authority to compel ADR use without party consent.<sup>65</sup>

### 3. Deciding whether to refer a case to ADR and selecting an ADR process

Whether and how you refer a case to ADR will depend on a number of factors, including the nature of the case, the availability of ADR procedures, the ADR rules established by your court, and your own views about ADR.<sup>66</sup> If the decision whether to refer a case to ADR remains with the individual judge (i.e., your court does not require ADR in certain types of cases), you will have to decide what you want to accomplish through ADR. This might be an evaluation of the strengths and weaknesses of the case, a judgment on the merits of the case, or assistance with settlement discussions. You will then need to determine when you should refer the case to ADR and what type of ADR procedure will accomplish that purpose.

The effort to match cases to ADR processes has a long history, which we will not discuss here because so much has been written elsewhere. We recommend that you consult the *Guide to Judicial Management of Cases in ADR*.<sup>67</sup> That manual discusses the kinds of issues a judge might consider when deciding whether to refer a case to ADR, what type of ADR to use, whether to order use of ADR, when in the litigation to make the referral to ADR, and how to appoint a neutral.

It is important to keep in mind that most district courts are not authorized to order parties to use arbitration without their consent. The ADR Act of 1998 states that “[a]ny district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.”<sup>68</sup> Ten districts are exempt from this provision and may retain the mandatory arbitration procedures authorized by statute in 1988.<sup>69</sup>

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63. 28 U.S.C. § 653(a) and (b), respectively (Supp. 1998).

64. Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* § I.A (Federal Judicial Center 2001) [hereinafter ADR Guide].

65. *See id.* § V.A.

66. Over the years, both the propriety and efficacy of ADR in the federal courts have been vigorously debated. For a discussion of the pros and cons of ADR in the federal district courts, see Donna Stienstra & Thomas E. Willging, *Alternatives to Litigation: Do They Have a Place in the Federal District Courts?* (Federal Judicial Center 1995).

67. *See* ADR Guide, *supra* note 64, §§ III, IV.

68. 28 U.S.C. § 652(a) (Supp. 1998).

69. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. 9, § 901, 102 Stat. 4663 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994); now codified at 28 U.S.C. §§ 651–658 (2000)). The ADR Act of 1998 provides that “[n]othing in this



Among the many case and party characteristics that might affect your referral decision and that are discussed in the *Guide to Judicial Management of Cases in ADR* are the following:

- whether justice will be served;
- whether the litigants' interests will be protected and advanced;
- whether there are legal issues that must be resolved (such as statute of limitations or jurisdiction) before the case can move forward;
- whether the parties have already attempted settlement and failed;
- whether the parties are opposed to ADR;
- whether any of the parties are proceeding pro se;<sup>70</sup>
- whether the projected costs of proceeding with litigation are disproportionate to the amount in controversy;
- whether the case involves few or many issues;
- whether the case involves an issue of public interest;
- what effect a pending dispositive motion may have; and
- whether the case is a class action, a mass tort action, or some other type of complex case.

Your referral decision will depend not only on the case's characteristics but on the types of ADR available to you. Each of the principal types of ADR presently used in the federal courts serves a different purpose. One or more may be suitable in a given case or at a particular stage in a case. The principal procedures—and thus the ones for which you are most likely to find a trained neutral—are mediation, arbitration, early neutral evaluation, and summary jury trial.

Depending on the needs of the particular case, any one of these procedures may be useful. The most frequently used form of ADR is mediation, perhaps because it can be used at most stages of the litigation and may require less intensive, and therefore less costly, preparation than more adjudicatory types of ADR.

#### *a. Mediation*

Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party—the mediator—assists the parties with settlement negotiations.

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chapter is deemed to affect any program in which arbitration is conducted pursuant to section title IX of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702), as amended by section 1 of Public Law 105-53." 28 U.S.C. § 654(d) (Supp. 1998). The Judicial Conference has consistently opposed authorizing additional courts to make mandatory referrals to arbitration.

70. Most federal district courts do not refer to ADR cases that are usually decided on the papers, such as Social Security and government collection cases, nor do they refer pro se cases. In the latter cases, courts are concerned about the pro se litigant's need for advice and the potential to compromise the ADR neutral. Recognizing the value of assisting these parties, however, some courts have set up procedures for referring these cases to magistrate judges, and two courts (the Northern District of California and the District of the District of Columbia) are experimenting with appointment of counsel for pro se litigants for the sole purpose of settlement discussions.

The mediator, who may meet jointly or separately with the parties, serves solely as a facilitator and does not issue a decision or make findings of fact. In the federal courts, the mediator is usually an attorney approved by the court, although in some courts magistrate judges, and occasionally district judges, bankruptcy judges, and other professionals, such as psychologists and engineers, may serve as mediators.

Mediation sessions are confidential and are structured to help parties clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options. Mediation is considered appropriate for most kinds of civil cases, and in a few courts referral to mediation is routine in most civil cases. The timing of the referral is variable and generally left to the judge. Conventional wisdom suggests that mediation will not be profitable until considerable discovery has been completed, but some courts have found that parties can benefit from earlier mediation.<sup>71</sup>

As mediation has developed, distinct mediation strategies have emerged. In classic mediation, the mediator's mission is purely *facilitative*—to help the parties find solutions to the underlying problems giving rise to the litigation. In this kind of mediation, mediator expertise in the process of mediation, rather than the subject matter of the litigation, is paramount. In the *evaluative* approach, the mediator uses case evaluation (i.e., an assessment of potential legal outcomes) as a primary settlement tool. Evaluative mediation is similar to early neutral evaluation and may be most effective if the mediator is an expert in federal litigation and in the subject matter of the case.

#### *b. Arbitration*

In court-based arbitration, one or more arbitrators listen to presentations by each party to the litigation, then issue a nonbinding judgment on the merits. Witnesses may or may not be called, and exhibits are generally submitted. The arbitrator's decision addresses the disputed facts and legal issues in the case and applies applicable legal standards. Either party may reject the nonbinding ruling and request a trial *de novo*. As an adversarial, rights-based process, arbitration may be particularly helpful when a decision on the merits appears to be important but the dollar value of the case makes trial uneconomical. Arbitration is believed to be particularly suited to contract and tort cases involving modest amounts of money, for which litigation costs are often disproportionate to the amount at stake. Ten district courts are authorized to order parties to use arbitration; in all other districts, referral is permitted only with the consent of the parties.<sup>72</sup>

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71. For example, in the Western District of Missouri, mediation occurs approximately thirty days after the answer is filed (i.e., very early in the case); 11% of attorneys thought the mediation occurred too early, compared with 11% and 24% in two districts in which mediation occurred near or after completion of discovery. See FJC Demonstration Programs Report, *supra* note 59, at 238.

72. 28 U.S.C. § 654 (Supp. 1998).

*c. Early neutral evaluation*

Early neutral evaluation (ENE) is a nonbinding ADR process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely court outcome. The ENE session is generally held before much discovery has taken place.

In ENE, a neutral evaluator, usually a private attorney with expertise in the subject matter of the dispute, holds a confidential session with parties and counsel early in the litigation to hear both sides of the case. The evaluator then helps the parties clarify arguments and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a nonbinding assessment of the merits of the case. Depending on the goals of the program, the evaluator may also mediate settlement discussions or offer case planning assistance. Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes.

*d. Summary jury trial*

The summary jury trial is a nonbinding ADR process presided over by a district or magistrate judge and designed to promote settlement in trial-ready cases. The process provides litigants and their counsel with an advisory verdict after an abbreviated hearing in which evidence is presented to a jury by counsel in summary form. Witnesses are generally not called. The jury's nonbinding verdict is used as a basis for subsequent settlement negotiations. If no settlement is reached, the case returns to the trial track.

Some judges use this resource-intensive process only for protracted cases; others use it for routine civil litigation in which litigants differ significantly about the likely jury outcome. Although the format of the summary jury trial is determined by the individual judge more than in most ADR procedures, summary jury trials are typically used after discovery is complete. The advisory verdict is delivered by a jury selected from the court's regular jury pools. A variant of the summary jury trial is the summary bench trial, in which the presiding district or magistrate judge issues an advisory opinion.

In a minitrial or minihearing, a third form of summary trial, the attorneys present their cases to high-level representatives of the parties who have authority to settle the case. The informal hearing may be conducted outside the courthouse, and generally no witnesses are called. After the presentations, the representatives of the parties meet to discuss settlement. The role of the court may be limited, unless the parties wish to have a judge preside over the hearing. Minitrials are uncommon and are generally used in large cases in which all parties are business entities.

#### **4. Selecting and compensating an ADR neutral**

You may have several options for providing ADR services to civil cases you refer to ADR. Your court may, for example, have a panel of non-court neutrals who are

trained in specific ADR procedures.<sup>73</sup> Your court may also use its Article III judges in rotation as settlement judges; it may have designated its magistrate judges as the settlement experts; or your district may be one of the few that has a trained mediator on staff. Another option is to refer cases to ADR providers in the private sector.

Before deciding whether an outside neutral, as compared with an internal settlement judge, is the best choice, consult your local rules to see if they give you discretion in how the neutral is selected. If they do, you might *consider* the following issues:

- *Cost.* Unless the outside neutral serves pro bono, use of another district or magistrate judge for settlement discussions will reduce the cost to the litigants; use of an outside neutral, however, frees in-court personnel to attend to other duties.
- *Neutrality.* If you are concerned about loss of your neutrality, or even the appearance of such a loss, an individual not connected with the court may provide the neutrality you want.
- *Expertise.* Outside neutrals may be able to provide subject matter expertise not available in court. Outside neutrals also are more likely to be trained in the specific ADR techniques you or the parties wish to use for the case.<sup>74</sup>
- *Availability.* In courts with crowded dockets, outside neutrals may be able to give more individual attention to a case, or get to it sooner, than court personnel.
- *Time.* Some ADR procedures, mediation in particular, can take several hours for a straightforward case, one or more days for a more difficult case, and many days over a long period of time for large or complex cases. Outside neutrals may have more time to give unless ADR is a routine part of the responsibilities of in-court personnel.

If at all possible, you should not personally select the ADR neutral; to do so creates a risk that you will appear biased or that you are channeling profitable work to favored providers. If your court has a roster of neutrals, it should also have procedures for party selection of the neutral. In some courts, the ADR staff selects the neutral. For a helpful discussion of the issues regarding appointment of the neutral, see the *Guide to Judicial Management of Cases in ADR*.<sup>75</sup>

When an outside neutral is used for dispute resolution, the neutral and the parties will have a keen interest in whether the neutral will receive a fee for his or

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73. Many courts have established such panels, which are usually made up of attorneys from the local bar who have met qualifications requirements set by the court. *See ADR and Settlement Sourcebook*, *supra* note 55, at 29–56 tbls.3–7. The ADR Act of 1998 requires that a court make **neutrals available** and ensure that they are qualified in the type of ADR procedures offered by the court. 28 U.S.C. § 653 (Supp. 1998).

74. *See, e.g.*, ADR Guide, *supra* note 64, § VI.

75. *Id.* § VI.

her services. The ADR Act of 1998 leaves to the district courts the decision whether to compensate neutrals, but it requires the courts to establish the amount of compensation, if any, in conformity with Judicial Conference guidelines.<sup>76</sup> The Judicial Conference guidelines require all district courts to establish a local rule or policy on compensation, whether neutrals serve pro bono or for a fee.<sup>77</sup> You should, therefore, look to your local rules for guidance. You may also want to consult the *Guide to Judicial Management of Cases in ADR*.<sup>78</sup>

Parties will also have an interest in the qualifications and standards of conduct expected of court ADR neutrals. The creation of a court panel of neutrals is beyond the scope of this manual but is a matter that judges should be concerned about if they or the parties need to look to such a panel for a neutral. For useful information about designing a sound court ADR program and establishing standards for neutrals, see the guidelines approved by the Court Administration and Case Management Committee of the Judicial Conference.<sup>79</sup>

## 5. Issuing a referral order

After you have decided to refer a case to ADR, you should decide how to formulate your referral order. Your court may have a standing referral order.

If you need to prepare your own referral order, *consider* including the following items:

- identification of the type of ADR to be used;
- identification of the neutral or a description of the process the parties should use to select a neutral;
- a statement on whether the neutral serves pro bono or for a fee and guidelines for compensation of the neutral;
- instructions on whether the parties must submit materials, such as a statement of positions and settlement status, to the neutral;
- guidelines on who must attend the ADR session, whether settlement authority must be present, and whether good faith participation is required;
- deadlines that must be met for initiating and completing the ADR process, as well as instructions on whether other case events, such as discovery, must go forward as scheduled or are tolled;

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76. 28 U.S.C. § 658(a) (Supp. 1998).

77. Administrative Office of the U.S. Courts, 1 *Guide to Judiciary Policies & Procedures*, ch. III (November 15, 1999).

78. See ADR Guide, *supra* note 64, § VII.

79. Court Administration and Case Management Comm., Judicial Conf. of the U.S., *Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals* (1997); reproduced *infra* at Appendix B [hereinafter CACM Guidelines].

- instructions regarding confidentiality of the proceedings and communications between the judge and the neutral;
- instructions about how to end the ADR process (e.g., where to submit a status report, if any);
- instructions about whom to contact if problems arise during the ADR process; and
- a statement about whether sanctions might be imposed and under what circumstances.<sup>80</sup>

It is particularly important that all persons involved in an ADR process, including the referring judge, have a clear understanding of two matters: (1) any ADR deadlines and how the ADR process will fit into the regular litigation schedule and (2) what the limits of any confidentiality provisions are, including who may speak with you and on what matters. The first is for the most part a matter of clarity about deadlines and whether other pretrial events will go forward during the ADR process. The second is a much more complex matter, with pitfalls for the parties, the neutral, and the judge. You should check your local rules, which must, in compliance with the ADR Act of 1998, provide for confidentiality in ADR proceedings.<sup>81</sup> See also the *Guide to Judicial Management of Cases in ADR* for an in-depth analysis of the limits of existing rules on confidentiality in court-based ADR programs.<sup>82</sup>

## 6. Managing cases referred to ADR

After you have referred a case to ADR, you may need to make decisions about a number of issues, such as whether discovery will be stayed or go forward; what your role should be in monitoring the ADR process; whether you will engage in ex parte communications with the neutral; and how the ADR process should be concluded. You may also have to resolve issues, such as a party who refuses to attend the ADR session; a neutral who has failed to disclose a conflict of interest; a request for public access to ADR sessions; or a motion to admit at trial information disclosed during ADR. These kinds of problems arise infrequently in cases referred to ADR, but when they do they can be messy and time-consuming. For a comprehensive discussion of how to handle such problems, see the *Guide to Judicial Management of Cases in ADR*.<sup>83</sup> The guide is especially helpful in identifying techniques you can use to prevent such problems. You should also consult your

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80. For a more extended discussion of the referral order and how it can help forestall problems in cases referred to ADR, see ADR Guide, *supra* note 64, § IX.

81. 28 U.S.C. § 652(d) (Supp. 1998).

82. ADR Guide, *supra* note 64, § VIII and app. E.

83. *Id.* § X.

local rules, which may, pursuant to the ADR Act of 1998, have well-established procedures for handling some of these matters.<sup>84</sup>

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84. Issues such as these are generally considered a part of ADR program design. For a summary of the rules and procedures of federal district court ADR programs, *see* **ADR and Settlement Sourcebook**, *supra* note 55. A helpful guide for designing court ADR programs is Elizabeth Plapinger & Margaret Shaw, *Court ADR: Elements of Program Design* (CPR Institute for Dispute Resolution 1992). You should also consult the Court Administration and Case Management Committee's guidelines on establishing an effective court ADR program; CACM Guidelines, *supra* note 79.





## VI. FINAL PRETRIAL CONFERENCE AND TRIAL PLANNING

- A. Planning the Final Pretrial Conference
  1. Timing and arrangements
  2. Preparation for the final pretrial conference
  3. Subjects for the conference
    - a. In general
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- B. The Trial Phase
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    - c. Assisting the jury during trial
  2. Bench trials
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The final pretrial conference provides yet another opportunity for you to manage and shape the case. This conference (also known as a “docket call” in some districts) can help you to improve the quality of the trial by

- reminding counsel of your procedures and expectations;
- stimulating counsel to prepare for trial;
- reducing the length of the trial by eliminating unnecessary proofs;
- avoiding surprise;
- ensuring the orderly and succinct presentation of the case; and
- anticipating and resolving potential trial problems.

Moreover, disclosure of trial evidence at the final pretrial conference helps promote settlement.

Some judges dispense with the final pretrial conference and order in routine cases. Some treat it as little more than a scheduling event. Others use it as a thorough rehearsal for the trial. However, because even seemingly simple cases can get out of control, resulting in avoidable cost and delay, you should consider holding a final pretrial conference unless there is clearly no need for it. More broadly, you

may view this pivotal case monitoring point as a necessary final review for ensuring that your policy and procedural guidance, designed to serve your particular management and information needs, has been followed.

### **A. Planning the Final Pretrial Conference**

The final pretrial conference is intended to “improve the quality of the trial through more thorough preparation” (Fed. R. Civ. P. 16(a)(4)) and to “facilitate the settlement of the case” (Fed. R. Civ. P. 16(a)(5)). To those ends, Rule 16(d) provides that

- any pretrial conference shall be held as close to the time of trial as is reasonable under the circumstances;
- the participants shall formulate a plan for trial, including a program for facilitating the admission of evidence; and
- the conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties.

If the purposes of the conference are to be achieved, it is critical that trial counsel, and preferably lead trial counsel, attend and participate. The Rule 16 subjects previously discussed (see *supra* section II.C.8) provide a general frame of reference for the final pretrial conference. The conference’s scope will depend on the nature, number, and complexity of the issues; the number of witnesses and volume of documentary evidence; and the experience and competence of the attorneys—in short, on what is needed under the circumstances to ensure a fair and efficient trial.

#### **1. Timing and arrangements**

In planning the final pretrial conference, *consider*

- setting the conference date sufficiently in advance of the trial date to allow for the possibility of at least one more final conference, in the event it is needed;
- holding the conference when discovery is substantially completed and a firm trial date has been set and is near;
- requiring the parties to be present;
- holding the conference where it is likely to be most productive (either in chambers or in open court); and
- having a transcript made of the conference for future reference in guiding the course of the trial.

#### **2. Preparation for the final pretrial conference**

Adequate preparation by the judge and counsel is necessary for the final pretrial conference to be productive. Pretrial preparation requirements should be adapted

to the needs of the particular case to ensure full exchange of relevant information and to improve the quality of the trial without imposing undue burdens. You should consult local rules for applicable provisions, realizing that modifications may be desirable to meet the particular needs of the case. For examples of pretrial orders, see Appendix A, Forms 9, 25, 35–41.

Consider requiring a preconference meeting of counsel for the purpose of preparing a joint pretrial statement covering an agenda of key topic areas to assist you in conducting the conference.

*Consider* having counsel exchange and submit the following:

- requested jury voir dire questions;
- lists that identify all witnesses and the subject matter of the witnesses' testimony, and that separately identify those witnesses the parties will definitely call and those they may call only if needed;
- lists that identify each exhibit the parties will definitely offer and those exhibits they may offer only if needed;
- copies of all proposed exhibits;
- brief memoranda on critical legal issues, as needed;
- statements of facts believed to be undisputed;
- motions in limine and any opposition thereto;
- deposition and discovery excerpts and any opposition thereto;
- proposed jury instructions that define the issues, that is, state the elements of each claim and defense; and
- proposed verdict forms, including special verdict forms or juror interrogatories if requested (under Rule 49), and proposed findings of fact and conclusions of law in non-jury cases.

While each of the above suggestions may not be important in every case coming before you, the suggestions regarding jury instructions and verdict forms are more generally useful. Preparing jury instructions and verdict forms is a useful discipline for attorneys, requiring them to analyze their case and, more critically, the sufficiency of the available proof.

### 3. Subjects for the conference

#### *a. In general*

According to Rule 16(d), the participants at the final pretrial conference should “formulate a plan for trial, including a program for facilitating the admission of evidence.” Rule 16 offers a checklist of relevant subjects appropriate for consideration at the final pretrial conference; you may also want to consult the *Manual for Complex Litigation, Third*.<sup>85</sup> You or counsel may suggest other subjects. The final pretrial conference is a significant stage of pretrial case management and a

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85. MCL, Third, *supra* note 13, § 40.3.

significant monitoring point for you to ensure that the case is trial or settlement ready. Your order imposing on the parties the burden to prepare and to appear to discuss the case at this final stage should also provide notice to the parties (through the order itself or an attached information package) as to what you wish them to prepare and the level of detail you require. The final pretrial conference is as significant as the initial Rule 16 conference; your scheduling order for this conference should reflect its importance. For illustrative procedures and orders, see Appendix A, Forms 9, 25, 35–41.

For additional matters worthy of suggestion to counsel and emphasis in your final pretrial conference order, *consider* the following approaches:

- Arrive at a final and binding statement of the factual and legal issues to be tried and encourage stipulations.
- Exclude evidence bearing on uncontested matters and evidence that is cumulative or unnecessary.
- Distribute your own rules of courtroom decorum. As legal practice has become more impersonal and professional courtroom courtesies have declined, many judges have developed their own rules of courtroom decorum or adopted those of others in their district. You may distribute such rules at the final pretrial conference or post them on your district's Web site.
- Inquire whether the parties still want a jury trial. Some jury demands are filed perfunctorily early in the case; the parties may in the meantime have changed their minds without having advised the court.

*b. Preliminary considerations*

A primary task that confronts you in organizing a successful pretrial conference is deciding how you will address a number of procedural considerations that will arise at the start of or during the course of the conference. As has been emphasized already, your early decisions on and notice to counsel regarding how these preliminary matters will be dealt with will save time and expense and will promote effective control of both the conference and trial proceedings.

*Consider* the following approaches:

- Hear already submitted motions in limine and make rulings at the conference, when possible, on the admissibility of evidence, the qualification of expert witnesses, claims of privilege, and other threshold matters (see Fed. R. Evid. 104(a)). The presubmission of motions in limine for rulings at the final pretrial conference can save time and provide another opportunity to set the stage for and pace of subsequent pretrial activities. Consider an admonition to counsel that any later motions in limine are considered waived without a strong showing that the matter was not one counsel would have known of in advance.
- Receive exhibits into the record.

- Receive and rule on matters concerning the mode or order of proof (see Fed. R. Evid. 611(a)).
- Bifurcate potentially dispositive issues.
- Review the numbers and purposes of proposed witnesses within the triable issue framework of the trial, challenging as necessary for redundancy or duplication, and imposing limits on the total number of witnesses each side may offer.
- Require agreement by counsel (to be included in your final order) that all documents are considered authentic if produced by parties, unless a specific document is objected to, to avoid unnecessary custodial witnesses or certification of authentication.
- Require narrative written statements for presenting, subject to cross-examination, the direct testimony of certain witnesses in bench trials and of expert witnesses in jury trials and avoiding the use of depositions in trial (see Rule 43 and Fed. R. Evid. 611(a)). Many judges feel that joint statements by counsel as to what a particular witness would say under oath are preferable, in terms of trial time, to depositions in trial.
- Have counsel list, by page and line for review, depositions to be used (i.e., those that are not amenable to the above procedure).
- Entertain motions for postponing the trial date only if submitted with a certification of client consent.<sup>86</sup> Only a few districts require client consent for continuances; however, because trial date continuances can have a severe impact on a judge's calendar, a different view may be warranted. In addition, because trial date certainty gives credibility to your calendar, you may want to use more stringent criteria in cases in which multiple continuances have been requested and cause exists to question the sincerity of counsel.
- Explore the possibility of settlement once more. The final pretrial conference presents one last opportunity to discuss settlement with the counsel and the parties, who may now realize for the first time the actual burdens of going forward. For those cases that do not settle, actual trial time may be shortened as a consequence of frank settlement discussions at this time.
- Clarify other procedural matters, such as (1) using video depositions (edited to limit playing time) and deposition summaries (in lieu of reading the transcript) at trial; (2) using advanced technologies in the presentation of evidence; (3) preinstructing the jury; and (4) approving forms and procedures for return of the verdict.

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86. *See, e.g.*, U.S. District Court for the District of Idaho, The Civil Justice Reform Act of 1990 Expense and Delay Reduction Plan, § II.E at 4 (1990); U.S. District Court for the Middle District of Louisiana, Civil Justice Reform Act Plan, art. III, Motions Practice 4 (1993); U.S. District Court for the Northern District of Texas, Expense and Delay Reduction Plan, § V at 8 (1995).

*c. Expert witnesses*

Management of expert witnesses presents another opportunity to avoid the often excessive reliance upon redundant or duplicative expert testimony, which not only wastes trial time but represents an extremely expensive portion of the parties' litigation budget. As the trial judge, you are uniquely placed to question expert witness justifications in an area in which the parties themselves may be technically unprepared to challenge their own counsel.

In connection with the final pretrial conference, *consider*

- ruling on the qualifications of expert witnesses, the admissibility of particular expert evidence, the use of hypothetical questions, and the requisite evidentiary foundations (see Fed. R. Evid. 104(a));
- entering a final pretrial order barring experts not previously identified and expert testimony at variance with that expert's prior deposition testimony, written report, or statement, unless preceded by proper notice and prior court approval;
- establishing procedures to enhance jury comprehension (see *infra* section VI.B.1.c.);
- determining whether to appoint a court expert (see Fed. R. Evid. 706); and
- limiting the number of experts permitted to testify (see Fed. R. Evid. 702).<sup>87</sup>

While it may appear easier to defer to the judgments of counsel regarding experts, it is important to reemphasize that you are the guardian of economy and efficiency in the use of public trial resources. Consider whether more than one expert per side is needed and should be permitted to testify with respect to any single scientific discipline; different disciplines may require different qualifications and therefore may call for different experts. See also *infra* section VII.B for a discussion of expert witnesses generally.

*d. Exhibits*

Limiting the number of exhibits and shaping those ultimately presented at trial is an important part of structuring an effective trial and preserving juror (and judge) patience. Duplicative, redundant, or unclear exhibits not only waste limited trial time, but may also prejudice the case of the presenter, who is often the last to recognize this.

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87. See, e.g., U.S. District Court for the Western District of Wisconsin, Civil Justice Expense and Delay Reduction Plan, § V.C. at 8 (1991).

*Consider*

- controlling the volume of exhibits by limiting their number and forcing counsel to justify their independent utility with regard to specific issues or proofs (see Fed. R. Evid. 611(a)(2));<sup>88</sup>
- having counsel redact voluminous exhibits;
- asking counsel to premark exhibits and provide copies of them to the court;
- insisting that counsel rehearse their handling of visual and other aids to ensure their dexterity with such aids in the courtroom; and
- identifying special or potentially prejudicial exhibits and developing protocols for their presentation.

*e. Jury issues*

Jurors are too often the forgotten actors in the litigation process. While no one consciously wishes to offend or abuse them, they are often subjected to seemingly arbitrary and unexplained delays, excluded from private sidebar discussions, and presented with confusing or arcane instructions in the course of trial. You are their only consistent champion and defender. You should highlight for trial counsel the risks they face in not considering juror needs from their first contact with a trial panel at voir dire through the trial stages, when fatigue and impatience can set in.

Aside from these general admonitions, *consider*

- screening prospective jurors by having them complete questionnaires in advance in cases in which a large jury pool is necessary and voir dire could be lengthy (see, for example, Appendix A, Forms 42 and 43);
- clarifying voir dire procedures generally (see Rule 47; see, for example, Appendix A, Forms 41, 44, and 45);
- establishing procedures for jury selection, including the number of jurors to be seated and the number of peremptories per side, as well as the procedure for their exercise (see Rule 48; see, for example, Appendix A, Forms 44–46);
- clarifying that all jurors remaining at the end of the presentation of evidence will deliberate (see Rule 48);
- determining how complex evidence will be presented to enhance jury comprehension;
- scheduling the final submission of jury instructions;
- drafting brief, well-organized instructions using clear and plain language to maximize jury comprehension (for guidelines, see Appendix A, Form 47);

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88. *See also id.*

- proposing a stipulation that a nonunanimous verdict may be returned by a specified number of jurors (see Rule 48); and
- preparing special verdict forms and considering whether to use seriatim verdicts (jury decides one issue at a time), general verdicts with interrogatories (see Rule 49), or special verdicts (see Rule 49).

In discussing juror-related issues, you can probe to determine if larger juror panels must be summoned for voir dire owing to the nature of the case or its complexity. Special precautions may be necessary to qualify a larger number of expected panelists. If many prospective jurors are likely to be ineligible or lengthy voir dire may be necessary, juror questionnaires can be mailed to the venire in advance with the assistance of the clerk's office. Whether the questionnaires are completed and returned in advance or completed at the courthouse, sufficient time needs to be allowed for their review and screening by counsel before voir dire.

Special verdicts and interrogatories can be useful devices to reduce the risk of having to retry the entire case. You can, with counsel, make the initial determination that complex issues raised and addressed in the proposed instructions lend themselves to special verdicts. Such verdicts also make possible alternative outcomes in cases in which the law is not settled or the law has changed but its retroactive application is in doubt (e.g., as under the Civil Rights Act of 1991). Because the preparation for special verdicts and interrogatories requires care to avoid inconsistencies or conflicts, however, you should obtain the attorneys' approval as to form.<sup>89</sup>

#### *f. Scheduling and limiting trial events*

One of the most direct and important ways your leadership can be exercised in the course of the final pretrial conference is in discussions of scheduling of trial events and the actual trial time likely to be required by the case. Scheduling trial events and limiting trial time through consultation with counsel is an exercise of authority well within the traditional discretion of the trial judge.<sup>90</sup> Counsel should be forced to estimate, and you can subsequently hone and accede to, time necessary for each major trial event from opening statements through closing arguments. In addition, the scheduling and timing of many other subevents can come into play.

*Consider* the following for discussion:

- the overall scheduling of the trial and of each trial day;

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89. See MCL, Third, *supra* note 13, § 22.45.

90. Fed. R. Civ. P. 16(c)(15) (listing discussions of time limits as a proper topic for pretrial conferences); *Gen. Signal v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1508–09 (9th Cir. 1995); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir.), *cert. denied*, 513 U.S. 1014, 115 S. Ct. 573, 130 L. Ed. 2d 490 (1994); *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1408 (7th Cir. 1991); see generally Pierre Leval, *From the Bench*, 12 Litig. 7 (1985) (discussing approaches to setting trial time limits).



- the length, scope, and content of opening statements;
- the length, scope, and content of closing arguments;
- the number of hours each side may have to conduct examination and cross-examination;
- the order of cross-examination and designation of cross-examiners in multiparty cases; and
- the order of final arguments and jury instructions (see Rule 51).<sup>91</sup>

Setting time limits requires careful consideration of the views of counsel (who know the case), of the allocation of burdens among the parties, and of how the respective cases will be presented (e.g., one side may depend on cross-examination of the opponent's witnesses to present much of its case). Naturally, this should be done in full consultation with counsel.

You may begin the process by getting consensus on the total time to be consumed, in days and hours. The starting point for that figure should be the original estimates presented by counsel on the cover sheet accompanying the original filing or at the earlier Rule 16 conference. From that total figure (further refined in the course of the discovery and pretrial process), time can be assigned to the various events of the trial process: opening statements, testimonial and exhibit presentation, direct and cross-examination, closing statements, and so forth. You may also consider specifying that any sidebar conferences (if they are allowed) will be charged against the time of the requester. It may be helpful to divide each day of counsel's time estimate into two sessions (morning and afternoon) on forms representing each trial day and have counsel plan their daily events and the divisions of total trial time between them; the results can be made part of the final pretrial order (see, for example, Appendix A, Form 44).

#### 4. The final pretrial order

Rule 16(e) requires entry of an order reciting all actions taken at the final pretrial conference; that order "shall control the subsequent course of the action" and may be modified only "to prevent manifest injustice." The purpose of the order is to memorialize the actions and rulings at the conference; the order should be clear and comprehensive, covering all important matters (such as those discussed above). Trial counsel should understand that no deviation or modification will be permitted except "to prevent manifest injustice."<sup>92</sup>

You may dictate the order on the record at the end of the conference, or you may direct counsel to prepare it on the basis of the record of the conference. For illustrative final pretrial orders, see Appendix A, Forms 9, 25, 35–41, and 44.

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91. See, e.g., U.S. District Court for the Northern District of Indiana, Civil Justice Expense and Delay Reduction Plan, § 2.05(c) at 16 (1993); U.S. District Court for the Northern District of Texas, Civil Justice Expense and Delay Reduction Plan, § VII at 9 (1993).

92. Fed. R. Civ. P. 16(e). See also MCL, Third, *supra* note 13, § 41.7.

## B. The Trial Phase

### 1. Jury trials

#### *a. In general*

Although case management tends to focus on the pretrial phase of litigation, management of the trial is equally important. Excessively lengthy and costly trials can deny parties access to civil justice, clog the court system, impose undue burdens on jurors, and diminish public respect for, and confidence in, the justice system. Judges have broad inherent discretion to manage the trial of the cases assigned to them. The following section addresses management techniques at trial. Not all of them will be appropriate for any given trial, but all are worthy of your consideration in the process of arriving at a suitable trial management plan. For illustrative trial guidelines and orders, see Appendix A, Forms 4, 44, and 48. For a discussion of high-visibility trials, see *infra* section VII.C.

#### *b. Techniques for trial management*

The lawyers, not the judge, must try the case, but there is much you can do to improve the quality of the trial and reduce its length and cost.

##### *Consider*

- streamlining voir dire procedures generally;<sup>93</sup>
- establishing procedures for conducting voir dire, for exercising peremptory challenges, and for giving opening statements;
- having counsel submit proposed voir dire questions for use by the judge and preparing for the voir dire examination in advance to ensure that all important points will be covered;
- conducting short daily conferences with counsel to identify upcoming witnesses and exhibits, to anticipate problems (such as objections to evidence, witness unavailability, or other potential causes of interruption or delay of the trial), and to assess the progress of the case generally;<sup>94</sup>
- controlling the volume of exhibits (e.g., by using summaries or redacted documents or imposing limits on the number of exhibits);<sup>95</sup>
- limiting the reading of depositions by use of a stipulated summary or agreed-on statement of the substance of a witness's testimony;<sup>96</sup>
- avoiding unnecessary proofs by narrowing disputes or by encouraging stipulations to such matters as the foundation for exhibits; and

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93. See MCL, Third, *supra* note 13, § 22.41. For civil trial matters generally, see Benchbook, *supra* note 43, §§ 6.03–6.07.

94. See *id.* § 22.15.

95. See *id.* § 22.13.

96. See *id.* § 22.33.

- minimizing or avoiding sidebar conferences, arguments, and other proceedings that disrupt the trial day.

You should let counsel know in advance the procedures you use for conducting voir dire and exercising challenges. Because lawyers tend to attach more importance to voir dire than judges do, you should consider allowing counsel a reasonable but limited time to supplement judge-conducted voir dire.

Presenting deposition testimony by reading depositions can save litigant costs, but it can bore jurors, so readings should be limited to key testimony. This practice should also be balanced against the reasonable desire on the part of counsel to allow a key witness to “speak the case” to a jury (at least in part through deposition testimony). Requiring that counsel, in advance of trial, designate or stipulate to summaries or depositions to be offered at trial can promote the effective and efficient use of these materials at trial.

For additional suggestions for streamlining trials, see the discussion of the pretrial conference in *supra* section VI.A.3.

### *c. Assisting the jury during trial*

Sound trial management will improve jurors’ performance, promote juror satisfaction with their service, and enhance the court’s public image. In conducting the trial, you should ensure that jurors are treated as important participants in the trial and assist them in carrying out their functions.<sup>97</sup>

#### *Consider*

- instructing the jury on trial procedure and the issues to be decided;<sup>98</sup>
- permitting jurors to take notes;
- permitting jurors to ask questions (in writing, submitted through the judge) when appropriate, under adequate safeguards;<sup>99</sup>
- discouraging or delaying sidebars whenever possible until the next recess;
- encouraging the use of techniques to enhance jury comprehension,<sup>100</sup> such as (1) jury notebooks listing witnesses and containing critical exhibits, glossaries, and so forth; (2) overhead projectors to display an exhibit to the jury as a witness testifies about it; (3) charts with pictures of witnesses; (4) summaries of exhibits; (5) the use of plain English by lawyers and witnesses; (6) interim summations (or supplemental opening statements) by counsel; and (7) interim explanations of legal principles (with counsel comment or objection) to prepare jurors for closing instructions;<sup>101</sup>
- giving jurors a copy of your charge;

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97. See generally William W Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575 (1991). See also *Called To Serve* (Federal Judicial Center 1995) (FJC video no. 2980-V/95).

98. See MCL, Third, *supra* note 13, § 2.431.

99. See *id.* § 22.42.

100. See *id.* § 22.3.

101. See *id.* § 22.433.

- determining whether to instruct jurors before or after closing arguments (see Rule 51); and
- permitting reasonable read-backs of trial testimony when requested by the jury during deliberations.

Many judges believe that the jury can make better use of closing arguments after having first heard the judge's instructions. Note also that some judges have gained valuable insights from exit questionnaires completed by jurors, enabling them to improve their trial management techniques.<sup>102</sup>

The comfort of sitting jurors affects their performance, and there are ways you can easily enhance their comfort. You should, for example, avoid calling jurors prior to the time they are to sit, explain any delays, and observe break times and day-end times. You can also reinforce the importance of jurors' service by thanking them for their time and sacrifice at the end of trial.

You may receive requests from counsel to speak to the jurors after the verdict. While such contacts may be prohibited for cause (e.g., posttrial motions), they may also be controlled (or denied entirely) by local rule. If such contacts are neither controlled nor prohibited, your decision whether to permit them should be guided by the jurors' comfort and the circumstances of the case; you should caution jurors that they may refuse any requests.

## 2. Bench trials

### a. *In general*

Avoiding cost and delay is no less important in bench trials than it is in jury trials, even though the absence of a jury eliminates some requirements. However, the lesser formality of bench trials should not be allowed to lead to casual proceedings and a cluttered record, which will make the case more difficult to decide and more difficult to review on appeal.

### b. *Techniques for trial management*

Many of the trial management techniques applicable to jury trials are relevant to bench trials as well.

In addition, *consider* the following approaches:

- Have direct testimony of witnesses under the parties' control submitted and exchanged in advance in narrative statement form (see Rule 43; for examples of instructions regarding submission of direct testimony in writing, see Appendix A, Form 49).
- Impose limits on testimony and exhibits to avoid creating an excessively long record that will make the case more difficult to decide.
- Adopt trial procedures to ensure that you understand the evidence as it comes in rather than leaving it to be studied after the case is submitted.

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102. See generally D. Brock Hornby, *How Jurors See Us*, 14 Me. B.J. 174 (1999).

Such procedures include asking questions of witnesses to enhance understanding, having opposing witnesses appear in court at the same time for back-to-back questioning, and having opposing experts confront each other to identify and explain the bases of their differences of opinion.

If substantial factual or technical material needs to be presented, and the credibility of the material is not a significant factor, consider allowing the receipt of direct testimony into the record by written statements exchanged in advance and subject to cross-examination at trial. This approach can reduce costs and expedite the trial and decision, provided you read the testimony in advance of trial. Opinions differ regarding whether this technique may be used without the parties' consent.<sup>103</sup>

Although exclusionary rulings are of less importance in bench trials than in jury trials, receiving evidence into the record indiscriminately may result in a record that is difficult for you to manage and digest in the decision-making process. One way to control the volume of evidence is to receive no exhibit unless the trial counsel offering it represents that he or she has personally read it.

### *c. Deciding the case*

Bench trials can be more burdensome than jury trials because judges may have trouble finding time to decide the case once it is submitted, and cases become more difficult to decide as they grow cold with the passage of time. Many judges follow the practice of taking a case under submission only if it cannot be decided from the bench and then setting a deadline on their calendar for its decision. A prompt decision saves resources, increases the parties' and public's satisfaction with the court, and eases the judge's burden.<sup>104</sup>

#### *Consider*

- having counsel submit proposed findings of fact and conclusions of law before trial begins, enabling you to accept or reject findings as the trial progresses (see Fed. R. Civ. P. 52);
- having counsel argue the case immediately following the close of the evidence (as in a jury trial) instead of using posttrial briefings;
- if briefing is needed, having briefs submitted before trial rather than after;
- deciding the case, whenever possible, promptly after the closing arguments by dictating findings of fact and conclusions of law into the record; and

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103. See MCL, Third, *supra* note 13, § 22.51. See also Charles R. Richey, *A Modern Management Tool for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 72 Geo. L.J. 73 (1983).

104. See generally MCL, Third, *supra* note 13, § 22.52 and Benchbook, *supra* note 43, § 6.02.

- adopting your own time standards for reaching decisions (e.g., within 120 days of the close of evidence).<sup>105</sup>

Your fact-finding can be greatly aided by the use of counsel-prepared materials, such as findings of fact and conclusions of law, as well as through trial briefs. With regard to the former, you may find it helpful to require that each finding be brief, noncontentious, and limited to one fact. Some judges also require that counsel mark the opponent's proposals to indicate which ones are contested and which are not (for an example of this approach, see Appendix A, Form 9).

Whatever you decide about the adoption of time standards for reaching decisions in bench trials, you should be aware that under the Civil Justice Reform Act of 1990, the Director of the Administrative Office must prepare semiannual reports listing all bench trials undecided for six months or more.<sup>106</sup>

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105. *See, e.g.*, U.S. District Court for the Western District of New York, Civil Justice Expense and Delay Reduction Plan, § II.11 at 11 (1993); U.S. District Court for the Middle District of Louisiana, Civil Justice Reform Act Plan, art. V(5) at 6 (1993).

106. *See* Admin. Office of the U.S. Courts, 3 Guide to Judiciary Policies & Procedures ch. D-IV (providing detailed guidelines for preparing reports on bench trials submitted).

## VII. SPECIAL CASE MATTERS

- A. Mass Tort, Class Action, and Other Complex Cases
  - 1. Complex cases generally
  - 2. Mass tort cases
  - 3. Class action cases
- B. Management of Expert Evidence
  - 1. Early pretrial evidence
  - 2. Final pretrial evidence
  - 3. Trial evidence
  - 4. Court-appointed experts
- C. High-Profile Cases
  - 1. Making a plan and assigning responsibilities
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  - 3. Interacting with the media
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    - b. Attorney interactions with the media
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  - 5. Planning for security
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  - 7. Managing the case and the rest of your docket
- D. Pro Se Cases
  - 1. Early screening
  - 2. In forma pauperis status
  - 3. Securing counsel for pro se litigants
  - 4. Scheduling and monitoring the pro se case
  - 5. Holding settlement discussions and conducting the trial

Although most of the cases on your docket are likely to be of the routine sort that are the subject of this manual, you will undoubtedly be assigned cases whose demands on you and others will go well beyond those of the ordinary case. In this chapter we discuss some of these types of cases, including class actions, capital habeas cases, and cases that attract intense media and public attention. Our goal in these discussions is not to give a full treatment of complex or unusual litigation, but only to offer some basic case management guidance, with the expectation that you will turn to other, readily available sources for more information.

In this chapter we also discuss two kinds of cases—prisoner litigation and pro se cases—that appear much more frequently on your docket and can be managed with many of the principles and techniques discussed in the preceding chapters.

In some important ways, however, these cases are different from the ordinary case; those differences and some suggestions for managing them are discussed below.

## A. Mass Tort, Class Action, and Other Complex Cases

The principles and techniques set out in the previous chapters are meant to apply to ordinary litigation. Management of complex cases often requires additional procedures and special techniques. The *Manual for Complex Litigation* has served since 1960 as the judiciary's primary source of innovative ideas about managing complex litigation.<sup>107</sup> We do not attempt to duplicate that source, and we refer the reader to that manual when appropriate.

### 1. Complex cases generally

One way in which the editors of the *Manual for Complex Litigation, Third (MCL, Third)* implicitly identified sets of complex cases was to write a separate chapter about each area of substantive law involved. Thus, antitrust, mass torts, securities, takeovers, employment discrimination, patent, CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)), and civil RICO cases gain a presumption of complexity by virtue of their treatment in the *MCL, Third*. Yet, such cases do not always call for the special management techniques that are associated with complex litigation, and some may well be managed more efficiently using the routine methods described earlier in this manual.

Given that factors other than subject matter may determine a case's complexity, how can you distinguish ordinary cases from complex cases? The editors of the *MCL, Third* approached that question from a functional perspective. If a case needs extensive management, it is complex: "The greater the need for management, the more 'complex' is the litigation."<sup>108</sup>

Consider some of the signs that a case will need extensive management:

- *Number of parties.* When a complaint lists dozens of plaintiffs or defendants or your courtroom is full of lawyers at the first pretrial conference, you can be pretty sure that the case is complex and will require some of the techniques discussed in the *MCL, Third*, such as organizing counsel, adopting standard motions and responses, coordinating discovery, and establishing fair and efficient approaches to trial.<sup>109</sup>
- *Number of similar or related cases.* The answers to some pivotal questions asked at a pretrial conference or listed on a form to be completed by counsel before the conference may reveal a substantial number of cases involving the same or similar transactions and legal claims in your court or in other federal or state courts. Under a system of random assignment of

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107. See *MCL, Third*, *supra* note 13.

108. *Id.* at 3.

109. See *id.* §§ 20.2 (role of counsel), 21.32 (motions practice), 21.4 (managing discovery), 22.0 (managing the trial).



cases, you may not even know that your colleagues have a large number of similar cases, but clerks of court often have this information and should be encouraged to look for trends. Sometimes, as with mass tort litigation, different attorneys may represent individual plaintiffs, and those attorneys may not initially be aware of the full scope of the litigation. The same defendants, though, will be named in most related cases, and the defendants' attorneys can often give precise information about the number and location of similar cases. Some judges routinely ask counsel to identify all similar cases, even though such cases may not be technically "related to" each other as that term is used in local rules.

- *Multiple transactions.* A warning sign that multiple cases may be filed sooner or later is the filing of a claim that is based on an intrinsic characteristic of a mass-produced substance (e.g., a products liability claim). A claim that a widely marketed pharmaceutical product, for example, is associated with a particular disease should alert you to the likelihood that similar claims will be filed.
- *Competing experts.* A leading indicator of case complexity is that the parties have experts who propose to testify to opposing conclusions about a central issue in the case, such as the capacity of a chemical or pharmaceutical product to cause the injuries plaintiffs allege. (Management of cases with competing experts is discussed in *infra* section VII.B.)
- *Complex subject matter.* The subject matter of a claim can suggest complexity without other indicators being present. Patent law cases, for example, often involve disputes about highly technical and complex matters. On the other hand, complex subject matter does not necessarily mean that case management will be complex. A case with complex legal issues, for example, might be managed and resolved by a ruling on a motion for summary judgment or some other straightforward procedure.
- *"Maturity" of the litigation.* If the dangers of a product that is the subject of a liability suit are clear from prior litigation (as with asbestos), past decisional history will have diminished much of the case's complexity. If, however, a case involves liability for a product that has never been found to cause the type of injury the plaintiff alleges, you can assume that it will be complex because of the parties' disputes over the scientific basis for causation.<sup>110</sup>
- *Class action allegations.* Managing a putative class action imposes additional responsibilities on a judge. You may have to control the parties' and their attorneys' communications with the putative class, designate counsel, rule on class certification, rule on the fairness of any proposed settlement

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110. For a discussion of applying the maturity factor to mass torts, see MCL, Third, *supra* note 13, § 33.2.

or dismissal, and provide for the administration of an approved settlement.<sup>111</sup>

- *Volume of discovery and evidence.* Cases that revolve around standard transactions, such as the use of a form contract or a public forecast of corporate earnings, will undoubtedly involve less factual complexity and hence require less management than cases arising from a host of individualized transactions, such as claims of product liability and personal injury arising from the manufacture of, say, an automobile.

If you conclude that the case before you is complex, consult the appropriate section of the *MCL, Third* for the specific type of case. Note that the section on patent litigation was written before the U.S. Supreme Court's decision in *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996), which assigns judges the role of determining the construction of patent claims as a matter of law before trying infringement issues to a jury. For a useful discussion of post-*Markman* case management procedures, see *Patent Law: A Primer for Federal District Judges*.<sup>112</sup>

## 2. Mass tort cases

Mass tort claims will call for you to make a number of discretionary decisions at the outset of the litigation. These decisions, which will affect the direction of the litigation and may contribute to its complexity, center on one key question—whether to aggregate the individual claims for pretrial or trial purposes. Even the seemingly simple and straightforward act of consolidating cases within your district should be considered only after consulting the *MCL, Third* and looking for the characteristics described above. As an alternative to aggregating similar claims, you should think about whether pursuing one or more test cases—or a sample of cases—would be the most efficient way to proceed. For a more recent discussion of the questions of whether, when, and how to aggregate mass tort cases, see the article *Mass Torts Problems and Proposals*.<sup>113</sup>

## 3. Class action cases

Management of class actions should be governed by principles discussed in the *MCL, Third*. Prompt consultation of the *MCL, Third* will aid you in making the critical decision about when to rule on the certification issues and actions that might be considered before ruling on a motion to certify a class, such as whether to allow preliminary discovery on class issues.<sup>114</sup>

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111. *See id.* § 30.0.

112. James M. Amend, *Patent Law: A Primer for Federal District Court Judges* (Berkeley Center for Law and Technology 1998).

113. Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 348–377 (1999). The Mass Torts Working Group was established by and reported to the Chief Justice.

114. For a discussion of settlement class actions after the U.S. Supreme Court decision in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2236 (1997), see Jay Tidmarsh, *Mass Tort Set-*

## B. Management of Expert Evidence

Experts are used in civil litigation with increasing frequency to testify on a variety of subjects, including economic, scientific, technological, medical, and legal subjects. Persons with qualifications across a broad spectrum of disciplines and experience may qualify as experts. Once they are so qualified, their forensic purpose is to “assist the trier of fact to understand the evidence or to determine a fact in issue” (Fed. R. Evid. 702). In light of two recent Supreme Court decisions,<sup>115</sup> management of expert evidence is an integral part of proper case management. Under those decisions, the district judge is the gatekeeper who must pass on the sufficiency of proffered evidence to meet the test under Federal Rule of Evidence 702. Your performance of the gatekeeper function will be intertwined with your implementation of Federal Rule of Civil Procedure 16.<sup>116</sup>

To further your own understanding of expert evidence, you can use several sources, beginning with the parties’ experts. You may also appoint your own expert, as discussed below. Or you can consult books, articles, and other items that deal with the subject matter of the case. One such resource, written specifically for federal judges, is the *Reference Manual on Scientific Evidence*; each chapter is a tutorial on a different scientific area, including DNA evidence, epidemiological evidence, medical evidence, engineering evidence, and estimations of economic loss in damages awards.<sup>117</sup>

### 1. Early pretrial evidence

Effective management of expert evidence begins at the pretrial stage. Rules 16(c)(4), (c)(5), (c)(10), and (c)(11) authorize you to require identification of witnesses and documents, avoid unnecessary or cumulative evidence, adopt special procedures for cases presenting difficulties or complexity, and take other action to aid in the disposition of the case. Resolution of issues involving scientific evidence is often a prominent aspect of cases involving expert testimony. Consequently,

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tlement Class Actions 25–31 (Federal Judicial Center 1998) and Willging, *supra* note 113, at 328, 356–61. For a discussion of limited fund class actions after the Court’s decision in *Ortiz v. Fibreboard*, 119 S. Ct. 2295 (1999), see S. Elizabeth Gibson, *Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations* (Federal Judicial Center 2000).

115. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

116. *See* *General Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring): [J]udges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, evidence. Among these techniques are an increased use of Rule 16’s pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.

117. *Reference Manual on Scientific Evidence* (Federal Judicial Center, 1st ed. 1994, 2d ed. 2000) [hereinafter *Reference Manual*].

motions in limine and motions for summary judgment are likely to play a role in these cases.

*Consider* the following approaches:

- Require identification of expert witnesses, by area of expertise if not by name, at an early Rule 16 conference to further the process of defining and narrowing issues, to focus discovery, and to facilitate settlement. In cases in which expert evidence is the predicate of the claim (e.g., medical malpractice), identification of an expert qualified to supply such evidence may be required before the case is permitted to proceed.
- Ask the parties to identify the issues that will be addressed by expert testimony and to make sure their experts address the same issues so that you can clearly see where the differences and conflicts lie.
- Attempt to identify the specific bases for the differences between opposing experts. The utility of expert evidence can be enhanced, and issues can be more easily decided, if the basis for the difference between opposing expert evidence, not merely the difference, is identified as early in the pretrial process as possible. This may be done by determining whether the experts' disagreement is over data, interpretation of data, factual or other underlying assumptions, applicable theories, risk assessments, or policy choices.<sup>118</sup>
- Limit the number of experts who will testify on a given issue.
- Set deadlines for opposing parties' mutual disclosure of expert reports or narrative statements of testimony, underlying data, and curricula vitae in appropriate sequence. Although Rule 26(b)(4) provides for interrogatories to obtain the experts' facts and opinions, predeposition exchanges of the proposed testimony and access to underlying data may be more efficient and can even make depositions unnecessary.
- Explore the possibility of joint expert reports.
- Establish a procedure for discovery (including ground rules for time, place, and payment of costs and fees) to avoid the cumbersome procedure under Rule 26(b)(4).<sup>119</sup>
- Provide for video depositions, including cross-examination, to avoid the need for expert witnesses to appear at trial.
- Use confidentiality orders to protect information produced from further dissemination.<sup>120</sup> Confidentiality orders can expedite and simplify discovery of sensitive matters, but they can also raise issues concerning future release of data from protection.

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118. A helpful source for your own understanding of the evidence is the *Reference Manual on Scientific Evidence*, *id.*

119. See MCL, Third, *supra* note 13, § 21.48 for a discussion of discovery into expert opinions.

120. See *id.* § 41.36 for a sample confidentiality order (Form A).

## 2. Final pretrial evidence

When expert evidence is anticipated at the trial, the final pretrial conference should address issues and potential problems related to such evidence, particularly rulings on expert qualifications and the admissibility of expert evidence under Federal Rule of Evidence 104(a). (See also *supra* section VI.A.3.c, where we discuss use of expert evidence in the context of the final pretrial conference.)

The admissibility of expert evidence is much litigated, and a substantial body of appellate law is evolving with variations from circuit to circuit. Particularly when you face questions of drawing the line between admissibility and weight and credibility, you should consult circuit law, which is in flux.

Distinguish rulings on admissibility under Rule 104(a) from motions for summary judgment under Rule 56. Ordinarily an evidentiary ruling should not be regarded as the vehicle for adjudicating a claim or defense, unless it is clear that no admissible evidence can be offered.

### *Also consider*

- having counsel identify specifically those parts of the opposing experts' reports and testimony with which they disagree and those parts that are not disputed;
- directing the parties, when the expense is warranted, to have the experts submit a joint statement specifying the matters on which they disagree and the basis for the disagreement;
- directing the parties, when the expense is warranted, to have their experts present at the pretrial conference to facilitate identification of the issues remaining in dispute;
- clearing all exhibits and demonstrations to be offered by the experts at trial and giving opposing parties an opportunity to review exhibits and raise objections;
- encouraging joint use of courtroom electronics, models, charts, and other displays;
- encouraging stipulations on relevant background facts and other noncontroverted issues; and
- having the experts and lawyers prepare a glossary of technical terms to be used at trial with definitions in understandable language.<sup>121</sup>

## 3. Trial evidence

If expert testimony is to “assist the trier of fact to understand the evidence or determine a fact in issue” (Fed. R. Evid. 702), the trial should be managed so as to enhance the trier of fact's comprehension.

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121. The source for these suggestions is William W Schwarzer & Joe S. Cecil, *Management of Expert Evidence*, in Reference Manual on Scientific Evidence, 2d ed., *supra* note 117, at 57.

Consider the following approaches:

- Have a tutorial for the jury or the judge before the trial begins, conducted by a neutral expert or experts chosen by the parties to explain fundamentals of complex scientific or technical matters.
- Exclude undisclosed experts and evidence from the trial. Few things are more disruptive at trial than the appearance of undisclosed experts or the offer of expert evidence at variance with prior testimony or reports.
- Have experts testify back to back to facilitate clarification of the extent and basis for their disagreement (if the extent and basis have not been previously established, see *supra* section VII.B.2).
- Assist the jury by giving preliminary and interim instructions, permitting note taking, and permitting them to ask questions.
- Use narrative written statements or reports for presentation of experts' direct testimony.

#### 4. Court-appointed experts

Federal Rule of Evidence 706 provides a detailed procedure for the selection, appointment, assignment of duties, discovery, report submission, and compensation of court-appointed experts. That procedure, however, does not preclude the use of other approaches, either by stipulation of the parties or by exercise of your inherent management power. Court-appointed experts may be used in various ways and for various purposes. They may, for example, serve as witnesses, consultants, examiners, fact finders, or researchers.

If you are considering appointment of an expert, make sure you consult with counsel and determine in advance of any appointment exactly what purpose the expert is to serve, how the expert is to function, and the extent to which the expert will be subject to discovery. You also need to address the potential for what may be considered *ex parte* communications. Arrangements for compensation of the expert should be made in advance and should define clearly the potential liability of the parties. Because of the time involved in identifying and appointing an expert, try to determine early in the case whether you will appoint an expert.<sup>122</sup> Academic departments and professional organizations can be a source for such experts.<sup>123</sup>

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122. See generally MCL, Third, *supra* note 13, §§ 21.51, § 21.52; see also Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 Emory L.J. 995 (1994); *infra* section VIII.C on appointment of special masters.

123. The American Association for the Advancement of Science (AAAS) will help federal judges find scientists and engineers suitable for appointment in specific cases. Information on the AAAS program can be found in *Court-Appointed Scientific Experts: A Demonstration Project of the AAAS*, at <http://www.aaas.org/spp/case/case.htm> (last visited July 6, 2001). The Private Adjudication Center at Duke University is establishing a registry of independent scientific and tech-

You should appoint the expert through a formal order, after the parties have had an opportunity to comment on it.

*Consider* including in the order

- the authority under which it is issued;
- the name, address, and affiliation of the expert;
- the specific tasks assigned to the expert (e.g., to submit a report, to testify at trial, to advise the court, to prepare findings);
- the subject on which the expert is to express opinions;
- the amount or rate of compensation and the source of funds;
- the terms for conducting discovery of the expert;
- whether the parties may have informal access to the expert; and
- whether the expert may have informal communications with the court and whether those communications must be disclosed to the parties.<sup>124</sup>

Whether or not the expert you appoint is new to litigation, consider giving the expert written information about what to expect procedurally and what kinds of contacts he or she may and may not have with the parties and other experts.

### C. High-Profile Cases

High-profile cases occur infrequently in most districts, but if you are assigned such a case you will face a number of management problems you usually do not encounter. Anticipating and then planning carefully for the needs and problems of these cases will be critical. A very useful guide to such planning is the manual *Managing Notorious Trials*, which was our source for the discussion that follows.<sup>125</sup> Although we have tried to capture the central issues and a range of procedures for handling high-profile cases, we suggest you consult that manual as well.

#### 1. Making a plan and assigning responsibilities

Your primary goal in preparing for a high-profile case will be to protect the integrity of the judicial process at every stage. To realize that goal you will need to

- protect yourself, the jurors (if any), and court staff from improper influences;
- provide security for parties, witnesses, jurors, and other trial participants;
- give the public reasonable access to the trial and any events and materials that would be available to the public in other cases;

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nical experts who are willing to provide advice to courts or serve as court-appointed experts. Information on the Private Adjudication Center program can be found in *The Registry of Independent Scientific and Technical Advisors*, at <http://www.law.duke.edu/pac/registry/index.html> (last visited July 6, 2001).

124. The source for this checklist is **Reference Manual**, *supra* note 117, at 63–64.

125. Timothy R. Murphy, Paula L. Hannaford, Geneva K. Loveland & G. Thomas Munsterman, *Managing Notorious Trials* (National Center for State Courts 1998).

- maintain efficiency of the pretrial and trial processes;
- provide for the jurors' comfort, especially if they are sequestered; and
- minimize disruption of other court functions.

One of the greatest challenges of a high-profile case is simply the sheer number of entities, beyond the court and parties, that must be involved. You will be very dependent on court staff for management of all these entities and the activity generated by the case. Thus, you should include them early in planning for the case, keep them informed as the case progresses, and give them discretion over their areas of expertise.

To use staff effectively, you and your clerk of court (or other designated coordinator for the case) should begin by identifying each of the requirements of the case and developing a plan to address them.

*Consider* including the following requirements in the plan:

- security;
- media relations;
- crowd control inside and outside the courtroom;
- inquiries by the public;
- management of case documents and their availability to the media and the public;
- jury selection;
- management of the jurors; and
- attention to the needs of court staff and other judges.

In preparing the plan, *consider*

- identifying who will be responsible for each of the requirements listed above;
- preparing a description of the duties and responsibilities of each person;
- clarifying where responsibilities overlap and how the staff involved should proceed if conflict or uncertainty arises; and
- meeting with staff at the outset to go over their responsibilities and meeting as needed for updates and morale building, but otherwise leaving the management of staff to the clerk of court or other person who has been designated oversight responsibility.

Your goal in taking these steps is not only to make sure there are no gaps in managing the events that swirl around a high-profile case, but also to foster cooperation and minimize conflict and confusion. You should, if at all possible, build your list of tasks and assignment of responsibilities using the court's existing organization rather than disrupting the court's normal procedures and staff assignments. Not only is this likely to be more efficient, but your recognition of the capabilities of existing staff will also help you gain their support.



Make sure the court's planning for the case involves everyone who may have an interest in the case or whose help you may need in managing the case. For example, the court is in control of the physical space in the courthouse and up to a certain boundary outside the courthouse. The U.S. Marshals Service will be part of your planning for security in those areas. Beyond that, other authorities will have responsibility. Your planning—and your meetings—may need to include such entities as the General Services Administration (GSA), fire department, police department, ambulance service, and mayor's office. For other purposes, you may need to involve the Federal Protective Service, the telephone company, the city's public relations office, and others. Include all relevant parties early and consistently.

Perhaps your most valuable resources in planning for a high-profile case are the judges and staff who have already handled such cases. The U.S. District Court for the District of Columbia probably handles more such cases than most other federal courts. Other districts with recent experience include the Eastern District of Arkansas, the Eastern District of California, the District of Colorado, and the Southern District of New York. Consult with their clerks and judges at the earliest possible moment.

## **2. Planning for the presence of the media**

As soon as you are assigned a high-profile case, you should make plans for managing the media. The most intense visibility and scrutiny will occur if the case goes to trial, but interest can spike at other times, too, such as when you issue important rulings and hold key hearings.

*Consider* the following in your planning:

- Which member of the court's staff will handle inquiries from the media? What instructions should that person, and other staff, be given for interactions with the media?
- How will the court determine who is a legitimate member of the media (e.g., through applications, background checks, passes)?
- What arrangements must be made for routine updates of schedules and case status (e.g., recorded phone message, written notice posted at designated location)?
- What arrangements must be made for providing the media with copies of case documents and exhibits (e.g., ask parties to file two sets of papers so that one can be provided to the media)?
- What will the media be permitted to know about the jury (e.g., will the media be given access to juror questionnaires and be allowed to attend the voir dire)?
- Is the courtroom large enough, or will you need an overflow room with closed-circuit television?

- Is the courtroom located in a place where the presence of the media will interfere with other court business as little as possible?
- How many of the seats in the courtroom should be allocated to the media and by what procedure should they be allocated (e.g., one pass per media organization, permanent or daily passes, forfeiture of a seat if it is not occupied within ten minutes before trial starts)?
- Where will sketch artists be seated to provide an unobstructed view? Will they be permitted to sketch victims, children?

Keep in mind that Judicial Conference policy does not permit the use of television cameras or other recording devices in the courtroom.<sup>126</sup>

### 3. Interacting with the media

#### *a. Court interactions with the media*

It is essential to maintain clear and reliable channels of communication between the court and the media. At the outset of a high-visibility case, you will want to take steps to gain the media's cooperation and goodwill. Above all, you want to make sure all media members are treated fairly and have the same level of access to information.

#### *Consider*

- establishing clear rules about media conduct and procedures for access to information;
- providing all essential information the media need, including schedules for hearings and the trial;
- asking the media to designate spokespersons or liaisons for bringing media inquiries to the court so that communications are more efficient; and
- emphasizing that you are in control of the case and courtroom and that you expect the media's cooperation and observance of your ground rules.

Some of the questions the media pose will be directed to you. If you do not want to answer media questions directly, make sure the person you select as your spokesperson is someone in whom you have complete confidence so that you do not risk errors in transmission. When responding to media inquiries, you should keep the following principles firmly in mind.

- Think through each question or issue carefully. Be aware that you will be held responsible for everything that has happened, even if someone else has handled a particular matter.

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126. Admin. Office of the U.S. Courts, 2 Guide to Judiciary Policies & Procedures, ch. III, pt. E at 25 (October 14, 1997) [hereinafter Judicial Conference Cameras Policy].

- Do not foster or appear to have an especially close relationship with any member of the media. You will be charged with favoritism at the least hint of special treatment.
- Avoid the appearance of withholding information or excluding the media.
- Do not make rulings from the bench unless your decision is carefully scripted and delivered.
- Do not become the focus of media attention yourself. Be careful about your words and actions on and off the bench.

*b. Attorney interactions with the media*

One unfortunate but real possibility in a high-profile case is that the attorneys will use the media to convince the public (and potential jurors) of their view of the case. If at all possible, you should avoid imposing gag orders on the attorneys, as such orders can heighten animosity and also are difficult and time-consuming to enforce. A much better approach is to sit down with the attorneys early in the case and tell them what your expectations are for their conduct. You can ask them for their agreement to observe limits on what is said to the media, and you should remind them of any disciplinary rules you intend to apply.

**4. Protecting the jurors, facilitating their attention, and providing for their comfort**

There will be great public and media interest in the persons who are selected for the jury in a high-visibility case. There will also be much written about the case that could affect the jurors. One of your key responsibilities in protecting the integrity of the trial is protecting the jurors from improper influences. If the trial is very long or the media and public are very aggressive, you will also need to give greater attention than usual to the jurors' concentration on the case and their personal comfort and sense of safety.

*Consider* taking the following steps:

- withholding from the public and media any information on juror questionnaires that was given in confidence;
- withholding from the public and media the addresses of jurors;
- during voir dire, asking prospective jurors whether the presence of the media makes them uncomfortable, will distract them, or will prevent them from deciding the case impartially;
- inquiring at voir dire and periodically thereafter whether any juror has been approached by the media or publishers with offers to purchase his or her story and if so, determining whether this may bias the juror or affect how the juror listens to the evidence;
- ensuring that jurors can enter and leave the courthouse safely and without interaction with the media or public;

- if jurors must walk through or eat in public spaces, cordoning off space for them and making sure they are accompanied by a member of the court staff;
- instructing the jurors daily not to watch television coverage of the trial, read press accounts, or talk with anyone about the trial, and promising to provide jurors with a scrapbook of media coverage at the end of the trial;
- keeping the jurors well informed about the daily schedule (e.g., when breaks will be taken) and about the overall trial schedule (e.g., approximately how much longer the prosecution's case will continue);
- permitting the jurors to use such aids as note taking and notebooks (prepared by the court or parties under your supervision and containing, for example, lists and pictures of witnesses and copies of key documents or evidence);
- instructing the media that they are strictly forbidden from interviewing jurors during the trial;
- advising the jurors that the decision whether to be interviewed at the end of the trial is theirs alone and asking them to be sensitive to the privacy of fellow jurors if they do choose to speak with the media;
- determining how the jurors will be dismissed when the trial ends so that they are not mobbed by the parties, public, or media and determining whether and how they will meet the media and the parties' attorneys;
- meeting informally with the jurors after the trial to thank them, answer their questions, and explore whether they have any remaining needs; and
- determining what posttrial arrangements can be made, if needed, to deal with any psychological trauma felt by the jurors.

Your planning and thoughtful consideration of the jurors should be evident from voir dire through posttrial events. The more rapport you can develop with the jurors, the more likely they will be to alert you to any problems or interference they experience. Make sure, however, that you plan for the extra time it will take to select the jurors and ensure their comfort and security in a high-profile case.

## 5. Planning for security

Like all other aspects of managing a highly visible case, you should make plans early in the case for meeting its security requirements. The person to whom you assign responsibility for security (your security coordinator) should develop a written security plan, which you should review and approve. Any entities likely to be involved in security, such as the U.S. marshals and local authorities, should be consulted, and each entity's responsibilities should be clearly outlined.

The first issue you and others should address is the level of security that will be needed. Some questions you can ask are the following:

- Is security needed only to control crowds, or could there be threats to the safety of participants in the case, including yourself and court staff?
- Is the case of local or national interest?
- Is security needed both inside and outside the courthouse?
- Are demonstrations or protests likely?

Answers to these questions will help your security coordinator determine how many security personnel are needed and where.

Some additional steps your security coordinator should take are to

- make sure the courtroom is large enough to accommodate additional security personnel if higher levels of security are needed for the jurors, witnesses, or yourself;
- make sure security is provided for exhibits during trial and when court is not in session;
- confer with the media to ensure that media equipment will not compromise security or safety;
- determine what kind of security, if any, is needed outside the courthouse (e.g., roadblocks, a ban on parking, outside guards or surveillance) and confer with local authorities as needed;
- determine who should be permitted access to the courthouse, when (e.g., evenings), and to what parts of the courthouse;
- if access is restricted to certain parts of the courthouse, make arrangements for barriers, signs, and so forth;
- determine how the media, the public, the parties, witnesses, jurors, and court staff will enter the courthouse and how they will be screened for entry;
- provide security (e.g., escorts) for the jurors if they must walk through public areas or must otherwise be protected; and
- determine what level of security is needed and where (in the courtroom, outside the courthouse) when the verdict is announced.

## 6. Managing the courtroom

A high-visibility trial will bring the media and the public to your court in numbers and moods you may not have encountered in other cases. You should make your expectations for their conduct very clear. You might want to set out your rules and expectations in a decorum order.

*Consider* including the following in your decorum order:

- how persons will be screened for entry into the courtroom (e.g., color-coded, photo-ID passes);
- the time seating will begin each morning and afternoon;

- seating arrangements in the courtroom for the media, the public, and those involved in the case who need reserved seating;
- entry and reentry rules while court is in session;
- the appropriate location for interviews (never in the courtroom);
- media equipment permitted in the courtroom (as noted earlier, cameras and recording devices are prohibited in district courts by Judicial Conference policy<sup>127</sup>);
- how questions from the media and public will be handled;
- how the media and public can obtain copies of exhibits and other case documents; and
- a clear prohibition against communicating with jurors during the trial.

## 7. Managing the case and the rest of your docket

Because the spotlight will be on you and the court during the litigation of a high-profile case, you should use all of your most effective case management skills with even greater consistency and dedication than you usually do. As emphasized in earlier chapters, you should set a realistic schedule for the case, in consultation with the attorneys, and then hold both them and yourself to that schedule.

Whether you will need assistance with the rest of your docket will depend on the nature of the high-profile case. If it is not a complex case and the media and public interest in it is most manifest at the time of the trial, you may be able to manage your other cases as well. But if the high-visibility case is both complex and intensely followed even in its earliest stages, you may find you need some help keeping your other cases—particularly your criminal cases—on schedule. You should speak with your chief judge about your needs. At minimum, you should arrange for another judge to handle matters in your other cases during the trial itself. Hearing motions or signing orders in other cases during your lunch breaks or in the early morning will do justice to neither the high-profile case nor your other cases.

### D. Pro Se Cases

Parties in the federal courts may plead and conduct their cases personally (28 U.S.C. § 1654), and they are doing so in increasing numbers. Many, but not all, pro se litigants are plaintiffs; many, but not all, are also prisoners. Cases involving a pro se litigant present special challenges for several reasons, not the least of which is your obligation to ensure equal justice for litigants who may have little understanding of legal procedure or the law. At each stage in the case, you may need to take actions not required in cases in which all parties are represented by counsel.

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127. See Judicial Conference Cameras Policy, *supra* note 126.

The burden for managing pro se cases falls heavily on court staff as well as on the judge. Pro se litigants tend to have many needs and questions and are likely to press court staff for assistance. Court staff are usually acutely aware that they should be helpful but must not give legal advice to any litigant.<sup>128</sup> At the same time, there are many actions court staff, especially pro se law clerks, can and must do. A very helpful manual for staff, as well as for judges, is the *Resource Guide for Managing Prisoner Civil Rights Litigation*,<sup>129</sup> prepared in response to passage of the Prison Litigation Reform Act of 1995 (PLRA). We have relied on this guide for the discussion below, and we encourage you to consult it for prisoner pro se cases on your docket.

### 1. Early screening

Techniques appropriate for the management of pro se litigation vary from case to case and may be affected by special procedures in place in your district. Many courts, for example, have pro se law clerks to screen these cases; some have special rules governing the assignment of successive cases brought by a pro se litigant. In addition, the PLRA governs many aspects of cases brought by incarcerated parties.<sup>130</sup>

Some judges direct the clerk's office staff to bring cases by pro se litigants to their attention immediately after filing so that they can review the documents. In fact, you have a special obligation under the PLRA to screen cases filed by prisoners even before they are docketed.

With regard to cases filed by prisoners, you must

- prohibit filing of an action unless available administrative remedies have been exhausted (42 U.S.C. § 1997e(a));
- prohibit filing of an action for “mental or emotional injury suffered while in custody without a prior showing of physical injury” (42 U.S.C. § 1997e(e));
- prohibit filing of an in forma pauperis (IFP) action if the prisoner has had three or more actions in federal courts that were dismissed as frivolous or malicious, if the action fails to state a claim on which relief can be granted, or if it seeks monetary relief from a defendant immune from relief, unless the prisoner is in imminent danger of physical injury (28 U.S.C. § 1915(g)); and

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128. A useful article on this subject is John M. Graecen, “No Legal Advice From Court Personnel.” *What Does That Mean?* Judges’ J., Winter 1995, at 10.

129. *Resource Guide for Managing Prisoner Civil Rights Litigation* (Federal Judicial Center 1996).

130. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, April 26, 1996, 110 Stat. 1321, Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. The PLRA amends 18 U.S.C. §§ 3624, 3626; 42 U.S.C. § 1997e; 28 U.S.C. §§ 1346(b), 1915; and 11 U.S.C. § 523(a); it adds new sections 28 U.S.C. §§ 1915A and 1932.

- dismiss a case at any time if you find that an IFP petitioner’s allegations of poverty are untrue, the action fails to state a claim on which relief can be granted, or it seeks monetary relief from a defendant immune from such relief (28 U.S.C. § 1915(e)(2)).

Non-prisoner pro se cases will also benefit from your early review. You and the parties may be saved considerable time later if you take a few minutes early in the case to start it down a fruitful path.

*Consider* generally the following approaches:

- Provide standard forms, through the clerk’s office, for pro se filers.
- Review the pleadings as soon as they are filed; if pleadings fail to meet technical requirements, inform the parties and give them an opportunity to cure defects. Actions brought by pro se litigants must be liberally construed and generally may not be dismissed before service unless legally frivolous. However, sanctions may be imposed on vexatious litigants, including an order directing the clerk to file no further documents without prior court order.
- Check promptly for threshold issues, such as subject matter and personal jurisdiction and venue.
- Use routine show cause orders to trigger dismissals under Federal Rule of Civil Procedure 4(m) if service of the complaint is not effected within 120 days.
- Consolidate related cases, such as cases involving similar claims arising in the same institution.

## **2. In forma pauperis status**

In forma pauperis cases filed by incarcerated parties are also governed by the PLRA. Prisoners with any monetary assets at all may no longer file a case without paying a filing fee.

Under the PLRA, the court must

- require a prisoner seeking IFP status to include in an affidavit “a statement of all assets [the] prisoner possesses” and “a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint . . .” (28 U.S.C. § 1915(a));
- require prisoners who are granted IFP status to pay the filing fee, by a partial initial payment from funds available and through monthly payments forwarded by the institution based on the balance in the prisoner’s account (28 U.S.C. § 1915(b));
- permit prisoners with no assets and no means to pay the filing fee to file at no cost (28 U.S.C. § 1915(b)(4)); and



- require prisoners against whom judgment is entered to make full payment of any costs ordered, by partial payment from funds available and through monthly payments forwarded by the institution based on the balance in the prisoner's account (28 U.S.C. § 1915(f)).

With regard to nonincarcerated pro se parties, you will have to decide how deeply to probe into their affidavit in support of IFP status.

In reviewing pro se filings, *consider*

- asking for W-2 forms, pay stubs, tax filings for the past year, and credit checks, if any; and
- alerting pro se parties to fee shifting and other possible costs if they are unsuccessful in their suits.

### 3. Securing counsel for pro se litigants

Pro se litigants in civil cases have no constitutional right to counsel. The decision whether to appoint counsel in these cases is in your discretion and should be made on a case-by-case basis. The exercise of your discretion should, however, be guided by both statutes and case law. Under 28 U.S.C. § 1915(e)(1), the “court may request an attorney to represent any person unable to afford counsel.” Because this language differs little from the pre-PLRA language, your decisions on when to grant and when to deny requests for counsel should be guided by preexisting case law and more recent case law.

Because no public funds are available (except under the Criminal Justice Act, 18 U.S.C. § 3006A, for representation of habeas corpus petitioners), appointment of counsel can present substantial difficulty. Many judges, however, attempt to find counsel for nonfrivolous cases because the need to protect the rights of an unrepresented party not only places additional burdens on a judge but generally will also be better met by counsel. Even if attorneys are unwilling to take full responsibility for litigating a case, they may be willing to advise the plaintiff, or they may be willing to be appointed for a specific limited role, such as to assist the pro se litigant during trial. Sometimes, consolidating related pro se cases can make the litigation of sufficient public interest to attract counsel.

You should take care, nonetheless, to appoint counsel only when a case warrants it. A high percentage of pro se cases do not have the merit to be worthy of a volunteer lawyer, and you should not call on attorneys to represent such cases, as their time is a valuable resource not to be wasted by the court. The truth of the matter is that in most of these cases you will be on your own.

When you decide that appointing counsel is warranted, you should call on resources available locally. Some courts, by local rule, require pro bono service as a condition of admission to the bar. A number of districts have civil pro bono panels of attorneys who have volunteered to represent indigents; some bar associations also provide such panels. Some volunteer programs include a screening process to identify meritorious cases.

Although there may be no ready source to cover attorneys' fees, there is generally some relief for expenses incurred. Although appointed counsel are typically responsible for initially paying reasonable expenses, such as those for transcripts and experts' fees, many districts have some arrangement for reimbursing these expenses through use of nonappropriated funds. The PLRA also provides for certain expenses, such as those for printing the record on appeal, to be paid by the Administrative Office once the prisoner has paid the partial filing fee.

In some cases filed pursuant to specific statutes—for example, 42 U.S.C. § 1983 and other civil rights statutes—there is a possibility that attorneys' fees could be awarded. Attorneys' fees might also be recovered in cases in which there is a contingency fee arrangement and the plaintiff prevails. In prisoner cases filed under 42 U.S.C. § 1988, however, the PLRA has made substantial changes to attorney fee provisions. Such fees may not be awarded unless they were directly and reasonably incurred in proving an actual violation of the plaintiff's rights that are protected by a statute pursuant to which a fee may be awarded under 42 U.S.C. § 1988 and the fees are proportionately related to court-ordered relief for the violation or were directly and reasonably incurred in enforcing relief ordered for the violation (42 U.S.C. § 1997e(d)). The PLRA also limits the hourly rate and provides that when a prisoner is awarded monetary damages, a portion of the judgment must satisfy the award of attorneys' fees.

#### **4. Scheduling and monitoring the pro se case**

Many judges do not believe that pretrial conferences are appropriate in most pro se cases involving an incarcerated pro se litigant. Thus, most courts, by local rule, exempt such cases from the requirements of Federal Rule of Civil Procedure 16. Rule 16 conferences can, however, be a useful tool in pro se cases in which the pro se litigant is not in custody, particularly for identifying and narrowing issues and for establishing your control over the case. A conference with the judge can also send a powerful message to pro se litigants that their cases are receiving the court's attention.

*Consider* holding an early conference in cases with nonincarcerated pro se litigants to do the following:

- Explain the procedural requirements in straightforward terms.
- Point out resources available, such as court-developed forms or instructions.
- Discuss a schedule for the case.
- Enter a procedural order to ensure that the case moves to prompt resolution and include dates for cutoff of discovery, for submission by the defendant of all relevant records and documents, and, in appropriate cases, for the filing of a motion for summary judgment and the response. Because the relevant facts usually are in the defendant's control, early disclosure will facilitate resolution of the action.

- Establish the least disruptive discovery method adequate to the task. A deposition with written questions may be preferable, for example, to a live deposition conducted by an unrepresented party.
- Tell the pro se litigant that the case will be closely monitored and identify a person to contact should problems arise.
- Explicitly require the pro se litigant to maintain a current address and telephone number on record with the court.
- Make clear to the pro se litigant the obligation to serve copies of all communications with the court on all opposing parties.

Many cases involving incarcerated pro se litigants can be decided on the papers, after the prisoner is required to respond to an order for a more definite statement or after the defendant has filed a motion for summary judgment. A few cases, however, may involve allegations that appear to warrant the time and effort of a pretrial conference. In such instances, you have several options.

*Consider*, for example, the following approaches:

- Confer by telephone conference.
- Use, if available in your courthouse, videoconferencing technology to conduct hearings in prisoner cases (see *infra* section IX.G.2.b for a discussion of videoconferencing).
- Conduct in-prison hearings (see 28 U.S.C. § 636(b)(1)(B): authority to hear “prisoner petitions challenging conditions of confinement”). In some districts, magistrate judges have been assigned this responsibility.

Many courts use a *Spears* hearing for cases involving an incarcerated pro se litigant.<sup>131</sup> The purpose of the hearing, which is “in the manner of a motion for a more definite statement” and is usually conducted by a magistrate judge, is to determine whether a prisoner can allege facts that will support a colorable claim. Hearings can be held at the prison, by telephone, or by videoconference. Many cases can be resolved through a *Spears* hearing, either by dismissal or by prison officials agreeing to solve a problem.

Many courts also use a *Martinez* report,<sup>132</sup> which requires prison officials to investigate the prisoner’s complaint, to report the findings of the investigation, and to supply certain standard information. A *Martinez* report can help you and the institution determine whether a case is frivolous and can be disposed of by motion or whether there are problems the institution can address informally.

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131. The hearing is named after the case *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). The *Spears* approach has been recognized by the Supreme Court (see, e.g., *Neitzke v. Williams*, 490 U.S. 319 (1989)) and is used in many courts.

132. The report is named after the case *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978). See also *Gee v. Estes*, 829 F.2d 1005 (10th Cir. 1987).

## 5. Holding settlement discussions and conducting the trial

Many cases involving a pro se litigant are appropriate for resolution by settlement rather than judgment or trial. At the same time, anyone who assists the parties in such cases with settlement negotiations runs the risk of being pressed by the pro se party to give legal advice. This is one reason why most federal courts exempt pro se cases from their ADR programs. Likewise, you as the judge should be cautious about assisting with settlement, since your assistance will very likely be misunderstood by the pro se litigant. Many commentators worry, nonetheless, that it is unfair to the pro se litigant for courts not to provide settlement assistance. To address this problem, you might consider appointing counsel for the limited purpose of representing the pro se litigant during settlement discussions with you, another judge, or an ADR neutral (see *supra* sections V.A.5 and V.B.3).

If the case proceeds to trial, you will want to make a serious effort, if you have not already, to appoint counsel. Should you fail to find counsel, or should the pro se litigant refuse counsel, you will need to provide guidance as the pro se party attempts to handle the trial alone. Some courts have prepared booklets with useful information, which they distribute free to litigants.<sup>133</sup> You can also provide sample documents and forms (e.g., forms for witnesses and exhibits) before trial to help the pro se litigant complete the necessary preparations. However, you will undoubtedly need to personally instruct the pro se litigant as well while carefully maintaining your impartiality.

Before the trial begins and then again on the record, you may want to tell the pro se litigant, with the other party present, what the trial will entail.

### *Consider*

- verifying that the party is not an attorney and chooses to proceed pro se;
- explaining the trial process (e.g., that you will hear the plaintiff first, then the defendant; that interruptions will not be permitted; that a record is being made);
- explaining the elements of the case (e.g., that the plaintiff is asking for \_\_\_\_; that this can be granted if the plaintiff shows \_\_\_\_);
- explaining that the party bringing the action has the burden to present evidence in support of the relief sought;
- explaining the kind of evidence that may be presented (e.g., testimony from witnesses and exhibits) and that everyone who testifies will do so under oath;
- explaining the limits on the kind of evidence that may be considered (e.g., describe hearsay evidence and explain that it may not be admitted at trial);

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133. See, e.g., United States District Court for the Eastern and Western Districts of Arkansas, *Your Day in Court: The Federal Court Experience* (1992).

- asking both parties whether they understand the process and the procedure; and
- permitting a non-attorney advocate to sit at the pro se party's counsel table and explaining that this advocate may provide support but will not be permitted to argue on behalf of a party or to question witnesses.<sup>134</sup>

If you need to question the pro se litigant during the trial (or at any other time) make sure you use questions that seek to obtain general information so as to avoid the appearance of advocacy on behalf of the pro se litigant. When the trial concludes, decide the matter promptly, if at all possible, and enter your decision.

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134. These suggestions are taken from Minnesota Conference of Chief Judges, Protocol To Be Used by Judicial Officers During Hearings Involving Pro Se Litigants (Adopted 1998).



## VIII. PERSONNEL RESOURCES IN LITIGATION MANAGEMENT

- A. Court and Chambers Staff
  - 1. Law clerks
  - 2. Secretary/office manager/judicial assistant
  - 3. Courtroom deputies or case managers
- B. Magistrate Judges
  - 1. Referral of nondispositive matters
  - 2. Referral of dispositive matters
  - 3. Referral of trials
  - 4. Other referrals
  - 5. Method for assigning matters to magistrate judges
- C. Special Masters
  - 1. Authority to appoint a special master
  - 2. Reasons for appointing a special master
  - 3. Selecting and appointing a special master
  - 4. The special master's report
  - 5. Compensating the special master

Chambers staff, personnel in the clerk's office, and a number of other individuals play important roles in case management. In the preceding chapters we noted the roles they play in specific stages or events in litigation. In this chapter we discuss more extensively the kinds of assistance chambers staff and others can provide.

As a general matter, district and magistrate judges should delegate everything they can, consistent with federal law, the rules of procedure, and their court's operating procedures. Judges should retain those tasks that only a judge may perform, that serve sound principles of case management, and that give them personal satisfaction. In deciding what to delegate and to whom, analyze each task, asking whether it is worth doing at all, how it can be done most effectively, and whether it can be done by someone other than you. Depending on the nature of the task and who is doing the delegating, other persons may provide valuable assistance.

### A. Court and Chambers Staff

#### 1. Law clerks

Law clerks have no statutorily defined duties, and therefore you have great discretion in what you assign to them. The most effective use of law clerks is to have them work on motions, do research and writing, and provide other forms of direct assistance to you.

Consider having your law clerks

- research or brief any issues raised by your review of the file in preparation for the Rule 16 conference;
- screen pro se and other pleadings for jurisdictional and other defects (if your court does not have a pro se law clerk<sup>135</sup>);
- research motions and evidentiary issues and prepare proposed rulings;
- review and annotate proposed jury instructions and findings of fact and conclusions of law;
- review and annotate trial exhibits and the trial transcript; and
- maintain a watch on current court of appeals decisions on points bearing on pending matters.

It is not advisable to have law clerks perform judicial duties, such as conducting Rule 16 conferences. Without a judge, who is able to issue orders and exercise control over the case, the conference tends to become a perfunctory exercise. You should also, as a general rule, not permit your law clerks to take telephone calls from attorneys or talk to them ex parte except about routine administrative and scheduling matters. Also, try not to give your law clerks tasks that can be performed by someone with other kinds of expertise; they should not, for example, usually act as courtroom deputies or sit in on court proceedings unless you have a specific educational or case-related reason for them to do so.

Remember that most law clerks have little or no relevant case management experience. It is therefore necessary to provide them with specific instructions, to plan their work, and to oversee them sufficiently to ensure that their time will be used most productively. You need to take care that they do not become buried in marginal research projects, spending undue amounts of time and pursuing unhelpful avenues. Because a large part of most law clerks' work concerns motions, their attendance at the motions calendar will be useful.

Several resources are available to help make the law clerks effective members of your team. When selecting law clerks, you can consult *Conducting Job Interviews: A Guide for Federal Judges*, which identifies desirable law clerk skills and provides sample interview questions for assessing those skills.<sup>136</sup> Another helpful guide for hiring law clerks is *The Law Clerk Appointment Process*, an FJTN program that is broadcast periodically and discusses Judicial Conference policies and statutory provisions regarding law clerk appointments.<sup>137</sup> When you are training new law clerks, you will want to have them read the *Chambers Handbook for Judges'*

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135. See *supra* § VII.D for a discussion of managing pro se cases.

136. David K. Hendrickson, *Conducting Job Interviews: A Guide for Federal Judges* (Federal Judicial Center 1999).

137. Broadcasts of this Administrative Office program are listed in the *FJTN Bulletin*, and the program is also available on videotape. Contact the Administrative Office's Human Resources Division for more information.



*Law Clerks and Secretaries*, which covers every aspect of the law clerk's role.<sup>138</sup> You should have them watch the FJTN broadcast *Orientation Seminar for Federal Judicial Law Clerks*, which focuses on ethics and legal writing.<sup>139</sup> You may also find it helpful, if you have two or more law clerks, to stagger their starting dates so that the experienced law clerk can train the novice, thus relieving you of this responsibility. You might also urge your district to have an annual daylong training session for law clerks, if it does not already, to orient them to clerk's office operations and other procedures that are uniform across the district.

## 2. Secretary/office manager/judicial assistant

Because you and your law clerks will generally be occupied with substantive legal work, it is helpful to have a staff member who is a skilled manager and who can interact effectively with other court offices and attorneys. These duties often fall to a judge's secretary (also referred to as office manager or judicial assistant), although that is not necessarily the case. Under Judicial Conference policy, district and magistrate judges may choose to hire another law clerk in lieu of a secretary.<sup>140</sup> Given the efficiencies provided by automation, many of the duties once performed by secretaries are no longer needed. At the same time, some of their traditional tasks, such as general office management, remain. How you allocate the many routine chambers tasks—whether to a secretary, law clerk, or courtroom deputy—may change as the demands of your workload and your available personnel change.

*Consider* whether a secretary might

- organize your calendar;
- answer routine mail;
- maintain chambers records and files;
- handle travel arrangements;
- maintain supplies, equipment, and furniture;
- maintain the chambers library;
- work with the librarian to develop an opinion retrieval file for unpublished opinions;
- help you write speeches and special letters;

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138. Chambers Handbook for Judges' Law Clerks and Secretaries (Federal Judicial Center 1994).

139. Broadcasts of this Federal Judicial Center program are listed in the *FJTN Bulletin*, and the program is also available on videotape. Contact the Federal Judicial Center's Information Services Office for more information.

140. *See* Report of the Proceedings of the Judicial Conference of the United States, Sept. 1991, at 66 (district judges); Report of the Proceedings of the Judicial Conference of the United States, Mar. 1993, at 16 (magistrate judges); and Report of the Proceedings of the Judicial Conference of the United States, Mar. 1999, at 26 (magistrate judges).

- compile a notebook of standard orders, letters, and forms for the law clerks; and
- set up a system to handle law clerk applications.<sup>141</sup>

If you decide to use your secretarial position to hire another law clerk, these duties will, of course, have to be performed by someone else.

### 3. Courtroom deputies or case managers

Although their titles vary, in every court there are clerk's office staff who play a central role in managing cases. In some courts they are organized as teams; in other courts individual staff members are assigned to individual judges. Although their duties and how they are organized vary from court to court and judge to judge, these staff members play a vital role in case management as the judge's calendar manager, administrative assistant, and contact with the attorneys. Appropriately trained and instructed, and given the necessary authority, these staff can become key players on your case management team.

*Consider* the following approaches:

- Designate the courtroom deputy<sup>142</sup> as the exclusive communication channel between the judge and the attorneys. While some judges prefer using their secretary or law clerks for this purpose, others use the deputy, who is not so close to the judge as to imply an improper *ex parte* communication. Using a single channel for communicating with the judge should also help the attorneys avoid confusion.
- Have the courtroom deputy monitor the status of all cases and ensure that you receive current information. The courtroom deputy should know the status of all cases on your docket and should be able to provide up-to-date reports about them and any matters, such as motions, needing your attention. The courtroom deputy can also prod lawyers in slow-moving cases and bring stalled cases to your attention. (See *infra* section IX.D and E for a discussion of statistical reports.)
- Have the courtroom deputy do all your case calendaring (according to your directions). You should meet regularly with the courtroom deputy to go over the status of cases and to plan your calendar. Your instructions and

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141. The Federal Law Clerk Information System, managed by the Administrative Office, provides an avenue for your staff to give information to prospective law clerks via the Internet. At this site you can post information about openings in your chambers and the application process. See Federal Law Clerk Information System, at <https://lawclerks.ao.uscourts.gov> (last visited July 6, 2001).

142. For simplicity's sake, we refer to this staff member by the most common term, *courtroom deputy*. If a court organizes its courtroom deputies in teams, a judge may work with more than one courtroom deputy, but the more common practice is to assign a single courtroom deputy to a single judge.

preferences—for example, on the length of a motions hearing—will guide the courtroom deputy in setting events on the calendar.

- Have the courtroom deputy prepare or supervise preparation of notices and orders.
- Have the deputy maintain liaison with the jury administrator to ensure the orderly and efficient use of prospective jurors.
- Free the deputy from nonessential courtroom duties. Although the presence of the deputy during trial will often be useful, there may be occasions when the deputy’s time could be better spent performing administrative duties. By having attorneys premark exhibits and by shifting responsibility for administering oaths and keeping minutes to others, you can free the deputy for other work.
- Encourage the courtroom deputy to stay current on the most sophisticated methods of calendar management that are available, including full use of automation. Though much automation is standardized, there is room for initiative and creativity in developing forms and procedures and in designing and maintaining statistical reports. (See *infra* section IX.D.2 for a discussion of innovative reports.)

Although the courtroom deputy works for you, this staff member is supervised by the clerk of court. An important part of the deputy’s responsibilities is to make sure that case information is timely and accurately submitted for the docket and that case documents are properly filed in the clerk’s office. Because of the deputy’s dual responsibilities—to you and to the clerk of court—you will want to be alert to any difficulties and maintain good communication between your chambers and the clerk’s office.

## B. Magistrate Judges

Magistrate judges can be a great help in managing a busy docket. Referrals to magistrate judges are governed by 28 U.S.C. § 636 and Federal Rules of Civil Procedure 72 and 73. In addition to enumerating specific duties, the statute authorizes assignment of “such additional duties as are not inconsistent with the Constitution and laws of the United States.”<sup>143</sup> Within the parameters set by the statute and rules, magistrate judges exercise such powers as are delegated by each district court through local rule or order.<sup>144</sup> Thus, a district judge’s use of magistrate judges will be guided not only by the statute, federal rules, and his or her own preferences, but also by the district’s decisions about their role. In making such decisions, a court may wish to consider advice from the Judicial Conference Committee on the Administration of the Magistrate Judges System, contained in

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143. 28 U.S.C. § 636(b)(3).

144. 28 U.S.C. § 636(b)(4) (stating that “[e]ach district court shall establish rules pursuant to which the [magistrate judges] shall discharge their duties.”).

the committee's *Suggestions for Utilization of Magistrate Judges*, available on the federal judiciary's intranet site.<sup>145</sup>

## 1. Referral of nondispositive matters

Any nondispositive pretrial matter may be referred to a magistrate judge for hearing and determination.<sup>146</sup> These matters include conducting Rule 16 conferences, supervising discovery, resolving discovery disputes, and ruling on motions that do not dispose of claims or defenses (for examples of referral orders, see Appendix A, Forms 50 and 51). The magistrate judge to whom a matter is referred is to enter a written order promptly.

Within ten days of service of the order, the parties may serve and file an appeal of the magistrate judge's decision. The district judge must consider any objection filed by a party and should modify or set aside any portion of the magistrate judge's order he or she finds to be clearly erroneous or contrary to law.<sup>147</sup> If you are a district judge and you delegate such nondispositive pretrial matters, you should adhere strictly to this narrow standard of review. Routinely second-guessing the magistrate judges will reduce the time savings you might have gained and very likely will encourage future appeals. (For sample language in a judge's guidelines for counsel, see Appendix A, Form 7.)

Increasingly, magistrate judges have taken on the role of conducting settlement conferences or serving as mediators in court-based ADR programs. You might consider referring cases to magistrate judges for these purposes when the amount of time required might be extensive or your impartiality might be questioned by close involvement in the parties' negotiations. At the same time, if extremely extensive mediation is needed, as in a mass tort or institutional reform case, consider appointing a special master (see *infra* section VIII.C).

## 2. Referral of dispositive matters

District judges may also designate a magistrate judge to conduct hearings, including evidentiary hearings, on dispositive matters.<sup>148</sup> These matters may include motions for injunctions, for judgment on the pleadings, for summary judgment, or to certify a class, as well as petitions for habeas corpus and petitions challenging conditions of confinement. Unless the parties have consented to full jurisdiction by the magistrate judge, the magistrate judge is limited to making recommenda-

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145. See Comm. on the Admin. of the Magistrate Judges Sys., Judicial Conf. of the U.S., *Suggestions for Utilization of Magistrate Judges*, at 156.119.80.10/judgescorner/magistrate/suggestion.html (Dec. 9, 1999). This document, along with other assistance on utilization issues, is also available from the Magistrate Judges Division of the Administrative Office at (202) 502-1830.

146. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

147. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

148. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

tions, including findings where appropriate, after a hearing on the record or a review of the case file and motions.<sup>149</sup>

A party may file written objections within ten days of service of the recommended disposition, and the opponent may respond within ten days. If you are the district judge receiving the appeal, you must perform a de novo review, which may be based on the record below or upon additional evidence, of any portion of the magistrate judge's disposition to which objection has been made and then enter an appropriate order.<sup>150</sup> You should exercise care in deciding which dispositive motions to assign to magistrate judges because the referral of dispositive motions can lead to wasteful duplication of judicial and attorney time and effort, especially when the motions involve primarily questions of law.

### 3. Referral of trials

With the consent of the parties, a magistrate judge may order the entry of judgment in a civil case.<sup>151</sup> If consent is for all aspects of the case, the magistrate judge conducts all proceedings, including a jury or non-jury trial if necessary. Or, parties may consent to have a magistrate judge rule on a specified case-dispositive motion. Consent should be given in writing and can be recorded in several ways, including in the attorneys' Rule 26(f) report to the court or on a specialized consent form. (See Appendix A, Forms 13 and 14 for examples in the context of the Rule 26(f) report; see Appendix A, Forms 52 and 53 for specialized consent forms.<sup>152</sup>)

Section 636(c)(2) of Title 28 of the U.S. Code directs the clerk of court to notify the parties, on filing of the action, of the availability of a magistrate judge to try cases on consent. The district judge or magistrate judge may thereafter again advise the parties of this availability, as well as of their right to withhold consent.<sup>153</sup> The Rule 16 conference is an appropriate occasion to inquire of the parties whether they are willing to consent to a final disposition, including trial—jury or non-jury—before a magistrate judge.

An increasing number of districts have adopted the practice of placing the magistrate judges on the assignment wheel to receive a portion of newly filed civil cases. In these districts, the parties are informed that their case will be assigned to a magistrate judge for all proceedings if the parties consent to it. The parties are given a specified amount of time to consent to this assignment; if consent is not given, the case is reassigned to a district judge.

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149. See generally MCL, Third, *supra* note 13, § 21.53.

150. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

151. Magistrate judges may dispose of civil cases on consent if their court has “specially designated” them to do so. 28 U.S.C. § 636(c)(1). All districts have designated their full-time magistrate judges to exercise this authority. (Assignments of such authority to part-time magistrate judges are subject to further statutory requirements. See 28 U.S.C. § 636(c)(1).)

152. Fed. R. Civ. P. 73(b).

153. *Id.*

#### 4. Other referrals

Section 636(b)(3) of Title 28 of the U.S. Code grants the district judge “catchall,” nonconsensual referral authority, the extent of which is not clearly established but the limits of which are set by Article III. There is authority permitting magistrate judges to preside while a jury deliberates and receive jury verdicts, to conduct postjudgment proceedings, and to take a variety of other judicial actions. You should consult circuit law on the limits of the authority granted under section 636(b)(3).<sup>154</sup>

#### 5. Method for assigning matters to magistrate judges

In making referrals to magistrate judges, district judges need to take into account the assignment procedures their districts use, which may include one or more of the following methods:

- *Standing order or local rule.* A standing order or local rule directs that magistrate judges have responsibility for certain categories of pretrial matters or for pretrial matters generally, with the possible exception of dispositive motions. They then routinely receive all such matters from the clerk’s office, subject to adjustment from time to time.
- *Inclusion on the wheel.* The entire civil docket is divided among all the district and magistrate judges as cases come in. Magistrate judges are then responsible for their dockets just as the district judges are. If the parties in an individual case do not consent to case assignment to a magistrate judge, the case is reassigned to a district judge, although the magistrate judge may continue to handle some or all pretrial matters.
- *Referral by case.* District judges refer selected cases to magistrate judges for some or all pretrial proceedings. Unless the referral is revoked, the magistrate judge conducts all matters up to a specified point, such as the final pretrial conference.
- *Pairing.* A magistrate judge is paired with one or more district judges and automatically conducts those judges’ pretrial matters as designated. In some districts, the magistrate judges are paired with district judges on a civil trial list and are ready to try cases when the district judges cannot and the parties consent to it.
- *Issue-by-issue assignment.* District judges assign particular motions or matters to magistrate judges, such as summary judgment motions, but otherwise retain complete control over cases for all other matters.

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154. See generally Inventory of United States Magistrate Judge Duties (Administrative Office of the U.S. Courts 3d ed., 1999).

## C. Special Masters

Special masters can be a critical asset in some cases. Appointment of masters is generally limited to large, complex cases and is therefore infrequent.<sup>155</sup> Because the use of masters is well covered in the *Manual for Complex Litigation, Third* and the *Reference Manual on Scientific Evidence*, we discuss only some basic issues here, drawing on those two publications.<sup>156</sup> For more information, see those two manuals.

### 1. Authority to appoint a special master

Appointment of special masters is governed primarily by Federal Rule of Civil Procedure 53.<sup>157</sup> An appointment is permitted in jury cases only when the issues are complicated, and in other cases, except for accountings or difficult damage computations, only when “some exceptional condition” requires it (Rule 53(b)). In every instance, a reference “shall be the exception and not the rule” (Rule 53(b)). In the absence of consent by the parties, the district judge may designate a magistrate judge as special master pursuant to Rule 53 and 28 U.S.C. § 636(b)(2). When the parties consent to it, the district judge has authority to designate a magistrate judge as special master under 28 U.S.C. § 636(b)(2), bypassing the limitations of Rule 53(b). Pursuant to 42 U.S.C. § 2000e-5(f)(5), the judge may also appoint a master under Rule 53 to hear Title VII cases, without a showing of exceptional circumstances, if the case has not been set for trial within 120 days after issue is joined (subject to the parties’ right to a jury trial under the Civil Rights Act of 1991).

Although judges have authority under Rule 53 to make an appointment *sua sponte*, most judges prefer to act only with the parties’ consent.<sup>158</sup>

### 2. Reasons for appointing a special master

Masters can be useful adjuncts for a variety of tasks in the management of complex or large-scale litigation: supervising discovery, finding facts in complicated controversies, performing accountings, organizing and coordinating mass tort litigation, mediating settlements, and monitoring compliance with complex remedial orders. The decision whether to appoint a master will involve weighing the extra expense imposed on the parties against potential benefits. Judges have at times

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155. Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan & John Shapard, *Special Masters’ Incidence and Activity* 15–21 (Federal Judicial Center 2000) (report to the Judicial Conference Advisory Committee on Civil Rules to inform its deliberations about whether changes are needed in Fed. R. Civ. P. 53) [hereinafter *Special Masters Study*].

156. See *MCL*, Third, *supra* note 13, § 21.52; *Reference Manual*, 1st ed., *supra* note 117, at 575–622.

157. Inherent authority may also support appointment of special masters, and a number of statutes and rules touch on the subject. See *Special Masters Study*, *supra* note 155, at 31–35.

158. See *id.* at 28–30.

delegated extensive duties to masters, which, though subject to the court's de novo review, has generated controversy and raised questions about the extent of judicial referral authority. Unless the parties affirmatively seek an appointment and explicitly waive the limits of Rule 53, you should limit your appointments to exceptional cases or conditions.

Within that general guideline, *consider* appointment of a special master to

- assist in pretrial proceedings, such as to control massive discovery requests, rule on claims of privilege, and make factual determinations on the admissibility of expert evidence;
- develop a case management plan, under your supervision, when a case involves hundreds or thousands of claims;
- evaluate the extent and size of damages;
- facilitate settlement;
- administer a class settlement;
- make recommendations regarding the facts that are necessary to determine liability or damages;
- allocate damages to individual litigants; and
- frame or monitor remedial decrees.

### 3. Selecting and appointing a special master

In selecting a special master, you will want to ensure that the master has two important qualifications: expertise in the matters for which you are appointing him or her, and the full trust of you and the parties. There are a number of ways in which you can identify candidates to serve as special masters.

*Consider*

- asking the parties to nominate candidates;
- appointing a magistrate judge;<sup>159</sup>
- appointing someone because of his or her service in another case; or
- asking someone else, such as another master or an outside agency, to recommend suitable candidates.

The method most frequently used by federal judges is to ask the parties to nominate candidates for appointment.<sup>160</sup> If you use this method, you may want to ask the parties to provide information about the candidates' qualifications and, if appropriate, to discuss the candidates with you or to participate in your interviews

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159. Magistrate judges not serving as special masters are properly and routinely referred duties that some courts have assigned to a special master. These include managing the pretrial phase of civil cases, crafting and monitoring remedial decrees, and facilitating settlement.

160. *See* Special Masters Study, *supra* note 155, at 35–40.



with the candidates. To avoid later problems, you and the parties should make certain the master has no conflicts of interest.<sup>161</sup>

An order appointing a master should specify what the master is to do and what the master's authority is. Generally, it is advisable to be explicit about matters that involve the appointment itself, such as conflicts of interest and ex parte communications,<sup>162</sup> and to leave the master some discretion over procedural issues, such as the discovery process and hearing procedures.

*Consider* including the following in a referral order:

- functions assigned to the special master and specific authority to carry them out;
- scope of the special master's investigative authority;
- procedures for the special master to obtain information from the parties;
- discovery rights to evidence supporting the special master's findings;
- disclosure of conflicts of interest;
- scope and standards for judicial review of the special master's work product;
- periodic reporting requirements;
- duration of appointment;
- standards of performance;
- compensation rate, method of payment, and allocation of costs among the parties;
- guidelines regarding ex parte communications with judge, parties, and experts;
- liability and immunity of the special master; and
- result or work product expected and the date thereof.<sup>163</sup>

#### 4. The special master's report

Rule 53(e) requires special masters to prepare a report and, if required by the judge, make findings of fact and conclusions of law. The master may submit a draft of the report to counsel for suggestions. In non-jury cases, a party may serve objections within ten days of service of the report; you must accept fact findings unless they are clearly erroneous, but you may accept, reject, or modify the report. Rule 53(e)(1) directs the master to file a transcript of proceedings and of the evi-

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161. For guidance in avoiding conflicts and other ethical problems, see Reference Manual, 1st ed., *supra* note 117, at 603.

162. For a discussion of federal court experiences relating to ex parte communications between special masters and the parties or the judge, see Special Masters Study, *supra* note 155, at 46–52.

163. Extracted in part from Margaret G. Farrell, *Special Masters*, in Reference Manual, 1st ed., *supra* note 117, at 605. For a summary of the contents of special master referral orders, see Special Masters Study, *supra* note 155, at 44–45.

dence, as well as the original exhibits, to facilitate your review. In jury cases, the master's findings are admissible in evidence. The parties may stipulate that a master's findings of fact shall be final, in which case only questions of law remain open for your consideration.

### **5. Compensating the special master**

Under Rule 53(a), compensation of special masters is to be set by the court. In practice, most judges rely on the parties and the master to negotiate the rate, usually the master's hourly rate; typically, the parties share the cost of the master on an equal basis.<sup>164</sup> You will want to keep a watchful eye on the compensation paid to masters, as the costs can be quite high in some cases. Your referral order can set a timetable for periodic submission of bills (at least quarterly) and can specify what information you wish to see to monitor fees and costs.

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164. See Special Masters Study, *supra* note 155, at 42. If a special master is appointed in a case subject to the Prison Litigation Reform Act of 1995, compensation and costs are to be paid from funds appropriated to the judiciary. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, April 26, 1996, 110 Stat. 1321, § 802(f)(4). The PLRA amends 18 U.S.C. §§ 3624, 3626; 42 U.S.C. § 1997e; 28 U.S.C. §§ 1346(b), 1915; and 11 U.S.C. § 523(a); it adds new sections 28 U.S.C. §§ 1915A and 1932.

## IX. INSTITUTIONAL ISSUES IN LITIGATION MANAGEMENT

- A. Coordination with Other Chambers and Courts
  - 1. Calendar conflicts
  - 2. Coordination of parallel litigation
  - 3. Uniform orders
  - 4. Discovery “hot lines”
- B. Differentiated Case Management (DCM)
  - 1. The systematic, differential treatment of civil cases
  - 2. Track designations and number of tracks
  - 3. Assignment of cases to tracks
- C. Automation, Court Technology, and Case Management
  - 1. Computers
  - 2. Computer training
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- D. Case Management and Statistical Programs
  - 1. Statistical report formats and content
    - a. Event Calendaring Reports
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- E. Case Management Report Applications
  - 1. CHASER
  - 2. CHASER variations
- F. Case Management/Electronic Case Files (CM/ECF)
- G. Trial Support Technologies
  - 1. In general
  - 2. Courtroom technologies
    - a. Video evidence presentation
    - b. Videoconferencing
- H. Visiting Judges

Most of this manual has been devoted to helping individual judges manage their cases. In this final chapter, we address a number of topics drawn from the larger field of institutional management that relate to and support individual case management responsibilities. Some of these topics constitute policy initiatives (e.g., the use of uniform orders); others involve the adaptation of new tools to the case management process (e.g., video technology). What links them all, however, is

that they constitute resources and initiatives that flow from the larger institution to the individual judge, who retains the option to use and tailor them within his or her own case management regime.

### **A. Coordination with Other Chambers and Courts**

Coordination with other chambers within your own court and in other courts—both state and federal—can provide case management assistance to you in a number of ways. These include maximizing your management efforts by drawing on the resources of your own institution, accommodating attorneys' conflicting calendar obligations to other courts, and minimizing duplicative or inconsistent case actions when parallel litigation is pending in another forum.

#### **1. Calendar conflicts**

When confronted with an attorney's calendar conflict, consider commonsense approaches to finding a reasonable accommodation. Rather than assuming that your calendar should have priority, you might consider various other relevant factors, such as which event was scheduled first, the relative urgency of the respective matters (e.g., a criminal case versus a civil case), and the relative burdens on the parties and on the courts in making accommodations. You should also consider communicating directly with the other judge, whether federal or state, to work out an accommodation. In some states, federal–state judicial councils have established protocols for intersystem calendar coordination.

#### **2. Coordination of parallel litigation**

Frequently, litigation raising the same or similar issues is brought simultaneously in different federal courts or in state and federal courts (e.g., claims for asbestos injury by many plaintiffs against the same group of defendants). On a much smaller scale, coordination may be appropriate when a federal court remands state law claims while retaining the federal claims. Coordinating such litigation to avoid duplicate effort and inconsistent outcomes should be seriously considered.

In such situations, you should consult with counsel and the presiding judge of the companion forum to consider the possibilities of

- coordinating calendaring;
- providing for common discovery;
- coordinating motions practice;
- identifying common issues that may be susceptible to resolution in a common proceeding; and
- undertaking coordinated or joint settlement and mediation efforts.

It is important to be alert to and to prevent efforts by attorneys to manipulate multiforum litigation and obstruct effective litigation management.<sup>165</sup>

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165. See MCL, Third, *supra* note 13, §§ 20.123, 20.225, 21.455, 31.

### 3. Uniform orders

The general case management and scheduling orders routinely issued by individual chambers after case filing or in preparation for a Rule 16 conference are invaluable tools. These orders often reflect a wealth of bench and bar experience in their specific provisions, as well as in their tenor and tone. Uniform orders can represent a bench-wide consensus on this experience and reflect the general demands of practice in your particular district. Such orders can send a clear, consistent message to the bar and public about the court's expectations, telling them what is appropriate and acceptable within the district regardless of the assigned judge. In doing so, uniform orders can reduce conflicts or misunderstandings between counsel and between counsel and the court. (See Appendix A, Forms 8, 9, and 16 for examples of uniform orders.)

Naturally, the achievement of consensus on the particular provisions of a general order may require modification or sacrifice of some individual preferences. However, some districts (both large and small) have adopted uniform orders with a flexible framework that allows individual judges to attach addenda to the uniform order if a case requires them. Others offer a uniform basic order with blank spaces under specific headings, allowing each judge to tailor the order for each case.

### 4. Discovery “hot lines”

A discovery “hot line” makes a district or magistrate judge available by telephone whenever out-of-court conflicts arise—for example, in depositions or conferences. Judges can serve in this capacity in an individual case or for designated periods for all cases. This concept is supported by national policy trends and research, which encourage the use of telephone and video technologies, as well as by policies that promote the greater use of magistrate judges in the civil litigation process.<sup>166</sup> In addition, those districts that have implemented some form of telephonic technology note the deterrence value the availability of a judge can have on practitioners' behavior in general.

At least two approaches can be used in setting up a hot line. The first is to create the position of a “duty,” or assigned, judge. The second approach is simply to encourage or mandate by local rule the use of teleconferences for all discovery disputes as a precondition to any formal paper filing, motion, or request for sanctions.

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166. See JCUS CJRA Report, *supra* note 1, at 20 (stating that “magistrate judges are indispensable resources” and “therefore the Conference recommends the effective use of magistrate judges . . .”).

## **B. Differentiated Case Management (DCM)**

### **1. The systematic, differential treatment of civil cases**

Differentiated case management (DCM) is a system for managing cases that is based on the assignment of cases to tracks. Each track in a DCM system is defined by specified criteria, such as the complexity of cases assigned to the track, the amount of discovery they will need, the likely time that will elapse between filing and trial, and the judicial and other resources that may be required. Each track also carries with it a specific set of procedures and case-event time lines that govern the progress of cases assigned to that track. These procedures, because they are standardized, allow the system to automatically track case progress, ensuring that no assigned cases “fall through the cracks” of case management control. DCM systems usually rely on a uniform case management order that assigns the case to a track and sets out the scheduling and other requirements of the assigned track. Appendix C provides an example of track definitions for a federal district court and copies of forms used by the court.

The purpose of a tracking system is to tailor the level of case management in each case to the needs of the individual case. However, unlike case management approaches that treat each case on an entirely individual basis, DCM provides systematic recognition of differences in case types and thus tries to conserve court resources by systematically tailoring their application. DCM systems were pioneered in a number of state courts and have subsequently been adopted in various forms in many federal district courts.

### **2. Track designations and number of tracks**

Tracking systems are usually based primarily on case complexity, and tracks are typically designated as “expedited,” “standard,” and “complex.” Track designations can also reflect particular, and familiar, case types (e.g., Social Security or asbestos cases) or case characteristics (e.g., administrative or appeals cases). While some district courts have chosen to use only complexity designations, a large minority use a combination of complexity and other designations. Most districts that have adopted DCM programs have established two to seven tracks; three- and five-track systems are the most common.

### **3. Assignment of cases to tracks**

The success of DCM is based in large measure on whether cases are correctly evaluated and assigned to the case management tracks. Some districts rely on judges alone to make the initial assignment decision, usually at an early case management conference. Others require the parties to make a track selection, which is then reviewed by the judge. Still other districts provide for joint decisions by the judge and a clerk of court, staff attorney, or the parties.

Many districts include an automatic track assignment process for certain types of cases. Administrative or appeals cases, such as Social Security or bankruptcy

appeals, are identified by their pleadings and are automatically assigned to the administrative/appeals track. For cases of greater complexity, as well as those not easily designated by case type, greater court involvement in the track assignment process is usually required.

Regardless of how tracks are initially designed or selected, all DCM systems preserve the discretion of the assigned judge to alter the previously chosen track or any of its predefined management controls as individual case needs evolve.

### **C. Automation, Court Technology, and Case Management**

Since 1975, when the first computer was used in the federal courts, the use of automation technology has increased rapidly. The following are among the more notable changes:

- Judges write opinions and orders almost exclusively through the use of word processing technologies.
- Many judges and law clerks conduct their legal research using on-line computer services.
- The dockets of all courts have been automated.
- Presentence reports are prepared using specially designed computer programs.
- Nationwide software applications facilitate collection of judicial statistics.
- Electronic case filing procedures are being installed in a number of federal district and bankruptcy courts.
- The courts are now interconnected by the nationwide installation of the Data Communications Network.

In addition, the Administrative Office, the Federal Judicial Center, the U.S. Sentencing Commission, and many districts provide information to the public electronically via their Internet home pages.<sup>167</sup> The Administrative Office has also established an internal (or Intranet) Web site, the J-Net, for disseminating publications, guides, memoranda, bulletins, and other documents to judges and judicial branch staff.

These national applications are supported by technical staff within each district. The clerks of court employ an automation staff, usually headed by a systems manager, who will assist you in selecting hardware and software, installing it, and providing in-house training for you and your staff.

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167. The Internet home pages for the agencies of the federal judiciary are as follows: Administrative Office of the U.S. Courts: <http://www.uscourts.gov>; <http://156.119.80.100/> (J-Net Intranet); Federal Judicial Center: <http://www.fjc.gov>; United States Sentencing Commission: <http://www.ussc.gov>.

## 1. Computers

The capacity of computers to provide case management support is constantly increasing. Every chambers is equipped with a standard, approved package of hardware and software to support all standard chambers functions. Additional court-wide automation support capabilities and applications administered through the clerk's office can also be used by individual judges. The nature and extent of this support will vary depending on the automation available in each court. You should become aware of what your court has available, consider how automation can further case management, and prepare yourself and your staff to use it.

## 2. Computer training

To use available computer technology, judges need to be familiar with personal computers (PCs) and extant software. Training is available to judges from various sources, both within the judiciary and without, including on the J-Net. Ask your court's automation support personnel or training specialist what training is available for you and your staff.

## 3. Word processing programs

Word processing programs permit you to write and store documents, such as jury instructions and forms, for ready access and modification. Macros, simple program instructions, permit you to automate repetitive tasks and facilitate preparation of orders and standard documents, such as sentencing reports. Software programs are available that allow text search and retrievals using strategies similar to those employed by LEXIS and WESTLAW. Using such software, you can archive jury instructions, orders, and memoranda for future retrieval and use. Word processing functionality will increase substantially with the next generation of case management hardware and software, known as Case Management/Electronic Case Files (or CM/ECF). This system, discussed *infra* at section IX.F, will effectively integrate word processing, case management, and Internet information management functions.

## 4. Privacy and electronic availability of case files

Many case files contain personal information filed as part of the case documents. With the increased use by courts of document-imaging technologies and electronic case filing, such personal information, which was once available only at the courthouse, may now be subject to widespread access through the Internet. This new electronic access creates many complex issues. The Judicial Conference has adopted policy guidelines for use by all federal courts in addressing privacy concerns created by electronic access.<sup>168</sup>

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168. The guidelines, which will be incorporated into the *Guide to Judiciary Policies and Procedures*, were adopted on September 19, 2001, and can be found at [www.privacy.uscourts.gov](http://www.privacy.uscourts.gov). The



## D. Case Management and Statistical Programs

Computer-based case management and statistical programs now available for use by individual judges can provide a wealth of caseload information on demand in a variety of formats. The standardized and customized reports these programs can generate allow you to track individual case progress and provide noticing or tickler functions regarding significant case actions, and they can guide your daily and monthly caseload planning. While standard formats for case information presentation are readily available, you can also customize the formats so that the resulting reports reflect your preferences.

An important factor in determining the content and format of your statistical reports should be their audience, which may vary by district and chambers. Although judges are the primary case managers within any district, judicial delegation of the case management function varies considerably from judge to judge. Primary nonjudicial case management functions may be performed solely in chambers, by a judge's secretary or law clerks; by clerk's office courtroom deputies, case managers, or docket clerks; or by any of the foregoing in combination (see *supra* section VIII.A).

In reviewing computer program capabilities and in choosing data content and formats, *consider*

- the advice of your case management team (courtroom deputies, case managers, and law clerks); and
- the use you will make of these reports within your case management delegation and routines.

### 1. Statistical report formats and content

The automated docketing system collects a great deal of information about each filed case. From that information you can extract the items that are relevant to your case management and arrange them in report formats that suit your needs. Listed below are some examples of reports judges have found useful and features of those reports. This listing is quite comprehensive and contains more features and details than are typically offered in the standardized statistical reports provided by the Integrated Case Management System (ICMS) or Chambers Access to Electronic Records (CHASER). (See Appendix D for sample reports.)

#### a. *Event Calendar Reports*

- *Answer Report* (by judge): case number; case filed date; service status; answer filed date; responsive pleading date; default entered; pretrial order; number of defendants.

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Conference is developing implementation guidelines. In the meantime, courts are asked to become familiar with the policy guidelines and to follow them to the extent possible.

- *Trial Settings Report* (cases set for trial within 120 days with pending motions by judge): case number; date filed; referral to arbitration; jury demand; discovery; pretrial order due date; proposed pretrial order received; pretrial order filed; pretrial conference; docket call set; trial; referral to magistrate judge, date of referral, and magistrate judge name.
- *Tickler Report* (by judge): docket number; case name; cause; scheduled action; actions due between (dates); date filed; referred to.

**b. Case-Tracking Report**

- *Case Inventory/Motions Combination Report* (by judge): jury demand; Rule 16 conference; settlement or status conference; magistrate judge conference; pretrial conference; pretrial order filed; trial date; referred date and name.

**c. Appeals and Quasi-Administrative Cases Report**

- *Monthly Appeals Report* (by judge): case number; bankruptcy or other appeal; prebriefing conference set; expedited; all briefs filed; at issue; at issue thirty days; at issue sixty days; at issue ninety-plus days.

**d. Prisoner Cases Report**

- *1915 Payment Record*: name; case number; initial payment; delinquent; case dismissed.

**2. Additional and innovative report formats**

Some districts have supplemented their standardized reports with graphics packages and new types of reports. These innovative reports include the following information:

- case event calendaring (e.g., answer, trial settings, and tickler reports);
- individual case types (e.g., appeals or administrative cases reports);
- specialized case processes (e.g., ADR or DCM case management information);
- specialized case information (e.g., amount in controversy; bench and jury trial continuance reports);
- administrative management information (e.g., total pleadings and papers filed; total trial and court hours); and
- special case costs (e.g., court reporter costs; juror costs).

These examples demonstrate the flexibility of the existing database, as well as the creativity of individual districts in building on existing data and report formats to expand their utility.

## **E. Case Management Report Applications**

### **1. CHASER**

CHASER (Chambers Access to Electronic Records) is an automated case management information retrieval system for judges' chambers. It is intended to help you and your staff access docket sheets, calendars, and motions information, as well as a variety of statistical and inventory reports. It provides access to data stored in the database in the clerk's office. Some courts also have PACER (Public Access to Electronic Records), which can now be made to perform many of the functions performed by CHASER. Using these systems, the trial judge is able to determine, among other things, the status of

- all pending cases and the date of the most recent activity in each case;
- all pending motions;
- all matters under submission; and
- compliance with pretrial orders and filing deadlines.

### **2. CHASER variations**

A new generation of CHASER reports have been developed that are designed to capitalize on the federal court system's migration to a Windows environment. This Web version of CHASER is easier to learn and use and allows users to switch back and forth quickly between the various reports or report sections; to copy information or dates from one application to another; and to customize report layouts for use at their own workstations.

While the new Web version of CHASER accesses the same case management database and offers the same query capabilities as the current version, it also offers the following enhancements:

- The new **Unscheduled Cases Report** flags all cases without a "next action."
- The current **Referred Motions Report** has been modified to include document and document part numbers for replies and responses to motions.
- The present **Docket Report** has been modified to extract the last update made to the case in the ICMS database.
- A new single case query is available that allows information to be viewed for a single specified case across all report formats.
- A calendaring function is available to track case-related, as well as personal, appointments.

## **F. Case Management/Electronic Case Files (CM/ECF)**

The Case Management/Electronic Case Files (CM/ECF) system uses Web technology to give the federal judiciary a new mechanism for information handling that will completely replace the current ICMS system. A fully implemented CM/ECF system will capture a document electronically at the earliest possible

point, ideally from the person who creates the document. The system will contain and manage everything presently included in a paper case file and will also contain the court's internal case-related documents (file notes, proposed rulings and orders, draft opinions, and so forth). It will also provide multiple, controlled levels of access to case files in CM/ECF systems throughout the federal judiciary, and it will include links to relevant information in automated court financial records and other records, as well as texts of case law, statutes, and other legal authority. If implemented by the court, the system's optional electronic filing capabilities will enable attorneys to file pleadings from their offices via the Internet; judges, court staff, and attorneys to have immediate access to new and historical documents; and case data and all related documents to be integrated and more manageable.

Significant features of CM/ECF include

- electronic notices of filings to other CM/ECF participants;
- next-generation case management, including tracking of motions, answers, deadlines, and hearings;
- up-to-date reports, queries, and docket sheets for individual cases;
- electronic delivery of documents to, from, and within the courts;
- electronic retrieval of case documents and dockets by all users;
- electronic document management, storage, security, and archiving; and
- automatic creation of docket entries from attorney filings.

Owing to its initial success in a number of pilot courts, the CM/ECF system will be made available throughout the federal court system over the next few years.<sup>169</sup>

## G. Trial Support Technologies

### 1. In general

Computer technology has the potential to provide substantial support in the management of both pretrial and trial matters. Some support can be derived from equipment available within the court, primarily PCs. In addition, attorneys in large cases often employ their own advanced technologies for handling documents and presenting evidence; you may derive additional management support from the use of this equipment.

*Consider* the following ways your trial management can benefit from in-court technologies:

- Computer-stored documents can be accessed during trial when the courtroom is equipped with computer consoles.

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<sup>169</sup> Since the inception of this pilot program in 1998, the prototype CM/ECF system has handled over 15,000 cases and 175,000 documents and docket entries for a user community of 75 judges, 400 court staff, and 1,000 attorneys (who used it to file their documents).

- Computer-aided transcription of trial proceedings can facilitate preparation of and access to the transcript; when used in a computer-integrated courtroom, it provides all trial participants with instant access to the transcript.
- Optical scanning devices permit the copying of large numbers of documents onto computer disks for review or display.
- In cases involving voluminous papers, counsel can provide the judge with disks containing depositions and exhibits for convenient storage and access.

## 2. Courtroom technologies

Courtroom technologies can be used to facilitate case management, reduce trial time and litigation costs, and improve fact-finding, juror understanding, and access to court proceedings. The Judicial Conference's Committee on Automation and Technology has found that courtroom technologies significantly enhance the fact-finding mission of the federal courts. To that end, the Judicial Conference has endorsed the use of technologies in the courtroom and, subject to priorities and the availability of funds, urges that (a) courtroom technologies—including video evidence presentation systems, videoconferencing systems, and electronic methods of taking the record—be considered necessary and integral parts of courtrooms undergoing construction or major renovation; and (b) the same courtroom technologies be retrofitted into existing courtrooms or those undergoing tenant alterations as appropriate.<sup>170</sup> The Federal Judicial Center has recently published a book to provide case management and legal guidance to judges on the use of these technologies.<sup>171</sup> Two of the less familiar technologies are briefly described below.

### *a. Video evidence presentation*

Video evidence presentation technologies display evidence electronically and simultaneously to everyone in the courtroom through monitors placed at the judge's bench, jury box, witness stand, and counsel tables. Most judges who have used such systems find that the systems improve their ability to manage proceedings, reach decisions, question witnesses, and understand testimony and evidence. These improvements seem to be due primarily to the judges' being able to view exhibits and contested materials at the same time as everyone else. In addition, most jurors who have been queried about the technique have indicated that they were able to see evidence clearly and follow the attorneys' presentations. Most judges also have found that the technologies make it easier for attorneys to present

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170. See Report of the Proceedings of the Judicial Conference of the United States, March 16, 1999, at 8. See also Report to Congress on the Optimal Utilization of Judicial Resources 7 (Administrative Office of the U.S. Courts 2000).

171. Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial (Federal Judicial Center and National Institute for Trial Advocacy, 2001).

at least some evidence; as a result, most judges believe they are able to remain more focused on testimony and evidence (although a substantial minority of judges prefer to handle the evidence in some instances).

*b. Videoconferencing*

Videoconferencing can be used to provide live two-way audio and video transmission between a court and a remote site. It offers opportunities to conduct some court proceedings without having all participants present in a single courtroom. Videoconferencing appears to be most useful in routine pretrial matters or in circumstances in which it represents an obvious logistical benefit to both counsel and the court. Judges and attorneys, in their responses to user surveys, have found that videoconferencing can save time and travel, thus having the potential to reduce overall litigation costs in some proceedings. Judges have also noted that by reducing the need to move prisoners for proceedings, court security is enhanced.

System users have also found that videoconferencing did not have a significant impact on several aspects of the proceedings in which it was used. It has not had a great effect on preparation time, the length of the proceedings, or the ability to examine or understand remote witnesses. The benefits cited almost universally by judges and attorneys have been the savings in travel time and costs, as well as improved flexibility in scheduling. For visiting judges, videoconferencing can also be a useful tool (used either from different locations within the same district or from different districts within the same circuit), allowing them to conduct proceedings without traveling to the court locations where the litigants are.

## H. Visiting Judges

When a judge becomes especially overburdened (because of illness, for example, or a months-long trial) or when a district as a whole becomes overburdened (because of a heavy criminal caseload, for example) the court can seek assistance from outside the district through designation of a visiting judge. Such designations are governed by statute and by Judicial Conference policy. A report to the Judicial Conference recommended that information be shared among judges and courts about how to obtain visiting judges and how to use them most effectively.<sup>172</sup> If you think you may need the help of a visiting judge, you can contact the staff of the Judicial Conference Committee on Intercircuit Assignments and consult the manual *The Use of Visiting Judges in the Federal District Courts*.<sup>173</sup>

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172. Report of the Judicial Officers Resources Working Group to the Executive Committee of the Judicial Conference of the United States (September 1999). The Working Group, which was appointed by the Chief Justice, was made up of the chairs of six Judicial Conference committees and the chair of the Judicial Panel on Multidistrict Litigation.

173. Jennifer Evans Marsh, *The Use of Visiting Judges in the Federal District Courts: A Guide for Judges & Court Personnel* (Federal Judicial Center 2001). The Administrative Office staff who support the Intercircuit Assignment Committee can be reached at (202) 502-1180.