Civil Litigation Management Manual

Second Edition

The Judicial Conference of the United States
Committee on Court Administration and Case Management

2010

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This is the second version of the *Civil Litigation Management Manual*, approved by the Judicial Conference of the United States at its March 2010 session. This revised version was prepared under the direction of the Judicial Conference Committee on Court Administration and Case Management.

The original version, prepared in 2001, captured the most effective practices developed by courts in implementing the pilot programs and plans required under the Civil Justice Reform Act of 1990. Under the Act's mandate, the judiciary was required to develop, and periodically update, a manual to describe and analyze "litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective." 28 U.S.C. § 479(c). This version retains the foundation of the original version and suggests additional practices for handling today's litigation. For instance, since 2001, electronic case management is now the norm under the Case Management/Electronic Case Files system, and electronic discovery is commonplace. This version addresses those realities. It also encourages judges to tailor case management to the specific needs of the case so that, where appropriate, a judge can ensure that the cost and complexity of a case relates closely to the nature and size of the claims.

As in the original version, the manual contains over 200 pages of forms in Appendix A. These forms were submitted by district and magis-

trate judges across the country as examples of methods to manage every stage of a civil case. The forms have been updated by many of the same judges who provided the original forms for the first version of this manual, and the Committee thanks those judges for their time and contributions. The Committee is also grateful to both the Administrative Office and the Federal Judicial Center for supporting the Committee in this project and for their substantial contributions.

Finally, this version will be available primarily electronically on the judiciary's website, the J-Net, and on the Federal Judicial Center's website. Moreover, unlike the original version, Appendix A, containing the court forms, will be available only electronically, not in print, so that the forms may be updated more easily. You should periodically check for changes to the manual or its appendices, as they will occasionally be updated in between major substantive revisions to reflect changes in the Federal Rules of Civil Procedure or other minor edits.

We hope that you will find this manual useful as one of the many tools available to assist you in your day-to-day work.

Julie A. Robinson
Chair, Court Administration and
Case Management Committee

Contents

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The Committee would also like to thank the many judges and Federal Judicial Center staff who authored publications that were heavily relied on to update several chapters of the manual. Federal Judicial Center Director Barbara J. Rothstein carefully reviewed and substantially revised Chapters 5 and 7 of the manual. Many thanks also to the judges and court staff who assisted the Committee by providing updated forms for use in Appendix A of the manual.

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Introduction

After the passage of the Civil Justice Reform Act of 1990 (CJRA), and the judiciary's implementation of the requirements of that Act, the Judicial Conference stated that "[t]he 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."[1] It has been shown that "[m]anaged 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."[2]

The first edition of this manual, published in 2001, was written after the judiciary's implementation of the CJRA[3] and its extensive study evaluating the impact of the Act in the federal courts.[4] In the ensuing years, several Federal Rules of Civil Procedure were amended in an effort to improve discovery processes and respond to the widespread use of technology and electronic records. Also, since 2001, courts' CJRA plans became part of their local rules,[5] and the Case Management/Electronic Case Files (CM/ECF) system was implemented in all federal district courts. These changes are reflected in this edition.

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

2. *Id.*

3. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Act required courts to adopt "civil justice expense and delay reduction" to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" (former 28 U.S.C. § 471). The Act suggested a number of case-management techniques for courts to consider including in their CJRA plans.

4. James S. Kakalik et al., An Evaluation of Judicial Case Management Under the Civil Justice Reform Act, Executive Summary (RAND Inst. for Civil Justice 1996) [hereinafter RAND CJRA Report].

5. Most provisions of the CJRA have expired, including the requirement that courts maintain expense and delay reduction plans; however, the CJRA's reporting requirements remain in effect. The judiciary publishes a public, semiannual report on pending civil matters. 28 U.S.C. § 476.

Certain practices continue to result in decreased case length and costs: they include early judicial management, shortened discovery periods, and the setting of an early, firm trial date.[6] Yet, the judiciary is handling cases of increasing complexity with voluminous electronic records and limited resources, raising case-management challenges. The judiciary continues to explore better practices in a time of widespread Internet use, a restrictive budget climate, and a greater demand for public access and accountability.

The federal rules contain the authority for the judge to manage civil litigation and to take steps to enforce limits set by those rules. In addition, the Judicial Conference, in adopting the RAND CJRA Report, endorsed a number of case-management techniques, including the following:

- Monitoring cases in which issues have not yet been joined to ensure that deadlines for service and answer are met, and beginning judicial action to dispose of cases if those deadlines are missed.
- Waiting a short time after issues are joined (perhaps a month) to see if a case will terminate; if not, resuming active judicial case management.
- Setting a firm trial date as part of the early case-management approach and adhering to that date as much as possible.
- Setting a reasonably short discovery period tailored to the individual case. For nearly all general civil cases, this policy should encourage judicial case management no later than six months after filing.[7]

To carry out these techniques, and to gain greater efficiency for the bench and the bar, many courts have adopted standardized case-management procedures for all civil cases within a district. Such courts

6. RAND CJRA Report, *supra* note 4, at 26–28.

7. The Judicial Conference, in adopting the RAND 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. JCUS CJRA Report, *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.*

use their websites to post standing orders or guidelines for civil practice, and, with the agreement of the district and magistrate judges, adopt standard orders for judges to use in all civil cases. Courts are encouraged to take such steps to maximize efficiency in their case-management procedures, but courts should remain able to tailor those procedures, when necessary, to suit the needs of a particular case.

This manual presents both successful practices and suggested practices in light of the new civil litigation landscape. The practices described here are derived from many sources, including judges' published writings, court orders, lectures, and Federal Judicial Center (FJC) materials. While the first edition borrowed heavily from the FJC publications *Manual for Litigation Management and Cost and Delay Reduction* (1992) and the *Manual for Complex Litigation, Third* (1995), this edition draws from the *Manual for Complex Litigation, Fourth* (2004) and *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (Federal Judicial Center 2007). 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 chapters generally follows the chronology of a civil case. Thus, we begin with techniques for monitoring service of process and conclude with management of trials. Chapters seven through nine turn to more specialized matters, such as the management of special types of cases, the use of technology and CM/ECF, personnel resources, and institutional issues in litigation management.

One cautionary note seems appropriate at this juncture. The tools and practices outlined in the chapters that follow should not be employed without first making the conscious decision that the practice is appropriate in the case at hand. This manual is inspired by the belief that early, active case-management results in greater efficiency, reduced costs, and a shorter time from filing to disposition. In a national survey conducted by the Federal Judicial Center in 1997, attorneys most often recommended increased judicial case management as a means of alleviating discovery problems and reducing discovery expense, but multivariate analyses failed to detect an association between judge's case-management approaches and disposition times or litigation costs. The study revealed that the total cost of litigation is most strongly associated with several other cost variables, especially the size of the monetary stakes, the size of the

law firm, the type of case, and whether the case was complex or contentious.[8]

Experience and anecdotal information suggest that some case-management techniques invariably add to the cost of litigation, usually in the form of added time requirements for lawyers and staff. It is also widely known that litigation costs in federal courts are rising and represent a real threat to any citizen's access to justice. Judges are urged to not apply time-consuming case-management practices to those cases that have low dollar value and are otherwise straight-forward factual disputes involving settled principles of law; in such cases, the corresponding cost benefit usually obtained in complex cases with the utilization of such techniques will likely be absent.

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.[9]

8. Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases 2 (Fed. Judicial Ctr. 1997).

9. The FJC also has published the following criminal case-management manuals: *Terrorism-Related Cases: Special Case-Management Challenges* (2008) and *Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers* (2007).

Chapter 1: Early and Ongoing Control of the Pretrial Process

A. Establishing Early Case-Management Control

Establishing early control over the pretrial process is pivotal in controlling litigation cost and delay.[10] 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 . . . to step in at any stage of the litigation where intervention is necessary in

10. *See* RAND CJRA Report, *supra* note 4, at 1, 11–16; Manual for Complex Litigation, Fourth § 10.1 (2004) [hereinafter MCL 4th].

> 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."[11]

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 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 Chapter 8, section B.5, *infra*), 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 guidelines

An important early opportunity to assert judicial control and to 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 case-management guidelines tailored to the district and individual judge. Such information, in the form of a local rule, general order, or standing order, can outline the specific expectations for counsel and parties, including the judge's administrative, case-management, and courtroom procedures. Such rules or orders often are posted on the court's website and can be provided to

11. 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).

parties and counsel as hard copy or electronically. In addition to general pretrial practice tips, the rules or orders may include specific information regarding the form in which attorneys should submit the reports or joint statements required by Federal Rule of Civil Procedure 16 or 26. Forms 4–9 in Appendix A provide several examples of case-management rules, orders, and guidelines provided by individual judges and courts to attorneys early in the case.

Consider creating for the attorneys and parties case-management guidelines containing

- a statement 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 Fed. R. Civ. P. 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 Fed. R. Civ. P. 26, including consideration of electronic discovery issues such as production, format, preservation, and location of the data;[12]
- 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 order (supplementing your court's local rules), you can provide specific and early notice to the parties of all preparations you

12. For further discussion of electronic discovery issues, see Chapter 3, section F, *infra*. *See also* Barbara J. Rothstein, Ronald J. Hedges & Elizabeth C. Wiggins, Managing Discovery of Electronic Information: A Pocket Guide for Judges (Fed. Judicial Ctr. 2008) *and* Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial (Fed. Judicial Ctr. 2001).

want them to make prior to your first status or scheduling conference. In addition, by structuring parties' initial planning meetings under Rule 26(f), you can ensure that all parties will subsequently make effective use of your limited, formal conference time, and avoid problems related to electronic data, such as the loss or destruction of evidence.

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. 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 the problems deepen. You can look for potential service problems, potential proof problems, complex legal or factual issues, electronic discovery matters, and early dispositive motions, and you can 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 Chapter 5, section A.3.c, *infra*);
- 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.

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.

c. Differentiated case management

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 the 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 timelines 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 A, Form 28, 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 resource application.

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 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, others use a combination of complexity and other designations. Districts that have adopted DCM programs generally have established from two to seven tracks—three- and five-track systems being the most common.

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 re-

quired. Some courts allow parties to initially designate the track assignment.

Regardless of how tracks are initially designated 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. See Appendix A, Forms 16, 26, 27, and 28, for examples of orders and local rules pertaining to differentiated case management.

B. Prompting Counsel to Give Early Attention to the Case

1. In general

While the responsibilities to properly conduct 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. Federal Rule of Civil Procedure 26(f) ensures that counsel meet and jointly prepare for the Rule 16 conference, exchange core case information, and adopt, to the extent possible, a joint discovery plan. 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 conferences.

2. The parties' "meet and confer" conference and mandatory initial disclosures

Federal Rule of Civil Procedure 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 the parties' claims and defenses; identify issues and solutions for electronic discovery; develop a proposed discovery plan; agree on claims of privilege and procedures to assert such claims, especially when such data is inadvertently produced; discuss the possibility of settlement; prepare a joint case-management report to the court; and exchange discoverable information or arrange for

its exchange. Parties must file their joint plan with the court within fourteen days of the "meet and confer" conference.[13]

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 attorneys and between an attorney 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 attorneys, as well as between you and them.

Laying an appropriate foundation for this meeting can begin with the initial scheduling orders and case-management guidelines discussed earlier (see Chapter 1, section A.2.a, *supra*). 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 case-management guidelines 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 a suggested format for the joint report 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, 19–24, and 29, for examples of orders concerning the Rule 26(f) meeting and the joint case-management report and discovery plan.[14]

13. Rule 26 does not apply to those limited actions specified under subdivision 26(a)(1)(B). The rule requires each party to disclose the names, addresses, and telephone numbers of persons likely to have discoverable information, and the subject of that information, to support its claims or defenses; to provide a copy or description of all documents, electronically stored information, 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. Fed. R. Civ. P. 26(a)(1).

14. Under Fed. R. Civ. P. 37(f), failure to participate in good faith in a Rule 26(f) conference to develop a discovery plan may result in court sanctions.

3. Supplementing the "meet and confer" agenda

Although Federal Rule of Civil Procedure 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 defendant, no later than ten days before the Rule 16 conference, written settlement proposals to be exchanged (or discussed) at that conference;
- requiring that the parties submit their views on the utility of any available alternative dispute resolution (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;
- identifying an anticipated date of trial (based on the discovery plan) and the expected number of trial days for each party;
- establishing a proposed agenda for the Rule 16 conference;
- 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; and
- requiring parties to identify the format and location of all discoverable electronic information, and to state whether the information is readily available, the cost for producing it, and whether it must be preserved.[15]

15. Managing Discovery of Electronic Information, *supra* note 12, at 4–5. Parties cannot be sanctioned by the court for failing to provide electronically stored information if the data was "lost as a result of the routine, good-faith operation of an electronic information system." Fed. R. Civ. P. 37(e). Accordingly, issues of electronic data preservation should be discussed and agreed on as early as possible in the case.

Chapter 2: Setting and Monitoring a Case-Management Plan

A. Consulting with Lawyers and Unrepresented Parties
B. Scheduling a Rule 16 Conference
C. Setting a Case-Management Plan Through the Rule 16 Conference
    1. Who should conduct the conference?
    2. When should the conference be held?
    3. Where should the conference be held?
    4. Is teleconferencing appropriate?
    5. Should the proceedings be recorded?
    6. Who should attend?
        a. Lawyers
        b. Litigants
        c. Others
    7. What can lawyers prepare?
        a. The conference statement/order
        b. Short-form conference statement/order
        c. Uniform orders
    8. What subjects are covered at the Rule 16 conference?
    9. What can you do to monitor the scope of the claims?
        a. Identifying and narrowing the issues
        b. Limiting joinder of parties and amendment of pleadings
D. The Scheduling Order and Calendar Management
    1. Issuing the scheduling order
    2. Calendar management considerations

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 in every case (except those exempted by local rule) "as soon as practicable" after receiving the parties' Rule 26(f) report or after consult-

ing with parties, but no later than the "earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared." The scheduling order controls the course of the action unless modified by a subsequent order (Fed. R. Civ. P. 16(d)).[16] Even in cases exempted by local rule from Federal Rule of Civil Procedure 16(b), a minimal but firm schedule should be set. At the other end of 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 Federal Judicial Center's *Manual for Complex Litigation, Fourth.*

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 requires 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.

Federal Rule of Civil Procedure 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 Federal Rule of Civil Procedure 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,

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

your calendar, and the lawyers' other commitments (see Chapter 2, section D, *infra*, for a discussion of the scheduling order).

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 (Fed. R. Civ. P. 16(a)):

- 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.

The decision 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 Rule 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 the specific procedures of your chambers, put a "face" on the judicial system for inexperienced 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 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, however, will still benefit from early judicial management of some kind.[17] For example, many courts exempt Social Security, government collection, habeas corpus, and section 1983 prisoner cases, and have adopted discrete management approaches or "tracks" appropriate for these 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 Chapter 1, section A.2.c, *supra*, for a discussion of differentiated case tracking generally.

You have broad discretion as a judge, guided by the stated purposes of Federal Rule of Civil Procedure 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 your expectations. Consider, therefore, posting on your court's website a standing order or guidelines covering your expectations for the pretrial process, such as discovery and motions practice, and trial procedures. For a sample of general orders and guidelines, 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 and 10–15. See also Chapter 1, sections A.2 and B.2, *supra*.

17. 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.*

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, and who should attend the conference.

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 considerations, 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. Federal Rule of Civil Procedure 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 Federal Rule of

Civil Procedure 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.[18]

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 issue orders);
- the character, experience, and attitude of the participants; and
- the nature of the issues.

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 the preferred approach, there are cases in which such

18. *But see* MCL 4th, *supra* note 10, § 11.22 (discussing the use and scheduling of multiple conferences in complex cases).

a conference is not necessary or feasible.[19] 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 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

19. 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.

- 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 Fed. R. Civ. P. 16(c)), and their familiarity with subjects the court will consider. The lawyers' participation will depend on your agenda for the conference, which you can communicate to the lawyers through your initial scheduling order or case-management guidelines (see Chapter 1, sections A.2.a and B.2, *supra*; see also examples of forms and orders in Appendix A, Forms 3–10, 13–15, and 25). 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;
- 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; and
- to save fees and other costs, you can limit the attendance of attorneys at conferences; however, the presence of counsel involved in related pending litigation may be helpful.

b. Litigants

Under Federal Rule of Civil Procedure 16(c)(1), some judges require litigants to attend or be available for the initial scheduling conference, but many judges 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.[20] Litigant attendance had no sig-

20. *See* RAND CJRA Report, *supra* note 4, at 78.

nificant effect on cost, however, 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."[21] 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
- 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.

c. Others

It has been recommended, and some judges require, that in cases involving extensive electronic discovery the persons most knowledgeable about the parties' computer systems and electronic data storage attend the initial Rule 16 conference.[22] Also, to save fees and other costs, judges limit

21. *Id.* at 80.
22. *See* Managing Discovery of Electronic Information, *supra* note 12, at 5.

the attendance of attorneys, sometimes to one per party; however, counsel involved in related pending litigation may be helpful at such a conference.[23]

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 Federal Rule of Civil Procedure 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 Chapter 1, section B.2, *supra*, 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) and requiring counsel to attend the Rule 26(f) conference in person.

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

23. *See* MCL 4th, *supra* note 10, § 11.23.

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 Federal Rule of Civil Procedure 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, nonargumentative 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 Federal Rule of Civil Procedure 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 topics to be addressed at the Rule 26(f) conference and by the scheduling order, see the *Manual for Complex Litigation, Fourth*.[24] See also Chapter 1, section B.2, *supra*.

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. Instead of a more formal conference statement/order, a short-form version may be an appropriate alternative in less complex cases. 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;

24. MCL 4th, *supra* note 10, §§ 11.211, 22.6.

- 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 the kinds of discovery required and how long discovery will take; and
- one or two sentences on settlement prospects for the case.

c. Uniform orders

Many judges have chosen to adopt a uniform order that is 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, 16, and 25.

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

Federal Rule of Civil Procedure 16(c) lists subjects for discussion at the Rule 16 conference, but that list is not exhaustive. Because Rule 16 conferences may be held not only at the beginning of a case (as a 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 (Fed. R. Civ. P. 16(c)(2)(A));
- 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;
- an agreement on procedures to be followed for determining claims of privilege, including claims arising after production of privileged information (Fed. R. Civ. P. 26(f)(3)(D));
- 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;[25]
- a clear identification of, and agreement on, all electronic discovery issues, including issues of preservation, cost, location, and format (Fed. R. Civ. P. 26(f)(3)(C));[26]
- specific time limitations for the joinder of parties and amendment of pleadings (Fed. R. Civ. P. 16(c)(2)(B));
- for district judges, referral to a magistrate judge for supervision of pretrial proceedings or, with party consent, for all aspects of the case (Fed. R. Civ. P. 16(c)(2)(H));
- 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) (Fed. R. Civ. P. 16(c)(2)(L));
- control of, limitations on, or potential problems with discovery, including the possibility of phased discovery;
- setting the discovery cutoff date;

25. It may be helpful to require attorneys to estimate the hours required to handle the case in this budget. *See* Awarding Attorneys' Fees and Managing Fee Litigation (Fed. Judicial Ctr. 2d ed. 2005) (discussing management of attorney fee litigation).

26. A thorough discussion of electronic discovery matters to be considered early in the case is contained in Chapter 3, section F, *infra*. *See also* Managing Discovery of Electronic Information, *supra* note 12, *and* Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial, *supra* note 12.

- suitability and appropriateness of the case for ADR, ADR choices available (e.g., arbitration, mediation, ENE, judicial settlement conference), parties' preferred ADR option, and parties' justification if no ADR option is chosen; and
- attorneys' estimates of the number of days a trial will take.[27]

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 Federal Rule of Civil Procedure 16(c)(2).[28] 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, to focus on the economics of the case, and to 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

27. *See* MCL 4th, *supra* note 10, § 11.21 (suggesting topics for the initial conference).

28. *See also id.* § 11.33.

be as specific as currently possible, but that any information developed in this process is subject to later clarification.

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 remaining issues;
- addressing and resolving early any questions concerning subject matter jurisdiction, which is 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, see Appendix A, Form 12);
- 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 Fed. R. Civ. P. 15; local rules may also apply). Federal Rule of Civil Procedure 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. It is helpful to create standard forms of orders for cases on different management tracks; these forms 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 1–3, 16, and 19–24; for orders for Social Security cases, see Forms 26 and 27.

Consider including the following items in your scheduling order:

- a deadline for joining parties and amending pleadings (Fed. R. Civ. P. 16(c)(2)(B));
- a date for completion of all discovery or particular phases or parts of discovery (Fed. R. Civ. P. 16(c)(2)(F)) by specifying cutoff dates for noticing depositions, for serving interrogatories and document requests, and for filing discovery motions;

- a deadline for filing dispositive motions;
- a deadline for identifying trial experts and exchanging experts' materials (Fed. R. Civ. P. 26(a)(2));
- a date for further conferences as needed (Fed. R. Civ. P. 16(b)(3)(B));
- a date for a final pretrial conference (Fed. R. Civ. P. 16(b)(3)(B));
- a date for a settlement conference (Fed. R. Civ. P. 16(b)(3)(B));
- a date for an ADR process (Fed. R. Civ. P. 16(c)(2)(I));
- a trial date (Fed. R. Civ. P. 16(b)(3)(B));
- 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.[29]

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.

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 the district judge to ensure that the order conforms to his or her schedule.

29. 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." Pub. L. No. 101-650, § 103(a)–(b), 104 Stat. 5089. The Judicial Conference, however, did not endorse this technique, noting its "almost universal rejection . . . by the bar and the courts." JCUS CJRA Report, *supra* note 1, at 41.

Consider the following:

- Overscheduling will be counterproductive; keep in mind your (and your 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.
- 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 judges trying whenever possible not to handle a particular matter more than once; for example, referral of dispositive motions to a magistrate judge should be carefully weighed (see Chapter 8, section B.2, *infra*).
- Parties must not be allowed to stipulate around deadlines or gain easy continuances.

The Case Management/Electronic Case Files (CM/ECF) system can assist you in managing your cases and your calendar. You should be familiar with the case-management reports available through CM/ECF, including reports created locally by your court. Examples of useful CM/ECF reports include pending motions reports (indicating time pending and ripeness), docket activity reports (to keep abreast daily of filings in your cases), and calendar reports. See Appendix C for samples and descriptions of reports available through CM/ECF. For general tips on using technology for case management, see Chapter 9, *infra*.[30] 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 electronic calendaring to flag your deadlines (see Chapter 9, *infra*, and Appendix C).

30. *See also* Effective Use of Courtroom Technology, *supra* note 12.

Chapter 3: Discovery Management

A. In General
B. Specific Techniques for Managing Discovery
C. Anticipating and Forestalling Discovery Problems
D. Limiting Discovery
   1. In general
   2. Document requests
   3. Depositions (who, how many, etc.)
E. Handling Discovery Disputes
   1. Methods for reducing the number of disputes
   2. Discovery motions
F. Discovery of Electronically Stored Information
   1. Electronic discovery issues
      a. Preservation of data
      b. Form of production
      c. Archives and legacy data
      d. On-site inspection or sampling
      e. Need for expert assistance
   2. Management tools for electronic discovery
      a. Early exchange of computer system information
      b. Rule 16(c) pretrial conference agenda
      c. Rule 26(a)(1) initial disclosures
      d. Proportionality
      e. Cost allocation
      f. Rule 53 special master or Rule 706 court-appointed expert

The parties may obtain discovery, by rule or court order, of "any nonprivileged matter that is relevant to any party's claim or defense," even if not admissible at trial so long as the discovery "appears reasonably calculated to lead to the discovery of admissible evidence" (Fed. R. Civ. P. 26(b)(1)). While the federal rules limit the frequency, extent, and nature of discovery, the judge may expand or limit the amount, frequency, or duration of discovery (Fed. R. Civ. P. 26 (b)(2)) by order in a specific case and/or through local rule or standing order.

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 managing discovery, 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:

- advising counsel of your expectations regarding the Rule 26(f) "meet and confer" conference and the discovery plan they must submit (see Chapter 1, section B.2, *supra*);
- 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 Fed. R. Civ. P. 26(b)(1));
- clarifying the extent of parties' obligations to supplement and update prior and subsequent disclosures and responses (see Fed. R. Civ. P. 26(e));
- establishing procedures for resolving discovery disputes including ensuring that the parties conferred or attempted to confer in an effort to resolve the dispute (Fed. R. Civ. P. 26(c)) (see Chapter 3, section E, *infra*);
- using special masters or liaison counsel to help organize and oversee the entire discovery process; and
- establishing guidelines for handling discovery of electronically stored information (see Chapter 3, section F, *infra*).

You can ask counsel to review the American College of Trial Lawyers' Code of Pretrial Conduct (2002) and Code of Trial Conduct (1994). Although other professional organizations publish similarly helpful guidelines, these codes expound the principles of civility and fairness on which a judge may resolve the typical discovery dispute.

For illustrative orders and forms for management of discovery, see Appendix A, Forms 2, 4, 8, 11, 13, 16, 25, and 29. For illustrative procedures, see the *Manual for Complex Litigation, Fourth*.[31]

B. Specific Techniques for Managing Discovery

Discovery influences both the length and cost of litigation.[32] 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.[33] 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.

Various techniques for management and control are available to you and the attorneys. Many districts have local rules 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.

31. *See* MCL 4th, *supra* note 10, § 11.4.
32. *See* RAND CJRA Report, *supra* note 4, at 67.
33. 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]

Consider

- encouraging counsel to use requests for admission to help define controversial issues and hence the limits of needed discovery—the judge should closely supervise this process because requests for admission, if broadly or contentiously worded, can be a waste of time; the most useful requests are narrowly drawn, factual, and neutrally worded;
- 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, including Rule 30(b)(6) depositions, to target particular witnesses, issues, and key players for the purpose of obtaining information needed for settlement negotiations, to address issues regarding electronically stored information, or to lay a foundation for a dispositive motion, thereby deferring and possibly obviating other discovery;
- requiring, pursuant to Federal Rule of Civil Procedure 26(a)(2), exchange of signed reports or statements of proposed testimony of experts in advance of their depositions;
- imposing, pursuant to Federal Rules of Civil Procedure 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 or interrogatories that include, as a preamble, a set of complex definitions that render the interrogatories burdensome and objectionable;
- arranging depositions so as to avoid unnecessary travel;
- requiring parties to identify all relevant, electronically stored information, distinguish data by ease and cost of accessing information, and identify all types of electronic formats being used by the parties; and
- in complex cases, having attorneys report via letter or teleconference at crucial case junctures on the status of documents, depositions, and settlement prospects.[34]

34. *See generally* MCL 4th, *supra* note 10, § 11.42 (tips for managing complex litigation, including using phased, targeted, or sequenced discovery, or having liaison counsel or special masters manage discovery).

Requiring updates either by letter or teleconference has a number of advantages: It makes a conference unnecessary; 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. Your case management should help anticipate problems that may grow into disputes and should help deal with disputes so as to contain them rather than letting them expand.[35] 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, 25, and 29.

To conserve resources, some district judges routinely refer discovery disputes and other matters to magistrate judges. The judge should refrain from referring all discovery disputes to a magistrate judge; this practice wastes time because two judges must become familiar with the case. Also, handling a discovery dispute is a good way to take the pulse of a case to determine if it is on track. Some larger courts have profitably designated a magistrate judge to become an expert in the discovery of electronically stored information and to serve as an institutional resource.

35. 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 the result of 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); this was also published 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* (Fed. Judicial Ctr. 1997) [hereinafter FJC Discovery Study].

Consider

- establishing ground rules for depositions if the nature of the case calls for it, such as where and how depositions are taken, who may attend, 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;[36]
- if it appears discovery will be contentious, allocating costs of compliance with costly discovery demands by issuing a protective order under Federal Rule of Civil Procedure 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);[37]
- to the extent the local rules do not do so, establishing (or asking counsel to recommend at the Rule 16 conference) procedures for claiming privilege; protecting information against inadvertent disclosure or other waiver, and making provisions for protecting the information if it is disclosed (Fed. R. Civ. P. 26(b)(5));[38] and requiring counsel to submit a log of potentially privileged, discoverable documents;[39]
- if you are a district judge, designating a magistrate judge to supervise discovery; or in complex litigation, when the overall litigation costs justify it, appointing a special master (see Chapter 8, sections B and C, *infra*, for a discussion of magistrate judges and special masters);

36. *See* MCL 4th, *supra* note 10, § 11.45.

37. *Id.* § 11.433. When deciding whether to issue a protective order, the court should consider not only the rights and needs of the parties but also the existing or potential interests of those not involved in the litigation. Pursuant to Fed. R. Civ. P. 26(c), protective orders should be issued "for good cause shown." Federal courts are public courts and the business conducted there should be conducted publicly unless there is a specific reason to keep certain matters confidential. To be relevant in the modern world, courts need to protect the legitimate secrets and private information of litigants and participants in the litigation process.

38. Federal Rule of Evidence 502 protects the disclosure of attorney work product or materials protected by attorney–client privilege if the disclosure was inadvertent and steps were taken to prevent disclosure and to correct the error, including complying with Rule 26(b)(5) (in which the claim for protection must be expressly stated and the documents described).

39. MCL 4th, *supra* note 10, § 11.431.

- requiring samples of electronic discovery be produced early and the data discussed to determine what issues, if any, may arise regarding the nature, location, format, preservation, or other challenges to producing electronically stored information;[40]
- requiring a conference between counsel before filing a motion in addition to the requirement that the parties certify that there has been a good-faith effort to resolve the dispute;
- requiring that counsel present the dispute to you by telephone conference before filing a formal motion;
- setting and enforcing page limits on motions 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 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.[41] 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.[42] In addition, setting limitations on the number of interrogatories (Fed. R. Civ. P. 33) has been found to measurably reduce overall lawyer work hours and shorten overall time to case disposition.[43] Moreover, handling early any issues or problems with

40. *Id.* § 11.446.

41. The FJC Discovery Study 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 35, at 554–55.

42. *See* RAND CJRA Report, *supra* note 4, at 16, 26.

43. *See* James S. Kakalik et al., Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data 55–58 (RAND Institute for Civil Justice 1998) [hereinafter RAND Discovery Report].

the preservation or production of electronically stored information will prevent unnecessary and costly disputes.[44]

Consider

- holding a brief (ten- to fifteen-minute) scheduling teleconference in all cases—even if you do not have time to hold a comprehensive Rule 16 conference, it is valuable to touch base with counsel at the beginning of the case;
- asking counsel to make a case for the discovery they expect to conduct;
- requiring the parties in the Rule 26(f) plan to outline the nature, scope, duration, and costs of discovery; 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 on the interim discovery findings that result.

The principle of proportionality embodied in Federal Rule of Civil Procedure 26(b) enables you to take affirmative steps to ensure that there is a reasonable relationship between the costs and burdens of discovery and what is at stake in the litigation. By taking an individualized approach to each case, you can ensure a fair application of discovery limitations.

Consider

- setting overall time limits and incorporating them into the scheduling order;
- limiting sua sponte the "frequency or extent of use of the discovery methods" under Federal Rule of Civil Procedure 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, and staying other discovery until motions-related discovery is complete;
- ensuring that all early issues regarding discovery of electronic information are addressed, such as whether the material is readily accessible; and

44. *See generally* Managing Discovery of Electronic Information, *supra* note 12.

- in the most complex cases, phasing discovery by time period or issue and requesting accompanying status reports with the completion of each phase.[45]

You are in a unique position to ensure a fair and open process and to prevent unnecessary delay. For illustrative forms and orders setting limits on discovery, see Appendix A, Forms 2, 11, 19–21, and 29. The *Manual for Complex Litigation, Fourth* also provides useful advice.[46]

2. Document requests

Unnecessarily broad or burdensome document requests are among the most dreaded, expensive, and time-consuming tools employed in the discovery process.[47] Moreover, electronic discovery issues need to be discussed early to prevent costly litigation later. By asking direct questions and making suggestions regarding the proposed exchange of information, 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 other party? List it." With this approach you can usually get the parties to exchange more relevant information than required under Federal Rule of Civil Procedure 26(a) without further discussion.
- Record agreements between the parties at conferences and place them in the final case-management order: "Plaintiff has agreed to produce _____. Defendant has agreed to produce _____."
- Address, and have the parties agree on, what electronically stored information is accessible and what is too difficult or costly to produce, in what form it will be produced, and what information needs to be preserved beyond the normal practices of the parties. Issue an order if necessary.

45. MCL 4th, *supra* note 10, §§ 11.41, 11.422.

46. *Id.* §§ 11.422, 11.423.

47. The FJC Discovery 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 35, at 530, 532.

- Ensure the parties reach nonwaiver agreements in the event of inadvertent disclosure of privileged information to the other party.

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 Federal Rules of Civil Procedure 16(b)(3) and 16(c)(2), 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.[48] The rules limit the parties to ten oral and written depositions, unless they otherwise stipulate (Fed. R. Civ. P. 30 and 31), but the court may impose a limit on any discovery, including depositions (Fed. R. Civ. P. 26(b)(2)). You should be assertive in suggesting a course of action that will phase depositions to reach important decision-making junctures in a case while avoiding unnecessary intermediate conferences or disputes.[49] 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.

48. *See id.* at 540.
49. MCL 4th, *supra* note 10, § 11.45.

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, clearly stating that, in general, discovery motions may not be submitted without a prior telephone conference requesting your permission to file them. Also, you may require that the parties attempt to resolve the dispute by letters and/or telephone conference with you before filing a motion.

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;
- being firm during the first discovery dispute telephone call in any case in which you expect ongoing discovery problems—this 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;
- if the dispute raises complex issues, requiring the attorneys to submit letters, no more than two pages in length, describing their positions; and
- permitting the filing of a motion only upon court order.

You will substantially reduce disputes by sending the message to counsel that (1) you will hear their disputes over the telephone, even during a deposition, (2) you expect professional conduct, (3) as a general rule, only work product and attorney–client privilege are valid bases for objections, and (4) discovery abuse will lead to sanctions. For an example of an order addressing discovery disputes, see Appendix A, Form 25.

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 the motions are docketed properly by the court.

F. Discovery of Electronically Stored Information

The wide array and amount of electronically stored information created by individuals and businesses, and that can be involved in litigation, can necessitate that you require the parties to identify electronic discovery issues early and with possibly greater specificity than is required for paper discovery. Handling these issues early can allow the parties to avert discovery disputes and prepare more efficiently for trial. Issues that may arise include data preservation, authentication, methods of producing the data before and during trial, and whether the costs of producing it are prohibitive or can be shifted between the parties.[50]

On the other hand, electronic discovery can greatly reduce cost and delay. For instance, the costs of photocopying, storing, and transporting data can be reduced dramatically or eliminated altogether, and software can assist in organizing, reviewing, and analyzing documents. 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, many of the set-up costs associated with electronic courtroom presentations can be reduced or eliminated.[51]

Consider

- encouraging early resolution of electronic discovery issues and disputes; and
- when appropriate, using Rule 706 experts and special masters to handle electronic discovery issues and resolve disputes.

50. *See id.* §§ 11.441–11.446.

51. For a more detailed treatment of the topic, see *Managing Discovery of Electronic Information*, *supra* note 12; R.J. Hedges, *Discovery of Electronically Stored Information: Surveying the Legal Landscape* (BNA Books 2007); *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008).

1. Electronic discovery issues

Electronically stored information raises many issues that may not occur, or occur with less complex challenges, in paper-based discovery. Among the most common issues are the following.

a. Preservation of data

Electronically stored information can be easily changed, overwritten, or deleted, whether it is stored on a computer, a handheld device, the Internet, or an enterprise-wide network. The nature of the electronic data, the equipment on which it is created, and the business or personal practices for storing the information are all factors in determining the accessibility of data for litigation.[52]

Consider

- asking the parties as soon as possible after litigation has commenced to take steps to identify, preserve, authenticate, and segregate relevant data (such as placing relevant data on a separate server or secure website);
- requiring the attorneys to agree on the steps they will take to avoid later accusations of spoliation; and
- issuing a preservation, or "freeze," order to stop the destruction of data in the normal course of business until the attorneys agree on steps to preserve certain relevant data.

As a practical matter, once a paper document is destroyed, it is no longer subject to discovery. However, the deletion of electronic data does not necessarily destroy the data. Hitting the "delete" key merely renames the file in the computer or network server, marking it available for overwriting if that particular space is needed in the future. The data itself may remain available for retrieval for months or years or may be overwritten only incrementally. Computer specialists, or computer forensics experts, can restore deleted data; but, depending on the circumstances, it may be costly and time-consuming to do so.

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

- asking the attorneys whether they expect deleted data to be subject to discovery; and

52. The court cannot impose sanctions on a party for "failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Fed. R. Civ. P. 37(e).

- determining whether there is a need for an early data-preservation order or agreement.

Businesses, as well as many individuals, periodically back up their computer data to disks or servers for disaster recovery purposes. Data and documents that have been edited, deleted, or overwritten in the normal course of business may be recovered from these sources. 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.

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

- what backup data may be available and, if available, accessible in a usable format for a reasonable cost;
- whether these data will be subject to discovery; and
- what the scope of such discovery should be and its estimated costs.

b. Form of production

Most written information produced in a case is created electronically. Electronically stored information is produced on a variety of equipment (desktop and laptop computers, personal digital assistants, cellular phones) using software (word-processing, database, and Internet applications) that generates data or metadata in a number of different formats (text, video, audio). The form and quantity of the data to be produced in a case should be addressed early in discovery.

Federal Rule of Civil Procedure 34 permits each party to request this information in any electronic medium "from which information can be obtained." Unless the requesting party specifies a particular format, the producing party must convert the data into "a reasonably usable format" or produce it in a way that it is "kept in the usual course of business." To protect the parties from unreasonable burden and cost, electronically stored information need not be produced in more than one format (Fed. R. Civ. P. 34(b)(2)(E)).

If discovery disputes arise, the parties must meet and confer before a motion to compel the production can be filed (Fed. R. Civ. P. 37(a)), and you may order the production of the data in a format requested by either of the parties, or in another format. To examine these issues, the parties can request, or the court can order, a test or sample of the electronic data, or an inspection of the electronic system (Fed. R. Civ. P. 34(a)). How-

ever, you should consider carefully any confidentiality or privacy concerns that may arise from such an inspection, as discussed in the next sections. Also discussed below are burdens associated with the time and cost of locating and producing the relevant data in a usable form.

Consider

- requiring an early agreement between the attorneys on the format(s) in which electronically stored information will be produced; 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. Archives and legacy data

As businesses, institutions, and government agencies adopt new computer systems, the data from older systems may be stored in an organized, retrievable fashion, but sometimes older data cannot be easily retrieved or viewed using current software. Older data may be unreadable without expensive conversion to modern media formats. Also, much data is not preserved in the format it was created—for instance, old e-mail may be stored in one combined document, rather than separate documents. The parties and court should consider whether the archived data must be produced in a different or more readily usable format, and determine the costs and burdens of doing so.[53]

Early in the litigation, *consider*

- 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; and
- if necessary, requiring the attorneys to survey their clients' stored data holdings and retrieval capabilities.

d. On-site inspection or sampling

Electronic discovery makes on-site inspections under Federal Rule of Civil Procedure 34(a) problematic. On the one hand, it may be necessary to actually view the computer system in operation to make sure the dis-

53. *See* MCL 4th, *supra* note 10, § 11.441.

covery 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 may be privileged information or considered a trade secret.

Consider

- encouraging the attorneys, to the extent it is relevant to discovery, to fully explain their computer system operations and storage, the data available, and their data-destruction policies;
- if necessary, requiring the parties to produce samples of their discoverable electronic data to assist the parties in making a meaningful agreement about data production; and
- requiring the attorneys to come to an agreement on whether onsite inspection is justified or necessary and, if so, what the protocol will be.

e. Need for expert assistance

If electronic discovery will involve any of the technical issues outlined above, the parties may need the assistance of electronic data experts. This is costly, but in the long run it 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 aspects of conducting discovery, including search protocols, privilege and relevance screening, and production.

2. Management tools for electronic 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 early, negotiate solutions, and follow through. You have several tools available to help you manage electronic 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 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 an-

ticipated 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 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 Federal Rule of Civil Procedure 30(b)(6) prior to the start of formal discovery under Federal Rule of Civil Procedure 26(d); and
- requiring the attorneys to discuss these issues at their Rule 26(f) meeting and include proposals in their 26(f) plan for inclusion in a Rule 16(b) order.

b. Rule 16(c) pretrial conference agenda

Perhaps the most important judicial management tool in electronic discovery is the Rule 16 pretrial conference. Federal Rule of Civil Procedure 16(c) lists several issues that may be addressed during the pretrial conference, but you may supplement that list with additional points on electronic discovery and issue a memo to the attorneys well in advance of the conference, preferably at the outset of the litigation. Topics that might be included in such a memo are evidence preservation; the identification of a technical expert who knows the party's computer system; archiving and destruction policies; the format and accessibility of potentially relevant data; and costs and burdens associated with production.

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

The expected agenda for the Rule 16 pretrial conference sets the tone for the initial disclosures, for the Rule 26(f) "meet and confer" conference of the parties, and for the parties' Rule 16 conference statement. The court's local rule or your standing order can require that the parties disclose the relevant aspects of their computer systems, and that they come to an agreement on electronic discovery matters prior to the Rule 16 pretrial conference.

d. Proportionality

Under Federal Rule of Civil Procedure 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, even sua sponte, 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. Electronic discovery may involve extraordinary costs, however, such as legacy data restoration. The court has the power to allocate costs equitably, balancing the needs of justice with the resources of the parties (Fed. R. Civ. P. 26(b)(2)). In some cases, you may find it appropriate to condition extraordinary discovery on payment of part or all of the costs by the proponent.

Factors to consider in apportioning costs include:

- the specificity of discovery requests;
- the likelihood of critical information discovery;
- the availability of information from other sources;
- the purposes for which the custodial party retains the information;
- the relative benefit in obtaining the information;
- the total costs associated with production;
- the relative abilities and incentives of the parties to control costs; and
- the resources available to each party.[54]

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 electronic data expert (Fed. R. Evid. 706).

54. *See id.* § 11.433.

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

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

Remember, however, that there is no court budget for a neutral expert, so the cost must be borne by the parties.

Even the suggestion of bringing in a neutral expert may help bring the attorneys to an agreement. See Chapter 7, section B.4, *infra*, for a discussion of court-appointed experts; and Chapter 8, section C, *infra*, for a discussion of special masters.

Chapter 4: Pretrial Motions Management

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   2. Motions screening
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C. Treatment of Specific Types of Motions
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      a. In general
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   5. Motions raising qualified immunity
   6. Motions that remove a case from the schedule set for it
   7. Motions for sanctions
      a. In general
      b. Specific techniques

Motions practice can be a source of undue cost and delay if misused or unmanaged. Research and practical experience show that in the federal courts, motions practice increases in intensity as monetary stakes and the number of attorneys go up.[55] It is therefore important that you seize the initiative regarding motions practice in your court, especially in complex or large cases.[56]

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 using national and local rules, general or standing orders of the

55. *See* RAND Discovery Report, *supra* note 43, at 28–38.
56. *See* MCL 4th, *supra* note 10, § 11.32.

court, 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 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; and 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.[57]

Consider, as a general approach,

- requiring that, when counsel meet and confer before filing a motion (Fed. R. Civ. P. 37(a) and 26(c)), they specifically state the issues to be addressed and the relief requested, and place any resolution in writing;
- 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.

57. *See*, *e.g.*, William W Schwarzer, Alan Hirsch & David J. Barrans, The Analysis and Decision of Summary Judgment Motions (Fed. Judicial Ctr. 1991), *reprinted in* 139 F.R.D. 441 (1992) [hereinafter Analysis of Summary Judgment]. *See also* William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 154 F.R.D. 311 (1994) (overview of case law on summary judgment).

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

Federal Rule of Civil Procedure 43(c) 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 a hearing if the parties accept the ruling. If they do not, the tentative ruling 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 that 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 liti-

gants would prefer a timely decision to a perfectly written one.[58] Additionally, matters taken under submission rather than immediately ruled on can slip through the cracks; in the press of business it may be difficult 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, 9, 21, 24, and 25.

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 judge time 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 Chapter 2, section C.8, *supra*). 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. Alternatively, to save your time and the parties' expenses, communication by telephone conference or letter can reestablish the case schedule.

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?

58. The remaining CJRA provision in effect requires a report every six months of all civil motions pending in the district courts for longer than six months, by individual judge. These reports occasionally become the subject of media attention and congressional concern.

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

Federal Rule of Civil Procedure 16(c)(2) specifically suggests that the judge 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 the motions 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 by letter every sixty days of the status of the case;
- planning requisite discovery for summary judgment motions;
- scheduling dispositive motions as early as feasible but not before a sufficient record for a decision has been made; and
- ordering that all motions to dismiss or for summary judgment be filed after the end of discovery unless there is a dispositive legal issue that may terminate the case or eliminate areas of discovery, so that such motions do not needlessly delay the start of discovery.

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 to establish 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 of these purposes 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[59]

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. Summary judgment motions are best filed as soon as the requisite discovery supporting them has been completed and the issue is ripe. A summary judgment motion 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.

59. *See* Fed. R. Civ. P. 56; *see also* Schwarzer, Analysis of Summary Judgment, *supra* note 57, at 441; MCL 4th, *supra* note 10, § 11.34 (advising on procedures for the effective use for summary judgment).

Consider

- requiring a prefiling conference;
- incorporating any special procedures for summary judgment (or any other) motions into your court's website, local court rules, or a standing order;
- 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).[60]

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 local rule, standing order, or 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 include 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 noted 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;

60. *See* Schwarzer, Analysis of Summary Judgment, *supra* note 57, at 500.

- 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 court and litigant time and costs. A bench opinion 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 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 (Fed. R. Civ. P. 65(b)).[61]
- 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

61. *See also* Benchbook for U.S. District Court Judges § 7.03 (Fed. Judicial Ctr. 5th ed. 2007) [hereinafter Benchbook].

requirements, schedule written submissions and a hearing date (see Fed. R. Civ. P. 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 a computer disk in a chambers-compatible format (Fed. R. Civ. P. 65(d)).
- Combine preliminary and permanent injunction proceedings when possible (see Fed. R. Civ. P. 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 the order's 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 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). You or the parties may raise the subject matter jurisdiction issue or you may entertain motions for remand on this basis at any time, but motions

based on 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 after the filing of the notice of removal (28 U.S.C. § 1447(c)).

b. Specific techniques

The two most common motions for remand are (1) motions alleging lack of federal question jurisdiction (asserting the absence of a substantial federal issue arising under the Constitution or federal law), and (2) 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 or addition 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 Federal Rule of Civil Procedure 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 (Rule 12(b)(1)) or personal jurisdiction (Rule 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 Federal Rule of Civil Procedure 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 on 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 unnecessary use as tactical tools 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 management 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 to sanction inappropriate 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 you as 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, Fourth.*[62]

62. MCL 4th, *supra* note 10, § 10.15.

Chapter 5: Alternative Dispute Resolution and Judicial Settlement

A. Alternative Dispute Resolution Procedures
   1. Some terms to keep in mind
   2. Authority to refer cases to ADR
   3. Deciding whether to refer a case to ADR, selecting an ADR process, and determining the appropriate time for the referral
      a. Mediation
      b. Arbitration
      c. Early neutral evaluation
      d. Summary jury trial, summary bench trial, and mini-trial
      e. Settlement week
   4. Selecting and compensating an ADR neutral
   5. Issuing a referral order
   6. Managing cases referred to ADR
B. 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 judge-hosted settlement negotiations

Only a small percentage of federal civil cases are resolved by trial.[63] Many of the remaining cases settle. And many of these cases 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.[64] Early settlement can also contribute substantially to the perception by litigants that the court has ful-

63. Although the trial rate varies from district to district, on average across the federal district courts only about 2.0% of civil cases are tried. *See* Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 2008 Annual Report of the Director 171, table C-4A.

64. Federal Rule of Civil Procedure 16(c)(2)(I) identifies "settling the case 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 alternative dispute resolution processes as acceptable special procedures.

filled its responsibility to help them resolve their dispute 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.

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) techniques for civil cases.

The chapter first discusses the variety of ADR procedures available through the U.S. district courts and then turns to the judicially hosted settlement conference. The principal reason for this order of presentation is that judges who conduct settlement negotiations may use any one of a number of techniques, including some of those generally referred to as ADR. For that reason, these techniques are defined and discussed first.

A. Alternative Dispute Resolution Procedures

An important aspect of litigation management is the use of methods other than conventional adjudication and traditional judicial settlement conferences to resolve cases. 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.[65]

65. 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. 4662 (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

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.[66] These rules may, for example, define the types of cases eligible for ADR; establish procedures by which cases are referred, including whether the judge has authority to order a case to ADR; identify those individuals the court has designated as ADR neutrals, including attorneys and the court's judges; and specify how the neutral is to be appointed and whether non-judge neutrals receive a fee. The local rules may even require that certain types of cases routinely go to ADR.

Apart from the question of whether your court authorizes referral of cases to ADR is the question of whether you, the judge, might use one of the court's authorized ADR procedures in negotiations you yourself conduct. You might do so either because your court has authorized its judges to serve as ADR neutrals or because you on your own conduct settlement discussions with parties by using ADR procedures such as mediation. To consider use of such procedures, you will want to know what procedures your court's local rules authorize and what those procedures entail.

This section (Chapter 5, section A) defines and discusses the types of ADR in the federal courts and focuses on your role as a judge referring cases to ADR procedures to be conducted by a third-party neutral. The next section (section B) focuses on your role as a judge conducting settlement procedures yourself.

1. Some terms to keep in mind

Although ADR has been used by the federal 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,

and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers (Fed. Judicial Ctr. & CPR Inst. for Dispute Resol. 1996) (summarizes history of federal court ADR developments and describes each district court ADR program).

66. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (1998), discussed at Chapter 5, section A.2, *infra*, requires that each district court provide an ADR program and do so by local rule (§ 651(b)).

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, 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, an arbitration program may require that the parties participate in an arbitration hearing, but the hearing produces a nonbinding decision, which the parties may reject in favor of a trial de novo or a settlement they negotiate themselves. A mediation, whether entered into voluntarily by the parties or upon order of the judge, results in resolution only if the parties reach a mutually acceptable agreement.
- *Court-annexed, court-based, and court-related.* 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 used for any kind of ADR program based in a court. The terms *court-based* and *court-related* have the same meaning as *court-annexed*. 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.[67]
- *Third-party neutrals.* Third-party neutrals are the individuals who conduct ADR sessions. Many federal courts have established rosters of neutrals who have met qualifications requirements set by the court, and the courts encourage parties to use these neutrals. Most members of federal court rosters have training and experience in the law. In addition to the rosters, many courts rely on their magistrate judges to conduct settlement sessions, and a few courts employ mediators on staff.

67. 28 U.S.C. § 651(b) (Supp. 1998). Several courts, in lieu of creating and managing their own court-based ADR programs, have arranged 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.

- *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—that is, 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 on subjective needs and interests, and result in an accommodative resolution.
- *Interest-based versus rights-based processes.* Interest-based dispute resolution processes expand the discussion beyond legal issues to look at the parties' 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 and identifying the interests that must be met to resolve the dispute. Rights-based processes (such as arbitration) narrow issues, streamline legal arguments, and predict or render adjudicated 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, the style of the third-party neutral, and the desires of the parties.

2. Authority to refer cases to ADR

The Judicial Conference has twice 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 . . . ."[68] 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

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

ADR . . . . [The Judicial Conference] recommends that local districts continue to develop suitable ADR programs . . . ."[69]

With passage of the ADR Act of 1998, all district courts must provide at least one form of ADR to litigants in civil cases.[70] Furthermore, the courts must require litigants to consider using ADR[71] and are permitted to order litigants to use mediation and early neutral evaluation.[72] These and other requirements of the Act—for example, that courts adopt procedures for making neutrals available and issue rules on disqualification of a neutral[73]—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 *Guide to Judicial Management of Cases in ADR,* a manual written for federal judges.[74] This source also examines judicial authority to compel ADR use without party consent.[75]

69. 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 et al., An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act xxxiv (RAND Inst. for Civil Justice 1996). The second study, of the use of ADR in three demonstration districts, found (1) a significant reduction in disposition time in ADR cases compared to non-ADR cases in one district (data were insufficient in the other two to make a determination); (2) attorney-estimated cost savings in ADR cases in all three districts; and (3) high attorney satisfaction with ADR 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 (Fed. Judicial Ctr. 1997) [hereinafter FJC Demonstration Programs Report].

70. 28 U.S.C. § 652(a) (Supp. 1998).

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

72. *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).

73. 28 U.S.C. §§ 653(a) and (b), respectively (Supp. 1998).

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

75. *See id.* § V.A.

3. Deciding whether to refer a case to ADR, selecting an ADR process, and determining the appropriate time for the referral

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.[76] Most federal district courts leave the referral decision to the individual judge. Although ADR has been authorized by many federal courts since at least the mid-1990s, many attorneys still do not voluntarily use these procedures. That makes the judge a critical element in the ADR process—i.e., in many cases, if you do not refer the case, either by order or strong encouragement, the parties very likely will not use an ADR procedure.

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 (which can be obtained through early neutral evaluation), a judgment on the merits of the case (which arbitration would provide), or assistance with settlement discussions (which mediation would provide). 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*.[77] 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.

76. 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?* (Fed. Judicial Ctr. 1995). *See also* Wayne Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 Ohio St. J. on Disp. Resol. 93 (2002); Wayne Brazil, *Should Court-Sponsored ADR Survive?*, 21 Ohio St. J. on Disp. Resol. 241 (2006); Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 St. John's L. Rev. 77, 90–91 (2007).

77. *See* ADR Guide, *supra* note 74, §§ III, IV.

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."[78] Ten districts are exempt from this provision and may retain the mandatory arbitration procedures authorized by statute in 1988.[79]

Among the many case and party characteristics that might affect your referral decision (and 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;[80]
- whether the projected costs of proceeding with litigation are disproportionate to the amount in controversy;
- whether the case involves few or many issues;

78. 28 U.S.C. § 652(a) (Supp. 1998).

79. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. 9, § 901, 102 Stat. 4663 (1988) (amended 1997) (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 chapter is deemed to affect any program in which arbitration is conducted pursuant to 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.

80. 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 pro se 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 several courts (e.g., the Northern District of California, the District of the District of Columbia, and the District of Idaho) on occasion appoint counsel for pro se litigants for the sole purpose of settlement discussions.

- 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, and early neutral evaluation.

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.[81]

The timing of the ADR referral is variable and generally left to the judge. For a process like arbitration, where the neutral makes a decision on the merits of the case, referral is likely to be later in the case, after most evidence has been developed. On the other hand, early neutral evaluation is, by definition, a process that occurs early in a case. For mediation, conventional wisdom has held that the process will not be productive until considerable discovery has been completed. Some courts have found, however, that parties can benefit from earlier mediation.[82] Some courts have also found that mediations are more likely to result in settlement if they occur before summary judgment motions are filed, suggesting that earlier referrals are more productive. Some federal judges order parties to "stage" discovery so that only the discovery needed for

81. In statistical year 2009, 28,078 cases were referred to ADR by fifty-one district courts. Of these cases, 18,745 (67%) were referred to mediation. Administrative Office, internal report. The referral numbers are submitted by district courts that apply for funds to support ADR staff in the clerk's office. Not all courts that authorize mediation submit a request for ADR staff funding.

82. A study in the Western District of Missouri, where mediation occurred approximately thirty days after answer was filed, found that 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 69, at 238.

the ADR process is obtained initially, with additional discovery undertaken only if the ADR process is not successful.

You should refer a case to ADR at the earliest possible point that productive negotiations can occur so as to help parties avoid higher litigation costs and the "digging in" that often results from mounting costs and prolonged conflict.

a. Mediation

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

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 problems that led to the litigation without giving his or her own view of the case. In this kind of mediation, mediator expertise in the process of mediation, rather than the subject matter of the litigation, is paramount. On the other hand, in the *evaluative* approach, the mediator is more likely to use techniques that include his or her view of the case (e.g., an assessment of potential legal outcomes). 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.

Over three-quarters of the ninety-four U.S. district courts have authorized use of mediation for civil cases, and by far the greatest num-

ber of cases referred to ADR are referred to mediation.[83] Not known is how many of these districts have also established (as compared to authorized) rosters of mediators and other features of an active mediation program. Nonetheless, in each of these districts, whether a court-based program has been established or not, the judges have been authorized to refer cases to mediation or litigants have been authorized to use mediation. And in a number of these districts, the court's judges have also, or exclusively, been authorized to serve as the court's mediators.

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, applying 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 by statute to order parties to use arbitration; in all other districts, referral is permitted only with the consent of the parties. Altogether a little more than a quarter of the ninety-four district courts authorize use of arbitration.[84] Few of the districts

83. See *supra* note 81 for a partial count of the number of cases referred to mediation. According to a Federal Judicial Center review of court local rules, general orders, and ADR plans, the following district courts specifically mention mediation as a procedure authorized by the court: AL-M, AL-N, AL-S, AK, AZ, CA-E, CA-N, CT, DE, DC, FL-M, FL-N, FL-S, GA-M, GA-N, GA-S, HI, ID, IL-C, IL-N, IN-N, IN-S, IA-N, IA-S, KS, KY-E, KY-W, LA-M, LA-W, ME, MA, MI-E, MI-W, MN, MS-N, MS-S, MO-E, MO-W, MT, NE, NH, NJ, NY-E, NY-N, NY-S, NY-W, NC-E, NC-M, NC-W, ND, OH-N, OH-S, OK-W, OR, PA-E, PA-M, PA-W, PR, RI, SC, TN-E, TN-M, TN-W, TX-E, TX-N, TX-S, TX-W, UT, VI, VA-E, VA-W, WA-E, WA-W, WV-N, WV-S, and WI-W. The local rules, general orders, and plans in some districts provide information about how the mediation process works (e.g., how cases are referred and how neutrals are appointed). Other districts' documents simply provide a general authorization to use ADR and mention mediation as one possible ADR process.

84. The districts that are authorized by statute to mandate arbitration are: Northern District of California, Middle District of Florida, Western District of Michigan, Western

authorized to mandate use of arbitration have retained their mandatory arbitration programs. Some have made the procedure voluntary, and some have dropped arbitration from their ADR offerings altogether. Even so, a significant number of cases are referred to arbitration each year by the districts that still mandate its use.[85] The arbitration services are always provided by a neutral other than one of the court's judges.

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. As originally designed by the Northern District of California, the ENE session is generally held before much discovery has taken place. Some courts have adapted the process for use later in a case and have dropped the word "early" while retaining the goal of providing a neutral evaluation of the case.

In ENE, a neutral evaluator, usually a private attorney with expertise in the subject matter of the dispute, holds a confidential joint 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 offer case-planning assistance or meet in private sessions with each party to facilitate settlement

District of Missouri, District of New Jersey, Eastern District of New York, Middle District of North Carolina, Western District of Oklahoma, Eastern District of Pennsylvania, and Western District of Texas. 28 U.S.C. § 654 (Supp. 1998). *See also supra* note 78 and accompanying text. Only three of the ten initially mandatory arbitration districts (NJ, NY-E, and PA-E) still maintain their mandatory programs. A number of additional districts, including several that once mandated arbitration, specifically mention arbitration as an ADR option authorized under their local rules, general orders, or ADR plans: AK, CA-N, CT, FL-M, GA-M, GA-N, GA-S, ID, KY-E, KY-W, ME, MD, MI-W, MN, NY-W, OH-M, PA-W, RI, TN-E, TN-M, TX-S, UT, WA-E, WA-W, WV-N, and WY (based on a Federal Judicial Center review of the district court local rules, general orders, and ADR plans). As with mediation, the rules, general orders, and plans in some districts provide information about how the arbitration process works, while other districts' documents simply provide a general authorization to use ADR and mention arbitration as one possible ADR process.

85. In statistical year 2009, 2,464 cases were referred to arbitration out of the 28,078 cases referred to ADR in the fifty-one districts reporting their referrals to ADR. *See supra* note 81.

discussions. Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes.

About a third of the ninety-four U.S. district courts authorize referral of cases to early neutral evaluation.[86] Whether each of these districts has also established a process for providing ENE is unknown, but at minimum, judges in these districts are authorized to refer cases to ENE, and each year a number of cases are referred to the process.[87] Judges typically do not serve as early neutral evaluators in court ADR programs with that name, although when mediating a case using a more evaluative approach, a judge may look very much like a neutral evaluator.

d. Summary jury trial, summary bench trial, and mini-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 counsel present summary evidence to a jury. Witnesses are generally not called. The advisory verdict is delivered by a jury selected from the court's regular jury pool. 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 recommend this resource-intensive process only for protracted cases, others 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 thought to be most useful after discovery is complete. Opinion is divided on the propriety of using jurors

86. A Federal Judicial Center review of district court local rules, general orders, and ADR plans found that the following districts specifically mention early neutral evaluation or neutral evaluation as an ADR process authorized by the court: AK, AZ, CA-E, CA-N, GA-N, IN-N, KY-E, KY-W, LA-M, ME, MS-N, MS-S, MO-E, MO-W, MT, NV, NY-N, NY-W, ND, OH-N, PA-W, TN-M, TX-N, TX-S, TX-W, VT, WA-E, WV-N, and WY. As with mediation, the rules, general orders, and plans in some districts provide information about how the ENE process works, while other districts' documents simply provide a general authorization to use ADR and mention ENE as one possible ADR process.

87. In statistical year 2009, 1,209 cases were referred to ENE out of the 28,078 cases referred to ADR in the fifty-one districts reporting their referrals to ADR. *See supra* note 81.

without telling them their decision is only advisory—though telling them could alter the way in which they hear evidence and reach a verdict.

A variant of the summary jury trial is the summary bench trial, in which the presiding district or magistrate judge issues an advisory opinion. A third form of summary trial is the mini-trial or mini-hearing, in which the attorneys present their case 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. Mini-trials are uncommon and are generally used in large cases in which all parties are business entities.

A little more than a quarter of the district courts authorize use of the summary jury trial.[88] Most courts simply authorize use of the summary jury trial; few spell out procedures for using this ADR process. Nonetheless, few cases are referred to this process.[89]

e. Settlement week

In a typical settlement week, a court suspends normal trial activity and, aided by volunteer mediators, sends numerous trial-ready cases to mediation sessions held at the courthouse. The mediation sessions may last several hours, with additional sessions held as needed. Cases unresolved during settlement week return to the court's regular docket for further pretrial or trial proceedings as needed. If settlement weeks are held infrequently and are a court's only form of ADR, parties who want to use ADR may have to look outside the court or to the court's judges for assistance while awaiting referral to the next settlement week. Only two fed-

88. A Federal Judicial Center review of district court local rules, general orders, and ADR plans found that the following districts specifically mention the summary jury trial as a procedure authorized by the court: AK, CA-N, CT, IL-C, IL-S, LA-E, LA-M, LA-W, ME, MA, MI-W, MN, NV, NH, NC-E, NMI, OH-N, OK-W, OR, PA-M, TX-N, TX-S, TX-W, WA-E, WA-W, WV-N, and WY.

89. In statistical year 2009, five cases, all in a single district, were referred to summary jury and summary bench trials out of the 28,078 cases referred to ADR in the fifty-one districts reporting their referrals to ADR. No cases were referred to mini-trials. *See supra* note 81.

eral district courts authorize use of the settlement week process, although other districts have used the process on occasion.[90]

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.[91] Your court may also use its Article III judges in rotation as settlement judges; it may have designated its district judges or 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 as to how the neutral is selected. If they do, you might *consider* the following issues:

- *Cost.* Some districts promote cost savings to litigants by agreeing to use district or magistrate judges to lead mediation efforts. This effort is often targeted at cases with relatively low dollar values. Other districts rely on outside neutrals in order to free in-court personnel for 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.[92]
- *Expertise*. Outside neutrals may be able to provide subject matter expertise not available in court. Outside neutrals also are more

90. In statistical year 2009, two courts referred 301 cases to settlement week out of the 28,078 cases referred to ADR in the fifty-one districts reporting their referrals to ADR. *See supra* note 81. The two districts that specifically authorize settlement week are NY-W and WV-S (based on a Federal Judicial Center review of court local rules, general orders, and ADR plans).

91. 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* Plapinger & Stienstra, *supra* note 65, at 29–56, tables 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).

92. See also the discussion in section B.1 of this chapter.

likely to be trained in the specific ADR techniques you or the parties wish to use for the case.[93]

- *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.

The method of selecting a neutral differs among the districts. As noted above, many districts maintain a roster of certified or, at least, registered neutrals, generally possessing a stated minimum of formal training as a neutral. The roster often includes the neutral's stated preference as to subject matter of the case (e.g., employment law, intellectual property, and securities). If your district lacks a roster, you should consider either proposing the establishment of a roster of qualified neutrals or informally assembling (and perhaps publishing on your district's website) your own roster. Some judges prefer, after considering the pertinent characteristics of the case and the participants, to select a neutral from the roster and to issue an order appointing the neutral and fixing a schedule for the ADR process (subject to the parties' objections based on a latent conflict, scheduling problems, special subject matter expertise, or another sound reason). Some judges prefer initially to solicit the parties' choice of a qualified and capable neutral from the roster (although some judges reserve the right, in the event that the parties' neutral is unsuccessful, to require a later mediation before a court-appointed neutral) and to permit the parties to fix a schedule. In any event, the judge should track the results achieved by the selected neutrals and remain familiar with which neutrals perform most effectively. Appointing neutrals with an established record of success and a reputation for excellence precludes any appearance of favoritism in the appointment of a neutral. For one view of the issues accompanying appointment of a neutral, see the *Guide to Judicial Management of Cases in ADR*.[94]

93. *See*, *e.g.*, ADR Guide, *supra* note 74, § VI.
94. *Id.*

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 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.[95] 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.[96] You should, therefore, look to your local rules for guidance. You may want to consult, as well, the *Guide to Judicial Management of Cases in ADR*.[97]

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.[98]

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 or, where appropriate, citing to the local rule or ADR plan where these items are set forth:

- 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;

95. 28 U.S.C. § 658(a) (Supp. 1998).

96. Admin. Office of the U.S. Courts, Guide to Judiciary Policy, vol. 4, ch. 5.

97. *See* ADR Guide, *supra* note 74, § VII.

98. Court Administration and Case Management Comm., Judicial Conference 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) [hereinafter CACM Guidelines], reproduced *infra* at Appendix B.

- instructions on whether the parties must submit materials, such as a statement of positions and settlement status, to the neutral and whether those statements are to be confidential or to be shared with the other party;
- 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;
- 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, and what papers to submit if the case settles;
- 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.[99]

For an example order referring cases to ADR, see Appendix A, Form 31.[100]

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 very important matter 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 proceed-

99. 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 74, § X.

100. Note that while this referral order does not include a separate section setting out confidentiality requirements, it references the court's local rules, where the court's confidentiality requirements are specified.

ings.[101] Also see 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.[102] For a sample form setting out a confidentiality agreement between parties, see Appendix A, Form 32.

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*.[103] The guide is especially helpful in identifying techniques you can use to prevent such problems. You should also consult your local rules, which may, pursuant to the ADR Act of 1998, have well-established procedures for handling some of these matters.[104]

101. 28 U.S.C. § 652(d) (Supp. 1998). *See also* DVD: Communications Between Judges, Settlement Judges, and Neutrals: What's OK, What's Off Limits? (Fed. Judicial Ctr. 2002) (FJC Media Library Number 4308-V/02).

102. ADR Guide, *supra* note 74, § VIII & app. E.

103. *Id.* § X.

104. 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 Plapinger & Stienstra, *supra* note 65. A helpful guide for designing court ADR programs is Elizabeth Plapinger & Margaret Shaw, *Court ADR: Elements of Program Design* (CPR Inst. for Dispute Resol. 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 98. *See also* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 Harv. Negot. L. Rev. 43 (2006) (surveying cases in state and federal courts that have litigated a wide range of issues arising from ADR procedures).

B. Judicial Settlement

Judge-hosted settlement negotiations 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. Serving as a settlement facilitator in your own cases—even those cases that will be tried to a jury—may result in later challenges to your impartiality and may result in recusal motions. Judges should only serve as settlement judge at the request, and for the benefit, of other judges. In some districts, magistrate judges serve as the court's primary settlement neutrals.

The traditional view of judicially hosted settlement conferences is that the judge assists the parties in exchanging settlement offers and very likely gives his or her own view of the strengths and weaknesses of each side's case in an effort to find a monetary value that will settle the dispute. More recently, the understanding of what judges do when conducting settlement negotiations has begun to shift as more judges learn, or bring with them into their judicial role, the theory and skills of mediation.[105] Use of these skills typically means a commitment of more time to an individual case's negotiations, a smaller role for the judge's view of the case, and more emphasis on a settlement that meets the parties' needs beyond a monetary settlement.

The extent to which you become involved in settlement discussions, and the extent to which you use the techniques of mediation, will depend on several factors, including the following: whether you have time; whether other alternatives are available; whether you feel your involvement could help the parties; whether your involvement could risk perceptions of settlement coercion or perceptions that your impartiality might be compromised; and, if you are a magistrate judge, whether the court or individual judges refer such matters to you.[106]

105. Since the mid-1990s, the Federal Judicial Center has offered workshops in basic mediation skills, initially to magistrate judges, then to district judges, and most recently to bankruptcy judges.

106. *See* Wayne D. Brazil, Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges 1–2 (Am. Bar Ass'n 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

1. The judge's role

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 the one 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. Another consideration in determining your proper role in settlement discussions is to ask whether the parties might interpret your participation as pressure to settle the case.[107]

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.[108] The safest stance, if you wish to host settlement discussions in your own cases, is to limit your participation to cases that will be tried to a jury and only those cases in which case-dispositive motions have been decided. This advice is even more pertinent if you are likely to become deeply involved in the case—for example, by helping the parties explore their underlying interests, which is an essential element of the mediation process. The more you learn about the parties—their positions, concerns, strategies, views of their opponents, and so on—the more difficult it will be for you to remain impartial or to sustain, for each

settlement judge not be the judge who will try the case, especially if the case is a bench trial.

107. *See* Commentary to Canon 3(A)(4), Code of Conduct for United States Judges ("A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.").

108. *See* Comm. on Codes of Conduct, Judicial Conference of the U.S., Code of Conduct for United States Judges, Canon 3(A)(4)(d) as revised July 2009 ("A judge may . . . with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters."). *See also* Admin. Office of the U.S. Courts, Guide to Judiciary Policy, vol. 2, Ethics Advisory Opinions, Advisory Opinion No. 95, June 2009 ("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.").

party, the appearance that you can be impartial if you have to rule on motions or the final outcome of the case.

If you prefer to have little role in settlement negotiations in your own cases, consider establishing a relationship with another judge for exchange of cases that would benefit from settlement assistance. Or consider referring your cases to your court's ADR program (see *supra* Chapter 5, section A).

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 by suggesting that they seek the assistance of a third-party neutral, whether from another judge or through your court's ADR program. 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

As a practical matter there are three logical points in a lawsuit where settlement efforts are optimal. The circumstances of each case dictate whether settlement efforts are most productive when: (1) no discovery has yet occurred and cost savings are significant, (2) discovery has been completed, but dispositive motions have not been filed, or (3) after discovery and after dispositive motions have been ruled upon. You should evaluate whether, in the case at hand, the apparent purposes of the parties favor one time period over the others for pressing settlement talks.

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 into 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. Don't wait until just before trial to raise settlement for the first time, because by that time the parties have already invested heavily in the case and may be unable to move from their positions. But if you have not raised settlement 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.

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 information about settlement efforts, see Appendix A, Form 8).
- having counsel identify, and then complete, only targeted discovery necessary to evaluate the case for settlement, leaving until later any discovery needed for purposes other than settlement discussions;
- 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;
- requiring counsel in fee-shifting cases 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 (again, preferably someone other than yourself if you are the fact finder); and
- referring the case to ADR procedures provided by your court's local rules or general orders or agreed to by the parties, such as

arbitration, mediation, or early neutral evaluation (see *supra* Chapter 5, section A).

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 30.

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 nature of the case, the history of the litigation, and the personalities and needs of the participants. There is no single way to assist settlement negotiations, 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 objectives 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 a discrimination case or the medical file in a personal injury case), 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;[109]
- 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 to you confidential memoranda, outlining the pivotal issues, the critical evidence, and counsel's settlement positions.

Over the years, judges have developed and refined a number of ways of helping parties settle their cases. To assist negotiations during the settlement conference itself, *consider* the following approaches:

- discussing with the participants the issues and the probable risks each party faces, without taking a position on the merits;
- asking the attorneys, in front of their clients, how much it will cost to litigate the case through trial and then suggesting to their clients that they put this sum toward settlement;

109. 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."

- helping parties focus on their underlying interests (e.g., resuming a profitable business relationship) rather than on disputed facts or legal principles;
- meeting separately with each side (parties and counsel) for candid evaluations of the parties' prospects and the costs of continuing the litigation—but keep in mind that while these meetings often become essential to the successful conclusion of settlement negotiations, you should have the parties' consent to them or they may preclude you from presiding at trial;
- suggesting that the corporate principals meet without counsel to reach an agreement as business people;
- delaying having parties state their "bottom lines" so as to keep the negotiating positions flexible;
- directing attention to damages, including possible tax consequences, instead of emphasizing liability issues, since in many settlements it is money rather than principle that ultimately matters—i.e., 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;
- severing one or more issues for a separate trial if doing so will provide the basis for settlement of other issues;
- looking 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;
- discussing 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?");
- providing a structure, when the parties are dug in, to help them exchange offers (e.g., asking the plaintiff to "come up with the next offer," asking the defendant to make a counteroffer, and asking them to continue exchanging offers until settlement or impasse is reached), which can force movement but takes the burden off the parties to make the first move;
- injecting realities, such as the risk of bankruptcy or the difficulties of collecting a judgment from a financially strapped defendant;

- recommending or encouraging the parties to exclude punitive damages as an element of the claim for settlement purposes;
- encouraging the defendant to make a Federal Rule of Civil Procedure 68 offer of judgment, carefully drafted to avoid later disputes; such an offer can be helpful in cases in which attorneys' fees can be awarded by the court, since the offer can cover all liability, but it must be unambiguous to enable the parties to determine whether the final judgment is more favorable;
- deferring any judicial recommendation of potential settlement figures until the outlines of a probable settlement become apparent;
- settling only some issues in the case, or the claims of some but not all parties;[110] and
- keeping 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.[111] These preferences varied by location, which suggests that you should try to understand your local culture in deciding the approach you will use 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

110. But see MCL 4th, *supra* note 10, § 13.21, for a discussion of the risks of partial settlements.

111. Brazil, *supra* note 106, at 1–2, 5–6.

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 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 settlement, may be discussed. Make it clear, on 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, Forms 33–34 for examples of orders 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.

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, Fourth*.[112]

5. Settlement in cases involving pro se litigants

Cases involving a pro se litigant seem to be obvious candidates for disposition by settlement, but you should not assist in settlement negotiations in pro se cases on your docket. 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

112. MCL 4th, *supra* note 10, § 13.14.

litigants in the case. Because this is a difficult line to walk, the better approach is simply to forego any involvement in settlement discussions in these cases. This is unfortunate, as early settlement would benefit many of these litigants. Pro se 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 judge or magistrate judge for settlement assistance; and
- establishing a regular exchange relationship with another district judge or magistrate judge to provide settlement assistance in pro se cases.

6. Ethical and other considerations in judge-hosted settlement negotiations

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 enter into side agreements that are not disclosed to other parties in the case. Negotiations regarding attorneys' fees may require your attention as well, 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, Fourth*.[113]

113. *Id.* §§ 13.22–13.24.

Chapter 6: Final Pretrial Conference and Trial Planning

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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 one. 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 "improv[e] the quality of the trial through more thorough preparation" (Fed. R. Civ. P. 16(a)(4)) and to facilitate settlement (Fed. R. Civ. P. 16(a)(5)). To those ends, Rule 16(e) provides that

- any pretrial conference must be held as close to the time of trial as is reasonable under the circumstances;
- the judge may require the participants to formulate a plan for trial, including procedures to facilitate the admission of evidence; and
- the conference must 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 topics previously discussed (see Chapter 2, section C.8, *supra*) 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, 24, and 35–40.

Consider requiring a preconference meeting of counsel for the purpose of preparing a joint pretrial statement covering an agenda of key issues 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, that state the elements of each claim and defense; and
- proposed verdict forms, including special verdict forms or juror interrogatories if requested (under Fed. R. Civ. P. 49), and proposed findings of fact and conclusions of law in nonjury 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 Federal Rule of Civil Procedure 16(e), the court may hold a final pretrial conference to "formulate a trial plan, including a plan to facilitate the admission of evidence." Rule 16(c) 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, Fourth*.[114] You or counsel may suggest other subjects. The final pretrial conference is a significant stage of pretrial case management and a 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 attached case-management guidelines) 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, 24, and 35–40.

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, including your preferences on the use of wireless communication devices (e.g., laptops, cellular phones, and personal digital assistants) in the courtroom by attorneys, parties, witnesses, and jurors. As legal practice has become more technology-driven, and professional courtroom courtesies have declined, many judges have developed their own rules of courtroom decorum or adopted those

114. *Id.* § 11.6.

of others in their district. You may distribute such rules at the final pretrial conference or post them on your district's website.

- 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)).
- Identify 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, subject to cross-examination, for presenting 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 Fed. R. Civ. P. 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., when narrative written statements of testimony cannot be used).
- Entertain motions for postponing the trial date only if submitted with a certification of client consent. Trial date continuances can have a severe impact on a judge's calendar, and trial date certainty gives credibility to your calendar and has been shown to reduce overall case disposition time.[115]
- Explore the possibility of settlement once more. The final pretrial conference presents one last opportunity to discuss settlement with 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.

c. Expert witnesses

Management of expert witnesses presents another opportunity to avoid the often excessive reliance on redundant or duplicative expert testimony, which not only wastes trial time but can represent 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.

115. RAND CJRA Report, *supra* note 4, at 89–90.

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 Chapter 6, section B.1.c, *infra*);
- determining whether to appoint an expert witness (see Fed. R. Evid. 706); and
- limiting the number of experts permitted to testify.

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 Chapter 7, section B, *infra*, 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.

Consider

- controlling the volume of exhibits by limiting their number and forcing counsel to justify each exhibit's independent utility with regard to specific issues or proofs (see Fed. R. Evid. 403, 611(a));
- 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 Fed. R. Civ. P. 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 Fed. R. Civ. P. 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 Fed. R. Civ. P. 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);
- in unique situations, whether to approve a stipulation by the parties that a nonunanimous verdict may be returned by a specified number of jurors (see Fed. R. Civ. P. 48); and

- preparing special verdict forms and considering whether to use seriatim verdicts (jury decides one issue at a time), general verdicts with interrogatories, or special verdicts (see Fed. R. Civ. P. 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.[116]

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.[117]

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.[118] Counsel should be forced to estimate, and

116. The juror questionnaire form has become automated and is submitted in advance of trial in many courts using the Juror Management System software.

117. *See* MCL 4th, *supra* note 10, § 11.633.

118. Fed. R. Civ. P. 16(c)(2) (trial time limits are a proper topic for pretrial conferences); Fed. R. Evid. 403, 611; Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001) (citing Gen. Signal v. MCI Telecomms. Corp., 66 F.3d 1500, 1508–09 (9th Cir. 1995)); Deus

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;
- 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 Fed. R. Civ. P. 51).

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 reaching 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).

v. Allstate Ins. Co., 15 F.3d 506, 520 (5th Cir.), *cert. denied*, 513 U.S. 1014 (1994); M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1408 (7th Cir. 1991).

4. The final pretrial order

Federal Rule of Civil Procedure 16(d) suggests that the court issue an order reciting all actions and rulings at the final pretrial conference. The order, which "controls the course of the action unless the court modifies it," should be clear and comprehensive, covering all important matters (as discussed above). Trial counsel should understand that no deviation or modification will be permitted except "to prevent manifest injustice."[119]

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, 24, 35–40, and 44.

B. The Trial Phase[120]

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 Chapter 7, section C, *infra*.

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.

119. Fed. R. Civ. P. 16(e). *See also* MCL 4th, *supra* note 10, § 11.67.

120. *See* Judicial Demeanor and Courtroom Control Practices (filmed by the Federal Judicial Center and American College of Trial Lawyers in 2009) (video on file with the Federal Judicial Center) (FJC Media Library No. 5077-V/09) (for discussion of difficult situations arising in the courtroom and suggestions on handling them).

Consider

- streamlining voir dire procedures generally;[121]
- 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;[122]
- controlling the volume of exhibits (e.g., by using summaries or redacted documents or imposing limits on the number of exhibits);
- limiting the reading of depositions by use of a stipulated summary or agreed-on statement of the substance of a witness's testimony;[123]
- avoiding unnecessary proofs by narrowing disputes or by encouraging stipulations to such matters as the foundation for exhibits; and
- 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

121. *See* MCL 4th, *supra* note 10, § 12.412. *See* Benchbook, *supra* note 61, § 6 (discussing general civil trial management).

122. *See* MCL 4th, *supra* note 10, §§ 12.13, 12.23.

123. *See id.* § 12.331.

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 Chapter 6, section A.3, *supra*.

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.[124]

Consider

- giving a preliminary instruction that identifies the sequential stages of a trial and provides a generic statement of the issues;[125]
- permitting jurors to take notes;
- permitting jurors to ask questions (in writing, submitted through the judge) when appropriate, under adequate safeguards (this is a topic of debate and the subject of varied practice among judges—proponents argue that permitting questions helps to maintain juror focus and job satisfaction; opponents fear that juror questions can result in needless distractions and threaten juror impartiality during the taking of evidence);[126]
- discouraging or delaying sidebars whenever possible until the next recess;
- encouraging the parties to stipulate to the use of techniques to enhance jury comprehension,[127] such as (1) jury notebooks listing witnesses and containing, for example, critical exhibits and

124. *See generally* William W Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575 (1991). *See also* Called To Serve (filmed by the Federal Judicial Center in 2005) (video on file with the Federal Judicial Center) (FJC Media Library No. 2980-V/05).

125. *See* MCL 4th, *supra* note 10, § 12.43.

126. *See id.* § 12.42. *See also* Federal Trial Handbook: Criminal § 17:13 (Thompson/West 2009) (the considerations discussed in the criminal handbook apply equally to a civil trial); Federal Trial Handbook: Civil § 16:15 (Thompson/West 2009); United States v. Richardson, 233 F.3d 1285, 1289, 1294–95 (11th Cir. 2000) (citing practices of various circuits in allowing juror questions, and a discussion in the concurrence regarding the problems and issues associated with juror questions).

127. *See* MCL 4th, *supra* note 10, § 12.31.

glossaries; (2) courtroom technology (e.g., using computers and video to display evidence to the jury);[128] (3) pictures of witnesses or evidence; (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 (N.B.: the use of interim summations or explanations by counsel is appropriate for more lengthy and complex cases but not efficient in a typical case);[129]

- giving jurors a copy of your charge;
- determining whether to instruct jurors before or after closing arguments (see Fed. R. Civ. P. 51(b)); 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.[130]

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

Counsel may request 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.

128. *See* Natl. Inst. for Trial Advocacy, Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial (edited by Fed. Judicial Ctr., 2001).

129. *See* MCL 4th, *supra* note 10, § 12.43.

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

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 Fed. R. Civ. P. 43; for examples of instructions regarding submission of direct testimony in writing, see Appendix A, Form 49).[131]
- 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. 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.

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.

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

131. *See* MCL 4th, *supra* note 10, § 12.333 (citing Fed. R. Civ. P. 26(a)(3)(B), 32(c)).

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.[132]

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

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 their 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, by judge, all bench trials sub-

132. *See generally id.* § 12.52 ("Decisions become more difficult as the record grows cold, and a long-delayed decision undermines public confidence in the justice system and must be included in the public reports required by 28 U.S.C. § 476 [bench trials submitted for more than six months, or any civil case pending more than three years].").

mitted for more than six months and all civil cases that have not been terminated within three years of filing.[133]

133. 28 U.S.C. §§ 476(a)(2), (3); *see* Admin. Office of the U.S. Courts, Guide to Judiciary Policy, vol. 18. These semiannual reports also list, by judge, all civil motions pending for more than six months. 28 U.S.C. § 476(a)(1).

Chapter 7: Special Case Matters

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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 and cases that attract intense attention from the media and public. 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, such as the *Manual for Complex Litigation, Fourth*,[134] 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.[135] We do not attempt to duplicate that source, and we refer the reader to that manual when appropriate.

1. Complex cases generally

Given that factors other than subject matter may determine a case's complexity, how can you distinguish ordinary cases from complex cases?

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 Fourth*, such as organizing counsel, adopting standard motions and responses, coordinating discovery, and establishing fair and efficient approaches to trial.[136]
- *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 sub-

134. *See* MCL 4th, *supra* note 10.

135. *Id.*

136. *See id.* §§ 10.2 (role of counsel), 11.32 (motions practice), 11.4 (managing discovery), 12.0 (managing the trial).

stantial 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 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 *infra* Chapter 7, section 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.[137]

- *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 or dismissal, and provide for the administration of an approved settlement.[138]
- *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. Cases involving extensive electronic discovery may also signal a need for greater judicial management.[139]

If you conclude that the case before you is complex, consult the appropriate section of the *MCL Fourth* for the specific type of case. Additional resources on specific topics include guidance for judges and clerks handling multidistrict litigation;[140] a pocket guide on managing patent litigation and several other resources on management of intellectual property cases;[141] and a report on two judges' use of expert science panels

137. For a discussion of applying the maturity factor to mass torts, see MCL 4th, *supra* note 10, § 22.344.

138. *See id.* § 21.0.

139. *See* Emery G. Lee III & Thomas E. Willging, National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Fed. Judicial Ctr. 2009) (presenting findings from a national survey of attorneys, including findings on the incidence and cost of cases with electronic discovery).

140. Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges (Judicial Panel on Multidistrict Litig. & Fed. Judicial Ctr. 2009); Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks (Judicial Panel on Multidistrict Litig. & Fed. Judicial Ctr. 2008).

141. *See* Complex Litigation Committee, American College of Trial Lawyers, Anatomy of a Patent Case (Fed. Judicial Ctr. 2009); Peter S. Menell et al., Patent Case Management Judicial Guide (Fed. Judicial Ctr. 2009); Herbert F. Schwartz, Patent Law and

in complex cases involving scientific evidence.[142] For cases involving complex scientific evidence, consult the *Reference Manual on Scientific Evidence*.[143]

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 Fourth* 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.[144]

3. Class action cases

Management of class actions should be governed by principles discussed in the *MCL Fourth*. Prompt consultation of the *MCL* 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. Efficient management of class action litigation is especially important as more such cases are filed in or removed to federal courts in response to

Practice (BNA Books 6th ed. 2008); *and* Robert A. Gorman, Copyright Law (Fed. Judicial Ctr. 2d ed. 2006).

142. Laural L. Hooper, Joe S. Cecil & Thomas E. Willging, Neutral Science Panels: Two Examples of Panels of Court-Appointed Experts in the Breast Implants Product Liability Litigation (Fed. Judicial Ctr. 2001).

143. Reference Manual on Scientific Evidence (Fed. Judicial Ctr. 2d ed. 2000). Each chapter in the manual discusses a different science topic. *See infra* Chapter 7, section B. Publication of a third edition is forthcoming.

144. For a discussion of whether, when, and how to aggregate mass tort cases, see Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 348–77 (1999).

the Class Action Fairness Act of 2005.[145] The pocket guide *Managing Class Action Litigation* offers a concise resource for managing these cases.[146]

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, experts' 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 three now well-known Supreme Court decisions,[147] management of expert evidence is an integral part of proper case management. Under those decisions, the district judge is the gatekeeper who must determine whether the proffered evidence is sufficient 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.[148]

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. Refer also to the *Reference Manual on Scientific Evidence*, which, in addition to an introductory essay on how science works, offers a tutorial in each chapter on a different science area,

145. Pub. L. No. 109-2, 119 Stat. 4 (2005). *See also* Emery G. Lee III & Thomas E. Willging, The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules (Fed. Judicial Ctr. 2008).

146. Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges (Fed. Judicial Ctr. 2d ed. 2009).

147. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Gen. Elec. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

148. *See Joiner*, 522 U.S. at 149 (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.

including DNA evidence, medical evidence, toxicology, and estimations of economic loss in damages awards.[149]

1. Early pretrial evidence

Effective management of expert evidence begins at the pretrial stage. Rules 16(c)(2)(D), (c)(2)(G), (c)(2)(L), and (c)(2)(P) 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. Resolving scientific evidence issues is often a prominent aspect of cases that involve expert testimony. Consequently, 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, allowing you to 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.[150]

149. *See supra* note 143.
150. *Id.*

- Limit the number of experts who will testify on a given issue. Some courts' local rules limit the number to one expert per subject, for example.[151]
- 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 provides for interrogatories to obtain the experts' facts and opinions,[152] 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).[153]
- 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.[154] Confidentiality orders can expedite and simplify discovery of sensitive matters, but they can also raise issues concerning future release of data from protection.

2. *Daubert* hearing; final pretrial evidence

When expert evidence is anticipated at trial, a *Daubert* hearing 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 Chapter 6, section A.3.c, *supra*, where we discuss use of expert evidence in the context of the final pretrial conference.)

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,

151. *See, e.g.,* Western District of Washington Local Rule 43(j).

152. Rule 26(b)(4)(B) prohibits interrogatories or depositions of experts employed only for trial preparation without a showing of exceptional circumstances in which it is impracticable for the party to obtain the information by other means.

153. See MCL 4th, *supra* note 10, § 11.48, for a discussion of discovery and disclosure of expert opinions.

154. See *id.* § 40.27 for a sample confidentiality order (Form A).

unless it is clear that no admissible evidence can be offered. However, an early *Daubert* hearing can be helpful for distinguishing admissibility issues from dispositive issues and may in some cases lead to a summary judgment motion.

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 in advance 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.[155]

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 admissibility, weight, and credibility, you should consult circuit law.

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.

155. The source for these suggestions is William W Schwarzer & Joe S. Cecil, *Management of Expert Evidence, in* Reference Manual on Scientific Evidence, *supra* note 143, 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 Chapter 7, section B.2, *supra*);
- assist the jury by giving preliminary and interim instructions, permitting note taking, and permitting jurors to ask questions (see Chapter 6, section B.1.c, *supra*, for a brief discussion of the issues involved in permitting juror questions); and
- 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 before making an 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.[156] Academic departments and professional organizations can be a source for such experts.

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 provide background material for the court, to advise the court);
- 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.[157]

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

156. *See generally* MCL 4th, *supra* note 10, §§ 11.51–11.54. See also, for guidance on appointment of court-appointed experts, 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). Also see Federal Rule of Civil Procedure 53, which was recently revised to provide more explicit guidance on appointment of special masters, and Chapter 8, section C, *infra,* on appointment of special masters.

157. The source for this checklist is Schwarzer & Cecil, *supra* note 143, at 63–64.

source for the discussion that follows.[158] 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. You should also read the guidelines prepared by the Administrative Office on managing cases that attract a high level of media attention (the guidelines are available online at http://jnet.ao.dcn/highprofiledc/index.htm). In the discussion that follows, the focus is on criminal cases, as these are the type of case most likely to attract media and public attention.

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;
- 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 may 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 staff 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.

158. Timothy R. Murphy, Paula L. Hannaford, Genevra K. Loveland & G. Thomas Munsterman, Managing Notorious Trials (Nat'l Ctr. for State Cts. 1998).

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;
- jury selection;
- management of the jurors; and
- attention to the needs of court staff.

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.

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.

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, and therefore your planning may need to include local entities as well.

Perhaps your most valuable resources in planning for a high-profile case are the judges and staff who have already handled such cases. For guidance on how to handle various aspects of planning for a high-profile case, contact the Administrative Office's Office of Public Affairs at (202) 502-2600.

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 messages; written notices posted at designated locations; and postings on the Internet, such as a case-specific site on the court's website)?
- What arrangements must be made for providing the media with copies of case documents, exhibits, and rulings (e.g., ask parties to file two sets of papers so that one can be provided to the media; post all written documents, including rulings, on a case-specific site on the court's website)?
- What will the media be permitted to know about the jury?
- Is the courtroom large enough to hold attendees, 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 those seats 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, or the jury?

Keep in mind that Judicial Conference policy does not permit the use of television cameras or other recording devices in the courtroom.[159]

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.
- 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.

159. Admin. Office of the U.S. Courts, Guide to Judiciary Policy, vol. 10, ch. 4 [hereinafter Judicial Conference Cameras Policy].

- 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.[160]

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 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;

160. For a useful discussion of the benefits and risks of electronic communication in the context of high-profile trials, see Quintin Cushner, Roger Hartley & Darrell Parker, *Spreading the News: Communicating with the Media During High-Profile Trials*, 93 Judicature 52 (Sept.–Oct. 2009).

- 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;
- providing the jurors with daily newspapers, with articles about the trial removed;
- 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 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, if they do choose to speak with the media, to be sensitive to the privacy of fellow jurors;
- 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. Very likely the U.S. Marshals Service will come to you with a plan already worked out, which you should review and approve when you are satisfied with it. 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.

When reviewing the Marshals Service's plan, consider asking the following questions:

- 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 you should consider 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 parking ban, 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 security is needed (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., using 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);[161]
- 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 media communicating with jurors during the trial.

161. *See* Judicial Conference Cameras Policy, *supra* note 159.

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 the attorneys 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 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.

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.

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.[162] 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*

162. Useful articles on this subject are John M. Graecen, *"No Legal Advice From Court Personnel," What Does That Mean?*, Judges' J., Winter 1995, at 10; and John M. Graecen, *Legal Information vs. Legal Advice: Developments During the Last Five Years*, 84 Judicature, Jan.–Feb. 2001, at 198.

Civil Rights Litigation,[163] prepared in response to passage of the Prison Litigation Reform Act of 1995 (PLRA). Although the resource guide was published in the mid-1990s, neither the PLRA nor the basic advice of the resource guide have changed. Therefore, we have relied on the guide for the discussion below, and we encourage you to consult it for prisoner pro se cases on your docket. In some districts, guidance is also available for the pro se litigants through manuals or booklets written by the courts and disseminated to pro se parties or through other services provided to pro se litigants, such as volunteer attorneys who advise on federal court procedure and preparation of pleadings.[164]

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.[165]

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

163. Resource Guide for Managing Prisoner Civil Rights Litigation (Fed. Judicial Ctr. 1996). Additional useful sources for court staff and judges include Committee to Increase Access to the Courts, *Proposed Protocol to be Used by Idaho Judges During Hearings Involving Self-Represented Litigants* (Idaho Court Assistance Offices Project 2002); *Proposed Best Practices for Cases Involving Self-Represented Litigants* (Am. Judicature Soc'y 2005); Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (Am. Judicature Soc'y 2005); and Honorable Beverly W. Snukals & Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices from a Judge's Perspective*, 42 U. Rich. L. Rev. 93 (2007).

164. *See, e.g.,* United States District Court for the Central District of California (Filing a Pro Se Action (2009) and the Federal Pro Se Clinic); United States District Court for the Northern District of California (Handbook for Litigants Without a Lawyer (2006)); United States District Court for the Northern District of Illinois (Filing a Civil Case Without an Attorney: A Guide for the Pro Se Litigant (2009)); *and* United States District Court for the Northern District of New York (The Pro Se Assistance Program).

165. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Apr. 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, 1932.

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 or appeals in federal courts that were dismissed as frivolous or malicious or if the action fails to state a claim on which relief can be granted, unless the prisoner is in imminent danger of physical injury (28 U.S.C. § 1915(g)); and
- 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 the action seeks monetary relief from a defendant immune from such relief (28 U.S.C. § 1915(e)(2)).

Nonprisoner 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 an orderly 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 jurisdiction, 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; and

- consolidate related cases, such as cases involving similar claims arising in the same institution.

2. In forma pauperis status

In forma pauperis (IFP) cases filed by incarcerated parties are also governed by the Prison Litigation Reform Act of 1995 (PLRA). Prisoners with any monetary assets at all may not 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 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 (28 U.S.C. § 1915(f)(2)).

With regard to non-incarcerated 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 case law developed both before and after the adoption of the PLRA.

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 attorney 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 prescribes that 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 and doing 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 the litigant can contact should problems arise;
- explicitly require the pro se litigant to maintain a current address and telephone number on record with the court; and
- 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 hearing (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.

If a hearing is warranted, c*onsider* the following approaches:

- conferring by telephone conference; or
- using, if available in your courthouse, videoconferencing technology to conduct hearings in prisoner cases.

Many courts use a *Spears* hearing for cases involving an incarcerated pro se litigant.[166] 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,[167] 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.

166. 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.

167. 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 (see *supra* Chapter 5, sections A.3 and B.5).[168]

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. 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 _____);

168. *See also* U.S. Dist. Ct., N.D. Ill., Settlement Assistance Program for Pro Se Litigants (Amended General Order, Nov. 6, 2006, available at http://www.ilnd.uscourts.gov/press/sap2006.html).

- 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);
- 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 the party or to question witnesses.[169]

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.

169. 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).

Chapter 8: Personnel Resources in Litigation Management

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 consider delegating those tasks that may be performed by others consistent with federal law, the rules of procedure, and their court's operating procedures, while retaining tasks that only a judge may perform. 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.

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.

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);[170]
- research motions and evidentiary issues and prepare proposed rulings;
- review and annotate proposed jury instructions, findings of fact, and conclusions of law;
- review and annotate trial exhibits and the trial transcript;
- maintain a watch on current court of appeals decisions on points bearing on pending matters; and
- draft opinions.

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.

Several resources are available to help you hire and train law clerks effectively. The Online System for Clerkship Application and Review (OSCAR), available on http://www.uscourts.gov, allows you to conduct the hiring process electronically by assisting with sorting and reviewing clerkship applications. You can also consult *Conducting Job Interviews: A Guide for Federal Judges*, which identifies desirable law clerk skills and provides sample interview questions for assessing those skills.[171] You may find additional help on the Human Resources page of the J-Net including policies regarding salary, terms of service, background investigations, and other hiring information. You should also contact your court's human resources specialist, and the human resources professionals at the Administrative Office, to assist you with judiciary hiring and employment policies.[172]

170. See Chapter 7, section D, *supra*, for a discussion of managing pro se cases.

171. David K. Hendrickson, Conducting Job Interviews: A Guide for Federal Judges (Fed. Judicial Ctr. 1999).

172. *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). Remember that, in hiring your law clerks, each judge is limited to one "elbow" or career law

When you are training new law clerks, you will want to have them read the *Law Clerk Handbook*, which covers every aspect of the law clerk's role.[173] You should have them watch the FJTN broadcast, *Orientation Seminar for Federal Judicial Law Clerks*, which focuses on ethics and legal writing.[174] It is advisable that you and your law clerks periodically review the Federal Judicial Center website for new publications, broadcasts, or e-learning opportunities. 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 unique to your district.

In orienting law clerks to your chambers procedures, you might consider advising them to speak with attorneys and other case participants only about routine administrative and scheduling matters, avoiding discussion of substantive legal issues. You also might consider reminding your law clerks that their use of the Internet, including social media, is governed by both the judiciary's policy on personal use of government equipment as well as the prohibitions in the Code of Conduct for Judicial Employees, which covers many areas including confidentiality, political activities, and activities that could give rise to an appearance of impropriety.[175]

clerk, unless the judge or the law clerk is grandfathered in under this 2007 policy. *See* Report of the Proceedings of the Judicial Conference of the United States, Sept. 2007, at 26–27.

173. Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges (Fed. Judicial Ctr. 2d ed. 2007); *see also* Barbara J. Rothstein, Chambers and Case Management (Fed. Judicial Ctr. 2009) (discussing case management from a law clerk's perspective); D. Brock Hornby, Working Effectively with Your Judge: An Outline for Remarks (Fed. Judicial Ctr. 2008); Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks (Fed. Judicial Ctr. 2002).

174. Your law clerks may view the broadcasts on the Federal Judicial Center's website in streaming video. Other broadcasts are available for viewing on the Federal Judicial Center's website, or by ordering the materials; these programs address substantive areas of law, ethics, and a summary of decisions of the Supreme Court's previous terms. Your law clerks may be able to obtain continuing legal education credit for viewing some of these videos. Your law clerk may contact the Federal Judicial Center, and his or her state bar association, for more information.

175. *See supra* note 172.

2. Secretary/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 officers and attorneys. These duties often fall to a judge's secretary (also referred to as a judicial assistant). Under Judicial Conference policy, however, district and magistrate judges may choose to hire another law clerk in lieu of a secretary. While technology has eliminated some administrative tasks in chambers, many judges rely on their secretaries to assist with the many duties that remain or have changed. How you delegate the many routine administrative 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

- handle scheduling and organize your calendar;
- answer routine electronic or paper mail;
- use the Case Management/Electronic Case Files (CM/ECF) system to file opinions and orders prepared by you, and run daily calendar, docket, or motions reports to check for new filings or motion ripeness;
- maintain chambers paper and electronic records and files;
- handle your and your staff's travel arrangements and travel vouchers;
- maintain supplies, equipment, and furniture;
- maintain the chambers library;
- assist you in filing required reports (non-case-related travel, private seminar attendance);
- assist you in preparing for official meetings;
- help you write speeches and special letters;
- compile a file of standard orders, letters, and forms, and/or create electronic forms (e.g., macros in WordPerfect) for standard documents regularly used or generated by chambers staff; and
- manage the law clerk application process.

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 assisting judges with 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[176] 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 through CM/ECF 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.
- Have the courtroom deputy do all of 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 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.

176. 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.

- Have the deputy maintain liaison with the jury administrator to ensure the orderly and efficient use of prospective jurors.
- Encourage the courtroom deputy to stay current on the latest courtroom technology, developments in CM/ECF, and other electronic organizational tools to facilitate document and exhibit handling and presentation, electronic calendaring, and electronic organization of case files and other documents. (See Chapter 9, *infra*, for a discussion of using information technology for case management.)

Although the courtroom deputy or case manager is assigned to assist you, this staff member is supervised by the clerk of court. Different districts use different models when developing the job description for a courtroom deputy. Some districts emphasize the responsibility to court chambers while others place greater emphasis on the work done 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

The jurisdiction and powers of a magistrate judge are defined at 28 U.S.C. § 636.[177] In addition to those statutory duties, the district court may assign magistrate judges "such additional duties as are not inconsistent with the Constitution and laws of the United States."[178] To that end, the district court must "establish rules pursuant to which the magistrate judges shall discharge their duties."[179] Thus, a district judge's utilization of magistrate judges will be guided not only by statute, federal rules, and his or her own preferences, but also by the district's decisions about magistrate judges' 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 the committee's *Suggestions for Utilization* of magistrate judges, available on the Judges' Corner of the J-Net, on the magistrate judges page.[180]

177. *See also* Federal Rules of Civil Procedure 72 & 73.

178. 28 U.S.C. § 636(b)(3).

179. *Id.* § (b)(4).

180. *See* Comm. on the Administration of the Magistrate Judges System, Judicial Conference of the U.S., Suggestions for Utilization of Magistrate Judges, available online

1. Referral of nondispositive matters

Any nondispositive pretrial matter may be referred to a magistrate judge for hearing and determination.[181] 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 conduct any required proceedings promptly and, when appropriate, to issue a written order.[182] Keep in mind, however, that you should assess whether the referral would cause undue delay in a case. Moreover, some district judges prefer to keep nondispositive matters, rather than refer them, so that they may exercise greater oversight and better familiarize themselves with the attorneys and parties in the case.

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 timely objections" filed by a party and should "modify or set aside any part of the [magistrate judge's] order that is clearly erroneous or contrary to law."[183] If a district judge delegates such nondispositive pretrial matters, the judge 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 of a judge's guidelines for counsel, see Appendix A, Form 7.)

Increasingly, many magistrate judges conduct settlement conferences or serve as mediators in court-based ADR programs. You might consider referring cases to magistrate judges for these purposes.

at http://jnet.ao.dcn/Judges/Magistrate_Judges/Utilize.html. This document, along with other assistance on utilization issues, including sample local rules concerning proceedings before magistrate judges and advice on facilitating parties' consent to a magistrate judges' case-dispositive authority, is also available at that site. For additional assistance, contact the Magistrate Judges Division of the Administrative Office at (202) 502–1830.

181. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

182. Fed. R. Civ. P. 72(a).

183. *Id.*

2. Referral of dispositive matters

District judges "may also designate a magistrate judge to conduct hearings, including evidentiary hearings," on dispositive matters.[184] These matters may include motions for injunctions, for judgment on the pleadings, for summary judgment, or to certify a class, as well as appeals from the Social Security Administration seeking disability benefits, 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 recommendations, including findings where appropriate, after a hearing on the record or a review of the case file and motions.[185] 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.

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 proposed disposition to which objection has been made and then enter an appropriate order.[186]

3. Referral of trials

With the consent of the parties, a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" when "specially designated" to do so by the district court.[187] If consent is for all aspects of the case, the magistrate judge conducts all proceedings, including a jury or nonjury trial if necessary. Or, parties may consent to have a magistrate judge rule on a specified case-

184. 28 U.S.C. § 636(b)(1)(B); *see also* Fed. R. Civ. P. 72(b)(1).

185. 28 U.S.C. § 636(b)(1)(B), (C); *see generally* MCL 4th, *supra* note 10, § 11.53.

186. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2), (3).

187. 28 U.S.C. § 636(c)(1). Every United States district court has designated its full-time magistrate judges to exercise this authority. Assignments of such authority to part-time magistrate judges are subject to certain limitations. For additional guidance, contact the Magistrate Judges Division of the Administrative Office at (202) 502-1830.

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.)

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 without adverse substantive consequences.[188] 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 nonjury—before a magistrate judge.

A number of districts place 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 usually 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.

4. Other referrals

Section 636(b)(3) of Title 28 of the U.S. Code grants the courts broad authority to assign "additional duties" to magistrate judges not inconsistent with the Constitution and laws of the United States. For instance, magistrate judges may preside while a jury deliberates, may receive jury verdicts, and may conduct postjudgment proceedings. You also should consult circuit law on the limits of the authority granted under § 636(b)(3).[189]

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:

188. 28 U.S.C. § 636(c)(1).

189. *See* Inventory of United States Magistrate Judge Duties (2009) (on the magistrate judges page of the Judges' Corner on the J-Net), at http://jnet.ao.dcn/Judges/Magistrate_Judges/Authority/Inventory.html.

- *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 individual cases to magistrate judges for some or all pretrial proceedings. Unless the referral is withdrawn, 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.
- *Issue-by-issue assignment.* District judges assign particular motions, such as summary judgment motions, or matters to magistrate judges but otherwise retain complete control over cases for all other matters.

C. Special Masters

Special masters can be a critical asset in some cases. Appointment of special masters is generally limited to large, complex cases and is therefore infrequent.[190] Because the use of special masters is well covered in the *Manual for Complex Litigation, Fourth* and the *Reference Manual on Sci-*

190. Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan & John Shapard, Special Masters' Incidence and Activity 15–21 (Fed. Judicial Ctr. 2000) (a report to the Judicial Conference's Advisory Committee on Civil Rules) [hereinafter Special Masters Study].

entific Evidence, we discuss only some basic issues here, drawing on those two publications.[191]

1. Authority to appoint a special master

Appointment of special masters is governed primarily by Federal Rule of Civil Procedure 53.[192] Unless provided otherwise by statute, a master may be appointed only in exceptional circumstances (Fed. R. Civ. P. 53(a)(1)(B)(i), (ii)). The 2003 amendments to Federal Rule of Civil Procedure 53, however, expand a master's permissible duties to pretrial and posttrial proceedings, limiting duties to nonjury proceedings, unless the parties consent otherwise. The conditions of appointment are (1) to perform duties by party consent; (2) to conduct a nonjury trial in the event of an "exceptional condition," or a "need to perform an accounting or resolve a difficult computation of damages"; or (3) to "address pretrial and posttrial matters" when a district or magistrate judge cannot "timely or effectively" do so (Fed. R. Civ. P. 53(a)(1)(A)–(C)).

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).

In the absence of consent by the parties, the district judge may designate a magistrate judge as special master pursuant to Federal Rule of Civil Procedure 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).

Although judges have authority under Federal Rule of Civil Procedure 53 to make an appointment sua sponte, most judges prefer to act only with the parties' consent.[193]

191. *See* MCL 4th, *supra* note 10, § 11.52; Reference Manual on Scientific Evidence, *supra* note 143, at 59–66.

192. 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 190, at 31–35.

193. *See id.* at 28–30.

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. A master may be useful where "the financial stakes justify imposing the expense on the parties and where the amount of activity required would impose undue burdens on a [district or magistrate] judge."[194] Special masters are also relied on if they have special expertise in a particular field such as patent cases, or cases involving science, business, or technology.[195]

Judges have at times 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 Federal Rule of Civil Procedure 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.

194. MCL 4th, *supra* note 10, § 11.52.

195. *Id.*; *see also* Reference Manual on Scientific Evidence, *supra* note 143, at 59–66; Jay P. Kesan & Gwendolyn G. Ball, A Study of the Role and Impact of Special Masters in Patent Cases (Fed. Judicial Ctr. 2009).

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;[196]
- 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.[197] If you use this method, you may want to ask the parties to provide information about the candidates' qualifications and, if appropriate, for the parties to discuss the candidates with you or to participate in your interviews with the candidates. To avoid later problems, you and the parties should make certain the master has no conflicts of interest.[198]

An order appointing a master should specify what the master is to do and what the master's authority is. Under Rule 53(c), a master, unless you direct otherwise, may "regulate all proceedings" and "take all appropriate measures to perform the assigned duties fairly and efficiently," including "conducting an evidentiary hearing" and "compel[ling], tak[ing], and record[ing] evidence." Special masters may also impose noncontempt sanctions on a party under Rule 37 or 45, or recommend contempt sanctions.

Rule 53(b)(2) requires that the referral order "direct the master to proceed with all reasonable diligence" and to include several matters:

196. 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.

197. *See* Special Masters Study, *supra* note 190, at 35–40.

198. For guidance in avoiding conflicts and other ethical problems, see *Reference Manual on Scientific Evidence*, *supra* note 143, at 66.

- the special master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
- the circumstances, if any, in which the master may communicate ex parte with the court or a party; [199]
- the nature of the materials to be preserved and filed as the record of the master's activities;
- the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
- the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

It is recommended that you consider including in the referral order the following:

- 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;
- periodic reporting, and the timing and method of delivering reports of activity;
- duration of appointment;
- standards of performance;
- the allocation of costs among the parties; and
- liability and immunity of the special master.[200]

You may consider appointing a special master as early as the initial scheduling conference.[201]

199. 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 190, at 46–52.

200. *See* Fed. R. Civ. P. 53(b)(2); MCL 4th, *supra* note 10, § 11.52. For a summary of the contents of special master referral orders, see Special Masters Study, *supra* note 190, at 44–45.

201. Fed. R. Civ. P. 16(c)(2)(H).

4. The special master's report

Federal Rule of Civil Procedure 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 all cases, a party may serve objections to the report no later than twenty-one days after a copy is served, unless you set a different time. You decide "de novo all objections to findings of fact" by the master, unless the parties stipulate, with your approval, that "the findings will be reviewed for clear error; or . . . will be final."[202] You may "adopt or affirm, modify, wholly or partly reject or reverse, or resubmit" the matter to the master with instructions.[203] In jury cases, the master's findings are admissible in evidence.

5. Compensating the special master

Under Federal Rule of Civil Procedure 53(g), 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.[204] 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.

202. Fed. R. Civ. P. 53(f)(2), (3).

203. Fed. R. Civ. P. 53(f)(1).

204. *See* Special Masters Study, *supra* note 190, 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 (PLRA) of 1995, Pub. L. No. 104-134, Apr. 26, 1996, 110 Stat. 1321, § 802(f)(4). The PLRA amends 18 U.S.C. §§ 3624 and 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.

Chapter 9: Using Information Technology for Litigation Management

Understanding the technology available to you and how you can tailor it to your needs is essential to effective case management. The judiciary provides you with both equipment and training opportunities so that you can use technology to your greatest advantage. Information technology (IT) training is offered in five areas: case management, writing and tracking opinions, working remotely outside chambers, keeping a calendar, and trial technologies.[205]

The primary case-management tool for federal judges is the Case Management/Electronic Case Files (CM/ECF) system. It is used in every district court by judges, attorneys, and others to file documents or create docket entries in the system. This system, and other software, can be used to manage your calendar, assist your opinion writing, organize your documents, and ease work flow in your office. This chapter reviews many of the solutions and training programs available to you.

A. Training for Judges and Court Staff

The Federal Judicial Center and Administrative Office have collaborated to offer judges a variety of in-person training programs during the year

205. In 2004, the Judicial Conference Committee on Information Technology determined that judges' IT training should "focus more specifically on judges' tasks and functions" and on the use of technology to accomplish those tasks and functions. The committee identified these five functional areas on which to focus IT training for judges. *See* Report of the Judicial Conference Committee on Information Technology, Sept. 2005, pp. 2–3.

and online training resources that can be found at the FJC's website, http://www.fjc.gov.

1. National workshops for all judges

The Federal Judicial Center offers a series of national workshops each year for appellate, district, bankruptcy, and magistrate judges. These one-and-a-half-day workshops are designed by judges for judges and will give you hands-on experience on how to use computer software, such as Adobe Acrobat, Microsoft Word, Corel WordPerfect, Lotus Notes,[206] and CM/ECF, to accomplish typical chambers tasks.

2. Workshops for newly appointed judges

The Federal Judicial Center also now provides more extensive IT training to magistrate judges as a part of their New Magistrate Judge Automation Orientation program, and will develop similar training to add to the orientation programs for newly appointed appellate, district, and bankruptcy judges. This enhanced IT curriculum consists of three modules: case management, remote connectivity, and desktop management.

In the case-management module, you will learn to

- use JPort[207] to make a connection to the judges' chambers computer;
- log onto CM/ECF to retrieve a motion;
- extract text from a PDF[208] motion;
- paste extracted text into a WordPerfect "note holder" document;
- create a PDF document from a WordPerfect document;
- perform find and search functions in a PDF document; and
- grant a routine motion and file a formal opinion in CM/ECF.

In the remote connectivity module, you will learn to

- customize features on your BlackBerry phone;
- review and manage your e-mail with greater efficiency;

206. Lotus Notes (or "Notes") is the judiciary's official electronic mail software.

207. JPort allows you to remotely access the judiciary's software applications, and your electronic data, as if you were in chambers.

208. Portable Document Format, commonly called PDF, is the type of document produced by Adobe Acrobat software.

- enter orders and delegate tasks directly using the CM/ECF Notice of Electronic Filing report; and
- create an abridged CM/ECF docket sheet.

In the desktop management module, you will learn to

- sort e-mail;
- identify sole-recipient e-mail;
- color-code incoming e-mail;
- manage e-mail using Notes Folders;
- calendar a meeting;
- communicate instantly with chambers staff;
- set Notes to give you directions to meetings and events away from the court; and
- set up an RSS feed to automatically notify you of the latest circuit opinions.

3. Online training for judges

Judges seeking online discussion forums, training modules that can easily fit within your schedule, and regularly updated best-practice tips can use the Federal Judicial Center website "Judges' IT: Ideas and Best Practices for Chambers Automation."[209]

At the site's online library, you can view demonstrations and run tutorials written or suggested by judges. The tutorials include topics such as creating CM/ECF reports (discussed below), docketing orders, managing pleadings, maintaining a calendar, using courtroom technology, and using technology in opinion writing. Future online training opportunities will include a live Web-based monthly workshop of IT tips and techniques prepared for judges by judges.

4. Training for court staff in support of judges

While training is offered at the national level for judges and court staff, you should also turn to your local IT professional for support to best suit your needs. The Federal Judicial Center and the Administrative Office provide workshops to train the trainers within your court. Court employees learn how to plan, develop, and deliver judge-oriented IT train-

209. The Federal Judicial Center and Administrative Office partnered to create the website, located at http://cwn.fjc.dcn/.

ing programs in their districts. These workshops for staff are offered two or three times per year and include topics such as "How Judges Work," "Conducting Training Needs Assessments," "Structured Writing," "Communicating Effectively with Judges and Chambers," and "Using Educational Technologies."

B. Using CM/ECF to Manage Cases

CM/ECF can be modified to reflect your court's local practices. From customized docketing and case-reporting capabilities to twenty-four-hour remote accessibility, the system securely maintains all pleadings filed in a case, as well as other information. Significant features of CM/ECF include

- notices of electronic filings to judges, court staff, and other case participants;
- up-to-the-minute 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 the public, and court users;[210] and
- electronic document management, storage, security, and archiving.

The CM/ECF system is modified regularly largely based on suggestions from judges and court staff. The courts are given regular software releases and informed about the modifications. Administrative Office staff can assist your court with technical help, and the Federal Judicial Center provides judges and staff with training on CM/ECF, as discussed above. The judiciary also has undertaken a process to create a new version of CM/ECF that is proposed to be more fully aligned with the work of judges and the courts, integrating more easily with other judiciary software and databases.[211]

210. The Public Access to Court Electronic Records (PACER) system provides electronic access to the federal courts' case-management systems. PACER allows the public to electronically access court filings and dockets, except those that are sealed. PACER users cannot file in CM/ECF. Instead, attorneys or parties may access a court's CM/ECF system by obtaining a CM/ECF account from the individual court and, even then, have only limited levels of access to the system, as determined by the court.

211. While the requirements for the next generation of the CM/ECF system are still being gathered, it is hoped that the next system will allow judges to more easily assign,

1. Case-management reports

The CM/ECF database enables each court and chambers to design its own package of tailored case-management reports. The automated docketing system contained within CM/ECF collects a great deal of information about each case from which you can extract information relevant to your case-management approach and view information in report formats that suit your needs.

The system will automatically e-mail you and your chambers staff a "Notice of Electronic Filing" that informs you that a docket entry has been added or a document has been filed in one of your cases. The notice includes a description of the event, its date and time of entry, and a live link to the document filed.

As your case progresses, the CM/ECF system can be used to create docket activity reports, showing any events that occur in your cases. Judges also use the system to create docket or motions reports to view and sort pending matters by various criteria, such as the age of a case or event, or its ripeness for disposition. To communicate with your staff about a case or event, you can use the case-management report. This tool allows you to create the electronic equivalent of "sticky notes" on your electronic documents or docket entries, saved privately in the system. The notes and memoranda can be used to make work assignments to staff, and you can set who can view the notes on a per-note basis. The notes are not accessible to the public.

Listed below are some examples of reports judges have found useful as well as the features of those reports:

- *Docket Report*—allows you to view party information and all docket entries for a case. The abridged docket report allows you to limit the report to docket entries within a date range or to certain document numbers.
- *Docket Activity Report*—displays a list of all docketing events that occurred in your cases in a specified time range. You can review this report daily or at other regular intervals to keep track of all activity in your open cases.

schedule, and manage work in chambers, and will have better calendaring capability. It is envisioned that the system will also assist judges in prioritizing and tracking their work, and in tracking old motions and long-pending cases.

- *Motions Report*—lists selected motions (pending, terminated, or both) by case number, office, presiding or referral judge, type of motion, filing date, or trial date. You can sort the report by motions that are ripe for ruling, or other criteria, such as the dates by which all pending motions should be fully briefed.
- *Civil Cases Report*—displays a summary list of cases selected by numerous criteria. For example, you can use the "date filed" criteria to review your cases by the length of time they have been pending.
- *Service and Answer Report*—lists cases in which at least one defendant has not filed an answer, and those cases in which all answers have been filed but no scheduling or pretrial order has been filed. The 120-day rule report lists cases in which one or more defendants have not been served a summons within 120 days of the filing of the case.
- *Trial Settings Report*—shows all cases for which a jury or nonjury trial has been requested, and can be sorted by whether a trial has been set.
- *Unscheduled Cases Report*—shows open cases where a breakdown has occurred in scheduling and nothing is scheduled for the future.
- *Calendar:*
  - *Daily Report*—displays your calendar for a single day by location, case, and event (i.e., appointment, deadline, or hearing), and you can link to related docket entries and filings.
  - *Monthly Report*—displays your calendar for the selected month, listing scheduling information for each case. This scheduling information can be modified or deleted from within the report.
- *Deadlines/Hearings Report*—lists scheduled items for a single case, sorted according to your preference.

See Appendix C for samples of a few of these reports available through CM/ECF.

2. Statistical and conflict-checking reports

The CM/ECF system also generates statistical reports that allow you to view the status of your case activities that are collected by the Administra-

tive Office. Some data on your workload, described below, are also converted into a report that is available to the public.

- *Monthly Trials and Other Court Activity (former JS-10 Form):* This is an automated version of the statistical report that courts must file monthly to report on select activities of each district judge inside and outside the courtroom.
- *MJSTAR Reporting:* The CM/ECF system automatically collects data on the work of magistrate judges, formerly reported by courts on the JS-43 form.
- *CJRA Reporting:* Under the requirements of the Civil Justice Reform Act of 1990, twice each year courts must provide the Administrative Office with data, by individual judge, on motions pending over six months, bench trials submitted more than six months ago, bankruptcy appeals pending over six months, Social Security appeal cases pending over six months, and civil cases pending more than three years.[212] The report is then published on the judiciary's national website, http://www.uscourts.gov. The CM/ECF system allows the judge to enter status codes explaining any causes for delay in the reportable motions or cases, then automatically sends the data to the Administrative Office for inclusion in the final report. The CJRA report does not report sealed cases, sealed motions, or sealed bench trials.
- *Conflict-Checking Reports:* The Judicial Conference requires that judges use automated conflict-screening for each case they are assigned, and judges use the conflict-checking software that has been added to the CM/ECF system to accomplish this requirement. The software is not a fail-safe and should be used to supplement your regular review of cases to ensure that no conflicts of interest exist.

C. Case Management Outside Chambers

You may have to conduct business in multiple courthouses, while on travel, or at home. The judiciary provides you with the equipment and software you need, such as a BlackBerry or laptop computer, and various judiciary-supported software applications. These technologies enable you

212. *See* Admin. Office of the U.S. Courts, Guide to Judiciary Policy, vol. 18.

to have complete, twenty-four-hour remote access to your chambers from nearly anywhere.

While remote access to CM/ECF requires only an Internet connection, you will need additional software to connect to the judiciary's private data communications network (DCN), which, in turn, will allow you access to the judiciary's other systems. Recognizing this need, the Judicial Conference Committee on Information Technology authorized the Administrative Office to develop virtual private network (VPN) technology. The judiciary encourages the use of JPort software to access the judiciary's DCN remotely. Using JPort, you can conduct your business as if you were sitting in chambers.[213]

213. See the Federal Judicial Center's webpage, Judges' IT: Ideas and Best Practices for Chambers Automation (at http://cwn.fjc.dcn/jit/home.nsf), for tools to assist you with remote access.

Appendix A: List of Sample Forms

Below is a list of sample forms. The forms are available online in PDF. They can be found on the Federal Judicial Center's intranet site, FJC Online, at http://cwn.fjc.dcn/fjconline/home.nsf/pages/1245; on the Center's Internet site at http://www.fjc.gov/public/home.nsf/pages/1245; and on the AO's J-Net at http://jnet.ao.dcn/Judges/Publications/CivilLitig.html.

The sample forms included in this appendix were obtained from the courts or their websites. Forms and orders are the copy in use by the court or the judge whose name is on the form or order, as of this writing.

These forms and orders illustrate multiple aspects of civil procedure and case management. Citation to a form to illustrate a particular point does not suggest the form is useful for only that point. A review of the forms generally may provide helpful ideas and language on a variety of matters.

Form 1: Initial Case Management Scheduling Order
Form 2: Order for Rule 26(f) Planning Meeting and Rule 16(b) Scheduling Conference
Form 3: Initial Scheduling Order
Form 4: Guidelines for Discovery, Motion Practice and Trial
Form 5: Individual Practices of Judge Miriam Goldman Cedarbaum
Form 6: Recommended Model for Individual Judge's Practices
Form 7: Standing Order for Matters Before Judge Martin J. Jenkins
Form 8: Instructions Regarding Pretrial Proceedings
Form 9: Standing Pretrial Procedure Order and Forms
Form 10: Report of Parties' Planning Meeting (Form 35, Fed. R. Civ. P.)
Form 11: Joint Case Management Statement and Proposed Order
Form 12: Order Setting Case Management Conference and Requiring Joint Case Management Statement
Form 13: Minute Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement
Form 14: Report of Parties' Planning Meeting Under Fed. R. Civ. P. 26(f) and L.R. 16.3(b)
Form 15: Report of Parties' Rule 26(f) Planning Conference
Form 16: Uniform Trial Practice and Procedures
Form 17: Jurisdictional Checklist

Appendix B: Guidelines for Ensuring Fair and Effective Court-Annexed ADR, Court Administration and Case Management Committee

Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals

Report of the ADR Task Force of the Court Administration and Case Management Committee

December 1997

I. Background

In June 1995, the Court Administration and Case Management Committee established an ADR Task Force, composed of Magistrate Judge John Wagner (OK-N), Bankruptcy Judge Barry Russell (CA-C), and District Judge Jerome Simandle (NJ), who served as chair. The purpose of the Task Force was to consider the issue of ethical guidelines for private sector attorneys who serve as neutrals in court-annexed ADR programs. This step was prompted by the substantial growth of such programs during the 1990s, programs which at this time are governed only by local rules. The Task Force's concerns were driven largely by rapid change in the district courts, but it recognized that ADR has grown apace in the appellate and bankruptcy courts as well.

To determine the incidence and nature of ethical problems in district court ADR proceedings, the Task Force held a series of meetings with those involved in court-annexed programs, including judges, court ADR staff, attorneys who serve as neutrals, and academics. There was general agreement that the incidence of ethical problems is low but that the combination of rapidly growing programs, sometimes inadequate training of ADR neutrals, and judges who are unfamiliar with ADR creates a potential for serious ethical breaches.

Through its meetings with the various ADR experts, the Task Force identified four areas where problems are likely to arise when courts use

private sector attorneys as ADR neutrals: past, present, and future conflicts of interest; confidentiality of materials and information disclosed during ADR; exposure of the neutral to subpoena to testify in subsequent litigation; and protection of ADR neutrals from civil liability through immunity.

For a number of reasons, the Task Force determined that national ADR ethics rules would be premature at this time. Not only did the ADR experts advise against them, but the Task Force believes there is considerable value in encouraging further experimentation at the local level before national rules, if any, are drafted. Furthermore, some issues, such as immunity and conflicts of interest, are either very complicated, are currently the subject of in-depth study by other organizations, or would require statutory authorization, which the Task Force is not prepared to recommend.

Nonetheless, the Task Force did conclude that it would be useful for the Committee to issue a general statement encouraging courts to give careful consideration to several specific ethical issues and advising the courts on the attributes of a well-functioning court-annexed ADR program. A recommendation to this effect was made and accepted at the June 1996 Committee meeting. The Task Force has subsequently identified the attributes of a well-functioning court-annexed ADR program and has developed a set of ethical principles for ADR neutrals. These are presented below.

II. The Attributes of a Well-Functioning Court-Annexed ADR Program

Our Task Force agrees with the consensus view that a federal court must make a conscious effort to determine whether some type of ADR is an appropriate response to local dockets, customs, practices, and demands for ADR services. We also believe that, for ADR to be most responsive to local conditions, it should be implemented at the local court level (district, appellate, or bankruptcy). There is sufficient breadth in the Federal Rules of Civil Procedure and other legislation, as the Judicial Conference has found, to foster and support implementation of varying ADR programs in the local courts.

Although we have witnessed the gradual development of a preference for mediation, we have not seen the emergence of a single type of ADR that should serve as a paradigm for all courts and we recommend none

here. Nevertheless, the Task Force believes there are common attributes of well-functioning ADR programs that all courts should strive to incorporate into their ADR programs and that should be enunciated through local rules.

At the same time, we recognize the need for flexibility in providing a means for dispute resolution that is informal, inexpensive, and adaptable. ADR is often valued, in fact, as an alternative to rule-bound and costly procedures like motion practice and trial. One cannot lose sight of the fact, however, that federal cases referred to ADR can be factually or legally complicated and can have high stakes. In such an environment, the basic ingredients of a fair and effective court-annexed ADR program should include at least minimal rules with respect to the expectations placed upon the court staff and judicial officers, the appointed neutrals, and the participants (attorneys and litigants).

Both research and anecdote suggest that, to date, litigants in federal court ADR programs have had positive experiences.[1] Our goal is to ensure that this remains true in the future. As use of ADR and understanding of its characteristics continue to grow, we feel that some guidance is both warranted and now possible. Thus, we offer the following eight attributes of a well-functioning court-annexed ADR program, drawn from our discussions with ADR experts, our own experiences, and other sources.[2] Given the critical role played by ADR neutrals, on whom the effectiveness, integrity, and reputation of court ADR rests, we address this attribute of court programs separately in Section III.

1. Research has consistently shown high attorney and litigant satisfaction with ADR procedures, including the fairness of these procedures. For the most recent research in federal courts, see *Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND 1997) and *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Federal Judicial Center 1997).

2. Other sources include two symposia offered by the Federal Judicial Center for representatives from district and bankruptcy courts with new or established ADR programs, as well as the National ADR Institute for Federal Judges, co-sponsored by the Federal Judicial Center, the Center for Public Resources, and the ABA's Litigation Section. A handbook prepared for the Institute, *Judge's Deskbook on Court ADR* (Center for Public Resources 1993), has served as a useful guide for courts interested in ensuring the quality of their ADR efforts. [*Editor's note:* The *Deskbook* can be found on the Federal Judicial Center's website, http://www.fjc.gov.]

1. **The local court should, after consultation among bench, bar and participants, define the goals and characteristics of the local ADR program and approve it by promulgating appropriate written local rules.**

   Comment: The program's structure follows the identification of its goals. The court should identify its needs after consultation with all constituencies, especially the advisory group set up under the CJRA if it is still in operation. The necessity for written guidance is self-evident, and the local rules process provides the surest means of careful promulgation. These rules should contain provisions to address each of the attributes discussed here, with special attention to ethical guidelines for ADR neutrals.[3]

2. **The court should provide administration of the ADR program through a judicial officer or administrator who is trained to perform these duties.**

   Comment: An ADR program does not run itself and cannot succeed without leadership. The selection of cases, administration of the panel of neutrals, matters concerning compensation of neutrals, and ethical problems will need to be addressed from time to time by a person with authority to speak for the court. During the past five years, a number of courts have appointed full-time, professional ADR staff, to whom they have assigned many core ADR functions, such as recruitment and training of neutrals, assignment of cases to neutrals, and evaluation of program effectiveness. Professional ADR staff can be particularly helpful in handling problems that arise in ADR, providing a buffer between the parties, neutral, and assigned judge. Although courts can retain these staff through the use of local funds, additional funding will depend on actions taken by the Judicial Resources Committee and the Judicial Conference of the United States. Where such staff are not available, their important functions can be and often ably have been performed by an ADR liaison judge.

3. For guidance in designing an ADR program and determining what topics should be covered by local rules, courts are strongly encouraged to consult the *Judge's Deskbook on Court ADR, supra* note 2 (available from the Federal Judicial Center). [*Editor's note:* See also the *Guide to Judicial Management of Cases in ADR* (Fed. Judicial Ctr. 2001) available on the Federal Judicial Center's website, http://www.fjc.gov.]

The important point is to have someone who is responsible for the program.

3. **When establishing a roster of neutrals for cases referred to ADR, the court should define and require specific levels of training and experience for its ADR neutrals, and appropriate training should be provided through the court or an outside organization. Training should include techniques relevant to the neutral's functions in the program, as well as instruction in ethical duties.**

   Comment: Court-appointed ADR neutrals are typically experienced attorneys from the local bar or, less frequently, attorneys specializing in an ADR practice. We have found, however, great variability in the training of these appointed neutrals. Some courts require no training, some provide training by judicial officers, and some provide training by expert consultants. No funding for training of attorney-neutrals has been available from central budget sources, so courts have sometimes funded training from local sources, such as bar associations or attorney admission funds, or have required the trainees to bear the cost. The training of a court's ADR neutrals, tailored to the goals and structure of the local program, is an essential ingredient of a well-functioning court-annexed ADR program. ADR neutrals cannot be expected to perform the sensitive functions of their role unless they have the necessary skills. Mediation and other techniques require special insights into the process that may be unavailable to ordinary litigators, no matter how experienced. Training should include instruction on ethics, to increase the sensitivity of the court-appointed neutral to the ethical demands of these duties.

4. **The court should adopt written ethical principles to cover the conduct of ADR neutrals.**

   Comment: Well-defined ethical principles are part and parcel of a well-functioning ADR program and are discussed in greater detail in Section III. Principles addressing past, present, and future conflicts, impartiality, protection of confidentiality, and protection of the trial process all should be included in a court's ADR rules. No national model for such ethical rules has yet emerged. It should be apparent that the American Bar Association's (ABA) Model Rules of Professional Conduct (RPC) (which derive from an adversarial conception

of an attorney-client relationship that is not pertinent to an attorney-neutral) and the Code of Conduct for United States Judges (which addresses the ethics of judges who adjudicate cases by exercise of judicial power) do not precisely fit the roles and functions of the appointed ADR neutral in most court programs. Similarly, the Model Standards of Conduct for Mediators, promulgated in 1995 by the American Arbitration Association (AAA), ABA, and Society for Professionals in Dispute Resolution (SPIDR), provide a helpful and thoughtful guide for mediators generally but not necessarily for mediators in court-annexed programs. Therefore, until national federal rules or guidelines, if any, are promulgated, courts should make certain their local rules spell out the duties of and constraints upon ADR neutrals.

5. Where an ADR program provides for the attorney-neutral to receive compensation for services, the court should make the method and limitations upon compensation explicit. A litigant who is unable to afford the cost of ADR should be excused from any fees.

Comment: Methods of compensation for ADR neutrals vary widely from court to court.[4] Some courts use a panel of neutrals who serve completely pro bono. Other courts use a modified program, where a certain number of hours are rendered free of charge, with a fixed hourly rate thereafter, while still others have a fixed per-case payment schedule (such as in the statutory arbitration courts under 28 U.S.C. § 651, et seq.). [*Editor's note:* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659–62 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)). After preparation of these guidelines in December 1997, the ADR Act of 1998 was codified at 28 U.S.C. §§ 651–658 (1998). Before passage of the ADR Act in October 1998, these U.S. Code provisions were more limited in scope, authorizing mandatory arbitration in ten districts and voluntary arbitration in another ten districts and setting

4. For the range of fee arrangements used in the district courts, see *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 29–56 (Federal Judicial Center 1996). [*Editor's note:* See also the Judicial Conference's regulations regarding the compensation of ADR neutrals (including arbitrators) adopted at Report of Proceedings of the Judicial Conference of the United States, Sept. 1999, pp. 53–54, and set forth in the *Guide to Judiciary Policies.*]

out provisions for implementing the arbitration programs. The ADR Act of 1998 retains the authority of the twenty districts to refer cases to arbitration (see 28 U.S.C. § 654(d) (1998)), but it also authorizes ADR more generally for the district courts.] Other programs have left the matter of compensation to the participants themselves, for negotiation with the neutral. Whatever funding mechanism is decided upon, the court's rule should minimize undue burden and expense for ADR, yet not impose on the ADR neutrals to render sophisticated or prolonged services on a pro bono basis as a matter of course. Where the court draws upon a panel of federal litigators to render service as ADR neutrals, the court must avoid the appearance of an attorney earning a benefit in litigation as a result of service to the court as an ADR neutral.

6. **The local court should adopt a mechanism for receiving any complaints regarding its ADR process and for interpreting and enforcing the local rules for ADR, including the ethical principles it adopts.**

   Comment: Courts have adopted a variety of mechanisms for handling problems in ADR, ranging from the appointment of a compliance judge (or ADR liaison judge) with general supervisory authority to the appointment of an ADR administrator who receives such complaints or other feedback and channels them appropriately to the court. It is important, whatever mechanism is decided upon, that the parties be aware of its availability and that it be relatively speedy and simple. Among the problems such a mechanism can address are failures of a party to attend the ADR session, scheduling difficulties, ineffectiveness of the ADR neutral and ethical problems.

7. **The court should carefully define the scope of confidentiality intended for information exchanged in its ADR program, striking a balance between absolute protection of ADR process information and the need to avoid shielding misconduct by participants or neutrals.**

   Comment: The candor of adversaries in a negotiation process can often depend on the confidentiality of negotiations, although this concern may be lessened in an evaluative or arbitral settlement process involving little or no confidential exchange. The rules of confidentiality and disclosure for attorney-client information under RPC 1.6

[*Editor's note:* RPC refers to the American Bar Association's Model Rules of Professional Conduct] will generally not apply to negotiations between adverse parties or discussions with an ADR neutral, and likewise Fed. R. Evid. 408 will not render confidential, but merely inadmissible for most purposes, evidence of conduct or statements made in compromise negotiations. In addition, most states have not adopted a statutory ADR privilege and therefore the degree of protection given by a local confidentiality rule will vary.

A blanket rule deeming the entire ADR process confidential has appeal, to protect the need of participants to share settlement facts with each other and with the attorney-neutral without fear that such information will be used against them in another forum. If the ADR process permits ex parte communications with the neutral, the participants should be assured that information imparted in confidence will not be shared unless authorized. A rule of complete confidentiality may be overbroad, however, and therefore costly if, for example, a participant has abused the process or revealed a fraud or crime. As in Rule 408, evidence does not become confidential merely because it was presented to the ADR neutral if it was otherwise discoverable by an adverse party independently of the ADR proceeding.

To avoid the problems of an overbroad rule, the confidentiality rule could provide that (a) all information presented to the ADR neutral is deemed confidential unless disclosure is jointly agreed to by the parties and (b) shall not be disclosed by anyone without consent, except (i) as required to be disclosed by operation of law, or (ii) as related to an ongoing or intended crime or fraud, or (iii) as tending to prove the existence or terms of a settlement, or (iv) as proving an abuse of the process by a participant or an attorney-neutral.

Whatever rule of confidentiality a court chooses, it will be informing the expectations of the ADR participants. The parties' expectations at the outset are material and will shape the ADR neutral's duties of confidentiality, as reflected in suggested Principle 6 below. The AAA/ABA/SPIDR standards, supra, thus state as to confidentiality: "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality." It is best practice to assure that the participants understand the contours of the confidentiality re-

quirements and protections at the outset by having the ADR neutral review the court's rule with them.

8. **The court should evaluate and measure the success of its ADR program, perhaps in conjunction with its advisory group.**

   Comment: In many districts with successful ADR programs, the advisory groups established by the CJRA have had important roles in designing, implementing, and evaluating the court's ADR processes. Whether an advisory group is used or not, however, it remains the responsibility of the local court to ensure that its program provides the quality and integrity of service that is commensurate with the court's aspirations and the parties' expectations. Unless such evaluation and measurement are included, the court may remain unaware of areas in need of improvement.

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These attributes of healthy and responsive ADR programs are not meant to provide an exclusive list. Courts may have needs and goals that go beyond these principles. The Task Force recommends the consideration of these principles as constituting a benchmark for a court-annexed ADR program.

III. Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs

If courts continue to use practicing attorneys as neutrals in court-annexed ADR programs, they must make sure their local rules satisfactorily address the role of the attorney-neutral. Particularly important are rules regarding ethical issues, such as maintaining confidentiality and revealing conflicts of interest. When adopting such rules, courts should make sure the rules are consistent with the type of ADR program established. For example, while existing rules for judges and lawyers operating in advocacy roles may translate to some extent to adjudicative ADR processes such as arbitration, they cannot properly be applied to non-adjudicative ADR processes such as mediation, where the attorney-neutral acts neither as judge nor advocate but rather as a neutral facilitator in a non-binding process. In designing ethical guidelines appropriate

to the type of ADR program adopted, courts should be encouraged to consider each of the following principles.

1. **An attorney-neutral appointed or selected by the court should act fairly, honestly, competently, and impartially.**

   Comment: This is an objective, not subjective, standard. Should the integrity or competency of an attorney-neutral be questioned, the inquiry should be whether an attorney-neutral has acted fairly, honestly, competently, and impartially. Whether this standard has been met should be measured from the point of view of a disinterested, objective observer (such as the judge who administers the ADR program), rather than from the point of view of any particular party.

   The imposition of a subjective appearance standard would unfairly require the neutral to withstand the subjective scrutiny of the interested parties, who, for example, might seek to attack the neutral's impartiality if disappointed by the settlement. As this would undermine the important public interest in achieving binding settlements, there is no intention to impose such a subjective standard under this principle.

2. **An attorney-neutral should disqualify himself or herself if there is a conflict of interest arising from a past or current relationship with a party to the ADR process.**

   Comment: Ordinarily, an attorney-neutral cannot perform effectively as a neutral if there is a past or present representational or other business relationship with one of the parties to the dispute, even if that relationship existed only in connection with entirely unrelated matters. However, such conflicts of interest may be waived by the parties, so long as the particulars of the representational or other business relationship are first fully disclosed on a timely basis. Family relationships, and relationships that give rise to an attorney-neutral's having a financial interest in one of the parties or in the outcome of the dispute, or prior representation with regard to the particular dispute to be addressed in the ADR process, cannot be waived.

   The Code of Conduct for United States Judges, which incorporates 28 U.S.C. § 455, provides guidance as to the grounds for disqualification of judges. Although the Code of Judicial Conduct is not directly applicable to the attorney-neutral context, it does set out

some guiding principles that can be applied if modified to accommodate the different orientation of an attorney-neutral operating in an ADR, as opposed to a public adjudication, context. Keep in mind, however, that § 455 is expressly required as the appropriate standard when evaluating the actions of arbitrators (28 U.S.C. § 656(a)(2)). [*Editor's note: See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4662 (1988) (previously codified at 28 U.S.C. § 656(a)(2) (1994)). *See also* 28 U.S.C. § 655(b)(2) (1998).]

3. **An attorney-neutral should avoid future conflicts that may arise after the ADR proceeding is complete. Thus, an attorney-neutral should be barred from representing a party to the ADR proceeding with regard to the same or substantially related matters, as should his or her law firm, except that no future conflict with regard to substantially related matters will be imputed to his or her law firm after the expiration of one year from completion of the ADR process, provided that the law firm shields the ADR neutral from participating in the substantially related matter in any way.**

   Comment: Parties to an ADR proceeding have a reasonable expectation that they will not be harmed in the future from an ADR neutral's knowledge about them, especially confidential information gained during the ADR process. Thus, this principle would preclude the ADR neutral from representing any other ADR party in the same or substantially related matters, recognizing the sensitive nature of information, opinions, and strategies learned by the ADR neutral. The same impairment would be imputed to the neutral's law firm in the same case, but it would dissipate with the passage of time, our recommendation being one year, in any substantially related matter. This safe harbor recognizes that it would be far too draconian to automatically preclude the law firm's representation of a prospective client for all time merely because an attorney-neutral in that firm conducted ADR proceedings involving that party in the past, even in a substantially related matter. This provision assumes that the attorney-neutral has observed the duty of confidentiality and that he or she can be screened from any future related matter undertaken by the firm.

A conflict rule that generally disqualifies an entire law firm from representing any party that participates in an ADR proceeding conducted by an attorney in the firm will have severe and adverse effects on court-annexed ADR programs that use active lawyers as neutrals. Finally, because an attorney who serves as a court-appointed ADR neutral does not thereby undertake the representation of the participants as clients in the practice of law, ethical rules governing future conflicts of interest arising from past representation, such as the ABA Model Rules of Professional Conduct 1.9 and 1.10, do not appear to apply.

4. **Before accepting an ADR assignment, an attorney-neutral should disclose any facts or circumstances that may give rise to an appearance of bias.**

   Comment: Once such disclosure is made, the attorney-neutral may proceed with the ADR process if the party or parties against whom the apparent bias would operate waive the potential conflict. The best practice is for the attorney-neutral to disclose the potential conflict in writing and to obtain written waivers from each party before proceeding.

5. **While presiding over an ADR process, an attorney-neutral should refrain from soliciting legal business from, or developing an attorney-client relationship with, a participant in that ongoing ADR process.**

   Comment: This provision prohibits the development of a representational attorney-client relationship, or the solicitation of one, during the course of an ADR process. It is not intended to preclude consideration of enlarging an ADR process to include related matters, nor is it intended to prevent the ADR neutral from accepting other ADR assignments involving a participant in an ongoing ADR matter, provided the attorney-neutral discloses such arrangements to all the other participants in the ongoing ADR matter.

6. **An attorney-neutral should protect confidential information obtained by virtue of the ADR process and should not disclose such information to other attorneys within his or her law firm or use such information to the advantage of the law firm's clients or to the dis-**

advantage of those providing such information. However, notwithstanding the foregoing, an attorney-neutral may disclose information (a) that is required to be disclosed by operation of law, including the court's local rules on ADR; (b) that he or she is permitted by the parties to disclose; (c) that is related to an ongoing or intended crime or fraud; or (d) that would prove an abuse of the process by a participant or an attorney-neutral.

Comment: This provision requires protection of confidential information learned during ADR processes. For this purpose, information is confidential if it was imparted to the ADR neutral with the expectation that it would not be used outside the ADR process; information otherwise discoverable in the litigation does not become confidential merely because it has been exchanged in the ADR process. This principle also permits disclosure of information that is required to be disclosed by operation of law. This provision accommodates laws such as those requiring the reporting of domestic violence and child abuse.

7. **An attorney-neutral should protect the integrity of both the trial and ADR processes by refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the ADR process, unless all of the participants agree and jointly ask the attorney-neutral to communicate in a specified way with the assigned trial judge.**

Comment: Courts implementing ADR programs should specifically adopt a written policy forbidding attorney-neutrals from speaking with the assigned trial judge about the substance of confidential negotiations and also prohibiting the assigned trial judge from seeking such information from an attorney-neutral. Docket control should be facilitated by means of the attorney-neutral's report of whether the case settled or not or through other periodic reporting that does not discuss parties' positions or the merits of the case. Such reports should be submitted to the ADR administrator, judicial ADR liaison, or the court clerk or his or her designee.

Public confidence in both the trial and settlement processes can be undermined if direct communication is permitted between the at-

torney-neutral and the assigned trial judge regarding the merits of the case or the parties' confidential settlement positions. However, it does no harm to communicate with the trial judge at the joint request of the parties, such as requests for continuances, discovery accommodations, more time to pursue the effort, or administrative closure of the case pending implementation of a settlement agreement.

8. **An attorney-neutral should fully and timely disclose all fee and expense requirements to the prospective participants in the settlement process in accordance with the rules of the program. When an ADR program provides for the attorney-neutral to receive a defined level of compensation for services rendered, the court should require the parties to make explicit the method of compensation and any limits upon compensation. A participant who is unable to afford the cost of ADR should be excused from paying.**

   Comment: If the court intends to require a certain level of pro bono service in order to participate as an attorney-neutral in a court-annexed ADR program, the level of the pro bono commitment should be explicitly defined. Where courts permit neutrals to charge a fee to ADR participants, disputes about ADR fees, though rare, can be prevented through disclosure at the outset of the fee arrangements.

Appendix C: Sample CM/ECF Reports

Below is a list of sample CM/ECF reports, available online in PDF. They can be found on the Federal Judicial Center's intranet site, FJC Online, at http://cwn.fjc.dcn/fjconline/home.nsf/pages/1245; on the Center's Internet site at http://www.fjc.gov/public/home.nsf/pages/1245; and on the AO's J-Net at http://jnet.ao.dcn/Judges/Publications/CivilLitig.html.

Docket Activity Report
Motions Report
Ripe Motions Report
Abridged Docket Report

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- Program 3: *Markman* Issues in Biotech Patent Cases (FJC Media Library No. 4048-V/01)
- Program 4: Basic Principles of Toxicology (FJC Media Library No. 4049-V/01)
- Program 5: Basic Principles of Epidemiology (FJC Media Library No. 4050-V/01)
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Appendix E: Table of Statutes and Acts

Appendix F: Table of Rules

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Civil Litigation Management Manual, Second Edition

2010 Judicial Conference of the United States, Committee on Court Administration and Case Management

This manual provides trial judges a handbook on managing civil cases. It sets out a wide array of case-management techniques, beginning with early case screening and concluding with steps for streamlining trials and final disposition. It also discusses a number of special topics, including pro se and high visibility cases, the role of staff, and automated programs that supports case management. This new edition incorporates statutory and rules changes and contains updated advice on electronic case management, electronic discovery, and ways of containing costs and expediting cases. The manual, which was produced and is being updated pursuant to a requirement set forth in the Civil Justice Reform Act of 1990, is based on the experiences of federal district and magistrate judges and reflects techniques they have developed. It was prepared under the direction of the Judicial Conference Committee on Court Administration and Case Management, with substantial contributions from the Administrative Office of the U.S. Courts and the Federal Judicial Center, and was approved by the Judicial Conference in March 2010. This new edition supersedes the first edition (2001) and the Manual for Litigation Management and Cost and Delay Reduction (1992).

Civil Litigation Management Manual, Second Edition (PDF, 220 pp.)

Note: Appendices A and C of the manual including sample procedures and guidelines, orders, and other materials can be downloaded below. Appendices A and C are only available on line and are not included in the published manual.

Appendix A: Sample Forms

Form 1: Initial Case Management Scheduling Order (PDF, 2 pp.)

Form 2: Order for Rule 26(f) Planning Meeting and Rule 16(b) Scheduling Conference (PDF, 8 pp.)

Form 3: Initial Scheduling Order (PDF, 2 pp.)

Form 4: Guidelines for Discovery, Motion Practice and Trial (PDF, 10 pp.)

Form 5: Individual Practices of Judge Miriam Goldman Cedarbaum (PDF, 3 pp.)

Form 6: Recommended Model for Individual Judge's Practices (PDF, 6 pp.)

Form 7: Standing Order for Matters Before Judge Martin J. Jenkins (PDF, 2 pp.)

Form 8: Instructions Regarding Pretrial Proceedings (PDF, 37 pp.)

Form 9: Standing Pretrial Procedure Order and Forms (PDF, 20 pp.)

Form 10: Report of Parties' Planning Meeting (Form 35, Fed. R. Civ. P.) (PDF, 2 pp.)

Form 11: Joint Case Management Statement and Proposed Order (PDF, 3 pp.)

Form 12: Order Setting Case Management Conference and Requiring Joint Case Management Statement (PDF, 3 pp.)

Form 13: Minute Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement (PDF, 4 pp.)

Form 14: Report of Parties' Planning Meeting Under Fed. R. Civ. P. 26(f) and L.R. 16.3(b) (PDF, 3 pp.)

Form 15: Report of Parties' Rule 26(f) Planning Conference (PDF, 10 pp.)

Form 16: Uniform Trial Practice and Procedures (PDF, 2 pp.)

Form 17: Jurisdictional Checklist (PDF, 2 pp.)

Form 18: Order Concerning Removal (PDF, 2 pp.)

Form 19: Scheduling Order (PDF, 2 pp.)

Form 20: Case Management Order (PDF, 4 pp.)

Form 21: Rule 16(b) Scheduling Order (PDF, 7 pp.)

Form 22: Rule 16 Initial Order (PDF, 3 pp.)

Form 23: Pretrial Scheduling Order (PDF, 3 pp.)

Form 24: Pretrial Order – Civil Case (PDF, 5 pp.)

Form 25: Scheduling Order and Standing Order on Discovery Procedures (PDF, 8 pp.)

Form 26: Scheduling Order for Social Security Cases (PDF, 3 pp.)

Form 27: Motions Order for Social Security Cases (PDF, 1 pp.)

Form 28: Local Rules and Orders Pertaining to Differentiated Case Management (PDF, 17 pp.)

Form 29: Joint Status Report and Provisional Discovery Plan (PDF, 4 pp.)

Form 30: Order for Settlement Conference (PDF, 2 pp.)

Form 31: Order Referring Case to Alternative Dispute Resolution (PDF, 3 pp.)

Form 32: Mediation Stipulation (PDF, 2 pp.)

Form 33: Order Dismissing Case When Parties Have Not Timely Advised Court of the Outcome of Settlement Efforts (PDF, 1 pp.)

Form 34: Stipulation of Settlement and Order of Dismissal (PDF, 2 pp.)

Form 35: Standing Order Governing Final Pretrial Conference (PDF, 9 pp.)

Form 36: Final Pretrial Order (PDF, 5 pp.)

Form 37: Order for Pretrial Preparation (PDF, 6 pp.)

Form 38: Pretrial Order (PDF, 10 pp.)

Form 39: Final Pretrial Order (PDF, 6 pp.)

Form 40: Order for Final Pretrial Conference (PDF, 8 pp.)

Form 41: Trial Order (PDF, 11 pp.)

Form 42: Juror Questionnaire (PDF, 1 pp.)

Form 43: Juror Questionnaire (PDF, 1 pp.)

Form 44: Order Setting Civil Jury Trial (PDF, 6 pp.)

Form 45: Judge Paul A. Zoss's Voir Dire (PDF, 2 pp.)

Form 46: Civil Jury Trial Checklist (PDF, 4 pp.)

Form 47: Guidelines for Preparation of Jury Instructions (PDF, 2 pp.)

Form 48: Expectations and Requirements for Trials (PDF, 7 pp.)

Form 49: Procedure for Presentation of Direct Testimony by Written Statement (PDF, 1 pp.)

Form 50: Referral Order for Referring Matters to Magistrate Judges (PDF, 1 pp.)

Form 51: Order of General Reference to Magistrate Judges (PDF, 3 pp.)

Form 52: Notice, Consent, and Reference of a Civil Action to a Magistrate Judge (PDF, 1 pp.)

Form 53: Statement of Consent to Proceed Before a United States Magistrate Judge and Designation (PDF, 2 pp.)

Appendix B: Guidelines for Ensuring Fair and Effective Court-Annexed ADR, Court Administration and Case Management Committee

See manual

Appendix C: Sample CM/ECF Reports

Appendix C: Docket Activity Report (PDF, 3 pp.)

Appendix C: Motions Report (PDF, 2 pp.)

Appendix C: Ripe Motions Report (PDF, 2 pp.)

Appendix C: Abridged Docket Report (PDF, 2 pp.)

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