

Part I

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Fair and efficient resolution of complex litigation requires at least that (1) the court exercise early and effective supervision (and, where necessary, control); (2) counsel act cooperatively and professionally; and (3) the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings. The generic principles of pretrial and trial management are covered in sections 11 and 12 and are applied to specific types of litigation in Part III. Section 10 discusses matters that cut across all phases of complex litigation.

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Although not without limits, the court’s express and inherent powers enable the judge to exercise extensive supervision and control of litigation. The Federal Rules of Civil Procedure, particularly Rules 16, 26, 37, 42, and 83, contain numerous grants of authority that supplement the court’s inherent power⁹ to manage litigation. Federal Rule of Civil Procedure 16(c)(12) specifically addresses complex litigation, authorizing the judge to adopt “special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”

In planning and implementing case management, the court should keep in mind the goal of bringing about a just resolution as speedily, inexpensively, and fairly as possible. Judges should tailor case-management procedures to the needs of the particular litigation and to the resources available from the parties and the judicial system. Judicial time is the scarcest resource of all: Judges should use their time wisely and efficiently and make use of all available help. Time pressures may lead some judges to believe that they should not devote time to civil case management. Investing time in the early stages of the litigation, however, will lead to earlier dispositions, less wasteful activity, shorter trials, and, in the long run, economies of judicial time and fewer judicial burdens.

9. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42–51 (1991); *Pedroza v. Cintas Corp.*, No. 6-013247-CV, 2003 WL 828237, at *1 (W.D. Mo. Jan. 9, 2003). References to “Rule(s)” refer to the Federal Rules of Civil Procedure.

10.11 Early Identification and Control

Judicial supervision is most needed and productive early in the litigation. To this end, courts should have a method of advising the assigned judge immediately that a case is likely to be complex; courts should also instruct lawyers to alert the judge in such a case. A case that needs increased supervision may not be apparent from the docket sheet.

The judge should hold an initial pretrial conference under Rule 16¹⁰ as soon as practical (many judges hold the conference within thirty to sixty days of filing), even if some parties have not yet appeared or even been served. Special procedures sometimes are needed even before the initial conference (for example, it may be necessary to take immediate action to preserve evidence).

Rule 16(b) requires the judge, usually after holding a scheduling conference, to issue a scheduling order¹¹ “as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant” (local rules may establish different deadlines). The initial pretrial conference may be used for this purpose unless a separate scheduling conference is needed. Many judges use standing case orders—sometimes tailored to specific types of litigation—to elicit specific information before the conference and to inform counsel of the matters they must be prepared to discuss.¹²

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Each multijudge court should determine for itself how assignment of complex litigation should be made: according to the court’s regular case-assignment plan, under a special rotation for complex cases, or to judges particularly qualified by reason of prior experience. Courts that do not assign actions automatically to a specific judge upon filing should nevertheless make an individual assignment as soon as a case is identified as complex or a part of

10. For discussion of the matters that should or may be covered in this and subsequent conferences, see *infra* section 11.2 (pretrial conferences). Special procedures may be needed even before the initial conference; for example, it may be necessary to take immediate action to preserve evidence. See *infra* section 11.442 (documents preservation).

11. For a sample scheduling order, see *infra* section 40.24.

12. For a sample order, see *infra* section 40.54 (civil RICO case-statement order); see also Civil Litigation Management Manual app. A, at 213–15 (Federal Judicial Center 2001) [hereinafter Litigation Manual] (Sample Form 12).

complex litigation. In unusual situations, the demands of complex litigation may be great enough to justify relieving the assigned judge from some or all other case assignments for a period of time or giving the judge assistance on aspects of the litigation from other judges.

10.121 Recusal/Disqualification

Title 28, section 455(c) of the U.S. Code directs judges to inform themselves about their personal and fiduciary financial interests and to make a “reasonable effort” to inform themselves about the personal financial interests of their spouse and any minor children residing in their household. Sections 455(b) and (f) designate when the judge must recuse and when parties may waive recusal. Upon assignment or reassignment of a complex case, the court should promptly review the pleadings and other papers in the case, the identities of parties and attorneys, and the nature of interests affected by the litigation for possible conflicts that may require recusal or disqualification. Counsel should submit a list, for review by the judge, of all entities affiliated with the parties and all attorneys and firms associated in the litigation. This review must be conducted at the outset, but the judge needs to consider both present and potential conflicts that may arise as a result of the joinder of additional parties, the identification of class members, or the assignment of related cases with the resultant involvement of additional litigants and counsel.¹³ As the case progresses, conflicts may continue to arise as additional persons and interests enter the litigation or as the judge’s staff changes.¹⁴ It is important that law clerks avoid having a relationship (including a pending offer) with any party or counsel.

Reassignment, when warranted, should be effected as promptly as possible, and the judge to whom the litigation is to be reassigned should make a similar inquiry into potential grounds for recusal before accepting the reassignment and notifying the parties.

13. See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859–62 (1988) (holding that “scienter is not an element of a violation of § 455(a); advancement of the purpose of the provision—to promote public confidence in the integrity of the judicial process—does not depend upon whether or not the judge actually knew” of the conflict, but rather what the public might reasonably expect the judge to know); *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir. 1982), *aff’d under 28 U.S.C. § 2109 sub nom. Ariz. v. United States Dist. Court*, 459 U.S. 1191 (1983) (disqualification of judge, five years after suit instituted, upon discovery that spouse owned stock in a few of the more than 200,000 class members).

14. See, e.g., Linda S. Mullenix, *Beyond Consolidation*, 32 Wm. & Mary L. Rev. 475, 539–40 (1991) (discussing complex case in which magistrate judge recused when law clerk was offered employment with firm of counsel representing party).

10.122 Other Judges

Although one judge should supervise the litigation, he or she may request other judges to perform special duties, such as conducting settlement discussions (see section 13.11). Moreover, in the course of consolidated or coordinated pretrial proceedings, severable claims or cases may appear that could be assigned to other judges.

10.123 Related Litigation

Complex litigation frequently involves two or more separate but related cases. All pending related cases or cases that may later be filed in the same court, whether or not in the same division, should be assigned at least initially to the same judge. Pretrial proceedings in these cases should be coordinated or consolidated under Federal Rule of Civil Procedure 42(a), even if the cases are filed in more than one division of the court.¹⁵ It may be necessary to transfer to the district judge related adversary proceedings in bankruptcy court, including proceedings to determine the dischargeability of debts.¹⁶ Counsel should be directed to inform the assigned judge of any pending related cases (as many local rules require). Sometimes related cases are identified on the face of the complaint. The judge to whom the complex litigation has been assigned should also ask whether related cases are pending in that district.

Assignment of related criminal and civil cases to a single judge will improve efficiency and coordination, especially when the cases are pending at the same time. Other factors, however, may suggest that the cases be handled by different judges—for example, extensive judicial supervision of pretrial proceedings in the civil litigation may be needed while the criminal trial is being conducted. See generally section 20.2.

Consolidation may be possible even when related cases are filed in different courts. Other courts can transfer cases under 28 U.S.C. § 1404(a) or § 1406 to the consolidation court, but only if personal jurisdiction and venue lie in the transferee forum.¹⁷ Pretrial proceedings in related cases may also be consolidated in a single district by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407. See section 20.13. State court cases may be removed to fed-

15. Under 28 U.S.C. § 1404(b) the court may, upon motion, transfer cases, motions, or hearings pending in the same district to a single division.

16. See, e.g., *In re Flight Trans. Corp. Sec. Litig.*, 730 F.2d 1128 (8th Cir. 1984).

17. See, e.g., *Nat'l Union Fire Ins. Co. v. Turtur*, 743 F. Supp. 260, 263 (S.D.N.Y. 1990); *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 24 (3d Cir. 1970) (citing 28 U.S.C. § 1404(a)); *Cote v. Wadel*, 796 F.2d 981, 984 (7th Cir. 1986); *Dubin v. United States*, 380 F.2d 813 (5th Cir. 1967) (citing 28 U.S.C. § 1406). If personal jurisdiction and venue do not lie in the transferee forum, transfer is improper even if plaintiffs consent. *Hoffman v. Blaski*, 363 U.S. 335 (1960).

eral court.¹⁸ They may also be transferred to or refiled in the consolidating district court following voluntary dismissal or dismissal based on *forum non conveniens*.

When transfer of all cases to a single court for centralized management is not possible the affected courts can still use informal means to coordinate proceedings to the extent practicable. Coordination methods include arrangements made by counsel, communications between judges, joint pretrial conferences and hearings at which all involved judges preside, and parallel orders. Another coordination method is to designate a “lead” case in the litigation; rulings in the lead case would presumptively apply to the other coordinated cases, and the judges in those cases may stay pretrial proceedings in those cases pending resolution of the lead case. Section 20.14 (cases in different federal courts) and section 20.31 (cases in federal and state courts) discuss coordination of related litigation more fully.

10.13 Effective Management

Effective judicial management generally has the following characteristics:

- *It is active.* The judge anticipates problems before they arise rather than waiting passively for counsel to present them. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.
- *It is substantive.* The judge becomes familiar at an early stage with the substantive issues in order to make informed rulings on issue definition and narrowing, and on related matters, such as scheduling, bifurcation and consolidation, and discovery control.
- *It is timely.* The judge decides disputes promptly, particularly those that may substantially affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
- *It is continuing.* The judge periodically monitors the progress of the litigation to see that schedules are being followed and to consider necessary modifications of the litigation plan. Interim reports may be ordered between scheduled conferences.
- *It is firm, but fair.* Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel,

18. See 28 U.S.C. §§ 1441–1452 (2000).

and they are revised when warranted. Once established, however, schedules are met, and, when necessary, appropriate sanctions are imposed (see section 10.15) for derelictions and dilatory tactics.

- *It is careful.* An early display of careful preparation sets the proper tone and enhances the court's credibility and effectiveness with counsel.

The judge's role is crucial in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings. Although elements and details of the plan will vary with the circumstances of the particular case, each plan must include an appropriate schedule for bringing the case to resolution. Case-management plans ordinarily prescribe a series of procedural steps with firm dates to give direction and order to the case as it progresses through pretrial proceedings to summary disposition or trial. In some cases, the court can establish an overall plan for the conduct of the litigation at the outset; in others, the plan must be developed and refined in successive stages. It is better to err on the side of overinclusiveness initially and subsequently modify plan components that prove impractical than to omit critical elements. Nevertheless, in litigation involving experienced attorneys working cooperatively, a firm but realistic trial date may suffice if coupled with immediate access to the court for disputes that counsel cannot resolve.

The attorneys—who will be more familiar than the judge with the facts and issues in the case—should play a significant part in developing the litigation plan and should have primary responsibility for its execution. Court supervision and control should recognize the burdens placed on counsel by complex litigation and should foster mutual respect and cooperation between the court and the attorneys and among the attorneys.

10.14 Supervisory Referrals to Magistrate Judges and Special Masters

The judge should decide early in the litigation whether to refer all or any part of pretrial supervision and control to a magistrate judge. The judge should consider a number of factors:

- the law of the circuit (see section 11.53);
- the experience and qualifications of the available magistrate judges;
- the relationship among and attitude of the attorneys;
- the extent to which a district judge's authority may be required;
- the time the judge has to devote to the litigation;
- the novelty of the issues and the need for innovation; and
- the judge's personal preferences.

Some judges prefer to supervise complex litigation personally, even in courts that routinely refer discovery or other pretrial procedures to magistrate judges. Referrals in complex cases may cause additional costs and delays when the parties seek judicial review, diminish supervisory consistency and coherence as the case proceeds to trial, create greater reluctance to try innovative procedures that might aid in resolution of the case, and cause the judge to be unfamiliar with the case at the time of trial. Other judges believe that such referrals provide effective case management during the pretrial stage, enabling the judge to devote time to more urgent matters.

Even without general referral to a magistrate judge, referral of particular matters may be helpful. Such matters include supervision of all discovery matters or supervision of particular discovery issues or disputes, particularly those that may be time-consuming or require an immediate ruling (including resolving deposition disputes by telephone; ruling on claims of privilege and motions for protective orders; and conducting hearings on procedural matters, such as personal jurisdiction). Magistrate judges may also help counsel formulate stipulations and statements of contentions, and may facilitate settlement discussions. See generally section 11.53.

Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving “some exceptional conditions” or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate.¹⁹ The additional expense imposed on parties also militates strongly against such appointment.²⁰ Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised).²¹ See sections 11.51–11.52.

Orders of referral should follow the guidance offered in Rule 53(b) and specifically describe what is being referred, the authority being delegated to the

19. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) (the length and complexity of a case and the congestion of the court’s docket do not alone justify a comprehensive reference to a special master). See also *Maldonado v. Administracion de Correccion del Estado Libre Asociado*, No. 90-2186, 1992 U.S. Dist. LEXIS 16393 (D.P.R. Sept. 30, 1992); *infra* section 11.52. Cf. *McLee v. Chrysler Corp.*, 38 F.3d 67 (2d Cir. 1994).

20. *Prudential Ins. Co. of Am. v. United States Gypsum Co.*, 991 F.2d 1080 (3d Cir. 1993) (writ of mandamus issued overturning appointment of master to hear merits of a claim for cost of testing, monitoring, and removing asbestos-containing products at thirty-nine sites).

21. See *Litigation Manual*, *supra* note 12, at 123–24. See generally Wayne D. Brazil et al., *Managing Complex Litigation: A Practical Guide to the Use of Special Masters* (1983).

magistrate judge or special master, and the procedure for review by the judge. Regular progress reports from the magistrate judge or special master are advisable.

10.15 Sanctions

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10.151 General Principles

The rules and principles governing the imposition of sanctions in complex litigation require special care because misconduct may have more severe consequences. Sanctions proceedings can be disruptive, costly, and may create personal antagonism inimical to an atmosphere of cooperation. Moreover, a resort to sanctions may reflect a breakdown of case management. Close judicial oversight and a clear, specific, and reasonable management program, developed with the participation of counsel, will reduce the potential for sanctionable conduct because the parties will know what the judge expects of them. On the other hand, the stakes involved in and the pressures generated by complex litigation may lead some parties to violate the rules. Although sanctions should not generally be a management tool, a willingness to resort to sanctions, *sua sponte* if necessary, may ensure compliance with the management program.²²

In designing the case-management program, the judge should anticipate compliance problems and include prophylactic procedures, such as requiring parties to meet and confer promptly in the event of disputes and providing ready access to the judge if the parties cannot resolve their differences. In addition, it helps if the court informs counsel at the outset of the court's expectations about cooperation and professionalism. Perceptions of the limits of legitimate advocacy differ, and advance guidance can reduce the need for sanctions later.

Although sanctions should be a last resort, they are sometimes unavoidable and may be imposed for general or specific deterrence, to punish, or to remedy the consequences of misconduct. If sanctions are imposed, the court should explain on the record or in an order the basis and purpose of its action.

22. See Fed. R. Civ. P. 11(c)(1)(B); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 n.8 (1991).

10.152 Sources of Authority

A number of federal statutes allow the court, in its discretion, to award costs, including attorneys' and sometimes experts' fees to prevailing parties.²³ The primary codified sources of authority to impose sanctions in civil litigation are 28 U.S.C. § 1927 and Federal Rules of Civil Procedure 11, 16, 41, and 56(g). Sanctions relating to discovery are authorized by Rules 26, 30, 32(d), 33(b)(3)–(4), 34(b), 35(b)(1), 36(a), and, most prominently, 37. Note that Rule 11 is expressly made inapplicable to discovery.²⁴ Under limited circumstances sanctions may also be imposed under local rules.²⁵

Sanctions may also be imposed under the court's inherent power,²⁶ even where the conduct at issue could be sanctioned under a statute or rule. Use of inherent power, however, should be avoided if the statute or rule is directly applicable and adequate to support the intended sanction.²⁷ The court may assess attorneys' fees pursuant to its inherent power, but when sitting in diversity should not do so in contravention of applicable state law embodying a substantive policy, such as a statute permitting prevailing parties to recover fees in certain classes of litigation.²⁸

Choice of authority for sanctions should be clear in the order, because the applicable standards and procedures and the available sanctions will vary depending on the authority under which the court proceeds. For example, 28 U.S.C. § 1927 authorizes the assessment of costs and fees against an attorney only—it provides no authority to sanction a party.

23. See, e.g., 42 U.S.C.A. §§ 1988(b), 1988(c), 2000e-5(k) (West 1994 & Supp. 2002); 15 U.S.C. §§ 78i(e), 78r(a) (2000). Such statutes may expressly predicate such an award on a finding that the action (or defense) was meritless, see, e.g., 15 U.S.C. § 77k(e), and common law may impose the same requirement when awards under such statutes are sought by defendants. See *Christansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978) (prevailing plaintiff qualifies for fee award absent "special circumstances," but prevailing defendant qualifies for fee award only if plaintiff's suit is "frivolous, unreasonable, or without foundation"). But see *Fogerty v. Fantasy Inc.*, 510 U.S. 517, 525 n.12 (1994) (same standard applies to plaintiffs and defendants seeking fees in copyright, patent, and trademark cases). Such awards may therefore be considered a sanction for meritless litigation.

24. Fed. R. Civ. P. 11(d).

25. See, e.g., E.D. Mich. Civ. R. 11.1; *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983).

26. See *Chambers*, 501 U.S. at 43–45, and cases cited therein; *Pedroza v. Cinatas Corp.* No. 6-01-3247-CV, 2003 WL 828237, at *1 (W.D. Mo. Jan. 9, 2003).

27. *Id.* at 49–50 & n.14 (distinguishing *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) (Rule 37)); *United States v. One 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993) (where civil rule limits sanction that may be imposed, court may not circumvent by resorting to inherent power).

28. *Chambers*, 501 U.S. at 50–53.

10.153 Considerations in Imposing

Factors to consider as to imposing sanctions include the following:

- the nature and consequences of the dereliction or misconduct;
- the person(s) responsible;
- the court's discretion under the applicable source of authority to impose sanctions and to choose which sanctions to impose;
- the purposes to be served by imposing sanctions, and the least severe sanction that will achieve those purposes; and
- the appropriate time for conducting sanctions proceedings.

Factors to consider as to the nature and consequences of the dereliction or misconduct include the following:

- whether the act or omission was willful or negligent;
- whether it directly violated a court order or a federal or local rule;
- its effect on the litigation and the trial participants;
- whether it was isolated or part of a course of misconduct or dereliction;²⁹ and
- any extenuating circumstances.

Rule 11 substantially limits the authority to impose monetary sanctions, but they may still be available in unusual cases or under other rules or powers. Generally, they are imposed only on the person(s) responsible for the misconduct; if assessed against counsel, they should be accompanied by a direction not to pass the cost on to the client. It may sometimes be appropriate for the court to sanction the client or the client and attorney jointly. Pitting attorney against client, however, can create a conflict of interest³⁰ and may require inquiry into potentially privileged communications. Though it may be ethically permissible for an attorney to reveal client confidences to the extent necessary in this context,³¹ this does not resolve the privilege issue. The least disruptive alternative may be for the court to impose joint and several liability on both

29. See Fed. R. Civ. P. 11(b) & (c) committee note (listing these and other considerations).

30. See *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 623 (2d Cir. 1991); *White v. Gen. Motors Corp.*, 908 F.2d 675, 685 (10th Cir.), *cert. denied*, 498 U.S. 1069 (1991).

31. See Model Rules of Prof'l Conduct R. 1.6(b)(2) (2002); Model Code of Prof'l Responsibility DR 4-101(c) (1981).

counsel and client³² or to defer the matter of sanctions until the end of the litigation.³³

Some types of nonmonetary sanctions may affect the litigation's outcome. A judge should impose dismissal, default, or preclusion of a claim or evidence only in egregious circumstances and only after consideration of the following factors:

- the policy favoring trial on the merits;
- whether the sanction will further the just, speedy, and inexpensive determination of the action;
- the degree to which the sanctioned party acted deliberately and knew or should have known of the possible consequences;
- the degree of responsibility of the affected client;
- the merits and importance of the claim(s) affected;
- the impact on other parties or the public interest; and
- the availability of less severe sanctions.

10.154 Types

In imposing the least severe sanction adequate to accomplish the intended purpose, the court can select from a broad range of options:³⁴

- *Reprimand*. An oral reprimand will suffice for most minor violations, particularly a first infraction. A written reprimand may be appropriate in more serious cases.
- *Cost shifting*. The purpose of Federal Rule of Civil Procedure 11 sanctions is deterrence rather than compensation; the rule therefore permits cost shifting only in “unusual circumstances.”³⁵ In contrast, many of the discovery rules (primarily Rules 26(g) and 37) and Rule 16(f) (dealing with pretrial conferences) require or permit cost shifting in specified situations. See generally section 11.433. Under 28 U.S.C. § 1927, and Federal Rule of Civil Procedure 56(g) and its inherent

32. See *Martin v. Am. Kennel Club, Inc.*, No. 87C2151, 1989 U.S. Dist. LEXIS 201, at *22–23 (N.D. Ill. Jan. 6, 1989) (“[a]bsent a clear indication of sole responsibility,” liability should be joint and several).

33. See, e.g., *O’Neil v. Ret. Plan for Salaried Employees of RKO Gen. Inc.*, No. 88 Civ. 8498, 1992 U.S. Dist. LEXIS 237, at *12–13 (S.D.N.Y. Jan. 10, 1992); Fed. R. Civ. P. 11 committee note.

34. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991) (“A primary aspect” of the court’s discretion to invoke its inherent sanction power “is the ability to fashion an appropriate sanction” for abuse of judicial process.).

35. See Fed. R. Civ. P. 11 committee note (monetary sanctions ordinarily paid into court, but may be directed to those injured if deterrence would otherwise be ineffective).

power, the court may order cost-shifting sanctions for actions taken in bad faith.

- *Denial of fees or expenses.* When attorneys' fees and expenses are incurred through dilatory or otherwise improper conduct or in proceedings brought on by such conduct, the court may decline to award such fees and expenses or may order counsel not to charge them to their clients.
- *Remedial action.* Counsel and parties may be required to remedy a negligent or wrongful act at their own expense, as by reconstructing materials improperly destroyed or erased.
- *Grant/denial of time.* Improper delay may justify awarding opposing parties additional time for discovery or other matters,³⁶ or denying otherwise proper requests for extension of time.

More serious sanctions, reserved for egregious circumstances, include the following:

- *Demotion/removal of counsel.* An attorney may be removed from a position as lead, liaison, or class counsel, or (in an extreme case) from further participation in the case entirely. Such a sanction, however, may disrupt the litigation, may cause significant harm to the client's case and the reputation of the attorney or law firm, and can conflict with a party's right to counsel of its choosing.
- *Removal of party as class representative.* Before imposing this sanction, the court should consider ordering that notice be given to the class under Rule 23(d)(2) to enable class members to express their views concerning their representation or to intervene in the action.³⁷
- *Enjoining party from commencing other litigation.* While there is a strong policy against denying access to the courts, a party may be enjoined from commencing other actions until it has complied with all orders in the current action, or from bringing, without court approval, other actions involving the same or similar facts or claims.
- *Preclusion/waiver/striking.* Failure to timely make required disclosures or production, raise objections, or file motions may constitute sufficient grounds for the court to preclude the introduction of related evidence, deem certain facts admitted and objections waived, strike

36. See, e.g., Fed. R. Civ. P. 30(d)(2).

37. See Fed. R. Civ. P. 23(d)(2) & committee note.

claims or defenses, or deny the motions, including those seeking to amend pleadings or join parties.³⁸

- *Dismissal*. This severe sanction should generally not be imposed until the affected party has been warned and given a chance to take remedial action, and then only when lesser sanctions, such as dismissal without prejudice and assessment of costs, would be ineffective.
- *Vacation of judgment*. The court may vacate a judgment it has rendered if procured by fraud.³⁹
- *Suspension/disbarment*. The court has inherent power to suspend or disbar attorneys, but should follow applicable local rules.⁴⁰
- *Fine*. Even without a finding of contempt, the court may assess monetary sanctions apart from or in addition to cost shifting. The amount should be the minimum necessary to achieve the deterrent or punitive goal, considering the resources of the person or entity fined.⁴¹
- *Contempt*. The court may issue a contempt order under its inherent authority,⁴² statute,⁴³ or rule,⁴⁴ and should indicate clearly whether the contempt is civil or criminal. The procedure and possible penalties will depend on that determination and the nature and timing of the contemptuous act.⁴⁵
- *Referral for possible criminal prosecution*. Where the misconduct rises to the level of a criminal offense,⁴⁶ the matter may be referred to the U.S. Attorney's Office.

38. See, e.g., Fed. R. Civ. P. 37(b)(2), (c)(1).

39. *Chambers*, 501 U.S. at 44 (inherent power); Fed. R. Civ. P. 60(b).

40. See *In re Snyder*, 472 U.S. 634, 643 & n.4 (1985). For discussion of the standard for taking such action, see *id.* at 643–47 (refusal to supplement fee petition or accept Civil Justice Act assignment coupled with single instance of discourtesy insufficient to support suspension).

41. See, e.g., Fed. R. Civ. P. 11(c)(2).

42. See *Chambers*, 501 U.S. at 44; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

43. See, e.g., 18 U.S.C. §§ 401–403 (2000); 28 U.S.C. § 1784 (West 2002); Fed. R. Crim. P. 42 committee note (statutes cited therein).

44. See, e.g., Fed. R. Civ. P. 37(b)(2)(D), 45(e); Fed. R. Crim. P. 17(g).

45. See *Benchbook for U.S. District Court Judges* §§ 7.01–7.02 (Federal Judicial Center, 4th ed. 2000) (criminal and civil contempt) [hereinafter *Benchbook*]; 18 U.S.C. § 3691 (2000) (jury trial of criminal contempts), § 3692 (jury trial for contempt in labor dispute cases), § 3693 (summary disposition or jury trial; notice); Fed. R. Crim. P. 42 (criminal contempt). Since there is no federal rule establishing a procedure for civil contempt, the court should follow the procedures of Fed. R. Crim. P. 42 to the extent applicable.

46. See 18 U.S.C. §§ 1501–1518 (2000) (obstruction of justice).

10.155 Procedure

The appropriate timing for imposing sanctions depends on the basis for the sanctions; the timing can be more problematic in complex litigation. Sanctions are often most effective when imposed promptly after the improper conduct has occurred⁴⁷ because this may maximize their deterrent effect in the litigation.

Sometimes, the frivolous nature of a paper may not be immediately apparent. Moreover, some misconduct or the extent of its consequences may not become apparent until the litigation has developed further. Some sanctions are, therefore, expressly conditioned on later developments.⁴⁸ Certain facts may have to be established before the court can decide the sanctions issue, which could delay the litigation unless sanctions are deferred until its conclusion. Similarly, sanctions should be deferred where the decision may require inquiry into potentially privileged communications and create a conflict of interest between counsel and client. Delaying rulings on sanctions also may allow the court more dispassionate consideration; however, applying the wisdom of hindsight should be avoided.

The assessment of sanctions should be preceded by notice and an opportunity to be heard.⁴⁹ The extent of the process afforded depends on the circumstances, primarily the type and severity of sanction under consideration.⁵⁰ An oral or evidentiary hearing may not be necessary for relatively minor sanctions.⁵¹ To provide notice when acting *sua sponte*, the court should issue an order for counsel or parties to show cause why sanctions should not be imposed, specifying the alleged misconduct.⁵² To avoid disrupting a settlement,

47. See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 881 (5th Cir. 1988). Cf. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991) (explaining exception to imposing prompt sanctions).

48. See, e.g., Fed. R. Civ. P. 37(c)(2) (recovery of expenses for failure to admit depends on later proof of matter not admitted); Fed. R. Civ. P. 68 (assessment of costs incurred after settlement offer refused depends on failure to obtain more favorable judgment).

49. *United States v. 4003–4005 5th Ave.*, 55 F.3d 85 (2d Cir. 1995); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). Some rules expressly require this. See, e.g., Fed. R. Civ. P. 11(c).

50. See, e.g., *United States v. Kouri-Perez*, 187 F.3d 1, 10 & n.4 (1st Cir. 1999); *Media Duplication Servs. v. HDG Software, Inc.*, 928 F.2d 1228, 1238 (1st Cir. 1991) (citing *Roadway*, 447 U.S. at 767 n.14 (due process concerns raised by dismissal are greater than those presented by assessment of attorneys' fees)); *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) (same); Fed. R. Civ. P. 11 committee note.

51. See, e.g., *In re Edmond*, 934 F.2d 1304, 1313 (4th Cir. 1991); *Hudson v. Moore Bus. Forms, Inc.*, 898 F.2d 684, 686 (9th Cir. 1990); Fed. R. Civ. P. 11 committee note.

52. *El Paso v. Socorro*, 917 F.2d 7 (5th Cir. 1990); *Maisonville v. F2 Am., Inc.*, 902 F.2d 746 (9th Cir. 1990); Fed. R. Civ. P. 11(c)(1)(B) & committee note.

avoid assessing monetary sanctions sua sponte once the parties have reached agreement.⁵³

Unless the sanction is minor and the misconduct obvious, it is advisable to put findings and reasons on the record or issue a written order.⁵⁴ The findings should clearly identify the objectionable conduct, state the factual and legal reasons for the action (including the need for the particular sanction imposed and the inadequacy of less severe measures), and cite the authority relied on. If the sanctions are appealed, such a record will facilitate appellate review and help the appellate court understand the basis for the court's exercise of its discretion.⁵⁵ There is normally no need to explain a denial of sanctions.⁵⁶

10.2 Role of Counsel

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10.21 Responsibilities in Complex Litigation

Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the court. The complexity of legal and factual issues makes judges especially dependent on the assistance of counsel.

Greater demands on counsel also arise from the following:

- the amounts of money or importance of the interests at stake;
- the length and complexity of the proceedings;

53. See Fed. R. Civ. P. 11(c)(2)(B) & committee note.

54. See Fed. R. Civ. P. 11(c)(3).

55. The standard of review is abuse of discretion. *Buford v. United States*, 532 U.S. 59, 64 (2001); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991) (inherent power); *Cooter & Gel v. Hartmax Corp.*, 496 U.S. 384, 405 (1990) (Rule 11); *Blue v. United States Dep't of the Army*, 914 F.2d 525, 539 (4th Cir. 1990) (28 U.S.C. § 1927).

56. Fed. R. Civ. P. 11 committee note. Only the First Circuit has held to the contrary. See *Metrocorps, Inc. v. E. Mass. Junior Drum & Bugle Corps Ass'n*, 912 F.2d 1, 3 (1st Cir. 1990); *Morgan v. Mass. Gen. Hosp.*, 901 F.2d 186, 195 (1st Cir. 1990).

- the difficulties of having to communicate and establish effective working relationships with numerous attorneys (many of whom may be strangers to each other);
- the need to accommodate professional and personal schedules;
- the problems of having to appear in courts with which counsel are unfamiliar;
- the burdens of extensive travel often required; and
- the complexities of having to act as designated representative of parties who are not their clients (see section 10.22).

The added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly. The certification requirements of Federal Rules of Civil Procedure 11 and 26(g) reflect some of the attorneys' obligations as officers of the court. By presenting a paper to the court, an attorney certifies in essence that he or she, based on reasonable inquiry, has not filed the paper to delay, harass, or increase costs.⁵⁷ A signature on a discovery request, response, or objection certifies that the filing is not "unreasonable or unduly burdensome or expensive" under the circumstances of the case.⁵⁸ These provisions encourage attorneys to "stop and think" before taking action.

Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible. Even where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute. Model Rule of Professional Conduct 3.2 requires lawyers to make "reasonable efforts to expedite litigation consistent with the interests of the client."⁵⁹

57. Fed. R. Civ. P. 11(b)(1). Fed. R. Civ. P. 26(g) contains substantially similar language. Case law in the circuit interpreting these provisions should be considered.

58. Fed. R. Civ. P. 26(g)(C).

59. *See also* Model Rules of Professional Conduct R. 3.1 (2002) (meritorious claims and contentions); Model Code of Professional Responsibility DR 7-102(A)(1) (1981) (action taken merely to harass).

10.22 Coordination in Multiparty Litigation—Lead/Liaison Counsel and Committees

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Complex litigation often involves numerous parties with common or similar interests but separate counsel. Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and examines witnesses, may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily. Instituting special procedures for coordination of counsel early in the litigation will help to avoid these problems.

In some cases the attorneys coordinate their activities without the court’s assistance, and such efforts should be encouraged. More often, however, the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation. To do so, invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable. Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties’ counsel.

10.221 Organizational Structures

Attorneys designated by the court to act on behalf of other counsel and parties in addition to their own clients (referred to collectively as “designated counsel”) generally fall into one of the following categories:

- *Liaison counsel*. Charged with essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions. Such counsel may act for the group in managing document depositories and in resolving scheduling conflicts. Liaison counsel will usually have offices in the same locality as the court. The court may appoint (or the parties may select) a liaison for each side,

and if their functions are strictly limited to administrative matters, they need not be attorneys.⁶⁰

- *Lead counsel.* Charged with formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.
- *Trial counsel.* Serve as principal attorneys at trial for the group and organize and coordinate the work of the other attorneys on the trial team.
- *Committees of counsel.* Often called steering committees, coordinating committees, management committees, executive committees, discovery committees, or trial teams. Committees are most commonly needed when group members' interests and positions are sufficiently dissimilar to justify giving them representation in decision making. The court or lead counsel may task committees with preparing briefs or conducting portions of the discovery program if one lawyer cannot do so adequately. Committees of counsel can sometimes lead to substantially increased costs, and they should try to avoid unnecessary duplication of efforts and control fees and expenses. See section 14.21 on controlling attorneys' fees.

The types of appointments and assignments of responsibilities will depend on many factors. The most important is achieving efficiency and economy without jeopardizing fairness to the parties. Depending on the number and complexity of different interests represented, both lead and liaison counsel may be appointed for one side, with only liaison counsel appointed for the other. One attorney or several may serve as liaison, lead, and trial counsel. The functions of lead counsel may be divided among several attorneys, but the number should not be so large as to defeat the purpose of making such appointments.

60. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, MDL No. 721, 1989 WL 168401, at *19–20 (D.P.R. Dec. 2, 1988) (defining duties of “liaison persons” for plaintiffs and defendants).

10.222 Powers and Responsibilities

The functions of lead, liaison, and trial counsel, and of each committee, should be stated in either a court order or a separate document drafted by counsel for judicial review and approval.⁶¹ This document will inform other counsel and parties of the scope of designated counsel's authority and define responsibilities within the group. However, it is usually impractical and unwise for the court to spell out in detail the functions assigned or to specify the particular decisions that designated counsel may make unilaterally and those that require an affected party's concurrence. To avoid controversy over the interpretation of the terms of the court's appointment order, designated counsel should seek consensus among the attorneys (and any unrepresented parties) when making decisions that may have a critical impact on the litigation.

Counsel in leadership positions should keep the other attorneys in the group advised of the progress of the litigation and consult them about decisions significantly affecting their clients. Counsel must use their judgment about limits on this communication; too much communication may defeat the objectives of efficiency and economy, while too little may prejudice the interests of the parties. Communication among the various allied counsel and their respective clients should not be treated as waiving work-product protection or the attorney–client privilege, and a specific court order on this point may be helpful.⁶²

10.223 Compensation

See section 14.215 for guidance on determining compensation and establishing terms and procedures for it early in the litigation.

10.224 Court's Responsibilities

Few decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel. There is often intense competition for appointment by the court as designated counsel, an appointment that may implicitly promise large fees and a prominent role in the litigation. Side agreements among attorneys also may have a significant effect on positions taken in the proceedings. At the same time, because appointment of designated counsel will alter the usual dynamics of client representation in important ways, attorneys will have legitimate concerns that their clients' interests be adequately represented.

61. See Sample Order *infra* section 40.22.

62. See *id.* ¶ 5.

For these reasons, the judge is advised to take an active part in the decision on the appointment of counsel. Deferring to proposals by counsel without independent examination, even those that seem to have the concurrence of a majority of those affected, invites problems down the road if designated counsel turn out to be unwilling or unable to discharge their responsibilities satisfactorily or if they incur excessive costs. It is important to assess the following factors:

- qualifications, functions, organization, and compensation of designated counsel;
- whether there has been full disclosure of all agreements and understandings among counsel;
- would-be designated attorneys' competence for assignments;
- whether there are clear and satisfactory guidelines for compensation and reimbursement, and whether the arrangements for coordination among counsel are fair, reasonable, and efficient;
- whether designated counsel fairly represent the various interests in the litigation—where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests;
- the attorneys' resources, commitment, and qualifications to accomplish the assigned tasks; and
- the attorneys' ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court—experience in similar roles in other litigation may be useful, but an attorney may have generated personal antagonisms during prior proceedings that will undermine his or her effectiveness in the present case.

Although the court should move expeditiously and avoid unnecessary delay, an evidentiary hearing may be needed to bring all relevant facts to light or to allow counsel to state their case for appointment and answer questions from the court about their qualifications (the court may call for the submission of résumés and other relevant information). Such a hearing is particularly appropriate when the court is unfamiliar with the attorneys seeking appointment. The court should inquire as to normal or anticipated billing rates, define record-keeping requirements, and establish guidelines, methods, or limitations to govern the award of fees.⁶³ While it may be appropriate and possibly even beneficial for several firms to divide work among themselves,⁶⁴ such an ar-

63. See *infra* section 14.21.

64. See *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 77 (S.D.N.Y. 2000); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 584 (3d Cir. 1984).

rangement should be necessary, not simply the result of a bargain among the attorneys.⁶⁵

The court's responsibilities are heightened in class action litigation, where the judge must approve counsel for the class (see section 21.27). In litigation involving both class and individual claims, class and individual counsel will need to coordinate.

10.225 Related Litigation

If related litigation is pending in other federal or state courts, consider the feasibility of coordination among counsel in the various cases. See sections 20.14, 20.31. Consultation with other judges may bring about the designation of common committees or of counsel and joint or parallel orders governing their function and compensation.⁶⁶ Where that is not feasible, the judge may direct counsel to coordinate with the attorneys in the other cases to reduce duplication and potential conflicts and to coordinate and share resources. In any event, the judges involved should exchange information and copies of orders that might affect proceedings in their courts. See generally section 20, multiple jurisdiction litigation.

In approaching these matters, consider also the status of the respective actions (some may be close to trial while others are in their early stages). Counsel seeking a more prominent and lucrative role may have filed actions in other courts.

10.23 Withdrawal and Disqualification

In view of the number and dispersion of parties and interests in complex litigation, the court should remind counsel to be alert to present or potential conflicts of interest.⁶⁷

It is advisable to deny motions for disqualification that claim the attorney may be called as a witness if such testimony probably will not be necessary and prejudice to the client will probably be minor. Disqualification on the ground that an attorney is also a witness may sometimes be denied where it would cause "substantial hardship" to the client. This exception is generally invoked

65. See, e.g., *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000); *Smiley v. Sincoff*, 958 F.2d 498 (2d Cir. 1992); *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in part and rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

66. See *infra* section 40.51.

67. See Model Rules of Prof'l Conduct R. 1.7–1.9 (2002); Model Code of Prof'l Responsibility DR 5-101(A), 5-104(A), 5-105(A) (1981); see also Model Rules of Prof'l Conduct R. 3.7 (2002); Model Code of Prof'l Responsibility DR 5-102 (1981) (lawyer as witness).

when disqualification is sought late in the litigation, and it requires the court to balance the interests of the client and the opposing party. The motion may also be denied when the likelihood that the attorney would have to testify should have been anticipated earlier in the case.⁶⁸ Motions for disqualification should be reviewed carefully to ensure that they are not being used merely to harass,⁶⁹ and disqualification should be ordered only when the motion demonstrates a reasonable likelihood of a prohibited conflict.⁷⁰

The court should promptly resolve ancillary legal issues requiring research into applicable circuit law, because uncertainty as to the status of counsel hampers the progress of the litigation. Additional delays may result if counsel seeks appellate review⁷¹ or if replacement counsel are precluded from using the work product of the disqualified firm. While disqualified counsel usually must turn over their work product to new counsel upon request, it is possible that counsel will deny the request when there is a danger that confidential information will be disclosed.⁷² Issues raised by disqualification motions include whether disqualification of counsel extends to the entire firm,⁷³ whether co-

68. Model Rules of Prof'l Conduct R. 3.7(a)(3) (2002); Model Code of Prof'l Responsibility DR 5-10(B)(4) (1981). See *General Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704 (6th Cir. 1982).

69. *Harker v. Comm'r*, 82 F.3d 806, 808 (8th Cir. 1996); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 433–36 (1985); *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1050–51 (9th Cir. 1985); *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1577–80 (Fed. Cir. 1984).

70. Though often premised on violations of state disciplinary rules, disqualification in federal court is a question of federal law. *In re Am. Airlines, Inc.*, 972 F.2d 605, 615 (5th Cir. 1992); *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992).

71. The denial of a motion to disqualify counsel in a civil case is not immediately appealable as a matter of right. *Cunningham v. Hamilton County*, 527 U.S. 198, 207 (1999); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). Nor is an order granting such a motion in a criminal case, *Flanagan v. United States*, 465 U.S. 259 (1984), or in a civil case, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). A petition for a writ of mandamus may be filed even if there is no right of appeal, see Fed. R. App. P. 21, but the standard of review may be more stringent. See *In re Dresser*, 972 F.2d at 542–43.

72. See *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201, 207–11 (7th Cir. 1978) (en banc), and *Int'l Bus. Machs. Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978) (the request to turn over work product may be denied when there is a danger that confidential information will be disclosed (*EZ Paints Corp. v. Padco, Inc.*, 746 F.2d 1459, 1463–64 (Fed. Cir. 1984))).

73. See Model Rules of Prof'l Conduct R. 1.10 (2002) (imputation of conflicts of interest); Model Code of Prof'l Responsibility DR 5-105(D) (1981). Compare *Panduit*, 744 F.2d at 1577–80, with *United States v. Moscony*, 927 F.2d 742, 747–48 (3d Cir. 1991), and *Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 830–32 (Fed. Cir. 1988). Timely erection of a “Chinese wall” to screen other firm members from the attorney(s) possessing confidential information may avoid imputed disqualification. See, e.g., *Blair v. Armontrout*, 916 F.2d 1310, 1333 (8th Cir. 1990);

counsel will also be disqualified,⁷⁴ and whether counsel may avoid disqualification based on consent,⁷⁵ substantial hardship,⁷⁶ or express or implied waiver.⁷⁷ If a disqualification motion is filed in order to harass, delay, or deprive a party of chosen counsel, sanctions may be appropriate under 28 U.S.C. § 1927 or Federal Rule of Civil Procedure 11 (see section 10.15).

Kennecott Corp. v. Kyocera Int'l, Inc., 899 F.2d 1228 (Fed. Cir. 1990) (per curiam) (unpublished table decision); United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990); Manning v. Waring, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); *Atasi*, 847 F.2d at 831 & n.5; *Panduit*, 744 F.2d at 1580–82; *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 257–59 (7th Cir. 1983) (screening not timely). Disqualification of an attorney on the ground that he or she will be called as a witness generally does not require disqualification of the attorney's firm. See *Optyl Eyewear*, 760 F.2d at 1048–50; *Bottaro v. Hatton Assocs.*, 680 F.2d 895, 898 (2d Cir. 1982).

74. Disqualification of counsel generally does not extend to cocounsel. See, e.g., *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 174 (5th Cir. 1979); *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607–10 (8th Cir. 1977); *Akerly v. Red Barn Sys., Inc.*, 551 F.2d 539, 543–44 (3d Cir. 1977); *Am. Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971). But disqualification is proper when information has been disclosed to cocounsel with an expectation of confidentiality. See *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977); cf. *Arkansas v. Dean Food Prods. Co.*, 605 F.2d 380, 387–88 (8th Cir. 1979); *Brennan's*, 590 F.2d at 174.

75. See, e.g., *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345–46 (9th Cir. 1981); *Interstate Props. v. Pyramid Co.*, 547 F. Supp. 178 (S.D.N.Y. 1982); cf. *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978).

76. Disqualification on the ground that an attorney is also a witness may be denied where it would cause “substantial hardship” to the client. Model Rules of Prof'l Conduct R. 3.7(a)(3) (2002); Model Code of Prof'l Responsibility DR 5-101(B)(4) (1981). This exception is generally invoked when disqualification is sought late in the litigation, and it requires the court to balance the interests of the client and those of the opposing party. Model Rules of Prof'l Conduct R. 3.7 cmt. ¶ 4 (2002). It may be rejected when the likelihood that the attorney would have to testify should have been anticipated earlier in the case. See *Gen. Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704 (6th Cir. 1982).

77. See, e.g., *United States v. Wheat*, 486 U.S. 153, 162–64 (1988) (court in criminal case may decline waiver of conflict); *Melamed v. ITT Cont'l Baking Co.*, 592 F.2d 290, 292–94 (6th Cir. 1979) (waiver found); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 205 (N.D. Ohio), *aff'd*, 573 F.2d 1310 (6th Cir. 1977) (same); cf. *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88–90 (5th Cir. 1976) (waiver and consent).

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11.1 Preliminary Matters

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11.11 Scheduling the Initial Conference

The court's first step in establishing control of the litigation is promptly scheduling the initial conference with counsel, generally within 30 to 60 days of filing, but with sufficient time for counsel to become familiar with the litigation and prepare for the conference. The judge should hold the conference before any adversary activity begins, such as filing of motions or discovery requests, and the order setting the conference may require that all such activity be deferred. Although Federal Rule of Civil Procedure 4(m) allows 120 days from filing to effect service, earlier service or appearance should be encouraged in order to give notice of the conference and of any interim administrative

measures even before responsive pleadings are filed. The court need not wait for service to be made on every party, once the primary parties have been notified.

The order scheduling the conference⁷⁸ generally refers to Federal Rule of Civil Procedure 16(c), which lists subjects for consideration at such a conference. Also worth considering are the following:

- requiring counsel in advance to discuss claims and defenses, a plan for disclosure and discovery, and possible settlement;⁷⁹
- listing specific topics that the court intends to address at the conference;
- inviting suggestions from counsel for additional topics;
- directing counsel to submit a tentative statement, joint if possible, identifying disputed issues as specifically as possible;
- directing counsel to submit a proposed schedule for the conduct of the litigation, including a discovery plan (see section 11.421);
- calling on counsel to submit brief factual statements to assist the court in understanding the background, setting, and likely dimensions of the litigation;
- suspending all discovery and motion activity pending further order;
- specifying that responses to the order will not be treated as admissions or otherwise bind the parties; and
- directing counsel to provide information about all related litigation pending in other courts.

See also section 22.6 (mass torts, case-management orders).

11.12 Interim Measures

At the outset of the case, pending the initial conference, the judge can *sua sponte* initiate special procedures, including the following:⁸⁰

- ordering joint briefs and limits on briefs' length and appendices;
- suspending some local rules, such as those requiring the appearance or association of local counsel or limiting the time for joining new parties;⁸¹

78. See sample order *infra* section 40.1.

79. Such a conference of counsel prior to discovery and the Rule 16 conference is required by Federal Rule of Civil Procedure 26(f).

80. See *infra* sections 22.6 (case-management orders in mass tort litigation) and 40.2 (sample orders).

- creating a single master file for the litigation, eliminating the need for multiple filings of similar documents when related cases have common parties;
- extending time for filing responses to the complaint until after the initial conference, making unnecessary individual requests for extensions;
- reducing under Federal Rule of Civil Procedure 5 the number of parties upon whom service of documents must be made—liaison counsel may be appointed to receive service of all papers and distribute copies to cocounsel (see section 10.221);
- modifying the timing of the initial disclosures required by Federal Rule of Civil Procedure 26(a)(1) (see section 11.13);
- permitting limited discovery, prior to Rule 26(a)(1) initial disclosure, of information helpful or necessary in formulating a discovery plan, such as Rule 30(b)(6) depositions of records keepers and computer personnel knowledgeable of the parties' data holdings and systems;
- ordering that paper and electronic records, files, and documents, and other potential evidence, not be destroyed without leave of court—preservation orders may impose undue burdens on parties and be difficult to implement; therefore, holding an early conference or hearing to work out appropriate terms for such orders should be encouraged (see section 11.442); and
- appointing interim liaison counsel or committees of plaintiffs' or defense counsel.

11.13 Prediscovery Disclosure

Federal Rule of Civil Procedure 26(a)(1) requires parties to exchange certain core information within fourteen days after their initial discovery planning conference⁸² without awaiting a discovery request.

Prediscovery disclosure avoids the cost of unnecessary formal discovery and accelerates the exchange of basic information to plan and conduct discovery and settlement negotiations. The judge should administer Rule 26(a)(1) to

81. Rule 1.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation provides that parties in actions transferred under 28 U.S.C. § 1407 may continue to be represented in the transferee district by existing counsel, without being required to obtain local counsel.

82. For discussion of the discovery planning conference see *infra* section 11.421. See Fed. R. Civ. P. 26(f) (discovery planning conference). Rule 26(g)(3) and Rule 37 provide for the imposition of sanctions for violation of Rule 26(a)(1).

serve those purposes; disclosure should not place unreasonable or unnecessary burdens on the parties (and should not require disclosure of any information that would not have to be disclosed in response to formal discovery requests). In complex litigation, this rule may need modification or suspension.

The scope of disputed issues and relevant facts in a complex case may not be sufficiently clear from the pleadings to enable parties to make the requisite disclosure. One purpose of Rule 26(f)'s requirement that counsel confer is to identify issues and reach agreement on the content and timing of the initial disclosures. To the extent the parties cannot agree during their conference, it sometimes helps to defer disclosure and fashion an order at the Rule 16 conference, defining and narrowing the factual and legal issues in dispute and establishing the scope of disclosure. This will require suspending, by stipulation or order, Rule 26(f)'s presumptive ten-day deadline for making disclosure.

Although Rule 26(a)(1) defines certain information that must be disclosed, it does not limit the scope of prediscovery disclosure and exchange of information. The parties have a duty to conduct a reasonable investigation pursuant to disclosure, particularly when a party possesses extensive computerized data, which may be subject to disclosure or later discovery.⁸³ The rule does not require actual production (except for damage computations and insurance agreements), but only identification of relevant information and materials. The judge may nevertheless direct the parties to produce and exchange materials in advance of discovery, subject to appropriate objections. Effective use of this device without excessive and unnecessary burdens on the parties can streamline the litigation.

Rule 26(e)(1) requires parties to correct or supplement disclosures at appropriate intervals if they learn that the information (even if correct when supplied) is materially incomplete or incorrect, unless they have already informed the other party of the corrective or additional information during discovery or in writing. The court should set a schedule for such supplementation and qualify or clarify the scope of the obligation to supplement in order to fit the particular litigation.

83. *See, e.g.,* *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *25 (N.D. Ill. Oct. 23, 2000) (noting that litigation of the discovery issues could have been avoided if the defendants had not “failed to conduct a sufficiently thorough search” pursuant to court-ordered mandatory disclosure under Federal Rule of Civil Procedure 26(a)(1)).

11.2 Conferences

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Federal Rule of Civil Procedure 16 authorizes the court to hold pretrial conferences in civil cases. These conferences are the principal means of implementing judicial management of litigation. Rules 16(a) and (c) suggest appropriate purposes for these conferences and subjects to discuss, but they are not exhaustive.

11.21 Initial Conference and Orders

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The initial conference launches the process of managing the litigation. It generally provides the first opportunity to meet counsel, hear their views of the factual and legal issues, and begin to structure the litigation and establish a management plan. It is therefore crucial that the judge be prepared to address the range of topics that the conference should cover. The principal topics include

- the nature and potential dimensions of the litigation;
- the major procedural and substantive problems likely to be encountered; and
- the procedures for efficient management.

The conference is not a perfunctory exercise, and its success depends on establishing effective communication and coordination among counsel and between counsel and the court (see section 11.22).

11.211 Case-Management Plan

The primary objective of the conference is to develop an initial plan for the “just, speedy, and inexpensive determination” of the litigation. This plan should include procedures for identifying and resolving disputed issues of law, identifying and narrowing disputed issues of fact, carrying out disclosure and

conducting discovery efficiently and economically, and preparing for trial in the absence of settlement or summary disposition. The agenda should be shaped by the needs of the particular litigation. The following checklist of procedures could help in the development of case-management plans (see also section 22.6):

- identifying and narrowing issues of fact and law (see section 11.33);
- establishing deadlines and limits on joinder of parties and amended or additional pleadings (see section 11.32);
- coordinating with related litigation in federal and state courts, including later filings, removals, or transfers (see section 20);
- effecting early resolution of jurisdictional issues;
- severing issues for trial (see section 11.632);
- consolidating trials (see section 11.631);
- referring, if possible, some matters to magistrate judges, special masters, or other judges (see sections 10.122, 10.14, and 11.5);
- appointing liaison, lead, and trial counsel and special committees, and maintaining time and expense records by counsel (see sections 10.22 and 14.21);
- reducing filing and service requirements through a master file and orders under Federal Rule of Civil Procedure 5 (see sections 11.12 and 20);
- exempting parties from or modifying local rules or standing orders (see section 11.12);
- applying and enforcing arbitration clauses;⁸⁴
- planning for prompt determination of class action questions, including a schedule for discovery and briefing on class issues (see sections 11.213, 21.11);
- managing disclosure and discovery, including establishing
 - a process for preserving evidence (see section 11.442);
 - document depositories and computerized storage (see section 11.444);
 - a uniform numbering system for documents (see section 11.441);

84. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

- procedures for the exchange of documents, photographs, videos, and other materials in digital format;⁸⁵
- procedures for the exchange of digital-format materials, such as databases, fax server files, PDA (personal digital assistant) files, E-mail, and digital voicemail;⁸⁶
- informal discovery and other cost-reduction measures (see sections 11.13 (precovery disclosure) and 11.423);
- procedures for resolving discovery disputes (see sections 11.424, 11.456);
- protective orders and procedures for handling claims of confidentiality and privilege (see section 11.43); and
- sequencing and limitations, including specific scheduling and deadlines (see sections 11.212, 11.421–11.422, 11.451, 11.462);
- planning for the presentation of electronic or computer-based evidence at trial, including the use of any audiovisual or digital technology in the courtroom;
- setting guidelines and schedules for the disclosure and exchange of digital evidentiary exhibits and illustrative aids (see section 11.643);
- establishing procedures for managing expert testimony (see sections 11.48, 11.51 (court-appointed experts and technical advisors), and 23.34 (expert scientific evidence, discovery control and management));
- creating schedules and deadlines for various pretrial phases of the case and setting a tentative or firm trial date (see section 11.212);
- discussing any unresolved issues of recusal or disqualification (see section 10.121);
- evaluating prospects for settlement (see section 13.1) or possible referral to mediation or other procedures (see section 13.15); and
- instituting any other special procedures to facilitate management of the litigation.

Federal Rule of Civil Procedure 16(e) directs the court to enter an order reciting any action taken at the conference. The order should address the various matters on the agenda and other matters conducive to the effective management of the litigation (section 22.6 has an illustrative list of items). The order should memorialize all rulings, agreements, or other actions taken, and set

85. See *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial* 61–97 (Federal Judicial Center 2d prtg. 2002) [hereinafter *Effective Use of Courtroom Technology*].

86. *Id.* at 93–97.

a date for the next conference or other event in the litigation. Counsel should promptly submit a proposed order.

11.212 Scheduling Order

Scheduling orders are a critical element of case management. They help ensure that counsel will timely complete the work called for by the management plan. Rule 16(b) requires that a scheduling order issue early in every case, setting deadlines for joinder of parties, amendment of pleadings, filing of motions, and completion of discovery. Scheduling orders in complex cases should also cover other important steps in the litigation, in particular discovery activities and motion practice. Scheduling orders should be informed by the parties' discovery plan submitted pursuant to Rule 26(f) (see section 11.421).⁸⁷ The order may also

- modify the time set by Rule 26(a)(1) for initial disclosure and set dates for its supplementation under Rule 26(e)(1) (see section 11.13);⁸⁸
- establish a schedule for amending discovery responses as required by Rule 26(e)(2), which requires parties to amend most discovery responses “seasonably” if they learn that the response is materially “incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing”; to maintain order and clarify counsel’s responsibilities, the scheduling order may specify a series of dates on which the parties must provide any amendment required;
- set dates for future conferences (see section 11.22), the final pretrial conference (see section 11.6), and trial; and
- provide for any other matters appropriate in the circumstances of the case.⁸⁹

To allow additional information to be gathered, some judges defer the scheduling conference until after the initial conference. The scheduling conference is best held soon after the initial conference, however, both to maintain momentum and to comply with the rule requiring the scheduling order to issue “as soon as practicable” and within 90 days of a defendant’s appearance and within 120 days of service. In any event, the judge should base the scheduling order on information and recommendations from the parties, rather

87. Fed. R. Civ. P. 16(d).

88. Fed. R. Civ. P. 16(b)(4).

89. Fed. R. Civ. P. 16(b)(6).

than on a standard form. Developments in the litigation may call for subsequent modification of a scheduling order entered early in the litigation.

11.213 Class Actions

Claims by or against a class require a procedure for dealing with the certification issues. A schedule for an early ruling on class certification typically should be set at the initial conference. Class certification or its denial will have a substantial impact on further proceedings, including the scope of discovery, the definition of issues, the length and complexity of trial, and the opportunities for settlement. Denial of class certification may effectively end the litigation. The court should ascertain what discovery on class questions is needed for a certification ruling and how to conduct it efficiently and economically. Consider also staying other discovery if resolution of the certification issue may obviate some or all further proceedings. Discovery may proceed concurrently if bifurcating class discovery from merits discovery would result in significant duplication of effort and expense to the parties.

See section 21 regarding principles and procedures involved in the management of class actions. For discussion of discovery in class actions, see section 21.14.

11.214 Settlement

At each conference, the judge should explore the settlement posture of the parties and the techniques, methods, and mechanisms that may help resolve the litigation short of trial. While settlement is most advantageous early in the litigation, meaningful negotiations may require specific critical discovery so that the parties have a fuller understanding of the strengths and weaknesses of their respective cases. Discovery may be targeted for this purpose, but settlement discussions should not delay or sidetrack the pretrial process. See section 13.11 for a general discussion of the judge's role in settlement. Judges should remind counsel to advise the court promptly when an agreement is imminent or has been reached.

11.22 Subsequent Conferences

Conferences following the initial conference help the judge to monitor the progress of the case and to address problems as they arise. Scheduling the conferences well in advance helps ensure maximum attendance. Some judges schedule conferences only as the need arises, and others schedule them at regular and frequent intervals, with agendas composed of items suggested by the parties or designated by the court. Directing parties to confer and submit

written reports before each conference helps avoid unnecessary conferences. Conferences may also be held in conjunction with motion hearings.

It is best not to adjourn a conference without setting the date for the next conference or the next report from counsel. Written status reports or conference calls can keep the court advised of the progress of the case between conferences. When a conference is scheduled, the court should distribute to counsel an agenda of items to be addressed, perhaps after calling for suggestions from counsel.

On-the-record conferences will minimize later disagreements, particularly if the judge anticipates issuing oral directions or rulings. Many judges hold all conferences on the record, particularly where numerous attorneys are in the courtroom. Nevertheless, an informal off-the-record conference held in chambers or by telephone can sometimes be more productive; a reporter can later be brought in to record the results of the conference. (28 U.S.C. § 753(b) sets forth the requirements for recording various proceedings.) Rule 16 requires (and sound practice dictates) that all matters decided at pretrial conferences be memorialized on the record or in a written order. Counsel may be directed to submit proposed orders incorporating the court's oral rulings.

The Federal Rules of Civil Procedure require a final pretrial conference when discovery and other pretrial matters are substantially complete⁹⁰ and a firm trial date has been set, usually about thirty to sixty days before the trial. More than one such conference may be needed, particularly if there will be more than one trial. See section 11.6.

11.23 Attendance

All attorneys and unrepresented parties should attend the initial pretrial conference. Requirements for attendance at subsequent conferences depend on the purposes of each conference. Costs can be reduced by relieving counsel from attending if their clients have no substantial interest in the matters to be discussed or if their interests will be fully represented by designated counsel, or by allowing them to attend by video or telephone conference, particularly if they have only a peripheral interest in the matters to be discussed. The judge should generally not bar any attorney's attendance, but might consider excluding attorneys who appear unnecessarily in order to claim court-awarded fees for that time. Authorizing compensation for one attorney per party only at routine conferences will also minimize attorneys' fees. Rule 16(c) requires that each party participating in a conference be represented by an attorney with

90. See Fed. R. Civ. P. 16(d).

authority to enter into stipulations and make admissions as to all matters the participants may reasonably anticipate will be discussed at that conference. Lead trial counsel should always attend the final pretrial conference. Rule 16(f) allows the court to impose sanctions for unexcused nonattendance at any conference. See section 40.1, ¶ 2.

Rule 16 also authorizes the court to require attendance or telephone availability of persons with authority to settle, including insurance carriers or their representatives when their interests are implicated and their presence will facilitate settlement. It may also be beneficial to invite counsel involved in related litigation and the magistrate judge or special master to whom matters to be discussed at the conference have been or may be referred. Judges should always consider the cost versus the benefits of such invitations.

11.3 Management of Issues

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11.31 Relationship to Discovery

The *sine qua non* of managing complex litigation is defining the issues in the litigation. The materiality of facts and the scope of discovery (and the trial) cannot be determined without identification and definition of the controverted issues. The pleadings, however, will often fail to define the issues clearly, and the parties may lack sufficient information at the outset of the case to arrive at definitions with certainty. Probably the judge's most important function in the early stages of litigation management is to press the parties to identify, define, and narrow the issues. The initial conference should start this process.

Plaintiffs may assert that substantial discovery must precede issue definition, and defendants may contend that plaintiffs must first refine their claims. Nonetheless, the judge must start the process of defining and structuring the issues, albeit tentatively, to establish the appropriate sequence and limits for discovery.

The controlling factual and legal issues can almost always be identified by a thorough and candid discussion with counsel at the initial conference, prior to discovery. The judge should construct the discovery plan after identifying the primary issues, at least preliminarily, based on the pleadings and the parties' positions at the initial conference. Discovery may then provide information for further defining and narrowing issues, which may in turn lead to revision and refinement of the discovery plan.

11.32 Pleading and Motion Practice

Finalizing pleadings and resolving emergency legal issues will help to define and narrow issues.

The judge should consider establishing a schedule for filing all pleadings, including counterclaims, cross-claims, third-party complaints, and amendments to pleadings that add parties, claims, or defenses. This avoids later enlargement of issues and expansion or duplication of discovery. The judge should also consider suspending filing of certain pleadings if statutes of limitations present no problems and should consider ordering that specified pleadings, motions, and other court orders (unless specifically disavowed by a party) are “deemed” filed in cases later brought, transferred, or removed, without actually filing the documents (see Sample Order, section 40.42).

The pleadings may disclose issues of law that can be resolved by a motion to dismiss, to strike, or for judgment on the pleadings. Challenges to the court’s personal or subject-matter jurisdiction should take priority. The legal insufficiency of a claim or defense may be raised by motion for failure to state a claim or for partial judgment on the pleadings. If the court considers evidence in connection with such a motion, the motion must be treated as one for summary judgment.⁹¹ Insufficient defenses and irrelevant or duplicative matter can be stricken under Federal Rule of Civil Procedure 12(f). If a motion concerns a pivotal issue that may materially advance the termination of the litigation, the ruling may be certified for interlocutory appeal under 28 U.S.C. § 1292(b) if there is “substantial ground for difference of opinion.” The judge may also provide for appellate review by entering final judgment as to a particular claim or party under Rule 54(b). See section 15.1.

Motion practice can be a source of substantial cost and delay. Following are some points the judge might consider:

- A Rule 12 motion can cause unnecessary expense if the asserted defect can be cured by amendment; therefore, instruct counsel to notify the opposing party and the court before filing such a motion in order to ascertain whether it will serve to narrow the issues in the case.
- Some motions can be decided based on oral presentations and reference to controlling authority, without briefs.
- Limiting the length of briefs and of appendices, affidavits, declarations, and other supporting materials, and requiring joint briefs whenever feasible, will expedite the litigation.

91. Fed. R. Civ. P. 12(b), (c). For discussion of summary judgment, see *infra* section 11.34.

- Prefiling conferences and requiring leave of court for filing of reply or supplemental briefs, or motions for reconsideration, will help avoid useless or unnecessary briefing.
- Prompt rulings from the bench will often help avoid unnecessary litigation activity.
- Some judges issue tentative rulings on motions in advance of the motion hearing. If the parties reject the rulings, they can direct their arguments at the hearing to specific issues.
- Multiparty litigation requires particular attention to scheduling. Counsel should inform the court as soon as possible of any motion to be filed, with sufficient time for opposing counsel to respond and the court to review submissions in advance. Discourage expedited motions unless they concern matters that will delay further proceedings if not resolved. It is sometimes best to specially set multiparty motions rather than schedule them as part of a regular motion docket or calendar call of the court; such motions also may be combined with other status conferences in the litigation.

11.33 Identifying, Defining, and Resolving Issues

The process of identifying, defining, and resolving issues begins at the initial conference. The attorneys should confer and submit a tentative statement of disputed issues in advance, agreed on to the extent possible (see section 11.11). The conference is an opportunity for the judge to learn about the material facts and legal issues and for counsel to learn about the opponent's case and gain a better perspective on their own. The judge should be willing to admit ignorance and ask even basic questions. Questions should probe into the parties' claims and defenses and seek *specific* information. Rather than accept a statement that defendant "was negligent" or "breached the contract," the judge should require the attorneys to describe the material facts they intend to prove and how they intend to prove them.

The judge should also inquire into the amount of damages claimed and the proposed proof and manner of computation, including the evidence of causation and the specific nature of any other relief sought (data that may also be subject to mandatory prediscovery disclosure, see section 11.13). The defense should identify the specific allegations and claims it disputes, the specific defenses it will raise, and the proof it will offer. This process helps identify the genuine disputes and may facilitate admissions and stipulations between the parties. The parties may, for example, be able to stipulate to the authenticity of documents or the accuracy of underlying statistical or technical data while reserving the right to dispute assumptions, interpretations, or inferences drawn

from the evidence. The judge may take judicial notice of facts after the opposing party has had an opportunity to proffer contradictory evidence.⁹²

A variety of actions can help to identify, define, and resolve issues in complex litigation, including the following:

- requiring nonbinding statements of counsel, such as those that may be required at the initial conference (see section 11.11)—such statements can be updated periodically by written reports or oral statements at later conferences;
- encouraging voluntary abandonment of tenuous claims or defenses by the parties, often after the court’s probing into the likelihood of success and the potential disadvantages of pursuing them;
- requiring counsel to list the essential elements of the cause of action—this exercise, designed to clarify the claims, may help identify elements in dispute and result in abandonment of essentially duplicative theories of recovery;
- incorporating formal amendments to the pleadings, including those resulting from an order under Federal Rule of Civil Procedure 12 striking allegations or requiring a more definite statement;
- using the authority in Rule 16(c)(1) to eliminate insubstantial claims or defenses;⁹³
- allowing contention interrogatories (see section 11.461) and requests for admission (see section 11.472), especially when served after adequate opportunity for relevant discovery;

92. See Fed. R. Evid. 201; *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 332 (1949); William J. Flittie, *Judicial Notice in the Trial of Complex Cases*, 31 Sw. L.J. 819, 829–39 (1978).

93. See, e.g., Fed. R. Civ. P. 16(c) committee note; *McLean Contracting Co. v. Waterman S.S. Corp.*, 277 F.3d 477 (4th Cir. 2002) (citing the interest of efficient judicial administration as a basis for 16(c)(1)); *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) (holding that a local rule requiring the party to identify disputed issues of material fact or waive arguments related to those issues “contributes to the efficient management of judicial business”); *Morro v. City of Birmingham*, 117 F.3d 508, 515 (11th Cir. 1997) (noting the importance of narrowing and defining the issues before trial); *Lexington Ins. Co. v. Cooke’s Seafood*, 835 F.2d 1364, 1368 (11th Cir. 1988) (“Given the vast number of details competing for the attention of a federal district judge, reducing all issues to writing before the pretrial conference substantially assists the trial court in its ability to understand the issues and to prepare for trial.”); *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371, 1375 n.6 (11th Cir. 1983) (noting trial court’s power under Rule 16 to summarily decide matters where no issue of fact exists); *Holcomb v. Aetna Life Ins. Co.*, 255 F.2d 577, 580–81 (10th Cir. 1958) (trial court may enter judgment at Rule 16 pretrial conference if no issue of fact); cf. *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356–57 (5th Cir. 1983) (judge may summarily dispose of unsupportable claim after Rule 16 conference held during recess in trial).

- ruling promptly on motions for full or partial summary judgment (see section 11.34);
- issuing sanctions for violations of Rules 16, 26, and 37 in the form of orders precluding certain contentions or proof (see section 10.15);
- requiring, with respect to one or more issues, that the parties present a detailed statement of their contentions, with supporting facts and evidence (see section 11.641)—the statements may be exchanged, with each party marking those parts it disputes; the order directing this procedure should provide that other issues or contentions are then precluded and no additional evidence may be offered absent good cause;
- requiring the parties to present, in advance of trial, proposed instructions in jury cases (see sections 11.65, 12.43) or proposed findings of fact and conclusions of law in nonjury cases (see section 12.52);
- conducting preliminary hearings under Federal Rule of Evidence 104 on objections to evidence (see section 11.642); and
- conducting a separate trial under Federal Rule of Civil Procedure 42(b) of issues that may render unnecessary or substantially alter the scope of further discovery or trial (see section 11.632)—special verdicts and interrogatories (see section 11.633) may be helpful, and on some issues the parties may waive jury trial (see section 11.62).

11.34 Summary Judgment

Summary judgment motions can help identify, define, and resolve issues. As the Supreme Court has stated, summary judgment is “not . . . a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules.”⁹⁴ Summary judgment may eliminate the need for further proceedings or at least reduce the scope of discovery or trial. Even if denied, the parties’ formulations of their positions may help clarify and define issues and the scope of further discovery. In addition, under Federal Rule of Civil Procedure 56(d), the court may issue an order specifying those facts that “appear without substantial controversy” and shall be “deemed established” for trial purposes.

Despite their benefits, summary-judgment proceedings can be costly and time-consuming. To avoid the filing of unproductive motions, the court may require a prefiling conference to ascertain whether issues are appropriate for summary judgment, whether there are disputed issues of fact, and whether the motion, even if granted, would expedite the termination of the litigation. A

94. *Celotex v. Catrett*, 477 U.S. 317, 329 (1986).

separate trial of an issue bifurcated under Rule 42(b) may sometimes be a preferable alternative.

Summary judgment is as appropriate in complex litigation as in routine cases⁹⁵—and, as a general proposition, the standard for deciding a summary judgment motion is the same in all cases.⁹⁶ Complex litigation, however, may present complicated issues not as susceptible to resolution as issues in more familiar settings. More extensive discovery may be necessary to create an adequate record for decision.⁹⁷ However, the party opposing summary judgment should make the necessary showing under Rule 56(f) in support of its request.⁹⁸

To avoid pretrial activities that may be unnecessary if the summary-judgment motion is granted, the schedule should call for filing the motion as early in the litigation as possible. This will maximize the potential benefits from its disposition while affording the parties an adequate opportunity to conduct discovery relevant to the issues raised, obtain needed evidence, and develop a sufficient record for decision.⁹⁹ Allowing adequate time for preparation before the motion is filed should reduce the opposing party's need for granting a continuance under Rule 56(f) to obtain affidavits or conduct further discovery to oppose the motion. Under Rule 56(f), the party requesting a continuance must specify (1) the discovery it proposes to take, (2) the evidence

95. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (approving grant of summary judgment in complex antitrust case).

96. See William W Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions* (Federal Judicial Center 1991), reprinted in 139 F.R.D. 441 (1992) [hereinafter *Summary Judgment*]. For U.S. Supreme Court cases discussing the standard and the parties' respective burdens, see *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451 (1992); *Celotex*, 477 U.S. at 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita*, 475 U.S. at 574.

97. See William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 *Hastings L.J.* 1 (1993).

98. See, e.g., *Harrods Ltd. v. Sixty Internet Domain Names*, No. 00-2414, 2002 U.S. App. LEXIS 17530, at *77 (4th Cir. Aug. 23, 2002); *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526 (1st Cir. 1996); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1388–90 (Fed. Cir. 1989); *Dowling v. City of Philadelphia*, 855 F.2d 136, 139–40 (3d Cir. 1988); *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986); *Madrid v. Chronicle Books*, 209 F. Supp. 2d 1227, 1232–33 (D. Wyo. 2002); *Nicholson v. Doe*, 185 F.R.D. 134, 136–37 (N.D.N.Y. 1999).

99. See *Celotex*, 477 U.S. at 327 (court must allow “adequate time” for discovery); *Anderson*, 477 U.S. at 250 n.5 (nonmoving party must have opportunity to discover information “essential to [its] opposition”). The court must use its discretion to determine what constitutes “adequate time” and what information is “essential” in opposition; requiring all discovery to be completed before entertaining the motion defeats the purpose of summary judgment.

likely to be uncovered, and (3) the material fact issues that evidence will support.

Rule 56(c) directs the court to rule on a summary-judgment motion on the basis of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits.”¹⁰⁰ The affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”¹⁰¹ Because of the volume of discovery materials in complex litigation and the potential for disputes over admissibility, these provisions can be a particular source of problems. The court may either direct the moving party to specify the material facts claimed to be undisputed or direct the opposing party to specify the evidence upon which a claimed factual dispute is based.¹⁰² Objections to evidence may be resolved by a hearing under Federal Rule of Evidence 104.¹⁰³ Each party should also submit a clear and unambiguous statement of the theories of its case. Such statements in the motion and the opposition will minimize the risk of error, as will a tentative ruling before hearing the motion.

The ruling on the motion should be in writing or read into the record, and it should lay out the court’s reasoning. It is important to decide such motions promptly; deferring rulings on summary judgment motions until the final pretrial conference defeats their purpose of expediting the disposition of issues.

100. Fed. R. Civ. P. 56(c). The court may also hold an evidentiary hearing under Rule 43(e), but when the motion cannot be decided because the parties’ submissions are unclear, the court may instead simply require additional, clarifying submissions.

101. Fed. R. Civ. P. 56(e). The requirements of personal knowledge and admissibility in evidence presumably apply also to the use of depositions and interrogatory answers. See 10A Charles A. Wright et al., *Federal Practice and Procedure: Civil 3d* § 2722 (3d ed. 1998).

102. For example, the parties should identify relevant deposition evidence by deponent, date, place of deposition, and page numbers; similarly detailed information should be provided for all other evidence submitted. Copies of relevant materials should be included with the moving and opposing papers. See Summary Judgment, *supra* note 96, at 480–81 & n.221; *Schneider v. TRW, Inc.*, 938 F.2d 986, 990 n.2 (9th Cir. 1991).

103. See *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir. 1983), *rev’d on other grounds sub. nom.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

11.4 Discovery

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The Federal Rules of Civil Procedure, along with the court's inherent power, provide ample authority¹⁰⁴ for early and ongoing control of discovery in complex litigation.

11.41 Relationship to Issues

Fundamental to controlling discovery is directing it at the material issues in controversy. The general principle governing the scope of discovery stated in Rule 26(b)(1) permits discovery of matters, not privileged, "relevant to the claim or defense of any party." The court has discretion to expand that to "any matter relevant to the subject matter involved in the action."¹⁰⁵ But Rule 26(b)(2) directs the court to limit the frequency and extent of use of the discovery methods permitted by the rules in order to prevent "unreasonably cumulative or duplicative" discovery and discovery for which "the burden or expense . . . outweighs its likely benefit, taking into account the needs of the case . . . the importance of the issues at stake . . . and the importance of the proposed discovery in resolving the issues." This underlying principle of proportionality means that even in complex litigation, discovery does not require leaving no stone unturned.

Early identification and clarification of issues (see section 11.3) is essential to discovery control. It enables the court to assess the materiality and relevance of proposed discovery and provides the basis for a fair and effective discovery plan. A plan established early in the litigation needs to take into account the possibility of revisions based on information gained through discovery. Alternative approaches to the sequencing of discovery have different costs and benefits. For example, deferring discovery on damages until liability has been decided may result in savings, but may also lead to duplicative discovery if resumed. Conversely, conducting discovery on damages before discovery on liability will sometimes facilitate early settlement by informing the parties of their potential exposure, but may be rendered unnecessary if the defendant is found not liable.

104. See *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350–54 (1978).

105. Fed. R. Civ. P. 26(b)(1).

11.42 Planning and Control

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A discovery plan should facilitate the orderly and cost-effective acquisition of relevant information and materials and the prompt resolution of discovery disputes. The plan should reflect the circumstances of the litigation, and its development and implementation must be a collaborative effort with counsel. The judge should ask the lawyers initially to propose a plan, but should not accept joint recommendations uncritically. Limits may be necessary even regarding discovery on which counsel agree. The judge's role is to oversee the plan and provide guidance and control. In performing that role, even with limited familiarity with the case, the judge must retain responsibility for control of discovery. The judge should not hesitate to ask why particular discovery is needed and whether information can be obtained more efficiently and economically by other means. Regular contact with counsel through periodic conferences will enable the judge to monitor the progress of the plan, ensure that it is operating fairly and effectively, and adjust it as needed.

11.421 Discovery Plan/Scheduling Conference

Adoption of a discovery plan is a principal purpose of the initial conference.¹⁰⁶ The initial conference should be preceded by a conference of counsel to develop a discovery plan for submission to the court.¹⁰⁷ Rule 26(f) requires such conferring and places joint responsibility on the attorneys of record and all unrepresented parties to arrange, attend (or be represented at), and participate in good faith in the conference. Rule 26(d) bars discovery, absent stipulation or court order, before that conference. An exception is found in Rule 30(a)(2)(C), which allows a deposition to be taken before the discovery conference if the notice contains a certification, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country unless deposed before that time. Such a deposition may

106. See Fed. R. Civ. P. 16(c)(6). See also *supra* sections 11.11, 11.33.

107. For a discussion of the factors to be considered in formulating a discovery plan, see William W Schwarzer et al., *Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice* (2d ed. 1994).

not be used against a party who demonstrates that it was unable through diligence to obtain counsel to represent it at the deposition.¹⁰⁸

Within fourteen days after conferring the parties must submit to the court a written report outlining their discovery plan.¹⁰⁹ The plan should address

- the form and timing of disclosure;
- the subjects of and completion date for discovery; and
- the possibility of phasing, limiting, or focusing discovery in light of the issues.

The parties' submission will be the starting point for developing the plan. If necessary, the court should direct the parties to resume discussion to prepare a more useful and reasonable plan. Rule 37(g) allows the court, after opportunity for hearing, to assess reasonable costs, including attorneys' fees, against a party or attorney failing to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f). It is ordinarily best to defer commencement of discovery until after a plan has been adopted.

Actions taken at the conference bearing on the discovery plan may include the following:

- examining the specifics of proposed discovery in light of Rule 26(b)(2), which calls for
 - limiting discovery that is cumulative or duplicative, or that is more convenient, less burdensome, or less expensive to obtain from another source, or that seeks information the party has had ample opportunity to obtain; and
 - balancing the burden and expense of any discovery sought against its benefit, after considering the need for the discovery, the importance of the amount or issues at stake, and the parties' resources;
- directing disclosure of core information where appropriate to avoid the cost and delay of formal discovery (see section 11.13);
- discussing issues related to the format, compression, resolution, and alteration of documents, photographs, videotapes, and other materials to be exchanged in digital form;¹¹⁰
- reminding counsel of their professional obligations in conducting discovery and the implications of the certification under Rule 26(g) that

108. Fed. R. Civ. P. 32(a)(3).

109. For a sample report, see Federal Rule of Civil Procedure appendix of forms (form 35).

110. See Effective Use of Courtroom Technology, *supra* note 85, at 61–97. Also see the material regarding form of production in *infra* section 11.446.

all disclosures and discovery responses are complete and correct when made, and that requests, objections, and responses conform to the requirements of the Federal Rules;

- providing for compliance with the supplementation requirements of Rules 26(e)(1) and (2)¹¹¹ by setting periodic dates for additional reports;
- requiring periodic status reports to monitor the progress of discovery (which can be informal, by letter or telephone); and
- issuing an order, which may be a part of the scheduling order required by Rule 16(b) (see section 11.212), which incorporates the discovery plan (for a sample order, see section 40.24).

11.422 Limitations

Discovery control in complex litigation may take a variety of forms, including time limits, restrictions on scope and quantity, and sequencing. The Federal Rules and the court's inherent power provide the court with broad authority. Among other provisions, Federal Rule of Civil Procedure 16(b) directs the court to limit the time for discovery, and Rule 26(b) empowers the court to limit the "frequency or extent of use of the discovery methods" under the rules, including the length of depositions. Rule 30(a) imposes a presumptive limit of ten depositions per side. Rule 30(d) has a presumptive durational limit of one 7-hour day for any deposition. Rule 33 establishes a presumptive limit of twenty-five interrogatories per party (see sections 11.451, 11.462). Rule 26(f)(3) requires the parties to address discovery limits in their proposed discovery plan.

Presumptive limits should be set early in the litigation, before discovery has begun. Information about the litigation will be limited at that time, so limits may need to be revised in the light of later developments. But they should be imposed on the basis of the best information available at the time, after full consultation with counsel, and with the understanding that they will remain binding until further order. In determining appropriate limits, the court will need to balance efficiency and economy against the parties' need to develop an adequate record for summary judgment or trial. This task further underlines the importance of clarifying and understanding the issues in the case before

111. Rule 26(e)(2) does not apply to deposition testimony, but when the deposition of an expert from whom a report was required under Rule 26(a)(2)(B) reveals changes in the expert's opinion, it triggers the duty of supplementation imposed by Rule 26(e)(1). See Fed. R. Civ. P. 26 committee note; Fed. R. Civ. P. 26(a)(2)(C).

imposing limits.¹¹² The following are examples of discovery limits that a judge might consider:

- *Time limits and schedules.* The discovery plan should include a schedule for the completion of specified discovery, affording a basis for judicial monitoring of progress. Setting a discovery cutoff date¹¹³ is an important objective, but may not be feasible at the initial conference in complex litigation. The discovery cutoff should not be so far in advance of the anticipated trial date that the product of discovery becomes stale and the parties' preparation outdated. Time limits impose valuable discipline on attorneys, forcing them to be selective and helping to move the case expeditiously, but standing alone they may be insufficient to control discovery costs. Unless time limits are complemented by other limitations, attorneys may simply conduct multi-track discovery, thereby increasing expense and prejudicing parties with limited resources. To prevent time limits from being frustrated, the judge should rule promptly on disputes so that further discovery is not delayed or hampered while a ruling is pending. Although attorneys will sometimes argue over "priorities," the rules provide for no such presumptive standing.
- *Limits on quantity.* Time limits may be complemented by limits on the number and length of depositions, on the number of interrogatories, and on the volume of requests for production. Imposing such limitations only after hearing from the attorneys makes possible a reasonably informed judgment about the needs of the case. Limitations are best applied sequentially to particular phases of the litigation, rather than as aggregate limitations. When limits are placed on discovery of voluminous transactions or other events, consider using statistical sampling techniques to measure whether the results of the discovery fairly represent what unrestricted discovery would have been expected to produce (section 11.493 discusses statistical sampling).
- *Phased, sequenced, or targeted discovery.* Counsel and the judge will rarely be able to determine conclusively early in the litigation what discovery will be necessary; some discovery of potential relevance at the outset may be rendered irrelevant as the litigation proceeds, and the need for other discovery may become known only through later developments. For effective discovery control, initial discovery should focus on matters—witnesses, documents, information—that appear

112. See Schwarzer & Hirsch, *supra* note 97.

113. See *In re Fine Paper Antitrust Litig.*, 685 F.2d 810 (3d Cir. 1982).

pivotal. As the litigation proceeds, this initial discovery may render other discovery unnecessary or provide leads for further necessary discovery. Initial discovery may also be targeted at information that might facilitate settlement negotiations or provide the foundation for a dispositive motion; a discovery plan may call for limited discovery to lay the foundation for early settlement discussions. Targeted discovery may be nonexhaustive, conducted to produce critical information rapidly on one or more specific issues. In permitting this kind of discovery, it is important to balance the potential savings against the risk of later duplicative discovery should it be necessary to resume the deposition of a witness or the production of documents. Targeted discovery may in some cases be appropriate in connection with a motion for class certification; however, matters relevant to such a motion may be so intertwined with the merits that targeting discovery would be inefficient. See sections 11.41 and 21.2.

- *Subject-matter priorities.* Where the scope of the litigation is in doubt at the outset—as, for example, in antitrust litigation—the court should consider limiting discovery to particular time periods or geographical areas, until the relevance of expanded discovery has been established. See section 11.41.
- *Sequencing by parties.* Although discovery by all parties ordinarily proceeds concurrently, sometimes one or more parties should be allowed to proceed first. For example, if a party needs discovery to respond to an early summary judgment motion, that party may be given priority. Some judges establish periods in which particular parties have exclusive or preferential rights to take depositions, and in multiple litigation, those judges direct that discovery be conducted in some cases before others. Sometimes judges order “common” discovery to proceed in a specified sequence, without similarly limiting “individual” discovery in the various cases.
- *Forms of discovery.* Some judges prescribe a sequence for particular types of discovery—for example, interrogatories may be used to identify needed discovery and documents, followed by requests for production of documents, depositions, and finally requests for admission.

If the court directs that discovery be conducted in a specified sequence, it should grant leave to vary the order for good cause, as when emergency depositions are needed for witnesses in ill health or about to leave the country.

11.423 Other Practices to Save Time and Expense

Various other practices can help minimize the cost, delay, and burden associated with discovery. Consider reminding counsel of the following:

- *Stipulations under Federal Rule of Civil Procedure 29.* The rule gives parties authority to alter procedures, limitations, and time limits on discovery so long as they do not interfere with times set by court order. Thus, the parties can facilitate discovery by stipulating with respect to notice and manner of taking depositions and adopting various informal procedures. The court may, however, require that it be kept advised of such agreements to ensure compliance with the discovery plan and may by order preclude stipulations on particular matters.
- *Informal discovery.* The court should encourage counsel to exchange information, particularly relevant documents, without resort to formal discovery (see section 11.13). Early exchanges can make later depositions more efficient. Informal interviews with potential witnesses can help determine whether a deposition is needed, inform later discovery, and provide the basis for requests for admissions through which the results of informal discovery are made admissible at trial.
- *Automatic disclosure.* Rule 26(a)(1) and many local rules and standing orders require the parties to identify relevant witnesses and categories of documents early in the litigation, without waiting for discovery requests. By stipulation or court order, the timing and content of this disclosure may be tailored to the needs of the particular case. See section 11.13.
- *Reduction of deposition costs.* Depositions taken by telephone, videoconference, electronic recording devices, or having deponents come to central locations sometimes save money. Likewise, parties may forgo attending a deposition in which they have only a minor interest if a procedure is established for supplemental questions—by telephone, videoconference, written questions, or resumption of examination in person—in the event that, after a review of the transcript, they find further inquiry necessary. Section 11.45 has additional discussion of deposition practices.
- *Information from other litigation and sources.* When information is available from public records (such as government studies or reports),

from other litigation,¹¹⁴ or from discovery conducted by others in the same litigation, consider requiring the parties to review those materials before undertaking additional discovery. The court may limit the parties to supplemental discovery if those materials will be usable as evidence in the present litigation. Interrogatory answers, depositions, and testimony given in another action ordinarily are admissible if made by and offered against a party in the current action. Similarly, they may be admissible for certain purposes if made by a witness in the current action.¹¹⁵ Coordination of “common” discovery in related litigation may also save costs, even if the litigation is pending in other courts. If related cases are pending in more than one court, coordinated common discovery can prevent duplication and conflicts. A joint discovery plan can be formulated for all cases, with agreement among parties that one of the cases will be treated as the lead case (with its discovery plan serving as the starting point for development of supplemental plans in the other courts), or with the use of joint deposition notices. See section 20. Counsel may also agree that discovery taken in one proceeding can be used in related proceedings as though taken there.

- *Joint discovery requests and responses.* In multiparty cases with no designated lead counsel, judges sometimes require parties with similar positions to submit a combined set of interrogatories, requests for production, or requests for admission. If voluminous materials are to be produced in response, the responding party may be relieved of the requirement of furnishing copies to each discovering party. Section 11.44 has further discussion of document discovery, including use of document depositories.
- *Modified discovery responses.* When a response to a discovery request can be provided in a form somewhat different from that requested, but with substantially the same information and with less time and expense, the responding party should make that fact known and seek agreement from the requesting party. For example, information sought on a calendar year basis may be readily and inexpensively available on a fiscal year basis. Similarly, if some requested information can be produced promptly but additional time will be needed for other items, the responding party should produce the information presently

114. Access to materials and testimony given in other cases may be impeded because of confidentiality orders, restrictions on release of grand jury materials, and other limitations. See *infra* sections 11.43 and 20.

115. See Fed. R. Evid. 801(d). The parties may stipulate to the admissibility of other information.

available and indicate when the remainder will be produced. Preferably, formal discovery requests should be prepared only after counsel have informally discussed what information is needed and how it can be produced most efficiently.

- *Phased or sequenced discovery of computerized data.* Sections 11.41 and 11.422 have discussed phasing discovery by issue. Computerized data, however, are often not accessible by date, author, addressee, or subject matter without costly review and indexing. Therefore, it may be appropriate for the court to phase or sequence discovery of computerized data by accessibility. At the outset, allowing discovery of relevant, nonprivileged data available to the respondent in the routine course of business is appropriate and should be treated as a conventional document request. If the requesting party requests more computerized data, consider additional sources in ascending order of cost and burden to the responding party, e.g., metadata or system data, archived data, backup data, and legacy data.¹¹⁶ The judge should encourage the parties to agree to phased discovery of computerized data as part of the discovery plan. But with or without a prior agreement, the judge may engage in benefit-and-burden analysis under Rule 26(b)(2)(iii) at each stage and enter an appropriate order under Rule 26(c), which may include cost sharing between the parties or cost shifting to the requesting party.¹¹⁷ See section 11.433.
- *Computerized data produced in agreed-on formats.* Information subject to discovery increasingly exists in digital or computer-readable form. The judge should encourage counsel to produce requested data in formats and on media that reduce transport and conversion costs, maximize the ability of all parties to organize and analyze the data during pretrial preparation, and ensure usability at trial. Wholesale conversion of computerized data to paper form for production, only to be reconverted into computerized data by the receiving party, is costly and wasteful. Particularly in multiparty cases, data production on CD-ROM or by Internet-based data transfer can increase efficiency. Section 11.444 discusses “virtual” document depositories.

116. For explanations of these terms, see Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2, at <http://www.fclr.org/2000fedctslrev2.htm> (last visited Nov. 3, 2003); see also *infra* section 11.446.

117. See *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y.) (defining five common categories of data accessibility, proposing sampling of backup data, and applying a seven-factor test in considering cost sharing or cost shifting).

- *Sampling of computer data.* Parties may have vast collections of computerized data, such as stored E-mail messages or backup files containing routine business information kept for disaster recovery purposes. Unlike collections of paper documents, these data are not normally organized for retrieval by date, author, addressee, or subject matter, and may be very costly and time-consuming to investigate thoroughly. Under such circumstances, judges have ordered that random samples of data storage media be restored and analyzed to determine if further discovery is warranted under the benefit versus burden considerations of Rule 26(b)(2)(iii).¹¹⁸
- *Combined discovery requests.* Several forms of discovery can be combined into a single request. Ordinarily, more time should be allowed for parties responding to a combined discovery request, even though such responses sometimes consume less overall time than do responses to traditional separate discovery requests. Because the rules impose no limits on requests for admission as they do on interrogatories, an order enlarging the number of permissible interrogatories may be necessary.
- *Conference depositions.* If knowledge of a subject is divided among several people and credibility is not an issue, a “conference deposition” may be feasible (see, e.g., Rule 26(b)(6)). Each witness is sworn, and the questions are then directed to the group or those having the information sought. Persons in other locations who may also be needed to provide information may be scheduled to be “on call” during the conference deposition. This procedure may be useful in obtaining background information, identifying and explaining documents, and examining reports compiled by several persons.
- *Subpoenas.* Under Rule 45, an attorney may subpoena documents or other tangibles from nonparties, avoiding unnecessary depositions. The rule also provides for subpoenas to permit inspection of premises possessed by nonparties, rendering unnecessary the commencement of an independent proceeding. See section 11.447.

11.424 Resolution of Discovery Disputes

Discovery disputes, with their potential for breeding satellite litigation, are a major source of cost and delay. Few aspects of litigation management are more important than the prompt and inexpensive resolution of such controversies. Procedures such as those described here take little judicial time but

118. *Id.*

result in substantial improvements in the conduct of discovery by deterring counsel from obstructive conduct. Such procedures are equally effective when a magistrate judge manages discovery.

A discovery plan should include specific provisions, such as the following, for the fair and efficient resolution of discovery disputes.

Presubmission conference of counsel. Submission of a dispute or a request for relief should be disallowed until the parties have met and attempted to resolve it. Rules 37(a) and 26(c) condition the right to make a motion to compel or for a protective order upon certification that the movant has in good faith conferred or attempted to confer with the opponent to resolve the matter without court action. Most local rules require such a conference before counsel may bring a discovery dispute to the court (some judges require the participation of local counsel in this conference).¹¹⁹ The discovery plan or scheduling order, however, should specify the ground rules for such conferences, such as requiring that the party requesting the conference send the opponent a clear and concise statement of the asserted deficiencies or objections and the requested action. Having to narrow and define the dispute and the requested relief should cause counsel to prepare for the conference, consult with clients, and seek a resolution that will avoid the need for judicial intervention. Any resulting resolution should be put in writing.

Submission to the court. Many judges believe that making themselves available to resolve discovery disputes informally discourages disputes and encourages quick resolution of those that are submitted. Some judges direct counsel to present disputes by conference call. Others direct submission by letter. A brief excerpt of the transcript containing relevant proceedings, either in writing or read by the reporter over the phone, will help the decision maker. The availability of a speedy resolution process, particularly during the course of a deposition, tends to deter unreasonable and obstructive conduct. The incentive for unreasonable behavior is reduced when the judge (or magistrate judge) is readily available by telephone and the opponent can obtain prompt relief (see section 11.456).

Avoiding formal motions in discovery disputes also forces attorneys to narrow and simplify the dispute rather than to elaborate on it as they would in a brief. Questions from the judge will further narrow and clarify the dispute. Often, the appropriate resolution becomes self-evident during the course of the conference. Even if informal presentation does not resolve a dispute, it can help to define and narrow it for further proceedings.

119. See, e.g., William W Schwarzer, *Guidelines for Discovery, Motion Practice and Trial*, 117 F.R.D. 273 (1987).

If informal procedures fail or are rejected, it helps to adopt procedures that minimize the activity needed to resolve the dispute. These procedures include restricting the length of motions, memoranda, and supporting materials, barring replies generally, and setting time limits for submission. Discovery disputes involving issues having a significant impact on the litigation—such as rulings on privilege—may require substantial proceedings. The judge should avoid discovery with respect to the discovery dispute itself except in extraordinary circumstances.

Special masters can successfully oversee discovery, particularly where there are numerous issues—such as claims of privilege—to resolve or where the parties are extraordinarily contentious. Appointing special masters, however, can increase substantially the cost of litigation, although the resulting efficiencies could result in offsetting savings. In any event, the court should avoid such appointments where the parties object with good cause or cannot afford the cost.¹²⁰

Counsel sometimes may submit certain discovery disputes to a judge outside of the district. Lawyers sometimes submit a motion, for example, to compel or terminate a deposition held outside the district where the action is pending, or a motion for a protective order, either to the judge before whom it is pending or to a judge in the district where the deposition is being held.¹²¹ In complex litigation, however, particularly if procedures have already been established for expedited consideration, consider requiring all such matters to be presented to the assigned judge. Federal Rule of Civil Procedure 37(a)(1) requires counsel to present a motion to compel to the court in which the action is pending if directed at a party; only if directed at a nonparty must it be presented to a court in the district where the discovery is taken. When a dispute is presented to a deposition-district court, however, the assigned judge may have or be able to obtain authority to act also as deposition judge in that district, and may be able to exercise those powers by telephone.¹²² In multidistrict litigation under 28 U.S.C. § 1407(b), “the judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conduct-

120. See *infra* section 11.52; Brazil et al., *supra* note 21 (based on experience in United States v. Am. Tel. & Tel. Co., 461 F. Supp. 1314 (D.D.C. 1978), 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Md. v. United States, 460 U.S. 1001 (1983)).

121. Fed. R. Civ. P. 26(c), 30(d).

122. See *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 877, 879 (D.C. Cir. 1981); *In re Corrugated Container Antitrust Litig.*, 644 F.2d 70 (2d Cir. 1981) (tacitly assuming power); *In re Corrugated Container Antitrust Litig.*, 620 F.2d 1086, 1089 (5th Cir. 1980).

ing pretrial depositions.” In other cases, an interdistrict or intercircuit assignment may enable the judge to whom the case is assigned to act as deposition judge in another district. In such cases, the deposition-district judge can always confer with the forum-district judge by telephone and thereby expedite a ruling.

Rulings. The judge should try to expedite the resolution of discovery disputes by whatever procedure is adopted. Pending disputes disrupt the discovery program and result in additional cost and delay. It is generally more important to the parties that the dispute be decided promptly than that it be decided perfectly, and it is best to memorialize the resolution on the record or by written order. Thus, consider directing prevailing counsel to prepare a proposed order and submit it to the opponent for review and then to the court. If the order is made at a conference during a deposition, the conference and order can be transcribed as part of the deposition transcript.

11.43 Privilege Claims and Protective Orders

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Attention should be given at an early conference, preferably before discovery begins, to any need for procedures to accommodate claims of privilege or for protection of materials from discovery as trial preparation materials,¹²³ as trade secrets, or on privacy grounds.¹²⁴ If not addressed early, these matters may later disrupt the discovery schedule. 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.¹²⁵

123. “Trial preparation materials” include, but are not limited to, traditional “work product.” See Fed. R. Civ. P. 26(b)(3) & committee note.

124. Although there is no privacy privilege, maintenance of privacy can be the ground for a protective order. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30, 35 n.21 (1984).

125. For a thorough discussion of the issues raised by protective orders, see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981). See also *Seattle Times*, 467 U.S. 20; Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457 (1991).

11.431 Claims of Privilege/Full Protection

Certain materials may qualify for full protection against disclosure or discovery as privileged,¹²⁶ as trial preparation material,¹²⁷ or as incriminating under the Fifth Amendment.¹²⁸ It helps to minimize their potentially disruptive effects on discovery, by addressing the possibility of such claims at an early conference and establishing a procedure for their resolution or for avoidance through appropriate sequencing of discovery. Parties sometimes try to facilitate discovery by agreeing that the disclosure of a privileged document will not be deemed a waiver with respect to that document or other documents involving the same subject matter. Some courts, however, have refused to enforce such agreements.¹²⁹

A claim for protection against disclosure based on privilege or protection of trial preparation materials must be made “expressly” and describe the nature of the allegedly protected information sufficiently to enable opposing parties to assess the merits of the claim.¹³⁰ This is usually accomplished by counsel submitting a log (frequently called a “*Vaughn Index*”¹³¹) identifying documents or other communications by date and by the names of the author(s) and recipient(s), and describing their general subject matter (without revealing the privileged or protected material).¹³² Unresolved claims of privilege should be presented directly to the judge for a ruling; if necessary, the judge can review the disputed information *in camera*.

Parties seeking protection, however, sometimes request that the trial judge not see the document, especially in a nonjury case. In such circumstances, the judge should consider referring the matter to another judge, a magistrate

126. Rulings on claims of privilege in diversity cases are governed by Federal Rule of Evidence 501, which provides that privilege is determined by state law where state law supplies the rule of decision.

127. See Fed. R. Civ. P. 26(b)(3), which extends qualified protection to such materials.

128. Potential Fifth Amendment claims are one reason why discovery in civil litigation may be stayed, in whole or in part, until termination of related criminal proceedings. See *infra* section 20.2. Conclusion of the criminal case, however, will not necessarily avoid further assertions of the privilege against self-incrimination.

129. See *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846–47 (8th Cir. 1988); *Khandji v. Keystone Resorts Mgmt., Inc.*, 140 F.R.D. 697, 700 (D. Colo. 1992); *Chubb Integrated Sys. v. Nat’l Bank*, 103 F.R.D. 52, 67–68 (D.D.C. 1984).

130. Fed. R. Civ. P. 26(b)(5), 45(d)(2). Withholding materials otherwise subject to disclosure without such notice may subject a party to Rule 37 sanctions and waive the privilege or protection. See Fed. R. Civ. P. 26 committee note.

131. See *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973).

132. Rule 26(b)(5) does not specify the information that must be provided, which may depend on the nature and amount of material withheld. See Fed. R. Civ. P. 26 committee note.

judge, or a special master. Judges, however, are accustomed to reviewing matters that may not be admissible; therefore, counsel should restrict such requests to the most sensitive, potentially prejudicial materials and be prepared to indicate, at least in general terms, the basis for the request.

In complex litigation involving voluminous documents, privileged materials are occasionally produced inadvertently. The parties may stipulate, or an order may provide, that such production shall not be considered a waiver of privilege and that the party receiving such a document shall return it promptly without making a copy.¹³³

11.432 Limited Disclosure/Protective Orders

Complex litigation will frequently involve information or documents that a party considers sensitive. There are two approaches to seeking protection for such material: (1) one or more parties may seek “umbrella” protective orders, usually by stipulation, or (2) the claim to protection may be litigated document by document.

Umbrella orders. When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication. Umbrella orders provide that all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected unless challenged. Such orders typically are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged. Some courts have therefore found that umbrella orders simply postpone, rather than eliminate, the need for close scrutiny of discovery material to determine whether protection is justified, thereby delaying rather than expediting the litigation.¹³⁴

133. See *In re Bridgestone/Firestone, Inc.*, 129 F. Supp. 2d 1207, 1219 (S.D. Ind. 2001) (Case Management Order dated Jan. 30, 2001).

134. See *John Does I–VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986). The problems of preserving protection for documents produced under umbrella orders are aggravated by the understandable tendency of counsel to err on the side of caution by designating any possibly sensitive documents as confidential under the order. The time saved by excessive designations, however, may be more than offset by the difficulties of later opposing some request for access or disclosure. Although the judge, in the interest of reducing the time and expense of the discovery process, should be somewhat tolerant of this practice, counsel should not mark documents as protected under the order without a good-faith belief that they are entitled to protection. Counsel should also be cautioned against objecting to document requests without first ascertaining that the requested documents exist. The designation of a document as confidential should be viewed as equivalent to a motion for a protective order and subject to the sanctions of Federal Rule of Civil Procedure 37(a)(4), as provided by Rule 26(c).

Applications for umbrella orders, usually presented to the court by stipulation of the parties, should specify the following matters:¹³⁵

- the categories of information subject to the order;
- the procedure for determining which particular documents are within protected categories;¹³⁶
- the procedure for designating and identifying material subject to the confidentiality order;¹³⁷
- the persons who may have access to protected materials;
- the litigation support providers' access to protected materials (support providers include consulting experts, document indexers, and technicians who prepare courtroom exhibits and demonstrative aids);
- the extent to which protected materials may be used in related litigation;¹³⁸
- the procedures for maintaining security; for example, information may be sealed or exempted from filing with the court under Federal Rule of Civil Procedure 5(d) or 26(a)(4), and copying or computerization of particularly sensitive documents may be prohibited or tightly controlled;¹³⁹
- the procedures for challenging particular claims of confidentiality—a common procedure is for the producing party to mark all assertedly protected material “confidential”; the opposing party then has a specified period, usually about two weeks, within which to contest the designation;¹⁴⁰

135. See sample orders *infra* section 40.27.

136. Umbrella orders do not eliminate the burden on the person seeking protection of justifying the relief sought as to every item, but simply facilitate rulings on disputed claims of confidentiality. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986).

137. Items produced under a claim of confidentiality should be identified with some special marking at the time of production to ensure that all persons know exactly what materials have been designated as confidential throughout the litigation. Specific portions of deposition transcripts may be marked as confidential through a written designation procedure; see sample order *infra* section 40.27, ¶ (g). If numerous documents are involved, a log may be maintained describing the documents and identifying the persons having access to them.

138. Restrictions on use in other litigation may not provide complete protection. See, e.g., *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693 (9th Cir. 1993) (reversing contempt order where party used confidential information but did not reveal trade secrets).

139. See sample order *infra* section 40.27.

140. See *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 529 (1st Cir. 1993). The burden remains on the party seeking protection; the opposing party need not offer affidavits to support a challenge. See *id.* at 531.

- the exceptions, if any, to the general prohibitions on disclosure; for example, the order may allow otherwise protected information to be shown to a witness at or in preparation for a deposition; the order usually provides that if a party desires to make a disclosure not clearly permitted, advance notice will be given to the other parties and the dispute, if not resolved by agreement, may be presented to the court for a ruling before disclosure;
- the termination of the order after the litigation or at another time;
- the return or destruction of materials received; and
- the court’s authority to modify the order, both during and after conclusion of the litigation.

Particularized protective orders. A person from whom discovery is sought may move under Rule 26(c) for a protective order limiting disclosure or providing for the confidentiality of information produced. As with other discovery motions, the movant must first make a good-faith attempt to resolve the dispute without court action;¹⁴¹ the parties should address the subject of protective orders in their proposed discovery plan.¹⁴² Rule 26(c) allows the court to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” The court should enter a protective order only when the movant makes a particularized showing of “good cause,” by affidavit or testimony of a witness with personal knowledge, of the specific harm that would result from disclosure or loss of confidentiality—generalities and unsupported contentions do not suffice.¹⁴³ When directed solely at discovery materials, protective orders are not subject to the high level of scrutiny required by the Constitution to justify prior restraints; rather, courts have broad discretion at the discovery stage to decide when a protective order is appropriate and what degree of protection is required.¹⁴⁴

In fashioning the order, it is important to balance the movants’ legitimate concerns about confidentiality against the legitimate needs of the litigation, individual privacy, or the commercial value of information.¹⁴⁵ Protecting only material for which a clear and significant need for confidentiality has been

141. Fed. R. Civ. P. 26(c).

142. Fed. R. Civ. P. 26(f)(4).

143. See *Cipollone v. Liggett Group Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), and cases cited therein; see also *Smith v. BIC Corp.*, 869 F.2d 194 (3d Cir. 1989).

144. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36–37 (1984).

145. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 428, 476 (1991).

shown¹⁴⁶ will reduce the burdensomeness of the order and render it less vulnerable to later challenge.

Modification and release. A protective order is always subject to modification or termination for good cause.¹⁴⁷ Even where the parties have consented to entry of a protective order, they may later seek its modification to allow dissemination of information received. Nonparties, including the media, government investigators, public interest groups, and parties in other litigation, may seek modification to allow access to protected information. In assessing such requests, courts balance the potential harm to the party seeking protection against the requesting party's need for the information and the public interest served by its release. Also relevant may be the disclosing party's degree of reliance on the protective order when disclosure was made. If a party freely disclosed information without contest based on the premise that it would remain confidential, subsequent dissemination may be unfair and may, in the long run, reduce other litigants' confidence in protective orders, rendering them less useful as a tool for preventing discovery abuse and encouraging more strenuous objections to discovery requests.¹⁴⁸ Courts of appeals apply different standards in balancing the continuing need for protection against the gains in efficiency and judicial economy that may result from release.¹⁴⁹ If the latter factors support release of otherwise confidential material, the court might consider redacting the material, allowing access only to that information necessary to serve the purpose for which release was granted. In addition, it is helpful to define the terms of the release, including precisely who may have access to the information and for what purpose.

A common basis for nonparty requests for release is the need for the information in related litigation. Conversely, the parties may seek discovery of information subject to a protective order in other litigation. Generally, the

146. See *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993) (citing Francis H. Hare Jr. et al., *Confidentiality Orders* § 4.10 (1988)).

147. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 782–83 (1st Cir. 1988), and cases cited therein; see also *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987). Even without modification, a protective order may fail to prevent disclosure of information as required by law. See, e.g., 15 U.S.C. § 1312(c)(2) (2000) (requiring access to discovery materials pursuant to a civil investigative demand despite protective order).

148. See *Miller*, *supra* note 145, at 499–500; cf. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987); *Palmieri v. New York*, 779 F.2d 861, 863 (2d Cir. 1985).

149. See *SEC v. TheStreet.com*, 273 F.3d 222, 231 (2d Cir. 2001); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (citing cases). If the party seeking information would be entitled to obtain it in the other litigation, there is little need to require redundant discovery proceedings. See *id.* (citing *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)).

party seeking discovery should first establish its right to discovery in the court in which it will be used. If that court permits discovery, it should normally determine the effect this will have given the earlier protective order issued by the other court. Section 11.423 discusses the use of documents from other litigation. Even where the protective order contains a provision prohibiting such use, the court that entered the order is permitted to require such disclosure, subject to appropriate restrictions on further use and disclosure.¹⁵⁰ In making this determination, the court should balance the continuing need for protection against the efficiency and judicial economy that may result from release. The court should consider the following questions:

- Was the disclosing party under an unqualified obligation to produce the material sought?
- Will the material be discoverable in subsequent litigation involving other parties?
- Does the other litigation appear to have merit?
- Would granting release save significant time and expense?
- Can the material be released in redacted form so as to aid legitimate discovery while minimizing the loss of confidentiality?
- Will modification of the protective order disrupt settlement of the case in which it was entered?
- Did the person providing discovery do so in reliance on the protective order?
- Would informal communication between the two judges be productive in arriving at an accommodation that gives appropriate consideration to the interests of all involved?

Even if designated as confidential under a protective order, discovery materials will lose confidential status (absent a showing of “most compelling” reasons) if introduced at trial or filed in connection with a motion for summary judgment.¹⁵¹ Confidential materials filed solely in connection with pre-

150. See *United Nuclear Corp.*, 905 F.2d at 1427–28; *Wilk*, 635 F.2d at 1299–1301 (protective orders should ordinarily be modified on request from other litigants, subject to appropriate conditions as to further use and cost); *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978) (confidentiality order modified to permit nonparty U.S. government to obtain discovery); but see *Palmieri*, 779 F.2d at 865–66 (denying modification to allow state to gain access to settlement agreement).

151. See, e.g., *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532–33 (1st Cir. 1993); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677–78, 684 (3d Cir. 1988); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983); *Joy v. North*,

trial discovery, however, remain protected as long as the “good cause” requirement of Rule 26(c) is satisfied.¹⁵² The general rule announced by the Supreme Court is that a public right of access to material produced in connection with a particular pretrial or trial proceeding arises when (1) the proceeding has historically been open and (2) public access plays a significant role in the proper functioning of the process.¹⁵³ To ensure continued protection, counsel sometimes stipulate to material nonconfidential facts to avoid the need to introduce confidential material into evidence. Counsel may also move to have confidential material excluded from evidence as prejudicial and of low probative value under Federal Rule of Evidence 403.¹⁵⁴

The administration of protective orders does not necessarily end with the disposition of the case. While it is common for protective orders to include provisions for posttrial protection, an order remains subject to modification after judgment or settlement, even if it was entered by consent of the parties.¹⁵⁵

11.433 Allocation of Costs

The cost of seeking and responding to discovery is a part of the cost of litigation that each party normally must bear, subject only to specific provisions for cost-shifting contained in statutes or rules. But Federal Rule of Civil Procedure 26(b)(2) directs the judge to take into account the cost of particular discovery in exercising the authority to control discovery. Among other things to consider are whether the information sought “is obtainable from some other source that is more convenient, less burdensome, or less expensive,” and whether to limit discovery if, in the circumstances of the case, the discovery’s “expense . . . outweighs its likely benefits.” Protective orders are a means of implementing the proportionality principle underlying the discovery rules. Rule 26(c) permits the court to issue orders “to protect a party or person from . . . undue burden or expense,” including an order “that the discovery . . . may be had only on specified terms or conditions . . . [or] only by a method of discovery other than that selected by the party seeking discovery.”

692 F.2d 880, 893 (2d Cir. 1982). *See also* *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161–65 (3d Cir. 1993) (protection lost if material filed with any nondiscovery motion).

152. *See* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984); *Leucadia*, 998 F.2d at 161–65; *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 5–7, 10–13 (1st Cir. 1986).

153. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982).

154. *See Poliquin*, 989 F.2d at 535.

155. *See id.*; *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781–82 (1st Cir. 1988); *Meyer Goldberg*, 823 F.2d at 161–62.

Taken together, these provisions confer broad authority to control the cost of discovery by imposing limits and conditions. The judge can implement the cost–benefit rationale of the rule by conditioning particular discovery on payment of its costs by the party seeking it. Short of barring a party from conducting certain costly or marginally necessary discovery, the judge can require the party to pay all or part of the cost as a condition to permitting it to proceed. Similarly, where a party insists on certain discovery to elicit information that may be available through less expensive methods, that discovery may be conditioned on the payment of the costs incurred by other parties. Such a cost-shifting order may require payment at the time or may simply designate certain costs as taxable costs to be awarded after final judgment.¹⁵⁶

Reference to the court’s authority to shift costs will give the parties an incentive to use cost-effective means of obtaining information and a disincentive to engage in wasteful and costly discovery activity. For example, where production is to be made of data maintained on computers, and the producing party is able to search for and produce the data more efficiently and economically than the discovering party, they may agree to use the former’s capabilities subject to appropriate reimbursement for costs. Where it is less expensive for a witness to travel to a deposition site than for several attorneys to travel to the witness’s residence, the party seeking discovery may agree to pay the witness’s travel expenses.

Cost allocation may also be an appropriate means to limit unduly burdensome or expensive discovery. Rule 26’s purpose is not to equalize the burdens on the parties, but Rule 26(b)(2)(iii) expressly requires the court to take the parties’ resources into account in balancing the burden or expense of particular discovery against its benefit. Thus, where the parties’ resources are grossly disproportionate, the judge can condition discovery that would be unduly burdensome on one of them upon a fair allocation of costs.

Considerations of cost allocation are not based on relative resources alone. Rule 26(b)(2)(iii) allows the court to allocate costs based on considerations of benefits, burdens, and overall case efficiency. Courts have articulated as many as eight factors relevant to cost allocation:

- the specificity of the discovery requests;
- the likelihood of discovering critical information;
- the availability of such information from other sources;
- the purposes for which the responding party maintains the requested data;
- the relative benefit to the parties of obtaining the information;

156. See 28 U.S.C. § 1920 (West 2002); Fed. R. Civ. P. 54(d).

- the total cost associated with the production;
- the relative ability of each party to control costs and its incentive to do so; and
- the resources available to each party.¹⁵⁷

11.44 Documents

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Complex litigation usually involves the production and handling of voluminous documents. Efficient management during discovery and trial requires planning and attention to the documentary phase of the litigation by the attorneys and the judge from the outset.

11.441 Identification System

Document production under the rules may occur in a variety of ways. Production may be voluntary and informal. It may occur under Federal Rule of Civil Procedure 34 (see section 11.443) or under Rule 33(d) by making documents available for inspection.¹⁵⁸ Alternatively, deponents may be required to produce documents by a subpoena *duces tecum*,¹⁵⁹ and nonparties may be commanded to produce documents by a subpoena issued under Rule 45.¹⁶⁰ Before any documents are produced or used in depositions, the judge should direct counsel to establish a single system for identifying all documents

157. *Rowe Entm't, Inc. v. William Morris Agencies, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (discussing factors to consider in shifting discovery costs), *appeal denied*, No. 98 CIV. 8272, 2002 WL 975713 (S.D.N.Y. May 9, 2002); *see also* *Murphy Oil U.S.A., Inc. v. Fluor Daniel, Inc.*, 52 Fed. R. Serv. 3d (Callaghan) 168 (E.D. La. 2002). *Cf.* *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2002) (questioning the eight factors considered in *Rowe* and proposing seven weighted factors).

158. Under Rule 33(d) the party may “specify the records from which the answer may be derived or ascertained . . . in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained.” If the information sought exists in the form of compilations, abstracts, or summaries, these should be made available to the interrogating party. Fed. R. Civ. P. 33 committee note.

159. *See* Fed. R. Civ. P. 30(b)(1).

160. Fed. R. Civ. P. 34(c).

produced (by any procedure) or used in the litigation. To reduce the risk of confusion, each document should be assigned a single identifying designation for use by all parties for all purposes throughout the case, including depositions and trial.

Counsel should be informed that consecutive numbering is usually the most practicable; blocks of numbers are assigned to each party in advance to make the source of each document immediately apparent. Every page of every document is Bates-stamped consecutively. The document's number may be later used to designate it; if the document is identified differently in the course of a deposition or on an exhibit list, the stamped number should be included as a cross-reference. If other means of designation are used, no designation should be assigned to more than one document, and the same document should not receive more than one designation unless counsel have reason to refer to different copies of the same document. In multitrack depositions, a block of numbers should be assigned to each deposition in advance. To avoid later disputes, a log should record each document produced and should indicate by, to whom, and on what date production was made. A record of the documents produced by a party and copied by an opposing party may also be useful.

The court can also order an identification system for computerized data that complements or integrates into the system adopted for paper documents. At a minimum, computer tapes, disks, or files containing numerous E-mail messages or word-processed documents should be broken down into their component documents for identification. However, databases containing millions of data elements, none of which are meaningful alone, can be difficult or impossible to break down and organize in a way directly analogous to conventional document collections. Special consideration should be given to their identification and handling.

Courts have traditionally given new designations to documents marked as exhibits for trial, often by assigning sequential numbers to one side and sequential letters to the other. Duplicate designations of documents, however, can be confusing; exhibits can readily be marked for trial by their discovery designations. If desired, a supplemental designation can be used to identify the offering party.

11.442 Preservation

Before discovery starts, and perhaps before the initial conference, the court should consider whether to enter an order requiring the parties to preserve and retain documents, files, data, and records that may be relevant to the litiga-

tion.¹⁶¹ Because such an order may interfere with the normal operations of the parties and impose unforeseen burdens, it is advisable to discuss with counsel at the first opportunity the need for a preservation order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant matter without imposing undue burdens.

A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations. In addition, a preservation order will likely be ineffective if it is formulated without reliable information from the responding party regarding what data-management systems are already in place, the volume of data affected, and the costs and technical feasibility of implementation. The following are among the points to consider in formulating an effective data-preservation order:

- Continued operation of computers and computer networks in the routine course of business may alter or destroy existing data, but a data preservation order prohibiting operation of the computers absolutely would effectively shut down the responding party's business operations. Such an order requires the parties to define the scope of contemplated discovery as narrowly as possible, identify the particular computers or network servers affected, and agree on a method for data preservation, such as creating an image of the hard drive or duplicating particular data on removable media, thereby minimizing cost and intrusiveness and the downtime of the computers involved.
- Routine system backups for disaster recovery purposes may incidentally preserve data subject to discovery, but recovery of relevant data from nonarchival backups is costly and inefficient, and a data-preservation order that requires the accumulation of such backups beyond their usual short retention period may needlessly increase the scope and cost of discovery. An order for the preservation of backup data obliges the parties to define the scope of contemplated discovery narrowly to minimize the number of backups that need to be retained and eventually restored for discovery purposes.

161. See *infra* section 40.25 (order for preservation of records). For examples from recent complex multidistrict litigation, see *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (E.D. La. Apr. 19, 2001) (Pretrial Order No. 10: Production and Preservation of Defendants' Electronic Data), at <http://propulsid.laed.uscourts.gov/Orders/order10.pdf> (last visited Nov. 10, 2003). See also *In re Bridgestone/Firestone, Inc. ATX, ATX II & Wilderness Tires Prods. Liab. Litig.*, MDL No. 1373 (S.D. Ind. Mar. 15, 2001) (Order Regarding Ford's Preservation of Electronic Data), at http://www.insd.uscourts.gov/Firestone/bf_docs/93730738.pdf (last visited Nov. 10, 2003).

- A preservation order may be difficult to implement perfectly and may cause hardship when the records are stored in data-processing systems that automatically control the period of retention. Revision of existing computer programs to provide for longer retention, even if possible, may be prohibitively expensive. Consider alternatives, such as having parties duplicate relevant data on removable media or retaining periodic backups.

Any preservation order should ordinarily permit destruction after reasonable notice to opposing counsel; if opposing counsel objects, the party seeking destruction should be required to show good cause before destruction is permitted. The order may also exclude specified categories of documents or data whose cost of preservation outweighs substantially their relevance in the litigation, particularly if copies of the documents or data are filed in a document depository (see section 11.444) or if there are alternative sources for the information. The court can defer destruction if relevance cannot be fairly evaluated until the litigation progresses. As issues in the case are narrowed, the court may reduce the scope of the order. The same considerations apply to the alteration or destruction of physical evidence.

11.443 Rule 34 Requests/Procedures for Responding

In litigation with voluminous documents, requests for production and the required responses can become mired in confusion. The discovery plan should anticipate the possibility of overlooked requests, costly responses, obscured failures to respond, and uncertainty about the specifics of requests and production.

The discovery plan should call for strict observance of Rule 34's requirements that requests to produce documents for inspection and copying specify the items sought individually or by category and describe each with "reasonable particularity."¹⁶² Each request must specify a reasonable time, place, and manner for inspection and copying.¹⁶³ A party served with a request must respond in writing within thirty days, stating for each item or category either that inspection and copying will be permitted as requested or that the party objects to the request; in the latter case, the reasons for the objection must be stated. If the responding party objects to only part of an item or category, it must permit inspection of the remaining parts. Documents must be produced for inspection "as they are kept in the usual course of business" or organized and labeled "to correspond with the categories in the request." In many cases, the volume

162. Fed. R. Civ. P. 34(b).

163. *Id.*

of computer data produced will far exceed the volume of paper documentation, and conventional procedures for “inspection and copying” are not applicable. Section 11.446 describes practices for the production of computer data in complex litigation.

The discovery plan should establish a schedule for submitting requests and responses and for subsequent supplementation of responses under Rule 26(e). In developing the plan, the court should consider counsel’s proposals for document discovery and imposing limits based on Rule 26(b)(2). The court may initially limit production to the most relevant files or may require a preliminary exchange of lists identifying files and documents from which the requesting party may then make selections. The court may also require, even if lead counsel or committees of counsel have not been appointed, that similarly situated parties confer and present joint Rule 34 requests and conduct their examinations at the same time and place. Parties can also be required to share extensive copies to save money.

In overseeing document production, the court should

- ensure that the burdens are fairly allocated between the parties;
- prevent indiscriminate, overly broad, or unduly burdensome demands—in general, forbid sweeping requests, such as those for “all documents relating or referring to” an issue, party, or claim, and direct counsel to frame requests for production of the fewest documents possible (this may be facilitated by pre-discovery conferences or discovery devices to identify relevant files before the request is made);
- prevent the parties from filing overwhelming or confusing responses; and
- guard against the parties tampering with files and other abusive practices.

11.444 Document Depositories

Central document depositories can promote efficient and economical management of voluminous documents in multiparty litigation.¹⁶⁴ Requiring the production of all discovery materials in common, computer-readable formats and insisting that these materials be made available on centrally generated computer-readable media (such as CD-ROM or DVD) or through a secure Internet Web site or a dial-in computer network may reduce substantially the expense and burden of document production and inspection. A depository

164. See *In re Bridgestone/Firestone, Inc.*, 129 F. Supp. 2d 1207, 1213 (S.D. Ind. 2001) (Case Management Order dated Jan. 30, 2001).

also facilitates determination of which documents have been produced and what information is in them, minimizing the risk of later disputes.

On the other hand, the cost of establishing and maintaining either a paper or computerized central document depository may be substantial; before ordering or approving one, the court must be sure that the cost is justified by the anticipated savings and other benefits. In consultation with counsel, the court should allocate costs fairly among the parties, considering their resources, the extent of their use of the depository, and the benefit derived from it. The cost of establishing and maintaining a central document depository is not a “taxable cost” under 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54(d).¹⁶⁵ One way of allocating costs is to charge parties for each use of the depository. The charge should be set no higher than what is necessary to cover costs; a depository should not be a profit-making enterprise. The judge may consider special arrangements for less affluent or less technologically sophisticated parties to ensure fair access.

It may be necessary to appoint an administrator to operate the depository, with the cost allocated among the parties.¹⁶⁶ If document depositories have been established in related cases in other courts, counsel may be able to arrange for the depositories’ joint use, sharing the expense; likewise, the judge should consider the requests of litigants in other cases, wherever pending, to use a depository established in the case before the court. Where significant costs are involved, periodic assessments to fund operations might be necessary, usually beginning with the order establishing the depository.

To create and operate a depository, counsel and the judge should collaborate in establishing procedures for acquiring, formatting, numbering, indexing, and maintaining discovery materials, and they should establish rules governing when and by whom documents may be accessed for examination or copying. If a party objects to placing documents in a central depository or to making them available on-line, the judge can issue an order under Rule 26(c)(2) directing production at the depository (or the place designated by the requesting parties) or permit the producing party at its expense to furnish copies to all parties.

165. *In re Two Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 964 (1st Cir. 1993). Counsel should also be aware that expenses incurred during discovery, which would ordinarily be taxable costs, may not be recoverable if the party could have avoided them by using the depository. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 142 F.R.D. 41, 46–47 (D.P.R. 1992).

166. For a list of possible duties for the administrator, see the amended case-management order in *In re San Juan Dupont Plaza Hotel Fire Litig.*, MDL No. 721, 1989 WL 168401, at *21 (D.P.R. Dec. 2, 1988).

Counsel and the judge must agree on a computer service provider to administer the depository, although technologies such as CD-ROM and the Internet reduce the need for physical storage facilities, inspection, and copying. Most discovery material can be produced by the parties to the depository in computer-readable form. For the remaining paper documents, the court may direct that some or all be “imaged” or scanned and made available either on disks or on-line (special provision for the retention of originals, if they carry independent legal significance, may be necessary).¹⁶⁷

11.445 Evidentiary Foundation for Documents

The production of documents, either in the traditional manner or in a document depository, will not necessarily provide the foundation for admission of those documents into evidence at trial or for use in a motion for summary judgment. In managing documents, the court should therefore also take into account the need for effective and efficient procedures to establish the foundation for admission, which can be accomplished by stipulation, requests for admission, interrogatories, or depositions (particularly Rule 31 depositions on written questions).¹⁶⁸ While admissions are only binding on the party making them, authenticity (as opposed to admissibility) may be established by the testimony of any person having personal knowledge that the proffered item is what the proponent claims it to be.¹⁶⁹ This is particularly true when discovery involves computerized data (see section 11.446) that must be retrieved from computer systems or storage media, imaged, converted to a common format, or handled by a third-party expert or court-appointed neutral in the process of production. The judge should advise parties to agree on handling because admissibility will depend on the efficacy of these procedures.

11.446 Discovery of Computerized Data

Computerized data have become commonplace in litigation. The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data meas-

167. For more on this technology, see *Effective Use of Courtroom Technology*, *supra* note 85 at 97–98.

168. See Fed. R. Civ. P. 36.

169. See *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 285 (3d Cir. 1983), *rev'd on other grounds sub. nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

ured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

Digital or electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances; or it can be accessible via the Internet, from private networks, or from third parties. Any discovery plan must address issues relating to such information, including the search for it and its location, retrieval, form of production, inspection, preservation, and use at trial.

For the most part, such data will reflect information generated and maintained in the ordinary course of business. As such, discovery of relevant and nonprivileged data is routine and within the commonly understood scope of Rules 26 and 34. Other data are generated and stored as a byproduct of the various information technologies commonly employed by parties in the ordinary course of business, but not routinely retrieved and used for business purposes. Such data include the following:

- *Metadata, or “information about information.”* This includes the information embedded in a routine computer file reflecting the file creation date, when it was last accessed or edited, by whom, and sometimes previous versions or editorial changes. This information is not apparent on a screen or in a normal printout of the file, and it is often generated and maintained without the knowledge of the file user.
- *System data, or information generated and maintained by the computer itself.* The computer records a variety of routine transactions and functions, including password access requests, the creation or deletion of files and directories, maintenance functions, and access to and from other computers, printers, or communication devices.
- *Backup data, generally stored off-line on tapes or disks.* Backup data are created and maintained for short-term disaster recovery, not for retrieving particular files, databases, or programs. These tapes or disks must be restored to the system from which they were recorded, or to a similar hardware and software environment, before any data can be accessed.
- *Files purposely deleted by a computer user.* Deleted files are seldom actually deleted from the computer hard drive. The operating system renames and marks them for eventual overwriting, should that particular space on the computer hard drive be needed. The files are recoverable only with expert intervention.
- *Residual data that exist in bits and pieces throughout a computer hard drive.* Analogous to the data on crumpled newspapers used to pack

shipping boxes, these data are also recoverable with expert intervention.

Each of these categories of computer data may contain information within the scope of discovery. The above categories are listed by order of potential relevance and in ascending order of cost and burden to recover and produce. The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case, particularly any discovery of data beyond that available to the responding parties in the ordinary course of business. The requesting parties should identify the information they require as narrowly and precisely as possible, and the responding parties should be forthcoming and explicit in identifying what data are available from what sources, to allow formulation of a realistic computer-based discovery plan. Rule 26(b)(2)(iii) allows the court to limit or modify the extent of otherwise allowable discovery if the burdens outweigh the likely benefit—the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems. Additionally, some computerized data may have been compiled in anticipation of or for use in the litigation and may therefore be entitled to protection as trial preparation materials.

There are several reasons to encourage parties to produce and exchange data in electronic form:

- discovery requests may themselves be transmitted in computer-accessible form—interrogatories served on computer disks, for example, could then be answered using the same disk, avoiding the need to retype them;
- production of computer data on disks, CD-ROMs, or by file transfers significantly reduces the costs of copying, transport, storage, and management—protocols may be established by the parties to facilitate the handling of documents from initial production to use in depositions and pretrial procedures to presentation at trial;
- computerized data are far more easily searched, located, and organized than paper data; and
- computerized data may form the contents for a common document depository (see section 11.444).

The goal is to maximize these potential advantages while minimizing the potential problems of incompatibility among various computer systems, programs, and data, and minimizing problems with intrusiveness, data integrity, and information overload.

Below are some of the relevant issues to be considered in reaching an optimal balance.

Form of production. Rule 34 provides for the production, inspection, and copying of computerized data, i.e., “data compilations from which informa-

tion can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.” Rule 33(d) permits parties to answer interrogatories by making business records available for inspection and copying, including “compilations,” where “the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.”

Conventional “warehouse” productions of paper documents often were costly and time-consuming, but the burdens and expense were kept in check by the time and resources available to the requesting parties to review and photocopy the documents. In a computerized environment, the relative burdens and expense shift dramatically to the responding party. The cost of searching and copying electronic data is insignificant. Meanwhile, the tremendously increased volume of computer data and a lack of fully developed electronic records-management procedures have driven up the cost of locating, organizing, and screening data for relevance and privilege prior to production. Allowing requesting parties access to the responding parties’ computer systems to conduct their own searches, which is in one sense analogous to the conventional warehouse paper production, would compromise legally recognized privileges, trade secrets, and often the personal privacy of employees and customers.

Evolving procedures use document-management technologies to minimize cost and exposure and, with time, parties and technology will likely continue to become more and more sophisticated. The judge should encourage the parties to discuss the issues of production forms early in litigation, preferably prior to any production, to avoid the waste and duplication of producing the same data in different formats. The relatively inexpensive production of computer-readable images may suffice for the vast majority of requested data. Dynamic data may need to be produced in native format, or in a modified format in which the integrity of the data can be maintained while the data can be manipulated for analysis. If raw data are produced, appropriate applications, file structures, manuals, and other tools necessary for the proper translation and use of the data must be provided. Files (such as E-mail) for which metadata is essential to the understanding of the primary data should be identified and produced in an appropriate format. There may even be rare instances in which paper printouts (hard copy) are appropriate. No one form of production will be appropriate for all types of data in all cases.¹⁷⁰

The court should consider how to minimize and allocate the costs of production. Narrowing the overall scope of electronic discovery is the most effec-

170. See *Effective Use of Courtroom Technology*, *supra* note 85, at 61–97; see also *supra* section 11.421.

tive method of reducing costs. Early agreement between the parties regarding the forms of production will help eliminate waste and duplication. More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in a specified nonstandard format, should be conditioned upon a showing of need or sharing of expenses.¹⁷¹

Search and retrieval. Computer-stored data and other information responsive to a production request will not necessarily be in an appropriately labeled file. Broad database searches may be necessary, requiring safeguards against exposing confidential or irrelevant data to the opponent's scrutiny. A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Some data may be maintained in compilations that are themselves entitled to trade-secret protection or that reflect attorney work product (e.g., data compiled for studies and tabulations) for use at trial or as a basis for expert opinions. Generally, claims of trade-secret or work-product privilege for computer data should be treated the same as similar claims for conventional data. The difference is that discovery respondents may be able to produce computer-data compilations containing confidential or privileged data, structures, or relationships in such a fashion as to suppress or eliminate the confidential or privileged data. For example, a computerized litigation support database containing the thoughts and impressions of counsel may be modified to reveal only "ordinary" attorney work product. Production of such ordinary work product would still be subject to the showings of substantial need and undue hardship under Rule 26(b)(3), as well as possible sharing of costs. If both parties plan to use litigation support databases to prepare their cases, encourage them to share the expense of preparing "ordinary" work product, such as document indexes, to which each party can add privileged data for their own

171. See *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1171 (7th Cir. 1998) (affirming a trial court order that the parties bear half the cost of copying 210,000 pages of E-mails as a "reasonable resolution of [the] problem" and "far from an abuse of discretion").

trial preparation use. Such arrangements often facilitate the production of large databases of imaged documents and are necessary for the establishment of a document depository.

Use at trial. In general, the Federal Rules of Evidence apply to computerized data as they do to other types of evidence.¹⁷² Computerized data, however, raise unique issues concerning accuracy and authenticity. Accuracy may be impaired by incomplete data entry, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions. The integrity of data may also be compromised in the course of discovery by improper search and retrieval techniques, data conversion, or mishandling. The proponent of computerized evidence has the burden of laying a proper foundation by establishing its accuracy.

The judge should therefore consider the accuracy and reliability of computerized evidence, including any necessary discovery during pretrial proceedings, so that challenges to the evidence are not made for the first time at trial. When the data are voluminous, verification and correction of all items may not be feasible. In such cases, verification may be made of a sample of the data. Instead of correcting the errors detected in the sample—which might lead to the erroneous representation that the compilation is free from error—evidence may be offered (or stipulations made), by way of extrapolation from the sample, of the effect of the observed errors on the entire compilation. Alternatively, it may be feasible to use statistical methods to determine the probability and range of error.

Computer experts. The complexity and rapidly changing character of technology for the management of computerized materials may make it appropriate for the judge to seek the assistance of a special master or neutral expert, or call on the parties to provide the judge with expert assistance, in the form of briefings on the relevant technological issues.

11.447 Discovery from Nonparties

Under Federal Rule of Civil Procedure 34(c), a nonparty may be compelled to produce and allow copying of documents and other tangibles or submit to an inspection by service of a subpoena under Rule 45; the producing person need not be deposed or even appear personally.¹⁷³ A party seeking such production has a duty to take reasonable steps to avoid imposing undue bur-

172. See Gregory P. Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations*, 43 N.Y.L. Sch. L. Rev. 875 (1999–2000).

173. Fed. R. Civ. P. 45(c)(2)(A). Despite the absence of a deposition, notice must be given to other parties. Fed. R. Civ. P. 45(b)(1).

den or expense on the person subpoenaed.¹⁷⁴ Objections to production must be made in writing by the subpoenaed person; the requesting party must then move for an order to compel production.¹⁷⁵ If granted, the order must protect the nonparty from significant expense resulting from the inspection or copying¹⁷⁶—the order may also protect against disclosure of privileged, confidential, or otherwise protected material and undue burden.¹⁷⁷

11.45 Depositions

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Depositions are often overused and conducted inefficiently, and thus tend to be the most costly and time-consuming activity in complex litigation. The judge should manage the litigation so as to avoid unnecessary depositions, limit the number and length of those that are taken, and ensure that the process of taking depositions is as fair and efficient as possible.

11.451 Limitations and Controls

The court has broad authority to limit depositions. Federal Rules of Civil Procedure 30(a)(2)(A) and 31(a)(2)(A) impose a presumptive limit of ten depositions each for plaintiffs, defendants, and third-party defendants (local rules may also restrict the number of depositions). Rule 30(d)(2) presumptively limits a deposition to one 7-hour day. While the parties may stipulate around the presumptive limit (unless prohibited to do so by the court), the court always has final authority under Rule 26(b)(2) to limit the number and length of depositions. Limits on depositions may also be imposed indirectly by the setting of the trial date or a discovery cutoff date. In large-stake cases, such limits can be evaded by multitrack discovery (concurrent depositions) in the absence of a further order by the court. Despite their cost and the potential for unfairness, such multitrack depositions may be a practical necessity to expedite cases in which time is of the essence. See section 11.454.

174. Fed. R. Civ. P. 45(c)(1).

175. Fed. R. Civ. P. 45(c)(2)(B).

176. *Id.*

177. Fed. R. Civ. P. 45(c)(3).

In exercising its authority to limit depositions, the court should use the information provided by the parties about the need for the proposed depositions, the subject matter to be covered, and the available alternatives. The extent to which the judge considers each particular deposition, categories of depositions, or only the deposition program as a whole will depend on the circumstances of the litigation. The judge may, for example, condition the taking of certain depositions, such as those of putative class members, on prior court approval. The judge's involvement in the development of this phase of the discovery plan should be sufficient to establish meaningful control over the time and resources to be expended. Aside from setting appropriate limits, the judge should also be concerned with the time and place of the depositions, including proposed travel and the recording methods.¹⁷⁸

To ensure that abusive practices do not frustrate the limits placed on depositions in the discovery plan, the judge should insist on observance of rules for the fair and efficient conduct of depositions. Rule 30(d)(1) requires that objections be stated “concisely and in a non-argumentative and non-suggestive manner”; local rules or standing orders may also establish guidelines for objections.¹⁷⁹ Under Rule 30(d)(1), counsel may instruct a deponent to not answer only for the purpose of enforcing a court-imposed limitation on evidence, or if preparing a motion under Rule 30(d)(3) to limit or terminate the examination for bad faith or harassment or to preserve a privilege (to the extent possible, disputed claims of privilege should be resolved in advance of the deposition). More stringent limitations may be imposed by local rule or by court order when necessary.¹⁸⁰ In addition, some judges issue guidelines covering the following matters:

- who may attend depositions;
- where the depositions are to be taken;
- who may question the witness;

178. Authority for judicial management of deposition discovery can be found in the federal rules. *E.g.*, Fed. R. Civ. P. 30(d) committee note (2000 amendment); Fed. R. Civ. P. 30(b), 30(d) committee notes (1993 amendment). For an example of comprehensive guidelines for deposition discovery not having the force of local rules or orders, but strongly encouraged by the court, see Civil Practice Fed. Court Comm., *Introduction to Civil Discovery Practice in the Southern District of Alabama* 11–16 (S.D. Ala. 1998), at <http://www.als.uscourts.gov/district-court/forms/discprat.pdf> (last visited Jan. 7, 2004).

179. *See, e.g.*, D.S.C. Civ. R. 30.04; N.D. Ohio Civ. R. 30.1. For a discussion of attorney conduct in depositions and citations to a number of cases construing local rules and standing orders, see *Hall v. Clifton Precision*, 150 F.R.D. 525, 527 (E.D. Pa. 1993). *But see In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998) (noting that deposition conduct orders should be narrowly drawn to avoid interfering with the deponent's right to counsel).

180. *See Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

- how the parties are to allocate the costs; and
- how the attorneys are to conduct themselves.¹⁸¹

Rule 30(d)(3) expressly authorizes sanctions for “impediment, delay or other conduct that has frustrated the fair examination of the deponent.”

Inefficient management of documents at a deposition can interfere with the deposition’s proper conduct. The discovery plan should establish procedures for marking deposition exhibits, handling copies and originals, and exchanging in advance all papers about which the examining party intends to question the witness (except those to be used for genuine impeachment).¹⁸²

11.452 Cost-Saving Measures

In addition to the general discovery practices discussed in section 11.42, there are numerous techniques used to streamline deposition discovery:

- *Informal interviews.* Informal interviews of potential witnesses may be arranged with the agreement of counsel. However, an attorney may not communicate with a represented party without the consent of that party’s counsel. If the represented party is an organization, the prohibition extends to persons with managerial responsibility and any other person whose act or omission may be imputed to the organization or whose statement may constitute an admission on the part of the organization.¹⁸³ The prohibition does not extend to former corporate employees.¹⁸⁴ Informal interviews may be useful for persons who have only limited knowledge or involvement and who are unlikely to be called as witnesses at trial. The witness may be sworn and the interview recorded electronically for possible use later in the case; by agreement or court order, the interview may also be converted into a nonstenographic deposition.
- *Nonstenographic depositions.* The party taking a deposition may record it on audio or videotape instead of stenographically without having it transcribed. With prior notice to the deponent and other parties, any other party may make its own recording of the deposition.¹⁸⁵ Videotaped depositions offer a number of advantages: They help deter mis-

181. See sample order *infra* section 40.22.

182. See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, MDL No. 721, 1989 WL 168401, at *43–44 (D.P.R. Dec. 2, 1988) (five days’ advance notice).

183. Model Rules of Prof’l Conduct R. 4.2 & cmt. (2002).

184. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-359 (1991). The law of the circuit should be consulted for recent developments in this area of the law.

185. Fed. R. Civ. P. 30(b)(3).

conduct by counsel at the deposition; they can preserve the testimony of witnesses who may be unavailable to testify at trial (such as experts with scheduling conflicts or persons suffering from an infirmity) and in dispersed litigation can avoid multiple live appearances by the same witness; they tend to hold a jury's attention better than reading a deposition transcript; they help the jury assess the witness's demeanor and credibility; and they are more effective in helping clients considering settlement to evaluate the quality of the opposition's case. Moreover, if the video recording is digital, it can be edited easily and exactly to eliminate objectionable and irrelevant material.

Measures to safeguard the accuracy of the recording may be necessary, such as having (1) the videotape operator, after being sworn, certify the correctness and completeness of the recording; (2) the deponent sworn on tape; (3) the recording device run continuously throughout the deposition; and (4) counsel agree to (or having the court order) standard technical procedures to avoid distortion. These procedures might cover such matters as the use of a zoom lens, lighting, background, and camera angle.¹⁸⁶ Both sides may record a deposition, each bearing its own expense.

- *Telephonic and videoconference depositions.* Telephonic or videoconferenced depositions can reduce travel costs. Federal Rule of Civil Procedure 30(b)(7) allows the court to order or the parties to stipulate to taking a deposition "by telephone or other remote electronic means." Supplemental examination by parties not present when a person was first deposed may be conducted effectively by telephone or videoconference. Through use of speaker phones, conference calls, or videoconference, distant witnesses may be examined by counsel from counsel's offices, with the court reporter located with the witness or, by stipulation, at one of the attorneys' offices (see section 11.494, extraterritorial discovery). A remote deposition may also be recorded nonstenographically. Remote depositions are most often used for relatively brief examinations that do not involve numerous documents, but may also be used to reduce travel costs or to avoid last-minute continuances or trial interruptions when deposition testimony becomes unexpectedly necessary. To ensure that deponents are not

186. See Michael J. Henke, *The Taking and Use of Videotaped Depositions*, 16 Am. J. Trial Advoc., 151, 158 (1992). Rule 30(b)(4) requires that "[t]he appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques."

coached, ground rules should specify who may be present with the deponent during the examination.

- *Conference depositions.* In special situations, such as a Rule 30(b)(6) deposition of an organization, several persons may be deposed simultaneously (in person, by telephone, or by videoconference) in a conference setting.¹⁸⁷
- *Representative depositions.* Where there are many potential nonparty witnesses, typically in the case of eyewitnesses, counsel may agree on a few representative depositions and stipulate that the testimony of other named witnesses would be the same.
- *Written questions.* In some circumstances, the rarely used procedures of Federal Rule of Civil Procedure 31 for depositions on written questions may be a cost-effective means of obtaining trial evidence. For example, Rule 31 deposition questions—unlike interrogatories—may be directed to nonparties and the answers used at trial to provide evidentiary foundation for documents. Rule 31 questions may also be useful in follow-up examinations by absent or later-added parties of persons whose depositions have been taken earlier.
- *Reduction in copies.* Costs can be controlled by (1) limiting the number of copies of deposition transcripts ordered, particularly if a document depository is established; (2) waiving filing of the original with the court; and (3) not having transcripts prepared of depositions that turn out to be of no value.
- *Limited attendance.* Limits may be set on the number of attorneys for each party or each side who may attend depositions, particularly in cases in which fees may be awarded or approved by the court.

11.453 Deferred Supplemental Depositions

In multiparty cases, the court should consider issuing an order relieving parties of the risks in not attending a deposition in which they have only a peripheral interest.¹⁸⁸ Such an order may direct that a copy of the deposition transcript be made available promptly to nonattending parties, who within a specified period thereafter may conduct supplemental examination of the deponent, either by appearing in person at a designated time and place for resumption of the deposition or by presenting questions in written form under Rule 31 or in a telephonic deposition under Rule 30(b)(7). A stipulation or

187. See *supra* section 11.423.

188. See *infra* section 40.29.

court order will be required to depose a person who already has been deposed in the case.¹⁸⁹ The order should specify whether the absent party has the right to require resumption of the adjourned deposition or—as is usually preferable—whether it must show cause why resumption is necessary. The order should also state whether the initial examination is admissible at trial if the deponent later becomes unavailable for supplemental examination.

These procedures can relieve parties, particularly those with limited financial resources, from the expense of attending depositions in which their interest is minimal or will likely be adequately protected by others in attendance. Such procedures should not be used as a tactical device to harass witnesses or to inconvenience other parties. Counsel for litigants with a substantial interest in a deposition should attend or be represented by other counsel.

The judge should provide for the use of depositions against persons who may become parties to the litigation by later amendment of the pleadings or the filing, removal, or transfer of related cases. The pretrial order may state that all previously taken depositions will be deemed binding on new parties unless, within a specified period after their appearance in the litigation, the new parties show cause to the contrary. Even in the absence of such an order, it is best for the court to limit the resumption of earlier depositions to questioning relevant to the new parties. Like other parties who have not attended a deposition, the new parties should have a specified period of time to conduct supplemental examination of the deponents, although the court may require a showing of some need for additional questioning. Permitting repetition of earlier examinations is rarely advisable.

11.454 Scheduling

Scheduling depositions involves sequencing them in relation to other discovery, fixing the order in which witnesses are to be deposed, and setting times and places that are feasible for all of the attorneys and witnesses. Absent stipulation or court order, depositions may not be taken before the Rule 26(f) discovery conference unless the notice is accompanied by “a certification, with supporting facts, that the person to be examined is expected to leave the country and be unavailable for examination in this country unless deposed before that time.”¹⁹⁰

Ordinarily, discovery by all parties proceeds concurrently. The rules do not give priority to any party or side. One purpose of a discovery plan is to establish an orderly procedure and to avoid indiscriminate noticing of depositions,

189. Fed. R. Civ. P. 30(a)(2)(B).

190. Fed. R. Civ. P. 30(a)(2)(C), 26(d).

which may result in inconvenience, harassment, and inefficiency. Depositions should be scheduled to accomplish the objectives of the discovery plan while minimizing travel and other expense, and reasonably accommodating parties, counsel, and witnesses. A plan might set specific dates for specific witnesses or set aside specified time periods during which designated parties are given either exclusive or preferential rights to schedule depositions, subject to exceptions for emergencies.

When depositions cannot be scheduled at times or places convenient to all counsel, attorneys should try to arrange for participation by others from their offices or counsel representing litigants with similar interests. Moreover, to meet discovery deadlines it may be necessary to conduct depositions on a multitrack basis, with depositions of several different witnesses being taken at the same time in one or more locations. Parties should be expected to work out these arrangements with little involvement by the court.

11.455 Coordination with Related Litigation

In related cases pending before the same judge, it is best to coordinate discovery plans to avoid conflicts and duplication. If the cases are pending before different judges, the judges should attempt to coordinate the depositions of common witnesses and other common discovery. Examination regarding subjects of interest only to a particular case may be deferred until the conclusion of direct and cross-examination on matters of common interest. Parties in related cases may also stipulate to the use of depositions taken in one particular case.

It may also be economical for the judges to afford parties in the present litigation access to depositions previously taken in other litigation (see section 11.423)—the judges can deem depositions of opposing parties and their employees admissible against parties involved in related litigation under Federal Rule of Evidence 801(d)(2). Depositions of other witnesses may be usable for impeachment under Federal Rule of Evidence 801(d)(1)(A). In other situations, such as those involving nonparties or a party's own witnesses, a new deposition may be necessary, but (with advance notice) the answers given at the earlier deposition may be adopted as the current testimony of the witness, subject to supplementation; telephonic nonstenographic depositions may be used for this purpose at little cost to either side.

See section 20 on coordination with related litigation.

11.456 Control of Abusive Conduct

To prevent frustration of the discovery plan, counsel must observe the rules for the fair and efficient conduct of depositions. See section 11.451. Those rules include Federal Rules of Civil Procedure 30(d)(1) and (4), local rules, and

the judge's standing orders. The court can inform counsel at the outset of the litigation, preferably by written guidelines, of the court's expectations with respect to the conduct of depositions, thereby reducing the likelihood of problematic conduct such as speaking and argumentative objections, instructions not to answer, coaching of witnesses (including restrictions during recesses in the deposition),¹⁹¹ and evasive or obstructive conduct by witnesses (see sections 11.451, 40.29). A speedy and efficient procedure to resolve discovery disputes also helps (see section 11.424).

Where abuses are rampant, the court might require that depositions be videotaped for judicial review or require counsel expeditiously to deliver a copy of the transcript of each deposition for judicial review. Alternatively, the court could direct that one or more depositions be supervised in person by a judicial officer or special master. The judge or special master may need to be present only briefly, setting the tone and making a few early rulings, and then remain on call. Even where a special master exercises continuous oversight, avoiding disputes and satellite litigation may justify the cost. Some judges have required that depositions be taken in court to allow periodic monitoring.

In rare cases, sanctions may be needed. Although sanctions may have a prophylactic effect for later depositions, they will do little to cure the damage that has already occurred and may further poison relations between counsel and should therefore be a last resort. See section 10.15.

11.46 Interrogatories

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Because interrogatories are often poorly drafted, misused, or employed to burden and harass an opponent, courts generally restrict the number permitted, forcing counsel to make the best use of the limited number of interrogatories through skillful and thoughtful drafting designed to accomplish a legitimate purpose.

11.461 Purposes

Primarily, interrogatories help determine the existence, identity, and location of witnesses, documents, and other tangible evidence as a prerequisite to planning further discovery. Much of this information is subject to pre-discovery

191. See *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

disclosure under the national or local rules. If not, the court's discovery order can require it. See sections 11.13, 11.423. Interrogatories may help fill gaps, ensure full compliance with informal requests, and obtain information dispersed among a number of persons under the opponent's control. They may also help to gather technical information when the requesting party may need an expert's assistance in formulating precise questions and the answering party may need time and special assistance to respond (e.g., when discovery is sought concerning systems and programs for the storage and retrieval of computerized data).

Contention interrogatories may sometimes help define issues, though the procedures discussed in section 11.33 are usually more productive in clarifying and narrowing issues and the contentions of the parties. Rule 33(c) permits interrogatories that call for "an opinion or contention that relates to fact or the application of law to fact," but permits the court to defer an answer "until after designated discovery has been completed or until a pretrial conference or other later time." Before allowing contention interrogatories, consider whether they are likely to be useful at that stage of the proceeding and ensure that they will not be argumentative.

Interrogatories may also be used, either alone or in conjunction with requests for admission under Federal Rule of Civil Procedure 36 (see section 11.47), to provide the foundation for a summary judgment motion. Whether certain facts are genuinely in dispute may be difficult to ascertain from depositions and affidavits, and even in response to Rule 36 requests, the opposing party may state that although reasonable inquiry has been made, it can neither admit nor deny the truth of particular matters that depend on the credibility of third persons. Interrogatories are a means of requiring a party to disclose any facts that it believes raise a triable issue with respect to particular elements of a claim or defense.

11.462 Limitations

Rule 33(a) imposes a presumptive limit of twenty-five interrogatories (including subparts) per party, and many local rules also restrict the number of interrogatories that may be propounded without stipulation or a court order. In complex litigation, with a great number of potentially relevant facts, a large amount of noncontroversial background information may be counterproductive. Nevertheless, it is best to retain some control over the use of interrogatories and, in considering requests to file additional interrogatories, to be guided

by the principles of Rule 26(b)(2). A basic question is whether the resulting benefits will outweigh the burdens.¹⁹²

11.463 Responses

Federal Rule of Civil Procedure 33(b)(3) requires that answers and objections be served within thirty days of the interrogatory unless the parties stipulate otherwise. The court may establish a different period by order and should consider doing so after determining, in consultation with counsel, how much time is truly needed to respond to specific interrogatories. Fed. R. Civ. P. 33(b)(1), (4). Any ground not stated in a timely objection will be deemed waived in the absence of good cause. Fed. R. Civ. P. 33(b)(4). Rule 26(e)(2) requires parties to reasonably amend interrogatory responses if, as new information comes to light, the responding party learns that a response—even if complete and correct when made—has become incomplete or incorrect (unless this information has otherwise been made known to opposing parties during discovery or in writing). The discovery plan should schedule periodic dates for review and amendment of interrogatory responses (see section 11.421). If an answer is withheld on privilege grounds, the claim must be accompanied by a description of the information withheld sufficient to enable other parties to assess the applicability of the privilege.¹⁹³ Answers must be signed by the person making them, and objections must be signed by counsel, subject to the certification required by Rule 26(g) when propounding and responding to interrogatories.¹⁹⁴ Some judges require that responses to contention interrogatories be signed by counsel; others permit a party to sign, stating in substance, “I have been advised by my attorneys that . . .” Such a statement, however, may waive attorney–client privilege.

11.464 Other Practices to Save Time and Expense

Use of the following techniques may increase the effectiveness and efficiency of interrogatories:

- *Master interrogatories; precluding duplicate requests.* The court should consider requiring similarly situated parties to confer and develop a single or master set of interrogatories to be served on an opposing party. If interrogatories have already been served by one party, other parties should be prohibited from asking the same questions, because

192. See Fed. R. Civ. P. 33(a).

193. Fed. R. Civ. P. 26(b)(5). See *supra* section 11.431.

194. The requirements of Rule 26(g) are described in *supra* section 11.421.

any party may use the answers to interrogatories served by another regardless of who propounded the interrogatory.¹⁹⁵

- *Use of interrogatories from other litigation.* Parties may also be barred from propounding interrogatories that an adversary has already answered in other litigation, when such answers are available or may be made available by the adversary.¹⁹⁶
- *Successive responses.* If some questions will require substantially more investigation than others, counsel may stipulate that the responding party will provide answers in stages as the information is obtained, rather than seek additional time for the first response. Federal Rule of Civil Procedure 29(2) requires court approval of stipulations extending the time to respond to interrogatories only if such stipulations would interfere with court-ordered time limits (see section 11.423).
- *Modified responses.* When interrogatories seek information that the responding party lacks or can obtain only with significant expenditure of time and money, and the information can be provided in a different form, that party should not object but rather advise the opponent and attempt to reach agreement on an acceptable form of response. For example, information requested on a calendar-year basis may be readily available on a fiscal-year basis, or information on overtime hours may be derived from records of compensation rates and overtime paid.
- *Early resolution of disputes.* The judge may require parties to object to interrogatories before expiration of the time for filing answers, particularly in cases where more than the standard thirty-day period is allowed for filing answers. If the parties cannot resolve the objections by modifying or clarifying the troublesome interrogatories, they should present their dispute to the court in a clear and concise manner, avoiding lengthy motions and briefs, and the court should rule promptly to avoid disruption of the progress of the litigation (see section 11.424).
- *Rule 30(b)(6) depositions.* When a party seeks discovery from an organization but does not know the identity of the individuals with relevant knowledge, the party may name the organization as the deponent, requiring it to designate persons to testify in response. This avoids the need for the two-step process of using an interrogatory to

195. See Fed. R. Evid. 801(d)(2).

196. See *id.*

discover the identity of knowledgeable individuals and then deposing them individually.

11.47 Stipulations of Fact/Requests for Admission

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11.471 Stipulations of Fact

Federal Rule of Civil Procedure 16(c)(1) provides that at any pretrial conference, the court “may take appropriate action, with respect to . . . the possibility of obtaining admissions of fact . . . which will avoid unnecessary proof” Although premature efforts to obtain stipulations may be counterproductive, judges might consider the early use of the combined discovery request described in section 11.423, in which a party may admit that particular facts are true in lieu of proceeding with other discovery regarding those matters. The judge can also encourage stipulations of facts that, after an appropriate opportunity for discovery has been afforded, should no longer be genuinely in doubt. Admission should be expected not only of facts of which each party has personal knowledge, but also of those that can be established by evidence from other sources. If the parties insist, facts of the latter type may be shown as “uncontested,” “uncontroverted,” or “conceded” rather than shown as “admitted,” but the legal effect is identical. Stipulations may be sought with respect both to the facts of the case and to matters that affect the admissibility of other evidence, such as the authenticity of records and the foundation requirements for exceptions to the hearsay rule under Federal Rule of Evidence 803(6) and similar provisions. Parties may be more willing to enter into stipulations for specified limited purposes, such as an injunction proceeding, motion for summary judgment, or bifurcated trial of an issue. They may be willing to enter early stipulations if there is provision analogous to that in Federal Rule of Civil Procedure 36(b) for timely withdrawal from an incorrect stipulation on the basis of newly discovered evidence when no substantial prejudice to other parties would result.

The court can assist the stipulation process by stressing the distinction between conceding the truth of some fact or agreeing not to contest it, and conceding its admissibility or weight. Counsel’s admission of the truth of an uncontroverted fact does not affect the right to object to its admissibility or to contest its probative value. Indeed, if a party contends that some fact is irrelevant or otherwise inadmissible, there is more reason to admit to its truth without the exhaustive investigation and discovery that might be warranted for an obviously critical fact. A party may stipulate to the accuracy of tabulations and

compilations, the significance of which it intends to dispute. The court should be cautious, however, of requiring a party to admit the accuracy of voluminous data or summaries of the same. As discussed in section 11.446, a response based on some limited study may be more appropriate even though this results in a summary with known errors.

The court should also remind parties of the tactical disadvantages of contesting at trial some matter on which their opponents will certainly prevail, or of being confronted at trial with an earlier denial of some matter that could not have been fairly disputed. Since an angry client, rather than the attorney, is often the person responsible for an “admit nothing” posture in the litigation, consider directing the clients themselves to attend a conference at which the desirability of early stipulations is discussed. Special masters can sometimes assist the parties in arriving at stipulations.

11.472 Requests for Admission

When voluntary means of narrowing factual disputes have been exhausted, admissions may be obtained under Federal Rule of Civil Procedure 36. This rule has its limitations, however. As discussed in section 11.463, complementary or supplementary interrogatories may be needed if a party in apparent good faith declines to admit the truth of some fact that depends on the credibility of other witnesses. In addition, like interrogatories, Rule 36 admissions are usable only against the party who made them and only in the action in which they were made. In multiparty litigation, therefore, requests may have to be directed to each party in each related action. Rule 36 requests answered by a party in prior or related litigation should be renewed; a straightforward new request that asks the party to admit each matter previously admitted should suffice.

Because parties often deny a requested admission on the basis of a trivial disagreement with a statement or without indicating the portions of the stated fact that are true, the court can urge the parties to observe their obligation under the rule to respond in good faith and point out the availability of sanctions for failure to do so.¹⁹⁷

197. “[W]hen good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.” Fed. R. Civ. P. 36(a). Sanctions are available under Rule 37(c)(2). *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933 (9th Cir. 1994) (affirming award of attorney fees incurred at trial based on failure to admit).

11.473 Statements of Contentions and Proof

The limitations of Rule 36 and the difficulties often encountered when attorneys attempt, even in good faith, to negotiate stipulations of fact have led to a third method for arriving at stipulations and admissions: the court orders counsel for one side, typically the plaintiff's, to draft a series of numbered, narrative statements of objective facts that they believe can be established, avoiding argumentative language, labels, and legal conclusions.¹⁹⁸ Opposing counsel must then indicate which of the proposed facts are admitted (or will not be contested) and which are disputed, specifying the nature of the disagreement by appropriate interlineation or deletion, as well as drafting narrative statements of additional facts that they believe can be established. The newly added statements are then returned to the first party for admission (or nondenial) or for specific disagreement. The parties then file a consolidated statement reflecting what is agreed and what remains in dispute as a stipulation of the parties. Judges sometimes incorporate the stipulation in a pretrial order, specifically providing that all (or only specified) objections to admissibility at trial are reserved.

This procedure for narrowing factual issues can be one of the final steps before trial, coupled with a provision precluding a party from offering at trial evidence of any fact not included in the narrative listing, except for good cause shown. It could also be used earlier in the litigation (after adequate opportunity for discovery) with respect to specified proceedings, such as a class certification hearing or a Rule 56 motion. The circumstances of the case will dictate whether all facts that the party proposes to prove must be listed—or only those that may possibly be admitted and, if admitted, would reduce the scope of evidence presented. The more extensive the required listing, the greater the opportunity to narrow the facts that remain for proof at trial; the judge should, however, weigh the potential for reduction in the length and cost of trial against the time and expense expended in identifying facts that will probably remain in dispute.

The degree to which stipulations can be obtained may depend not so much on the procedures used as on the attitude of the parties. Attorneys are sometimes reluctant to make any concessions on behalf of their clients. In such cases, the judge may be able to persuade counsel that, in addition to fulfilling their responsibilities as officers of the court, they will serve their clients' interests by streamlining the litigation through appropriate concessions and admissions. The refusal by counsel to stipulate to provable facts almost never results

198. See Manual for Complex Litigation, Third, 515 (Federal Judicial Center 1995).

in an advantage through a failure of proof and usually imposes additional costs on both sides in discovery, at trial, or both.

11.474 Requests for Judicial Notice

The judicial notice procedure provided by Federal Rule of Evidence 201 may also be used to eliminate the need for some fact-finding at trial. With respect to matters “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” an appropriate request may be filed under Rule 201 requiring opposing counsel to justify their refusal to stipulate.

11.48 Disclosure and Discovery of Expert Opinions¹⁹⁹

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.483 Court-Appointed Experts 100

Effective litigation management requires reasonable judicial control over the use of expert witnesses.²⁰⁰ Some judges confer with counsel before testifying experts are retained, to determine whether the proposed testimony will be necessary and appropriate, and to establish limits on the number of expert witnesses and the subjects they will cover.

Management of the disclosure and discovery of expert opinions is also essential to ensure adequate preparation by the parties, avoid surprise at trial, and facilitate rulings on the admissibility of expert evidence.

11.481 Trial Experts

Federal Rule of Civil Procedure 26(a)(2) requires the pre-discovery disclosure, by the parties, of the identity of expert witnesses to be called at trial and of extensive additional information, including the following:

- a signed written report stating all opinions to which the expert will testify;
- the bases for those opinions;
- the data or information *considered* in forming the opinions—according to the 1993 committee note on Rule 26, this requirement substan-

199. For more detailed discussion of the management of expert testimony, see generally William W. Schwarzer & Joe S. Cecil, *Management of Expert Evidence*, in Reference Manual on Scientific Evidence 39 (Federal Judicial Center 2d ed. 2000). See also *infra* section 23 (expert scientific evidence).

200. See *infra* sections 22.87, 23.22, 23.27, 23.35, 23.37.

tially eliminates work product protection from communications between counsel and the expert; the court may conduct an *in camera* inspection if necessary to redact irrelevant material;²⁰¹

- exhibits to be introduced as a summary or in support of the opinions;
- the expert's qualifications (including a list of all publications authored in the last ten years);
- the compensation the expert is to receive; and
- a list of other cases in which the expert has testified within the last four years.²⁰²

Local rules or standing orders may contain similar requirements, and the judge may enter an order adapting these requirements to meet the needs of the litigation. Rule 26(a)(2) applies only to experts “retained or specially employed” to give expert testimony or “whose duties as an employee of the party regularly involve giving expert testimony,” but the judge may extend the rule to other experts (e.g., treating physicians) or, conversely, waive it as to certain experts.²⁰³

At the initial conference, establish a timetable for expert disclosure and procedures to implement it. Absent stipulation or a court order, these disclosures must be made at least ninety days before trial or, if the evidence is intended solely for rebuttal, thirty days from the opposing party's disclosure. Supplementation under Rule 26(e) is also required.²⁰⁴

Scheduling should take into account that the parties may lack sufficient information to select expert witnesses until the issues have been further defined and certain discovery is completed; a party's decision may also await the disclosure of the opinions of experts selected by other parties. Rule 26's committee note states that the party with the burden of proof on an issue should normally be required to disclose its expert testimony on that issue before the other parties.

Disclosure must be made sufficiently in advance of trial for the parties to take depositions if necessary and for the court to conduct appropriate pretrial proceedings, such as hearing motions under Federal Rule of Evidence 104(a) directed at expert evidence and motions for summary judgment.²⁰⁵ Expert depositions are authorized by Rule 26(b)(4)(A); Rule 26(b)(4)(C) normally

201. See *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595–96 (3d Cir. 1984).

202. Fed. R. Civ. P. 26(a)(2)(A), (B).

203. Fed. R. Civ. P. 26 committee note.

204. See Fed. R. Civ. P. 26(a)(2)(C).

205. The court at that time may also want to consider appointment of an expert under Fed. R. Evid. 706. See *infra* section 11.51.

requires the discovering party to pay the expert's reasonable fees for responding. (The Rule 26 committee note advises that disclosure may reduce the need for expert discovery, however, and warrant substantial limitations on it.)

Experts may wish to modify or refine their disclosed opinions in the light of further studies, opinions expressed by other experts, or other developments in the litigation. Although Rule 26(e)(1) requires that opposing counsel be advised of these changes, the judge should set a final cutoff date by which all additions and revisions must be disclosed in order to be admissible at trial.²⁰⁶

Early and full disclosure of expert evidence can help define and narrow issues. Although experts often seem hopelessly at odds, revealing the assumptions and underlying data on which they have relied in reaching their opinions often makes the bases for their differences clearer and enables substantial simplification of the issues. In addition, disclosure can facilitate rulings well in advance of trial on objections to the qualifications of an expert, the relevance and reliability of opinions to be offered, and the reasonableness of reliance on particular data.²⁰⁷ Judges use various procedures to identify and narrow the grounds for disagreement between opposing experts, such as asking them to explain the reasons for their disagreement.

11.482 Consulting Experts

Discovery with respect to nontestifying experts is much more limited. Such experts are not covered by Rule 26(a)(2) and may be deposed only upon a showing of "exceptional circumstances under which it is impractical . . . to obtain facts or opinions on the same subject by other means."²⁰⁸ If such a deposition is allowed, consider imposing time limits and requiring the party seeking discovery to pay an appropriate share of the cost reasonably incurred in obtaining the expert's testimony (cost shifting under Rule 26(b)(4)(C) is mandatory "unless manifest injustice would result").

The stringent disclosure requirements applicable to testifying experts may lead parties to rely on consulting experts, deferring a decision whether to designate them as trial experts. The judge should address this matter at the initial conference and establish a cutoff date for designation of trial experts and compliance with disclosure requirements.

206. See Fed. R. Civ. P. 37(c)(1) (failure to make Rule 26(a) disclosures "without substantial justification" precludes introduction of nondisclosed witnesses or information at trial).

207. See generally *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) (rejecting "general acceptance" test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

208. Fed. R. Civ. P. 26(b)(4)(B). When a physical or mental examination is made under Fed. R. Civ. P. 35, a party may obtain the examiner's report even if the examiner is not testifying.

11.483 Court-Appointed Experts²⁰⁹

Although Federal Rule of Evidence 706 provides that an expert appointed by the court may be deposed, judges should establish the terms on which an expert serves and the nature of the functions the expert is to perform. When such an appointment is made, the extent of discovery permitted should be determined at the outset. This may depend on whether the expert is to testify and on the issues the expert is to address.²¹⁰

11.49 Special Problems

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11.491 Government Investigations/Grand Jury Materials

Early in the litigation, the court should inquire about relevant government reports and other materials. Access to such materials can reduce the need for discovery and assist in defining and narrowing issues. If not a matter of public record, these materials can sometimes be obtained by agreement with the agency, by subpoena, or by requests under the Freedom of Information Act.²¹¹

Factual findings of a government agency may be admissible under Federal Rule of Evidence 803(8)(C), but some discovery may be needed to determine whether the information meets the rule's "trustworthiness" standard. The rule provides a hearsay exception, in civil cases and against the government in criminal cases, for "[r]ecords, reports, statements, or data compilations . . . of public offices and agencies, setting forth . . . factual findings resulting from an investigation conducted pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Objections to the admissibility of the findings may be addressed in a pretrial hearing under Federal Rule of Evidence 104, if necessary.²¹²

Grand jury materials can sometimes be used to reduce discovery in related civil litigation. Federal Rules of Criminal Procedure 6(e)(3)(D) and (E) set out the procedures for seeking disclosure of grand jury materials. Grand jury pro-

209. See *infra* section 11.51.

210. See generally Reference Manual on Scientific Evidence, *supra* note 199.

211. 5 U.S.C. § 552 (2000).

212. See *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

ceedings are presumptively secret, but the court may order disclosure upon a showing of a particularized need.²¹³ Although disclosure may be ordered of testimony given before the grand jury and of documents subpoenaed or otherwise obtained for its use,²¹⁴ a person may invoke the Fifth Amendment privilege against self-incrimination and refuse to answer questions about such testimony even if it was given under a grant of immunity.²¹⁵ The production to a grand jury of otherwise discoverable material does not, however, entitle it to Federal Rule of Civil Procedure 6 protection.²¹⁶ Copies of material produced to a grand jury are subject to discovery.

Requests for disclosure of grand jury materials are generally addressed to the judge who supervised the grand jury proceedings.²¹⁷ Nevertheless, because that court may not be able to assess the “particularized need” for the materials in the litigation for which the materials are sought, the court should consult with the trial judge assigned to the litigation.²¹⁸ If disclosure is ordered, the court may include in the order protective limitations on the materials’ use.²¹⁹

11.492 Summaries

Whenever possible, voluminous or complicated data at trial should be presented by counsel through summaries, including compilations, tabulations, charts, graphs, and extracts. Federal Rule of Evidence 1006 creates an exception to the “best evidence” rule, allowing writings, recordings, or photographs that cannot conveniently be examined in court to be presented in the form of “charts, summaries or calculations.” The rule does not affect the requirement that the originals be admissible. While counsel in jury cases usually recognize the need for summaries, they may overlook their utility in nonjury cases; the

213. See Fed. R. Crim. P. 6(e)(2), (3)(C)(i). The “particularized need” requirement derives from case law and is described in detail in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222–23 (1979). See also *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983); *Ill. v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 & n.14 (1983).

214. Some courts give greater protection to transcripts of testimony than to documentary evidence. See, e.g., *In re Grand Jury Proceedings (Miller Brewing Co.)*, 717 F.2d 1136 (7th Cir. 1983). Production under Fed. R. Civ. P. 33(d) or 34 of documents previously subpoenaed by a grand jury may be facilitated if the producing party has retained copies.

215. *United States v. Balsys*, 524 U.S. 666, 683 (1998); *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983).

216. See *Finn v. Schiller*, 72 F.3d 1182, 1187 (4th Cir. 1996); *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988).

217. *Douglas Oil*, 441 U.S. at 226.

218. *Id.* at 226–31.

219. *Id.* at 223.

trial judge should not be expected to “wad[e] through a sea of uninterpreted raw evidence.”²²⁰

Summaries may be offered under Federal Rule of Evidence 611(a) solely as an aid to understanding, with the underlying evidence separately admitted into the record. Whenever possible, however, summaries should be received as substantive evidence under Rule 1006, in lieu of the underlying data. When summaries are so used, opposing parties must be given an adequate opportunity to examine the underlying data in advance of trial and raise objections in time to enable the proponent of the summary to make necessary corrections. As noted in section 11.446, the use of sampling techniques to verify summaries and quantify possible errors may be adequate and preferable to an item-by-item examination of the underlying data. When the summary is received as substantive evidence of the data it contains, the underlying data will not become part of the record, although receipt of a few examples of the source materials may be helpful in illustrating the nature of the underlying data summarized.

11.493 Sampling/Opinion Surveys

Statistical methods can often estimate, to specified levels of accuracy, the characteristics of a “population” or “universe” of events, transactions, attitudes, or opinions by observing those characteristics in a relatively small segment, or sample, of the population. Acceptable sampling techniques, in lieu of discovery and presentation of voluminous data from the entire population, can save substantial time and expense, and in some cases provide the only practicable means to collect and present relevant data. In one case, for example, a statistical expert profiled the compensatory damage claims of the class members to assist the jury in fixing the amount of punitive damages.²²¹

The choice of appropriate sampling methods will depend on the objective. There is a difference between sampling to generate data about a population so the data will be verified or declared true and sampling, like polling, to measure opinions, attitudes, and actions by a population. In the case of the former, the reliability and validity of estimates about the population derived from sampling are critical.

220. *Crawford v. W. Elec. Co.*, 614 F.2d 1300, 1319 (5th Cir. 1980).

221. *In re Shell Oil Refinery*, 136 F.R.D. 588 (E.D. La. 1991), *affirmed sub nom.* *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), *reh’g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh’g*, 53 F.3d 663 (5th Cir. 1994) (case settled before rehearing).

The sampling methods used must conform to generally recognized statistical standards. Relevant factors include whether

- the population was properly chosen and defined;
- the sample chosen was representative of that population;
- the data gathered were accurately reported; and
- the data were analyzed in accordance with accepted statistical principles.

Laying the foundation for such evidence will ordinarily involve expert testimony and, along with disclosure of the underlying data and documentation, should be taken up by the court well in advance of trial. Even if the court finds deficiencies in the proponent's showing, the court may receive the evidence subject to argument going to its weight and probative value.²²²

By contrast, questioning a sample of individuals by opinion polls or surveys about such matters as their observations, actions, attitudes, beliefs, or motivations provides evidence of public perceptions. The four factors listed above are relevant to assessing the admissibility of a survey, but need to be applied in light of the particular purpose for which the survey is offered. In addition, in assessing the validity of a survey, the judge should take into account the following factors:

- whether the questions asked were clear and not leading;
- whether the survey was conducted by qualified persons following proper interview procedures; and
- whether the process was conducted so as to ensure objectivity (e.g., determine if the survey was conducted in anticipation of litigation and by persons connected with the parties or counsel or by persons aware of its purpose in the litigation).

Parties who propose to offer sampling or survey evidence may want to consider whether to disclose details of the proposed sampling or survey methods to the opposing parties before the work is done (including the specific questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process). Objections can then be raised promptly and corrective measures taken before the survey is completed. A meeting of the parties' experts can expedite the resolution of problems affecting admissibility.

Parties sometimes object that an opinion survey, although conducted according to generally accepted statistical methods, involves impermissible

222. See *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992); *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988).

hearsay. When the purpose of a survey is to show what people believe—but not the truth of what they believe—the results are not hearsay.²²³ In the rare situation where an opinion survey involves inadmissible hearsay, Federal Rule of Evidence 703 nevertheless allows experts to express opinions based on the results of the survey.²²⁴

11.494 Extraterritorial Discovery

Discovery directed at witnesses, documents, or other evidence located outside the United States will often create problems, since many countries view American pretrial discovery as inconsistent with or contrary to their laws, customs, and national interests. For example, in civil-law jurisdictions where courts control the gathering and presentation of evidence, taking a deposition may be viewed as a judicial act performed by another sovereign. In addition, many common-law jurisdictions disfavor discovery requests directed at obtaining material other than evidence to be presented at trial.²²⁵ The need for evidence located outside the United States should be explored early in the proceedings to allow for the extra time that may be required to obtain it. Consider ways to minimize cost and delay, or to develop alternate methods of proof when the evidence cannot be obtained. For example, the parties may achieve substantial savings by paying a willing deponent to come to the United States or, if permitted by the laws of the host country, conducting short depositions telephonically.

The following factors may affect foreign discovery:

- *Laws of the United States.* The procedures for obtaining evidence from other countries are prescribed by
 - the Federal Rules of Civil Procedure, particularly Rule 28(b) (depositions in a foreign country);²²⁶
 - statutes, particularly 28 U.S.C. § 1781 (transmittal of letter rogatory or request), § 1783 (subpoena of person in a foreign country), and § 1784 (contempt); and

223. See Fed. R. Evid. 801(c), 803(3).

224. See Fed. R. Evid. 703.

225. See, e.g., *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 480 (7th Cir. 2000); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] A.C. 547 (H.L.); S. Seidel, *Extraterritorial Discovery in International Litigation* 24 (PLI 1984).

226. See also Fed. R. Civ. P. 44(a)(2) (authentication of foreign official record). Rule 28(b) must be read in conjunction with the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, *done* Oct. 5, 1961, T.I.A.S. No. 10072, 527 U.N.T.S. 189 (entered into force for the United States on Oct. 15, 1981), *reprinted in* Fed. R. Civ. P. 44; see also 28 U.S.C. §§ 1740, 1741, 1745 (West 2002).

- international agreements, particularly the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Hague Convention”);²²⁷ attention must also be given to applicable decisional law²²⁸ and the Federal Rules of Evidence.²²⁹
- *Laws and attitude of the foreign country.* The extent and form of pretrial discovery that other sovereigns will compel or even permit vary widely. Even within a particular country, the rules may differ depending on the nature and identity of the person or body from which the discovery is sought and on the type of information (e.g., the breadth of discovery may depend on whether the evidence is testimonial or documentary).²³⁰ Some countries not only refuse to compel a witness to provide evidence, but also prohibit even the voluntary production of some items of evidence. The attitude of the other country may also be affected by its current diplomatic relations with the United States and by the nature of the litigation. This latter factor is particularly important if the American litigation involves claims (such as antitrust) that conflict with the law or policies of the foreign country.
- *Position of the person or body from which discovery is sought.* Foreign discovery rules may vary depending on whether discovery is sought from
 - a national of the United States, of the country in which the discovery is to be conducted, or of another country;
 - a person or entity party to the American litigation or otherwise subject to the jurisdiction of the American courts—where the entity or person from whom discovery is sought is subject to the court’s jurisdiction, it will often be faster and less costly to use the Federal Rules’ standard discovery methods;²³¹ and

227. *Opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 (entered into force for the United States on Oct. 7, 1972), *reprinted in* 28 U.S.C. § 1781 (West 2002) [hereinafter Hague Convention]. As its title implies, the convention does not apply to criminal cases. *See* Obtaining Discovery Abroad 9 (ABA 1990).

228. *See, e.g.,* *Breard v. Greene*, 523 U.S. 371, 375 (1998); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522 (1987); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Societe Internationale v. Rogers*, 357 U.S. 197 (1958); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977).

229. *See, e.g.,* Fed. R. Evid. 902(3) (self-authentication of foreign public documents).

230. For example, most countries party to the Hague Convention will not execute letters of request for the purpose of obtaining pretrial disclosure of documents. *See* Hague Convention, *supra* note 227, art. 23.

231. *See* Obtaining Discovery Abroad, *supra* note 227, at 2; *Societe Nationale*, 482 U.S. at 549.

- an instrumentality or arm of a foreign country, or a person or entity willing to provide the information.
- *Posture of the litigant.* Extraterritorial discovery will be expedited if the parties to the litigation cooperate by entering into stipulations under Federal Rule of Civil Procedure 29 as to the manner and location of discovery. Stipulations for nonstenographic and telephonic depositions under Rule 30(b)(2), (7) also may be valuable (the court may also order the use of these procedures; see section 11.452), but such procedures may violate foreign law. Stipulations as to admissibility are particularly important because the discovery may not be in the question-and-answer form traditional in American litigation. The refusal of a party with foreign connections or interests to enter into stipulations may not necessarily reflect an uncooperative attitude but may be compelled by the laws or customs of the foreign country. In this regard, the court should note that under Rule 28(b), “[e]vidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.”

Because procedures for obtaining foreign discovery vary from country to country and are often complex, it is generally advisable for the attorneys to associate with local counsel. The Department of State and the appropriate United States embassy or consulate can also provide assistance in planning discovery in foreign countries.²³² The Department of State’s Office of Citizens Consular Services can provide lists of local counsel and current information regarding such matters as reservations and declarations under the Hague Convention, practices in nonsignatory countries, the procedures to be followed in particular countries, and actual results of discovery efforts in specific countries.²³³

Depositions. Federal Rule of Civil Procedure 28(b) establishes four alternative procedures for taking depositions in other countries.²³⁴ Under Rule 28(b)(1), when the country where discovery is sought is a signatory to the

232. For the U.S. State Department’s regulations on foreign discovery, see 22 C.F.R. § 92 (1993).

233. Inquiries should be directed to the Office of Citizens Consular Services, Dept. of State, 2201 C Street, N.W., Washington, DC 20520.

234. See also Restatement (Third) of the Foreign Relations Law of the United States § 474(2) (1987).

Hague Convention,²³⁵ depositions may be taken in accordance with the convention, as described below, though resort to the Convention is not mandatory.²³⁶ When the country is not a signatory, counsel may use one of the procedures in Rule 28(b)(2)–(4). Under Rule 28(b)(2), the American court may issue a “letter of request” (formerly called a “letter rogatory”) seeking the voluntary assistance of the court or other agency of the foreign country to compel the deponent to provide evidence.²³⁷ There may be a long delay, perhaps as much as two years, between the issuance of a letter of request and receipt of the evidence. The Department of State’s Office of Citizens Consular Services often can provide information about recent experiences in particular countries.

The foreign country ultimately decides whether to honor and execute the letter of request. Many countries not party to the Convention, such as Canada, routinely execute letters of request from United States courts.²³⁸ When the deponent is willing to give evidence, the parties may use the “notice” or “commission” methods of Rule 28(b)(3) and (4), respectively, if not prohibited by foreign law. For example, in Japan and Turkey a deposition on notice is permissible only of an American citizen, while Swiss law makes it a crime to take any deposition in that country without governmental authorization. The “notice” method is essentially the same used for a typical domestic deposition. Under the “commission” method, the American court appoints a per-

235. The rule refers to “any applicable treaty or convention,” but the intended reference is to the Hague Convention. See Fed. R. Civ. P. 28 committee note.

236. See *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 529–40 (1987); see also Restatement (Third) of the Foreign Relations Law of the United States, *supra* note 234, § 473.

237. For a thorough discussion of the issues and procedures involved in obtaining judicial assistance from a foreign country, see Bruno Ristau, *International Judicial Assistance Part IV* (1990). For the form and substance of a letter of request, see Hague Convention, *supra* note 227, arts. 1–14.

238. Currently, the U.S. State Department’s Web site lists more than thirty nations in which the Hague Convention is in force. See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, at http://travel.state.gov/hague_evidence.html (last visited Nov. 10, 2003). The Hague Convention’s official Web site lists additional states in which the Hague Convention is in force by “accession,” but not all of these necessarily have reciprocal arrangements with the United States. See Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, <http://www.hcch.net/e/status/evidshte.html> (last visited Nov. 10, 2003). The situation is fluid, as former territories become independent nations and other nations experience fundamental political changes. For current information about a specific nation, consult the Department of Justice, Civil Division, Office of International Judicial Assistance, 1100 L Street, N.W., Room 11006, Washington, DC 20530; tel: (202) 307-0983; fax: (202) 514-6584.

son—typically an American consular officer²³⁹—to administer the oath and preside over the deposition.

Much foreign discovery will occur in the numerous countries that are contracting states to the Hague Convention.²⁴⁰ The Convention generally allows evidence to be taken compulsorily pursuant to a letter of request or voluntarily before a diplomatic officer or consular agent or any person “commissioned” for the purpose.²⁴¹ (Issuance of both a commission and a letter of request, as authorized by Rule 28(b), may be a useful measure to guard against the risk that a deponent may not remain willing to testify voluntarily.) Although the judicial authority executing the request will apply its own procedures, Article 9 of the Convention states that special requests—for example, for a verbatim transcript or for answers in writing and under oath—are to be honored unless incompatible with the law of the executing state or otherwise impossible or impracticable. In practice, though, such requests are commonly not complied with. Under the Convention, letters of request must be sent to a “central authority” designated by the receiving country; the identities of the authorities designated are given in notifications appended to the treaty.²⁴² The Convention must, however, be read in light of the numerous reservations and declarations made by the contracting states, through which they have modified or declined to adopt various provisions. Many countries, for example, require that a judicial officer conduct depositions, and a majority will not execute letters of request issued for the purpose of obtaining documents related solely to pretrial discovery. Each country’s declarations and reservations are listed in the notifications at the end of the convention.²⁴³ These create variances among the discovery rules applicable in the contracting countries and may be complex.

When “necessary in the interest of justice,” a United States national or resident in a foreign country may be subpoenaed to testify or produce documents.²⁴⁴ Failure to comply may subject the person to punishment for contempt.²⁴⁵

Blocking laws. Efforts to obtain or compel production of documents located outside the United States may be impeded by one of the increasing num-

239. See 22 C.F.R. § 92.4(a) (2001).

240. For a list of contracting states, see Hague Convention, *supra* note 227.

241. Hague Convention, *supra* note 227, arts. 16–17.

242. See 28 U.S.C.A. § 1781 at 125–41 (West Supp. 1993). For discussion of the procedures and problems associated with letters of request, see Spencer W. Waller, International Trade and U.S. Antitrust Law § 7.08 (1992).

243. See 28 U.S.C.A. § 1781 at 125–41 (West Supp. 1993).

244. 28 U.S.C. § 1783 (West 2002).

245. *Id.* § 1784.

ber of foreign nondisclosure (or “blocking”) laws.²⁴⁶ These laws take the form of general commercial and bank secrecy laws, as well as more specific and discretionary blocking statutes aimed at combating perceived excesses in American discovery.²⁴⁷ The fact that certain discovery is prohibited under foreign law, however, does not prevent the court from requiring a party to comply with a demand for it,²⁴⁸ though the prohibition may be relevant in determining the sanctions to be imposed for noncompliance.²⁴⁹ Where a party fails to comply with a discovery order because of a blocking statute, the court may impose any of the sanctions set forth in Federal Rule of Civil Procedure 37(b), though it may also consider factors such as the party’s good faith efforts to comply in declining to impose them.²⁵⁰

Judicial control. The Supreme Court has cautioned federal courts to exercise special vigilance to protect foreign litigants from unnecessary or unduly burdensome discovery and to supervise pretrial proceedings particularly closely to prevent discovery abuses.²⁵¹ The additional cost of foreign discovery may increase the danger that it will be used for an improper purpose, such as to burden or harass; objections to abusive discovery advanced by foreign litigants should therefore receive the court’s “most careful consideration.”²⁵² In deciding whether to order production of information abroad, and in framing such an order, the following are worth considering:

- the importance to the litigation of the discovery requested;
- the degree of specificity of the request;
- whether the information sought originated in the United States;
- the availability of alternative means to secure the information;
- the extent to which noncompliance with the request would undermine important U.S. interests; and
- the extent to which compliance would undermine important interests of the country in which the information is located.²⁵³

246. See Obtaining Discovery Abroad, *supra* note 227, *passim*.

247. See Waller, *supra* note 242, § 7.09.

248. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 544 n.29 (1987).

249. *Societe Nationale v. Rogers*, 357 U.S. 197, 204–06 (1958).

250. See Obtaining Discovery Abroad, *supra* note 227, at 18–22.

251. *Societe Nationale*, 482 U.S. at 546.

252. *Id.*

253. Restatement (Third) of the Foreign Relations Law of the United States, *supra* note 234, § 442(1)(c); see also *Societe Nationale*, 482 U.S. at 544 n.28 (citing earlier draft of the restatement).

Comity also dictates that American courts take into account special problems confronted by the foreign litigant because of its nationality or location and any sovereign interests expressed by a foreign state.²⁵⁴ An order requiring that *all* extraterritorial discovery be conducted using the procedures in the Hague Convention when available may serve this purpose.

Careful drafting can reduce the risk that a foreign country will refuse to execute a letter of request. In most cases, the request should be directed at evidence for use at trial and should be as specific as possible. Hague Convention countries that have executed a reservation under Article 23²⁵⁵ will ordinarily not execute general requests for broad categories of documents for use in discovery.²⁵⁶ The letter should include no unnecessary information, and the language should be simple and nontechnical.²⁵⁷ The court should incorporate findings as to the extent of discovery to be permitted and the need therefore in a separate order that can be presented to foreign authorities, even if letters of request are not being issued.

Federal judges are not authorized to travel abroad to control the conduct of depositions, at least in the absence of specific approval by the Judicial Conference of the United States.²⁵⁸ For this reason, it is best to adopt in advance appropriate guidelines to govern such depositions consistent with the laws of the other country.²⁵⁹ Moreover, if permissible under the laws and customs of that country, the judge may be available by telephone to resolve disputes or may appoint a special master to supervise the deposition personally.²⁶⁰ Before employing either of these procedures, the judge should seek advice from the Department of State's Office of Citizens Consular Services.

254. *Societe Nationale*, 482 U.S. at 546.

255. *See supra* note 227.

256. *See Waller, supra* note 242, § 7.08[3].

257. U.S. Dept. of State Circular, Preparation of Letters Rogatory (Mar. 1992).

258. Report of the Proceedings of the Judicial Conference of the United States 4–5 (March 1978).

259. For suggested deposition guidelines, see *supra* section 11.45.

260. *See supra* sections 11.424, 11.456.

11.5 Special Referrals

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Complex litigation often involves extensive fact-finding in preparation for trial, or in aid of settlement. Referrals to a neutral arbiter or special master may at times be helpful, either by relieving the judge of time-consuming proceedings or by bringing to bear special expertise. The authority to make such referrals is circumscribed and conditioned, and the costs and benefits must be balanced.

11.51 Court-Appointed Experts and Technical Advisors

Court-appointed experts serve a number of purposes: to advise the judge on technical issues, to provide the jury with background information to aid comprehension, or to offer a neutral opinion on disputed technical issues.²⁶¹ The court has broad discretion to appoint such an expert, *sua sponte* or on request of the parties, but should consider whether there are adequate alternatives to such an appointment, such as directing the parties to clarify, simplify, and narrow the differences between them.²⁶² Below are some of the problems and implications of appointing an expert:

- *Cost.* Court appointment of an expert increases the already high cost of complex litigation. Except in the rare cases where such funding is provided by statute, Federal Rule of Evidence 706(b) requires the parties to pay the expert's compensation. The judge allocates this expense among the parties and determines the time of payment (usually periodic deposits in court during the litigation, subject to reapportionment at the outcome). Courts often decline to appoint an expert when one party is indigent to avoid the unfairness of requiring the other side to pay all of the expert's compensation. The court has the authority, however, to order the nonindigent party to pay this expense in compelling circumstances (e.g., when the indigent party's claim has merit that cannot viably be presented absent such expert assistance). The

261. For an extensive discussion of the various aspects of using court-appointed experts, see Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706* (Federal Judicial Center 1993); see also Schwarzer & Cecil *supra* note 199, at 59–63.

262. See *supra* section 11.48; Cecil & Willging, *supra* note 261, at 67–78.

judge should provide for payment at the time of appointment to ensure that the expert will be compensated.²⁶³

- *Neutrality of the expert.* Truly neutral experts are difficult to find. Though they will have no commitment to any party, most experts do not come to the case free of experience and opinions that will predispose—or may be perceived to predispose—they in some fashion on disputed issues relevant to the case.
- *Undue influence.* Experts are typically appointed in cases that are extraordinarily difficult, and their independence relative to the parties' experts may cause the jury to give their opinions undue weight. For this reason, the testimony of the expert must be limited to those issues specified by the court. Disclosure to the jury of the expert's court-appointed status is discretionary.²⁶⁴
- *Delay.* The testimony of a court-appointed expert may lengthen the trial, although there may be offsetting savings by narrowing the issues, reducing the scope of the controversy, and perhaps promoting settlement.
- *Timing of the appointment.* The need for an appointment will not always be clear early in the litigation. By the time it becomes clear, the case may be at or about to go to trial, when introduction of a court-appointed expert would cause delay.

Nevertheless, in appropriate cases, appointment of a neutral expert, even at an advanced stage of the proceedings, can be beneficial:

- court-appointed experts can have “a great tranquilizing effect”²⁶⁵ on the parties' experts, reducing adversariness and potentially clarifying and narrowing disputed issues;
- they can help the court and jury comprehend the issues and the evidence;
- they can suggest acceptable procedures and ground rules for preserving and exchanging digital-format materials relevant to the case, and assist in settling disputes regarding electronic evidence; and
- they may facilitate settlement or at least stipulations.

263. See *McKinney v. Anderson*, 924 F.2d 1500, 1510–11 (9th Cir. 1991); *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1057–59 (8th Cir. 1984) (en banc); *Cecil & Willging*, *supra* note 261, at 62–65.

264. Fed. R. Evid. 706(c).

265. E. Barrett Prettyman, *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges*, 21 F.R.D. 395, 469 (1957).

The order of appointment should clearly specify whether the expert is appointed under authority of Rule 706 or as a technical advisor under the inherent authority of the court, along with the assigned duties, functions, and compensation.²⁶⁶ A court-appointed expert, when forming opinions, is not limited to information presented by the parties at a hearing. Furthermore, testifying experts are subject to discovery with respect to their opinions; therefore, the order should specify the ground rules for depositions and other discovery directed at the expert, including the extent to which materials used or considered by the expert will be subject to discovery. The order should also specify whether the expert is to provide a written report to the parties before trial, and whether *ex parte* communications with the judge will be permitted. The order may also state how the jury should be instructed. Generally the jury would be told that the opinions of a court-appointed expert should be treated the same as those of other expert witnesses—the opinions are entitled to only such weight as is warranted by the witness’s knowledge, expertise, and preparation.

Judges sometimes appoint an expert to render assistance other than testifying at trial, such as analyzing and evaluating reports prepared by the parties’ experts or attorneys.²⁶⁷ In such situations, *ex parte* communications regarding matters of substance may be necessary but should be subjected to procedural safeguards. Such safeguards might include (1) giving the parties notice of the expert’s identity and precise function; (2) providing written instructions detailing the expert’s duties; and (3) requiring the expert to submit a written report or otherwise advising the parties of the substance of the advice given.²⁶⁸ *Ex parte* communications are always suspect and should be allowed only in exceptional circumstances.

When the court is selecting an expert witness for appointment, the best candidate is one whose fairness and expertise in the field cannot reasonably be questioned and who can communicate effectively as a witness. The court should make every effort to select a person acceptable to the litigants. First, the parties should be asked to submit a list of proposed experts; they may be able, with the assistance of their own experts, to agree on one or more candidates. The court may also call on professional organizations and academic groups to provide lists of qualified and available persons (though not delegating the selection to any such organization), giving the parties an opportunity to com-

266. See Cecil & Willging, *supra* note 261, at 59, 63.

267. See, e.g., *Webster v. Sowders*, 846 F.2d 1032, 1035, 1039 (6th Cir. 1988) (asbestos).

268. See *Reilly v. United States*, 863 F.2d 149, 158–59 (1st Cir. 1988); Schwarzzer & Cecil, *supra* note 199, at 62; Cecil & Willging, *supra* note 261, at 41 & nn.83–84.

ment. In making appointments, judges must avoid even the appearance of patronage or favoritism.²⁶⁹

11.52 Special Masters

Federal Rule of Civil Procedure 53 authorizes judges to appoint special masters to aid in handling pretrial and posttrial matters tried without a jury “that cannot be addressed effectively and timely by an available district court judge or magistrate judge of the district.”²⁷⁰ Reference to a special master must be the exception and not the rule. The Supreme Court held in *La Buy v. Howes Leather Co., Inc.*²⁷¹ that the general complexity of the litigation, the projected length of trial, and the congestion of the court’s calendar do not constitute the exceptional circumstances that would justify appointment of a trial-level special master. These considerations, however, do not preclude more limited references, such as those regarding resolution of pretrial or nondispositive matters,²⁷² mediation of settlement negotiations (see section 13.13), or posttrial implementation of a decree.²⁷³

Whether to appoint a special master involves largely the same considerations discussed in section 11.51 with respect to court-appointed experts and technical advisors. Appointment of a magistrate judge makes it unnecessary to worry about imposing extra expense²⁷⁴ on parties or about the question of neutrality. It may be particularly difficult to appoint a completely disinterested

269. See 28 U.S.C. § 458 (West 2002).

270. Rule 53(a)(1)(C). For an examination of the changes in practices that documented a basis for the rule change, see Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan, & John Shapard, *Special Masters’ Incidence and Activity: Report to the Judicial Conference’s Advisory Committee on Civil Rules and Its Subcommittee on Special Masters* (Federal Judicial Center 2000).

271. 352 U.S. 249, 259 (1957).

272. See *In re Bituminous Coal Operators Ass’n, Inc.*, 949 F.2d 1165, 1168–69 (D.C. Cir. 1991) (improper to refer dispositive matters, but proper to refer pretrial preparation or calculation of damages); *In re United States*, 816 F.2d 1083, 1091 (6th Cir. 1987) (improper to refer dispositive matters, proper to refer nondispositive matters); *In re Armco*, 770 F.2d 103 (8th Cir. 1985) (per curiam) (improper to refer trial on merits, though proper to refer all pretrial matters, including dispositive motions). The court in *Stauble*, while making a similar distinction, noted that the reference would not have violated Article III if the judge had afforded de novo review of the special master’s determination. *Stauble v. Warrob, Inc.*, 977 F.2d 690, 698 n.13 (1st Cir. 1992).

273. See Fed. R. Civ. P. 53(a)(1)(C) & (b)(2)(A).

274. See Fed. R. Civ. P. 53(a); *Prudential Ins. Co. of Am. v. United States Gypsum Co.*, 991 F.2d 1080, 1085, 1087 (3d Cir. 1993) (disqualifying special master, in part because of availability of magistrate judges).

special master with no prior relationship to any of the parties, since special masters are often practicing attorneys and tend to have substantial experience with similar disputes. Rule 53(a)(2) requires that a master “not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 445 unless the parties consent with the court’s approval to appointment of a particular person after disclosure of any potential grounds for disqualification.”

Also, appointment of a magistrate judge pursuant to statute may be appropriate where the purpose is to collect, assemble, and distill voluminous data presented by the parties and where the primary qualifications are objectivity and familiarity with evidentiary hearings rather than expertise in some technical field. Appointment of a special master to supervise discovery may be appropriate where the financial stakes justify imposing the expense on the parties and where the amount of activity required would impose undue burdens on a judge. It is generally preferable to appoint special masters with the parties’ consent, and either to permit the parties to agree on the selection or to make the appointment from a list submitted by the parties. The clerk and deputy clerks of court may not be appointed as special masters “unless there are special reasons requiring such appointment which are recited in the order of appointment.”²⁷⁵

Special masters have increasingly been appointed for their expertise in particular fields, such as accounting, finance, science, and technology.²⁷⁶ Accordingly, the distinction between special masters under Federal Rule of Civil Procedure 53 and court-appointed experts under Federal Rule of Evidence 706 has become blurred in the context of appointments to serve in nonjury trial settings. The court may make an appointment under the latter rule without Rule 53’s restrictions. Although Rule 706 speaks of a “witness,” it also specifically permits the appointed expert to make “findings.” Thus, when the court is calling on a neutral for that person’s “scientific, technical, or other specialized knowledge,” as contemplated by Federal Rule of Evidence 702, it may consider making the appointment under Rule 706 even though the master will not testify. Presumptively, however, a person appointed under Rule 706 would be subject to discovery and cross-examination; Rule 53 makes no provision for discovery or cross-examination of special masters, but the parties have access to the special master’s report. Rule 53(g)(1), however, requires the court to allow the parties “an opportunity to be heard” and allows the court to

275. 28 U.S.C. § 957 (West 2002).

276. For discussion of the roles played by special masters and magistrate judges, see e.g., FJC Study, *Special Masters*, *supra* note 270; Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. Pa. L. Rev. 2131 (1989).

“receive evidence” before deciding whether to adopt, modify, reject, or resubmit a special master’s report.

In jury matters, amended Rule 53 eliminates any blurring of functions. Appointment of a Rule 706 expert becomes the only option for bringing in an independent expert to assist the jury. Any expert appointed under Rule 706 is, of course, subject to discovery and cross-examination.

An order of reference to a special master should specify the scope of the reference, the issues to be investigated, the circumstances under which ex parte communication with the court or a party will be appropriate, the time and format for delivering the master’s record of activities, the compensation, and the delegated powers.²⁷⁷ Subject to the terms of that order, a special master may take all appropriate measures to perform the special master’s duties,²⁷⁸ including requiring production of tangible evidence and examining witnesses under oath. The special master may call parties to testify (see Rule 53(d)), and other witnesses may be subpoenaed by the parties.²⁷⁹ Under Rule 53(b), the order of reference may direct a special master to make findings of fact, but due process requires that the findings be based on evidence presented at an adversarial hearing. Unless otherwise directed by the order of reference, the special master may evaluate and rule on the admissibility of evidence. Unlike a court-appointed expert, however, a special master is not authorized to conduct a private investigation into the matter referred. The order should also provide arrangements to ensure that the special master’s fees will be paid.

Ordinarily, the special master must produce a report on the matters submitted by the order of reference, including any findings of fact or conclusions of law.²⁸⁰ The parties may stipulate that the special master’s findings of fact are to be accepted as final, leaving only questions of law for review, which is on a de novo basis.²⁸¹ Otherwise, the court must decide de novo all objections to a special master’s findings of fact.²⁸² The judge should keep in mind that the special master’s findings may carry undue weight with the jury.

277. See Fed. R. Civ. P. 53(b).

278. Fed. R. Civ. P. 53(c).

279. Fed. R. Civ. P. 53(c) & (d).

280. Fed. R. Civ. P. 53(f).

281. Fed. R. Civ. P. 53(g)(4).

282. Fed. R. Civ. P. 53(g)(3).

11.53 Magistrate Judges Under 28 U.S.C. § 636(b)(1)

Referrals may also be made to magistrate judges, pursuant to 28 U.S.C. § 636(b)(1), Federal Rules of Civil Procedure 53(f) and 72, and local rules²⁸³ (apart from referrals of supervision of pretrial proceedings as discussed in section 10.14). Like a special master, a magistrate judge acting under these provisions makes factual determinations based on evidence presented at an adversarial hearing and submits a disposition or recommended disposition, along with proposed findings of fact when appropriate, by written report filed with the court and served on the parties.²⁸⁴ The parties have no right to engage in discovery from, or to cross-examine, the magistrate judge. Under Federal Rule of Civil Procedure 72, the magistrate judge's rulings on nondispositive matters may, if objected to within ten days of service, be modified or set aside only if "clearly erroneous or contrary to law."²⁸⁵

On matters dispositive of a claim or defense, the magistrate judge's recommended disposition is, on timely, specific, written objection by a party,²⁸⁶ subject to de novo determination by the district judge, who may, but need not, take further evidence.²⁸⁷ This distinction is clarified by 28 U.S.C. § 636(b)(1), which allows the designation of a magistrate judge only to provide proposed findings of fact and recommendations for disposition of motions for injunctive relief, judgment on the pleadings, summary judgment, dismissal of indictment, suppression of evidence in a criminal case, class certification, dismissal for failure to state a claim, or involuntary dismissal.²⁸⁸ Section 636(b)(1)(A) allows determination of any other pretrial matter subject to reconsideration only if "clearly erroneous or contrary to law." There is no explicit authority (as there is in Rule 53(e)(4)) for the parties stipulating to be bound by the magistrate judge's findings. This situation must be distinguished from that in which a magistrate judge acts as a district judge under 28 U.S.C. § 636(c).

In considering whether to make a referral to a magistrate judge, the court must balance the advantages of obtaining the magistrate judge's assistance against the risk of delay from requests for review of the magistrate judge's order, proposed findings, or recommendations.

283. See also Mag. Judges Div., Admin. Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993).

284. 28 U.S.C. § 636(b)(1)(C) (West 2002).

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

286. Even in the absence of an objection, the judge should review the report for "clear error." Fed. R. Civ. P. 72 committee note.

287. Fed. R. Civ. P. 72(b) and committee note.

288. 28 U.S.C. § 636(b)(1)(B) (West 2002).

11.54 Other Referrals

Other possible resources in complex litigation include referral to a private or public technical agency, use of an advisory jury of experts in a nonjury case, and consultation with a confidential advisor to the court.²⁸⁹ Caution is recommended in experimenting with such procedures—absent statutory authorization or a party’s stipulation—in cases in which, if the court of appeals finds reversible error, a lengthy and costly retrial might be required. Referrals to court-appointed experts, special masters, and magistrate judges authorized by statute or rule are adequate in most cases to provide the needed assistance. The judge should consider innovative uses of recognized procedures to make the process more fair and efficient when complicated issues are involved, such as appointing a team of experts to serve under Rule 706, but not to the extent of displacing the parties’ right to a resolution of disputes through the adversary process.²⁹⁰

11.6 Final Pretrial Conference/Preparation for Trial

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The purposes of the final pretrial conference, explicated in Federal Rule of Civil Procedure 16(a), are to “improv[e] the quality of the trial through more thorough preparation” and to “facilitat[e] the settlement of the case.” These ends take on special importance in complex litigation and are embodied in Rule 16(d), which requires that

289. See Cecil & Willging, *supra* note 261, at 40–41.

290. For a discussion of the use of outside neutral persons in facilitating settlement, see *infra* section 13.13.

- the final pretrial conference be held as close to the time of trial as is reasonable under the circumstances;
- the parties formulate a plan for trial, including a program for facilitating the admission of evidence; and
- the attorneys who will conduct the trial attend the conference.

The order setting the conference should specify the items to be taken up. It should also maximize the utility of the conference by deciding summary judgment motions and (to the extent feasible) motions *in limine* well in advance (see section 11.34, summary judgment). The judge should tailor preparation for the final pretrial conference to accomplish the purposes of Rule 16. Essential agenda items include exchange and discussion of the following:²⁹¹

- a final list identifying the witnesses to be called and the subject of their testimony, including a designation of deposition excerpts to be read;
- copies of all proposed exhibits and visual aids, including illustrative exhibits and computer-generated evidence;
- a list of all equipment and software to be used at trial, and suggestions as to possible shared use of equipment and operators;
- proposed questions for voir dire;
- concise memoranda on important unresolved legal issues;
- nonargumentative statements of facts believed to be undisputed;
- proposed jury instructions, including any special instructions needed regarding computerized evidence or equipment (see section 11.65);
- proposed verdict forms, including special verdicts or interrogatories;²⁹² and
- in nonjury cases, proposed findings of fact and conclusions of law.²⁹³

11.61 Date and Place of Trial

Although civil trial dates are problematic in many courts because of criminal dockets, a trial date for complex litigation should be firm, given the number of people involved and the expense incurred in preparation. The trial date needs to take into account the commitments of the court and counsel and should permit an uninterrupted trial. The judge should advise counsel in advance that once the date is set, there will be no continuances. Some judges set a

291. For a comprehensive list of potential agenda items, see *Litigation Manual*, *supra* note 12, at 79–85.

292. See Fed. R. Civ. P. 49. See also *infra* sections 11.633, 12.451.

293. See *Litigation Manual*, *supra* note 12, app. A, at 188, 206–07 (Sample Form 9).

deadline after which they will not permit partial settlements that might necessitate a continuance of the trial (see section 13.21).

Where litigation includes cases filed in other districts and transferred to the court for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407, those cases must be remanded at or before the conclusion of the pretrial proceedings to the districts from which they were transferred.²⁹⁴ Consider whether to pursue alternatives that would allow a transferee judge to obtain authority (e.g., by action of the parties, the transferor court, or the committee on intercircuit assignments) to retain a role that is consistent with *Lexecon*. See section 20.132. Venue motions that may have been deferred should be decided. In referring cases back to the MDL Panel, it is helpful to indicate the nature and expected duration of remaining discovery, the estimated time before the case will be ready for trial, and the major rulings that, if not revised, will affect further proceedings. The court can also make appropriate recommendations for further proceedings. In most cases transferred under 28 U.S.C. § 1407, substantially all discovery will be completed before remand. In some cases, however, such as mass tort litigation, discovery regarding individual damages may have been deferred and must be conducted in the transferor district after remand. Section 20.133 has a fuller discussion of remand.

11.62 Reevaluation of Jury Demands

Although a general demand for a jury trial may have been made early in the litigation,²⁹⁵ the final pretrial conference is an appropriate time to consider whether the parties are entitled to a jury trial on particular issues and, if not, whether those issues should be decided in a separate trial (which may be concurrent with the jury trial), decided by motion,²⁹⁶ or submitted to an advisory jury.²⁹⁷ If both jury and nonjury issues are to be tried, the judge should determine whether *Beacon Theatres, Inc. v. Westover*²⁹⁸ requires that the jury issues be decided first. Even if so, it is possible to hear evidence during the jury trial on related nonjury issues, provided that the parties are later afforded opportunity to supplement the record with evidence relevant only to the nonjury issues and that a decision on the nonjury issues is deferred until after the verdict has been returned. In mass tort cases, some judges ask the parties to consider whether to try liability and lump sum damage issues to the jury, leaving the

294. See *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

295. See Fed. R. Civ. P. 38.

296. See Fed. R. Civ. P. 39(a).

297. See Fed. R. Civ. P. 39(c).

298. 359 U.S. 500 (1959).

resolution of individual damage claims to special agreed procedures (see section 22.93, mass tort litigation, trial).

11.63 Structure of Trial

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The judge should seek suggestions from counsel for approaches to structuring the trial that will improve the trial process. In addition to the devices discussed below, consider trying one or more test cases, with appropriate provision concerning the estoppel effect of a judgment. The interplay of these various devices can have a significant effect on the fair and efficient resolution of complex litigation.²⁹⁹ In considering any of these devices, keep in mind the devices' potentially disparate impact on the parties (given the parties' respective trial burdens and possibly unequal resources), their effect on the right to trial by jury, the possibilities of settlement, and the interests of the court and the public.

11.631 Consolidation³⁰⁰

Federal Rule of Civil Procedure 42(a) authorizes the judge to consolidate, for trial or pretrial, actions pending in the same court involving common questions of law or fact if it will avoid unnecessary cost or delay. Consolidation may be for trial of the entire case or only for separable common issues. Moreover, it may be appropriate even if some issues or cases are to be tried before a jury and others before the court; the same evidence must be presented only once even though the judge may consider it in some of the cases and the jury may consider it in others. Class actions may be consolidated with cases brought by opt-outs or other individual plaintiffs. When this occurs, the judge must ensure that counsel for parties in the non-class actions have a fair opportunity to participate in the presentation of evidence and arguments at trial, particularly when their clients are primarily affected.

Whether consolidation is permissible or desirable depends largely on the amount of common evidence among the cases. Unless common evidence predominates, consolidated trials may confuse the jury rather than promote efficiency. To avoid this problem, the judge may consider severing for a joint trial those issues on which common evidence predominates, reserving noncommon

299. For an illustration, see *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981).

300. See also *supra* section 10.123 and *infra* section 22.54.

issues for subsequent individual trials. For example, in mass tort litigation, liability issues could be consolidated for joint trial and damage issues reserved for later individual trials. If most of the proof will be common but some evidence admissible in one case should not be heard in others, consider a multiple-jury format. However, cases with major conflicts between the basic trial positions of parties should not be consolidated, at least not without ensuring that no prejudice results. Consolidation is also inappropriate where its principal effect will be to magnify unnecessarily the dimensions of the litigation.³⁰¹

11.632 Separate Trials

Whether the litigation involves a single case or many cases, severance of certain issues for separate trial under Federal Rule of Civil Procedure 42(b) can reduce the length of trial, particularly if the severed issue is dispositive of the case, and can also improve comprehension of the issues and evidence. Severance may permit trial of an issue early in the litigation, which can affect settlement negotiations as well as the scope of discovery. The court should balance the advantages of separate trials, however, against the potential for increased cost, delay (including delay in reaching settlement), and inconvenience, particularly if the same witnesses may be needed to testify at both trials. There is also the potential for unfairness if the result is to prevent a litigant from presenting a coherent picture to the trier of fact.³⁰²

The court should take care when deciding which issues may and should be severed for separate trial and the order in which to try them. Under *Beacon Theatres*, the right to trial by jury on legal claims may not (except under “the most imperative circumstances”) be lost by a prior determination of equitable claims; this may require trial of legal claims before deciding related claims in equity, or trying them concurrently.³⁰³ In addition, issues for trial should not be severed if they are so intertwined that they cannot fairly be adjudicated in isolation³⁰⁴ or when severance would create a risk of inconsistent adjudication.

Generally, when issues are severed for separate trials, they should be tried before the same jury unless they are entirely unrelated. Severance may take the form of having evidence on discrete issues presented sequentially, with the jury returning a verdict on an issue before the trial moves on to the next issue (see section 12.34).

301. See *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993).

302. See *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (severed trial creates risk of “sterile or laboratory atmosphere”).

303. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959).

304. See *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (antitrust).

11.633 Special Verdicts and Interrogatories

Special verdict forms or interrogatories accompanying a general verdict form may help the jury focus on the issues, reduce the length and complexity of the instructions, and minimize the need for, or scope of, retrial in the event of reversible error.³⁰⁵ They can provide posttrial guidance in conducting additional discovery, ruling on nonjury issues (possibly with some issues presented to the jury while others are reserved for decision by the court) or motions for summary judgment,³⁰⁶ trying remaining issues, or negotiating settlement. Having counsel submit proposed verdict forms along with jury instructions at the pretrial conference will help focus counsel's attention on the specific issues in dispute and will help inform the court.

Special verdict forms and interrogatories can help the jury understand and decide the issues while minimizing the risk of inconsistent verdicts. It is best for the court to arrange the questions on the form in a logical and comprehensible manner; for example, asking questions common to several causes of action or defenses only once and grouping related questions together. Where the legal standards applicable to similar claims or defenses differ (for example, where different laws may apply to different parties), careful drafting of questions on a special verdict form can ease problems that consolidation could otherwise cause. Issues not in dispute should be excluded.

Special verdict forms may also be used in connection with a procedure by which issues are submitted to the jury sequentially. The jury may be asked to consider a threshold or dispositive issue and return its verdict before submission of other issues, which may be rendered moot by the verdict.

Some judges and attorneys are reluctant to use these devices out of fear of inconsistent verdicts and jury confusion, but these problems can be avoided by good drafting. Parties' views on the desirability of special verdict forms or interrogatories will differ, however, if these devices are seen as advantageous to one side; the court will have to evaluate the arguments for and against them in the particular case.

The court may also suggest that the parties stipulate to accept a majority verdict if the jury is not unanimous³⁰⁷ or to waive a verdict and accept a decision by the judge based on the trial evidence. Although such stipulations may be obtained after the case has gone to trial, the parties may be more amenable before trial begins.

305. Fed. R. Civ. P. 49. See *infra* section 12.451.

306. See *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981) (special verdicts following a joint trial of all cases (including "opt-out" cases) on all issues except individual amounts of damages provided foundation for summary judgment motions regarding damages).

307. See Fed. R. Civ. P. 48.

11.64 Procedures to Expedite Presentation of Evidence

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- .642 Pretrial Rulings on Objections 124
- .643 Disclosure of and Objections to Digital Evidence and Illustrative Aids 126
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The principal purpose of the final pretrial conference is the “formulat[ion of] a plan for trial, including a program for facilitating the admission of evidence.”³⁰⁸ The plan should eliminate, to the extent possible, irrelevant, immaterial, cumulative, and redundant evidence, and should further the clear and efficient presentation of evidence. Essential to accomplishing this purpose is a final definition of the issues to be tried. The process of defining and narrowing issues begun at the initial conference and discussed in section 11.3 should reach completion at the final pretrial conference, which can then turn to the proof the parties expect to offer at trial. Fair, effective, and innovative ways of presenting that proof may include presenting voluminous data through summaries or sampling (see sections 11.492–11.493); presenting summaries of deposition testimony; and presenting expert testimony by reports on videotape or by videoconferencing.³⁰⁹ Other techniques to expedite the presentation of evidence are discussed below and in section 12.3.

11.641 Statements of Facts and Evidence

One method used by judges to ensure adequate preparation, streamline the evidence, and prevent unfair surprise is to have each party prepare and submit a statement listing the facts it intends to establish at trial and the supporting evidence. The statement should be informative and complete, but free of argument and conclusions. If adopted, evidence not included in the statement should not be permitted at trial. Exchanging such statements may help narrow factual disputes and expedite the trial (also see generally section 11.47). Such statements should not be required routinely, however, because the substantial amount of work required for their preparation may outweigh the benefits.

11.642 Pretrial Rulings on Objections

Judges should strive to resolve objections to evidence and cure technical defects (such as lack of foundation) before trial. Where the admissibility of evidence turns on other facts, the facts should be established where possible

308. Fed. R. Civ. P. 16(d).

309. *Effective Use of Courtroom Technology*, *supra* note 85, at 168–74, discusses videoconferencing witness testimony.

before trial—by stipulation if there is no basis for serious dispute (see section 11.445). Parties should be required, to the extent feasible, to raise their objections to admissibility in advance of trial (usually by motions *in limine*), with all other objections (except those based on relevance or prejudice) deemed waived. Under Federal Rule of Civil Procedure 26(a)(3), objections (other than under Federal Rule of Evidence 402 or 403) to the admissibility of proposed exhibits disclosed as required by Rule 26(a)(3)(C) or to the use of depositions designated as required by Rule 26(a)(3)(B) are waived unless made within fourteen days of disclosure or excused by the court. Pretrial rulings on admissibility save time at trial and may enable parties to overcome technical objections by eliminating inadmissible material, obtaining alternative sources of proof, or presenting necessary foundation evidence. In addition, such rulings may narrow the issues and enable counsel to plan more effectively for trial. Receiving exhibits into the record during the final pretrial conference can also save time by avoiding the need for formal offers at trial.

Opposing counsel may indicate their objections to documentary evidence in a response to the pretrial listing of such evidence by opposing counsel. Objections to deposition testimony can be noted in the margin of the deposition where the objectionable matter appears, and the court's ruling can be indicated in the same place. Objections to other types of evidence can be made by means of a separate motion or other written requests describing the nature of the proposed evidence and the grounds of the objection.

The court should weigh the benefits of advance rulings on objections against the potential for wasteful pretrial efforts by the court and counsel. For example, ruling on objections in a deposition may require the judge to read it before trial, despite the fact that the deposition or the objections to it may be partially or entirely mooted or withdrawn because of developments during trial. Some judges prefer to make pretrial rulings only on those objections that counsel consider sufficiently important, either because of their significance to the outcome of the case or because of their effect on the scope or form of other evidence.

Pretrial rulings are also advisable with respect to proffered expert testimony that may be pivotal. The judge may rule on the basis of written submissions, but an evidentiary hearing under Federal Rule of Evidence 104(a) may be necessary to determine whether the evidence is admissible under Rules 702 and 703.³¹⁰

310. The subject is discussed at length in Schwarzer & Cecil, *supra* note 199, at 53–54. See also *infra* sections 23.2, 23.35.

11.643 Disclosure of and Objections to Digital Evidence and Illustrative Aids

The court should consider requiring disclosure of all digital materials that will be shown to the jury. The timing of the disclosure may differ for evidentiary exhibits, illustrative aids, and expert materials. The timing may also vary according to the type of digital materials (e.g., digital photos versus animations) and whether they will be used in opening statements, direct examination, cross-examination, or closing arguments.³¹¹ Such disclosure will help expedite the pretrial and trial processes, assist the court in making pretrial and otherwise timely rulings on admissibility, and minimize surprising the court and parties.

Disclosure should ordinarily be in the same format to be used at trial. For example, paper copies may not adequately represent documents and photos to be presented with a computer because the paper copies cannot reveal any sound, motion, or alteration that may be involved. Computer animations and simulations should be disclosed in the format to be used at trial, which is typically digital or analog videotape; in addition, however, the opposing party needs the computer files that constitute the actual animation or simulation in order to expose underlying assumptions and construct an effective cross-examination.³¹² The disclosure of digital materials raises a number of issues that must be resolved during pretrial, or at least before the materials are shown to the jury.³¹³ For example, the phrase “digital alteration” means different things to different people, so some ground rules are needed about the alteration of photographs, documents, videotapes, and other materials at a fairly early point in the pretrial proceedings.³¹⁴ The planned use of an animation or simulation also raises issues for pretrial consideration, including the treatment of any narration (possibly including hearsay statements), the need for limiting instructions (such as to clarify the specific purpose for which the evidence is being offered), the authenticity and reliability of the underlying data, and the assumptions on which the exhibit is based.³¹⁵ It may be advisable for a party to obtain at least a preliminary ruling or guidance concerning the admissibility of an animation or simulation (or any other expensive and elaborate exhibit) be-

311. See Effective Use of Courtroom Technology, *supra* note 85, at 105–06, and the additional pages referenced therein.

312. *Id.* at 113–14.

313. For a discussion of possible objections to digital evidentiary exhibits and illustrative aids, see *id.* at 180–209.

314. See *id.* at 106–13.

315. See Joseph, *supra* note 172, at 890–93; Effective Use of Courtroom Technology, *supra* note 85, at 205–09.

fore substantial expense is incurred in its preparation (e.g., at the storyboard stage of a computer animation).

11.644 Limits on Evidence

Some attorneys understand the advantages of selectively presenting evidence, but others leave no stone unturned, resulting in trials of excessive length unless limited by the judge. Where the parties' pretrial estimates suggest that trial will be excessively long, the judge should discuss the possibility of voluntary, self-imposed limits with the lawyers, perhaps suggesting exhibits or testimony that could be eliminated and inviting further suggestions.

If this approach is not productive, consider imposing limits in some form, using the authority under Federal Rule of Civil Procedure 16(c)(4) and Federal Rules of Evidence 403 and 611. Announcing an intention to impose such limits may suffice to motivate counsel to exercise the discipline necessary to expedite the case. Before imposing limits, the judge should be sufficiently familiar with the litigation to form a reasonable judgment about the time necessary for trial and the scope of the necessary evidence.

Limits may be imposed in a variety of ways:

- by limiting the number of witnesses or exhibits to be offered on a particular issue or in the aggregate;
- by controlling the length of examination and cross-examination of particular witnesses;
- by limiting the total time allowed to each side for all direct and cross-examination; and
- by narrowing issues, by order or stipulation.

Limits need not hamper counsel's ability to present their case; indeed, counsel often welcome them. At the same time, limits should not jeopardize the fairness of the trial. In designing limits, consider the respective evidentiary burdens of the parties. Generally, limits are best imposed before trial begins so that the parties can plan accordingly, but the need for limits may not become apparent until trial is underway. Limits must be firm so that one side cannot take advantage of the other, but it is sometimes necessary to extend the limits. If a party requests, the judge may advise the jury of any limits imposed in order to prevent unwarranted inferences from a party's failure to call all possible witnesses.

11.645 Use of Courtroom Technology to Facilitate Evidence Presentation

Trials in a technologically advanced courtroom usually move faster and take less time than a traditional trial. This faster pace puts a premium on law-

yers' preparation and a clear and well-defined case theory. All exhibits must be identified and organized before trial so that digital files can be assembled and stored on a laptop computer to be taken to court. Most of the illustrative aids to be used with the opening statement and the direct examination of witnesses need to be prepared before trial so that they are consistent with and support the case theory. Judges may more confidently impose time limits on lawyers because technology assists in making presentations move along more quickly and predictably.

Each piece of equipment should contribute to efficiency. For example, presenting an exhibit with the help of an evidence camera or laptop computer eliminates the sometimes-lengthy pauses for approaching the bench, handing copies of exhibits to opposing counsel, and passing the exhibit hand-to-hand among the jurors. Documents on a CD or a laptop can be accessed and displayed almost instantly, resulting in time savings that can be quite significant in trials involving a significant number of documents. Computer presentations can also be accessed very quickly, as well as altered on the spot, if necessary, in case of an objection. Real-time transcription frees judges from detailed note taking and enables them to focus on what is taking place with the witnesses, lawyers, and jurors. In the event of a contested objection, it also allows the judge to look at the pending question or just-uttered answer to see exactly what was said. Videoconferencing gives judges the flexibility to conduct pre-trial hearings from remote locations or to schedule the testimony of witnesses at remote locations to fit the trial schedule.

11.65 Proposed Jury Instructions

The final pretrial conference should complete the pretrial process of identifying and narrowing issues. To that end, the parties should submit and exchange proposed substantive jury instructions (both preliminary and final) before the conference; some judges require counsel to confer and submit a single set of those instructions on which there is no disagreement.³¹⁶ This process compels counsel to analyze the elements of their claims and defenses and the supporting and opposing evidence. Many judges then use the parties' submissions as a starting point for preparing their own substantive instructions and find that they are generally accepted by counsel with little argument. Proposed instructions can be submitted electronically to enable the judge to make revisions on chambers computers. This also helps those judges who want to pre-

316. For more on jury instructions, see *infra* section 12.43.

sent preliminary and final jury instructions on monitors or a projection screen. Many judges provide their own standard instructions to counsel for comment.

11.66 Briefs and Final Pretrial Motions

If legal issues remain to be resolved, counsel should submit briefs before the final pretrial conference. Early submission will assist the court and counsel in preparing for the conference and make the conference more productive.

With discovery complete and critical evidentiary rulings made, some additional issues may be ready for summary judgment. Motions for summary judgment should be presented and decided no later than the final conference, absent special circumstances. Deferring such motions and their resolution to the eve of trial may cause unnecessary expense and inconvenience to counsel, witnesses, jurors, and the court, and may interfere with trial preparation.

11.67 Final Pretrial Order³¹⁷

At the conclusion of the final pretrial conference, the judge should enter an order reciting all actions taken and rulings made, whether at the conference or earlier. The order should provide that it will govern the conduct of the trial and will not be modified except “to prevent manifest injustice.”³¹⁸

Below are some of the things that should be stated in the order:

- the starting date of the trial and the schedule to be followed;
- the issues to be tried;
- if separate trials are to be held, the issues to be tried at the initial trial;
- the witnesses to be called and the exhibits to be offered by each side (other than for impeachment);
- whether additional undisclosed or other specified evidence is precluded;³¹⁹
- which objections are to be deemed waived;³²⁰
- procedures for consolidation or severance or transfer of cases;
- procedures for the presentation of testimony and exhibits;
- procedures regarding the use of technology at trial; and
- other housekeeping matters to expedite the trial.

317. See *infra* section 40.6.

318. Fed. R. Civ. P. 16(e).

319. Fed. R. Civ. P. 26(a)(3).

320. *Id.*

No single format can be prescribed for a final pretrial order that will be suitable for all complex litigation. The judge and attorneys must tailor the trial according to the circumstances of the specific litigation.

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Judicial management can reduce complexity, cost, and trial time, and can improve the quality of the trial. Its effectiveness depends on the design and

implementation of flexible and creative plans that take into account the specific needs of particular litigation and permit the attorneys to try their case in an orderly fashion.

Although judicial management is equally important in civil and criminal litigation, the two frequently pose different problems and considerations. This section deals with civil trials.

12.1 Administration

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12.11 Trial Schedule

A trial schedule is essential to the orderly conduct of a trial. The schedule may, but need not, limit the length of the trial itself or the time allotted to each side for examination and cross-examination (see section 12.35). Whether or not it imposes time limits, the schedule should specify the days of the week and the hours each day that the trial will be held, as well as holidays and other recess days (such as for a weekly motions day). It is appropriate to set the trial schedule only after consultation with counsel and after making appropriate accommodations for other time demands of the participants. The schedule ordinarily should be modified only in urgent situations. Very lengthy trials may require periodic review and adjustment of the schedule.

Adherence to the schedule requires all trial participants to make appropriate arrangements for their other activities. Jurors should be informed of the schedule at the time of voir dire; any who are unable to commit to it should be excused, if possible. The judge should inform them of any changes in the trial schedule and advise them of the trial's progress so that they can alter their own arrangements. If unforeseen events arise during a trial affecting a juror's availability, accepting minor delays is generally preferable to losing a juror who may later be needed for a verdict.

All trial participants should be punctual and prepared to proceed on schedule. To minimize interruptions, attorneys may be permitted to enter and leave the courtroom discretely during the proceedings. Informing the jury will avoid any perception of discourtesy.

To expedite the trial and avoid keeping the jury waiting, it is advisable to devote the trial day to the uninterrupted presentation of evidence. Objections, motions, and other matters that may interrupt generally should be raised at a time set aside for the purpose, before the jury arrives or after it leaves for the

day. Any matter that must be raised during the presentation of evidence should be stated briefly without argument and ruled on promptly. If an objection is too complex for an immediate ruling, consider deferring the matter until it can be resolved without taking the jury's time, and proceeding with the presentation of evidence, possibly directing counsel to pursue a different line of questioning for the moment. In managing the trial, the judge should not hesitate to use the authority of Federal Rule of Evidence 611(a) to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."

Judges employ different approaches to the scheduling of trial:

- *Six-day week.* An extended trial week can expedite a lengthy trial, but may take too great a toll on trial participants and leave insufficient time for other activities.
- *Four-and-a-half-day week.* With this commonly used schedule, one half day each week is reserved for administrative matters, hearings outside the presence of the jury, and other nontrial matters.
- *Short-day schedule.* Holding trial from 9 a.m. to noon for a short day or from 8 a.m. to 2 p.m. for a longer day permits jurors time for their personal commitments during the trial (which can reduce requests to be excused) and allows the court and counsel substantial time to keep up with other work.

12.12 Courthouse Facilities

A trial with a large number of attorneys, parties, witnesses, exhibits, and documents requires advance planning for appropriate accommodations. Such a trial may require the following:

- a larger courtroom, in the courthouse or elsewhere;
- a courtroom that is technologically equipped;
- installation of case-specific technology in the courtroom for the case at hand;
- physical modifications to the courtroom, such as additional space for counsel, parties, files, exhibits, or persons whose presence may be needed, such as experts or consultants;
- jury accommodations, particularly in a lengthy trial;
- witness and attorney conference rooms; and
- courtroom security and access during nontrial hours.

The judge should alert those responsible for courthouse facilities of the trial needs as far in advance as possible. Allowing the parties access before trial to the courtroom and other areas as necessary helps them to prepare and to

advise the court of potential problems. Preparation is particularly important (and may require more time and effort than usual) if attorneys plan to bring evidence presentation equipment into a courtroom that is not technologically advanced or to supplement the court-provided equipment.³²¹ Most courts designate court personnel with whom the parties may coordinate these activities.

12.13 Managing Exhibits

Trial efficiency increases if each document or other item to be offered in evidence or used at trial (other than for impeachment) is

- premarked with an identification number, preferably in advance of trial but at least one day before it is to be offered or referred to at trial (preferably a single identification designation should be used for pre-trial discovery and trial) (see section 11.441)—the numbering system should accommodate and differentiate between evidentiary exhibits and illustrative aids;³²²
- listed on the form used by the court to record such evidence—counsel should obtain in advance of trial copies of the court’s form or, subject to the judge’s approval, create a form for use in the particular case;
- made available to opposing counsel and the court before trial begins;
- copied, enlarged, or imaged³²³ as necessary for use at trial; and
- redacted, if lengthy, to eliminate irrelevant matter.

As discussed in section 11.64, the judge should consider requiring pretrial disclosure of proposed exhibits and objections thereto, and ruling at that time on admissibility to the extent feasible. The following procedures expedite the trial and help avoid interruptions:

- admitting into evidence exhibits not objected to, or to which pretrial objections were overruled, without formal offer and ruling;
- issuing pretrial rulings on objections to evidence—this should preclude the parties from renewing the offer or objection at trial, absent a substantial basis for reconsideration;³²⁴

321. The use of technology at trial is discussed in *infra* section 12.3; see also *Effective Use of Courtroom Technology*, *supra* note 85, at 1–59, 137–216.

322. *Id.* at 123–28.

323. Imaging of documents for computerized storage and retrieval is discussed in *supra* section 11.444.

- ruling on objections made at trial from the bench without argument, deferring any necessary argument to the next scheduled recess, and having counsel proceed with other matters (see section 12.15); and
- alternatively, permitting attorneys not needed in the courtroom to present objections and arguments to a magistrate judge while the trial is proceeding, and receiving unresolved objections, along with the magistrate judge’s summary of the arguments, for resolution after the jury has been excused.³²⁵

12.14 Transcripts

The benefits of expedited, daily, or hourly transcripts should be balanced against the costs they add to the litigation. Ultimately, the decision whether to incur the extra costs of such transcripts is for counsel. Under 28 U.S.C. § 1920(2), the court may tax as costs “fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case.” Courts do not ordinarily include in taxable costs the additional fees for expedited or daily transcripts.³²⁶

Having a transcript available can speed readbacks requested by the jury during deliberations, but the transcript, if given to the jury, may overshadow the jurors’ mental impression of witness demeanor and credibility. Many judges advise jurors at the outset of the trial to be prepared to rely on their recollection rather than a transcript.

Real-time court reporting permits transcription on a monitor as the verbal exchange takes place. The more common practice is to provide a monitor only for the judge, but monitors may be provided in other locations in the courtroom³²⁷ (e.g., counsel tables).

12.15 Conferences During Trial

The court should consider scheduling a conference with counsel at the end of each trial day, after the jury has been excused. The conference may be brief,

324. Counsel should, however, consult local law to determine whether renewal of the objection is required to prevent waiver. See *United States v. Rutkowski*, 814 F.2d 594, 598 (11th Cir. 1987).

325. See Harry M. Reasoner & Betty R. Owens, *Innovative Judicial Techniques in Managing Complex Litigation*, 19 Fed. Litig. Guide 603, 605–06 (1989) (discussing ETSI Pipeline Project v. Burlington N., Inc., No. B-84-979-CA (E.D. Tex.)).

326. See 10 Wright et al., *supra* note 101, § 2677 and cases cited therein.

327. For further discussion of this technology, see *Effective Use of Courtroom Technology*, *supra* note 85, at 29–32 and 164–68.

but should generally be on the record to avoid later misunderstandings. Such a conference helps avoid bench conferences and other trial interruptions. It can be used to plan the next day's proceedings and to fix the order of witnesses and exhibits, avoiding surprises and ensuring that the parties will not run out of witnesses. Counsel can raise anticipated problems, and the judge may hear offers of proof and arguments. The judge may, in light of other evidence previously presented, determine that further evidence on a point would be cumulative. In large litigation, attorneys working on the case but not directly engaged in the courtroom can prepare motions for consideration at the conference. The judge can provide guidance to attorneys without the stigma of courtroom admonitions, remind them, when necessary, of appropriate standards of conduct, and cool antagonism generated in the heat of trial. A short conference before the jury arrives in the morning can address last-minute changes in the order of witnesses or exhibits or follow up on matters raised at the previous day's conference.

12.2 Conduct of Trial

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12.21 Opening Statements

Opening statements are of particular importance in complex litigation. To maximize their utility, consider some of the following points:

- the effectiveness of opening statements is often enhanced if preceded by preliminary instructions from the judge outlining the principal issues in the case;
- opening statements should be brief—perhaps subject to a time limit;
- it may be beneficial to set ground rules in advance for dealing with sensitive issues, such as punitive damages and evidence that may yet be ruled inadmissible;
- in long trials, it may be useful to allow each side time to make supplementary opening statements during trial to help the jury understand evidence as it is presented;
- it is helpful to set rules for the use of charts and other demonstrative aids not then in evidence—the court should encourage the use of such aids at this stage to aid jury comprehension, but should give opposing counsel an opportunity to review and object to them in advance of trial;

- it is best to review all computer-driven graphics (particularly those with motion or sound) to be used in opening statements;³²⁸
- in multiparty cases, a decision should be made whether to permit each party to present an opening statement to establish its separate identity with the jury and, if this is the case, how to minimize repetition and limit time; and
- opening statements in nonjury cases are still useful in informing the court of each party's contentions and proposed order of proof, but they may be brief.

12.22 Special Procedures for Multiparty Cases

Appropriate procedures to minimize delay and confusion from the proliferation of counsel in multiparty cases can include the following:

- assigning primary responsibility for the conduct of trial to a limited number of attorneys, either by formal designation of trial counsel (see section 10.22) or by encouraging informal arrangement among the attorneys, taking into account legitimate needs for individual representation of parties;
- in cases in which the court will award or apportion attorneys' fees, overseeing the arrangements for trial preparation, clarifying the extent to which attorneys in subsidiary roles will be entitled to compensation, and ensuring that attorneys will not claim compensation for time unnecessarily spent at trial (see section 14.213);
- providing that objections made by one party will be deemed made by all similarly situated parties unless expressly disclaimed;
- permitting other counsel to add further grounds of objection, again on behalf of all similarly situated parties unless disclaimed;
- minimizing repeated objections by ordering that objections to a particular line of examination will be deemed "continuing" until its completion, without the need for further objection unless new grounds arise as the examination proceeds; and
- in cases alleging collusion or conspiracy, allowing counsel reasonable leeway to demonstrate their independence from one another and, if requested, giving cautionary instructions.

328. *See id.* at 153–64.

12.23 Advance Notice of Evidence and Order of Proof/Preclusion Orders

Counsel should exchange lists (with copies if not previously supplied) for each trial day indicating the order in which expected witnesses and exhibits will be called or offered. The lists should identify those portions of depositions to be read. The court should specify the amount of advance notice required, balancing opposing counsel's need for time to prepare against the possibility that intervening developments will require changes. Some judges require a tentative listing of the order of witnesses and exhibits a week or more in advance, with instructions to communicate changes as soon as known, and give a final list at a conference at the close of the preceding day.

Absent unusual circumstances, counsel should also indicate in advance when adverse parties or their employees will be called to testify. Counsel should try to accommodate personal and business conflicts and, to avoid surprise and possible embarrassment, not call on the opponent to produce a person without warning. If numerous employees are called, the judge should require counsel to order them so as to avoid disrupting the adversary's affairs unnecessarily. When plaintiffs call significant defense witnesses, consider permitting defendants to offer their case on redirect examination. The court can encourage counsel for the adverse party, upon sufficient advance notice, to arrange for the presence of witnesses under the party's control at the agreed-on time without the need for a subpoena (and even if not subject to subpoena). Ordinarily, it is best when witnesses, whether or not subpoenaed, are allowed to report on timely request rather than remain in continuous attendance.

If a party will not make available an employee who is beyond the court's subpoena power, any party may offer that witness's deposition for any purpose "unless it appears that the absence of the witness was procured by the party offering the deposition."³²⁹ Though the court probably lacks authority to compel the appearance, it may encourage cooperation by precluding the uncooperative party from later calling such a witness. The court may similarly preclude witnesses who have earlier successfully resisted testifying for the opposing side on privilege or other grounds; an effective procedure is to enter an order requiring witnesses to elect between testifying or asserting a privilege at least forty-five days prior to trial.

329. Fed. R. Civ. P. 32(a)(3)(B).

12.24 The Judge's Role

This section sets out general principles relating to the judge's role at trial; for specific actions the judge may take to control the presentation of evidence at trial, see section 12.35.

Judges can control the courtroom and proceedings without frustrating the adversary process, and still remain humane and considerate. Such control provides the parties, counsel, and jurors with prompt, firm, and fair rulings. It keeps the trial moving in an orderly and expeditious fashion, bars cumulative and unnecessary evidence, and holds all participants to high professional standards (see section 12.35 for discussion of judicial control of time and proof). It also helps reduce the stress and tension of a long trial.

Counsel appreciate a judge's sensitivity to counsel's rights in the adversarial process to employ accepted strategies and tactics that serve their clients' interests. Counsel should understand courtroom procedures, such as the location from which to examine witnesses and the mechanics for submitting exhibits to witnesses, the clerk, or the jury. Written guidelines may be helpful, particularly to attorneys unfamiliar with local customs.

In jury trials, judicial restraint in questioning witnesses minimizes both the appearance of partiality and the disruption of counsel's presentation. The court should generally refrain from asking questions until counsel have finished their examination and even then limit questions to matters requiring clarification. See section 12.35.

12.3 Presentation of Evidence

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Although presentation of evidence is normally controlled by counsel's strategies and tactics, complex litigation presents other concerns, primarily jury comprehension and the length of the trial. These are not unrelated: A shorter trial promotes jury comprehension, and effective presentation of evidence saves time. Moreover, many jurors expect information to be presented succinctly, even where it deals with complex matters.

The judge should encourage or even direct the use of techniques to facilitate comprehension and expedition—primarily simplification of facts and evidence, use of plain language, and use of visual and other aids. Some techniques are time-tested; others are more innovative, but can improve the trial process without risking error.

12.31 Glossaries/Indexes/Demonstrative Aids

Aids that organize massive quantities of evidence and familiarize jurors with the relevant vocabulary can significantly enhance jury comprehension. Such aids include glossaries of important terms, names, dates, and events; informative indexes of exhibits to assist in identification and retrieval; and time lines of important events in the case. To the extent feasible, the judge should encourage or direct the parties to develop glossaries, indexes, and time lines as joint exhibits. They may be prepared using the procedure suggested for developing statements of agreed and disputed facts (see section 11.471); if necessary, the court can refer disputes to a magistrate judge. Stipulated facts should be presented in the form of a logically organized statement.

Jurors understand better and remember more when information is presented both visually and verbally. Graphics, such as charts and diagrams, are common demonstrative aids.³³⁰ Demonstrative evidence may be admitted, whatever its source, if it will help the trier of fact understand other evidence,³³¹ however, the court should prohibit misleading representations, such as physical representation of data (e.g., the area occupied on a chart) that is disproportionate to the ratio of the numbers represented, distorted representation of data (e.g., representing one-dimensional data by three-dimensional bars), showing amounts of money in nonconstant dollars, or graphs taking figures out of context or using different scales that may distort large or small differences in data.³³² The judge should try to rectify such problems pretrial.

330. See *supra* section 12.21 on the use of demonstrative aids during opening statements and *Effective Use of Courtroom Technology*, *supra* note 85, at 137, on computer-generated graphics.

331. See 2 McCormick on Evidence § 212, at 9–10 (John William Strong et al. eds., 4th ed. 1992).

332. See Edward R. Tufte, *Visual Explanations: Images and Quantities, Evidence and Narrative* (1997); *Envisioning Information* (1990); and *The Visual Display of Quantitative Information* (1983).

12.32 Use of Exhibits

Counsel should present exhibits in a manner that will communicate some significant fact (except when an exhibit is simply a link in a chain of proof). Thus, documentary proof should be redacted to eliminate irrelevant matter, and its contents offered, whenever possible, by way of summary or other streamlined procedure that will focus the jury's attention on the material portions. See section 11.492.

It is time-consuming when counsel circulate exhibits among the jurors, and it disrupts the examination of witnesses, except where the physical qualities of an object are themselves relevant. It is helpful, however, to display exhibits so that the jurors, the judge, and counsel can view them while hearing related testimony. Below are some options to consider:

- *Enlargements.* They may be posted, or projected on a screen easily visible to the witness, judge, and jurors; counsel can direct attention to particular portions of an exhibit during examination.
- *Evidence presentation systems.* Such systems display evidence electronically and simultaneously to everyone in the courtroom and may significantly assist jury involvement and comprehension and expedite trial. The most basic use is for the retrieval and display of documentary exhibits. Evidence presentation systems can also be used to create and display illustrative aids by combining an exhibit with enhancements that make the content of the exhibit easier to understand—for example, by highlighting and enlarging relevant portions of documents and photos, juxtaposing text from two or more pages, adding explanatory labels and text, displaying digitized videotaped transcripts of depositions, playing digitized audio files, and presenting complex animations and simulations. The following should be considered with respect to evidence presentation systems:
 - providing counsel with an orientation to the courtroom evidence presentation system;³³³
 - having counsel practice using the technology, overcoming the problem that some lawyers may have had little or no experience with these valuable resources;³³⁴
 - permitting attorneys to bring their own evidence presentation equipment into a courtroom that is not technologically advanced

333. See *Effective Use of Courtroom Technology*, *supra* note 85, at 49–50.

334. *Id.* at 51.

- and allowing them to practice on the equipment in the courtroom before trial (an increasing number of courts have evidence presentation systems installed in at least one courtroom, although attorneys typically must provide their own laptop computer, if one is to be used);³³⁵
- determining whether counsel, the court, or a combination of the two will control the equipment at trial;³³⁶
 - determining whether the use of the system will be optional or mandatory for attorneys;³³⁷ and
 - requiring attorneys to state for the record the backup plan in case of equipment failures.³³⁸
- *Copies and exhibit books.* In some cases it may be cost-effective for counsel simply to provide jurors with individual binders containing indexed copies of selected exhibits central to the presentation at trial, updated as needed, with separate pages summarizing counsel's contentions concerning their significance. If juror note taking is allowed (see the discussion of juror notebooks in sections 12.421–12.422), there should be space for their notes about each exhibit. Other less important exhibits may be distributed and collected by the courtroom clerk on a daily basis, with jurors instructed not to make notes on their copies.

To avoid cumbersome and time-consuming handling of exhibits, exhibits should be premarked and received into evidence pretrial. Copies of exhibits to be used should be available to a witness on the stand and in the hands of counsel before an examination begins. If voluminous, relevant exhibits can be kept in tabbed notebooks stacked on a cart located within easy reach of the witness, counsel can direct the witness to the volume and tab number of exhibits as needed.

335. *Id.* at 44.

336. *Id.* at 45–46.

337. *Id.* at 44–45.

338. *Id.* at 141–42.

12.33 Depositions

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The court should encourage counsel to avoid reading depositions at trial and to consider the techniques detailed in the following subsections.

12.331 Summaries

If the contents of a deposition are a necessary element of a party's proof, the preferred mode of presentation is a succinct stipulated statement or summary of the material facts that can be read to the jury. Most of the contents of pretrial depositions are irrelevant or at least unnecessary at trial; the material portions rarely exceed a few lines or pages. The judge should encourage the parties to agree on a fair statement of the substance of the testimony, possibly with the assistance of a magistrate judge. Video presentation may increase the effectiveness of summaries, as discussed below.

12.332 Editing, Designations, and Extracts

A fair presentation of the contents of a deposition may, however, also require presenting a colloquy with the witness. The portions read should be limited to the essential testimony of the witness, but may include not only the deponent's "final" answer but also testimony that reflects demeanor, attitude, recollection, and other matters affecting credibility. Rather than going through a deposition to eliminate unnecessary portions, the judge can direct counsel to select for designation only the genuinely material parts that cannot be presented by way of summary. Background information, such as that bearing on the qualifications of an expert, may be covered by a brief stipulation read to the jury in advance.

Before trial, each party should designate those portions of depositions it intends to read at trial. Using this information, other counsel can designate additional portions, if any, to be read. Under Federal Rule of Civil Procedure 32(a)(4), if only a part of a deposition is offered, "an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other part."³³⁹ The parties should repeat this series of exchanges until they have designated

339. See also Fed. R. Evid. 106.

the portions to be offered. Those portions usually will be introduced at trial in the same sequence in which they appear in the deposition, although another sequence can be adopted to improve comprehension.

A common and convenient method for making designations is for the parties to bracket the portions to be offered on the pages of the deposition, each using a different color. Other parties may indicate objections in abbreviated language opposite the brackets (e.g., “D obj. hearsay, not best evidence”). The court’s rulings may be indicated in a similar fashion, enabling counsel to read only the admitted portions from the original deposition.

Developments during trial may change the parts of depositions that the parties want to offer. Ordinarily, the court should permit parties to change their designations as long as other parties are advised promptly of such changes and have sufficient notice to revise their counterdesignations.

12.333 Presentation/Videotaped Depositions

In nonjury cases, relevant excerpts of depositions or summaries can be prepared and offered as exhibits, usually without being read at trial and transcribed by the court reporter. The judge can later read these excerpts along with other exhibits in the record. The judge, however, should hear the testimony if a ruling from the bench is expected. The same procedure can be used in jury trials; it reduces the volume of deposition evidence but increases the number of exhibits.

In jury cases, attorneys or paralegals usually read deposition testimony. The court should discourage or prohibit using actors and ensure that the reader’s pauses, inflection, and tone do not unfairly distort the witness’s deposition testimony. If a tape recording (e.g., made by court reporters during depositions as a backup) is available, it may be played for the jury when necessary. Under Federal Rule of Civil Procedure 32(c), deposition testimony may be offered at trial in nonstenographic form if the offering party provides a transcript of the pertinent portions to the court and, under Rule 26(a)(3)(B), to other parties (indeed, in a jury trial, on a party’s request it must be so presented if available unless the court for good cause orders otherwise). Recordings may, however, be difficult to hear and understand.

Videotape is generally more effective for the presentation of deposition testimony, for impeachment and rebuttal, and for reference during argument.³⁴⁰ Videotaped depositions may be used routinely or for key witnesses

340. For discussion of the use of videotaped depositions during argument, see Henke, *supra* note 186, at 165 (citing Gregory P. Joseph, *Modern Visual Evidence* § 3.03[2][f] (1984)). See also *Effective Use of Courtroom Technology*, *supra* note 85, at 187, 191–92 (discussing possible objections to the use of videotapes at trial).

only; any party may videotape a deposition without court order.³⁴¹ To avoid an unfair difference in emphasis, however, testimony should not be presented by different means on direct and cross-examination.³⁴² As with all depositions, videotaped depositions should be purged of irrelevant and inadmissible matter.

Digitized video (made with a digital video camera) is easier to edit and use in the courtroom than analog video because specific portions can be identified more readily. When appropriate, consider requiring counsel to exchange analog video for a digitized version to minimize expense and to ensure that all copies of the recording to be used at trial are of the same quality.

As with written depositions, when edited versions of videotaped depositions are offered, other parties may request introduction of deleted portions.³⁴³ Counsel should provide other parties access to recordings in their entirety before trial, allowing them to designate the portions they contend should be shown and to present unresolved disputes promptly to the court.

The process for determining the admissibility of videotape testimony should be addressed early in the litigation before the parties have made extensive investments. The persuasive power of visual presentation carries with it the potential for prejudice, a risk heightened by the opportunities for manipulation. Rulings on objections are critical. Unless the parties can reach substantial agreement on the form and content of the videotape to be shown to the jury, the process of passing on objections can be so burdensome and time-consuming as to be impractical for the court.

12.334 Alternative Means of Presenting Testimony

Videoconferencing³⁴⁴ makes it possible to present the testimony of absent witnesses, including witnesses recalled for only brief testimony, without the

341. Fed. R. Civ. P. 30(b)(2), (3).

342. See *Traylor v. Husqvarna Motor*, 988 F.2d 729, 734 (7th Cir. 1993) (disapproving presentation of live direct testimony and videotaped cross).

343. See Fed. R. Civ. P. 32(a)(4); Fed. R. Evid. 106.

344. This technique was used in *San Juan Dupont Plaza Hotel Fire Litigation*, MDL 721, and in *In re Washington Public Power Supply System Securities Litigation*, MDL 551. In both cases, the court held that witnesses (at least if under a party's control) may be compelled to testify by such means despite being beyond the court's subpoena power, reasoning that the limits on that power are intended only to protect witnesses from undue inconvenience. See *San Juan*, 129 F.R.D. at 426 (approving Judge Browning's reasoning in *Washington Public*). For considerations related to the videoconferencing of witness testimony, see *Effective Use of Courtroom Technology*, *supra* note 85, at 168–74.

cost and other disadvantages of depositions.³⁴⁵ In some instances, the cost and burden of obtaining the physical presence of a witness will be disproportionate to the importance of the expected testimony. For videoconferencing, the procedure for examination is similar to that in the courtroom—the witness is sworn and examined on direct and cross—though additional safeguards may be needed.³⁴⁶ The cost should generally be borne by the party calling the witness, though a portion may be allocated to other parties who prolong examination by extensive cross-examination or objections.³⁴⁷

Federal Rule of Civil Procedure 43(a) permits presentation of witness testimony by videoconference “for good cause shown in compelling circumstances and upon appropriate safeguards.” The Rule 43(a) committee notes point out that the appearance of a witness by videoconference “cannot be justified by a showing that it is inconvenient for the witness to attend the trial.” More is required, unless both parties consent. Courts have found good cause shown in instances where it was necessary to obtain the testimony of witnesses who are incarcerated, medically incapacitated, or otherwise unable to travel to the courtroom, or who are located at a distance and are only peripherally involved in the trial. A peripheral fact witness or a witness who supplies a part of the foundation for an exhibit might be inconvenienced considerably by traveling a significant distance to participate in a trial for only a brief interval. Judges also have allowed child witnesses to appear by videoconference to avoid emotional distress the child might experience from a courtroom appearance.

12.34 Sequencing of Evidence and Arguments

Jury recollection and comprehension in lengthy and complex trials may be enhanced by altering the traditional order of trial. Sequencing techniques include the following:

- *Evidence presented by issues.* Organizing the trial in logical order, issue by issue, with both sides presenting their opening statements and evidence on a particular issue before moving to the next, can help the jury deal with complex issues and voluminous evidence, but may result in inefficiencies if witnesses must be recalled and evidence re-

345. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989).

346. For a sample protocol, see *id.*, 129 F.R.D. at 427–30 (adapted from protocol used in *Washington Public*). For example, it is necessary to control the presence of other persons in the room in which the witness is being interrogated by remote means.

347. See *id.* at 428.

peated. See section 12.21. This procedure is roughly equivalent to severance of issues for trials under Federal Rule of Civil Procedure 42(b).

- *Arguments presented by issues/sequential verdicts.* If it is impractical to arrange the entire trial in an issue-by-issue format, it may still be helpful to arrange closing arguments by issue, with both sides making their closings on an issue before moving to the next. The entire case may be submitted to the jury at the conclusion of all argument, or the issues may be submitted sequentially (see section 12.451 (special verdicts and general verdicts with interrogatories) and section 35.35 (civil RICO trials)). The latter procedure may be advantageous if a decision on one issue will render others moot or if the early resolution of pivotal issues will facilitate settlement; on the other hand, it can lengthen the total time for deliberations and requires recurrent recesses while the jury deliberates.
- *Interim statements and arguments.* In a lengthy trial, it can be helpful if counsel can intermittently summarize the evidence that has been presented or can outline forthcoming evidence. Such statements may be scheduled periodically (for example, at the start of each trial week) or as the judge and counsel think appropriate, with each side allotted a fixed amount of time. Some judges, in patent and other scientifically complex cases, have permitted counsel to explain to the jury how the testimony of an expert will assist them in deciding an issue. Although such procedures are often described as “interim arguments,” it may be more accurate to consider them “supplementary opening statements,” since the purpose is to aid the trier of fact in understanding and remembering the evidence and not to argue the case.³⁴⁸ (Interim jury instructions, discussed in section 12.433, and reminders to the jury of the difference between evidence and counsel’s statements³⁴⁹ may also be helpful.)

12.35 Judicial Control/Time Limits

Limits on time and evidence are ordinarily set at the pretrial conference so that counsel can plan accordingly before the trial begins. See section 11.644. Judicial intervention may become necessary, however, if evidence exceeds reasonable bounds and does not contribute to resolving the issues presented.

348. See, e.g., *In re Visa Check/Mastermoney Antitrust Litig.*, 96-CV-5238, 2003 WL 1712567 (E.D.N.Y. Apr. 1, 2003) (order addressing jury selection and conduct of upcoming trial).

349. See Robert M. Parker, *Streamlining Complex Cases*, 10 Rev. Litig. 547, 553–54 (1991).

One judicial alternative is to limit or bar the examination of witnesses whose testimony is unnecessary or cumulative and to call for stipulations where a number of witnesses would testify to the same facts. Judges can review the order in which witnesses are to be called to determine if it would interfere with an orderly trial. For example, counsel may try to call an adversary's expert witness before critical evidence has been presented and before the party's own expert has testified. When particular, clearly defined subject matter requiring the testimony of two or more persons is involved, it may be efficient to examine the witnesses simultaneously, allowing the more knowledgeable witness to answer. This may require consent of counsel, in view of the parties' right under Federal Rule of Evidence 615 to have witnesses excluded. Expert witnesses needed to advise counsel are not subject to exclusion.³⁵⁰ Opposing expert witnesses may be examined seriatim in order to clearly frame their agreements and disagreements for the trier of fact.

The judge should ordinarily refrain from interfering with counsel's mode of questioning, except when ruling on objections. However, the judge should consider limiting the examination when the questioning is confusing, repetitive, or irrelevant and threatens to delay the trial. Federal Rules of Evidence 611(a) and 403 permit exclusion even of relevant testimony "if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The judge may intervene, even without objection, in order to

- bar testimony on undisputed or clearly cumulative facts—testimony may be disallowed as cumulative if it relates to evidence to be covered in later testimony, or matters beyond the scope of the examination;
- clarify confusing questions or answers;
- prohibit repeated paraphrasing of answers into new, duplicative questions (e.g., "Do I understand you to mean that . . ."; "Is it your testimony then that . . ."; "Is it fair to say that . . ."; and the like); and
- encourage stipulations by opposing counsel to avoid routine testimony, such as the date of a document.

It is helpful for the court to issue guidelines providing, among other things, that it will

- not instruct witnesses to answer "yes or no" to questions that (1) are compound, (2) require a witness to make or accept a characterization rather than testify to a fact, or (3) are argumentative in form or substance;

350. Fed. R. Evid. 615(3) committee note.

- bar questions framed as arguments rather than requests for testimony that the witness is competent to give;
- prohibit questions asking one witness to comment on the credibility of another, unless prior request is made outside of the jury's presence; and
- sustain objections that an answer is nonresponsive only when made by interrogating counsel.

As noted in section 11.644, time limits generally should be established before trial. The burdens of an unduly long trial on jurors and on the public's access to the court may, however, require setting limits during trial. Such limits should not prejudice either side, but the mere threat of such limits may cause counsel to expedite the trial. Limits may grant each party a specified number of hours for all direct and cross-examination, restrict the time for specific arguments, or limit the time for examination of particular witnesses. Once limits have been imposed, the court should grant extensions only for good cause, taking into account the requesting party's good-faith efforts to stay within the limits and the degree of prejudice that would result from the denial of an extension.

It occasionally may be appropriate for the judge to use Federal Rule of Evidence 614's authority to question parties' witnesses. However, such questions should avoid the appearance of partiality or interference with counsel's trial strategy and should be limited to clarifying matters on which the jury may be confused. Rule 614's committee note states that "the authority [to question witnesses] is . . . abused when the judge abandons his proper role and assumes that of advocate." Such abuse may be grounds for reversal.

Rule 614 also allows the court to call its own witnesses (subject to cross-examination by the parties); however, that authority is rarely used, other than with respect to an expert under Rule 706 (see section 11.51). An alternative approach is for the judge to suggest questions to counsel outside the hearing of the jury, or inquire whether the matter will be clarified or addressed by another witness.

12.4 Jury Trials

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Jury trials in complex cases place a heavy responsibility on the judge, who must ensure not only that the parties receive a fair trial but also that the jurors are treated with courtesy and consideration by counsel, staff, and the court itself. Although the jurors are the decision makers, they too often are in the dark about much of what is happening in court and are left to wait while the judge and counsel discuss matters outside their presence.

12.41 Impaneling the Jury³⁵¹

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12.411 Size of the Venire and Panel

Federal Rule of Civil Procedure 48 requires between six and twelve jurors for a civil trial. Local rules may also address jury size. Rule 47(c) allows the judge to excuse jurors during trial for good cause, but federal courts no longer seat alternates in civil trials—all jurors not excused participate in deliberations. A verdict from a jury of less than six requires a stipulation. The committee note to Rule 48, however, suggests avoiding verdicts of fewer than six, even

351. See generally Benchbook, *supra* note 45, §§ 2.05–6.03.

with a stipulation, because smaller juries may be less reliable. For similar reasons, many judges prefer seating twelve jurors, especially in complex cases.

The court should seat enough jurors to minimize the risk of a mistrial, considering the probability of incapacity, disqualification, or other developments requiring the excuse of jurors during trial. This is especially important in complex cases. The primary factor is the expected length of trial. One rule of thumb is to select eight jurors for a trial expected to last up to two months, ten jurors for a trial expected to last four months, and twelve jurors for a longer trial. In determining appropriate jury size, consider asking the parties if they will stipulate, in the event of a hung jury, to accept a verdict from a less-than-unanimous jury³⁵² or to allow the case to be decided on the record by the court.³⁵³ The parties may be more amenable to entering such agreements before voir dire than after the jury has been selected.

12.412 Voir Dire

The court may examine prospective jurors itself or allow the parties to do so.³⁵⁴ The judge who conducts the examination must “permit the parties or their attorneys to supplement the examination by such further inquiry as it [the court] deems proper or . . . submit to the prospective jurors such additional questions of the parties or their attorneys as ‘it [the court] deems proper.’”³⁵⁵ The judge should invite the attorneys to submit proposed questions in advance of trial and to conduct reasonable follow-up questioning of the jurors after the judge has finished.

In cases involving potentially large jury venires, judges often mail pre-voir dire jury questionnaires to prospective jurors for basic information and to identify prospective jurors unable to serve. This avoids unnecessary trips to court, but may lead to many requests by potential jurors to be excused and to inappropriate inquiries about the case. An alternative is to have prospective jurors complete a questionnaire in court before voir dire begins.³⁵⁶

During voir dire, the court should inform prospective jurors of the expected length of trial, the trial schedule, and other facts that may bear on a juror’s ability and qualifications to serve. The prospect of a long trial may produce many requests to be excused, and may generate the risk of a jury consisting solely of persons who are retired or otherwise not employed outside their

352. See Fed. R. Civ. P. 48.

353. See Fed. R. Civ. P. 39(a)(1).

354. Fed. R. Civ. P. 47(a); Fed. R. Crim. P. 24(a).

355. Fed. R. Civ. P. 47(a). Federal Rule of Criminal Procedure 24(a) is similar, but applies to the defendant, defense counsel, and the government’s attorney.

356. See *infra* section 40.7.

home. Introductory comments can reduce requests for excuses—these comments should emphasize the responsibilities of citizenship and the importance of representative juries, and describe the challenge of litigation and the opportunity to learn more about the judicial process.

Some judges permit counsel to deliver opening statements to the entire venire so that prospective jurors can respond to voir dire questions more intelligently.

12.413 Peremptory Challenges

In civil cases, each party is allowed three peremptory challenges.³⁵⁷ Several plaintiffs or several defendants may be considered a single party for that purpose, but the court may allow additional challenges, depending on whether parties' interests conflict or diverge significantly. The court should grant additional challenges sparingly because they will increase the size of the venire and lengthen voir dire and the jury-selection process. Presumptively, each side should have the same number of challenges. Some judges have used unconventional methods of jury selection in complex cases to increase the participation of relatively more experienced and educated jurors. Such techniques are best used with the consent and cooperation of counsel.³⁵⁸

12.42 Juror Note Taking/Notebooks/Questions

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12.421 Note Taking

Arguments for juror note taking are particularly compelling in long and complicated trials.³⁵⁹ Many jurors will not take notes, but denial of permission to do so may be inconsistent with the large measure of responsibility the system places on jurors, and it may hamper their performance. If note taking is permitted, the court should provide jurors with paper (or notebooks with space for notes, see section 12.422) and pens. Jurors should be told that notes are only for their individual use and not to be shown or read to others, that

357. 28 U.S.C. § 1870 (West 2002); Fed. R. Civ. P. 47(b). In felony cases, defendants are allowed ten challenges jointly and the government six (with additional challenges for alternates, if selected); the court may allow additional defense challenges if there are multiple defendants. Fed. R. Crim. P. 24(b).

358. See William W Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 580–81 (1991).

359. See *id.* at 590–91.

note taking should not distract them from observing the witnesses, and to leave their notes in the jury room during recesses.

12.422 Juror Notebooks

Individual notebooks can hold exhibits (see section 12.32) and provide assistance to help jurors organize and retain information (witness and exhibit lists, pictures of witnesses, chronologies and timelines, glossaries (see section 12.31), and excerpts from instructions).³⁶⁰ The amount of material in the notebooks should be controlled to ensure that the notebooks remain clear and useful.

12.423 Juror Questions

Some judges allow jurors to ask questions in open court in civil cases. Others require them to submit questions in writing for consideration by the judge and counsel. Still others disallow juror questions. Some judges say nothing on this subject; others inform jurors that questions are permitted at the conclusion of a witness's examination to help them understand the evidence. Jurors, however, should be cautioned that it is for the lawyers to try the case and that matters occurring to them during one witness's examination may later be covered by another's³⁶¹ or may be inadmissible under the Federal Rules of Evidence.

360. See Parker, *supra* note 349, at 550. Preliminary and interim instructions are discussed in *infra* sections 12.432–12.433.

361. The pros and cons of juror questioning, and the procedures to follow if it is allowed, are discussed in *United States v. Cassiere*, 4 F.3d 1006, 1016–18 (1st Cir. 1993); *United States v. Johnson*, 914 F.2d 136, 137–39 (8th Cir. 1990) (criminal); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 513–17 (4th Cir. 1985); Schwarzer, *supra* note 358, at 591–93 (also providing sample instruction).

12.43 Jury Instructions³⁶²

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12.431 General Principles

A complex and protracted trial makes understandable jury instructions particularly important. Instructions should use language that laypersons can understand—instructions should be concise, concrete, and simple, be in the active voice, avoid negatives and double-negatives, and be organized in logical sequence. Counsel should submit proposed instructions at the final pretrial conference to focus the judge's and lawyers' attention on the issues to be tried (see section 11.65).

Substantive instructions should be tailored to the particular case, and the judge should avoid a generalized pattern of instructions. The judge should explain propositions of law with reference to the facts and parties in the case; illustrations familiar to jurors may also help. Instructions using the language of appellate opinions are rarely meaningful to jurors. Most judges reword—or at least edit—counsel's proposed instructions, which are often argumentative and one-sided. Combining the proposals submitted by counsel for each side rarely produces sound and intelligible instructions. Instructions should be read to the jury in a manner that enhances comprehension and retention; rarely should the reading take more than thirty minutes. Some judges use the court's evidence presentation system to put the jury instructions on a screen or monitors in the courtroom so that jurors can read along as the instructions are given orally.³⁶³ Jurors usually like to have one or more copies of the instructions in the jury room (see section 12.434). In complex cases with long verdict forms, it is helpful for each juror to have an individual copy of the verdict form.

12.432 Preliminary Instructions

Jurors can deal more effectively with the evidence in a lengthy trial if they are provided with a factual and legal framework to give structure to what they see and hear. Moreover, jurors should understand the trial process in which

362. See generally Benchbook, *supra* note 45, §§ 2.07–2.08, 6.05–6.06 (jury instructions in criminal and civil cases, respectively).

363. See *Effective Use of Courtroom Technology*, *supra* note 85, at 149–53, for related discussion and suggestions.

they are about to participate and what they can expect. Preliminary instructions provide context and basic guidance for the jurors' conduct. These instructions typically contain or delineate the following:

- *Preliminary statement of legal principles and factual issues.* The instructions should summarize the key factual issues, including the undisputed facts and the parties' major contentions (which may be drafted jointly by the parties), and explain briefly the basic legal issues and principles, such as the elements of claims and defenses to be proved. The court should emphasize that these instructions are preliminary—they don't cover all the issues or principles—and that instructions given at the conclusion of the case will govern deliberations. Since one purpose of these instructions is to prepare jurors for opening statements, they are usually given first, permitting counsel to refer to them in opening statements. The judge may, however, defer instructions until after opening statements or give supplemental preliminary instructions at that time.
- *The conduct of the trial.* The judge should inform jurors of the anticipated course of the trial from opening statements to verdict, the methods for presenting evidence, and the procedure for raising and resolving objections. It is also useful to introduce court personnel—the clerks, bailiffs, and reporters—and to provide a short orientation to the equipment in the courtroom.³⁶⁴
- *Schedule.* Jurors should be informed of the hourly and daily trial schedule and any holidays or other recesses.
- *Precautions to prevent mistrial.*³⁶⁵ The judge should direct jurors not to discuss the case or communicate with trial participants. It is also important that they be warned against exposure to publicity and attempts at independent fact-finding, such as viewing the scene of some occurrence or undertaking experiments or research.
- *Pretrial procedures.* The instructions should briefly describe the various discovery devices used during the pretrial stage of the litigation, such as depositions, document production, and interrogatories. This information will be helpful when the evidence is introduced, and it explains how the parties learned the facts of the case.
- *The functions and duties of the jury.* The judge should describe the jury's role as fact-finder; the burden of proof; assessing the credibility of witnesses; the nature of evidence, including circumstantial evidence

364. See *id.* at 146–49 (suggesting language for explaining courtroom technology to jurors).

365. See also *infra* section 12.44 (avoiding mistrial).

and the purpose of rules of evidence; and the jurors' need to rely on their recollection of testimony (including any special instructions about the use of juror notebooks, note taking, or questions). Most of these instructions should be repeated in the final jury charge, supplemented by any special explanations (such as use of convictions to impeach credibility) warranted by developments at trial, or the use of special verdicts or interrogatories.³⁶⁶

12.433 Interim and Limiting Instructions

Developments in the course of trial may require additional instructions. Under Federal Rule of Evidence 105, when evidence is admitted that is admissible as to some but not all parties or for a limited purpose only, the court must, upon request, instruct the jury accordingly. At counsel's request, the judge may repeat such limiting instructions at the close of trial. Counsel should be advised that when they contemplate offering such evidence, they should raise the issue promptly (if possible, before trial) and submit proposed instructions.

The judge may also give instructions at any point in the trial where they might be helpful to the jury. An explanation of applicable legal principles may be more helpful when the issue arises than if deferred until the close of trial, but counsel should be permitted to comment or object before an instruction is given. As with preliminary instructions, the judge should caution the jury that these are only interim explanations, and that the final, complete instructions on which they will base their verdict will come at the close of trial. If the parties are presenting their evidence according to a prescribed sequence of issues (see section 12.34), the instructions should be structured accordingly.

12.434 Final Instructions

Although proposed instructions should generally be submitted to the court in connection with the final pretrial conference, developments during the trial may require their revision or supplementation. Counsel are entitled to file written requests for instructions "at the close of the evidence or at such earlier time as the court reasonably directs," and are entitled to notice of the judge's proposed action before closing arguments.³⁶⁷ Most judges, rather than responding to particular requests, provide counsel with the entire charge they propose to give and then hold a charge conference to consider counsel's objections and requests; generally there will be little controversy if the judge has

366. See *infra* sections 12.436, 12.45 (supplemental instructions and verdicts, respectively).

367. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

prepared instructions.³⁶⁸ Having proposed instructions submitted electronically can expedite the editing process.

Final instructions may be given before or after closing arguments, or both.³⁶⁹ Though traditionally instructions have been given after counsel's closings, there are advantages to giving the bulk of the instructions before argument.³⁷⁰ Instructions on the law may make closing arguments easier to understand, and counsel can refer to instructions already given in arguing their application to the facts. At a minimum, counsel should know before closing arguments what final instructions will be given. This may help them structure their arguments. The judge should reserve the final closing instructions, however, until after arguments, reminding the jury of the instructions previously given and instructing them about the procedures to follow in deliberations.³⁷¹

Most judges give jurors copies of the instructions to use during deliberations. Because jurors are unlikely to remember lengthy and complex legal terms, define these terms in advance so that they can listen to the charge for a general understanding rather than try to memorize it. Some judges keep the written charge from jurors while they deliver the instructions, to focus attention on the delivery. Others permit the jurors to follow the text in hard copy or on a monitor, or at least give them a brief topical outline to follow as the instructions are given. Jurors should have any special verdict forms or interrogatories for use during deliberations.

The oral charge, which the court reporter transcribes, should be complete within itself (i.e., not merely refer to writings that the jury may be given). The judge should instruct jurors that, in the event of any variations between the oral and written charges, the oral charge controls and governs their deliberations. Some judges have experimented with providing jurors with a tape recording of the charge for use during deliberations. Access to specific passages may be facilitated by recording designated portions on separate tapes, or maintaining a record of the counter number where different portions begin.³⁷² The charge should focus on helping the jurors understand the law and their responsibilities.

368. For a general discussion of procedures and options, see *Benchbook*, *supra* note 45, §§ 2.08, 6.06.

369. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

370. See Fed. R. Civ. P. 51 committee note.

371. See *Stonehocker v. Gen. Motors Corp.*, 587 F.2d 151, 157 (4th Cir. 1978); *Babson v. United States*, 320 F.2d 662, 666 (9th Cir. 1964).

372. See Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Judges in the Second Circuit*, 60 N.Y.U. L. Rev. 423, 456–69 (1985).

In complex litigation, some judges comment on evidence in order to explain subject matter foreign to jurors and to keep them from being confused or misled by adversarial presentations. Such comments should be impartial and assist comprehension only. Before commenting on the evidence, however, consider submitting the proposed language to counsel for comment and objections. The judge's comments may be included with the written instructions given to the jury, but it may be preferable not to do so to avoid giving the comments undue weight. A judge's expression of a personal opinion on disputed facts can be problematic.³⁷³

After the judge has given all instructions, and before the jury retires, counsel are entitled to record any objections to the charge outside the presence of the jury.³⁷⁴ It is helpful to remind counsel that objections and the grounds must be stated distinctly or be deemed waived.³⁷⁵ The judge can then give corrective or supplemental instructions (see section 12.436) before deliberations begin.

12.435 Jurors' Use of Exhibits During Deliberation

Some judges send all exhibits received in evidence (except items such as currency, narcotics, weapons, and explosive devices) directly to the jury room for reference during deliberations. Other judges await requests from the jury, or withhold some items—such as those received for impeachment or another limited purpose—until and unless requested by the jury, when they repeat the limiting instructions. If the exhibits are voluminous, jurors should be given an index or other aids to assist their examination (see section 12.31).

12.436 Supplemental Instructions and Readbacks

Requests by the jury for supplemental instructions during deliberations are handled in much the same manner as final instructions, i.e., the appropriate response is determined after consulting with counsel and allowing them to object to the proposed response on the record. The instructions should be given orally in open court, with a reminder to the jury to consider the instructions as a part of those previously given, which remain binding.

The final instructions should advise the jurors that in deliberating on their verdict, they will not have a transcript available but will have to rely on the ex-

373. See *Quercia v. United States*, 289 U.S. 466, 469 (1933). *Quercia*, in which Chief Justice Hughes discusses judicial comments on evidence in detail, is still cited as the leading case on the issue. See, e.g., *United States v. Beard*, 960 F.2d 965, 970 (11th Cir. 1992).

374. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

375. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

hibits and their recollection of the testimony. Nevertheless, after long and complex trials, most juries will request readbacks of testimony. The court should instruct the jury to make requests as specific and narrow as possible to avoid excessively long readbacks, then should confer with the attorneys to seek agreement on the portions of the testimony to be read. Counsel should state any objections on the record.

Readbacks should not unduly emphasize any part of the evidence.³⁷⁶ Some judges decline readback requests altogether, to save time and to avoid potentially unfair distortions of the record. This approach can sometimes make the jury's task more difficult. Some readbacks can be avoided, however, by an agreed-on statement of the parties' positions on the matter at issue. Readbacks should never be authorized absent counsel's consent or, at least, absent an opportunity to be heard.

12.44 Avoiding Mistrial

Complex trials increase the potential and consequences of mistrials. Accordingly, the judge might consider the following precautions to minimize the most obvious risk, the jury's failure to reach a verdict:

- *Evidence and instructions.* Trials and charges should present the facts and the law so as to maximize jury comprehension.
- *Stipulations on verdict.* In advance of trial, the judge should encourage the parties to stipulate under Federal Rule of Civil Procedure 48³⁷⁷ to accept a nonunanimous verdict, or under Rule 39(a)(1) to accept a nonjury decision on the same evidence if a jury verdict cannot be obtained (see section 11.62). Such stipulations may be made during trial or deliberations—indeed, the parties may not seriously consider them until actually faced with the possibility of mistrial caused by the need to remove a juror—but are generally easier to obtain in advance.
- *Partial verdicts.* Permit juries to return a partial verdict on issues on which they can agree.
- *Cautionary instructions.* As discussed in section 12.432, the jurors, at the outset and periodically during the trial, should be given appropriate instructions regarding improper conduct. The final instructions may also include a brief explanation of the consequences of a mistrial.
- *Special verdicts and interrogatories.* These are discussed in section 12.451.

376. See *United States v. Hernandez*, 27 F.3d 1403, 1408–10 (9th Cir. 1994).

377. See section 12.411.

- *The jury room.* The jury deliberation room should be “sanitized” before the jury retires, and all counsel should review all material before it is sent into the room, to ensure that it includes nothing extraneous.
- *Sequestration.* The judge should consider sequestration only in extraordinary cases where public interest and media coverage are so intense as to jeopardize the fairness of the trial.
- *Seating a sufficient number of jurors.* If a juror is excused or disqualified during deliberations, it need have no effect as long as six jurors remain. If the loss of one or more jurors would reduce the jury to fewer than six members, however, the court cannot accept the resulting verdict (absent the stipulation described above). Seating a sufficient number of jurors helps to avoid this situation (see section 12.411).

12.45 Verdicts

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12.451 Special Verdicts and General Verdicts with Interrogatories

Special verdicts and interrogatories are common in complex trials. As discussed in section 11.633, they simplify instructions, help jurors organize their deliberations, facilitate partial verdicts, isolate issues for possible appellate review, and reduce the costs and burdens of a retrial. A general verdict form should at least require separate verdicts on each claim and on damages, but be drafted so as to prevent duplicate damage awards. Counsel and the court should consider the form of verdict during pretrial.

Special verdicts may require the jury to return findings on each issue of fact, leaving the court to apply the law to the jury’s findings. Some courts have held that the court may also amend special verdict responses to conform to the jury’s obvious intention or to correct a manifest error.³⁷⁸ The preparation of special verdict forms can be complicated. Federal Rule of Civil Procedure 49(a) suggests the court submit “written questions susceptible of categorical or other brief answer,” or “written forms of the several special findings which might properly be made under the pleadings and evidence.” Alternatively, the rule

378. See *Aquachem Co. v. Olin Corp.*, 699 F.2d 516, 520 (11th Cir. 1983); *Shaffer v. Great Am. Indem. Co.*, 147 F.2d 981 (5th Cir. 1945), *but cf.* *Austin-Westshore Constr. Co. v. Federated Dep’t Stores, Inc.*, 934 F.2d 1217, 1224 (11th Cir. 1991) (*Aquachem* does not apply to general verdicts with interrogatories).

permits any “method of submitting the issues and requiring the written findings thereon as [the judge] deems most appropriate.”

The verdict form should be concise, clear, and comprehensive. If any issue of fact raised by the pleadings is omitted, the parties must demand its submission before the jury retires or they will waive their right to a jury trial on that issue. The court may make its own findings on issues omitted without such demand.³⁷⁹

Inconsistent verdicts are a concern even with standard verdict forms, but careful structuring and instructions should minimize the risk of inconsistency. Rule 49 requires the court to instruct the jury on how to complete the verdict form properly, including both the procedure for rendering special verdicts and the specific substantive issues to be decided. Consider having the jury return partial verdicts seriatim, instructing on each issue individually before the jury deliberates on it.

Alternatively, the court could submit a general verdict form with interrogatories. The jury both determines the facts and applies the law; it also makes findings on “issues of fact the decision of which is necessary to a verdict.”³⁸⁰ Some consider this procedure an attractive compromise between a simple general verdict and special verdicts. It maintains the traditional role of the jury while diminishing the need to relitigate factual issues if an error of law taints the general verdict. On the other hand, interrogatories increase the length and complexity of deliberations and are more likely to produce inconsistencies. When the interrogatory answers are consistent with each other but inconsistent with the general verdict, the court may simply enter judgment according to the *answers*, or may return the jury for further deliberation or order a new trial.³⁸¹ The court may not accept the verdict if the answers are inconsistent with each other and at least one is also inconsistent with the general verdict; it must first try to reconcile the answers, ordering further deliberations or a new trial if it cannot.³⁸² After the return of special verdicts or a general verdict with interrogatories, it is important to allow counsel to be heard before discharging the jury. That will allow further deliberations to cure inconsistencies following supplemental instructions, and, perhaps, amendment of the verdict form.³⁸³

379. Fed. R. Civ. P. 49(a).

380. Fed. R. Civ. P. 49(b).

381. *Id.*

382. *See id.*; *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

383. Case law on the court’s authority to amend or supplement verdict forms after the jury has returned a verdict is scarce; for a case holding it permissible to amend interrogatories, see *United States v. 0.78 Acres of Land*, 81 F.R.D. 618, 622 (E.D. Pa.) (mem.), *aff’d*, 609 F.2d 504 (3d Cir. 1979).

12.452 Judgment as a Matter of Law

The court may grant judgment as a matter of law (formerly directed verdict) on a claim or defense during the trial. Federal Rule of Civil Procedure 50(a)(1) lets the judge, once a party has been fully heard on an issue, determine the issue against that party if “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” The court may grant a motion for judgment as a matter of law on any “claim or defense that cannot . . . be maintained or defeated without a favorable finding on that issue.” The motion must “specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment,” in order to allow the opposing party an opportunity to correct any deficiencies in its proof. If meritorious, it will reduce costs to grant such motions as soon as a party has completed presentation on a fact essential to one or more of its claims or defenses. Such motions should not be granted, however, before the party has been apprised of the materiality of the fact and afforded an opportunity to supplement its evidence on that fact.³⁸⁴

Counsel must move for judgment as a matter of law before submission of the case to the jury. Judges sometimes deny or defer such motions initially, even those with merit, until the jury renders a verdict. In this way, if the jury “gets it right” the judge need not disturb the verdict; any question of invading the province of the jury is avoided, and the verdict will be more difficult to overturn on appeal than would a judgment rendered on motion. If the jury instead renders a verdict lacking sufficient evidentiary support, the judge may then grant the motion upon its renewal. Rule 50(b) permits the judge to order a new trial or enter judgment as a matter of law. If the latter, Rule 50(c)(1) still requires the judge to rule on the motion (if any) for a new trial, to assist the appellate court in determining the type of relief to grant if the judgment is reversed. Thus, there will be a jury verdict for the appellate court to reinstate if it chooses.

Motions for judgment as a matter of law may effectively be combined with the procedure discussed in section 12.34 for sequencing issues for trial. If issues likely to be dispositive are scheduled first, a ruling may reduce or obviate further proceedings. Thus, the judge may choose to deny a pivotal summary judgment motion during pretrial if its correct resolution is doubtful, while scheduling the trial to begin with presentation of the facts in issue (or scheduling a separate trial).³⁸⁵ Even if not dispositive, early judicial resolution of issues unsubstantiated by facts or law may significantly reduce the scope of evi-

384. Fed. R. Civ. P. 50 committee note.

385. *Id.*

dence, argument, and instructions. An order granting a motion for judgment as a matter of law should be in writing or read into the record, with stated reasons.

12.453 Return of Verdict³⁸⁶

When the jury has returned a special verdict or a general verdict with interrogatories, the judge and counsel should promptly review it for inconsistencies so as to permit appropriate steps before the jury is discharged. After consultation with counsel, the judge should promptly approve a form of judgment for entry by the clerk.³⁸⁷ If the judgment does not resolve all aspects of the litigation, entering final judgments as to some claims or parties allows an appeal to be taken.³⁸⁸

Where issues have been bifurcated or submitted to the jury for seriatim verdicts, the jury may need to resume hearing evidence and receive further instructions or begin deliberations on other issues.³⁸⁹ If a recess is called, the judge should instruct the jurors that they remain under the restrictions originally imposed; if the recess extends more than a few days, a supplementary examination of jurors may be necessary on their return to determine whether grounds for disqualification have arisen in the interim.

If the jury is deadlocked, the judge will need to consider appropriate inquiries and instructions. Although the large investment in a long trial makes a mistrial costly, there should not be undue pressure on jurors to reach agreement. The incorrect use of an *Allen* charge may trigger a reversal.³⁹⁰

386. For general procedures for receipt of civil verdicts, see *Benchbook*, *supra* note 45, § 6.07.

387. See Fed. R. Civ. P. 58.

388. See Fed. R. Civ. P. 54(b); see also 28 U.S.C. § 1291 (West 2002); *infra* section 15.1.

389. See *supra* sections 11.632 (separate trials), 12.34 (sequencing of evidence and arguments).

390. *Darks v. Mullin*, No. 01-6308, 2003 U.S. App. LEXIS 6977, at *288 (10th Cir. Apr. 11, 2003) (prohibiting use of *Allen* charge if found to impermissibly coerce the jury); *United States v. Brennan*, No. 01-3148, 2003 U.S. App. LEXIS 6546, at *37 (3d Cir. Apr. 7, 2003) (noting that the circuit has “developed a prophylactic rule prohibiting the use of such an *Allen* charge because of its power to coerce,” but allowing a modified *Allen* charge with noncoercive language); *but cf.* *Mason v. Mitchell*, 320 F.3d 604, 642 (6th Cir. 2003) (holding that *Allen* charge was not so coercive as to deny due process rights); *United States v. Walrath*, No. 02-2824, 2003 U.S. App. LEXIS 6359, at *7–*10 (8th Cir. Apr. 3, 2003) (reviewing challenged jury instruction for abuse of discretion); *United States v. Crispo*, 306 F.3d 71, 76–78 (2d Cir. 2002) (reviewing *Allen* charge under an abuse of discretion standard); *United States v. Weymouth*, 45 Fed. Appx. 311, 312 (4th Cir. 2002) (per curiam) (same).

12.5 Nonjury Trials

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Nonjury trials may take less trial time than jury trials do, but, unless well managed, may take longer to decide. Although nonjury trials require less formality, procedures to promote clarity and expedition are still important. In fact, the judge has greater freedom to control the conduct and shape of a bench trial than he or she does a jury trial. For example, rather than receive vast volumes of documents to be sorted out during the decision-making process following trial, the court can use redaction, summaries, sampling, and other helpful techniques.

12.51 Adopted Prepared Statements of Direct Testimony

Where credibility or recollection is not at issue, and particularly when the evidence is complicated or technical, a court may consider ordering witnesses under the parties' control to present their direct testimony in substantial part through written statements prepared and submitted in advance of trial.³⁹¹ At trial, the witness is sworn, adopts the statement, may supplement the written statement orally, and is then cross-examined by opposing counsel and perhaps questioned by the judge. The statement is received as an exhibit and is not read into the record. As with all exhibits, objections should be resolved before trial. Because the witness adopts the statement orally in open court, Rule 43 is not violated.³⁹²

This procedure—which may be particularly appropriate for expert witnesses, witnesses called to supply factual background, or those needing an interpreter—has several advantages. The proponent can ensure that it has made a clear and complete record; the judge and opposing counsel, having read the statement, are better able to understand and evaluate the witness's testimony; opposing counsel can prepare for more effective cross-examination; and the reduction in live testimony saves time.

391. See Charles. R. Richey, *Requiring Direct Testimony to be Submitted in Written Form Before Trial*, 72 Geo. L.J. 73 (1983). Circuit law should be consulted on whether the consent of parties is required.

392. See *In re Adair*, 965 F.2d 777 (9th Cir. 1992).

12.52 Findings of Fact and Conclusions of Law³⁹³

The court might consider directing each party to submit proposed findings of fact and counterfindings responding to opposing counsel's submissions, unless the pretrial briefs and statements of agreed on and disputed facts serve this purpose. Some judges require counsel to exchange proposed findings and conclusions before submitting them to the court, marking for the court the portions disputed. Counsel should draft findings in neutral language, avoiding argument and conclusions, and identify the evidence expected to establish each finding. Proposed findings allow the judge to follow the evidence during trial, and to adopt, modify, or reject findings as trial proceeds. This process simplifies the court's final preparation of findings of fact, which along with its conclusions of law are required by Federal Rule of Civil Procedure 52 (also see section 12.452 and Rule 52(c), judgment on partial findings). Some judges require parties to submit proposed findings electronically for ease of adoption, but appellate courts frown on verbatim use of the parties' submissions.³⁹⁴

Under Rule 52(a), the court's findings of fact and conclusions may be filed as an opinion or memorandum of decision or read into the record in open court. The latter procedure produces a quick decision while enabling the court to refine its opinion later as needed. The court may defer the decision until after receiving posttrial briefs. However, adequate pretrial memoranda may make posttrial briefs unnecessary. Some judges call for closing arguments immediately after the close of evidence, as in jury trials, and render their decisions promptly following the arguments.

Whatever time savings may be realized by a bench trial can easily be lost if the case is not decided promptly. 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. Many judges avoid this problem by ruling from the bench whenever possible (preparing their ruling as the trial progresses) or by setting a deadline for their decision (forcing themselves to arrange their calendar to allow sufficient time).

393. For general guidance, see *Benchbook*, *supra* note 45, §§ 2.04, 6.02.

394. See *Falcon Constr. Co. v. Econ. Forms Corp.*, 805 F.2d 1229, 1232 (5th Cir. 1986) (a court that adopts findings verbatim leaves doubt whether it has discharged its duty to review the evidence itself and reached its decision on the basis of its own evaluation of evidence). Verbatim adoption of proposed findings may lead to more searching review at the appellate level. See, e.g., *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (7th Cir. 1985); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970). Compare the Seventh Circuit's opinion in *Andre* with that in *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985) (despite verbatim adoption, no special scrutiny required where judge paid careful attention to evidence and wrote own opinion).

12.53 Procedures When Combined with Jury Trial

As discussed in section 11.63, some judges try jury and nonjury issues concurrently (occasionally with an advisory jury, whose verdict is not binding). Evidence admissible only on a nonjury issue may have to be presented without the jury present. The proper sequencing of the jury and nonjury decisions must comply with *Beacon Theatres, Inc. v. Westover*, under which the right to a jury trial on legal claims may not be lost by a prior determination of equitable claims, except under “the most imperative circumstances.”³⁹⁵

12.6 Inability of Judge to Proceed

Should the judge become unable to proceed after trial has begun, Rule 63 permits any other judge to proceed with the trial upon certifying familiarity with the record and determining that the parties will not be prejudiced. Of course, this will require the prompt availability of a transcript or other record of the prior trial proceedings and any associated video recordings; otherwise, it may be impossible to avoid prejudicing one or more parties.³⁹⁶

The rule requires the successor judge in a civil nonjury trial, upon request, to recall any witness whose testimony is material and disputed, and who is available to testify again without “undue burden.” The rule also permits the recall of any other witness.³⁹⁷ It is unlikely that a successor judge will wish to decide a complex case without having heard all the direct and cross-examination of witnesses, unless the parties stipulate to a decision on the record.

Whether a judge unable to proceed in a complex jury trial should be replaced to avoid mistrial is a difficult question, and the answer depends in part on how close the trial is to completion. If the disability occurs near the start of the trial, declaring a mistrial may be the preferable course. On the other hand, if a large investment of resources (not only the parties’ but also the jurors’ time) has been made in the trial, a mistrial should be avoided if the replacement judge has confidence that the trial can go forward without sacrificing fairness. Note that one of the reasons for the 1991 amendment liberalizing Rule 63 was “the increasing length of federal trials.”³⁹⁸

395. 359 U.S. 500, 510–11 (1959).

396. Fed. R. Civ. P. 63 committee note.

397. Fed. R. Civ. P. 63 & committee note.

398. Fed. R. Civ. P. 63 committee note.

13. Settlement

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The high stakes in complex cases increase the incentive to avoid the risk of trial, and the burgeoning cost of pretrial activity places a premium on settling early in the litigation. At the same time, however, the large sums involved, the high number of parties and counsel, and the complexity of the issues magnify the difficulty of achieving settlement. This section discusses the role of the trial judge, general principles and techniques to promote settlement, and special problems that may arise. Settlement of specific types of litigation is covered in section 21.6 (class actions), section 22.9 (mass tort litigation), section 31.8 (securities litigation), and section 32.46 (employment discrimination).

13.1 Trial Judge's Role

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13.11 General Principles

Some cases involve important questions of law or public policy that are best resolved by public, official adjudication. Other times, however, resistance to settlement arises from unreasonable or unrealistic attitudes of parties and counsel, in which case the judge can help them reexamine their premises and assess their cases realistically. The judge can encourage the settlement process by asking at the first pretrial conference whether settlement discussions have occurred or might be scheduled. As the case progresses, the judge occasionally can suggest that the parties reexamine their positions in light of current or anticipated developments.

The judge can then facilitate negotiations by removing obstacles to compromise and can help overcome the intransigence or militance of clients.

Without touching on the merits, the judge can focus the parties' attention on the likely cost of litigating the case to conclusion, in fees, expenses, time, and other resources. Other helpful measures include scheduling settlement conferences, directing or encouraging reluctant parties, insurers, and other potential contributors to participate, suggesting and arranging for a neutral person to assist negotiations, targeting discovery at information needed for settlement, and promptly deciding motions whose resolution will lay the groundwork for settlement.³⁹⁹

Judges may be particularly helpful in identifying and encouraging consideration of nonmonetary solutions. Where, for example, the parties contemplate a continuing relationship, the court can stimulate thought about innovative and mutually beneficial arrangements for the future that may pave the way for agreement on monetary terms. Drawing on experience and common sense, a judge may see opportunities for compromise not apparent to the parties and guide their negotiations toward solutions they might not otherwise discover.

Settlement efforts, however, should not delay or divert the pretrial process; both can and should operate effectively on parallel tracks. Nor should settlement efforts be permitted to impair the parties' perception of judicial fairness and impartiality. Some judges participate actively in settlement discussions of a case, as well as handling pretrial activity and trial if the case does not settle. Others are uncomfortable in what they view as a dual role. Occasionally, the parties request that the assigned judge participate in settlement discussions, waiving the right to seek recusal.⁴⁰⁰ Such involvement, however, might affect the parties' confidence in the judge's ability to try the case impartially. Thus, many judges rarely engage in substantive settlement negotiations in cases they are expected to try, particularly by bench trial.⁴⁰¹ Instead, they bring in another judge or other neutral person for settlement purposes. In some large litigation, the parties are willing to pay for the services of a skilled mediator. See section 13.15.

Judicial participation in settlement negotiations demands patience and a willingness to listen. One obstacle may be removed only to reveal another. The judge should not become, or allow counsel and the parties to become, discouraged, but should seek openings and opportunities not readily apparent. Parties may signal their expectations and limits in subtle ways. Often their true objectives remain hidden from all but the most attentive listener. An observant judge can open channels for effective communication.

399. See *Litigation Manual*, *supra* note 12, at 58–64.

400. See *id.* at 58.

401. See D. Marie Provine, *Settlement Strategies for Federal District Judges* 28 (Federal Judicial Center 1986).

13.12 Timing/Relationship to Discovery

Many judges broach settlement at the initial scheduling conference.⁴⁰² Counsel should prepare by discussing the possibility of settlement during the Federal Rule of Civil Procedure 26(f) conference, as the rule requires, and becoming familiar with their clients' positions. Though the parties may lack sufficient information for serious discussions, the court can use the conference to explore the prospects for settlement, as well as the possibility of reference to extrajudicial procedures (see section 13.15). Consider scheduling negotiations and periodic progress reports and assisting counsel in developing a format for them.⁴⁰³ Counsel should attend settlement conferences with full settlement authority or with immediate access to their client.⁴⁰⁴ Any impending or finalized settlement should be disclosed to the court promptly (see also section 13.23).

Although settlement should be explored early in the case, the parties may be unwilling or unable to settle until they have conducted some discovery. The benefits of settlement are diminished, however, if it is postponed until discovery is completed. A better approach may be to target early discovery at information needed for settlement negotiations.⁴⁰⁵ Most judges do not stay discovery or other pretrial proceedings based on the pendency of settlement discussions, because the momentum of the litigation and trial preparation can create a powerful impetus for settlement. A short, judicially monitored extension may be appropriate, however, if the parties are close to agreement, and if a particular activity or deadline could affect their positions. Avoiding the expense of imminent discovery can be an inducement to settle, but a possible settlement should not preclude or limit further discovery needed by other parties (see section 13.22).

13.13 Specific Techniques to Promote Settlement

A number of techniques have proven successful in promoting settlement. The list below is not exhaustive, and creativity in this aspect of the litigation has few risks. The following techniques may be productive:

- *Firm trial date.* Setting a firm trial date is generally the most effective means to motivate parties to settle. To keep the date credible, ensure

402. See Fed. R. Civ. P. 16(a)(5), (c)(9) (pretrial conferences may be used to consider settlement).

403. See Litigation Manual, *supra* note 12, at 21.

404. See Fed. R. Civ. P. 16(c).

405. Targeted discovery is discussed in *supra* section 11.422.

that the case proceeds on schedule through pretrial; early settlement discussions generally should not be allowed to delay pretrial proceedings.

- *Reference to another judge or magistrate judge.* One way to avoid the appearance of partiality is to refer the parties to another judge or magistrate judge for settlement negotiations. Many courts have reciprocal arrangements by which judges assist in settlement negotiations in cases assigned to other judges.
- *Participation by parties.* Requesting or requiring that the parties or representatives attend settlement conferences⁴⁰⁶ may expedite negotiations and help avoid the delays involved in seeking authority. In any event, the attending parties will become better informed of the strengths and weaknesses of each side's case and the costs and risks of pursuing the litigation. The parties' presence can, however, inhibit frank discussion by counsel, who may feel obliged to keep up appearances for the benefit of their clients.
- *Confidential discussions with judge.* A judicial meeting with each party (or side) separately for confidential discussions, with their mutual consent, may help the parties find common ground. The parties may be more willing to speak candidly outside of the adversarial setting, and the judge can point out weaknesses without fear of compromising a party's position in the eyes of opposing counsel. The judge may also ask counsel to submit confidential memoranda outlining their settlement posture. After such discussions, the judge may be able to suggest areas of possible agreement, without revealing confidences.
- *Settlement counsel, special masters, or experts.* The litigating attorneys may not be suited to conduct settlement discussions and may be hampered by personal antagonisms developed in the course of the litigation. In such cases, consider suggesting that one or more of the parties engage or designate special settlement counsel separate from lead and liaison counsel (see section 10.222). Judges have also used special masters to assist in settlement of complex litigation and in post-settlement claims-resolution proceedings. The judge can arrange for the special master's compensation with the agreement of the parties and select an individual from a list provided by the parties (see section 11.52).

406. See Fed. R. Civ. P. 16(c) (court may require party or its representative to be present or available by telephone).

- *Contribution bar orders.* To facilitate partial settlements in multiparty cases, the court may (unless prohibited by the underlying statute) approve as a term of the settlement an order barring claims for contribution or indemnification by nonsettling defendants. To ensure binding effect, the affected parties or their representatives should be before the court, and their rights should be protected.⁴⁰⁷ Such orders typically contain a formula for calculating a setoff for nonsettling defendants based on the settlement amount or the settlors' adjudged proportion of fault.⁴⁰⁸
- *Offer of judgment.* Federal Rule of Civil Procedure 68 allows a party defending against a claim to serve an offer of judgment on the adverse party at any time up to ten days before trial (or proceedings to determine damages if liability has already been adjudged). The party served has ten days to accept or be liable for all costs incurred after the offer is made, unless it obtains a more favorable judgment.⁴⁰⁹ The court's invoking this procedure can create an added incentive to accept a reasonable offer in litigation (such as antitrust) where taxable costs may be high, particularly where the underlying statute defines costs to include attorneys' fees.⁴¹⁰ Local or state rules may include similar, possibly harsher provisions than Rule 68. In deciding whether such state rules or statutes apply in diversity cases, consider *Burlington Northern Railroad Co. v. Woods*,⁴¹¹ which held inapplicable an Alabama statute imposing a mandatory penalty against appellants obtaining a stay pending an unsuccessful appeal, on the ground that it conflicted with Federal Rule of Appellate Procedure 39.
- *Representative case(s).* The results of a trial of one or a few representative lead cases can provide information and motivation helpful to settlement of related cases.
- *Severance.* The early resolution of one or more issues by separate trial may provide a basis for settlement of others. The resolution of liability,

407. See, e.g., *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1031 (2d Cir. 1992); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989); *McDonald v. Union Carbide Corp.*, 734 F.2d 182, 184 (5th Cir. 1984) (per curiam).

408. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) (admiralty).

409. See *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1263–69 (3d Cir. 1991) (upholding application of Pennsylvania Rule of Civil Procedure 238, which predicates penalty, *inter alia*, on failure to obtain judgment of more than 125% of offer).

410. See *Marek v. Chesny*, 473 U.S. 1, 7–12 (1985).

411. 480 U.S. 1 (1987).

damages, or other pivotal issues can provide the parties with the information or incentive needed for a comprehensive settlement. A federal court, however, cannot enforce agreements settling claims lacking an independent basis for federal subject-matter jurisdiction unless the court embodies the settlement in the dismissal order at the request of the parties.⁴¹²

13.14 Review and Approval

Ordinarily, settlement does not require judicial review and approval.⁴¹³ Many of the exceptions to this rule, however, are of particular relevance to complex litigation. The Federal Rules require court approval of settlements in class actions (including actions brought by or against an unincorporated association as a class),⁴¹⁴ shareholder derivative actions,⁴¹⁵ and actions in which a receiver has been appointed.⁴¹⁶ The antitrust laws require court approval of consent judgments proposed by the United States in actions it has instituted.⁴¹⁷ Common law may call for review and approval in a variety of contexts where the settlement requires court action, particularly if it affects the rights of nonparties or nonsettling parties,⁴¹⁸ or where the settlement is executed by a party acting in a representative capacity.⁴¹⁹

Although the standards and procedures for review and approval of settlements vary, in general the judge is required to scrutinize the proposed settlement to ensure that it is fair to the persons whose interests the court is to protect. Those affected may be entitled to notice⁴²⁰ and an opportunity to be

412. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

413. *In re Masters*, 957 F.2d at 1025–26; *see* Fed. R. Civ. P. 41(a)(1)(ii) (voluntary dismissal by stipulation signed by all parties).

414. Fed. R. Civ. P. 23, 23.2. Settlement in class actions is discussed in *infra* section 21.6.

415. Fed. R. Civ. P. 23.1.

416. Fed. R. Civ. P. 66.

417. 15 U.S.C. § 16(e) (2000) (review of proposed antitrust consent judgment to determine if in the public interest).

418. *See, e.g., In re Masters*, 957 F.2d at 1025–26 (parties unwilling to settle unless the court enforced the terms); *TBG Inc. v. Bendis*, 811 F. Supp. 596, 600 (D. Kan. 1992) (settlement required bar order affecting rights of nonsettling parties).

419. *See, e.g., Gaxiola v. Schmidt*, 508 F. Supp. 401 (E.D. Tenn. 1980) (action brought on behalf of minors). State law, when applicable in a diversity case, may require approval in similar contexts. *See, e.g., Owen v. United States*, 713 F.2d 1461, 1464–68 (9th Cir. 1983) (applying California law requiring approval of certain settlements in cases involving joint tortfeasors); *Soares v. McCloskey*, 466 F. Supp. 703 (E.D. Pa. 1979) (applying Pennsylvania estate statute).

420. *See, e.g., Fed. R. Civ. P. 23(c)(2)*.

heard.⁴²¹ This usually involves a two-stage procedure. First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.

The judge must have information sufficient to consider the proposed settlement fully and fairly. All terms must be disclosed, so that the judge can understand the agreement's effect on those not party to the settlement and help prevent collusion and favoritism.⁴²² Because the parties or attorneys often have conflicts of interest, the proponents should explain why the proposed settlement is preferable, for those not a party to it, to continuation of the litigation. The proponents should respond to any objections raised. When settlement is proposed early in the litigation, the judge may need additional information necessary for a full review.

The judge must guard against the temptation to become an advocate—either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not party to it. Judges should be open to the views of those who may be affected by the settlement, whether or not they have legal standing to be heard. This may include providing notice to absent parties even if not required by governing law, and appointing an expert under Federal Rule of Evidence 706 to provide a neutral assessment, or special counsel to represent the interests of persons who are absent or under a legal disability.

The trial court may not rewrite a settlement agreement; if it is unacceptable the court must disapprove it,⁴²³ but it may suggest changes.⁴²⁴ An order rejecting a proposed settlement or consent decree is generally not immediately appealable, but may be appealed if the proposal includes injunctive relief.⁴²⁵ The proponents may revise their agreement to overcome the court's objections and resubmit it; if the changes are substantial, it may be necessary for the court to begin the notice and review process anew. An order approving a settlement should be supported by a statement of the court's reasoning so as to create a record for appellate review.⁴²⁶

421. See, e.g., *Michaud v. Michaud*, 932 F.2d 77, 81 (1st Cir. 1991); *Garabedian v. Allstates Eng'g Co.*, 811 F.2d 802 (3d Cir. 1987).

422. See *In re Warner Communications. Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986).

423. See *Evans v. Jeff D.*, 475 U.S. 717, 727 (1986); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989); *In re Warner*, 798 F.2d at 37.

424. See *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) (discussing process of reviewing proposed settlement).

425. See *Carson v. Am. Brands, Inc.*, 450 U.S. 79 (1981); see also 28 U.S.C. § 1292(a)(1) (West 2002).

426. See *Cotton*, 559 F.2d at 1331.

13.15 Alternative Processes to Encourage Settlement

A number of processes outside of the traditional litigation process have proved effective in helping parties reach settlement. The Federal Judicial Center's *Guide to Judicial Management of Cases in ADR* (2001) discusses such processes and how to use them.

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13.21 Partial Settlements

In litigation involving numerous claims and parties, litigants sometimes seek settlement limited to particular claims, defenses, or issues, or a settlement with less than all of the parties. Such partial settlements may provide funds needed to pursue the litigation, limit the extent of exposure, reduce the scope of discovery or trial, aid the parties in obtaining evidence, and facilitate later settlements on other issues and with other parties. On the other hand, the timing or terms of partial settlements can interfere with the ultimate resolution of the litigation. A partial settlement on terms that prove too generous, for example, may create resistance to later, more reasonable settlement offers. To avoid such problems, settling parties may adopt a general formula for all settlements; if adhered to, this may discourage adverse parties from prolonging litigation to get better terms.

Late partial settlements in multiparty cases present a number of potential problems.⁴²⁷ Attorneys with assigned responsibilities at trial may drop out when their client's case has been settled, requiring reorganization of counsel and disrupting trial planning. Although it is a common and legitimate litigation strategy to settle with one adverse party to weaken another's position, doing so on the eve of trial may seriously disrupt the progress of the case. The power to shift costs for such conduct, and the desirability of doing so, are both unclear, but the judge can discourage belated and potentially disruptive settlements. If necessary to reduce the prejudice to nonsettling parties, the judge can grant a continuance. The judge can also remind lead counsel, members of a trial team, and other attorneys who have accepted responsibilities on behalf of

427. Partial settlements in class actions are discussed in *infra* section 21.651.

other parties and attorneys that their fiduciary obligations may survive the dismissal of their own clients.

Partial settlements can affect the issues and parties not covered. A partial settlement may (by law) release certain nonsettling parties or entitle them to a setoff for amounts received in settlement from coparties; in some areas of law, this may depend on the settling parties' intention.⁴²⁸ The agreement must therefore indicate clearly which parties and claims it covers, making plain the relationship between the damage items covered and those that may later be awarded by judgment. The court needs to consider whether and in what manner payments made under the settlement agreement will be treated as offsets against future awards,⁴²⁹ and how the settlement will be treated at trial.

The parties may attempt to apportion the settlement among different claims, sometimes for tax purposes⁴³⁰ and sometimes to enhance their position against nonsettling parties. When partial settlements are submitted for judicial approval, apportionment clauses should be reviewed for their effect on further proceedings and other parties. Agreements that do not permit appropriate modification of such clauses if justified by later developments should not be approved.

Evidence of the settlement of a claim is inadmissible at trial "to prove liability for or invalidity of the claim or its amount," though not for other purposes. Though federal law disfavors admission, in diversity cases the court may be obliged to apply state law to the contrary.⁴³¹ There is disagreement over whether Federal Rule of Evidence 408 prohibits the introduction of evidence of a partial settlement for the purpose of allowing the jury, in determining damages, to consider the amount already recovered from other sources.⁴³² An alternative approach is for the court to make an appropriate reduction in any

428. See *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 343–47 (1971) (discussing subject generally and adopting "intention of parties" rule for release of antitrust coconspirators).

429. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) (admiralty).

430. Several U.S. Tax Court decisions hold that agreements apportioning liability solely to create a tax deduction should not be approved. See, e.g., *Fed. Paper Bd. Co. v. Comm'r*, 90 T.C. 1011, 1024 n.33 (1988); *Metzger v. Comm'r*, 88 T.C. 834, 849–50 (1987); *Fisher Cos. v. Comm'r*, 84 T.C. 1319, 1340 (1985).

431. Fed. R. Evid. 408.

432. See, e.g., *Carota v. Johns Manville Corp.*, 893 F.2d 448 (1st Cir. 1990); see also *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161, 166 n.10 (5th Cir. 1983). If such evidence is received, the court should give appropriate limiting instructions.

judgment recovered against nonsettling parties,⁴³³ informing the jury of the fact (not the amount) of settlement where necessary to explain a party's absence.⁴³⁴

13.22 Agreements Affecting Discovery

One of the major incentives to settle is to avoid the cost and burden of further discovery. Settlement provisions that relieve a settling party from further discovery (at least in part) may be problematic if other parties need discovery from a settling party, particularly in light of the limits on nonparty discovery. Such provisions should therefore be drafted to take into account other parties' continuing need for discovery. Though nonsettling defendants usually lack standing to appeal orders approving partial settlements, they may appeal if they suffer formal legal prejudice.⁴³⁵

A settlement agreement may also purport to require a party not to disclose its terms, or to return, destroy, or keep confidential discovery materials previously obtained. The effect, if not the purpose, of such an agreement may be to forestall or frustrate other litigation, pending or anticipated. For this and other public policy reasons, including the protection of First Amendment interests (not to mention problems under state law), such agreements may be invalid, unenforceable, or simply not entitled to approval. Where such an agreement may be appropriate (e.g., to protect trade secrets), consider requiring that the materials be preserved for a reasonable period of time. The relevant analysis is similar to that employed when considering issuance of a protective order (see section 11.43).

13.23 Side Agreements

Agreements allocating financial responsibility among persons or entities are common—contracts of insurance and indemnification are prime examples. Occasionally, however, litigants try to apportion damages through side agreements that supplement their formal settlement agreements but are not intended to be disclosed to others. These agreements may not of themselves be unlawful or unethical, and on occasion there may be legitimate reasons for not

433. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 531–32 (5th Cir. 1984), modified on other grounds, 757 F.2d 614 (1985) (en banc); *McHann*, 713 F.2d at 166.

434. *Jackson*, 727 F.2d at 531.

435. See, e.g., *Zupnik v. Fogel*, 989 F.2d 93, 98 (2d Cir. 1993); *Mayfield v. Barr*, 985 F.2d 1090, 1092–93 (D.C. Cir. 1993); *Agretti v. ANR Freight Sys. Inc.*, 982 F.2d 242, 247 (7th Cir. 1992) (defining “formal legal prejudice”); *Alumax Mill Prods., Inc. v. Cong. Fin. Corp.*, 912 F.2d 996, 1002 (8th Cir. 1990), and cases cited therein.

disclosing them to other parties. In presenting settlement agreements for judicial approval, however, the parties are obliged to make full disclosure of all terms and understandings, including any side agreements. The settling parties may request that certain terms not be disclosed to other parties, but must justify this to the court.⁴³⁶

Common types of side agreements include the following:

- “*Mary Carter*” agreements.⁴³⁷ In return for a settlement payment, the plaintiff may agree to release a particular defendant from liability, even though the defendant remains party to the suit, with the further provision that the defendant will be reimbursed in some specified manner out of any recovery against other defendants.⁴³⁸ Many varieties of such agreements have developed, including loan-receipt agreements and agreements to dismiss during the case or not to execute a judgment if the defendant does not take an aggressive posture against the plaintiff’s claims.⁴³⁹ These agreements have been criticized as unfair to nonsettling defendants,⁴⁴⁰ because they align the interests of the “settling” defendant, who remains in the litigation, with those of the plaintiff (usually covertly), eliminating their normal adversarial relationship.⁴⁴¹ Nevertheless, courts have rarely rejected a settlement on this basis,⁴⁴² although it is advisable for the court to give such agreements particular scrutiny.⁴⁴³

The primary problem raised by *Mary Carter* agreements is disclosure. Typically, parties enter them secretly or request that the court not disclose the terms of the agreement. Nondisclosure, however, mag-

436. See, e.g., *In re Braniff, Inc.*, No. 91-03325-BKC-6Cl, 1992 WL 261641, at *5 (Bankr. M.D. Fla. Oct. 2, 1992) (parties must disclose to court and, unless good cause shown, other parties all agreements settling or limiting liability, whether “formal or informal, absolute or conditional”).

437. *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Dist. Ct. App. 1967).

438. See *Robertson v. White*, 81 F.3d 752, 754 n.1 (8th Cir. 1996); *Marathon Oil Co. v. Mid-Continent Underwriters*, 786 F.2d 1301, 1303 n.1 (5th Cir. 1986); *Wilkins v. P.M.B. Sys. Eng’g, Inc.*, 741 F.2d 795, 798 n.2 (5th Cir. 1984); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1236 (7th Cir. 1983). For other definitions, see materials cited in *Hoops v. Watermelon City Trucking, Inc.*, 846 F.2d 637, 640 n.3 (10th Cir. 1988).

439. See Frank D. Wagner, Annotation, *Validity and Effect of Agreement with One Cotortfeasor Setting His Maximum Liability and Providing for Reduction or Extinguishment Thereof Relative to Recovery Against Nonagreeing Cotortfeasor*, 65 A.L.R.3d 602 (1975).

440. See *Bass v. Phoenix Seadrill/78, Ltd.*, 562 F. Supp. 790, 796 (E.D. Tex. 1983).

441. See *Hoops*, 846 F.2d at 640.

442. *Bass*, 562 F. Supp. at 796.

443. See *Wilkins v. P.M.B. Sys. Eng’g, Inc.*, 741 F.2d 795, 798 n.2 (5th Cir. 1984).

nifies the prejudice to other parties, since neither the jury nor the defense can take the agreement into account when considering the testimony of the settling defendant; the agreement may therefore be ground for a new trial.⁴⁴⁴ For this reason, case law favors requiring disclosure of such agreements to the court, parties, and jury.⁴⁴⁵ Thus, at the outset of the litigation, the court should impose a continuing duty on counsel to promptly disclose all such agreements without need for a motion or discovery request.

- *Sharing agreements.* Defendants sometimes agree in advance to allocate responsibility for damages among themselves according to an agreed formula (often based on market share). These agreements serve the legitimate purposes of controlling parties' exposure and preventing plaintiffs from forcing an unfair settlement by threats to show favoritism in the collection of any judgment that may be recovered. They may, however, expressly prohibit or indirectly discourage individual settlements. They also create a disincentive for defendants to make available evidence indicating liability on the part of codefendants. Therefore, although they are generally appropriate, the court may refuse to approve or enforce agreements that violate public policy or unfairly prejudice other parties.⁴⁴⁶

Sharing agreements should be discoverable. Once the agreement is made known, it may be possible to structure partial settlements to take its terms into account. It is less clear when and whether such agreements should be admissible in evidence. Since Federal Rule of Evidence 408 does not require exclusion of settlement agreements when offered for purposes such as proving bias, they may be admitted to attack a witness's credibility or demonstrate that formally opposing parties are not in fact adverse, accompanied by a limiting instruction that the agreement is not to be considered proof or disproof of liability or damages.⁴⁴⁷ Settlement agreements should not be admitted, however, when they are of little relevance and may be prejudicial⁴⁴⁸ (e.g., by suggesting a conspiracy to the jury).

444. See *Leger v. Drilling Well Control, Inc.*, 69 F.R.D. 358, 361 (W.D. La. 1976), *aff'd*, 592 F.2d 1246 (5th Cir. 1979); *cf.* *Reichenbach v. Smith*, 528 F.2d 1072 (5th Cir. 1976) (error found harmless).

445. See, e.g., *Hoops*, 846 F.2d at 640; *Reichenbach*, 528 F.2d at 1076 (dictum).

446. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, MDL No. 721, 1993 U.S. Dist. LEXIS 14191 (D.P.R. Sept. 14, 1993).

447. See *Brocklesby v. United States*, 767 F.2d 1288, 1292–93 (9th Cir. 1985).

448. See Fed. R. Evid. 403.

- “*Most-favored nation*” clauses. Settlement agreements proposed early in the litigation often contain a “most-favored nation” clause to encourage early settlement by protecting all parties against being prejudiced by later, more favorable settlements with others. Such clauses typically obligate a signatory plaintiff to give signatory defendants a proportionate refund if the former settles with other defendants for less, or a signatory defendant to make additional payments to signatory plaintiffs if the former settles with other plaintiffs for more.

Such clauses have several drawbacks: (1) the potential liability under them is indeterminate, making them risky; (2) the additional recovery they may produce for some plaintiffs without any effort by their attorneys makes it difficult to fix fees; and (3) the factors that induce parties to settle with different parties for different amounts, such as the time of settlement and the relative strength of claims, are nullified. Such clauses can provide an incentive for early settlement as well as an obstacle to later settlements. To limit their prejudicial impact, such clauses should terminate after a specified length of time (to prevent one or more holdouts from delaying final implementation), impose ceilings on payments, and allow flexibility to deal with changed circumstances or with parties financially unable to contribute proportionately.⁴⁴⁹ The judge may have to consider voiding or limiting them if enforcement becomes inequitable. If this determination involves disputed questions of fact, an evidentiary hearing and possibly additional discovery may be necessary.⁴⁵⁰

- *Tolling agreements*. Parties may enter into agreements under which one side promises not to assert a statute-of-limitations defense in return for some consideration. Parties should disclose these agreements to the court and other parties to avoid disruption of the case-management plan and frustration of the goals of court-imposed deadlines.

449. See *In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 139 n.3 (5th Cir. 1985); *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 614 F. Supp. 377, 381–82 (E.D. Pa. 1985), *aff’d mem.* 791 F.2d 917 (3d Cir. 1986).

450. See *In re Corrugated Container*, 752 F.2d at 142–43; *Fisher Bros.*, 614 F. Supp. at 381 & n.8.

13.24 Ethical Considerations

A number of ethical issues can confound settlement agreements even if not kept secret:

- *Communications with represented parties.* State rules of professional responsibility bar attorneys from communicating directly with a party represented by counsel (absent that counsel's presence or consent).⁴⁵¹ These rules prohibit attorneys from directly negotiating settlement with adverse parties.⁴⁵² The parties themselves are free to engage in direct settlement discussions without their attorneys. It may be an ethical violation, however, for an attorney to use a client or a third party to violate the prohibition on direct communication with represented parties.⁴⁵³
- *Agreements foreclosing other representation.* Defendants have attempted to condition settlement on an agreement that plaintiff's counsel will not represent other persons with similar claims, but it is an ethical violation for an attorney to enter into or propose such an agreement.⁴⁵⁴ "Futures deals" are an ethically dubious variation, in which the settling attorney agrees to process similar claims of future clients according to the settlement terms or to advise clients to accept those terms.
- *Negotiations regarding attorney fees.* In routine nonclass litigation, in which each party is responsible for its own attorneys' fees, settling defendants customarily pay a negotiated sum, leaving counsel and their clients to settle their fees. Problems may arise, however, in cases where the court must approve settlements containing provisions for attorneys' fees, as in class actions (see section 21.7) or in cases, such as civil

451. Model Rules of Prof'l Conduct R. 4.2 (2002); Model Code of Prof'l Responsibility DR 7-104(A)(1) (1981). For the purposes of this rule, class members are considered parties represented by class counsel. For further discussion and citations, see *infra* section 21.33.

452. See *Walker v. Kotzen*, 567 F. Supp. 424, 426–27 (E.D. Pa. 1983), *appeal dismissed*, 734 F.2d 9 (3d Cir. 1984). For settlement and related communications in class actions, see *infra* sections 21.3, 21.6.

453. Model Rules of Prof'l Conduct R. 8.4(a) & cmt. (2002) (it is professional misconduct for a lawyer to attempt to violate rule through another person).

454. Model Rules of Prof'l Conduct R. 5.6(b) & cmt. (2002); Model Code of Prof'l Responsibility DR 2-108(B) (1981); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1039 (1968).

rights actions, in which the losing side is liable for the adversary's attorneys' fees.

It is problematic when settlement negotiations involving attorney fees are conducted simultaneously with negotiations on the merits. When a defendant offers to settle for a lump sum covering both damages and fees, negotiating the allocation may create a conflict of interest for the plaintiff's attorney.⁴⁵⁵ The problem is acute when the plaintiffs are represented by legal aid or another nonprofit group that has agreed with the clients to seek fees only from the opposing parties.⁴⁵⁶ The Supreme Court, while recognizing that "such situations may raise difficult ethical issues for a plaintiff's attorney," has declined to prohibit this practice, reasoning that "a defendant may have good reason to demand to know his total liability."⁴⁵⁷ Indeed, the Court has stated that settlement of civil rights cases would be impeded by rules prohibiting simultaneous negotiations of fees.⁴⁵⁸

Proposed settlements arising out of such negotiations need not be rejected out of hand, but should be reviewed for fairness of the allocation between damages and attorneys' fees.⁴⁵⁹ The ethical problem will be eased if the parties agree to have the court make the allocation.

A further problem is presented if a defendant conditions a settlement favorable to plaintiffs on an agreement to waive attorney fees, particularly if the relief sought is primarily or entirely nonmonetary. Plaintiffs' attorney has an ethical obligation to obtain the most favorable relief for the client without regard to the attorney's interest in a fee, and may thereby be coerced into giving up all fees.⁴⁶⁰ This practice may discourage other attorneys from representing civil rights claimants.⁴⁶¹ Some bar associations have ruled it unethical for defendants to request fee waivers in exchange for relief on the merits.⁴⁶² The Supreme Court, however, has approved the practice, reasoning that a prohibition on fee waivers would discourage settlement. Because of the "potentially large and typically uncertain magnitude" of fee awards,

455. See *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 453 n.15 (1982).

456. See *Evans v. Jeff D.*, 475 U.S. 717, 721 (1986).

457. *White*, 455 U.S. at 453 n.15; see *Evans*, 475 U.S. at 732–34; *Marek v. Chesny*, 473 U.S. 1, 6–7 (1985).

458. *Evans*, 475 U.S. at 736–37 & nn.28–29.

459. See *id.* at 754, 765 (Brennan, J., dissenting); but see *id.* at 738 n.30.

460. See *id.* at 727–30 & nn.14, 16.

461. *Id.* at 754–59 (Brennan, J., dissenting).

462. *Id.* at 728 n.15.

defendants are unlikely to settle until the issue of fees has been resolved.⁴⁶³ The judge is therefore free—but not required—to approve such settlements. The Supreme Court suggested that disapproval might be appropriate if the defendant had no realistic defense on the merits or if the waiver was a “vindictive” act designed to discourage counsel from bringing such cases.⁴⁶⁴ Counsel, though, may be prohibited by state rules from proposing such settlements.

- *Failure to submit offers to client.* Attorneys have an obligation promptly to submit nonfrivolous offers of settlement to the client, unless prior discussions have made clear that the proposal will be unacceptable.⁴⁶⁵ Breach of this duty is egregious if counsel will be compensated in whole or in part on the basis of the number of hours expended in the litigation, as in the case of defense counsel or when fees are awarded or approved by the court on a lodestar basis.

463. See *id.* at 732–38.

464. *Id.* at 739–40 & n.32.

465. See Model Rules of Prof'l Conduct R. 1.2(a) & cmt., 1.4 & cmt. (2002); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 326 (1970); *Deadwyler v. Volkswagen of Am. Inc.*, 134 F.R.D. 128, 140 (W.D.N.C. 1991), *aff'd*, 966 F.2d 1443 (4th Cir. 1992).

14. Attorney Fees⁴⁶⁶

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Regulating and awarding attorneys' fees presents the court with an opportunity and a mechanism for managing class actions and other forms of complex litigation. Under the "American Rule," parties generally bear their own costs of litigation,⁴⁶⁷ and the attorneys and client ordinarily negotiate the rate at which attorneys are to be paid and the scope of their work. In complex litigation, however, there is often no traditional client with the authority to negotiate the terms of the representation or the rate for compensating counsel. In class actions involving monetary stakes, the natural conflict that arises between lawyers and class members necessarily draws the judge into the role of regulating and awarding attorney fees.⁴⁶⁸ Unless the judge protects the interests of absentee class members, those interests may go unrepresented.

466. The subject is treated at length in Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* (Federal Judicial Center 1994). See also *supra* section 13.24 (negotiation of fees and settlement); *infra* section 21.27 (appointment of class counsel); *infra* section 21.7 (fee awards in class actions).

467. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

468. See, e.g., *Rawlings v. Prudential-Bache Props, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) ("The interest of class counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class.").

Judicial involvement can have a major impact on the reasonableness of fee requests and on the management of the litigation. The court has considerable discretion to use fees as a tool in a class action or a multidistrict consolidation. Calibrating the amount of attorney fees to a reasonable share of the benefits of a class settlement or award is an appropriate and effective means of managing class action litigation and preventing abuses of the class action device.⁴⁶⁹ For example, a fee award that is limited to a reasonable percentage of the coupons actually redeemed in a “coupon settlement” may eliminate the worst coupon settlement abuses.⁴⁷⁰ An announcement at the outset by the judge of the intention to apply such a rule will motivate attorneys to ensure that class benefits have a real value to the class.

Because of the sums involved, the calculation of fee awards often is complex, burdensome, bitterly contested, and a precursor to satellite litigation. Establishing guidelines and ground rules—even establishing budgets or rates for payment—early in the litigation helps ease the judge’s burden and helps prevent later disputes. To facilitate the hearing and resolution of fee petitions, Rule 54(d)(2)(D) explicitly authorizes district courts to adopt local rules by which fees issues “may be resolved without extensive evidentiary hearings” and authorizes judges to refer fee matters to special masters or magistrate judges.

14.1 Eligibility for Court-Awarded Fees

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14.11 Types of Cases—Overview

An initial determination should be made by the court early in the case as to whether the prevailing party is entitled to court-awarded fees. The nature of an

469. Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 490 (2000) (“The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.”) (emphasis omitted); *see also* *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).

470. *See* *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377–80 (D. Mass. 1997); *see also* *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801–02, 819–20 (3d Cir. 1995).

award depends on the type of case and fund as well as applicable local rules and circuit law.

Below are the principal types of cases and situations in which courts may award attorney fees:

- *Common-fund cases.* If attorneys' efforts create or preserve a fund or benefit for others in addition to their own clients, the court is empowered to award fees from the fund.⁴⁷¹ The award may be made from recoveries obtained by settlement or by trial. Common-fund cases are predominantly, but not exclusively, class actions; some class actions may also be brought under fee-shifting statutes. Federal Rule of Civil Procedure 23 limits attorney fees in class actions to those that are "reasonable."⁴⁷²

A variant on the traditional common-fund case occurs frequently in mass tort litigation—in both class actions and large consolidations—where a separate fund to pay attorney fees is created as a part of a settlement. The court must distribute the fund among the various plaintiffs' attorneys, which may include class counsel, court-designated lead and liaison counsel, and individual plaintiff's counsel.⁴⁷³

- *Statutory-fees cases.* Over 150 statutes, covering actions ranging from antitrust and civil rights to little known types of claims, authorize courts to depart from the American Rule and award attorney fees to a prevailing party.⁴⁷⁴ Whether the award is mandatory or permissive depends on the particular statute and applicable case law and may depend on whether the prevailing party is the plaintiff or the defendant.⁴⁷⁵

471. See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trs. of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882).

472. Rule 23(h) restates the existing law in its provision that "the court may award reasonable attorney fees."

473. See *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603 (1st Cir. 1992).

474. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983); see also *Hirsch & Sheehey*, *supra* note 466, at 1–3.

475. *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) ("A prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant."). See also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); but cf. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522 (1994).

- *Designated counsel.* The court may award fees to lead counsel, liaison counsel, and other attorneys designated to perform tasks on behalf of a group of litigants (see section 10.22).⁴⁷⁶
- *Objectors.* The court may award fees to objectors who provided services that contributed to an increase in the common fund available to a class, that aided the court’s review of a class-action settlement, or that otherwise advanced the interests of the class or assisted the court.⁴⁷⁷
- *Special parties.* Under the common law and many state statutes, court approval is required for the payment of fees charged by counsel for minors, incompetents, and trusts.
- *Sanctions.* The court has inherent power to award fees against a litigant who conducts litigation in bad faith or vexatiously.⁴⁷⁸ A statutory counterpart, 28 U.S.C. § 1927, provides for awards against an offending attorney. Various provisions of the Federal Rules of Civil Procedure authorize the award of fees against parties who have failed to comply with rules or orders with respect to discovery and other pre-trial proceedings. Section 10.15 has a detailed discussion of sanctions.

14.12 Common-Fund Cases

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14.121 Percentage-Fee Awards

The common-fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment.⁴⁷⁹ The exception applies where a common fund has been created by the efforts of a plaintiff’s attorney⁴⁸⁰ and rests on the principle that “persons

476. *In re Air Crash Disaster*, 549 F.2d 1006, 1016 (5th Cir. 1977) (relying on “common-fund” principles and inherent management powers of court in complex litigation); *see also infra* section 20.312 and text accompanying notes 700–05 (discussing the relationship between fee allocations in multidistrict litigation and state–federal cooperation).

477. *See* Fed. R. Civ. P. 23(e)(4), 23(h) & committee notes; *infra* sections 21.723 (role of objectors), 21.71 (criteria for approval of fee requests).

478. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *see also* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258–59 (1975); *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981).

479. *Trs. of the Internal Improvement Fund v. Greenough*, 105 U.S. 527, 536 (1882).

480. *Compare* *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), *and* *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), *and* *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237 (1985) [hereinafter *Third Circuit 1985 Task Force Report*], *with*

who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."⁴⁸¹ Historically, attorney fees were awarded from a common fund based on a percentage of that fund.⁴⁸² After a period of experimentation with the lodestar method (based on the number of hours reasonably expended multiplied by the applicable market rate for the lawyer's services), the vast majority of courts of appeals now permit⁴⁸³ or direct⁴⁸⁴ district courts to use the percentage-fee method in common-fund cases. The only court of appeals that has not explicitly adopted the percentage method seems to allow considerable flexibility in approving combined percentage and lodestar approaches.⁴⁸⁵

Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), *appeal following remand*, 540 F.2d 102 (3d Cir. 1976).

481. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). *See also* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392 (1970).

482. *See, e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885). The rationale differs significantly from that on which statutory-fee awards rest. *See* Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) ("[S]tatutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive statutory rights."). *See also* *In re* SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 532 (E.D. Pa. 1990).

483. For a circuit-by-circuit review, see Alba Conte, *Newburg on Class Actions* app. 14-1 (Supp. June 2002). The following seven courts of appeals permit awarding fees by either the percentage-fee or lodestar method or both (generally using the lodestar as a cross-check): *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (fee award simulating "what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character" would be appropriate); *Brown*, 838 F.2d at 454 (Tenth Circuit case).

484. The following three courts of appeals direct district courts to use the percentage-fee method, sometimes supplemented with a lodestar "check": *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821–22 (3d Cir. 1995); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I*, 946 F.2d at 774. *See also* *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 742 (3d Cir. 2001) (directing the district court to apply a lodestar cross-check and to award fees with a multiplier no greater than three); *cf.* *In re* Cendant Corp. Litig., 264 F.3d 201, 285 (3d Cir. 2001) (stating that the "lodestar cross-check . . . is very time consuming" but the district court may use it "if necessary").

485. Longden v. Sunderman, 979 F.2d 1095, 1099–1100 (5th Cir. 1992) (indicating that the circuit "has yet to adopt this [percentage of common-fund] method" and affirming a district judge's use of a combined lodestar and percentage-of-fund approach). *See also* Strong v. Bell-South Telecomms., Inc. 137 F.3d 844, 852–53 (5th Cir. 1998) (approving application of lodestar and stating that application of a percentage-of-fund approach could be restricted to a percentage of claims actually made by class members and not the total amount that might be claimed). The

In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended.⁴⁸⁶ The percentage method also has been criticized as arbitrary, especially “when applied by courts in an automatic fashion.”⁴⁸⁷ Attorney fees awarded under the percentage method are often between 25% and 30% of the fund.⁴⁸⁸ Several courts have established benchmarks, either a specific figure or a range, subject to upward or downward adjustment depending on the circumstances of the case. Awarding attorneys 25% of a common fund represents a typical benchmark.⁴⁸⁹ Any single rate, however, is arbitrary and cannot capture variations in class actions’ characteristics. A fixed benchmark will often yield fee awards that are excessive for certified class actions in which the risk of non-recovery is relatively small.⁴⁹⁰

Accordingly, in “mega-cases” in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery to be appropriate.⁴⁹¹ One court’s survey of fee

practice of many district judges in the Fifth Circuit appears to be to use either the percentage approach or both methods. *See, e.g., In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 500 (N.D. Miss. 1996), and cases cited therein (applying a percentage-of-fund method and discussing the *Johnson* factors that courts in the Fifth Circuit typically apply in lodestar analyses). For further discussion of the *Johnson* factors, see *infra* note 509.

486. *Third Circuit 1985 Task Force Report*, *supra* note 480, at 248 (finding that “there appears to be a conscious, or perhaps unconscious, desire to keep the litigation alive despite a reasonable prospect of settlement, to maximize the number of hours to be included in computing the lodestar”).

487. *Third Circuit 2001 Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689, 707 (2001) [hereinafter *Third Circuit 2001 Task Force Report*].

488. Thomas E. Willging, Loral L. Hooper & Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 69, 146–47 figs. 67 & 68 (Federal Judicial Center 1996) [hereinafter FJC Empirical Study of Class Actions]; *see also, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (25% with adjustments up to 33% for complexity, risk, and nonmonetary results).

489. *See Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989) (adopting 25% benchmark). Several other courts of appeals have endorsed variations of the 25% benchmark. *See, e.g., Swedish Hosp.*, 1 F.3d at 1272 (affirming that a 20% award is within the range of reasonable fees in common-fund cases, since the majority fall between 20% and 30%); *see also* cases cited *infra* note 498.

490. FJC Empirical Study of Class Actions, *supra* note 488, at 60 (finding settlement rates for certified class actions ranging from 62% to 100% in four federal district courts).

491. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 339–40 (3d Cir. 1998), and cases cited therein (award constituting 6.7% of common fund remanded “for a more thorough examination and explication of the proper percentage to be awarded to class counsel . . . in light of the magnitude of the recovery”).

awards in class actions with recoveries exceeding \$100 million found fee percentages ranging from 4.1% to 17.92%.⁴⁹² Likewise, judges who have used competitive bidding to select counsel and establish the terms for attorney fee awards have produced percentage-of-recovery awards considerably lower than the 20%–30% average award reported above.⁴⁹³

Two courts of appeals have rejected benchmark percentages, preferring more qualitative standards.⁴⁹⁴ Benchmarks are subject to considerable fluctuation and should be applied, if at all, with the caveat that “[t]he benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.”⁴⁹⁵ The Third Circuit 2001 Task Force on Selection of Class Counsel recommended that courts “avoid rigid adherence to a ‘benchmark’” and concluded that “a percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel.”⁴⁹⁶

The application of a benchmark percentage for unusually large funds may result in a windfall.⁴⁹⁷ In that circumstance, some courts have used a sliding scale, with the percentage decreasing as the magnitude of the fund increases,⁴⁹⁸

492. *Id.* at 339.

493. See Lural L. Hooper & Marie Leary, Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study pt. VII (Federal Judicial Center Aug. 29, 2001), *reprinted in* 209 F.R.D. 519, 595–97 tbl.4, 598 (2001) (finding in nine terminated bidding cases that the fee awards ranged from 5% to 22%, with 8% being the median award).

494. *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 736–37 (3d Cir. 2001) (district court may not rely on a formulaic application of the appropriate range in awarding attorney fees under the percentage-of-fund method in a class action, but must consider the relevant circumstances of the particular case, including the size of the settlement); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 51–52 (2d Cir. 2000) (“We are nonetheless disturbed by the essential notion of a benchmark. . . . [M]arket rates, where available, are the ideal proxy for [attorney] compensation.”).

495. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

496. *Third Circuit 2001 Task Force Report*, *supra* note 487, at 705.

497. See *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1297–98 (9th Cir. 1994); see also *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 350–51 & nn.75, 76 (N.D. Ga. 1993), and cases cited therein (listing declining percentages based on case law).

498. See *In re First Fid. Bancorporation Sec. Litig.*, 750 F. Supp. 160 (D.N.J. 1990) (30% of first \$10 million, 20% of next \$10 million, 10% of any recovery greater than \$20 million); *Sala v. Nat’l R.R. Passenger Corp.*, 128 F.R.D. 210 (E.D. Pa. 1989) (33% of first \$1 million, 30% of amount between \$1 million and \$2 million); *Third Circuit 1985 Task Force Report*, *supra* note 480, at 256. *But see In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 79–81, 84 (S.D.N.Y. 2000) (discussing decreasing and increasing fee scales and choosing a fee scale with a single increment, from 0% below a certain recovery—the “X factor”—to 25% for all amounts above that

or they have used the lodestar method.⁴⁹⁹ Where the fund is unusually small or where actual common benefits are difficult to determine and possibly illusory, a benchmark (or any award based on a percentage of recovery) may likewise be inapplicable. Particularly where the common benefits are in the form of discounts, coupons, options, or declaratory or injunctive relief, estimates of the value or even the existence of a common fund may be unreliable, rendering application of any percentage-of-recovery approach inappropriate.⁵⁰⁰ Where there is no secondary market for coupon redemption, the judge can conclude that the stated value of the coupons is misleading and does not provide a sufficiently firm foundation to support a fee award. Awarding fees in the form of a percentage of the coupons themselves may give attorneys an incentive to ensure that a secondary market becomes available to convert the benefits into cash.⁵⁰¹ Alternatively, courts can award fees as a percentage of coupons actually redeemed by class members.⁵⁰² Where payment of a common benefit is scheduled to take place in the future, consider linking the attorney-fee award to that future payment.⁵⁰³

level); *In re Am. Cont'l Corp. Lincoln Sav. & Loan Sec. Litig.*, MDL No. 834 (D. Ariz. July 24, 1990) (25% of first \$150 million, 29% of any recovery greater than \$150 million plus additional incentives for prompt resolution of case); Milton I. Shadur, *Response: Task Force Report: "Against the Manifest Weight of the Evidence,"* 74 Temp. L. Rev. 799, 803 (2001) (discussing use of an absolute cap on fees). The Third Circuit 2001 Task Force identified adherents of both decreasing and increasing percentages and concluded that either approach might reasonably be used. *Third Circuit 2001 Task Force Report*, *supra* note 487, at 719.

499. *In re Wash. Pub. Power*, 19 F.3d 1291 (9th Cir. 1994).

500. *See, e.g., Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 851–52 (5th Cir. 1998) (upholding district court's use of lodestar based on finding "insignificant benefit" to class member in "phantom" common fund asserted to be worth \$64 million); *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) (stating that "the lodestar rationale has appeal where as here, the nature of the [coupon] settlement evades the precise evaluation needed for the percentage of recovery method"); *Weinberger v. Great N. Ne-koosa Corp.* 925 F.2d 518, 526 n.10 (1st Cir. 1991) (upholding the "district court's implied premise that the lodestar is the soundest available alternative").

501. *See, e.g., In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648, 2001 WL 170792, at *3–*5, *15–*17 (S.D.N.Y. Feb. 22, 2001) (discussing initial agreement on coupons and changes made after court-appointed experts reported on value of coupons; counsel fees paid in same proportion of cash and coupons as class benefits paid).

502. *Third Circuit 2001 Task Force Report*, *supra* note 487, at 693 n.12 (quoting Brian Wolfman's testimony that "[b]y tying counsel's fate to that of their clients, the typical coupon settlement would become a thing of the past").

503. *See, e.g., Bowling v. Pfizer*, 132 F.3d 1147, 1152 (6th Cir. 1998) (portion of fees related to future funding to be determined and paid after the fund is created, over a ten-year period, using lodestar method).

A number of courts favor the lodestar as a backup or cross-check on the percentage method when fees might be excessive.⁵⁰⁴ To use the lodestar method, the court should give the attorneys early notice that they should keep track of their time. (At least one court has discontinued using the lodestar as a check on the reasonableness of percentage awards because of the lodestar method's perceived faults.⁵⁰⁵)

In securities fraud and other types of cases in which a large fund is likely, some district judges have used competitive bidding to aid in selecting class counsel and determining a proposed percentage fee.⁵⁰⁶ See section 21.27. Others, however, have concluded that competitive bidding is incompatible with the Private Securities Litigation Reform Act of 1995. See section 31.31. In addition, one court of appeals has minimized one advantage of competitive bidding by ruling that a fee percentage established at the outset of the case must be reviewed at the conclusion of the case, using traditional factors governing such awards. Section 14.211 further discusses bidding.

The decision of an award of attorney fees in a common-fund case is committed to the sound discretion of the trial court, which must consider the unique contours of the case.⁵⁰⁷ Reasons for the selection of a given percentage must be sufficiently articulated for appellate review. The court should identify relevant factors and how these factors helped determine the percentage awarded.⁵⁰⁸ The factors used in making the award will vary,⁵⁰⁹ but may include one or more of the following:

504. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (“encourag[ing] the practice of requiring documentation of hours as a ‘cross check’ on the reasonableness of the requested percentage”); *United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999) (holding that a lodestar-calculated fee amounted to a reasonable percentage of the common fund); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (upholding a district court fee award based on a percentage of the common fund and then cross-checked against the class counsel’s lodestar); *In re Gen. Motors Corp.*, 55 F.3d at 820 (finding it “sensible for a court to use a second method of fee approval to cross check its conclusion under the first method”).

505. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266–67 & n.3 (D.C. Cir. 1993) (citing *Third Circuit 1985 Task Force Report*, *supra* note 480, at 246–49).

506. For a description of the characteristics of the cases in which competitive bidding has been used to date, see Hooper & Leary, *supra* note 493, pt. III, *reprinted in* 209 F.R.D. at 529–38 & tbl.1.

507. *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988). For an overview of factors to consider in determining the amount of attorney fees to award in class-action litigation, see Fed. R. Civ. P. 23(h) committee note; *see also infra* section 21.7.

508. *Camden I*, 946 F.2d at 775. *See also* *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272–73 (9th Cir. 1989).

- the size of the fund and the number of persons who actually receive monetary benefits;⁵¹⁰
- any understandings reached with counsel at the time of appointment concerning the amount or rate for calculating fees; any budget set for the litigation; or other terms proposed by counsel or ordered by the court;
- any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation;⁵¹¹
- any substantial objections to the settlement terms or fees requested by counsel for the class by class members (it is, however, a court’s duty to scrutinize applications for fees, independently of any objection⁵¹²—in the appropriate case, a court has authority to award fees to an objector that assists the court in scrutinizing the settlement, the fee requests, or both;⁵¹³
- the skill and efficiency of the attorneys;
- the complexity and duration of the litigation;
- the risks of nonrecovery and nonpayment;

509. In *Brown*, the Tenth Circuit endorsed the use of the *Johnson* factors in determining a reasonable percentage fee. 838 F.2d at 454–55 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)). Similarly, the Eleventh Circuit instructed the district courts within that circuit to apply the *Johnson* factors plus other pertinent factors. *Camden I*, 946 F.2d at 775. In contrast, the Ninth Circuit established a 25% benchmark for such awards, subject to upward or downward adjustment “to account for any unusual circumstances involved in [the] case.” *Grauly*, 886 F.2d at 272. See also *In re RJR Nabisco, Inc. Sec. Litig.*, MDL No. 818, 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992) (“What should govern such awards is . . . what the market pays in similar cases.”).

510. See cases cited *supra* notes 500, 503 (*Strong, General Motors, Weinberger, and Bowling*). In *Strong*, the district court examined the actual value of telephone usage credits requested under the settlement and found them to be \$1.7 million, far below the parties’ valuation of \$64 million. *Strong*, 137 F.3d at 851. For approaches to reviewing and determining the value of in-kind settlements, see generally Note, *In-Kind Class Action Settlements*, 109 Harv. L. Rev. 810, 823–26 (1996). See also the Private Securities Litigation Reform Act, 15 U.S.C. §§ 77z-1(a)(6), 78u-4(a)(6) (2000) (fee award should not exceed a “reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class”).

511. Rule 23(e)(2); see *infra* section 21.631; Fed. R. Civ. P. 54(d)(2)(B).

512. *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328–29 (9th Cir. 1999). See *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 743–44 (3d Cir. 2001) (directing district court to evaluate the objector’s contribution to the ultimate fee and to award compensation to that extent); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1285 (S.D. Ohio 1996) (awarding \$105,037.46 to a public interest group that objected to the settlement and provided “extensive” and “invaluable” objections to the fee applications).

513. *In re Cendant Corp.*, 243 F.3d at 743–44.

- the amount of time reasonably devoted to the case by counsel; even where fees are to be awarded on a percentage-of-fund basis, some judges cross-check the percentage by conducting a modified lodestar analysis;⁵¹⁴ and
- the awards in similar cases.

Unlike a statutory-fee analysis, where the lodestar is generally determinative,⁵¹⁵ a percentage-fee award sometimes gives little weight to the amount of time expended. Attorneys' hours may be one of many factors to consider.⁵¹⁶ Indeed, one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation.⁵¹⁷ Generally, the factor given the greatest emphasis is the size of the fund created, because "a common fund is itself the measure of success . . . [and] represents the benchmark from which a reasonable fee will be awarded."⁵¹⁸

14.122 Lodestar-Fee Awards

Judges award attorney fees in some common-fund cases based on the lodestar or a combination of the percentage-of-fund and other methods. The lodestar is at least useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.⁵¹⁹

514. *See id.* at 735.

515. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *see also infra* section 14.122.

516. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988).

517. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338–39 (1980) (recognizing the importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk nonpayment); *Third Circuit 1985 Task Force Report*, *supra* note 480, at 248.

518. 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:6, at 547, 550 (4th ed. 2002). *See also Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Brown*, 838 F.2d at 456.

519. *See, e.g., In re Cendant Corp.*, 243 F.3d at 724, 742 (finding multipliers ranging from 1.35 to 2.99 in past years compared with a multiplier of 7–10 in a common-fund case in which counsel was selected by bidding); *cf. In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 947 (N.D. Ill. 2001) (criticizing the use of lodestar for cross-checking to reduce the fee of counsel selected by bidding).

When the fund is unusually large, the lodestar may be more appropriate than the percentage method.⁵²⁰ In these unique mega-cases, selection of percentage figures, even on a sliding scale, may be arbitrary because of the absence of comparable cases.⁵²¹ As with percentage fees, an award of attorney fees under the lodestar method should fairly compensate the attorney for the reasonable value of services rendered, given the circumstances of the particular case.⁵²²

The lodestar method may also be appropriate for distributing fees out of a common fund created to compensate attorneys, e.g., payment of lead counsel in a multidistrict consolidation or a nationwide settlement of mass tort litigation. Some cases may call for allocation of fees among different sets of plaintiffs' lawyers, such as those designated to serve on a steering committee (and entitled to compensation for that service) and those who represent individual plaintiffs. Because compensation directed to any group of attorneys will reduce the amount available to satisfy other contingent fee arrangements, the court should attempt to resolve conflicts between these groups in determining a fair allocation.⁵²³

The lodestar calculation begins with multiplying the number of hours reasonably expended by a reasonable hourly rate.⁵²⁴ The number of hours reasonably expended and the reasonable hourly rate must be supported by adequate records and other appropriate evidence; therefore, counsel intending to seek a fee award should maintain specific and adequate time records.⁵²⁵ Failure to keep contemporaneous time records may justify an appropriate reduction in

520. See *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1297 (9th Cir. 1994).

521. See, e.g., *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998) (indicating that hypothetical percentage-fee arrangements do not "provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding \$1 billion").

522. See *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

523. See *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603 (1st Cir. 1992).

524. *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983). A number of the additional factors set forth in *Johnson* will usually be subsumed in the determination of the reasonableness of the time spent and the hourly rate.

525. See, e.g., *In re Cont'l Ill. Sec. Litig.*, 572 F. Supp. 931, 934 (N.D. Ill. 1983) (requiring in a pretrial order that attorneys organize and report their time by activity, not by attorney), *rev'd on other grounds*, 962 F.2d 566 (7th Cir. 1992); see also Hirsch & Sheehy, *supra* note 466, at 103–04; Thomas E. Willging, *Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial 30–32* (Federal Judicial Center 1984) [hereinafter *Judicial Regulation*] (reporting outside attorneys' enthusiastic support for this aspect of the district judge's order).

the award.⁵²⁶ In especially large cases, consider seeking additional staff to review fee petitions and uncover duplicative, excessive, or unproductive efforts,⁵²⁷ or appointing a special master under Rule 54(d)(2)(D).

What constitutes a reasonable hourly rate varies according to geographic area and the attorney's experience, reputation, practice, qualifications, and customary charge. The rate should reflect what the attorney would normally command in the relevant marketplace.⁵²⁸ In exceptionally complex national litigation, the court should consider establishing a national rate for all the attorneys.⁵²⁹ Federal Rule of Civil Procedure 54(d)(2)(D) allows establishment of "special procedures to resolve fee issues without extensive evidentiary hearings." Such procedures might include "a schedule reflecting customary fees or factors affecting fees within the community."⁵³⁰

The lodestar figure may be adjusted, either upward or downward,⁵³¹ to account for several factors including, *inter alia*, the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues pre-

526. *Hensley*, 461 U.S. at 433. Some circuits require contemporaneous time records as a condition to an award of fees. See 5th Cir. R. 47.8.1 (absent contemporaneous records, fee based on minimum time necessary); *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983); *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319 (D.C. Cir. 1982).

527. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1319 (E.D.N.Y. 1985) (describing work of three temporary law clerks); *Hirsch & Sheehey*, *supra* note 466, at 114–15. For a study of the use of professional staff to review attorney fee vouchers and occasionally to negotiate budgets with attorneys, see Tim Reagan et al., *The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration* (Federal Judicial Center Apr. 2001) (unpublished report, on file with the Federal Judicial Center). See also Alan J. Tomkins & Thomas E. Willging, *Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts* (Federal Judicial Center 1986).

528. *Blum*, 465 U.S. at 895 ("[R]easonable fees' . . . are to be calculated according to the prevailing market rates in the relevant community . . ."); *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973).

529. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987) (holding that "in an exceptional multiparty case . . . public policy and administrative concerns call for the district court to be given the necessary flexibility to impose a national hourly rate when an adequate factual basis for calculating the rate exists"); cf. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 591 (3d Cir. 1984) (rejecting national rates as incompatible with a lodestar approach to fees). See also *Third Circuit 1985 Task Force Report*, *supra* note 480, at 261 (recommending use of national rates in exceptional cases).

530. Fed. R. Civ. P. 54(d)(2)(D) committee note (1993 amendments); see also *Third Circuit 1985 Task Force Report*, *supra* note 480, at 260–62 (advocating steps to create uniform district-wide fee schedules).

531. See *Conte & Newberg*, *supra* note 518, § 14:5, at 541–42.

sented, the risk of nonpayment,⁵³² and any delay in payment.⁵³³ Accurate computation requires an adjustment for the loss of the use of the money up to the time of the award,⁵³⁴ and perhaps an award of interest.⁵³⁵ Historic interest rates generally are a more accurate starting point than current rates,⁵³⁶ but it is permissible to use current rates as a rough approximation of the adjustment needed to compensate for delay in payment.⁵³⁷ Whether enhancements for the risks assumed by plaintiffs' attorneys are permissible in common-fund cases was unresolved as of publication of this manual.⁵³⁸

14.13 Statutory-Fee Cases

The analysis of attorney fees in a statutory-fee (or fee-shifting) case differs from that in a common-fund case.⁵³⁹ Shifting fees in a statutory-fee case serves the public policy of encouraging private enforcement of statutory or constitutional rights. Under most fee-shifting statutes, fees are available to a "prevailing party." In *Buckhannon*, the Supreme Court said a prevailing party is a party that has altered its legal relationship with its adversary through a judgment or consent decree entered by the court.⁵⁴⁰ (A litigant's status as the beneficiary of an out-of-court settlement, or as the beneficiary of an adversary's voluntary action mooting a case, does not by itself entitle that litigant to an award of at-

532. See *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994).

533. See generally *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), *appeal following remand*, 540 F.2d 102 (3d Cir. 1976). But see *Burlington v. Dague*, 505 U.S. 557 (1992) (barring use of multiplier in statutory-fee case). Some courts have held this bar to be inapplicable in common-fund cases. *In re Wash. Pub. Power*, 19 F.3d at 1299–1300.

534. *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989). For a comprehensive study of the *Jenkins* case and a case-based formula for achieving an integrated approach to the issues of pre-judgment and postjudgment interest, see Russell E. Lovell II, *Court-Awarded Attorneys' Fees: Examining Issues of Delay, Payment, and Risk* (1999).

535. *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

536. Lovell, *supra* note 534, at 88–92.

537. *Jenkins*, 491 U.S. at 283–84.

538. See *Burlington*, 505 U.S. at 561, 567 (no enhancement in statutory-fee cases).

539. See *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

540. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 604 (2001) ("enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989))).

torney fees as a prevailing party.⁵⁴¹) If the *Buckhannon* test has been met, the lodestar is the appropriate method to use in calculating a fee award.⁵⁴²

The lodestar calculation—reasonable hours multiplied by a reasonable rate—usually provides an appropriate estimate of the value of a lawyer’s services.⁵⁴³ Enhancements available in common-fund cases, such as for results obtained,⁵⁴⁴ novelty and complexity of the issues presented,⁵⁴⁵ and the contingent nature of the litigation, are not appropriate enhancements in a statutory-fee award case.⁵⁴⁶ Only in the rare statutory-fee award case may exceptional results or quality of representation warrant an upward adjustment.⁵⁴⁷ A delay in payment may be taken into account by applying current rates or factoring in an interest adjustment.⁵⁴⁸

A downward adjustment of the lodestar figure may be appropriate when the prevailing party achieves only “limited success.”⁵⁴⁹ Where the plaintiff recovers only nominal damages and no other indicia of success, for example, the court can award “low fees or no fees.”⁵⁵⁰ It is a good idea to examine not only the amount of recovery but also “the significance of the legal issue on which the plaintiff prevailed and the public purpose the litigation served.”⁵⁵¹ Courts

541. *Id.* at 605 (rejecting the claim that a plaintiff could be a prevailing party if its actions served as a catalyst for defendant to voluntarily change its allegedly illegal conduct).

542. *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (lodestar approach is the centerpiece of attorney fee awards).

543. *Pa. v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum*, 465 U.S. at 897.

544. *Blum*, 465 U.S. at 900 (“Because acknowledgment of the results obtained generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award.”).

545. *Id.* at 898–99 (novelty and complexity will be reflected either in an increase in the number of hours or, for especially experienced attorneys who would thus expend fewer hours, in an increased hourly rate).

546. *Burlington v. Dague*, 505 U.S. 557, 561, 567 (1992).

547. *Blum*, 465 U.S. at 898 (the quality of representation is usually reflected in an attorney’s hourly rate).

548. *Mo. v. Jenkins*, 491 U.S. 274, 283–84 (1989). *See also* *Pa. v. Del. Valley Citizens’ Council for Clean Air*, 483 U.S. 711 (1987); *see also supra* notes 533–37 and accompanying text.

549. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

550. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). “[T]he relevant indicia of success [are] the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served” *Id.* at 122 (O’Connor, J., concurring). *See also* *Phelps v. Hamilton*, 120 F.3d 1126, 1131–32 (10th Cir. 1997) (applying Justice O’Connor’s *Farrar* factors), and cases cited therein.

551. *Morales v. City of San Rafael*, 96 F.3d 359, 364–65 (9th Cir. 1996) (awarding fees because plaintiff’s nonmonetary success significantly advanced public purpose of deterring un-

have found public purposes in the deterrence arising from jury findings of liability,⁵⁵² in the broad applicability of nonmonetary relief,⁵⁵³ and in the public significance of the issues on which plaintiffs prevailed.⁵⁵⁴

Awards should not be more than an amount “reasonable in relation to the results obtained.”⁵⁵⁵ In public interest cases, however, the fact that the lodestar amount exceeded the damages awarded does not by itself justify adjusting the lodestar downward.⁵⁵⁶ In applying the lodestar, therefore, the court must consider counsel’s level of effort given the issues at stake, its degree of success in the litigation, including the public ramifications of any success, and the efficiency and economy with which it handled the litigation.

lawful arrests), *amended on other grounds on denial of hearing and reh’g en banc* 108 F.3d 981 (9th Cir. 1997).

552. *Brandau v. Kan.*, 168 F.3d 1179, 1183 (10th Cir.) (concluding that “while Plaintiff’s litigation did not achieve significant monetary benefits, it served a larger public purpose” of deterring future sexual harassment and putting defendant on notice about the need to educate its employees about sexual harassment), *cert. denied*, 526 U.S. 1133 (1999).

553. *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748 (2d Cir. 1998) (upholding fee award based on significance of injunction entered and jury finding of statutory civil rights violation).

554. *Phelps*, 120 F.3d at 1132 (examining “whether the judgment vindicates important rights and deters future lawless conduct”); *O’Connor v. Huard*, 117 F.3d 12, 18 (1st Cir. 1997) (basing fee award on vindicating rights of pretrial detainees despite \$1 damage award).

555. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). However, fees should not be reduced simply because the plaintiff was not successful on every contention in the litigation. *Id.* at 435. The “most critical factor is the degree of success obtained.” *Id.* at 436. *See also* *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790–91 (1989) (rejecting test that would focus on the “central issue” in the litigation); *Hirsch & Sheehey*, *supra* note 466, at 27–33.

556. *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (affirming award of \$245,456.25 in attorney’s fees in civil rights litigation in which plaintiff received \$13,300 in damages after prevailing against the city and police officers); *Morales*, 96 F.3d at 363–65 (ordering lodestar application where attorneys submitted bills totaling \$139,783.25 and jury had awarded damages of \$17,500); *see also* *Hirsch & Sheehey*, *supra* note 466, at 33–35.

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The judge should encourage agreement by the parties on the fee,⁵⁵⁷ but also should keep in mind the potential conflict of interest for the attorney seeking damages for the client and fees for itself.⁵⁵⁸ Also, an agreement will not be binding in a class-action settlement or other common-fund litigation.⁵⁵⁹ In many instances, there will be no agreement and the judge must determine the fees.

557. *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984); *Hensley*, 461 U.S. at 437. *See, e.g., White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 453–54 n.15 (1982); *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801–04 (3d Cir. 1995); *Cheng v. GAF Corp.*, 713 F.2d 886, 889–90 (2d Cir. 1983); *Mendoza v. United States*, 623 F.2d 1338, 1352–53 & n.19 (9th Cir. 1980); *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015, 1017 (3d Cir. 1977). *See also supra* section 13.24.

558. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 725, 728 n.14 (1986) (describing the attorney's duty to evaluate a settlement offer based on the client's interest without regard to the attorney's interest in obtaining a fee).

559. *See In re Gen. Motors Corp.*, 55 F.3d at 801–04 (examining adequacy of attorneys to represent settlement class); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 126–27 (1885); *see also infra* sections 21.6–21.7.

14.211 Selecting Counsel and Establishing Fee Guidelines

In class-action litigation—and generally in multidistrict consolidated litigation—the judge has the opportunity and the obligation to appoint counsel who will represent the beneficiaries of any common fund. See Rule 23(g). As discussed more fully in sections 21.27 (class actions) and 31.5 (securities class actions), judges have used four distinct approaches to the selection of counsel: (1) reviewing the recommendations of lawyers who have filed related actions and appointing the recommended lawyers if they are adequate to represent the interests of the class (“private ordering”); (2) selecting among counsel who have filed related actions but are unable to reach an agreement and who compete for the appointment; (3) inviting bids from counsel who may or may not have filed a related action (“competitive bidding”); and (4) allowing the most adequate plaintiff to select counsel, subject to review by the court (“empowered-plaintiff” approach)—this technique is mandated by the Private Securities Litigation Reform Act for securities class actions. See section 31.31.⁵⁶⁰ There will frequently be a number of law firms interested in serving as lead counsel, so judicial involvement is often necessary in selecting counsel and setting guidelines for future fee applications in the case.⁵⁶¹ Procedures for selection or designation of counsel in class-action settings pursuant to Rule 23(g) are discussed in section 21.27, which also presents criteria and procedures that courts have used in considering selection of counsel by competitive bidding.⁵⁶²

There are alternatives to bidding. A discussion about fees at an early stage of the litigation can simulate the type of uncertainty a client faces in negotiating a fee.⁵⁶³ Judges should consider advising the parties at the outset of the litigation about the method to be used for calculating fees and, if using the percentage method, about the likely range of percentages.⁵⁶⁴ At an early conference or in an early pretrial order after consultation with counsel, it is helpful to es-

560. Pub. L. No. 104-67, § 27(a)(3)(B)(v), 109 Stat. 737, 740 (codified as amended at 15 U.S.C. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v) (2000)).

561. See, e.g., *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720–21 (7th Cir. 2001) (calling for district courts to use competitive bidding or other *ex ante* procedures to approximate a market rate for legal services in a class action).

562. For a discussion of the bidding process, see *Third Circuit 2001 Task Force Report*, *supra* note 487; Symposium, *Third Circuit Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 685 (2001); Hooper & Leary, *supra* note 493.

563. See *In re Synthroid*, 264 F.3d at 718 (remanding a case in which the district court had used a percentage method and indicating that “[t]he best time to determine [a market] rate is the beginning of the case”).

564. Some judges have reported success using this approach. See Hirsch & Sheehy, *supra* note 466, at 100–01 & n.444.

establish guidelines and procedures that will lighten the burdens on the participants, clarify expectations, and reduce the opportunities for disputes.⁵⁶⁵ Matters such as those discussed in the following paragraphs should be covered. Although most of these factors are relevant primarily to the lodestar method, they may aid in regulating percentage awards as well. Judges have an independent duty to review fees and specifically determine if they are reasonable, applying traditional legal tests.⁵⁶⁶

14.212 Staffing

A major issue in determining fees is the appropriate level of staffing for the particular litigation. Consider setting at least presumptive guidelines at the outset of the litigation, after discussion with counsel. Some judges find that appointing a single law firm, not a committee, to represent the class helps to keep fees reasonable. Setting guidelines at the outset, subject to revision, can reduce the potential for later conflict and facilitate judicial review of fee applications. Guidelines can cover the number of attorneys who may charge for time spent attending depositions, court hearings, office and court conferences, and trial.⁵⁶⁷ Guidelines may also caution against using senior attorneys on projects suitable for less senior (and less costly) attorneys.⁵⁶⁸ Finally, guidelines may set forth the range of hourly charges for particular attorneys on the case and permissible charges for travel time.⁵⁶⁹ In setting such guidelines, there is a need for some symmetry between the staffing levels of plaintiffs and defendants.

565. See *In re Cont'l Ill. Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983) (pretrial order establishing fee guidelines and record-keeping responsibilities), *rev'd on other grounds*, 962 F.2d 566 (7th Cir. 1992); Hirsch & Sheehey, *supra* note 466, at 97–98, 109–111; Judicial Regulation, *supra* note 525, at 11–34 (presenting attorneys' reactions to the pretrial order concerning fees in the *Continental Illinois* litigation); Administrative Order re Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases (Bankr. S.D.N.Y. June 24, 1991), *reprinted in* 3 Bankr. Local Ct. R. Serv. (CBC) N.Y., 98.14–98.19 (1996). See also Bennett Feigenbaum, *How to Examine Legal Bills*, 177 J. Acct. 84 (May 1994) (listing criteria for testing reasonableness).

566. See generally *Cendant Corp. Prides Litig.*, 243 F.3d 722 (3d Cir. 2001), and cases cited therein.

567. See, e.g., *In re Cont'l Ill.*, 572 F. Supp. at 933–34 (emphasizing individual responsibility and establishing staffing guidelines for depositions and legal research and criteria for compensating document review); see also Judicial Regulation, *supra* note 525, at 15–26.

568. *In re Cont'l Ill.*, 572 F. Supp. at 933 (directing that “[s]enior partner rates will be paid only for work that warrants the attention of a senior partner”).

569. *Id.* at 934 (travel limited; airfare to be reimbursed at tourist rates).

14.213 Maintaining Adequate and Comprehensible Records

Complete time records are critical when fees are based on a lodestar and are advisable in any large litigation. Such records may be used as a cross-check on the percentage-of-fund method. Sometimes, however, these records may be too voluminous for effective judicial analysis. The judge should address this issue early in the case by directing counsel to develop record-keeping procedures to facilitate review.⁵⁷⁰ Counsel should maintain contemporaneous records that show the name of the attorney, the time spent on each discrete activity, and the nature of the work performed. Consider recommending that attorneys use computer programs to facilitate analysis of billings and of fee requests. Agreed-on forms of summaries may be used to achieve similar results.

14.214 Submission of Periodic Reports

Some judges require periodic reports in anticipation of an award at the end of the litigation (it may be necessary to submit some of the information under seal or *in camera*).⁵⁷¹ This practice encourages lawyers to maintain records adequate for the court's purposes and enables the court to spot developing problems. Periodic review of time charges sometimes leads the judge to establish a tentative budget for the case, acceptable billing ranges for attorneys, or at least limits on recoverable fees for particular activities.

14.215 Compensation for Designated Counsel

Lead and liaison counsel may have been appointed by the court to perform functions necessary for the management of the case but not appropriately charged to their clients. Early in the litigation, the court should define designated counsel's functions, determine the method of compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions. Guidelines should cover staffing, hourly rates, and estimated charges for services and expenses.

570. For a discussion of various approaches that judges use to accomplish this goal, see Hirsch & Sheehey, *supra* note 466, at 103–05. See also Judicial Regulation, *supra* note 525, at 30–32.

571. See Hirsch & Sheehey, *supra* note 466, at 104–05.

14.216 Reimbursement of Expenses

Rules and practices vary widely with respect to reimbursement of lawyers' expenses out of the fee award.⁵⁷² Charges for paralegals and law clerks at market rates⁵⁷³ and the fees of necessary experts are generally reimbursable while secretarial assistance is not. Courts have differed over whether overtime is reimbursable, as well as such items as computer-assisted legal research, copy and printing costs, certain meals and travel, and fax, telephone, and delivery charges. The court should establish ground rules at the outset for determination of such claims.

In some litigation, parties may incur substantial costs for various litigation support or services, such as special computer installations, costly expert services, or elaborate trial exhibits or demonstrations. Counsel who expect to treat such items as reimbursable expenses or taxable costs should advise the court and opposing counsel and obtain clearance before incurring the expenses. This should also be done when there are questions relating to taxation of costs.

14.22 Motion for Attorney Fees

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14.221 Contents of the Fee Motion

Federal Rule of Civil Procedure 23(h) establishes procedures in class actions for ruling on motions for attorney fees, notifying the class, holding hearings, making findings, and using special masters or magistrate judges to assist in the process. See generally section 21.72. In non-class-action cases, Rule 54(d)(2) and any rules specifying the requirements of motions for fees in other cases should be the primary source of procedures governing fee motions. If counsel is advised early in the case of the possibility of departure, they can prepare and maintain records that will facilitate the later preparation of the motion. The judge should give timely notice to counsel of a decision to bifurcate the determination of liability for fees from that of the amount under Rule 54(d)(2)(C).

Where multiple counsel in the case expect to submit separate fee motions, consider requiring them to coordinate their submissions, avoid duplication,

572. See generally 1 Alba Conte, *Attorney Fee Awards* §§ 2.19, 4.41–4.43 (2d ed. 1993 & Supp. Nov. 2002) (discussing cost reimbursement in common-fund and statutory-fee cases).

573. *Mo. v. Jenkins*, 491 U.S. 274, 288 (1989).

and perhaps attempt to resolve disputes among themselves before submission. Lead counsel can be made responsible for overseeing this process.⁵⁷⁴

14.222 Timing

For nonclass litigation, Rule 54(d)(2)(B) requires that motions for attorney fees be filed and served no later than fourteen days after entry of judgment unless otherwise provided by statute or order of the court. Prompt filing of the motion gives the opponent and other interested parties notice of the claim before the time for appeal has expired, affords the court an opportunity to rule on the application while the services are still fresh in mind, and allows an appeal to be taken at the same time as an appeal on the merits.

Although such motions are ordinarily made at the end of the case, an interim award of fees and expenses will sometimes be appropriate.⁵⁷⁵ For discussion of the Rule 23(h)(1) requirement that notice of a motion for attorney fees in a class action be given to class members, see section 21.722.

14.223 Supporting Documentation and Evidence

In advance of any fee-award hearing, counsel should submit time and expense records, to the extent not previously submitted with the motion and in manageable and comprehensible form, to encourage parties to reach agreements where possible and to streamline the hearing. Where different claims were litigated, the records should identify the claims to which particular services relate.⁵⁷⁶ Counsel should also submit the evidence on which they will rely in urging particular rates for certain lawyers, or a particular percentage when that method is to be used. The direct testimony of witnesses in support of the application can be in the form of declarations, with the witnesses available at the hearing for cross-examination if requested.⁵⁷⁷

574. For a description of one district judge's approach to using lead counsel to coordinate interim and final submissions of multiple requests for fees, see Hirsch & Sheehey, *supra* note 466, at 117.

575. See *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790–92 (1989).

576. *Hensley v. Eckerhart*, 461 U.S. 424, 437 & n.12 (1983).

577. See generally Charles Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony To Be Submitted in Written Form Prior to Trial*, 72 *Geo. L.J.* 73 (1983). For a discussion about applying this technique to fee hearings, see Hirsch & Sheehey, *supra* note 466, at 107–08.

In class actions, all agreements or understandings made in connection with a settlement must be described in writing and may have to be disclosed.⁵⁷⁸ See section 21.725. In any type of case, the judge may wish to direct the movant to disclose any agreement with a client in which the terms deal with “fees to be paid for the services for which the claim is made.”⁵⁷⁹

14.224 Discovery

For discussion of discovery regarding fee requests in class actions, see section 21.724. Discovery in connection with fee motions should rarely be permitted, but may be advisable where attorneys make competing claims to a settlement fund designated for the payment of fees.⁵⁸⁰ With appropriate guidelines and ground rules, the materials submitted should normally meet the needs of the court and other parties. If a party or an objector to a settlement requests clarification of material submitted in support of the fee motion, or requests additional material, the court should determine what information is genuinely needed and arrange for its informal production.

14.23 Judicial Review/Hearing and Order

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14.231 Judicial Review

Exacting judicial review of fee applications, burdensome though it may be, is necessary to discharge the obligation to award fees that are reasonable and consistent with governing law. In common-fund litigation, class counsel may be competing with class members for a share of the fund, thus placing a special fiduciary obligation on the judge because class members are unrepresented as

578. Fed. R. Civ. P. 23(e)(2) & committee note; *see also* Smiley v. Sincoff, 958 F.2d 498, 501 (2d Cir. 1992) (discussing the district court’s power to review and invalidate private fee agreements); *In re* “Agent Orange” Prod. Liab. Litig., 818 F.2d 216, 218, 222–24 (2d Cir. 1987); 7B Charles Alan Wright et al., *Federal Practice & Procedure Civil 2d* § 1803 (Supp. 2002) (discussing *Agent Orange*). *But see* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (counsel free to divide lump sum award as they see fit without disclosure). *See generally supra* section 13.23 (full disclosure of all side agreements must be made to the court in presenting a related settlement agreement for judicial approval).

579. Fed. R. Civ. P. 54(d)(2)(B).

580. *See In re* Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 614 n.20 (1st Cir. 1992) (discovery not required, but is one way to afford competing claimants due process). *See also* Fed. R. Civ. P. 23(h)(2) committee note (“If the motion provides thorough information, the burden should be on the objector to justify discovery . . .”).

to this issue.⁵⁸¹ If there are no objectors to the fee request, consider whether to appoint counsel to represent the class on this issue, balancing the additional cost an appointment will likely entail against the possible benefit to the class.⁵⁸²

Standards for reviewing common-fund attorney fee requests are discussed in section 14.12, and standards for reviewing statutory attorney fee requests are discussed in section 14.13. The following is a summary of several techniques judges have developed to expedite the review process, primarily relevant to application of the lodestar approach:

- *Establishing at the outset of the case the method of compensation and, if possible, any percentage formula that will be used.* Innovative methods used in this connection have included competitive bidding procedures for the selection of class counsel⁵⁸³ and appointment of an outside attorney to negotiate a fee arrangement for the class.⁵⁸⁴
- *Sampling.* The judge can select certain blocks of time, at random, examining them closely to determine the reasonableness of the hours charged and apply the results to the entire fee application by extrapolation.⁵⁸⁵
- *Evaluating the request in light of a budget submitted by counsel at the beginning of the case.*⁵⁸⁶ Counsel must justify substantial departures from the budget.
- *Using computer programs to facilitate analysis of fee requests.*⁵⁸⁷ See section 14.213.
- *Having defendants submit billing records.* Records showing defendants' attorney fees may provide a reference for determining the reasonableness of fees where defendants oppose plaintiff's counsel's fee request.⁵⁸⁸

581. *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 730–31 (3d Cir. 2001); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994).

582. *In re Wash. Pub. Power*, 19 F.3d at 1302.

583. *See supra* section 14.211.

584. *See Third Circuit 1985 Task Force Report, supra* note 480, at 256; *see also* Hirsch & Sheehey, *supra* note 466, at 101 n.444.

585. *Evans v. City of Evanston*, 941 F.2d 473, 477 (7th Cir. 1991) (approving the sampling technique employed as reasonable); *see also* Hirsch & Sheehey, *supra* note 466, at 96–97 (reporting interviews with judges who have used sampling).

586. Hirsch & Sheehey, *supra* note 466, at 97–98.

587. *Id.* at 101–02. A bankruptcy judge reported creating and maintaining a database of local attorney billing rates, which she shares with other judges. *Id.* at 102.

588. *Id.* at 105–06.

- *Delegating discrete tasks to law clerks and secretaries.* Law clerks can compare the billing request with the product of the billing as shown in the case file.⁵⁸⁹
- *Using magistrate judges, special masters, or experts.*⁵⁹⁰ Before calling on outside assistance, the judge should take all reasonable steps to simplify and streamline the process. The trial judge has a familiarity with the case that cannot be matched by any judicial adjunct.

14.232 Hearing and Order

Rule 54(d)(2)(C) requires the court, on request of a party or class member, to “afford an opportunity for adversary submissions with respect to [a] motion” for attorney fees. An evidentiary hearing may be required in some cases, but Rule 54(d)(2)(D) permits the court to “establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings.” Due process may require affording claimants a meaningful opportunity to be heard concerning competing applications for fees payable from a common fund.⁵⁹¹ A hearing must be held in a class action in which a settlement would bind the class,⁵⁹² and that hearing should ordinarily encompass attorney fee petitions. If a hearing is anticipated, the judge should hold a preliminary conference to narrow the issues and resolve as many disputes as possible. Techniques to expedite bench trials should be used, such as exchange and submission of direct testimony subject to cross-examination of the witness at the hearing when requested (see section 12.51).⁵⁹³

Rule 54(c)(2)(C) requires the court to “find the facts and state its conclusions of law as provided in Rule 52(a)” and to issue its judgment in a separate document under Rule 58. The order, which should be made public, must “provide a concise but clear explanation of its reasons for the fee award.”

589. *Id.* at 114–15.

590. Fed. R. Civ. P. 54(d)(2)(D). *But see* Estate of Connors v. O’Connor, 6 F.3d 656, 658–59 (9th Cir. 1993) (magistrate judge cannot enter final, appealable order). *See also* Hirsch & Sheehy, *supra* note 466, at 107 (discussing threat to appoint auditor to resolve fee dispute at the loser’s expense), 115–17 (discussing use of magistrate judges, special masters, experts, and settlement judges in managing fee applications).

591. *In re* Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 616 (1st Cir. 1992). For discussion of the hearing procedures for class-action settlements, see *infra* section 21.634.

592. Fed. R. Civ. P. 23(e)(1)(C) (requiring a hearing before approving a settlement, voluntary dismissal, or a compromise that would bind class members).

593. *See In re* Fine Paper Antitrust Litig., 751 F.2d 562, 572 (3d Cir. 1984).

15. Judgments and Appeals

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15.1 Interlocutory Appeals

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- .12 Proceedings While Appeal Pending 212

15.11 When Permitted

The principal occasions on which an appellate court may permit interlocutory appeal are these:

- *Orders granting, continuing, modifying, dissolving, or refusing to dissolve or modify injunctions.* Appeals as of right from such orders are authorized by 28 U.S.C. § 1292(a)(1),⁵⁹⁴ and an appellate court may treat an order as an injunction even if the district court has labeled it otherwise.⁵⁹⁵ Interlocutory appeals are also authorized from certain orders relating to receiverships and decrees in admiralty. An interlocutory order that merely has the practical *effect* of denying an injunction is appealable as of right under 28 U.S.C. § 1292(a)(1) upon a showing that the order would have “serious, perhaps irreparable” consequences and can be effectively challenged only by appeal.⁵⁹⁶ Section 1292(a)(1) generally does not, however, permit interlocutory appeals from orders granting or refusing to grant stays.⁵⁹⁷ Failure to take an interlocutory

594. 28 U.S.C. § 1291 (West 2002).

595. *Sierra Club v. Marsh*, 907 F.2d 210, 214 (1st Cir. 1990); *Cohen v. Bd. of Trs.*, 867 F.2d 1455, 1466 (3d Cir. 1989) (en banc). *See also* *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1277 (3d Cir. 1991) (to be deemed an injunction, order must be directed to party, enforceable by contempt, and designed to protect some or all of the substantive relief sought).

596. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). *See also* *Gulfstream Aerospace Corp. v. Maycamas Corp.*, 485 U.S. 271, 287–88 (1988); *Sierra Rutile, Ltd. v. Katz*, 937 F.2d 743, 749 (2d Cir. 1991). Under Title 9, an order refusing a stay to permit arbitration pursuant to a written arbitration agreement is immediately appealable, but one granting such a stay is not. 9 U.S.C. §§ 16(a)(1)(A), 16(b)(1) (2000).

597. *Gulfstream*, 485 U.S. at 279–88 (overruling the *Enlow-Ettleson* doctrine).

appeal does not waive the right to appeal an order after final judgment.⁵⁹⁸

- *Orders not otherwise appealable that “involve a controlling question of law as to which there is substantial ground for difference of opinion . . . [if] an immediate appeal from the order may materially advance the ultimate termination of the litigation.”*⁵⁹⁹ Some judges give a party an opportunity to seek interlocutory review of an order by issuing a written order finding that this standard is met. Such an order should clearly articulate the reasons and factors underlying the court’s decision.⁶⁰⁰ The court of appeals has discretion to hear or decline the appeal.⁶⁰¹ Adopted with complex litigation in mind,⁶⁰² 28 U.S.C. § 1292(b) provides a mechanism for obtaining early review of crucial orders where an appellate ruling may simplify or shorten the litigation.⁶⁰³ Examples include orders certifying or refusing to certify a class or allocating the cost of notice, granting or denying motions disposing of pivotal claims or defenses, finding a lack of subject-matter jurisdiction,⁶⁰⁴ or determining the applicable substantive law. The appellant has ten days from entry of the district court’s order to petition the court of appeals for permission to appeal.⁶⁰⁵
- *Orders constituting a clear abuse of discretion in circumstances where the court’s legal duty is plainly established.* Review may be available by way of extraordinary writ.⁶⁰⁶ Appellate courts grant these writs rarely, limiting them to situations where the trial court has clearly committed le-

598. See, e.g., *Clark v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 924 F.2d 550, 553 (4th Cir. 1991). The issue may, of course, become moot after final judgment.

599. 28 U.S.C. § 1292(b) (West 2002).

600. *Metro Transp. Co. v. N. Star Reinsurance Co.*, 912 F.2d 672, 677 (3d Cir. 1990).

601. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (appeal may be denied for any reason, including docket congestion).

602. See 16 *Wright et al.*, *supra* note 578, § 3929.

603. See, e.g., *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1016 (5th Cir. 1992) (orders defining class and class issues, designating class representatives, and setting a class trial plan), *reh’g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh’g*, 53 F.3d 663 (5th Cir. 1994) (case settled before rehearing).

604. See *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991) (order remanding cases to state court upon finding that the federal statute providing federal jurisdictional predicate was unconstitutional).

605. 28 U.S.C. § 1292(b) (West 2002); Fed. R. App. P. 5(a). Failure to meet this deadline is a jurisdictional defect and is strictly enforced. See, e.g., *Tranello v. Frey*, 962 F.2d 244, 247–48 (2d Cir. 1992).

606. See 28 U.S.C. § 1651 (West 2002); Fed. R. App. P. 21.

gal error, and a party is entitled to relief but cannot obtain it through other means.⁶⁰⁷ Writs have been granted to require that a demand for trial by jury be honored,⁶⁰⁸ to vacate orders restricting communications with class members,⁶⁰⁹ to uphold claims of sovereign immunity,⁶¹⁰ to vacate orders appointing special masters,⁶¹¹ and to enforce claims of privilege⁶¹² or work-product protection.⁶¹³ A writ may be sought as an alternative ground for interlocutory review where review is denied under section 1292(b).⁶¹⁴

- *Collateral orders that finally determine claims separable from rights asserted in the action and that would be effectively unreviewable on appeal from final judgment.* Under the “collateral order” doctrine, certain nonfinal orders may be considered final decisions for purposes of 28 U.S.C. § 1291.⁶¹⁵ Examples are orders denying immunity,⁶¹⁶ preventing intervention,⁶¹⁷ or modifying a protective order.⁶¹⁸ Courts have construed this doctrine narrowly.⁶¹⁹ As an alternative, a writ may be

607. *Kerr v. United States Dist. Court*, 426 U.S. 394, 402–03 (1976).

608. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

609. *See, e.g., Coles v. Marsh*, 560 F.2d 186 (3d Cir. 1977).

610. *See, e.g., Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).

611. *See, e.g., La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

612. *Jenkins v. Weinshienk*, 670 F.2d 915 (10th Cir. 1982); *Rowley v. Macmillan*, 502 F.2d 1326 (4th Cir. 1974); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff’d per curiam*, 400 U.S. 348 (1971).

613. *See, e.g., Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984).

614. *See, e.g., In re Cement Antitrust Litig.*, 673 F.2d 1020 (9th Cir. 1982) (judge’s recusal reviewable by mandamus, but not under section 1292(b)), *aff’d under 28 U.S.C. § 2109 sub nom. Ariz. v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983).

615. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (order directing defendants to bear part of cost of class notice held immediately appealable).

616. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993); *Mitchell v. Forsyth*, 472 U.S. 511, 524–30 (1985).

617. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987).

618. *See Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (cases cited therein).

619. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (order denying class certification held not immediately appealable). Mindful of the constraints of *Coopers*, appellate courts have declined to review interlocutory orders restricting communications with class members, *Lewis v. Bloomsburg Mills, Inc.*, 608 F.2d 971 (4th Cir. 1979), awarding interim attorneys’ fees, *Hillery v. Rushen*, 702 F.2d 848 (9th Cir. 1983), directing class counsel to create a list of class members at their own expense, *Judd v. First Federal Savings & Loan Ass’n*, 599 F.2d 820 (7th Cir. 1979), and transferring the action to another district court because of a forum selection clause,

sought.⁶²⁰ It is unclear whether the right to appeal a collateral order is lost if the appeal is not taken immediately.⁶²¹

- *Orders granting or denying class action certification.* See section 21.28.
- *Where a claim has been resolved while others remain pending, or the rights or liabilities of one party have been determined while others remain in the litigation.* Review may be available under Federal Rule of Civil Procedure 54(b) if the district court, in its discretion, makes “an express determination that there is no just cause for delay” and has given “an express direction for the entry of judgment.” The order should state the court’s reasons. The district court has discretion to direct entry of judgment only for those decisions that are “final” within the meaning of 28 U.S.C. § 1291.⁶²² Unlike 28 U.S.C. § 1292(b), Rule 54(b) does not provide for certification of issues.⁶²³ Once judgment has been entered and the certification made, the party affected must perfect its appeal or it is waived.⁶²⁴ A Rule 54(b) appeal with respect to a particular party or a discrete claim may be appropriate to speed the final resolution of the litigation. On the other hand, such appeals sometimes result in duplication of work for the court of appeals by having to hear separate appeals on the same or similar issues.⁶²⁵
- *Reference of controlling questions of state law to a state appellate court.* A number of state appellate courts entertain references from federal courts of unsettled questions of state law.

Nascone v. Spudnuts, 735 F.2d 763 (3d Cir. 1984). *But cf.* *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983) (order refusing to enforce contractual forum selection clause held immediately appealable). For cases on interlocutory appeals of orders on motions to disqualify counsel, see *supra* note 71.

620. Some appellate courts will treat appeals outside the scope of the collateral order doctrine as petitions for special writs. *See, e.g.*, *Cheyney State Coll. Faculty v. Hufstedler*, 703 F.2d 732, 736 (3d Cir. 1983) (discretionary with court of appeals).

621. *See* *Exc. Nat’l Bank v. Daniels*, 763 F.2d 286, 290–92 (7th Cir. 1985).

622. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742–44 (1976); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437–38 (1956).

623. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 443 (3d Cir. 1977).

624. *See, e.g.*, *Local P-171, Amalgamated Meat Cutters & Butchers Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1071 n.7 (7th Cir. 1981).

625. *See* *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co.*, 351 U.S. at 441–44 (Frankfurter, J., dissenting).

15.12 Proceedings While Appeal Pending

An interlocutory appeal, whether by right or by permission, does not ordinarily deprive the trial court of jurisdiction except with respect to the matter that is the subject of the appeal.⁶²⁶ Notwithstanding the pendency of an interlocutory appeal, the litigation usually proceeds as scheduled through discovery and other pretrial steps toward trial. However, depending on the nature of the issue before the appellate court, it may be appropriate for the trial judge to suspend some portion of the proceedings or alter the sequence in which further activities in the litigation are conducted.

15.2 Entry of Final Judgment

Federal Rule of Civil Procedure 58 directs the district judge to set forth the final judgment on a separate document identified as such, separate from any order, memorandum, or opinion. If the final judgment will run to several pages, consider preparing for signature a single cover sheet that refers to and adopts the provisions set forth in an attached appendix. The judgment is effective only when entered by the clerk in accordance with Rule 79(a).⁶²⁷ The time for appeal does not begin to run until the conditions set by Rules 58 and 79(a) have been met.⁶²⁸ Though notice of the entry is not required to start the time for appeal running,⁶²⁹ failure to receive notice may support such a motion for reopening the time to appeal.⁶³⁰ Prevailing parties should therefore send their own notice as a supplement to that expected from the clerk.⁶³¹ A notice filed before disposition of such motion becomes effective upon the motion's disposition.⁶³² The pendency of a motion for costs or attorneys' fees tolls the time to appeal if the court on timely application delays entry of the underlying judgment.⁶³³

If a party timely files a motion under Rule 50(b) for judgment as a matter of law, under Rule 52(b) to amend or make additional findings of fact, or under Rule 59 for a new trial or to amend the judgment, the time to appeal runs

626. See *Taylor v. Sterrett*, 640 F.2d 663, 667–68 (5th Cir. 1981); 19 James Wm. Moore et al., *Moore's Federal Practice* § 203.11 (3d ed. 1997).

627. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978).

628. Fed. R. App. P. 4(a)(7); *United States v. Indrelunas*, 411 U.S. 216 (1973).

629. See Fed. R. App. P. 4(a)(1).

630. See Fed. R. App. P. 4(a)(6).

631. See Fed. R. App. P. 4(a)(6) committee note.

632. See Fed. R. App. P. 4 committee note on the 1993 amendments.

633. See Fed. R. Civ. P. 58 committee note.

instead from entry of the order denying a new trial or granting or denying any of the other motions.⁶³⁴ These postjudgment motions should, therefore, be acted on promptly. Postjudgment motions may affect the appealability of other cases consolidated for trial.

The final judgment in a class action must describe the class with sufficient specificity to identify those bound by the decision.⁶³⁵ In actions maintained under Rule 23(b)(3), the court should compile—and refer in the judgment to—a list that identifies the persons who were sent individual notice and did not timely elect to be excluded from the class.

15.3 Disposition of Materials

Most courts by local rule or order direct or permit the parties, after the time for appeal has expired, to remove many of the documents and other exhibits.

The parties, however, may need those materials—often gathered or compiled at great expense—in other litigation, pending or not. Therefore, the court should be reluctant to authorize immediate destruction of documents and other exhibits. Items permitted to be withdrawn from the court should usually be retained by the parties for a reasonable period of time so that, if shown to be needed in other litigation, they can be produced without undue expense or delay.

634. Fed. R. App. P. 4(a)(4).

635. Fed. R. Civ. P. 23(c)(3).

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