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April 1988

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CONDUCTING COURT PROCEEDINGS BY TELEPHONE

Sometimes in the search for innovative techniques, simple and seemingly routine measures for achieving cost and time savings are overlooked. For instance, in the midst of taking a deposition, the attorneys might disagree as to the appropriateness of a series of questions. Rather than adjourning, a conference call is placed to the judge, arguments are made, and a ruling or a motion to compel is provided allowing the deposition to continue. Or, an unscheduled pretrial conference might be deemed necessary and one of the lawyers is in trial in another court in the city. Rather than delaying until a time convenient to all can be arranged, a multi-party telephone call is set up, issues are discussed, and a change in the trial schedule is averted. These are just two examples of how conducting court proceedings through conference telephone hook-up is rapidly gaining acceptance and use as an effective technique of case management.

Some courts designate certain matters to be heard routinely by telephone conference and set aside a regular time for conducting telephone proceedings. In other courts, the appropriateness or necessity of a telephone conference is decided on a case-by-case basis. Whether routine or periodic, if the telephone conference has been scheduled in advance, the call is placed by court personnel and the judge is notified when all parties are on the line. If a telephone conference has not been prescheduled--for instance, when a judge has an unexpected break in his agenda or spots a problem that needs to be dealt with quickly--the judge may simply have the parties called to determine whether they are amenable to holding a telephone conference at that time.

Once the conference is under way, the procedures are similar to those for an in-person appearance, except that the parties are told to identify themselves prior to making a statement. When appropriate, the court reporter makes a record of the proceeding. A speaker phone at the judge's station facilitates reporting by a court reporter and the participation of the courtroom deputy and parties who have chosen to appear in person. Judges who set aside a specific time for a number of phone conferences may find two phones useful. While one conference is being conducted, the calls for the next conference can be placed, thereby saving the judge the time consumed during placement of calls.

GSA offers two services for placing conference calls. The National Conference Service, which is available in all locations, can connect up to twenty-eight phones. This service, provided through the national conferencing operator (FTS 245-3333), is more cost-effective when there are at least six parties on the line. The Local Conference Service, which is available in many, but not all locations, can connect up to five locations within the contiguous United States. The local FTS operator can

provide this service. Interested judges should contact FTS and telephone company representatives to determine the availability of these services in their locations.

In addition to the benefits to the courts, the savings in costs to litigants produced by telephone conferencing can be substantial. An informal study of telephone conference calls conducted by Chief Judge Robert F. Peckham in the Northern District of California indicated that litigants whose counsel are located in the same city as the court can potentially save 50 percent of costs, with even greater savings possible for litigants with out-of-town counsel.

Further information and materials on this subject, including an article on the use of teleconferencing in the federal district courts, are available through the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005. Also, Chief Judge Robert F. Peckham (N.D. Cal.) (FTS 556-5646) and Chief Judge Alfred L. Luongo (E.D. Pa.) (FTS 597-0736) may be contacted by interested colleagues about their experiences with teleconferencing.

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Federal Judicial Center

June 1983 Vol. 1, No. 2

"FIRST FRIDAY" -- LITIGANT AND WITNESS ORIENTATION

Most lawyers, even if their court appearances are infrequent, are familiar with federal courtroom personnel and trial procedures. Similarly, federal jurors possess a familiarity with the court staff and processes through means of an orientation process which includes not only instructions but also films and booklets. However, for most individual litigants and witnesses, this will be their first and only appearance in federal court. Lack of knowledge as to what to expect or as to what may be expected of them may render the experience a frightening and overwhelming one and, thus, may result in litigants and witnesses giving a poor account of themselves.

In recognition of this problem and its potential consequences and in an effort to preserve the appropriate formality and dignity of the court, a technique has been developed that provides litigants and witnesses with an opportunity to become acquainted with courtroom proceedings in advance of the actual trial.

Approximately ten days prior to the first Friday of each month, a letter (reproduced below) is mailed to the lawyers whose cases appear on the civil trial list for the upcoming month. The letter extends an invitation to the lawyers to attend an informal orientation session with their respective clients and witnesses; attendance is optional. The trial judge, appearing without his robe, conducts these "First Friday" sessions from a lectern in front of the bench. At these sessions, which usually run for approximately thirty minutes, the trial judge introduces the courtroom deputy, the court reporter, and the law clerks; explains the functions of these individuals; and notes their location in the courtroom. The "First Friday" sessions provide a forum in which the trial process is succinctly described and the participants are advised of the roles and responsibilities of opposing counsel. They are assured that the court will not suffer harrassing or embarrassing tactics by a cross-examining lawyer. Questions are also invited from the participants, but they are informed from the outset that individual cases will not be discussed.

Dear Counsel:

> There is reason to believe that litigants and witnesses faced with an appearance in the federal court for the first time view the experience with great apprehension. All too often, their only contact with courts has been the movies and television. In an effort

to explain what is involved in the court itself, I propose to meet informally _____ at _____ P.M. in the courtroom with those litigants and witnesses whose cases will be tried during the month of _____. I will introduce the Courtroom Deputy, the Court Reporter and my law clerks and explain their function. I will describe the trial process and assure them that they will be neither harassed nor embarrassed by a cross-examining attorney. I will answer questions, but I will not, under any circumstances, discuss the individual cases.

This is completely optional. If you think it would be helpful, you may so advise your client and your witnesses. You are not obligated to be present, but if you have not appeared frequently in federal court, you might find it useful.

I would welcome your comments and suggestions about this procedure.

Very sincerely yours,

United States District Court

* * * *

For further information, Chief Judge Carl B. Rubin (S.D. Ohio) (FTS 684-3297) may be contacted by interested colleagues about his experience with this orientation technique.

Chambers to Chambers

Federal Judicial Center

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TRIAL TRANSCRIPTS: SAYING NO TO PREMATURE REQUESTS

Trial courts receive numerous requests from prisoners and other indigent petitioners to be provided with copies of trial transcripts and other documents. Such requests are made pursuant to 28 U.S.C. § 753(f) which provides that fees for trial transcripts furnished in proceedings arising under 28 U.S.C. § 2255 by persons permitted to sue or appeal in forma pauperis are to be paid by the United States "if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." Further, 28 U.S.C. § 753(f) states that fees will likewise be paid by the United States in other proceedings brought by persons permitted to appeal in forma pauperis "if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question)."

Often, however, petitioners make requests for free trial transcripts before they are prepared to file their 28 U.S.C. § 2255 actions or other appeals; the requests are made to permit scrutiny of the transcripts to see whether possible grounds for appeal might exist. Such potential "fishing expeditions" are not authorized under 28 U.S.C. § 753(f), and such requests may be denied. See, e.g., United States v. Lewis, 605 F.2d 379 (8th Cir. 1979); Route v. Blackburn, 498 F. Supp. 875 (M.D. La. 1980).

Unnecessary expenses to the taxpayer can be avoided while still informing the petitioner of the appropriate steps to take in making a proper, more timely request for transcripts. The following two orders are provided as examples of how to accomplish that end:

O R D E R

> NOW, [Date], upon consideration of defendant's motion in forma pauperis, for transcripts, criminal informations, and other documents and because:
>
> 1. Fees for transcripts furnished in proceedings brought under 28 U.S.C. § 2255 by persons permitted to sue or appeal in forma pauperis are paid by the United States if the trial judge or a circuit judge certifies that the

the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal (28 U.S.C. § 753(f)),

2. Defendant has not brought a proceeding under 28 U.S.C. § 2255, and

3. A motion for preexisting records and transcripts is premature prior to the filing of a habeas corpus complaint (United States v. Losing, 601 F.2d 351 (8th Cir. 1979)),

IT IS ORDERED that defendant's motion is DENIED.

* * * *

O R D E R

NOW, [Date], upon consideration of plaintiff's motion for preparation of transcripts at governmental expense, and because:

1. Fees for transcripts furnished to persons permitted to appeal in forma pauperis shall be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question) (28 U.S.C. § 753(f)), and

2. Plaintiff's motion and supporting papers do not state the issues to be presented on appeal,

IT IS ORDERED that within twenty days plaintiff shall submit a memorandum setting forth the issues to be presented on appeal and a brief statement in support of plaintiff's contentions as to each issue.

* * * *

Interested colleagues may contact Judge Daniel H. Huyett, 3rd (E.D. Pa.) (FTS 597-9644) about his experience with these orders.

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Federal Judicial Center

February 24, 1984 Vol. 2, No. 1

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Federal Rule of Civil Procedure 16(c)(7) and Alternative Dispute Resolution Mechanisms

Federal Rule of Civil Procedure 16(c), as amended effective August 1, 1983, provides a list of subjects that may be considered and acted upon at pretrial conferences. One of the listed topics is the possible use of "extrajudicial procedures to resolve the dispute," Fed. R. Civ. P. 16(c)(7), procedures often referred to as alternative dispute resolution mechanisms. It is useful, therefore, to review briefly some of the devices and procedures currently available and some of the relevant local rules.

The role and responsibilities of the court and the parties in regard to dispute resolution mechanisms vary. Some devices are mandatory, with local rules designating procedures for the handling of particular categories of cases. Other procedures are institutionalized by local rules or draw upon existing institutions within the district, but are initiated at the discretion of the trial judge. Finally, other mechanisms are purely voluntary; while the judge can discuss and explore their use with the parties, it is up to the litigants whether to proceed with them.

Arbitration has long served as an alternative to judicial resolution of disputes. It has been used extensively in labor and commercial matters in which parties to a contract voluntarily agree to seek binding arbitration of disputes that may develop during the contract period. Voluntary arbitration is available under rule 16(c)(7). Certain federal courts currently require litigants to arbitrate (local civil rule 49, E.D. Pa.; temporary local rule 500, N.D. Cal.), but a dissatisfied party is entitled to a trial de novo (see E. Allan Lind and John E. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (FJC rev. ed. 1983); A. Leo Levin, "Court-Annexed Arbitration," 16 U. Mich. J.L. Reform 537 (1983)). Under local civil rule 39.1(g) of the Western District of Washington, the parties may agree to submit their litigation to arbitration. This agreement may provide either that the arbitration award is to be final or that a party dissatisfied with the award may obtain a trial de novo upon timely application to the court.

Mediation is a second dispute settlement process, in which a neutral third party assists the litigants in resolving their claims; normally, the mediator acts to facilitate communication between the parties rather than imposing a solution. Again, the Western District of Washington, under local civil rule 39.1(d), provides for the mediation of disputes. Furthermore, under local rule 32, a judge in the Eastern District of Michigan may refer diversity cases to a mediation panel when the relief sought is exclusively money damages. Unlike traditional mediation, the mediation panel here provides attorneys with an estimate of the settlement value of the claim which the parties can accept or reject. An interesting feature of the program

permits the trial judge to impose certain costs as a penalty if a resulting trial does not improve on the award suggested by the mediation panel. See Joe S. Cecil and Barbara S. Meierhoefer, Report on the Mediation Program in the Eastern District of Michigan (FJC 1983).

A third mechanism that can be employed is useful for those cases in which the significant bar to settlement is disagreement between the parties or their attorneys as to a jury's likely findings on liability and damages. The summary jury trial is a half-day proceeding in which attorneys for the opposing parties are given one hour each to summarize their cases before a six-member jury. After these presentations, the presiding judge or magistrate delivers a brief statement of the applicable law, and the jury then deliberates and renders a verdict. Unless the parties agree in advance to the contrary, the verdict is purely advisory. Settlement negotiations then proceed. See M. -Daniel Jacoubovitch and Carl M. Moore, Summary Jury Trials in the Northern District of Ohio (FJC 1982).

The final procedure to be noted in this brief survey is the minitrial. In this technique, after a period of pretrial preparation, the lawyers make informal, abbreviated presentations of their case to the party principals, usually business or corporate executives with settlement authority. Lawyers normally design these presentations to give the parties a clear and balanced picture of the strengths and weaknesses of the positions on both sides, removing many of the collateral legal issues, and thus converting the dispute between lawyers into a businessperson's problem. Minitrials have been used successfully in several large, complex intercorporate disputes to effect speedy and cost-effective resolutions. See, e.g., Eric D. Green, "Growth of the Mini-Trial," 9 Litigation 12 (1982).

The Center will continue to monitor developments in this area. Copies of the reports and local rules referred to above are available through the Center's Information Services Office, 1520 H Street, N.W., Washington, D.C. 20005. For further information on and assistance with alternative dispute resolution mechanisms, contact the Center for Public Resources, 680 Fifth Avenue, 9th Floor, New York, New York 10019 (212-541-9830) and the National Institute for Dispute Resolution, Suite 600, 1901 L Street, N.W., Washington, D.C. 20036 (202-466-4764).

Chambers to Chambers

Federal Judicial Center

June 4, 1984 Vol. 2, No. 2

USE OF NARRATIVE STATEMENTS AS DIRECT TESTIMONY; AN ALTERNATIVE FOR EXPERT WITNESSES

As a substitute for the traditional means of presenting evidence by posing questions to witnesses at trial, a number of experienced judges are requiring the parties to submit to the court, in advance of trial, certain direct testimony in written narrative (or question-and-answer) form. These statements are to contain everything that the witness would testify to on direct examination if he or she were asked the appropriate questions.

The proposed testimony may be signed by oath or affirmation of the witness, and copies are provided to counsel for all parties. Opposing parties are given a brief period to file, in written form, any evidentiary objections to the narrative testimony. Prior to filing such objections, the parties are expected to confer in good faith to resolve any disputes. The judge rules on any unresolved objections before trial.

In a jury trial, the judge explains the procedure to the jury, and the witness then reads the prepared statement. The witness is given the opportunity in court to add to or delete any portion of the statement, and counsel is permitted to ask questions to clarify the direct testimony. Cross-examination then proceeds in the normal manner by way of question and answer. In a bench trial, the judge normally reads the statement before the trial and then proceeds in court with comments, additional questions, and cross-examination.

Proponents of the technique note that it streamlines the presentation of evidence by eliminating repetitious testimony and inarticulate and confusing questions and answers. It affords counsel the opportunity to present testimony in a clear, concise, and orderly manner and allows opposing counsel to prepare more effective cross-examination. The resulting testimony is more crisp and effective, enabling the fact finder(s) to make better judgments on the issue of credibility. Further, the technique eliminates unfair surprise.

While this procedure is potentially available for use for all witnesses in all types of cases (although it is restricted to nonjury cases by local rule in the Central District of California), the judges who employ the technique find it to be beneficial primarily with expert witnesses, especially economists in antitrust cases and chemists, physicists, and other scientific witnesses in patent and products-liability cases. It is also of significant utility in complex litigation, where management and control of cases normally require substantial intervention and participation by the court. Finally, narrative statements are of great value when a witness is testifying in a foreign language.

For more information on this procedure, see Charles R. 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 Georgetown Law Journal 73 (1983); Gus J. Solomon, "Techniques for Shortening Trials," 65 Federal Rules Decisions 485 (1975). In addition to describing the technique, Judge Richey's article demonstrates its appropriateness under the inherent powers of the court, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence.

Copies of these articles are available from the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005. In addition, interested colleagues may contact Judge Richey (D.D.C., FTS 535-3444) and Judge Solomon (D. Or., FTS 423-2151) about their experiences with narrative statements.

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JOINT REPRESENTATION OF CODEFENDANTS: A CHECKLIST FOR THE RULE 44(c) INQUIRY

Under rule 44(c) of the Federal Rules of Criminal Procedure, when two or more defendants have been jointly charged or have been joined for trial and are represented by the same retained or assigned counsel, the trial judge is required to make an inquiry with respect to the joint representation and to advise each defendant as to his or her rights to effective assistance of counsel and to separate representation. See Holloway v. Arkansas, 435 U.S. 475 (1977); Glasser v. United States, 315 U.S. 60 (1942).

Rule 44(c) does not specify what measures must be taken, what questions asked, or what information elicited as part of this inquiry. Although the measures employed to best protect each defendant's rights may vary from case to case, and the scope of the required inquiry is left to the court's discretion, there are some general issues that arise in most cases. A brief listing of the problems inherent in joint representation cases may be a helpful starting point for initiating and conducting the inquiry.

The following is a checklist of possible conflicts that Judge Justin L. Quackenbush (E.D. Wash.) (FTS 439-3814) has found useful; interested colleagues can contact Judge Quackenbush about his experience with it. The codefendants and the attorney should be present for the court's explanation of these conflicts.

A. PRETRIAL MATTERS

1. There might be a lack of independent investigation in support of each defendant's case.

2. Dual representation might inhibit or prevent independent plea negotiations on behalf of each individual defendant.

3. Dual representation would prohibit the possibility of plea negotiation to obtain immunity or a sentencing recommendation in exchange for testimony against the other defendant.

4. The attorney-client privilege might prevent the attorney from communicating information gathered from one defendant to the other defendant.

B. TRIAL ISSUES

1. Dual representation might affect a decision as to waiver of jury by one defendant.

2. Dual representation might affect the strategy in the use of peremptory challenges or challenges for cause.

3. Dual representation might prevent an attorney from challenging the admission of evidence favorable to one defendant and prejudicial to the other.

4. For the same reasons, dual representation might prevent an attorney from introducing evidence exculpatory of one defendant and inculpatory of the other.

5. Dual representation might adversely affect the decision as to whether one or both of the defendants should or should not testify.

6. Dual representation might inhibit the ability of the attorney to fully cross-examine the government's witnesses.

7. Dual representation would prohibit the attorney from final argument that places the blame on only one of the defendants.

C. SENTENCING ISSUES

1. Dual representation would prohibit the attorney from engaging in posttrial negotiations with the government as to full disclosure by one defendant versus the other.

2. Dual representation would prohibit the attorney from arguing the relative culpability of the defendants to the sentencing judge.

D. GENERAL MATTERS

1. The judge should make clear that a court-appointed attorney is available to represent a codefendant or to consult with a codefendant about dual representation.

2. The attorney proposing to represent codefendants should be required to state how the problems of dual representation will be avoided.

The Center is indebted to Judge Quackenbush for providing this checklist. Because of the significant utility of this checklist, a chapter incorporating it has been added recently to the Bench Book for United States District Court Judges.

Chambers to Chambers

Federal Judicial Center

August 15, 1985 Vol. 3, No. 1

DISTRICT COURT GUIDES TO LOCAL DISCOVERY PRACTICES PROVE HELPFUL

Two district courts have issued guides to their local civil discovery practices that appear designed to fill in the gaps in the Federal Rules of Civil Procedure or local rules. As one judge noted recently, what is needed are guides for lawyers on the "culture of discovery practice in each district."

One model for this effort is Introduction to Discovery Practice in the Southern District of Alabama, a twenty-five-page pamphlet prepared by a committee of trial lawyers in Mobile and distributed by the court. In the introduction, the authors note that the booklet "is not meant to serve as law or as binding rule; it is simply a general and informal guide as to how the rules applicable to civil discovery are ordinarily interpreted and applied" in the district. They go on to note that "[m]any of the gaps" in the rules or the case law "have been filled informally by trial lawyers and judges, and over the years...a custom and usage has developed in several recurring discovery situations."

Significantly, the pamphlet begins by stating that discovery "is normally practiced with a spirit of ordinary civil courtesy and honesty." The need for such courtesy is stressed throughout the volume. It is deemed appropriate, for instance, to telephone the opposing counsel before filing a notice of deposition or motion to compel, and it is expected practice to attempt to accommodate the schedules of opposing lawyers when scheduling discovery activity. Further, it is noted that many lawyers produce or exchange documents upon an informal request, and "[n]aturally a lawyer's word that he will produce a document, once given, is his bond and should be timely kept."

Among the other matters addressed in the pamphlet are who may attend depositions, attorney-deponent conferences during deposition, and the requirements for tape-recorded and videotaped depositions. Guidelines for the production of documents are included with comments on the format, listing, copying, and inspection of such items. Further, practitioners are cautioned that the time limits for discovery are strictly enforced in the district; if a lawyer "must go to court to make the recalcitrant party answer, the moving lawyer is ordinarily awarded counsel fees" pursuant to rule 37(a)(4) of the Federal Rules of Civil Procedure.

In the Eastern District of New York, a special committee formed by Chief Judge Jack B. Weinstein prepared a report on discovery practices that was incorporated in a Manual on Discovery published by the district court. The New York publication features standing discovery orders adopted by the court.

All the orders were adopted March 1, 1984, for an experimental three-year period. Among the orders are ones covering cooperation among counsel,

stipulations, scheduling conferences, referring discovery matters to magistrates, resolution of discovery disputes, depositions by telephone, alternate means of recording depositions, document production, form interrogatories and document requests, discovery of experts, and claims of privilege. The Eastern District committee expressly recommended that "discovery matters in most cases ought to be handled by magistrates," and that "greater utilization of magistrates is important to the expeditious resolution of discovery disputes."

Six months before the orders expire, a written review of their operation will be provided by an oversight committee.

Copies of both publications are available through the Center's Information Services, 1520 H Street, N.W., Washington, DC 20005.

Chambers to Chambers

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JURY MANAGEMENT IN SHARON V. TIME, INC.

Former Judge Abraham D. Sofaer (S.D.N.Y.), who presided at the libel trial of General Ariel Sharon's libel suit against Time, Inc., used several innovative jury techniques in that proceeding. The one that drew the most interest required the jurors to make several separate findings. First, it had to decide if the article was defamatory. When it decided that affirmatively, it had to decide if the article was false. Only when the jury decided that question affirmatively was it given the thorny issue of actual malice.

The Federal Judicial Center asked Judge Sofaer to describe why and how separate, seriatim verdicts were obtained from the jury in Sharon v. Time, Inc., on the issues of defamatory meaning, falsity, and actual malice. His explanation follows:

Little doubt exists with respect to a district judge's authority to order separate, seriatim verdicts on specific issues in a civil case. Rule 49 of the Federal Rules of Civil Procedure gives courts broad discretion in designing special verdicts, or general verdicts with interrogatories. In any event, the parties in Sharon agreed to my proposals.

The principal reason for having the jury consider each issue separately was to enhance the jury's capacity to comprehend its responsibilities and to abide by my rulings on the law and evidence. The trial lasted about eight weeks, and much of the evidence (exhibits and testimony) was admissible only on particular issues. By having the jury proceed one issue at a time, the parties and I were able to monitor their deliberations at least to the extent of ensuring that they were given only exhibits and testimony admissible on the issue they had under active consideration. Some of the notes sent out by the jury reflected the possibility that, had the jury been allowed to consider all the issues together, and hence been allowed to receive any exhibit or portion of the testimony at any time, they might have failed to abide by my evidentiary rulings. The parties also prepared a chart, at my request, that listed every exhibit in evidence, described the exhibit in sufficient detail to enable the jury to identify the items they wished to see, and indicated the issue or issues on which each exhibit was admissible. We knew in advance, therefore, exactly which exhibits the jury would be permitted to see at each stage in the deliberations.

Perhaps the most important consequence of structuring the jury's consideration and decision of the issues was that the jury was thereby encouraged to treat the issues of falsity and actual malice as separate matters, with separate legal standards and evidence. Justices Black and Goldberg had predicted in New York Times v. Sullivan, 376 U.S. 254 (1964), that juries would inevitably confuse these questions, and tend to disregard the actual-malice standard. Id. at 295 (Black, J., concurring), 298 n.2 (Goldberg, J., concurring). Professor Emerson's study of the

issue led him to a similar conclusion. See T. Emerson, The System of Freedom of Expression 535-37 (1970). The high rate at which libel verdicts for plaintiffs have been set aside by trial and appellate courts during the last two decades indicates that these observations may have substance. The popular literature also suggests that juries tend to disregard actual malice; an article by Steven Brill in The American Lawyer, for example, concluded from interviews with jurors in the Tavoulareas case that they had essentially ignored the court's instructions on actual malice. See Brill, Inside the Jury Room at the Washington Post Libel Trial, Am. Law., Nov. 1982, at 1, 93-94. This background, together with the closeness of the actual malice issue in Sharon, made separate jury consideration of the issue seem a natural and sensible measure.

Additional guidance was provided to the jury in the form of detailed instructions on the actual-malice issue, which the parties allowed the jury to have with them in writing during their deliberations. I also prepared a jury verdict form that took the jury step by step through each of the theories on which plaintiff had relied.

Another advantage in using the seriatim verdict in Sharon was that it made unnecessary definitive rulings on questions of law, the erroneous decision of which might have led to a new trial. Time was eager for a separate, initial verdict limited to defamatory meaning, hoping thereby to end the trial. The plaintiff argued that the statement at issue was defamatory as a matter of law, in light of the testimony of Time's reporter as to what he meant to communicate. I had serious doubts as to plaintiff's argument, but was able to avoid deciding this issue by allowing the jury to render it moot by its finding of defamatory meaning.

A much closer question arose on the falsity issue. Time contended that, after New York Times v. Sullivan, public-figure plaintiffs were required to prove falsity by clear and convincing evidence. Some authority exists to support this proposition, chiefly dicta in the circuit and district courts. See, e.g., Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977). Plaintiff agreed that he should bear the burden of proof, but argued that the standard should be by a preponderance of the evidence. I decided to instruct the jury under the clear-and-convincing-evidence standard, but I told the parties that if the jury found for Time under that standard, I would instruct it to reconsider the issue of falsity under the preponderance-of-the-evidence standard. I considered asking the jury to apply both standards in my initial instructions, but concluded that asking them to apply alternative standards at the same time could be confusing and prejudicial. By having them come in with a separate verdict on falsity, I was able to determine whether an alternative instruction was necessary. Here, too, the jury rendered the issue moot by finding for plaintiff under the more demanding standard.

One more practical advantage to the seriatim verdict was that it gave me additional opportunities to pursue settlement. The attorneys for Sharon and Time had worked closely with me in attempting to settle the case prior to trial. We almost succeeded on two separate occasions. I thought, perhaps, that after the finding of defamatory meaning, or after the verdict on falsity, the parties might be willing to end the case and avoid a decision on actual malice. My hopes were unrewarded, but the effort was worthwhile and might well succeed in other cases.

The jury's capacity to render a rational verdict in Sharon was protected by my

decisions to bifurcate the trial and to sequester the jury during deliberations. I realized after about two weeks of testimony that Time was planning to rest its defense largely on evidence admissible only on the issues of reputation and damages. The parties had earlier led me to believe that most of the reputation evidence would be admissible also on actual malice, but this turned out to be untrue. The evidence admissible only on reputation, moreover, was both extensive and highly inflamatory. By bifurcating the trial, we saved about a week of trial time, and I was spared the task of reviewing the proposed evidence to avoid unfair prejudice under Fed. R. Evid. 403.

The jury was sequestered from the day I instructed them until they concluded their deliberations, some ten days later. During that period a massive barrage of commentary appeared in the press, consisting of highly opinionated articles and news reports. Some reporters were so eager to talk to the jurors that they called their homes during deliberations, despite my warnings, and on occasion ran after them in the streets even when the jury was in the custody of U.S. marshals. Had I not sequestered the jury, a mistrial would likely have resulted.

The seriatim verdict was necessary in Sharon, and worked well. It may be useful in other cases, but its use should be left to the discretion of trial judges. Furthermore, the trial judge could, in using this form of verdict, control the order of the jury's findings in any appropriate manner. For example, the judge could have the jury pass on actual malice first, when that issue appears potentially dispositive and susceptible of decision without confusion. No need appears to exist in all cases to have the jury actually report each separate verdict in court. Some public report of each verdict in Sharon was necessary because of the intense public interest in the case. A formal report of each verdict in court was used in Sharon, including the polling of jurors, at the defendant's request.

A final question concerning the jury came when, in sending out the verdict finding no actual malice, the jury also spontaneously sent the following written statement, which the jurors asked to have read along with the rest of their verdict:

> We found that certain Time employees, particularly correspondent David Halevy, acted negligently and carelessly in reporting and verifying the information which ultimately found its way into the published paragraph of interest in this case.

I allowed the jury to read this statement. Common-law juries have traditionally played a moral as well as a technical role, acting as the community's conscience even as they perform their duties. The Sharon jurors, moreover, had deliberated with great care and personal sacrifice for more than ten days, and in my judgment had earned the privilege of having their views heard. Finally, this ad hoc expression of juror sentiment had public significance in light of the widespread debate over the conduct of defendant's personnel, and as a demonstration of the jury's capacity to distinguish actual malice from negligence and carelessness.

Copies of the charge and verdict form in Sharon v. Time, Inc. can be obtained by writing to Information Services, Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005. Please include a self-addressed mailing label.

Chambers to Chambers

Federal Judicial Center

February 18, 1986 Vol. 4, No. 1

Chambers to Chambers is provided to advise judges of techniques and procedures found helpful by other judges. Each issue is initially prepared by and reviewed by federal judges. Publication signifies that the Center regards it as a responsible and valuable work. It should not be considered a recommendation or official policy of the Center; on matters of policy the Federal Judicial Center speaks only through its Board.

USE OF ALTERNATE JURORS IN CIVIL CASES

As part of its continued oversight functions, the Judicial Conference Committee on the Operation of the Jury System has recently recommended that district courts regularly seek the parties' consent to have alternate jurors participate in deliberations in civil cases. This issue of Chambers to Chambers is devoted to that recommendation and to the reasoning behind it. It has been prepared at the suggestion of the Committee, chaired by Judge T. Emmet Clarie, and has been approved by it.

This matter came to the Committee's attention in connection with a presentation by Professor Richard Lempert of the University of Michigan Law School on social science research on the effect of jury size on the decision-making process. The Committee was informed that the research suggests, at least with regard to juries of between six and twelve members, that larger juries are more able to handle complex issues, are more accurate, and are less likely to reach extreme verdicts. Nonetheless, both Professor Lempert and the Committee recognized that it would be impractical and inappropriate to suggest that all federal courts return to twelve-person juries in civil cases. The Committee therefore recommended instead that courts should seek a stipulation of the parties to the effect that when a civil jury retires to deliberate, any remaining alternates be included.

Essentially, the Committee believes that the routine seating of alternates will be advantageous both to the individual jurors involved and the court system as a whole. The Committee's five specific rationales for encouraging this practice are as follows:

1. The costs in both time and money of such a practice will be negligible.

2. Jurors who must sit through an entire trial are likely to pay greater attention if they expect to participate in the deliberations. In addition, jurors both desire and deserve this opportunity after sitting through an entire trial.

3. The jury decision-making process is likely to be enhanced by the additional members. See the research cited by Justice Blackmun writing the lead opinion for the Supreme Court in Ballew v. Georgia, 435 U.S. 223 (1978).

4. Many judges now include available alternates as deliberating jurors, and it appears the procedure is working well.

5. Should a juror be incapacitated during the deliberations, at least six members are likely to remain to return a verdict.

The Committee notes that F.R. Civ. P. 47(b) provides, "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict" (emphasis added). Thus, it appears that the proposal may be implemented only with the parties' consent. See Kuykendall v. Southern Railway Co., 652 F.2d 391 (4th Cir. 1981) (new trial required where case was submitted to jury of seven without consent of parties; local rule provided for juries of six or twelve).

For all of the above reasons, the Committee urges district judges using six-member juries to seek the consent of the parties to have all jurors, regular and alternate, who are sitting at the end of the trial participate in deliberations in civil cases.

Chambers to Chambers

Federal Judicial Center

July 10, 1986 Vol. 4, No. 2

USE OF SPECIAL MASTERS TO CONDUCT SETTLEMENT NEGOTIATIONS

Settlement negotiations that are undertaken at the initiative of the court are usually managed by judges and magistrates. Some courts have programs that provide for the appointment of attorneys as mediators, also in the effort to achieve settlement. In some circumstances, however, it may be appropriate for the court to appoint a special master to conduct settlement negotiations. While use of a master should be limited to exceptional cases, for example, where the issues are complicated or complex or where other special conditions so require, masters may be appointed to handle settlement across a broad variety of case types.

Chief Judge Sherman G. Finesilver of the District of Colorado has developed a sample order containing procedures and conditions to be used when a special master is appointed to conduct settlement negotiations. An extract of this order is printed below. Chief Judge Finesilver has found these procedures useful in copyright, trade secret, antitrust, personal injury and securities cases where a master's specialized expertise was required and when the need for flexible and extended time schedules limited the use of judicial personnel. Because of the additional expense involved, consent of the parties usually is obtained in advance.

As part of the procedure, the parties prepare, exchange, and submit to the master a narrative statement of the facts and issues of the case and, later, prepare, exchange and submit briefs. A hearing with limited oral argument before the special master is held and settlement discussions proceed. A representative of each party, with full settlement authority, is required to attend both the hearing and the discussion. Firm time limits are set for each stage of the proceeding.

Chief Judge Finesilver also notes that he has had success in using these same general procedures when he has acted as a settlement judge for complex cases pending before other judges. Following submission of written statements and a hearing at which each side briefly presents its position, Chief Judge Finesilver separates the parties into different rooms. He then acts as a go-between, discussing with the parties what he perceives to be the strengths and weaknesses of their positions, and relaying respective offers between the parties. Chief Judge Finesilver has found that as long as he can keep the parties negotiating, there is a good chance of achieving settlement.

The Center is indebted to Chief Judge Finesilver for providing the sample order that is extracted below. Interested colleagues should write Chief Judge Finesilver (Room C-224, U.S. Courthouse, Denver, Colorado 80294) for further information.

In The United States District Court
For the District of

ABC, Plaintiff	)	
vs.	)	Civil Action No. _____
XYZ, Defendant	)	

Order Re Settlement Procedure

---

* * *

The trial of this case will be protracted and expensive. Experience indicates that with the cooperation of counsel and litigants, cases such as this can be settled in advance of trial. In this manner, costs of litigation are lessened and time of the court, attorneys, litigants, and witnesses is conserved.

Within the next few days, the court will circulate to counsel the name of an individual who may be appointed as a settlement master in this case. In order to expedite these proceedings, however, the court will at this time establish the conditions to be followed in the settlement proceedings, in order that counsel will be prepared to appear before the settlement master at the earliest possible date.

One-half the cost of the services and expenses of the master shall be paid by plaintiff and one-half by defendant. The parties shall each deposit the sum of [amount] into the registry of the court by [time and date], to provide a fund for payment of the master. The parties shall deposit additional funds as ordered by the court.

The master and the parties shall keep all proceedings, documents, and discussions confidential, and the court shall not receive any information related thereto except for the final result.

By [time and date, approximately three weeks after date of the order], each party shall prepare and simultaneously exchange and submit to the master a narrative statement of the facts and issues of the case (not to exceed ten pages, double spaced, on 8½ X 11" paper) with reference to and copies of principal exhibits to be relied upon by each party. The parties shall supply to the master any additional information requested by the master. By [time and date, approximately two weeks after submission of the narrative statements], each of the parties shall simultaneously exchange and submit to the master a brief (not to exceed ten pages, double spaced, on 8½ X 11" paper).

The master shall then set, after consultation with the parties, a date and time for a hearing and settlement discussions involving the master at [place, preferably

the courthouse]. A representative of each party, with full settlement authority, shall attend the hearing and settlement discussions. The presence of counsel does not fulfill the requirement of the presence of an individual with settlement authority. Furthermore, no more than two persons each for the plaintiff and defendant, and no more than three attorneys representing each party shall attend. Settlement discussions may extend for longer than one day and counsel who will try the case and principals are to make arrangements to be available for all sessions. Evening sessions may be scheduled.

At the hearing, each party shall present oral argument to the master limited to thirty (30) minutes. The master shall then have the opportunity to ask each party for any additional information that the master may require. The master may then comment on the case, and shall proceed with settlement discussions.

The court shall be advised only of the result of the settlement negotiations. The settlement discussions shall be considered offers of compromise and not admissible for any purpose at trial. See Rule 408, Federal Rules of Evidence.

The master, to the extent he deems it appropriate, may recess the settlement discussions or hold the settlement discussions over a period of several days. In any event, the hearing before the settlement master is to be completed by [time and date, approximately three weeks after the briefs are submitted]. The court is to be advised by the master, in writing, as to the results of the settlement discussions by [time and date, approximately two weeks after the hearings commence].

Counsel are directed to send a copy of this Order to their respective clients. The cooperation of counsel in furthering the spirit and tenor of this Order is appreciated.

This Order may be modified, as necessary.

DATED this ___ day of ___, 19__, at [city, state].

BY THE COURT:

_____
, District Judge
United States District Court

Chambers to Chambers

Federal Judicial Center

September 9, 1986 Vol. 4, No. 3

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SAVING TIME IN EMPANELLING GRAND JURIES

A large metropolitan-area district court with a heavy criminal caseload may have more than two dozen grand juries in a year. Swearing in each of those juries separately consumes substantial amounts of judicial time.

More efficient use of grand juries can reduce the number of grand juries sitting at any one time, and empanelling two or more new grand juries simultaneously can save additional time. Several districts employ such procedures, and report substantial success.

For example, the past practice in the Southern District of Florida had been to await a motion by an assistant United States Attorney for empanelling a new grand jury. In order to avoid intruding on the right of the executive branch to empanel grand juries, the court routinely granted such motions. As a result, there was no attempt to assess the need for and use of grand juries in a systematic way, and assistant United States Attorneys sometimes requested grand juries without proper regard for whether an existing grand jury could be used.

To remedy this problem, Chief Judge James Lawrence King instituted a new procedure. The Chief Judge, the United States Attorney, and the relevant court clerical personnel meet annually to plan how many grand juries will be needed, and at what times during the ensuing year. A motion and order scheduling grand jury empanelments for the upcoming year is then drawn up, allowing the Chief Judge to consider the matter only once and have it settled for the entire year.

A similar procedure has been in effect for many years in the District of Maryland, reports Judge Frank A. Kaufman, until recently Chief Judge of the district. The District of Maryland divides its calendar into four, three-month jury terms. One month before the end of any given jury term, the United States Attorney's office reports to the jury plan judge concerning the current usage of grand juries, and makes recommendations and suggestions as to whether existing grand juries should be continued in existence for further terms or should be discharged, and how many regular or special grand juries are needed in the coming term and the reasons therefor. The scope of inquiry of each of the grand juries is also outlined by the United States Attorney's office. Based on this information, the court is able to arrange for the jury clerk to summon enough prospective grand jurors to meet the government's needs for the upcoming term.

Where the court is satisfied with the U.S. Attorney's procedures for assessing grand jury needs and scheduling grand jury empanelments, judicial involvement in the scheduling process may be limited. However, even in courts that do not generally require frequent grand jury empanelments, it may be desirable to have some systematic procedure for conferring with the United States Attorney's office to discuss grand jury empanelment needs, and thereby avoid what Chief Judge John T. Curtin (W.D.N.Y.) has termed "a haphazard approach to the problem."

Creating a systematic schedule for empanelling new grand juries also gives the court control over the swearing in of the new grand jurors. Two or more juries can be empanelled simultaneously. Judge King estimates that it takes him three hours to charge and swear in one grand jury, but only three and a half hours when he charges and swears in two groups of grand jurors at the same time. In the District of Maryland, where all of the regular and special grand juries for each term are empanelled in one joint organizational proceeding, the procedure usually does not take more than one hour, Judge Kaufman reports. Several years ago, when five new grand juries were empanelled, the proceeding lasted approximately two hours.

The most striking evidence of the success of the scheduling procedure is the reduction in the number of grand juries needed. In the Southern District of Florida, 27 grand juries were empanelled in the year before the judicial-prosecutorial conference was instituted. The following year, only 15 grand juries were needed. In the District of Maryland, Judge Kaufman recalls only two instances since 1973 when the United States Attorney has requested, on an urgent basis, that a special grand jury or an additional regular grand jury be empanelled at any time other than the beginning of a jury term. This not only saves time for the judges, but also for their staffs and for the jury section of the clerk's office.

Chief Judge H. Dale Cook has instituted a procedure in the Northern District of Oklahoma to remedy the difficulty that some grand juries of long duration may have in obtaining a quorum after several grand jury members have been excused for illness or other reasons. Chief Judge Cook now swears in and charges the entire panel of eligible prospective grand jurors, and then picks 23 individuals from the panel at random to compose the grand jury. If any of the 23 grand jurors must be excused at a later time, the court simply calls in someone from the already-sworn panel to replace the excused grand juror. Chief Judge Cook has used the procedure for the past three years, and has found it to be both useful and timesaving.

The Southern District of Florida has also made efforts not to waste the time of the grand jurors. Jurors are notified by special phones when a session has been cancelled, and prosecutors have been urged to start the jury's sessions on schedule. Facilities for the grand jurors have also been upgraded.

The Southern District of Florida has drafted a motion and order concerning its procedures for creating an annual master calendar for empanelling new grand juries. Copies of those forms may be obtained by writing to Information Services, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed mailing label.

ChambersToChambers

Federal Judicial Center

November 17, 1986 Vol. 4, No. 3

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ALLOCATING TIME FOR DIRECT AND CROSS-EXAMINATION AND OTHER PRESENTATION OF EVIDENCE

In presiding over the trial of Westmoreland v. CBS, Judge Pierre N. Leval (S.D.N.Y.) found that the case presented circumstances that justified altering some of the usual courtroom procedures. The subject matter of the trial was vast: CBS alleged dishonesty by General Westmoreland and the U.S. Military Command in Vietnam (MACV) over a period of a year in understating the size of the enemy in order to substantiate an over-optimistic assessment of the progress of the war. General Westmoreland alleged dishonesty by CBS in the preparation of a one-and-one-half hour documentary film making the above accusations against him. The list of potentially valuable witnesses on both issues was very long, and the issues were very complex. It was anticipated that the trial of the case would take many months (although the case eventually settled after sixty-two days of trial).

The trial therefore presented two problems that are often found in longer jury trials. The first is the risk of overexpansion of the witness lists and endless duration of the trial. The second is the difficulty the jury will find understanding complex evidence over a long trial when counsel have no opportunity during the course of trial to give explanations.

The Federal Judicial Center has asked Judge Leval to describe some of the innovative procedures he employed in Westmoreland to respond to the problems posed by the length and complexity of the case. In this Chambers to Chambers, Judge Leval discusses the procedure of allocating time for direct and cross-examination and other presentation of evidence. (Judge Leval's procedure was recently cited with approval in United States v. Reaves, 636 F.Supp. 1575 (E.D.Ky. 1986), in which the court placed time limits on various stages of the trial of a complex criminal tax fraud case.) In a subsequent Chambers to Chambers, Judge Leval will discuss the use of "interim summations."

* * *

The classical response to the risk of overexpansive witness lists in lengthy jury trials is for the judge to disallow witnesses who are "merely cumulative" and to curtail cross-examination when it becomes repetitive or unproductive. I find

this approach less than satisfactory. First, the judge ordinarily does not know the testimony of a witness until hearing it. Second, evaluation of the importance of the testimony can be difficult in a complicated case, and more time may be spent in argument than is saved by the cut-off order. Third, I cannot say that cumulative testimony is necessarily without value where the issue is disputed. Conversely, testimony may be unimportant although not technically cumulative. Finally, the responsibility to decide what is important and what is clutter is a strategic decision that belongs more properly to counsel than to the judge.

A solution sometimes suggested is to give each side the same number of weeks or months for its direct case. The apparent fairness of such an allocation may be deceptive. There is no necessary logic to the proposition that each side will have a direct case of the same bulk. Often one side's case is presented through the cross of the opposition's witnesses. Many trials are over after the plaintiff's direct case. Secondly, such an allocation gives an incentive to drag out cross; a short cross is a gift to the opponent.

It seemed to me preferable to charge each side for the time it used, whether on direct or cross or otherwise presenting evidence. Each side would be allotted the same number of hours. As in a chess match, when it's your move, your clock is running.

The fairness of this system depends on the validity of the assumption that, on an average taken of many witnesses, cross will consume time roughly equal to the direct. If this assumption is reasonable, the system will work fairly whether 30, 50 or 100 percent of the witnesses are heard on plaintiff's direct case. It might not work in a short case, as scope is needed to permit deviations to average out. But in the long run, at least for the Westmoreland trial, it seemed to work quite well.

Selecting the proper number of hours is the biggest problem. Too low a number could be disastrous. Such a mistake might not be correctable by adding allowance later on because counsel might earlier have made irretrievable sacrifices. Surely the best way to start looking for the right number is by consulting counsel. If their answers seem responsible, that may be the best place to end. If their demands seem inflated, they should be required to make justification with a detailed plan, budgeting (on a non-binding basis) the allocation of direct examination to each witness. A judge who suspects counsel of packing the budget with allowances for witnesses who will not be called can provide that time may not be transferred from uncalled witnesses.

I would caution the judge not to cut it too fine and, as a safety valve, to advise from the start that a modest extra allowance may be granted to a party who runs out of time in spite of a responsible effort to stay within budget.

The question of a rebuttal case should be addressed at the outset and an understanding reached as to whether it must be budgeted from the original allotment or whether a separately dedicated allotment will be made.

Another significant problem that warrants attention at the outset is the turnover point--after how many of the plaintiff's hours will he rest his direct

case and turn the helm over to the defendant. This point should be identified with some precision at the start of trial so that the defendant can allocate his time between cross of the plaintiff's witnesses and direct of his own.

There is little doubt that, if use of this system proliferates, the inventive minds of counsel will develop time-directed tactics of gamesmanship, such as diabolically short, conclusory directs, giving the adversary the practical option of leaving the witness untouched, or spending a long time bringing out the basis of the witness's conclusions so as to try to undermine them. In some instances, these tactics will be abusive and unfair. The court should make clear in its initial order that it retains the power to modify the allotments to prevent unfairness. A possible remedial technique discussed in Westmoreland was to give the cross-examiner a longer time at no greater charge than the time expended on direct.

I have been asked whether I am confident of the lawfulness of such a limitation on trial. I know of no authority to the contrary and can see no reason why such an order should be struck down if the time allotments are reasonable. It is a common practice in the appeals courts to limit the number of pages of briefs, as well as the time for argument. Court time is a valuable and limited resource, and as the volume of litigation grows, the ability of courts to render service to the public is increasingly threatened.

Given my experience in one long trial, this technique has considerable benefits--primarily five: It requires counsel to exercise a discipline of economy choosing between what is important and what is less so. It reduces the incidence of the judge interfering in strategic decisions. It gives a cleaner, crisper, better-tried case. It gives a much lower cost to the clients. Finally, it can save vast time for all participants.

Counsel on both sides in Westmoreland have told me they believe they tried their case better as a result of the time limit, and that it was shorter by a half.

I note also an interesting suggestion made by David Dorsen, one of General Westmoreland's counsel, that the technique be adapted to control the time spent in depositions.

Chambers to Chambers

Federal Judicial Center

December 8, 1986 Vol. 4, No. 5*

Chambers to Chambers is provided to advise judges of techniques and procedures found helpful by other judges. Each issue is initially prepared by and reviewed by federal judges. Publication signifies that the Center regards it as a responsible and valuable work. It should not be considered a recommendation or official policy of the Center; on matters of policy the Federal Judicial Center speaks only through its Board.

INTERIM SUMMATIONS

In a previous Chambers to Chambers, Judge Pierre N. Leval (S.D.N.Y.) described the procedure that he employed in the trial of Westmoreland v. CBS of allocating time for direct and cross-examination and other presentation of evidence. What follows is Judge Leval's description of a second innovation used in the Westmoreland trial to adapt to the length and complexity of the case, that of allowing counsel to present "interim summations."

* * *

Trials today are often far more complicated than they were in the days when the basic structure of trial procedure was developed. We embrace the comforting fiction that the jury understands, while adhering to ancient procedures that virtually guarantee the opposite.

There is only so much that counsel can communicate effectively in the opening statement. Counsel may be inclined to keep the opening simple, so as not to lose rapport with the jury. Much of what is said will, in any event, soon be forgotten. The jury will have little likelihood of catching the confirmatory or contradictory relationships between different pieces of evidence. After many months of trial, all of this will be discussed in complicated summations in which the jurors will be asked to remember what witnesses said long months ago.

The jury could be made better aware of the significance of the evidence and of its relationship to the complex issues if counsel were permitted to speak to the jury from time to time.

I had difficulty settling on a suitable procedure in the trial of Westmoreland v. CBS. The solution I finally adopted was unstructured and, as with the procedure for allocating time, biased in the direction of giving counsel maximum control. I decided to give counsel for each side an overall allowance of two hours for interim summations, and to permit them to draw on their allowance virtually as they chose, the only limitation being that the choice of moment should not interfere with the adversary's presentation of evidence or with the court's schedule.

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*The preceding issue of Chambers to Chambers, entitled "Allocating Time for Direct and Cross-Examination and Other Presentation of Evidence," was incorrectly numbered. It should have been numbered Vol. 4, No. 4.

Counsel gave intsums, as we called them, 84 times (plaintiff-43; defendant-41), each using approximately 100 of his 120 minutes before the premature termination of the trial. The average intsum lasted less than 2½ minutes. They were given on 25 of the 62 trial days, on different occasions and for different purposes. Most frequently, intsums were given at the start or conclusion of a witness's direct or cross. Sometimes the examiner stopped to address the jury in the midst of his examination, or on the receipt of a document or playing of a film. Often counsel responded to an adversary's intsum; sometimes they declined the gambit. On one occasion, an intsum provoked a series of brief answers and rejoinders.

Intsums were used to explain the significance, strength or weakness of proof; to point out confirmation or contradiction of other evidence; to introduce new themes; to respond to opposing arguments; and to challenge the adversary's ability to prove his contentions.

I have been asked whether allowing interim summations invites abuse and overreaching by counsel. No doubt there are lawyers with whom it would be foolish to try it. If it is used, the judge might caution counsel against taking unreasonable liberties. The threat of remedial instructions should decrease any incentive to overreach. On the other hand, for the judge to invoke an automatic formulaic, "the jury's recollection governs" may be perceived as an open invitation to distort. The judge also might consider suspension or curtailment of intsums for an attorney who proved ungovernable.

Interim summations offer both sides a much improved opportunity to communicate their message--to have some assurance that the jury is understanding the issues and the significance of proofs.

Long trials, more so than short ones, are likely to produce swings in the jury's affections by reason of the long periods of time in which first one side, then the other, controls the flow of witnesses. Interim summations can reduce those swings. During the plaintiff's onslaught, the defendant can alert the jury to forthcoming answers. And during the defendant's turn, the plaintiff will remind the jurors of otherwise forgotten proofs.

It could be argued that the interim summation increases the opportunity for the more skilled counsel to outflank his rival and thus makes the trial more subject to determination based on relative skills of counsel. This may be true (as it is also of the opening, the summation, and the putting of questions). On the other hand, if the interim summation gives the jurors a better understanding of the facts, it reduces their vulnerability to manipulation.

ChambersToChambers

Federal Judicial Center

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July 13, 1987 Vol. 5, No. 1

APPOINTMENT OF COUNSEL FOR INDIGENTS IN CIVIL CASES

Under 28 U.S.C. § 1915(d), a court "may request an attorney to represent" a person eligible to proceed in forma pauperis who is unable to employ counsel. Most judges and magistrates would prefer to have an indigent litigant represented by counsel rather than proceed pro se. The problem, however, is where to get a lawyer, particularly in civil cases for which no funds are authorized or appropriated to pay counsel.

Many districts have responded to this problem by maintaining lists of pro bono volunteers who are willing to represent indigents in civil cases. Law school clinical programs, bar association committees, and public interest law firms also supply lawyers. Several courts have gone further and have established, by local rule or general order, more formal procedures for providing counsel for indigents, including mandatory programs that require members of the bar of the court to accept appointment in such cases.

For example, the San Antonio division of the Western District of Texas has linked representation of indigents in civil cases with the court's program for appointing counsel to represent criminal defendants. Pursuant to Local Rule 200-9, all attorneys who practice and reside in the division are required to represent criminal defendants in cases under the Criminal Justice Act (CJA). The rule, however, permits attorneys to choose to accept civil appointments to satisfy their obligation in lieu of receiving criminal appointments.

Under the San Antonio division's program, attorneys are required to submit questionnaires to the court's CJA Panel Classification Committee, on which they may indicate their willingness to take civil cases. The names of such attorneys remain on the CJA Panel list, but are specially marked to indicate the attorneys' interest in civil cases. The name of an attorney who accepts a civil appointment remains on the CJA Panel list, but goes to the bottom of the list the next time it comes up for a criminal appointment. The district has also adopted a plan authorizing use of nonappropriated funds derived from the court's portion of bar admission fees to reimburse attorneys for some expenses incurred in representing indigents in civil cases, up to $300.

The Northern District of Illinois, which established a two-tiered system of bar admission under the pilot program on attorney admissions, requires members of the trial bar, as distinguished from the general bar, to be available for appointment to represent indigents in civil cases. Attorneys are not required to accept more than one such appointment during any 12-month period. All members of the trial bar, except for government attorneys, nonprofit legal aid attorneys, and attorneys

whose principal place of business is outside the district, comprise a pool from which the court randomly selects a "panel" of prospective appointees from time to time. Procedures for appointment from the panel are governed by the district's General Rules 3.80-3.99, which describe, inter alia, factors used in determining whether to appoint counsel; factors used in determining which attorney to appoint; method of selection; duties and responsibilities of appointed counsel; discharge of an appointed attorney at the party's request; and duration of representation.

The rules also provide detailed procedures for relief from appointment on grounds of conflict of interest; lack of competence to provide representation in the particular action; incompatability or disagreement on litigation strategy; lack of time because of temporary burden of other professional commitments; and the attorney's opinion that the party is proceeding for purposes of harassment or malicious injury, or that the claims or defenses are not warranted.

It is the party's responsibility to bear the cost of litigation expenses, to the extent "reasonably feasible" in light of the party's financial condition. An appointed attorney may advance part or all of the payment for such expenses, but is not required to do so.

The district has established detailed "Regulations Governing the Prepayment or Reimbursement of Expenses in Pro Bono Cases." Funds for such reimbursement are provided from a District Court Fund, which consists of the admission fees for membership in the federal trial bar. Costs that may be reimbursed include some deposition and transcript costs; some costs of investigative, expert, or other services; some travel expenses; some fees for service of papers and witnesses; some interpreter services; and some costs of photocopies, photographs, telephone calls, and telegrams. No more than $1,000 in expenses may be paid from the fund for a party in any proceeding. If, upon application by the appointed attorney, a fee award is made by the court pursuant to statute, regulation, rule, or other provision of law, the attorney must repay any amounts received from the fund.

The Central District of Illinois has also established a mandatory program of pro bono representation in civil cases, pursuant to an order entered on November 22, 1985. The order states that "membership in the Federal Bar carries with it a correlative responsibility to serve as an appointed attorney in pro se matters," and provides that as attorneys are admitted to practice in the district, they be added to the listings of Civil Pro Bono Panels established in each division of the district. As in the Northern District of Illinois program, some exemptions from the appointment requirements are available. Procedures for appointment are similar to those in the Northern District program.

Unlike attorneys in the Northern District program, however, an attorney in the Central District is not precluded from entering into "appropriate contingent fee" arrangements with the party, but (1) the attorney may not make such an arrangement a condition to undertaking or continuing representation, and (2) the attorney must be mindful that the representation was not voluntary in its inception and that the party is unrepresented in dealing with the attorney. Awards of attorneys' fees are allowed upon appropriate application of the appointed attorney; pro se litigants in Social Security disability cases must be specifically advised by

the clerk that a statutory attorneys' fee may be awarded, to be paid from the award, if any, of retroactive disability benefits. There are no provisions for reimbursement of expenses incurred by the appointed attorney.

The Eastern and Western Districts of Arkansas have recently established a mandatory program for appointment of counsel to represent parties proceeding in forma pauperis, pursuant to Rule 34 of the districts' local rules. This program replaces a mandatory pro bono program that was established in the Eastern District of Arkansas in March 1986 pursuant to a general order, but was rescinded in February 1987 after it was challenged on procedural and constitutional grounds by a local practitioner.

As in the other programs, attorneys may withdraw from representation under certain conditions (e.g., actual representation of pro bono client in past year; party's position is nonmeritorious), and may arrange for substitute counsel without relieving themselves of the obligation to accept appointment in subsequent cases. Attorneys who volunteer for appointments will have their names advanced on the pro bono lists, and will be exempt from appointments under the local rule for two years from the date of any actual appointment received.

Several districts have issued general orders, adopted local rules, or otherwise formalized their procedures for appointing volunteer attorneys to represent indigents in civil cases. For example, Civil Rule 29 of the District of Connecticut and General Order No. 25 of the Northern District of California both provide detailed procedures governing appointments from among lists of volunteers, including provisions for reimbursement of some litigation expenses from the courts' nonappropriated funds. Formal procedures have also been adopted in the Southern District of New York, Eastern District of New York, District of New Jersey, and Eastern District of Wisconsin.

In order to obtain volunteers for its pro bono program, the Eastern District of Wisconsin sponsored a one-day trial practice seminar on civil rights litigation, Social Security cases, and other areas in which appointed counsel would become involved. The seminar was free of charge, but attorneys who attended were required to become part of the district's volunteer panel and agree to accept one case per year. Attorneys were also eligible to receive continuing legal education credit for attendance at the seminar. More than 150 attorneys were signed up for the panel as a result of the seminar. Recently, the district sponsored another similar seminar on appellate practice in order to obtain volunteers to handle pro bono cases in the Seventh Circuit.

The District of Columbia District does not maintain a pro bono panel as such, but submits requests for appointment of counsel to the local bar referral service, which then attempts to obtain representation by volunteers. A special D.C. bar committee has also been appointed, comprised of former U.S. District Court law clerks, to help arrange for pro bono representation of pro se litigants in the district court.

Requests for copies of any of the local rules, orders, and written procedures discussed in this Chambers to Chambers may be sent to Information Services, Federal Judicial Center, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked.

Chambers to Chambers

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October 9, 1987 Vol. 5, No. 2

CONDUCT OF VOIR DIRE IN LIGHT OF BATSON V. KENTUCKY

The recent case of Batson v. Kentucky, 476 U.S. ___, 106 S. Ct. 1712 (1986), proscribed for the first time prosecutors' racially motivated exercise of peremptory challenges in a single case. The Judicial Conference Committee on the Operation of the Jury System has reviewed that decision and found that it underscores the desirability of a particular voir dire practice, namely that all peremptory challenges (as well as challenges for cause) be exercised at side bar or otherwise out of the hearing of the prospective jurors. This issue of Chambers to Chambers, which has been prepared by the Committee, will discuss that procedure.

BACKGROUND. Batson overturned the 20-year precedent of Swain v. Alabama, 380 U.S. 202 (1965), and held for the first time that a prosecutor's racially discriminatory use of peremptory challenges, even in a single case, violates the equal protection rights of both the defendant and the excluded jurors under the Fourteenth Amendment. Swain had previously declared such conduct unconstitutional only if it was shown to be part of a systematic practice, employed by prosecutors in case after case, whatever the circumstances, whatever the crime, and whoever the defendant. Finding this a "crippling" evidentiary burden, Batson overturned this portion of Swain and held that a defendant may challenge the government's exercise of peremptory challenges based solely on the facts of his or her own case.*

To establish a prima facie case under Batson, the defendant must show (1) that he or she is a member of a cognizable racial group, (2) that members of this group were excluded by the prosecutor's use of peremptory challenges, and (3) that these facts and any other relevant circumstances "raise an inference" that the challenges were used to exclude veniremen solely on account of their race. Once the prima facie case is established, the prosecution must come forward with a "neutral explanation" for its use of the challenges. Justice Powell, writing for the majority, emphasized that this explanation need not rise to a level justifying exercise of challenge for cause, but at the same time he admonished that the prosecution may not rebut the inference of discrimination merely by stating that it acted on the assumption that jurors would be partial to the defendant because of their shared race.

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*The Supreme Court held recently in Griffith v. Kentucky, 107 S. Ct. 708 (1987), that the Batson rule applies retroactively to all cases, state and federal, pending on direct review or not yet final. Earlier, the Court held in Allen v. Hardy, 478 U.S. ___, 106 S. Ct. 2878 (1986) (per curiam), that the ruling in Batson was not to be applied retroactively to cases on federal habeas review.

The prosecution "must articulate a neutral explanation related to the particular case to be tried." 106 S. Ct at 1723.

RECOMMENDED PROCEDURE. Assuming this holding will apply in the federal courts ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Id. at 1724 n.24 (emphasis added).), the Jury Committee believes that Batson makes it desirable for courts to hear all peremptory challenges (as well as challenges for cause) privately, out of the hearing of prospective jurors.

To illustrate, consider the situation in which a prosecutor peremptorily challenges a black venireman and in which the defendant successfully establishes that the challenge was an equal protection violation under Batson. As suggested in footnote 24 of Justice Powell's majority opinion, supra, the trial judge will then have to remedy the situation either by discharging the entire venire and selecting a new jury from a panel not previously associated with the case, or by disallowing the discriminatory challenge and resuming selection with the improperly challenged juror reinstated on the venire. As a matter of administrative convenience, the latter is clearly the preferable remedy, but once a peremptory challenge is made in open court the effectiveness of recalling the challenged juror is doubtful, even if the resulting discussion is held at bench after public airing of the disputed challenge. The black juror will know that he or she had originally been dismissed on racial grounds, and his or her ability to decide the case impartially might therefore be strained. Furthermore, the mere fact that the litigants and the court engaged in a colloquy regarding the juror's race could prove upsetting not only to the affected juror but also to the other veniremen. In light of the fact that the entire venire was "tainted" by the discussion of the juror's race, the trial judge might well conclude there is no adequate remedy other than selecting the jury from an entirely new panel.

The same type of difficulty can result if proposed challenges for cause are made openly. Even if the proposed challenge for cause is denied, the affected juror cannot help but feel awkward and perhaps hostile toward the party who questioned his or her impartiality, and the other prospective jurors might be embarrassed about the entire procedure.

The way to avoid these problems is to require litigants to exercise all challenges, both peremptory and for cause, at side bar or otherwise out of the hearing of the jury. In this way, jurors are never aware of Batson discussions or arguments about challenges, and therefore can draw no adverse inferences by being temporarily dismissed from the venire and then recalled. In the Committee's view this has always been the preferred way for trial judges to hear challenges, but the potential interjection of racial matters into this process under Batson makes this practice even more desirable.

Chambers to Chambers

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September 30, 1988 **Vol. 6, No. 1**

The Center has received several suggestions--most recently from Chief Judge Paul Roney of the Eleventh Circuit and Judge H. Lee Sarokin of New Jersey--that judges need a vehicle for sharing ideas and problems in court administration and case management. The utility of such a vehicle was demonstrated during the combined circuit workshop for the First and Third Circuits in April. An hour was set aside for district judges to make five-minute presentations on such ideas; the hour was oversubscribed in short order.

Over the next six months, Chambers to Chambers will provide space to extend this kind of idea sharing to the entire federal district bench. District judges are invited to send in brief descriptions of innovative solutions to problems and experience with ideas for improving case management and court operations. The Director of the Center has asked Judge Sarokin, Judge Murray Schwartz of Delaware, and Judge David Dowd of the Northern District of Ohio to review the contributions and periodically forward materials to the Center for appearance in Chambers to Chambers.

Please send contributions to Judge H. Lee Sarokin, United States District Judge, U.S. Post Office and Courthouse, Post Office Box 419, Newark, New Jersey 07102.

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October 24, 1988 Vol. 6, No. 2

MASS-DISASTER LITIGATION -- ORGANIZATION OF THE PARTIES

In Re: San Juan Dupont Plaza Hotel Fire Litig., No. MDL-721, is the multi-district case that arose out of the catastrophic fire that engulfed the San Juan Dupont Plaza Hotel on New Year's Eve 1986, killing 97 people and injuring more than 100. The first fire-related lawsuit was filed barely five days after the blaze and assigned to Judge Raymond L. Acosta (D.P.R.). Several months later the Multi-District Litigation Panel transferred a case filed in California to Puerto Rico for pretrial proceedings with the cases already pending there, thus making Judge Acosta the transferee judge for this litigation.

We asked Judge Acosta to describe some of the techniques he is using to manage this complex case. He writes that "obtaining control of the litigation requires two types of organization: (1) organizing the parties and (2) organizing the courthouse." In this Chambers to Chambers Judge Acosta discusses methods of organizing the parties. A future Chambers to Chambers will examine his organization of the courthouse staff.

INTRODUCTION

The management of this case, which is like suddenly flying a Boeing 747 after a lifetime of piloting single-engine planes, differs from my other cases by pure force of numbers. Two hundred sixty-four individual complaints have been filed on behalf of more than 2,300 plaintiffs claiming $1.7 billion in damages from the 211 defendants named in plaintiffs' 288-page Amended Master Complaint. When we add third-, fourth-, and even fifth-and sixth-party defendants, a total of 226 defendants are named in the litigation. The record in this case presently runs over 140 volumes and 6,000 docket entries, reflecting millions of pages worth of documents and 140 pretrial orders issued to date. It was obvious from the start that the only way to spell judicial relief in this case was c-o-n-t-r-o-l. Specifically, the court immediately had to institute a management plan that presented solutions to anticipated problems rather than fall into the trap of reacting to piecemeal issues presented by the parties.

Control means not only holding tight reins on attorneys, observing strict deadlines, and maintaining organizational prerogatives but also establishing a theme, in addition to the fair, speedy, and efficient resolution of the matter. I immediately impressed upon counsel not to approach this litigation as if it were some kind of sports contest. I made it abundantly clear that because of the complex nature of the case, stubborn or malicious intransigence would not be tolerated and sanctions would be imposed.

From the beginning of the litigation, I treated the individual complaints as a single, albeit complicated, case. The number of issues to be considered was narrowed, thus avoiding the waste of time that would have resulted from having to consider the same issues in each individual lawsuit. Most importantly, this allowed me: (1) to set up an interim plaintiffs' committee (a group of lead counsel that represented plaintiffs during the process of securing the disaster site in order to preserve evidence); (2) to begin to identify the players; and (3) to set up an efficient process for identification, removal, testing, and storage of crucial physical evidence from the disaster site. It was extremely important to commence these

activities as soon as possible to assure control, despite the fact I was not officially designated transferee judge until months later.

A. LEAD COUNSEL

The use of experienced lead counsel has been crucial to the progress of the case. I believe it is in the best interest of all parties, even defendants, to have a relatively small group of attorneys handle the coordination of discovery. Lead counsel produce master discovery requests, which ensures that the plaintiffs are not flooded with an inordinate amount of documents or repetitious demands while allowing defendants to get the information they need more quickly, efficiently, and economically. This type of coordination is particularly necessary for the scheduling of depositions, which currently consist of 27 depositions ("tracks") simultaneously being taken daily throughout the nation. The job of lead counsel in coordinating such a schedule is enormous, but it is necessary in order to meet our June 1, 1989, trial date. It is estimated that there will be over 2,000 depositions taken in one year alone.

Although lead counsel are preferred, individual parties are not ignored. Lead counsel are used to further the interests of all parties. The court can, however, hear from individual counsel, provided that some adequate ground rules are followed. For example, all attorneys attending a status conference (usually more than 100) may address the court, yet it is not uncommon to have only 12 of them speak, and the conference itself last less than three hours. The key is to narrow the issues to be covered during the meeting and to preclude counsel from merely repeating the arguments of fellow counsel or the matters covered in their written memoranda.

As to the designation and organization of lead counsel, in my second order I established a nine-lawyer Plaintiffs' Steering Committee (PSC) to represent the interests of all plaintiffs. Work that is common to all plaintiffs must be channelled through the PSC. Defendants, on the other hand, are harder to organize, because they often have conflicting interests (many will be cross-claiming against each other and some are third-party plaintiffs/defendants). Nevertheless, many defendants have common interests and/or legal representation, and all of them are obviously concerned with the scope and proper scheduling of discovery. Therefore, I designated 10 defense attorneys to represent 10 distinct categories of defendants on the Discovery Committee. (I only limited the total number of representatives; the parties themselves selected the category that best identified them.) Three members of the PSC represent plaintiffs on the Discovery Committee, for a total of 13 members whose main responsibility is the scheduling of discovery and out-of-court resolution of discovery disputes. Committee disputes are resolved by the Magistrate, who as Discovery Master supervises their activities.

Selecting the right people to act as lead counsel is essential to their effectiveness. In deciding who to appoint to the PSC, I considered the character and training of each individual as well as how they could work with each other. Our goal was to get a proper mixture of older, more experienced attorneys and younger, more enthusiastic and energetic ones. The same criteria were used in approving defendants' representatives. However, defendants themselves were permitted to select their own representatives from the court's "approved" list.

The members of the Discovery Committee are required to file regular expenditure reports with the court. The reports, which are filed under seal, are meant to force counsel to keep contemporaneous expense records to assist the court (or probably a special master) when the time comes to determine the compensation of liaison counsel.

B. THE JOINT DOCUMENT DEPOSITORY

In order to process the enormous amount of discovery material being generated, I ordered the parties to set up a Joint Document Depository (as was done in previous mass-disaster cases). The depository provides the parties with a place to store, inspect, and reproduce all the discovery materials produced in the litigation. The depository is also in charge of obtaining sites and providing court reporters for depositions, as well as disseminating the monthly deposition schedule. We were fortunate in

obtaining the services of the administrator of the depositories in the Hilton fire case and the MGM Grand Hotel fire case, Ms. Suzanne Foulds, to be in charge of our depository. An important factor in her effectiveness has been to bring her under the aegis of the court rather than permit the Discovery Committee or any group of attorneys to influence her services to their sole advantage. This also helps the court to keep in close contact with the daily progress of discovery.

C. LIAISON PERSONS

The receipt and notification of documents do not have to be made by the parties. Rather, they use the "liaison persons," one for plaintiffs and one for defendants, who are office managers in charge of providing clerical services to the parties. Their main responsibility is to receive motions and pleadings from the parties and orders from the court and to forward them to all parties. Thus, rather than sending notices to 400 attorneys, our Clerk's Office sends out only two copies of orders. Additionally, rather than doing the work themselves, the parties have only to deliver their motions to the opposing side's liaison person for service to be effective (it also means that we no longer get a 30-page certificate of service with each document, which greatly reduces the size of the file).

D. ASSESSMENTS

This well-oiled machine runs on hard work by everyone concerned, tight control from the court, and, of course, money. Expenses are covered through a series of monetary assessments upon the parties. PSC members and other plaintiffs' attorneys provided the initial funding for the operation of the committee, including the services of their liaison person. Each PSC member was required to make a $50,000 contribution, and all plaintiffs' counsel (including PSC members) are required to pay $800 for each decedent named in a wrongful death action and $300 for each allegedly injured plaintiff (this has generated a total of approximately $1.6 million). Eventually, the PSC members will receive attorney's fees and reimbursement for costs "off the top" of any settlements and/or awards reached in this case. The percentage amount will depend on the quality of work provided. Defendants fund the operations of their liaison person's office through court-imposed periodic assessments. They will also, at a later date, fund the fees and costs of their representatives in the Discovery Committee.

The Joint Document Depository's expenses are paid from assessments upon both plaintiffs and defendants, with plaintiffs paying 15 percent and defendants the remaining 85 percent of the costs. The depository has also achieved a method of "breaking even" on most of its overhead costs. Instead of hiring a copy service firm, it rented two enormous copy machines as well as telefax machines, etc. Its copy fee provides a cost-effective and quick product for the attorneys and a greater degree of control by the depository at a price significantly under the market.

But this method barely suffices to cover salaries, office rent, etc. It does nothing for the greatest cost of all: depositions. The 27 tracks of depositions roughly cost more than $100,000 a week in conference room rentals, reporters, etc. To date, three assessments totaling $24,500 have been made upon defendants to fund their liaison person's office and the depository, for a total of over $3.3 million. Plaintiffs have to date been assessed $540,000 to fund the depository. The PSC, Discovery Committee, liaison persons, and depository are all under strict and uniform accounting procedures.

* * *

The Center has received several suggestions--most recently from Chief Judge Paul Roney of the Eleventh Circuit and Judge H. Lee Sarokin of New Jersey--that judges need a vehicle for sharing ideas and problems in court administration and case management. The utility of such a vehicle was demonstrated during the combined circuit workshop for the First and Third Circuits in April. An hour was set aside for district judges to make five-minute presentations on such ideas; the hour was oversubscribed in short order.

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November 22, 1988 Vol. 6, No. 3

In a previous Chambers to Chambers, Judge Raymond L. Acosta (D.P.R.) described some of the management procedures he is using to organize the parties in In re San Juan Dupont Plaza Hotel Fire Litig., No. MDL-721. In this issue Judge Acosta discusses some techniques for organizing the court.

THE COURT'S ORGANIZATION

A. THE DUPONT TEAM

I have approached the management of this case from the beginning as a team effort. The "Dupont Team" consists of my two law clerks, Vilma Vila and Richard Graffam-Rodriguez, secretary, docket clerk, and courtroom deputy clerk. Also included are the Magistrate and his clerk. Since the existing staff could not handle the entire litigation and the court's regular workload, an additional law clerk, Pedro A. Malavet, secretary, and docket clerk were hired. All have been active in "brainstorming" sessions from the start. At times we even role play situations in an effort to explore every strategy and its ramifications. Our goal is to anticipate problems and to make sure the discovery machine is working as smoothly as possible. The team approach assures me that there is always someone available at any given time to continue with the orderly operation of the case despite absences due to vacations or illnesses. This also gives me the benefit of a wider range of input with respect to systems, methodology, innovative ideas, and, of course, research.

The team meets once a week to discuss the case. Individual problems can be disposed of through a series of phone conversations if they involve simple issues, whereas several meetings may be required to dispose of more complicated matters. Office and file-management matters related to the case are likewise handled by consensus, but without involving the judge or magistrate--unless necessary.

I have also benefitted from the experience of other judges in the handling of similar complex cases. For example, Judge Weinstein's writings have been very enlightening, as have been orders by Judge Bechtle in the MGM Grand Hotel case, Judge Rubin in the Beverly Hills Supper Club fire cases, and Judge Collinson in the Multi-Piece Rim litigation, among others. I like to think that our case will someday also contribute to the pool of uniform systems that appear to be evolving in the handling of mass disaster litigation.

The U. S. Magistrate, Justo Arenas, was appointed to handle all discovery matters and nondispositive motions, thus freeing the court to concentrate on over-all planning, implementation methods, and dispositive matters. Needless to say, the functions of the Magistrate are extremely time consuming as he wrestles daily with discovery disputes from all over the country.

B. SETTLEMENT COORDINATION

An element that is present in every civil suit is the matter of settlement possibilities. A mass disaster suit is no exception. On the contrary, because of the enormity and complexity of the action it is something that should be earnestly pursued in order to minimize the costs of litigation, which ideally translates into more acceptable benefits to the victims (of course, assuming liability is proved). Though settlement should always be explored this should never deter the court's steady and rapid course towards trial. We view settlement simply as a way of narrowing the issues for trial.

We have been fortunate in being able to obtain the services of Judge Louis C. Bechtle of E.D. Pa., who presided over the MGM fire litigation and who has graciously consented to his designation as Settlement Coordinator. It was my firm belief that the management of this case could take a giant step forward if Judge Bechtle would act as Settlement Coordinator at an early stage of the case. The logic of this conviction was compelling not only because of the similarity of the disasters but also, more importantly, because Judge Bechtle has a personal acquaintanceship with many of the attorneys and parties in this case, who were also involved in the MGM case. In other words, many of the issues and arguments and much of the strategy and coordination involving the MGM settlement discussions are effectively reconstituted here for, it is hoped, speedy resolution of some, if not all, of the claims.

C. THE DOCKET CLERK

I cannot emphasize enough how important it is to have a properly trained docket clerk in a case such as this. The docket clerk in the MGM case, Ms. Dean Sykes of D. Nev., who is a veteran of over 16,000 docket entries in that case, has given our staff valuable information and training both over the telephone and during a visit to Puerto Rico. With her help, a system to handle the large number of filings was established. In the early days of the litigation, the Magistrate and I carried the original volumes of the file (at one point as many as 10) to the status conferences. Now the original never leaves the clerk's office. Rather, we work with courtesy copies, which the parties are required to file together with the original. Additionally, a blank line in the "docket sheet" (now 242 pages long) below the entry of the filing is used to note the disposition of that motion. This allows for quick review of the disposition of matters and a determination of what is pending. These seemingly simple procedures are the only way to prevent chaos in disposing of motions. Development of a special form, called the "Minute Order Form," for summary disposition of several motions has also been helpful. It quickly became popular among judges here and is now the standard form for all cases in this district.

D. RESOURCE MATERIAL

Having the appropriate resource material is very important in any case, but it is particularly important in a complex case. The efficient management of a complex case not only requires the court to handle issues that are currently before it, but it also requires us to anticipate problems that may arise in the future. Having the benefit of thoughtful analysis of possible problems and their solution can help the court in making decisions as to case management. The Manual for Complex Litigation--Second, published by the Federal Judicial Center, is a good general guide to the problems of complex litigation. Counsel respect the Manual and tend to follow its organization when framing issues to be presented to the court. Although this is a mass-disaster case, I have found the antitrust section of the Manual to be particularly helpful. Other resources from the Center can also be of assistance. The materials on asbestos-related litigation deserve special attention.

In addition I have developed several orders to address case management matters arising in this litigation. At the end of this case, when we are in a better position to evaluate what has worked well, I

intend to submit several of these orders to the Manual's editors for publication. I would urge other judges handling similar cases to do the same. In the meantime, copies of Dupont orders are available [from Judge Acosta] upon request.

CONCLUSION

In closing, the one recommendation that I would like to make is that the courts have to take charge of the case in a mass disaster as soon after the tragedy as possible. Chaos can be avoided only if the litigation is controlled from the beginning.

Since nothing can happen until someone files the first complaint the touchy problem of ambulance chasing should be dealt with by a jaundiced hut averted eye. The court's time and energy in the crucial beginning stages of the suit should not be diverted from the main thrust of the case, i.e., control. Therefore, accusations and squabbles should be referred by the complaining attorney(s) to the Ethics Committee of the Bar Association.

Our federal judicial system is best prepared to handle complex litigation. But disasters are unpredictable, both in nature and intensity. Perhaps, as recommended by Judge Weinstein, a "Rapid-Deployment Judicial Force" that is trained to handle such cases as the need arises should be given serious consideration. Such a force must include not only trained judges, but also the support staff that is required to handle the complicated logistics of mass litigation. Various agencies of the Executive branch have teams poised ready to enter immediately into the investigation of major events such as an airline or vessel disaster, kidnapping, or terrorist activity. The purpose is to gain effective control through a specialized approach by highly trained personnel. The Judicial branch could learn from this example by having experienced judges, docket/document clerks, and a system at the ready and thereby assure the efficient administration of complex litigation.

Chambers to Chambers

Federal Judicial Center

January 5, 1989 Vol. 7, No. 1

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STANDARDS OF LITIGATION CONDUCT FOR ATTORNEYS IN N.D. TEX.: DONDI PROPERTIES CORP. V. COMMERCE SAV. & LOAN ASS'N.

Recently the judges of the Northern District of Texas sat "en banc" to establish standards of litigation conduct for civil actions in the district. See Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc). The district court set out rules to address the growing problem of "abusive litigation tactics" and "sharp practices between lawyers." Violations of these standards, the court warned, "will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context." In this Chambers to Chambers we reprint excerpts from the court's opinion and the set of standards it adopted. The footnotes we have included are numbered as in the opinion.

* * * * *

At the request of a member of the court, we convened the en banc court[3] for the purpose of establishing standards of litigation conduct to be observed in civil actions litigated in the Northern District of Texas. . . .

The judicial branch of the United States government is charged with responsibility for deciding cases and controversies and for administering justice. We attempt to carry out our responsibilities in the most prompt and efficient manner, recognizing that justice delayed, and justice obtained at excessive cost, is often justice denied.

We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.

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[3] We concede the unusual nature of this procedure. We note, however, that the U.S. District Court for the Central District of California recently sat en banc to decide the constitutionality of the sentencing guidelines promulgated pursuant to the Sentencing Reform Act of 1984. See United States v. Ortega-Lopez, 684 F. Supp. 1506 (C.D. Cal. 1988) (en banc).

As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice. We now adopt standards designed to end such conduct.

. . . .

By means of the Rules Enabling Act of 1934, now codified as 28 U.S.C. § 2072, Congress has authorized the Supreme Court to adopt rules of civil procedure. The Court has promulgated rules that empower district courts to manage all aspects of a civil action, including pretrial scheduling and planning (Rule 16) and discovery (Rule 26(f)). We are authorized to protect attorneys and litigants from practices that may increase their expenses and burdens (Rules 26(b)(1) and 26(c)) or may cause them annoyance, embarrassment, or oppression (Rule 26(c)), and to impose sanctions upon parties or attorneys who violate the rules and orders of the court (Rules 16(f) and 37). We likewise have the power by statute to tax costs, expenses, and attorney's fees to attorneys who unreasonably and vexatiously multiply the proceedings in any case. 28 U.S.C. § 1927. We are also granted the authority to punish, as contempt of court, the misbehavior of court officers. 18 U.S.C. § 401. In addition to the authority granted us by statute or by rule, we possess the inherent power to regulate the administration of justice. . . .

. . . .

We next set out the standards to which we expect litigation counsel to adhere.

The Dallas Bar Association recently adopted "Guidelines of Professional Courtesy" and a "Lawyer's Creed" that are both sensible and pertinent to the problems we address here. From them we adopt the following as standards of practice to be observed by attorneys appearing in civil actions in this district:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes, to the judiciary, candor, diligence and utmost respect.

(C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.

(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.

(J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Attorneys who abide faithfully by the standards we adopt should have little difficulty conducting themselves as members of a learned profession whose unswerving duty is to the public they serve and to the system of justice in which they practice.[9] Those litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them. Malfeasant counsel can expect instead that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." (Citation omitted.)

We do not, by adopting these standards, invite satellite litigation of the kind we now see in the context of Fed. R. Civ. P. 11 motions. To do so would defeat the fundamental premise which motivates our action. We do intend, however, to take the steps necessary to ensure that justice is not removed from the reach of litigants either because improper litigation tactics interpose unnecessary delay or because such actions increase the cost of litigation beyond the litigant's financial grasp.[11]

Similarly, we do not imply by prescribing these standards that counsel are excused from conducting themselves in any manner otherwise required by law or by court rule. We think the standards we now adopt are a necessary corollary to existing law, and are appropriately established to signal our strong disapproval of practices that have no place in our system of justice and to emphasize that a lawyer's conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play.

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[9] We note that these standards are consistent with both the American Bar Association and State Bar of Texas Codes of Professional Responsibility.

[11] We note, by way of example, the Dallas Bar Association guideline that eliminates the necessity for motions, briefs, hearings, orders, and other formalities when "opposing counsel makes a reasonable request which does not prejudice the rights of the client." This salutary standard recognizes that every contested motion, however simple, costs litigants and the court time and money. Yet our court has experienced an increasing number of instances in which attorneys refuse to agree to an extension of time in which to answer or to respond to a dispositive motion, or even to consent to the filing of an amended pleading, notwithstanding that the extension of time or the amended pleading would delay neither the disposition of a pending matter nor the trial of the case.

to

Federal Judicial Center

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February 7, 1989 Vol. 7, No. 2

INNOVATIONS

As previously announced, Chambers to Chambers will devote space on a trial basis over the next several months for judges to share innovative solutions to problems and ideas for improving case management and court operations. Judge H. Lee Sarokin (D.N.J.), Judge Murray Schwartz (D. Del.), and Judge David Dowd (N.D. Ohio) will review contributions from judges and periodically forward materials to the Center for publication. What follows is the first in the series of "Innovations."

Judge H. Lee Sarokin (D.N.J.)

The inspiration for this column came about as the result of a casual conversation with Chief Judge Richard Bilby (D. Ariz.). He mentioned that he required lawyers to furnish the court and each juror with a hotograph identifying each witness as an aid in later recollecting the witness's testimony. In hearing this, I thought that there must be hundreds of other similar ideas and practices being utilized by judges with no available means to share them with distant colleagues. Thus, with the encouragement of the Federal Judicial Center, comes this column. What appears here you may accept or reject, or may be doing already, but we hope it will provide gems from time to time that will improve the administration of justice, increase the efficiency of the judiciary, and make trials more meaningful for juries.

For starters, may I recommend the use of a written jury questionnaire in those cases in which you expect numerous challenges for cause. In the Cipollone case (cigarette litigation) the lawyers developed a questionnaire jointly, which was submitted to a 600-person panel brought in for one day. The lawyers then reviewed the questionnaires and submitted their challenges and responses to me by attaching them to the questionnaires, with references to the specific answers upon which they relied. I then spent one day reviewing the challenges and ruled upon them. The balance of the panel was brought back and the jury selection was completed that day—making a total of two days for jurors' attendance, in what otherwise would have taken many days and possibly weeks.

Judge Richard P. Conaboy (M.D. Pa.)

I tried a patent case that involved the understanding and the evolution of five very specific and complicated chemical formulas. Lawyers on both sides were chemists as well as lawyers and each side had two experts in chemistry and dye chemistry.

I thought of using a master to resolve some of the issues or of appointing a court expert, but both of these ideas had drawbacks, since what I really needed was personal guidance in understanding the testimony in the case rather than someone to help me reach a decision.

I discussed the various rules on appointment of masters and experts with counsel, and indicated to them that I would agree to try the case non-jury if each side would agree that I could hire an expert to sit with me and assist me in trying the case. I specified that each side would pay half the costs involved and that the expert would report only to me.

All counsel agreed. I appointed the head of the chemistry department of one of the local colleges. He sat with me throughout 21 days of the trial and consulted with and advised me at breaks and at other periods of time concerning understanding and appropriate interpretation of the chemical formulas and chemical terminologies involved. He was carefully instructed by me that he was not to become involved in reaching any decision in the case since that was solely my function.

Counsel also encouraged me to remain active in assisting them to settle the case even though I was trying the matter non-jury, and I agreed to do so.

The experiment worked extremely well, and after 21 days of testimony I was able to sit with counsel and guide them towards what everyone agreed was a very responsible settlement of a very complicated matter.

Judge Dickinson R. Debevoise (D.N.J.)

Frequently a judge must hear a matter within a limited period of time—because of his or her schedule, because relief must be granted before an uncontrollable event will occur, etc. In such cases I divide the available time between the two parties, and they must present their cases within the time available to them. If testimony is offered, the offering party must include 50 percent of the time used on direct examination for cross-examination. If the cross-examining party exceeds 50 percent of the direct examination time, the excess is charged to that party.

This technique can also be used for regular trials and other proceedings where the parties, if left to their own devices, appear about to consume an inordinate amount of time. Pick a reasonable time, preferably (but not necessarily) with the consent of the parties. Once the parties react to the pressure of the situation (and they soon do) a little flexibility can graciously be injected if necessary. I have even used this technique with jury trials.

The judge has to be a scorekeeper, noting the time each examination begins and ends. Judge Mark L. Wolf in Boston found a chess clock, with its two timers, useful during the Gillette injunction hearing. In the various proceedings in which I have used this technique no party has ever used all the time allocated to it.

Judge Robert E. Keeton (D. Mass.)

I have attempted to create an incentive to resolve discovery disputes as follows:

By procedural order, call attention to the court's concern that counsel on both sides may have violated Rules 11, 16, and 26 (and 33, 34, and 36 when applicable) by (1) making more extreme discovery demands than could be certified, pursuant to Rule 26(g), as supported by a belief formed after "a reasonable inquiry," consistent with the rules and "warranted by existing law or a good faith argument for extension, modification, or reversal of existing law" and "not unreasonable or unduly burdensome or expensive," and (2) simply objecting rather than responding to the extent that the demand is not objectionable—for example, by producing documents "as requested" under Rule 34(b) except as "to a part of an item or category" to which an objection applies. Require the parties to confer to resolve disputes before a date set for hearing, with notice that if at the hearing the court finds that both parties are in violation of obligations under the Rules, the court expects, as a sanction, to hear the matter only long enough to be satisfied as to which side is less seriously in violation, then entering an order adopting that side's position (unless such a ruling would be impractical or unfair for some overriding reason).

This gives each side an incentive to modify its position to assure that, when the scheduled conference commences, its position is less objectionable than the other side's. Proposals back and forth with this objective may reduce the distance between the opposing positions far enough that the parties decide to bridge that gap by agreement rather than taking the controversy to hearing.

Judge Alan N. Bloch (W.D. Pa.)

I have developed an order that I utilize in every civil RICO case, which requires a statement as to (1) the alleged misconduct and basis of liability for each defendant; (2) a list of other wrongdoers; (3) a list of the alleged victims, and how each victim was allegedly injured; (4) the details of the pattern of racketeering, including specifics as to the predicate acts, the dates, the participants and other pertinent details; (5) how the predicate acts form a pattern of racketeering, and how they relate to a common plan; (6) a description of the enterprise: who constitutes it, its structure, purpose and function; (7) the relationship of the defendants to the enterprise and how each defendant's activities relate to the enterprise, if they do; (8) the relationship between the enterprise and racketeering; (9) the benefits of the enterprise; and (10) the effects on interstate or foreign commerce. Copies of the order for anyone who wishes to use it are available by writing to me.

* * * *

Please send contributions for Innovations to Judge H. Lee Sarokin, U.S. District Judge, U.S. Post Office & Courthouse, P.O. Box 419, Newark, N.J. 07102.

Chambers to Chambers

Federal Judicial Center

November 27, 1989 Vol. 7, No. 3

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HANDLING NEWS MEDIA ARRANGEMENTS DURING HIGH VISIBILITY TRIALS

Judge Gerhard A. Gesell (D.D.C.) recently presided over a criminal trial that attracted widespread local and national news media coverage. We asked Judge Gesell to describe some of the techniques he used to permit media access but avoid disruption. His description follows.

A recent case that fell my way[1] was obviously going to be one of those occasional very high visibility criminal trials preceded by extensive pretrial proceedings that would attract the full weight of daily coverage by local and all major national news organizations. The case also involved a large volume of classified material, raising other problems of access. Drawing on lessons learned during the Watergate and other nationally publicized cases, we developed procedures to assure maximum press access and avoid expected disruption of the proceedings by a "full court press." The following arrangements worked fairly well.

First, we set up the usual code-a-phone system, immediately recording on the assigned number each pretrial and trial development and all announcements of future scheduling as dates were set. The press and members of the public were encouraged to telephone the code-a-phone for information.

But, of course, this arrangement met only some of the problems. Following my normal practice, I declined all picture taking, television panels, and interview requests. Yet there were bound to be some press matters that required contact with the court, as, indeed, there were. Seating for the courtroom immediately became an acute problem of vital interest to the press as well as the court's administrative staff.

I had refused to go to the larger ceremonial courtroom because of the circus atmosphere it might create and other difficulties. My regular courtroom seats 100 behind the rail. Approximately 75 different print and TV news organizations, foreign and domestic, would be covering every development, day to day, through what promised to be extensive pretrial proceedings and trial. Other members of the press anticipated dropping in from time to time. Some news organizations worked in relays, some needed room for sketch artists. Apart from the media, there was an enormous demand for seats from all quarters competing for space with the press. We needed space for the public, for the defendant's family, for families of the lawyers on both sides, for counsel advising witnesses, for court personnel interested in the proceedings, for security and classification specialists, for VIPs, and others. When push came to shove, only 45 seats at most could be set aside for the press. The court was ill-equipped to allocate these seats, given the large press interest, and, of course, access to the courtroom was vital, considering the lack of any electronic coverage which could be viewed or heard elsewhere.

[1] U.S. v. Poindexter, North, Secord and Hakim, Criminal No. 88-80.

While courthouse personnel could and did handle other demands for space, allocating press seats involved an expertise no one at the courthouse had. I designated a senior, well-respected member of the press to act as liaison between the court and all branches of the media. He had covered other high visibility criminal cases for a major TV network and understood the needs of the press. A notice was put out on the city wire service notifying news agencies that they could apply for seats by writing to a designated court official. The name and office telephone number of the liaison representative was made available so that he—not the court—would receive questions and complaints.

I made it clear that the press could not sit beyond the bar of the courtroom or attempt to interview anyone in the courtroom during recess or otherwise. Passes for the trial, entitling the holder to sit in one of the press rows, were assigned by the liaison representative without involvement of the court. Applicants other than the major newspapers, networks, and news services were put in pools sharing a single pass. Once this was arranged, courthouse administrative personnel made certain the press passes were being used and that each pooled seat was rotated properly.

Several passes were cancelled after the news organizations to which they were issued failed to use them at least half of the time. Forfeited passes went to the news organizations next in line on a waiting list compiled by date of application. Reporters without permanent passes were permitted to form a special line and were given any press seats not occupied within 20 minutes of the start of the morning or afternoon session. Most of the reporters were accommodated. The first row was reserved for sketch artists. Wire service reporters, who frequently must leave to file, were given aisle seats near the rear to minimize distraction.

The liaison representative also assisted in another significant way. Through him I learned of press needs and problems anticipated or unexpected and was able to satisfy many concerns. He was designated to pick up copies of exhibits from the courtroom clerk and to arrange for their duplication on a photocopy machine rented by the pressroom regulars. The liaison representative also arranged a rotating pool of the television stations to make videotape copies of photographic exhibits. If the arrangements made for assuring availability of copies of exhibits, orders and memoranda, or names of jurors chosen, etc., happened to break down in some respect, the difficulties were brought to the court's attention by the liaison representative and were ironed out where possible, or explained. The reporters regularly assigned to the courthouse had no special privileges as far as the coverage of the case was concerned.

Because of the large volume of classified material involved in the case and the consequent need for closing the courtroom at various times during pretrial and for nonjury matters during trial, many novel problems of media access developed. Techniques for promptly supplying as much material from closed sessions as possible to the press were put in place in consultation with the liaison representative and court personnel.

In a case of this character, the press needs clear-cut factual answers to reasonable questions concerning procedures, timing of decisions on pending motions, schedule, and the like. Camera crews and other personnel outside the courthouse are involved. Reasonable concerns must be satisfied when possible. What the press writes is its business and not the court's, but the process flows more smoothly if purely neutral factual information can be made available to all members of the press in the same form at the same time.

Under the procedures established by the court, reporters knew they could funnel relevant questions through the liaison representative. He gathered the questions in the pressroom after each morning and afternoon session, eliminating duplicative and overlapping inquiries. The boiled-down list, usually two or three questions, was telephoned to chambers, and appropriate responses provided—often immediately, but never more than an hour or two later—to be relayed to reporters in the pressroom on a non-attribution

basis. On some occasions, the court believed it was necessary and useful to inform counsel of the questions received and the answers the court proposed to give.

These procedures were established as the sole means of communication between the press corps and the court. And they worked. The press knew that the court itself was involved and that there was no need individually to try to get the information from courthouse personnel or trial participants. Several times the court was able to use the liaison apparatus to relay concerns to the press about its activities, and to enlist its understanding and cooperation.

It is difficult to convey the benefits of such an arrangement unless one has experienced the massive attention one of these high visibility criminal cases can generate. The story of the trial becomes daily grist for the press, even if there is nothing to report. Without clear, fair rules and established lines of communication, the entire courthouse and the chambers of the trial judge come under siege: court personnel are distracted, and it is difficult to concentrate on the work at hand as reporters seek something to write about or talk about, running down the wildest rumors. When rules and procedures are clear the press benefits. As long as all are treated equally, matters move forward more responsibly with less confusion and greater accuracy.

In this instance the procedures worked well. My home telephone is listed, but I never received calls at home from the press. There were no newspaper personnel seeking access to chambers, and it was possible to concentrate on the judicial work at hand. Of course, designated administrative and clerical personnel and the security people were still extremely busy, but by centralizing all inquiries through the liaison representative their task was considerably lightened. Most of the problems that arose would have required the clerk of court or one of his deputies to check with the court, in any event; direct access hastened and simplified the process. Whenever inquiries touched on the evidence or the merits they were ignored. The press wrote and spoke as they chose.

* * *

As announced earlier this year, Chambers to Chambers is devoting space on a trial basis for judges to share innovative solutions to problems and ideas for improving case management and court operations. Judge H. Lee Sarokin (D. N.J.), Judge Murray Schwartz (D. Del.), and Judge David Dowd (N.D. Oh.) will review contributions from judges and periodically forward materials to the Center for publication. Please send contributions for this "Innovations" column to Judge Sarokin, U.S. Post Office & Courthouse, Post Office Box 419, Newark, NJ 07102.

Chambers to Chambers

Federal Judicial Center

February 5, 1989 Vol. 8, No. 1

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INNOVATIONS

From time to time, *Chambers to Chambers* will devote space for judges to share innovative solutions to problems, ideas for improving case management and court operations, and questions about situations they often confront. Judge H. Lee Sarokin (D.N.J.), Judge Murray Schwartz (D. Del.), and Judge David Dowd (N.D. Ohio) will review contributions from judges and periodically forward materials to the Center for publication. Please send contributions for "Innovations" to Judge Sarokin, U.S. Post Office & Courthouse, P.O. Box 419, Newark, N.J. 07102.

Judge Peter C. Dorsey (D. Conn.)

I was presented with the Parajudicial Program by two older trial lawyers in Connecticut who had become inactive by reason of the partnership agreements under which they had functioned. Both were interested in having some activity that would utilize their experience and keep their interest alive.

I have coined the phrase "Parajudicial Officer" simply to reflect that these people function in a quasi-judicial role. They do everything they are able to do in relation to case management that I might otherwise be obliged to do. They monitor discovery, make recommendations with respect to scheduling, suggest disposition of discovery as well as substantive disputes, often on an informal basis and in lieu of the more formal motion practice. They communicate with counsel in cases to sense the progress of the matter and look for attempts to foreshorten it to the advantage of the parties. They conduct settlement conferences, usually in an informal fashion whereby they do not adhere to a strict scheduling, but, by communication with the attorneys, attempt to obtain a sense of when it is appropriate to move on a particular matter. They have greatly relieved me from the necessity of dealing with supervisory or monitoring functions that are quite appropriate and extremely contributive in supplement to a strict schedule for proceeding through the discovery and motion process.

Lest it be lost in the shuffle, it should be noted that this provides an opportunity for older lawyers with litigation experience to function in relation to the judicial process in what the Parajudicial Officers have described to me as an extremely fruitful and rewarding experience.

Parajudicial Officers act under the delegation of authority of the district judge and by agreement of the parties.

Request for suggestions concerning situations where counsel is retained by someone other than defendant

Recently, Chief Judges Santiago E. Campos (D.N.M.) and Lucius D. Bunton (W.D. Tex.) exchanged correspondence concerning the situation where low-level drug couriers, sometimes known as

"mules," are represented in court by retained counsel who are paid by persons higher up in the drug distribution chain. Chief Judge Campos wrote: "I sense the great possibilities of conflict in such situations. The obvious issue which arises is: Who is retained counsel representing? The person who pays him or the not very knowledgeable and unsophisticated defendant?" He observed that counsel's loyalty may well affect decisions concerning defendant's cooperation, role in the offense, effective assistance, and so on.

Chief Judge Bunton acknowledged that the problem has come up often in his court, but "[t]here really isn't anything that I know of that can be done. The 'mule' is entitled to representation. There is no law that keeps one person from hiring an attorney for someone else. While the attorney may state that he owes his allegiance to his client, both of us know that he or she really is going to answer to the person picking up the tab."

Chief Judge Bunton directed this correspondence to the Center in order to obtain the benefit of what other judges are doing with this situation. If any judges have encountered or thought about this situation, we would be pleased to learn how they have addressed it or what their thoughts may be on this subject. Please send responses to Judge H. Lee Sarokin, U.S. Post Office & Courthouse, Post Office Box 419, Newark, N.J. 07102, whose committee will review items for inclusion in "Innovations."

to

Federal Judicial Center

April 16, 1990

Vol. 8, No. 2

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INNOVATIONS

The last edition of *Innovations* contained a request for suggestions on how to treat the situation where low-level drug couriers, sometimes known as mules, are represented in court by retained counsel who are paid by persons higher up in the drug distribution chain. The issue that arises is: Whom is retained counsel representing, the person who pays the fee or the often unsophisticated and not very knowledgeable defendant? Counsel's loyalty may affect decisions regarding defendant's cooperation and may raise questions concerning effective assistance of counsel. Several responses were received.

Judge William B. Enright (S.D. Cal.) described the problem that occurs when a "defendant desires to cooperate with the government and make a plea agreement in the absence of his retained counsel. This situation arises normally when an incarcerated defendant sends a letter to the court or to the U.S. Attorney indicating that he desires to cooperate but his lawyer was retained by higher-ups in the organization, or, if such counsel were contacted, the physical safety of the defendant would be at risk.

"In those situations the letter cannot be disregarded, in my opinion, and the problem is quite real. A possible solution is to have the requesting defendant brought before a magistrate of the court, a judicial officer capable of conducting an inquiry. The inquiry would be held *in camera* under oath on the record in order to ascertain the bona fides of the defendant. Once a magistrate is satisfied that the defendant's request is genuine, he should appoint new counsel to advise the defendant of his rights and possible options and also notify counsel of record that a hearing will be held promptly to determine the status of counsel in the matter. At that time, defendant should make his intentions known in open court that he desires to change counsel and confirm that appointed counsel go forward from this point and retained counsel be relieved. CJA funds have not been a problem for this purpose.

"This procedure meets the problem directly. It attempts to deal with it in a straightforward manner. Representation of the individual defendant is achieved and yet retained counsel is brought up to date promptly, even though that may also pose some risk to the defendant. I do not believe further proceedings can continue without the knowledge of retained counsel. This process permits defendant to be competently advised by a truly independent counsel at a critical stage in the proceedings. The trial judge should not participate because of the very nature of the information which may be given to the magistrate by the defendant.

"This procedure permits a neutral judicial factfinder to ascertain the nature and extent of the problem and to act in a simple and direct manner with minimum interference with all concerned."

Judge Peter Beer (E.D. La.) observed that because this problem usually arises in plea bargain proceedings, "it's really difficult to discern how much the defense attorney is putting out for the mule."

Judge Beer suggested that district courts may wish to note on the record their impression of what appears to be taking place. "If this is done out of the presence of the jury, then it is at least on the record and available for review."

Judge Anthony A. Alaimo (S.D. Ga.) wrote that he encountered the problem in *U.S. v. Sims*, CR No. 486-87 (S.D. Ga.), *aff'd*, 845 F.2d 1564 (11th Cir.), *cert. denied*, 109 S.Ct. 395 (1988).

"At a pretrial conference, and by subsequent Order, I requested the identity of any person other than a particular defendant who was paying or becoming obligated to pay attorney's fees for such defendant. My articulated reason to counsel was that the information was necessary in order to determine whether there might be some conflict of interest, as well as for the purpose of qualifying the jury for relationship and interest to such persons paying the attorney's fees.

"Counsel declined to furnish the information and, when called to the stand, each defendant took the Fifth on advice of counsel.

"The Eleventh Circuit affirmed me on my right to know this information.

"While I indicated to counsel that I would take the matter back up after final order on appeal, by way of citation for contempt, I have not done so."

Judge Alaimo added that "*Wood v. Georgia*, 450 U.S. 261 (1981), imposes a duty on the trial court to inquire about the possibility of a conflict of interest in representation."

Judge B. Avant Edenfield (S.D. Ga.) also suggested that *Wood v. Georgia* might provide some guidance, and wrote: "My practice has been to ask the lawyer as an officer of the court who is paying him when I have some reason to apprehend a conflict might exist."

Magistrate Kenneth R. Fisher (W.D.N.Y.) suggested *In re Grand Jury Subpoena*, 781 F.2d 238, 248 & n.6 (2d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986), as a case on point and added:

"In light of *Wheat v. U.S.*, 486 U.S. 153 (1988), and *U.S. ex rel. Tineo v. Kelly*, 870 F.2d 854, 857 (2d Cir. 1989), I would think judges have an independent duty to conduct an inquiry similar to that required by Fed. R. Crim. P. 44(c). After the inquiry, if a substantial conflict becomes evident, *Wheat* requires disqualification of counsel and appointment of another conflict-free counsel."

* * *

Please send additional suggestions or contributions for "Innovations" to Judge H. Lee Sarokin, U.S. Post Office & Courthouse, P.O. Box 419, Newark, N.J. 07102.

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ChambersToChambers

Federal Judicial Center

Volume 9, Number 1, February 1994

Dispositive Motion Procedure Saves Court Time

Many judges in the District of New Jersey have had success with a "dispositive motion procedure" that allows parties in civil cases to set their own briefing schedules for motions. Developed by Judge Alfred J. Lechner, Jr., this process is now codified in the general rules of the district (see page 3).

Under this procedure, the moving party serves the motion and all relevant documents, including the supporting brief and affidavits or declarations, on the adversary but does *not* initially file the papers with the court. The moving party submits only a copy of the transmittal letter to the court to make the court aware that a motion is in progress. The parties then consult and determine when the opponent will submit opposition papers to the moving party. If they cannot agree on a date, they communicate by telephone with the judge to whom the case is assigned in order to set a date for submission of the opposition. (Judge Lechner notes that in the six-and-a-half years he has used the procedure, this has not occurred more than five times.) After the movant receives the opposition papers, the parties follow the same process with regard to the reply.

After all of the moving, opposition, and reply papers are prepared, the moving party files them with the court, accompanied by a transmittal letter listing all of the submissions. A copy of the transmittal letter is sent to the opposing attorney and serves to verify that all of the opposition papers were filed with the court. The moving party also completes and files a notice of motion, setting as the return date the next regularly scheduled motion day that is at least sixteen business days from the date of filing of the completed package.

Judge Lechner developed the dispositive motion procedure because of the difficulties he experienced with dispositive or other "heavy" motions. Many motions were delayed by requests for extensions of time to submit opposing or reply papers. Problems also arose when opposition or reply papers were filed the day of oral argument. The procedure has eliminated these problems in the motions in which it is used. Because it has been so effective, a majority of the judges in the district have adopted it. It is not used, however, in habeas matters, pro se litigation, emergency applications, or discovery motions.

According to Judge Lechner, the procedure significantly improves court organization, reduces prefiling judicial involvement, and results in heavy motions being processed and decided by the court more quickly. It eliminates piecemeal filing of motion papers since all papers are submitted to the court at one time. In addition, because the parties set their own schedules, court time is not spent processing requests for extensions of time to submit papers or for adjournments. Law clerks do not have to track down stray motion papers, call delinquent parties, or handle requests to adjourn return dates. Judges do not have to evaluate such requests. The court does not have to rearrange its calendar to accommodate scheduling changes.

Judge Lechner points out that because the parties agree among themselves regarding the schedule for filing opposition and reply papers, they have sufficient time to review their respective positions in light of the adversary's submissions. This more deliberate but informal process has sometimes resulted in parties resolving matters themselves. The judge notes that on occasion moving parties have not pursued their motions after they received opposition papers, and opposing parties have sometimes agreed to the relief sought without the need for court intervention.

Even more significant, in Judge Lechner's view, is the opportunity the procedure affords the court to review all of the moving, opposition, and reply papers

well in advance of the return date. The filing of the complete package sixteen business days before the hearing gives the judge adequate time, including at least three weekends, to review the submissions. The judge contrasts this to the usual procedure, which often results in the filing of opposition or reply papers on the day before or morning of oral argument.

Judge Lechner thinks that the procedure has been well received by the bar because of its clear advantages over the usual process and, in particular, because it does not restrict emergency applications. He feels that the procedure benefits everyone involved: Attorneys have the time they need to prepare and submit papers on heavy motions; the court has sufficient time to consider motions and all the documentation submitted; and litigants are not restricted.

For all of these reasons, the judge believes the dispositive motion procedure increases the efficiency of court processing and expedites judicial review and disposition of motions.

Note: This is the first issue of *Chambers to Chambers* since volume 8, number 2, which was published in April 1990.

U.S. District Court Rule 12 [excerpted from the district rules of the District of New Jersey]

. . . .

N. Optional Procedure for Dispositive Motions

A judge may advise the attorneys in a particular case or in all his or her civil cases, other than *habeas corpus* or *pro se* litigation, that dispositive motions and other motions presenting complex legal or factual issues shall be presented and defended in the manner prescribed in Appendix N to these Rules. If motions are processed in accordance with this paragraph, the procedure specified in Appendix N shall be deemed to supersede any conflicting provisions [in the rules]. . . .

APPENDIX N. OPTIONAL MOTION PROCEDURES

The procedures set forth in this appendix will govern motions governed by General Rule 12N.

The moving party will prepare its notice of motion, brief, affidavits and other supporting documentation. The notice of motion shall not contain a return date.[1] These papers will be sent to all adversaries and a copy of the cover letter *ONLY* will be sent to the deputy clerk of the judge to whom the case is assigned. The copy of the cover letter will be filed in the Clerk's Office.[2]

If the opposition papers cannot be prepared within the normal 10-day period, the parties may agree to a reasonable extension. If the parties cannot so agree, they should telephone chambers of the judge to whom the case is assigned to obtain the time within which the opposition papers must be prepared. An original and two copies of all opposition papers are then to be served on the moving party (one copy is to be served on all other parties), with a copy of *ONLY* the cover letter to be sent to the judge's chambers. One copy of the reply is to be served on all parties, with a copy of the cover letter to be sent to the judge's chambers. *THIS PROCEDURE IS TO BE FOLLOWED FOR CROSS MOTIONS AS WELL.*

After the motion has been fully briefed and is ready for submission to the court, all original papers,[3] plus one copy of each together with a cover letter are to be sent to the Clerk. The originals will be filed; the copies will be delivered to the judge. The cover letter is to list separately *each* document (brief, affidavit, etc.) submitted. A copy of the cover letter is to be forwarded to the deputy clerk of the judge to whom the case is assigned.[4] The return date on the Notice of Motion is to be the next regularly scheduled motion day which *is at least SIXTEEN BUSINESS DAYS* from the date of filing, unless the parties agree to a later date.

A statement must be included on the cover of the moving, opposition or reply brief as to whether oral argument is requested. If *any* party requests oral argument, generally it will be granted, either in person or by telephone conference call on the record. However, absent a request for oral argument, the matter will be decided on the papers pursuant to Fed. R. Civ. P. 78, unless the Court directs otherwise.

This procedure is not to be used for motions covering discovery, pro hac vice admissions, amendments to pleadings, etc., or as previously mentioned, for *habeas corpus* or *pro se* litigation.

1. The return date should be inserted in the Notice of Motion when the moving party is ready to file all documentation with the court.

2. The submission of a copy of the cover letter will enable the judge to acknowledge and follow the status of these motions. Receipt of such a letter will be sufficient to evidence the extension of the time for filing a responsive pleading (e.g., an answer) pursuant to Fed. R. Civ. P. 12(a) and (b).

3. Only briefs in support, in opposition or in reply may be submitted (no rebuttal, surreply, etc.). Such briefs are to comply with General Rule 27B in all respects.

4. The cover letter will inform the opposition of exactly what documents have been submitted.

ChambersToChambers

Federal Judicial Center

Volume 9, Number 2, March 1994

Many District Courts Encourage Expanded Role for Magistrate Judges in Civil Cases

Spurred by the need for innovation in managing their civil trial dockets, the spirit of experimentation fostered by the Civil Justice Reform Act, and the encouragement of the Judicial Conference,[1] more and more district courts are seeking to use magistrate judges more fully in disposing of civil cases. A number of courts are including magistrate judges along with district judges in random draws and rotation schemes in which magistrate judges are assigned cases directly rather than by referral from district judges. Most courts using this procedure continue the practice of assigning district judges to the cases as well, so that they are available as backup to handle dispositive motions and trials in the event the parties do not consent to the exercise of full jurisdiction by the designated magistrate judge.[2] Although most of these courts still require written consent under Fed. R. Civ. P. 73(b), a few of them recently adopted opt-out or waiver approaches that presume consent to magistrate judge jurisdiction over all aspects of civil cases in the absence of objection by the parties. The following information on current court practices was obtained through telephone conversations with district and magistrate judges in several districts.

Direct assignment/opt-out approach adopted

In January 1993, the Middle District of North Carolina promulgated Standing Order No. 30, which provides that "[o]ne case out of each thirteen cases . . . will be randomly assigned to each magistrate judge to conduct all proceedings, including the ultimate trial upon consent." By a rotation method, a district judge is paired with the assigned magistrate judge on each case. Once the issues are joined, the clerk of court sends counsel a notice from the chief judge, explaining the need for assignment of the case to a magistrate judge, pointing out the extensive experience of the district's two magistrate judges and the advantages of trial before them (an earlier trial date, a special setting[3]), and requesting that counsel return the decision form giving or withholding consent within 20 days. The last sentence of the notice states, in capital letters:

> Since you are required by law to communicate your decision to the clerk, failure to return the form will be deemed a consent to the exercise of complete jurisdiction by the magistrate judge under 28 U.S.C. § 636(c).

According to the clerk's office, parties in 70% of the cases assigned under Standing Order No. 30 through September 1993 either affirmatively consented or did not object to the magistrate judge's exercise of jurisdiction. Magistrate Judge Russell Eliason not only feels that the rule is helping to expedite civil dispositions but also believes that because the court has explicitly authorized an expanded role for magistrate judges, attorneys have become more willing to use them in different ways.[4]

The District of Montana in Billings is using a similar procedure in assigning a magistrate judge and obtaining consent to his or her conduct of civil trials. Civil filings are assigned directly to Magistrate Judge Richard W. Anderson in a random draw from the wheel. The court's Civil Justice Expense and Delay Reduction Plan requires the clerk of the court to notify the parties at their first appearance that the case has been assigned to a magistrate judge. The notice sets out the text of the court's Rule 105-2(d), which states that the case will be reassigned to an Article III judge upon a written demand for reassignment by any party, served upon the other parties at "any time after commencement of the action and not later than ten (10) days after the service of the last pleading directed to such is-

sue." The demand, like that for a jury trial, may be endorsed upon a pleading.

The Montana rule further provides that "[t]he failure of a party to serve a demand . . . constitutes a waiver by the party to have . . . trial proceedings conducted and judgment entered, by an Article III judge, and a consent . . . to have the magistrate judge . . . conduct any or all trial proceedings and order the entry of judgment . . . ." District Judge Jack Shanstrom says the procedure, which has been in effect since April 1992, has been very successful. In only a handful of cases have parties opted out of having the magistrate judge preside over all phases of the litigation, and Judge Shanstrom knows of no complaints about Rule 105-2(d) from the bar.[5]

In a variation on the direct assignment procedure, District Judges William G. Young and Rya W. Zobel and Magistrate Judge Robert B. Collings, who are teamed for a two-year period in an experiment conducted by the District of Massachusetts, drew up a list of cases to be tried in April 1993 by any one of them without regard to a case's original assignment. Judge Young used the opt-out approach to obtain consent, stating in the "Notice of Special Trial Assignment" that "[u]nless a written objection to trial before Magistrate Judge Collings is filed within fifteen days of the date of this notice, your consent to such trial will be recorded." Judge Zobel, on the other hand, obtained the consent of the parties at the pretrial conference. The success of the April effort, which resulted in settlement of 59 of the 72 cases originally scheduled and completion of trials in the remaining cases by the end of the first week in May, encouraged the team of judges to schedule another joint trial list later in the year.

Direct assignment/written consent required

Other courts that are randomly assigning civil cases directly to magistrate judges still require parties to file a written consent to trial. Under the Eastern District of Missouri's Civil Justice Reform Act plan, adopted in November 1993, civil cases are "randomly and equally" assigned among district and magistrate judges. When a case is assigned to a district judge, the clerk's office provides consent forms and advises the parties that they may consent to trial before a magistrate judge. Parties notified that their case has been assigned to a magistrate judge are obliged to return a signed form indicating consent or requesting reassignment to a district judge no later than 20 days after the entry of appearance of the last served party. If the form indicating consent is not returned in the time specified, the clerk randomly reassigns the case to a district judge. Magistrate judges in the Portland and Eugene divisions of the District of Oregon are part of the pool of judicial officers available for random selection as the assigned judge in civil cases. When a magistrate judge is selected as the assigned judge, a district judge is chosen at random, as well. Consent forms are issued at the time of filing; at subsequent status conferences and the final pretrial conference, parties are advised of their option to go to trial before the magistrate judge to whom the case is assigned. In its local rules, the court encourages consent by emphasizing that "as felony criminal caseloads increase for the district judges . . . less time is available for Article III judges to conduct civil trials." Parties routinely consent to trial before the assigned magistrate judge.[6]

Direct assignment of diversity cases considered

The magistrate judges of the Northern District of California in San Francisco have proposed a modified direct random assignment procedure that is currently under active consideration by the local rules committee. Magistrate Judge Wayne Brazil reports that under the proposal, all or some portion of diversity cases only will be assigned off the wheel to magistrate judges, with no dual or backup assignment to a district judge. The magistrate judge will handle all matters until an issue arises that requires consent. At that time, the parties will be advised that they may file written consent with the clerk's office if they wish the magistrate judge to conduct all aspects of the litigation. Judge Brazil says diversity cases were chosen because the judges wanted a class of cases that varied in size and complexity in order to avoid the charge that magistrate judges will be assigned only smaller, less complex cases that will, consequently, receive "second-class justice." In addition, the scope of diversity cases will provide magistrate judges with a broader range of trial experiences, which will demonstrate to the bar their capacity to handle a variety of matters.[7]

Success attributed to support of district judges

Although the Western District of Washington (Seattle) does not randomly assign civil cases to its three magistrate judges until after written consent is obtained, Magistrate Judge John Weinberg reports that the court led the Ninth Circuit in the number of civil cases referred by consent for the year ending June 30, 1992. Judge Weinberg attributes this "in no small part to the support of our district judges for consent references." He notes that early in every civil case filed, the parties receive not only a letter from the court clerk requesting that they consider consenting but also a letter signed by all eight district court judges urging them "to give consideration to a consensual referral." In addition, in lieu of convening a conference of counsel pursuant to Fed. R. Civ. P. 16, most of the district judges send the parties an Order Requiring Joint Status Report that asks them to state whether they will consent to reference to a magistrate judge. If the parties indicate their agreement in the status report, the court accepts this statement as written consent to the exercise of complete jurisdiction by a magistrate judge, who is then selected at random for referral of the case.

Legal authority regarding opt-out procedure

It should be noted that there is some question regarding the validity under Rule 73(b) of requiring parties to opt out of, rather than affirmatively consent to, trial by a magistrate judge.[8] The language of the rule itself appears to mandate affirmative consent: "[The parties] shall execute and file a joint form of consent or separate forms of consent setting forth such election." Case law interpreting the underlying statute, 28 U.S.C. § 636(c), supports that view. *See EEOC v. West La. Health Servs.*, 959 F.2d 1277 (5th Cir. 1992) ("Consent to trial by a magistrate . . . cannot be implied," citing *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc)); *Clark v. Poulton*, 914 F.2d 1426 (10th Cir. 1990) ("[W]e join the great weight of authority and hold that consent . . . must be explicit and cannot be inferred from the conduct of the parties."); *Securities & Exch. Comm'n v. American Principals Holdings (In re San Vicente Medical Partners Ltd.)*, 865 F.2d 1128 (9th Cir. 1989) ("[W]e have held that a clear and unambiguous manifestation of the parties' consent to the magistrate's exercise of jurisdiction is required."); *Silberstein v. Silberstein*, 859 F.2d 40 (7th Cir. 1988) ("We have . . . consistently refused to infer consent from the parties' conduct."); *Hall v. Sharpe*, 812 F.2d 644 (11th Cir. 1987) ("Consent must be 'clear and unambiguous,' and cannot be inferred from the conduct of the parties."); *Ambrose v. Welch*, 729 F.2d 1084 (6th Cir. 1984) ("We decline to view the parties' conduct throughout the proceedings as supplying the necessary consent.").

On the other hand, courts that have chosen the opt-out procedure find support for it in *Peretz v. U.S.*, 111 S. Ct. 2661 (1991).[9] The *Peretz* decision clarified the Supreme Court's 1989 holding in *Gomez v. U.S.*, 490 U.S. 585, that under the Federal Magistrates Act a magistrate judge's "additional duties . . . not inconsistent with the Constitution and laws" did not "encompass the selection of a jury in a felony trial without the defendant's consent." In *Peretz*, the Court emphasized that the *Gomez* ruling was narrow, "carefully limited to the situation in which the parties had not acquiesced at trial to the Magistrate's role." *Peretz* was critically different, the Court said, because petitioner's counsel affirmatively welcomed the magistrate judge's role in selecting the jury. Equating the duties a magistrate judge performs in presiding over *voir dire* at a felony trial with those involved in supervision of civil and misdemeanor trials, the Court concluded that the "additional duties" clause permitted a magistrate judge to conduct jury selection in a felony trial if the parties consent. It emphasized:

> In reaching this result, we are assisted by the reasoning of the Courts of Appeals for the Second, Third, and Seventh Circuits, all of which, following our decision in *Gomez*, have concluded that the rationale of that opinion does not apply *when the defendant has not objected to the magistrate's conduct* of the *voir dire*. See *United States v. Musacchia*, 900 F.2d 493 (CA2 1990); *United States v. Wey*, 895 F.2d 429 (CA7 1990); *Government of the Virgin Islands v. Williams*, 892 F.2d 305 (CA3 1989).

111 S. Ct. at 2667–68 (emphasis added).

The Court went on to say that "the Constitution affords no protection to a defendant who . . . *fails to demand the presence of an Article III judge* at the selection of his jury." (Emphasis added.)

Notes

1. In 1990, the Judicial Conference approved a recommendation of the Federal Courts Study Committee that 28 U.S.C. § 636(c)(2) be amended to allow district and magistrate judges to remind parties of the possibilities of consent to civil trials be-

fore magistrate judges. Thereafter, Congress passed such an amendment. In June 1993, the Judicial Conference's Committee on Administration of the Magistrate Judges System (hereinafter Magistrate Judges Committee) approved a long-range plan that encourages each district court to utilize magistrate judges more fully in addressing the special needs of the court and forecasts expanded use of magistrate judges in handling civil trials by consent.

2. Of the courts discussed in this article that make dual assignments, only the District of Oregon and the Middle District of North Carolina do not disclose to the parties the names of district judges paired on civil cases that are assigned directly to magistrate judges.

3. The heavy caseloads of the district judges dictate that several cases be set for trial simultaneously on their calendars. In contrast, magistrate judges' calendars are less crowded, so they usually can "specially set" one case for trial on a specific date.

4. As an example of the more open attitude manifested by the bar, Magistrate Judge Eliason pointed to an eight-day hearing on a preliminary injunction that he conducted pursuant to the referral system used before Standing Order No. 30 became effective. As a result of Standing Order No. 30, at the end of the hearing, counsel decided to submit the case to him on the record rather than take the matter before a district judge. He also cited a dispute over the breach of a settlement agreement in a patent case in which counsel asked for a limited assignment to him to decide the question.

5. The District of Idaho recently adopted a direct assignment/opt-out procedure as well. Under General Order No. 98, civil cases are assigned to magistrate judges "in such a proportionate basis as determined by the Article III District Judges." No district judge is assigned to cases sent directly to a magistrate judge. Within 10 days after the last defendant appears, parties must file a written objection or demand for reassignment to a district judge or be deemed to have consented to the conduct of all proceedings by the magistrate judge.

6. In the Eastern District of New York (Brooklyn), magistrate judges are "drawn at the same time and in the same manner" as district judges for the direct assignment of civil cases. A district judge is also randomly assigned to any case allocated from the draw to a magistrate judge. Parties are advised orally during pretrial proceedings that they can file written consent to trial before the designated magistrate judge by obtaining a form from the clerk's office.

7. Currently, Northern District magistrate and district judges in San Jose are paired so that every civil case filed is randomly assigned to both a district and magistrate judge. At every opportunity thereafter, from the initial management conference to the final pretrial conference, counsel are reminded of the option to have the magistrate judge conduct the entire proceeding. The court has a high consent rate, according to Magistrate Judge Edward Infante, because counsel have a chance to get to know the magistrate judges, who preside over all nondispositive pretrial discovery motions. The San Jose court is now preparing to include magistrate judges on the wheel for direct assignment of a proportionate share of all civil cases, and the judges are strongly considering adopting an opt-out procedure.

8. In December 1991, the Magistrate Judges Committee voted not to endorse a proposal to adopt an opt-out or waiver system of obtaining litigant consent to civil trials. Most recently, the long-range plan approved by the Magistrate Judges Committee expressly declined to endorse the opt-out system. *See* Long Range Plan for the Magistrate Judges System 6-4 (as amended December 7, 1993) (available from the Magistrate Judges Division of the Administrative Office of the U.S. Courts). According to the Magistrate Judges Division, however, there is ongoing discussion about this issue, and it will probably be revisited at the June 1994 Magistrate Judges Committee meeting.

9. In *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 290 (1993), the Magistrate Judges Division of the AO concluded that the *Peretz* decision suggests that a majority of the present Supreme Court favors "a pragmatic approach . . . to uphold the authority of non-Article III judicial officers." The article discusses the *Peretz* ruling in detail, as well as four circuit court opinions upholding the constitutionality of the consensual civil trial authority of magistrate judges.

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Chambers to Chambers

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Thoughts on Jury Trial in a Patent Case

The following article by Judge Avern Cohn (E.D. Mich.) was first published in the Intellectual Property Law Section Newsletter *of the State Bar of Michigan. With Judge Cohn's permission, we are reprinting it in* Chambers to Chambers *because we believe his remarks will be of interest to federal judges throughout the country.*

Patent disputes, validity and infringement, are commonly tried to juries these days notwithstanding a feeling that jurors may have difficulty understanding the evidence and applying it to the law as stated in the instructions. Whatever jurors' difficulties, the Seventh Amendment, as currently interpreted, requires a trial by jury when any party to the dispute makes such a demand. Therefore, it behooves judges and lawyers to do all they can to make the evidence and the law understandable to jurors. My experience in four patent jury trials leads me to conclude that much more can be done than I have observed being done.

1. The first question to be answered is the nature of the trial, i.e., liability and damages at the same time or a bifurcated trial under Fed. R. Civ. P. 42(b). Jurors' comprehension is improved and the trial process simplified when validity and infringement are separately tried from willfulness and damages. A 60 to 90 day hiatus between the two trials, if two trials are necessary, is usually sufficient. Customarily, the same jury should be assembled to avoid having to repeat any of the evidence.

2. Both the judge and the lawyers should have a complete understanding of the issues in the case before the trial begins. This understanding can be best assured if the verdict form, special questions (i.e., written interrogatories under Rule 49(b)), and instructions on the law of the case are agreed upon before the trial begins. Too often these matters are dealt with after the proofs have been completed and in the short interval of time that is generally available after the parties have rested and final argument begins. Of the three—verdict form, special questions, and instructions– the special questions and instructions are the most important and most difficult for the parties to agree on. Special questions are an essential element of jury decision making. It is the special questions that give jurors the pathway to decision and assure the judge that the jury understands the issues. With a set of special questions keyed to the differences between the parties, a general verdict is usually unnecessary. If a general verdict is used, it should be in multiple parts, again to lead the jury through the principal issues in the case. Once the special questions and verdict form have been agreed upon, the instructions on the law of the case can then be discussed. The instructions should be tailored to the issues in dispute. This means that the jury must be given the particular rules that underlie the issues on which the parties disagree, as reflected in the special questions and verdict form.

3. If possible, evidentiary objections, particularly on admissibility of expert testimony, should be ruled on before trial.

4. At the start of trial, the preliminary instructions should include a description of the patent system, an overview of the rules regarding validity and infringement, and some explanation of what the jurors will be called on to decide. Jurors should then be told what the parties agree on and what they disagree on. Jurors should be given a stipulated glossary of patent terms as well as the technical terms they are likely to hear during the course of the case. Opening statements should describe the invention and what each party's position is in words and phrases understandable to lay people, keeping in mind what the verdict form and special questions will look like, and what the judge has already told the jurors in the preliminary instructions. If the parties have agreed to a *meaningful* stipu-

lation of facts, this can be read to the jury either before or after opening statements.

5. Jurors should be given a notebook containing the patent, principal exhibits, and glossary. The notebook should have an index and tabs and be supplemented periodically during the trial. Only those exhibits that the parties have agreed upon should be included.

6. Jurors should be allowed to take notes and ask questions. Questions should be screened by the judge and answered either by the judge or in follow-up questions to witnesses. Answers by the judge should be agreed upon in advance with counsel for the parties.

7. Questions should be phrased with the jurors in mind. Witnesses should be told in advance by counsel that their answers are directed to lay jurors and not to counsel or the judge. Too often lawyers and witnesses appear to be oblivious of the fact that it is the jurors who are the important listeners and viewers and not the judge. Interruptions and objections should be kept to a minimum. Jurors are not amused by contentious lawyers and do not look kindly on lawyers who ignore the judge's rulings.

8. Direct examination and cross-examination should not be overdone. If an effort is made to impeach a witness by a prior inconsistent statement in a discovery deposition, care should be taken not to rush the examination to assure that the jurors understand the line of inquiry.

9. All of the devices that allow for simplification of the evidence and understanding by the jurors of the evidence, whether it be questions and answers, writings, drawings, pictures, etc., should be utilized. Use of simple, clear visual aids should be encouraged.

10. If difficulty is anticipated with a line of questioning or particular exhibit, the judge should be alerted in advance to enable him or her to deal with the matter before the jurors arrive or after they leave. Sidebar conversations and excusing the jury from the courtroom should be avoided whenever possible. It is particularly disconcerting to jurors when a witness is called, sworn, and an objection is sustained to the first substantive question, resulting in excusal of the witness. Jurors do not like it when they do not understand what is going on.

11. Final argument should be keyed to the issues in dispute and to the verdict form and special questions. (To make the summations more meaningful, many judges instruct the jury before counsel speak.)

12. The instructions should contain more than general statements of the law. If the jury is being called on to construe ambiguous claim language, for example, in the context of expert testimony and the like, alternative interpretations should be made known to them in the instructions. This perhaps can best be accomplished by including each party's "theory of the case" in the jury instructions.

13. The jury should have the text of the instructions in their hands while the judge is reading them and then take the text with them into the jury room.

14. While a judge can handle a "shotgun" approach to a patent case, such an approach is extremely difficult for a jury to deal with, and it is questionable whether a jury makes a good decision when that approach is taken.

For an overview of this specialized area of the law, see the Center's monograph Patent Law and Practice, *by Herbert F. Schwartz. To order, write to Information Services Office, One Columbus Circle, N.E., Washington, DC 20002-8003. Please enclose a self-addressed mailing label to expedite delivery.*

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Judges Should Set Time Limits on Trials for the Public's Sake

The following article by Chief Judge William O. Bertelsman (E.D. Ky.) was first published in the ABA Journal for October 1994. It is reprinted here with the permission of Chief Judge Bertelsman and the Journal.

Even though the caption of a complaint reads *plaintiff v. defendant,* there is always an unnamed party to every action—the public, whose resources are squandered if judicial proceedings extend beyond reasonable bounds.

The public's right to a just, speedy, and inexpensive determination of every action is infringed if a judge allows a case—civil or criminal—to consume more than its reasonable share of time.

A judge cannot rely on the attorneys to keep the time for trying a case within reasonable bounds. The perspectives of judge and attorneys differ markedly. A judge wants to reach a just result expeditiously and economically. Attorneys' primary concern is winning, but they often confuse quantity with quality.

Therefore, judges must recognize that they, rather than the attorneys, have a more objective appreciation of the time a case requires when balancing its needs against the court docket.

Rule 16 Authorization

Since December 1, 1993, an amendment to Rule 16 of the Federal Rules of Civil Procedure has expressly authorized a trial judge to impose reasonable time limits on trials for the first time.

Time limits will seem novel to most judges and attorneys. But, after reading an article by U.S. District Court Judge Pierre Leval of New York some years ago, I have been using time limits in my courtroom. I have found that they are successful in reducing wasted time, expense, and the numbing repetition that seems endemic to modern litigation.

Setting a reasonable time limit forces counsel to conform their zeal to the need of the court to conserve its time and resources. But, subject to the time limits imposed, counsel remain in control of the case. Numerous objections or *sua sponte* interruptions by the judge to debate what evidence is repetitious or cumulative are avoided. Properly streamlined, the case is more effective in ascertaining the truth.

The first case in which I issued time limits was a criminal tax fraud case involving a labyrinth of transactions, both fictitious and genuine. The prosecutor had given me an estimate of four weeks for her case-in-chief. It soon became obvious that she would never meet that goal. So I imposed a time limit based on her original estimate.

Once the time limit was imposed, she moved along briskly and finished two hours early. Even more importantly, her case became clearer because she had to talk about the forest rather than each tree, or even each leaf.

Thereafter, I began to use time limits routinely in both civil and criminal cases. In the beginning, I kept a stopwatch on the proceedings. If an attorney took an hour on direct, any time in excess of that on cross was charged against the cross-examiner. As the trial approached its end, it began to look like the last two minutes of a professional football game, with lawyers pulling various gambits to try to run the other side out of time.

After some experimentation, I came up with what I think is a better, more flexible system:

- The trial judge and attorneys should agree on reasonable time limits at a pretrial conference. The time granted each side should be equal, even though one party might have more background evidence to present. An attorney who does not get equal time, for whatever reason, will feel unfairly treated.
- The limits must have some flexibility. Trial judges should not use a stopwatch approach. This encourages gamesmanship. Rather, let each side know that if it uses excessive time for cross-examination or objections, additional time may be given the other side. Even if the judge has to give each side an extra half day, the trial will still be days or weeks shorter than one without time limits. Usually extra time will not be necessary.
- Although time limits are flexible, a judge must be firm in insisting that attorneys substantially observe the limits. The way that the attorneys achieve brevity is by making stipulations, editing depositions, summarizing voluminous evidence, using techniques developed in summary jury trial practice, and, above all, getting to the point by eliminating fancy footwork, extraneous matters, and any repetition.

That is all there is to it, and it really works. Remember the old commercial slogan: "Try it; you'll like it." That is the way it is with time limits for attorneys, judges, and jurors, but especially for clients.

Now that the authority to use time limits on trials is officially recognized, I hope it will be constructively used to bring some needed efficiency to modern litigation.

Readers of this issue will also be interested in an earlier *Chambers to Chambers* on the use of time limits. *See* Judge Pierre Leval, *Allocating Time for Direct and Cross-Examination and Other Presentation of Evidence,* Chambers to Chambers, vol. 4, no. 3 (Nov. 17, 1986).

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Chambers to Chambers

Federal Judicial Center
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Appointment of Counsel and Jury Selection Issues in Federal Death Penalty Cases

With passage of the Federal Death Penalty Act of 1994, Title VI of the Violent Crime Control and Law Enforcement Act of 1994, federal law now makes the death penalty a sentencing option for over sixty offenses. At this point, however, only a few federal judges have presided over capital cases. Those cases were brought under the 1988 Anti-Drug Abuse Act. As time goes on, it seems likely that an increasing number of district judges will sit on capital cases. (The judicial branch's fiscal 1996 appropriations request projects that the Department of Justice will seek the death penalty in twenty additional cases in fiscal 1996.)

This is the first in a series of *Chambers to Chambers* on legal and practical problems unique to capital cases. This issue focuses on appointment of counsel and jury selection. Subsequent issues will discuss monitoring and limiting expenses and fees, pretrial matters (including motions), jury instructions, and conducting the punishment phase of a capital trial. We cannot cover in depth all the issues a judge might encounter in a criminal case, but we hope to identify significant recurring issues, discuss methods of approaching them, and identify other resources available to judges handling death penalty cases.

The *Chambers to Chambers* series will initially draw upon the experience of four district judges who have handled federal capital cases: Judges Avern Cohn (E.D. Mich.), James Hughes Hancock (N.D. Ala.), Reena Raggi (E.D.N.Y.), and Milton Shadur (N.D. Ill.). Judge Cohn currently has a case pending trial in which three defendants face capital charges. Judges Hancock, Raggi, and Shadur were among the first to try capital cases brought pursuant to 21 U.S.C. § 848(e), the so-called drug kingpin murder provision, which includes the death penalty as a sentencing alternative for drug-related killings. In both Judge Hancock's case and Judge Raggi's case, capital charges were lodged against one defendant. Judge Shadur's case involved two capital defendants who were tried separately.[1]

Appointment of Counsel

Judges can expect issues to arise in the following areas: determining how many attorneys to appoint to represent a given capital defendant, deciding whether to replace or supplement retained counsel, and finding qualified counsel.[2]

Determining how many attorneys to appoint

Authority for the appointment of counsel in capital cases is found in 18 U.S.C § 3005 and 21 U.S.C. § 848(q)(4). Section 3005 of 18 U.S.C., as amended by section 60026 of the 1994 Act, states:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, *assign two such counsel, of whom at least one shall be learned in the law applicable to capital cases* . . . . (Emphasis added.)

Section 848(q)(4) of 21 U.S.C. provides:

> Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, *a defendant who is or becomes financially unable to obtain adequate representation . . . shall be entitled to the appointment of one or more attorneys* . . . . (Emphasis added.)

Each of these provisions permits the court to appoint two attorneys to represent a capital defendant, but what if the defendant files a motion requesting the court to appoint additional counsel in the case? Does the specification "two such counsel" in 18 U.S.C. § 3005 bar the appointment of more than two?

Several district judges have interpreted 21 U.S.C. § 848(q)(4) as giving them discretion to appoint more than two attorneys in such circumstances, both from the wording of section 848(q)(4) itself and from language in other subsections of section 848(q) requiring the court to consider the seriousness of the possible penalty, the complexity of the litigation, and the unique nature of capital cases in approaching related counsel issues in such cases.[3] Vol. VII, ¶ 6.01(A) of the *Guide to Judiciary Policies and Procedures,* as recently amended to implement the 1994 changes to 18 U.S.C. § 3005, also provides support for the assignment of multiple counsel in capital cases. It advises that "[p]ursuant to 21 U.S.C § 848(q)(4), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in [a federal capital] case."

What considerations might lead the court to conclude that more than two attorneys are needed to adequately defend a given capital defendant? If the case is sufficiently complex and is expected to take an extended period of time to try, the court might conclude that, because of the extraordinary demands the case will place upon defense counsel, three attorneys will be required to provide the defendant with adequate representation. Additional counsel may also be justified in a case involving complex legal issues of first impression, a case requiring extensive or far-ranging defense investigation, or a case in which the only defense counsel in the case with capital litigation experience is from out of state, a result which may occur when the state in which the court is sitting does not have a death penalty.

The Federal Judicial Center is preparing a range of education and training responses designed to assist district judges who may be assigned capital cases. The primary focus of these efforts is to disseminate information and materials that will alert judges to recurring issues in such cases and help judges manage them effectively. The Center expects to coordinate these efforts with the Committee on Court Administration and Case Management and other interested Judicial Conference committees and their staff.

The Center also plans to serve as a clearinghouse for information on techniques judges are using to manage death penalty cases. As part of this effort, we are contacting judges who have handled death penalty cases and asking them to send us selected case materials. These materials will be indexed by topic, maintained in the Center's Information Services Office, and made available to any federal district court judge.

Replacing or supplementing retained counsel

The fact that a capital defendant has retained counsel does not necessarily preclude the court from appointing additional counsel, and appointing additional counsel under 21 U.S.C. § 848(q)(4) can help alleviate problems that may arise when a capital defendant retains counsel. For example, Judge Cohn concluded that two of the defendants in his case had retained lawyers who were not sufficiently experienced in capital cases. Each defendant, having retained one attorney, was unable to afford a second. Thus they became "financially unable to obtain adequate representation," which permitted Judge Cohn to appoint second attorneys for them under 21 U.S.C. § 848(q)(4). Appointing the second attorneys also satisfied 18 U.S.C. § 3005's requirement that at least one counsel representing a defendant in a capital case be "learned in the law applicable to capital cases." Furthermore, given that prosecutions brought under 21 U.S.C § 848(e) are likely to result in multicount, multidefendant indictments alleging the intentional killing of one or more persons by members of a drug-distribution ring, retained counsel may have to be removed because of a conflict of interest or for other reasons. In Judge Cohn's case, the government moved to have one defendant's retained counsel removed from the case on grounds that he was providing other defendants in the case with the identity of government informants. (Judge Cohn eventually denied the motion.)

Another possibility, given the complex and protracted nature of capital litigation, is that a defendant who has retained counsel may run out of money before the case is over. The defendant in Judge Raggi's case became unable to pay his lawyer. Retained counsel successfully petitioned the court for appointment under 21 U.S.C. § 848(q)(4).[4] In Judge Shadur's case, retained counsel had to petition the court for appointment after the government seized their client's assets for proposed forfeiture.

Finding qualified counsel

As noted above, section 60026 of the Federal Death Penalty Act of 1994 amends 18 U.S.C. § 3005 to require that at least one of the attorneys appointed by the court in a capital case "be learned in the law applicable to capital cases." How does the court decide whether a lawyer meets that requirement? Amended section 3005 addresses the issue only in general terms: "In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts."[5] Section 848(q)(5) of 21 U.S.C. requires only that

> at least one attorney [appointed pursuant to section 848(q)(4)] must have been admitted to practice in the court in which the

prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

The American Bar Association has promulgated detailed guidelines for both the appointment and performance of counsel in death penalty cases.[6] Its criteria for lead counsel include recommendations that the attorney have prior experience as lead or cocounsel in at least one case in which the death penalty was sought and as lead counsel in no fewer than nine jury trials of serious and complex cases that were tried to completion (including one or more murder or aggravated murder charges). They recommend that counsel be experienced in the use of expert witnesses and evidence, including expert psychiatric and forensic evidence. One criterion considered by Judge Raggi was whether counsel had tried a death penalty case to verdict in the sentencing phase of the case.

Finding qualified counsel can be especially hard when the court sits in a judicial district located in a state that does not have a death penalty. Judges Raggi and Cohn encountered this difficulty, and they solved it by finding qualified counsel in states with death penalty statutes. Judge Raggi also sought recommendations from top law schools and law firms known to handle habeas corpus cases involving death penalty issues. Judge Cohn, unable to find counsel suitably qualified to represent one of his capital defendants in either Michigan or a neighboring state, followed the recommendation of the chief federal defender for the Eastern District of Michigan and appointed attorneys from Illinois, Indiana, and Georgia who met the requirements of 21 U.S.C. § 848(q)(5) and 18 U.S.C. § 3005.

Jury Selection

Jury selection in capital cases requires substantial advance planning and coordination. The court will need a large panel of prospective jurors, given the potential duration of the case, the number of peremptory challenges available to each side, and the likelihood that alternate jurors will be needed. For example, after disqualifications for cause, at least sixty

The following resources are also available to judges attempting to familiarize themselves with the myriad legal and practical issues involved in death penalty cases.

- *The 1994 Ninth Circuit Capital Punishment Handbook* (updated November 1994). The handbook was designed as a research tool for the use of judges and law clerks of courts in the circuit. It focuses largely on law and procedures applicable in capital cases in the seven Ninth Circuit states with a death penalty. However, it also contains an analysis of issues common in death penalty cases, focusing on federal law and including summaries of relevant U.S. Supreme Court case law. Copies have been sent to each district judge and are available in circuit libraries. Contact Asif Quraishi, Death Penalty Law Clerk for the Ninth Circuit, at (415) 744-6150.
- The Eleventh Circuit's opinion in *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), *cert denied*, 114 S. Ct. 2724 (1994), an appeal challenging the first death sentence imposed under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e)-(q). The opinion includes a detailed overview of the provisions of that Act.
- The Federal Death Penalty Resource Counsel Project, a program of the Defender Services Division of the Administrative Office of the U.S. Courts, assists defenders and Criminal Justice Act panel attorneys engaged in the defense of federal capital cases, identifies and recruits counsel qualified for appointment in such cases, and compiles information on potential and pending federal death penalty cases throughout the United States. Volume I of the project's three-volume set *Materials on the Federal Death Penalty*, which includes reported district court and U.S. court of appeals decisions in federal capital cases and listings of district court rulings on recurring issues in such cases, is available to district judges on request. Please contact David Bruck, P.O. Box 11744, Columbia, SC 29211, tel. (803) 765-1044, or Kevin McNally, P.O. Box 1243, Frankfort, KY 40602, tel. (502) 227-2142.
- The Federal Judicial Center Information Services Office has sets of the materials used by Judges Raggi and Shadur in their death penalty cases. The papers include documents and transcripts relating to voir dire, preliminary jury instructions, jury charge, and verdict forms. Judges who want copies of these documents should call the Information Services Office at (202) 273-4153.

prospective jurors will be required to seat a jury of twelve and four alternates in a capital case, assuming each side exercises the twenty peremptory challenges available to it in selecting the jury and the two strikes available to it in selecting alternates. It seems reasonable to expect at least an equal number of jurors to be disqualified for cause because of their attitudes toward the death penalty and other highly charged issues likely to be involved in the case. For these reasons, Judges Shadur and Hancock decided to begin the jury selection process in their cases with a venire of 125 to 150 prospective jurors. Judge Raggi summoned 200 prospective jurors in her case, in part because it involved a defendant with alleged ties to an organized crime family. Judge Cohn also intends to summon approximately 200 prospective jurors for each of the capital cases he will be trying.

Screening prospective jurors

Judge Shadur began the jury selection process by drafting a letter for his district's jury department to send to the 400 some persons summoned to serve as jurors during the period when his capital case was expected to go to trial. The letter said that "a criminal trial that may approach two months in length" would begin during the summoned jurors' period of service. It did not mention that the case potentially involved the death penalty, because Judge Shadur felt that prospective jurors would be less likely to make an effort to be excused from the case if the fact that the case involved the death penalty was first revealed to them in person, in the courtroom. The letter enclosed a questionnaire designed to identify which of the summoned jurors would be in a position to serve for a two-month period. Judge Shadur personally reviewed every one of the responses that had offered a reason for not serving based on length of time alone. He deferred service entirely for some respondees, excused some from service during that month, and excused others only from service in his capital trial. He began jury selection for his first capital trial with a venire of approximately 125 prospective jurors. By following this procedure, he was able to complete the screening process

The judges contributing to this publication found it helpful in preparing and trying their cases to discuss the issues involved with colleagues who had previously handled, or were currently handling, capital cases. (They have also expressed their willingness to confer with district judges who may be handling such cases in the future.) As of March 1995, the following additional district judges have handled federal death penalty cases under the 1988 Anti-Drug Abuse Act, 21 U.S.C. § 848(e)-(q). A listing in italics signifies that jury verdicts on capital charges were returned in both the guilt and punishment phases of a case.

Harold A. Ackerman, District of New Jersey (defendant committed suicide during trial)

John T. Curtin, Western District of New York (plea of guilty to noncapital offense)

Adrian G. Duplantier, Eastern District of Louisiana (government withdrew notice of intent to seek death penalty)

Thomas F. Hogan, District of the District of Columbia (plea of guilty to noncapital offense)

Raymond A. Jackson, Eastern District of Virginia (plea of guilty to capital offense, government waived jury for sentencing, court sentenced defendant to life without possibility of release)

Elizabeth A. Kovachevich, Middle District of Florida (government withdrew notice of intent to seek death penalty)

Henry C. Morgan, Jr., Eastern District of Virginia (three defendants received sentence other than death)

Wilbur D. Owens, Jr., Middle District of Georgia (government withdrew notice of intent to seek death penalty)

Robert M. Parker, Eastern District of Texas (two defendants received sentence other than death)

Sylvia H. Rambo, Middle District of Pennsylvania (plea of guilty to noncapital offense)

Frank H. Seay, Eastern District of Oklahoma (one of three defendants sentenced to death, case on appeal in Tenth Circuit)

James R. Spencer, Eastern District of Virginia (three defendants sentenced to death, case on appeal in Fourth Circuit)

Stanley Sporkin, District of the District of Columbia (case pending trial)

Joseph E. Stevens, Jr., Western District of Missouri (case pending trial)

Ursula M. Ungaro-Benages, Southern District of Florida (case pending trial)

Filemon B. Vela, Southern District of Texas (defendant sentenced to death, case on appeal in Fifth Circuit)

Robert L. Vining, Jr., Northern District of Georgia (court granted defendant's pretrial motion to dismiss on double jeopardy grounds, government has appealed)

in each of his capital cases with a sufficient number of prospective jurors to permit selection of a full jury and alternates even though both sides almost fully exhausted their peremptory challenges.

Judge Raggi also used a jury questionnaire to screen prospective jurors. The members of her venire were summoned to court to fill out the questionnaire and receive general information about the case, including the fact that it involved charges carrying a potential death penalty. The questionnaire itself did not inquire into juror attitudes about the death penalty, however. Judge Raggi and the attorneys in the case reviewed the questionnaires. Jurors who were not excused for hardship or cause were then required to return to court for further questioning. Judge Raggi set aside a week for individual voir dire of the remaining jurors. Thirty to forty prospective jurors were examined each day. Judge Cohn will be following a similar procedure, although prospective jurors in his case will be reporting to a magistrate judge for the initial orientation and filling out of questionnaires, and his questionnaire contains questions about juror attitudes toward the death penalty.

Voir dire questioning

Judges Shadur and Raggi decided that because of the extreme delicacy of the voir dire process in capital cases, the possibility of confusing jurors by technical or awkwardly phrased questions, and the risk of counsel's tainting the entire venire by a chance remark during questioning, they would ask all voir dire questions themselves after reviewing questions submitted by counsel. Judge Hancock asked initial voir dire questions himself, but he permitted the attorneys to participate in follow-up questioning.

A significant part of the individual voir dire conducted in their cases involved questioning prospective jurors about their attitudes toward the death penalty, a process which has become known as "death-qualifying" the jury. After reviewing the relevant Supreme Court case law and considering the testimony of University of Chicago Professor Hans Zeisel, Judge Shadur concluded that only two questions about attitudes toward the death penalty had to be asked of each prospective juror.[7] Each question was designed to inquire into potential polar extremes in juror attitudes toward the death penalty. The first question was phrased as follows:

> For any reason—whether as a matter of moral or religious or philosophical beliefs or as a matter of conscience or personal belief, or for any other reason, *can you say that you would never vote to impose the death penalty under any circumstances*, in accordance with the statutory procedure that I have outlined?

Assuming the response to that question and any follow-up questions did not disqualify the juror, Judge Shadur then asked this question:

> Suppose you wind up sitting as a juror in this case, and that the jury finds the defendant guilty, so the case goes into phase two, the sentencing hearing. Remember that if the jury finds the defendant not guilty, then that is the end of it.
>
> The case then goes into the second phase [the court then summarizes the statutory procedures to be followed in the sentencing phase of the case]. Assume that, at that stage, what you conclude on looking at the entire thing is that it is a situation in which the jury could legally impose the death penalty, but the jury is not obligated to do it. *Would you always in that situation vote to impose the death penalty?*[8]

Before proceeding with these questions, Judge Shadur gave the panel an overview of how the jury would proceed to make its decisions during the two potential stages of the case. He then began his individual voir dire by asking each prospective juror, at side-bar, both of the above questions (except where a yes answer to the first question had required the prospective juror's disqualification under *Witherspoon v. Illinois*, 391 U.S. 510 (1968)) and any appropriate follow-up questions. In each of his capital cases, it took Judge Shadur approximately two and a half court days to complete his individual voir dire questioning and seat a jury of twelve and four alternates.

Prospective juror questionnaire responses are likely to prompt individual voir dire questioning on other topics, including prospective juror attitudes on racial matters, attitudes toward drugs and firearms, and exposure to pretrial publicity. For example, upon request, a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Turner v. Murray*, 476 U.S. 28 (1986).

Avoiding selection of a second jury to hear the penalty phase of the case

Although provisions of both the 1988 and 1994 Acts permit different juries to hear the guilt and sentencing phases of a capital case, assuming both phases are necessary, there are strong practical reasons for having a single jury handle both phases of the case.[9] Even with advance planning on the part of the trial court, the assistance of clerk's office jury personnel, and the full cooperation of counsel, the process of jury selection in a capital case—including obtaining a venire of suitable size, questioning that venire appropriately through questionnaires and detailed, individual voir dire, and selecting a jury and alternates through the exercise of challenges—is likely to take a substantial period of time. If a second jury is chosen after completion of the guilt phase, the entire process will have to be repeated. This will create a period of delay between the two phases and increase the likelihood of witness availability problems in the second phase. In addition, selecting a second jury to hear the penalty phase will increase the amount of time

needed to try that phase, because those portions of the evidence presented at trial that were also relevant to sentencing will have to be presented to the new jury.

Fed. R. Crim. P. 23(b) could affect the court's ability to use only one jury in a capital case. Rule 23(b) prohibits the return of a verdict by a jury of fewer than twelve except by written stipulation or if one juror must be excused for cause after the jury has begun its deliberations. If the alternate jurors are discharged at the end of the trial on the merits and a juror then has to be excused for cause after the jury has begun deliberations, a valid verdict on the merits can be returned under Rule 23(b), but if that verdict is guilty, the court would then be faced with the prospect of selecting another jury for the penalty phase. Even if the verdict in the guilt phase of the case was returned by a jury of twelve, the subsequent loss of a juror at any time before return of verdict in the penalty phase of the case would raise the prospect of a mistrial in that phase, if defense counsel refused to enter into a stipulation for a verdict by a lesser number of jurors. (Such a stipulation is permitted by 21 U.S.C. § 848(i)(2).)

Judge Shadur prepared for this potential problem by ruling that the alternates would not be discharged at the end of the evidence in the guilt phase of the case. Instead, he instructed them to continue observing his admonition not to talk with anyone about the trial and to call in each day to see if they might be needed for further service. When the jury returned a guilty verdict on the death penalty count, the alternates were called back to sit with the original twelve jurors during the punishment phase of the case. Under this arrangement, the original twelve jurors and the alternates heard the identical evidence, both during the course of the trial and during the second-phase hearing on punishment.[10] If anything had happened to one or more of the original jurors during the punishment phase, but before the jury returned to deliberate, Judge Shadur would have replaced them with alternates to ensure a jury of twelve. If a juror became unable to serve after deliberations on punishment had begun, Rule 23(b) would have been invoked. As it turned out, none of the original jurors had to be replaced.

Recent amendment to 18 U.S.C. § 3432

Section 60025 of the Federal Death Penalty Act of 1994 amends 18 U.S.C. § 3432 by providing for an exception to that provision's requirement that a capital defendant be furnished a list of the veniremen, and of the witnesses to be produced at trial to prove the indictment, at least three days before commencement of trial. Under amended section 3432, the list of veniremen and witnesses need not be furnished if the court finds, by a preponderance of the evidence, that "providing the list may jeopardize the life or safety of any person." Absent such a finding, some judges have made the list available earlier than when required by statute, in order to facilitate defense counsel's preparation for trial. Judge Hancock made the list of veniremen and witnesses available to counsel for the defendant in his case ten days before commencement of trial. In Judge Shadur's case, the parties agreed that the timely production of a witness list and the furnishing of the list of veniremen three working days before commencement of the jury selection process would represent compliance with section 3432. Section 3432 requires the list to include "the place of abode of each venireman and witness." The lists provided by Judges Hancock, Shadur, and Raggi included the name of the town, community, or neighborhood in which each person resided, but not the street address.

Notes

1. In Judge Shadur's case, *United States v. Cooper,* No. 89-CR-580, the first case involving capital charges brought under the 1988 Anti-Drug Abuse Act, two defendants were charged with violating 21 U.S.C. § 848(e), among other counts. Each defendant was convicted on the capital count but sentenced to life imprisonment after the jury decided not to impose the death penalty. Judge Hancock's case, *United States v. Chandler,* 996 F.2d 1073 (11th Cir. 1993), *cert denied,* 114 S. Ct. 2724 (1994), involved sixteen defendants charged under 21 U.S.C. § 848(a) and a variety of other statutes. One defendant, Chandler, was also charged with violating 21 U.S.C. § 848(e). Chandler was tried separately, convicted on all counts, and sentenced to death upon recommendation of the jury. In Judge Raggi's case, *United States v. Pitera,* No. 90-CR-0424, the defendant was convicted of killing two individuals in violation of 21 U.S.C. § 848(e) and sentenced to life imprisonment on recommendation of the jury. In Judge Cohn's case, *United States v.*

Brown, No. 92-CR-81127, the indictment initially charged six defendants with capital offenses. Since then, Judge Cohn has granted the government's request to dismiss the capital charge lodged against one defendant, a second defendant has been killed, and a third has entered a plea of guilty under a plea agreement in which the government withdrew its request for the death penalty. One of the three remaining capital defendants will be tried separately.

2. These issues are, of course, related to those involved in determining the hourly rate of compensation for counsel appointed in capital cases. Judge Shadur suggests that hourly rates for counsel should be determined at the same time the number of defense counsel is decided and approved as close to the beginning of the case as possible. Issues involved in compensating counsel, investigators, and expert witnesses under section 848(q)(9) and (10) will be discussed in a forthcoming *Chambers to Chambers.*

3. See, e.g., the opinion of Judge Sterling Johnson in *United States v. Munoz-Mosquera,* E.D.N.Y. No. 91-CR-1235(S-2), and Judge Raggi's order in *United States v. Pitera,* No. 90-CR-0424, appointing an attorney who had previously been retained by the defendant under 21 U.S.C. § 848(q)(4), after the defendant became unable to pay the attorney, and referring to the appointment of three additional attorneys under that provision. (Judge Raggi subsequently relieved one of the three other attorneys from the case.) The defendant in Judge Raggi's case was charged in a twenty-count indictment alleging that he had participated in the activities of an organized crime family, headed a continuing criminal enterprise, committed nine murders, including two punishable by death, and committed various drug and firearms offenses.

Judge Raggi has since concluded that two defense attorneys would have been enough to handle the case appropriately.

4. Judge Raggi required counsel to disclose his retainer and document the number of hours he had worked on the case. She then applied the Criminal Justice Act rate of payment to all of counsel's billable hours. Only when the retainer was exhausted using that rate of payment did she actually begin to compensate counsel with public (Criminal Justice Act) funds.

5. Vol. VII, ¶ 6.01(B) of the *Guide to Judiciary Policies and Procedures* has been amended to implement the quoted portion of 18 U.S.C. § 3005. Paragraph 6.01(B) now requires the federal public defender organization or the Administrative Office to consult with the court and any previously appointed or retained counsel regarding the facts and circumstances of a case in which it is recommending counsel, in order to determine the qualifications that may be required to provide effective representation in the case. It also identifies legal organizations whose standards the defender organization or Administrative Office should consult in evaluating the qualifications of counsel being considered for appointment.

6. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (February 1989).

7. The late Professor Zeisel was coauthor with Harry Kalven, Jr., of *The American Jury* (Little, Brown and Company, 1966). The questions were designed to comply with Supreme Court case law articulating standards for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. *See, e.g., Morgan v. Illinois,* 112 S. Ct. 2222 (1992); *Wainwright v. Witt,* 469 U.S. 412 (1985); *Witherspoon v. Illinois,* 391 U.S. 510 (1968).

8. Judges Raggi and Hancock asked similarly phrased questions. Judge Raggi has provided the Center with the transcript of a substantial portion of her voir dire in *United States v. Pitera.* The transcript includes numerous examples of death-qualifying questions and follow-up questions.

9. Section 848(i)(1)(B) of 21 U.S.C. articulates limited circumstances in which a second-phase (punishment) hearing may be held before a different jury than the jury that decides a defendant is guilty of an 848(e) violation. Similarly, 18 U.S.C. § 3593(b), enacted as part of the Federal Death Penalty Act of 1994, limits the circumstances under which a punishment hearing may be conducted before a jury impaneled for the purpose of that hearing. As Judge Cohn observes, referring to *The Death Penalty in the United States,* 50 J. Soc. Issues, no. 2 (Summer 1994), the argument that separate juries should ordinarily be impaneled to sit in the guilt and punishment phases of a capital trial has been advanced by social science researchers whose studies have concluded that death-qualified juries are somewhat more prone to convict capital defendants than nondeath-qualified juries. These researchers suggest that death-qualifying only the second jury (that is, the jury that sits at the sentencing stage of a capital trial) would counteract this tendency. However, in *Lockhart v. McCree,* 476 U.S. 162 (1986), the Supreme Court rejected the argument that the defendant was consitutionally entitled to a nondeath-qualified jury on the issue of guilt, and noted that the state has an entirely proper interest in having a single jury sit in both phases of a capital trial. In addition some judges point to practical considerations that militate against impaneling a second jury.

10. Judge Hancock also followed this procedure, with one exception. He sought and obtained a stipulation from the parties agreeing to the continued service of the alternate jurors throughout the remainder of the case, in light of Fed. R. Crim. P. 24(c)'s mandate that alternate jurors "shall be discharged after the jury retires to consider its verdict."

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ChamberstoChambers

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Compensation of Counsel, Investigators, and Expert Witnesses in Federal Death Penalty Cases

Because the number of federal capital cases in the district courts will increase as a result of the enactment of the Federal Death Penalty Act of 1994, the Federal Judicial Center is devoting several issues of *Chambers to Chambers* to the legal and practical problems unique to these cases. The May 1995 issue focused on appointment of counsel and jury selection.[1] This issue deals with compensation of counsel, investigators, and expert witnesses. Subsequent articles will treat pretrial matters (including motions), trial-management issues, and the punishment phase of a capital trial. Although these articles do not provide exhaustive coverage of the topics, they are meant to assist judges in coping with some of the recurring problems presented by capital cases.

In addition to outlining statutory authority, case law, and Judicial Conference policy regarding the award of fees and expenses in death penalty cases, this issue of *Chambers to Chambers* discusses the experiences of a number of judges who have had to make decisions giving practical effect to the law and policy guidelines. Judges Avern Cohn (E.D. Mich.), James Hughes Hancock (N.D. Ala.), Reena Raggi (E.D. N.Y.), and Milton Shadur (N.D. Ill.), all of whom have handled death penalty cases brought pursuant to the 1988 Anti-Drug Abuse Act, 21 U.S.C. § 848(e)–(q), offered substantial information and assistance for this article, as they did for the first one. Several other judges with experience in capital cases prosecuted under the Anti-Drug Abuse Act also provided information: Judges Thomas F. Hogan (D.D.C.), Wilbur D. Owens, Jr. (M.D. Ga.), Frank H. Seay (E.D. Okla.), James R. Spencer (E.D. Va.), and Joseph E. Stevens, Jr. (W.D. Mo.).

Legal authority for award of fees and expenses

In a federal capital case, neither the rate and amount of compensation to be awarded to defense counsel nor the fees and expenses to be paid for investigative, expert, and other services are limited by Criminal Justice Act (CJA) hourly rates or compensation maximums. The law gives district judges broad authority to determine the amount that is "reasonably necessary" to obtain qualified counsel and adequate services. 21 U.S.C. § 848(q)(10). This is emphasized in policies and guidelines adopted by the Judicial Conference. *VII Guide to Judiciary Policies and Procedures*, ¶¶ 6.02A and 6.03B (Administrative Office of the U.S. Courts) [hereinafter *VII Guide*].

Judicial Conference guidelines urge judges "to compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided." At the same time, the guidelines recommend that judges limit the hourly rate for attorney compensation to "between $75 and $125 per hour for in-court and out-of-court time." *VII Guide* ¶ 6.02B. In a November 27, 1995, memorandum to all U.S. judges,

the Executive Committee of the Judicial Conference asked judges "in these times of scarce resources" to adhere to the recommended rate of between $75 and $125 per hour.[2] The guidelines do not recommend an hourly rate for investigative and expert fees and expenses, which a judge must determine after an ex parte proceeding to authorize such services. 21 U.S.C. § 848 (q)(9); *VII Guide* ¶ 6.03A.

Attorney compensation awards

The Federal Death Penalty Resource Counsel Project, a program administered by the Administrative Office's Defender Services Division, has collected information on attorneys' fee awards from judges and attorneys throughout the country. The data show that, as of fall 1995, the actual hourly rate for counsel appointed to federal capital cases in major metropolitan areas was at least $125 for both in- and out-of-court time. The Project reported that even in some smaller cities, such as Richmond, Va., Macon, Ga., and Muskogee, Okla., district courts set a rate of $125 per hour for all time spent. In large cities like Detroit, Atlanta, and Washington, D.C., a rate of $150 per hour is being awarded with increasing frequency.[3] A chart showing all federal death penalty cases, prepared by Project attorneys and updated as of July 1995, indicates that $125 per hour for in- and out-of-court time is the prevailing rate. A fee of $150 per hour is the highest rate noted (awarded in about one-fifth of the cases); in a smaller number of cases, the top fee is $100 per hour. In a handful of cases, lesser awards of $90 and $75 for associates and $40 for paralegals are recorded.[4] Project attorneys emphasize that the information provided on the chart is incomplete and should not be considered definitive. (There are two published opinions on the award of attorneys' fees in death penalty cases, both approving the $125 per hour rate: *U.S. v. Cheely*, 790 F. Supp. 901 (D. Alaska 1992) and *U.S. v. Cooper*, 746 F. Supp. 1352 (N.D. Ill. 1990).)

Fees awarded by the judges contacted for this article reflect the same distribution. In all but two cases the rate set was $125 an hour.[5] Judge Stevens awarded lower fees of $115 an hour in court and $100 per hour out of court for lead counsel; he also set a rate for second counsel of $105 per hour in court and $95 per hour out of court.[6] Judge Cohn, on the other hand, established a top rate of $150 an hour in and out of court, with $75 per hour for associate counsel and $40 an hour for paralegals. After consulting with the federal public defender, Judge Hogan also awarded $150 per hour to lead counsel for all time spent on the case; associate counsel received a lesser rate. Most of the judges said $125 an hour seemed a reasonable fee for their area. Judge Raggi believed the fee was adequate but said because it was difficult to get good experienced trial attorneys in New York City to take the case, she did not think a distinction should be made between time in and out of court. Since Judge Shadur consid-

The following list of district judges who are presiding over or have handled federal death penalty cases supplements the list of seventeen judges provided in the previous issue of *Chambers to Chambers*. A listing in italics signifies that jury verdicts on capital charges were returned in both the guilt and punishment phases of a case.

D. Brook Bartlett, Western District of Missouri (case pending trial)
Monti Belot, District of Kansas (case pending trial)
Ginger Berrigan, Eastern District of Louisiana (case pending trial)
Sam R. Cummings, Northern District of Texas *(one defendant sentenced to death; new trial motion pending)*
Thomas McAvoy, Northern District of New York (case in trial)
Richard P. Matsch, District of Colorado (case pending trial)
Terry Means, Northern District of Texas *(one defendant sentenced to death; new trial motion pending);* (case pending trial for second defendant)
Martha Vazquez, District of New Mexico (case pending trial)
Samuel Grayson Wilson, Western District of Virginia (case pending trial)

ered $125 an hour a "bargain rate" in his district, he did not think a lower amount should be awarded to associate attorneys. Judge Spencer noted that perhaps as much as $25 of the fee was an "added premium because the lawyers were either solo practitioners or in small firms and had to shut down everything else to do the cases."

Since the death penalty is not authorized in Michigan, Judge Cohn found it necessary (as did Judge Raggi in New York) to appoint out-of-state counsel for each of five defendants to fulfill the requirements of 18 U.S.C. § 3005 that at least one attorney "shall be learned in the law applicable to capital cases." A $150 per hour fee was justified, he believed, in order to engage highly qualified counsel from another jurisdiction. At the same time, at the beginning of the case Judge Cohn advised defendants' counsel that he was considering capping attorneys' fees for pretrial work at $125,000 per attorney. After a hearing on the proposed cap, he issued an order that limited the pretrial fees (inclusive of fees of associate counsel and paralegals) for two defendants, each represented by two appointed counsel, to an aggregate of $250,000 per defendant. The pretrial fees for two defendants who were each represented by a single appointed counsel were limited to $175,000 per defendant. The order did not include out-of-pocket expenses and it recognized "the possibility that the limits set may have to be reconsidered if good cause is shown." None of the defendants went to trial in the case. Three pled guilty to noncapital charges two days before trial, and one pled guilty after a jury had been selected. As of November 1995, attorneys' fees and expenses claimed by the five defendants totalled $617,500.

None of the other judges placed a cap on attorneys' fees. Judge Shadur questioned whether "it is possible to project in advance what time it will take to represent a defendant properly." Instead, he told counsel "up front in no uncertain terms that [he] would be monitoring the requests very carefully indeed, both for duplicative activity and for any apparent over-lawyering." Judge Owens also expressed doubt about a judge's ability to make an accurate assessment at the outset of a case. Judge Raggi said she might seriously explore setting a cap in a future case but emphasized that it would be necessary to get counsel to agree to a limit on fees at the beginning. She observed that "these are expensive cases and everyone has to recognize that a judge cannot be too strict in limiting counsel's ability to provide an adequate defense."

Awards for investigative and expert services

As mentioned above, the court must determine in ex parte proceedings that investigative, expert, or other services are "reasonably necessary." Two Supreme Court cases address the determination the trial court must make: *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), and *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985). In *Ake*, the Court spelled out three factors that are relevant in determining whether the government is required to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense case: (1) the private interest that will be affected by the action of the state; (2) the governmental interest that will be affected if the safeguard is to be provided; and (3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. The Court found a due process violation in *Ake*, but contrasted that holding with the situation in *Caldwell*. In that case, a state court had denied the defendant's requests for appointment of a criminal investigator and fingerprint and ballistics experts "because the requests were accompanied by no showing as to their reasonableness." There was no deprivation of due process, the Supreme Court said, "[g]iven that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial."

Most of the judges contributing to this article indicated that their experience in ruling on requests for investigators and most types of experts in noncapital cases prepared them for similar decisions in capital proceedings. "It's a question of what it is reasonable to allow," Judge Raggi said. "In my case, the government had a lot of ballistics experts; I had to let the defense have them, too. But I didn't allow a jury selection expert because I thought defense counsel had the expertise. With more esoteric experts, however, judges are feeling their way." Mitigation specialists posed the most difficulty. Judge Spencer explained that he initially underestimated the time such experts would

What does a capital case cost?

In February 1992, the Financial Analysis Branch of the AO's Defender Services Division estimated that 90% of federal death penalty cases would cost an average of $337,500. The estimate was based on a 1990 informal survey of Death Penalty Resource Centers and a review of seven federal cases in which the death penalty was sought for eleven defendants. None of the cases had reached the appeal stage at the time of the analysis. The average hourly rate for counsel in the cases was $122. The figure of $337,500 was calculated by multiplying 2,500 attorney hours (the low range of estimates for taking a case through trial and appeal) by $125 per hour and adding to that sum $25,000 for expert services.

In the fall of 1994, the Federal Death Penalty Resource Counsel Project reported total CJA defense costs (not including appeals) in sixteen completed death penalty cases. The costs ranged from $70,858 in the Eastern District of Virginia to $427,495 in the Eastern District of New York; in five of the cases (three of which ended with a guilty plea before trial; one with the government's withdrawal of its death penalty request; and another with the defendant's suicide) costs exceeded $200,000. Partial and anecdotal data compiled by Project attorneys as of July 1995 indicated that counsel representing fourteen defendants (out of fifty-two listed) had received fees of more than $100,000; the highest total was $376,500.

Judge Hogan advised the Center that final costs in his case totalled $245,000 in attorneys' fees and $46,500 for a variety of experts. These were costs expended up to the day of trial when the defendant pled guilty to a noncapital offense. In November 1995, Judge Cohn provided the following breakdown of expenditures for each of the five defendants in his case:

Defendant A:
- 90% ready for trial
- $132,000 in fees and expenses paid to one assigned lawyer with capital experience
- $80,000 in fees and expenses paid to experts, etc.

Defendant B (not sentenced yet):
- 50% ready for trial
- $37,000 in fees and expenses paid to one assigned lawyer with capital experience; fees and expenses for second assigned lawyer unknown at present
- $23,000 in fees and expenses paid to experts, etc.

Defendant C (not sentenced yet):
- 75% ready for trial
- $91,500 in fees and expenses paid to one assigned lawyer with capital experience; $100,000 in fees and expenses paid to second assigned lawyer (lawyer initially assigned was replaced with another)
- $24,000 in fees and expenses paid to experts, etc.

Defendant D (not sentenced yet):
- 25% ready for trial
- $39,000 in fees and expenses paid to one assigned lawyer with capital experience
- No fees or expenses paid to experts, etc.

Defendant E (not sentenced yet):
- 100% ready for trial
- $187,000 in fees and expenses paid to one assigned lawyer with capital experience; $31,000 in fees and expenses paid to second assigned lawyer
- No fees or expenses paid to experts, etc.

spend on the case because he did not realize the volume of information they would review: "The amount of evidence at the mitigation phase was incredible. These experts got reports from elementary school; they dug up a lot of information." Their varying backgrounds and expertise—psychological, sociological, demographic—also complicated the judges' task. Judge Shadur said that judges faced with requests for such experts should "place the burden on defense counsel to provide information to assist them" in making decisions.

In an August 1995 letter to Judge Stevens, the AO's Office of General Counsel noted that the employment of mitigation specialists who are "experienced and/or trained penalty investigator[s] may be justified by the fact that a superior product is generally produced, as well as by its cost effectiveness." The letter further explained that an experienced mitigation expert should perform services "at less expense than a lawyer or a guilt-phase investigator, neither of whom have been specifically trained for, or have as much experience in, for example, interviewing a client or family member about physical, sexual or emotional abuse . . . or noting . . . signs of mental illness—which are important mitigating factors."

Some judges pointed to yet another quandary: When should the court allow the defense to hire experts who will not be used if the defendant is not convicted of a capital crime? They said it is not possible to wait until a capital verdict is rendered before authorizing such experts because this would delay the punishment phase of a death penalty trial and probably require impaneling a second jury. Thus, in their view, judges must allow defendants to hire and authorize payment for experts whose expertise ultimately may not be needed.

Nearly all of the judges indicated greater willingness to establish a ceiling on the fees and expenses of investigators and experts than on compensation for counsel. In fact, even in capital cases, prior authorization of the court is required for all investigative, expert, or other services where the cost (exclusive of reimbursement for reasonable expenses) will exceed $300, unless the judge waives the requirement in the interests of justice. 18 U.S.C. § 3006A(e)(2).[7]

As he did with attorneys' fees, Judge Cohn set an aggregate cap ($35,000) on investigative and expert fees and expenses for each defendant. To date, one of the defendants who pled guilty just before trial exceeded the cap. Judge Stevens approved caps for different types of investigators and experts based on their lowest estimates of cost, recognizing there might be a subsequent need to request additional funding.[8] Judges Hogan and Spencer set hourly fees and limits and required counsel to seek approval for any additional hours. Judge Raggi followed her procedure in noncapital cases and authorized experts' fees up to a specific ceiling based on counsels' reasonable projection of costs; beyond that ceiling, counsel had to seek further authorization. She stressed that all ex parte requests to hire investigators or experts should be presented on papers that can be sealed and made a part of the record.

Monitoring fees and expenses

Because of the demanding nature and length of most death penalty cases, the Judicial Conference has authorized interim payments to counsel, investigators, and experts. *VII Guide* ¶¶ 2.30B and 3.06B. (See *VII Guide,* Appendices E and F for procedures and sample memorandum orders providing for interim payments.) All of the judges queried for this article authorized interim payments at intervals of one or two months, and all reviewed personally the vouchers submitted by counsel before approving them. (The voucher forms, CJA 30 and 31, and instructions to attorneys for filling them out can be found in Appendix A of *VII Guide.*) Most often, a courtroom deputy, magistrate judge, or, in Judge Hogan's case, the federal public defender first checked the vouchers and called any questions to the judge's attention. Both Judges Hogan and Shadur, following the practice recommended by the Judicial Conference in noncapital CJA matters, withheld payment of one-third of each interim award of attorneys' fees until the end of the case.

None of the judges found reviewing the vouchers unduly burdensome. Judge Shadur emphasized that "it is much easier to evaluate requests when you stay on top" of them. Judge Raggi said she spent thirty min-

utes to an hour each month reviewing and approving vouchers after her courtroom deputy had done a preliminary check.

In most cases, the judges did not have significant questions about the attorneys' fees requested. However, Judge Shadur did discount two attorneys' requests because he had doubts about the number of hours claimed for certain in-court activities, and also because a substantial portion of the time records submitted in support of the requests lacked detail. Judge Hogan replaced two lawyers whose fees he believed were too high. Judges Owens and Shadur stressed that counsel should understand from the outset the importance of keeping detailed records of all work done. Indeed, paragraph 2.32 of *VII Guide*, which was recently approved by the Judicial Conference, requires appointed counsel to "maintain contemporaneous time and attendance records for all work performed, including work performed by associates, partners, and support staff, as well as expense records." It further provides that these records may be subject to audit for a period of three years after approval of the final voucher.

Judges scrutinized counsel's expenses carefully as well. As the sample order in *VII Guide* (Appendix E) recommends, each judge set a dollar limit—from $150 to $1,000—for single reimbursable expense items, beyond which prior court approval was necessary. On this basis, Judge Spencer denied an attorney's request to be reimbursed for expenses already incurred in accompanying an investigator on a trip. He also denied several similar requests for approval of travel expenses in advance because he did not believe it was necessary for counsel to travel with investigators in those instances. Judge Cohn approved a request made in advance by out-of-town counsel for rental of an apartment at $2,500 per month based on a comparison of the request with the higher cost of a hotel, even at the government rate.[9]

Expert and investigative fee requests also received close review. Judge Seay denied a defendant's "unsubstantiated and undocumented" request for authorization to pay for an additional ten hours of services rendered by a jury-selection expert, beyond thirty hours previously approved by the court. However, he granted another defendant's request to pay the fees of an expert witness that exceeded by $285 the court's previously approved cap. Judge Shadur also approved payment of $1,155 for the services of a ballistics expert even though the court had not approved the expenditure in advance. He found that even if counsel's failure to obtain prior court approval were considered unjustified, "the price of denial would be entirely out of proportion to the seriousness of the offense." The AO General Counsel's office suggested in its letter to Judge Stevens that courts "monitor the use of expert and investigative funds by requiring preliminary testing and investigation to gauge the necessity of further expert assistance."

With reference to the monitoring responsibility, Judge Cohn voiced concern that judges are not auditors: "They really have to take the vouchers and descriptions of work at face value. No one goes through them and verifies their accuracy." Judge Shadur underscored the difficulty of evaluating fee requests—especially in an ex parte context without input from adverse parties—in retrospect and from the outside. "In the end, a judge has to decide, 'Does this sound about right?' and sign off."

Judge Owens stressed that it is important to issue an order early in the case that reflects "an understanding between the court and counsel regarding every possible expenditure." Judge Hogan cautioned, however, that courts "shouldn't be too reticent in allowing expenditures for counsel and relevant experts in death penalty cases. Because the ultimate issue is so serious, these cases are subject to full review. It makes sense to spend dollars up front for good counsel and experts. Otherwise, the cases will have to be retried two or three years later."

In view of the fact that district judges have such wide discretion in approving compensation in death penalty cases, Judge Cohn emphasized that "it is extremely valuable for them to maintain mechanisms for exchanging information. This is the best way," he said, "for judges to develop chamber benchmarks for action, which are the only real limits in the exercise of discretion."

Notes

1. Chambers to Chambers, *Appointment of Counsel and Jury Selection Issues in Federal Death Penalty Cases*, vol. 10, no. 1 (Federal Judicial Center 1995).

2. The committee made this request because of the expected reduction in fiscal year 96 appropriations to pay for assigned counsel services and the likely elimination of funding for Post Conviction Defender Organizations. The memo indicated that if the recommended rates are not adhered to, "at some point next year, [the Judicial Conference] may have to adopt a lower guideline range for all [federal capital prosecutions and death penalty federal habeas corpus proceedings]."

3. Affidavit of Kevin McNally, November 21, 1995, in Materials on the Federal Death Penalty, vol. 1 (Federal Death Penalty Resource Counsel Project 1995).

4. Materials on the Federal Death Penalty, vol. 1. The chart shows the types of experts appointed or retained and fees paid, hourly rates for counsel, and total attorneys' fees awarded. Volume 1 is available to district judges on request. Please contact David Bruck, P.O. Box 11744-1744, Columbia, SC 29211, tel. 803-765-1044, or Kevin McNally, P.O. Box 1243, Frankfort, KY 40602-1243, tel. 502-227-2142.

5. Judge Hancock authorized a rate of $100 per hour for counsel representing a capital defendant in post-conviction proceedings. According to Federal Death Penalty Resource Counsel Project attorneys, appointment of counsel in post-conviction matters is handled differently in different circuits. In some, the court of appeals makes the appointment, while in others, it is the district court. Project data indicate that most attorneys appointed to handle the few direct appeals to date have been awarded $125 per hour.

6. Judge Stevens originally established rates of $100 per hour for lead counsel and $75 per hour for second counsel for both in- and out-of-court time. In July 1995, after hearing argument by defense counsel that these rates were below the national average, he raised the rates to those indicated.

7. *See* VII Guide to Judiciary Policies and Procedures, Notice to CJA Panel Attorneys Regarding Availability of Investigative, Expert and Other Services, Appendix A.

8. Judge Stevens amended his initial order setting limits after it became apparent that the three defendants could not share the services of a fact investigator for certain aspects of the case. The defendants also convinced the judge that he should not set the limits for mitigation specialists and mental health experts below the minimum they requested, as he had originally done.

9. Government rate in a local hotel was $95 per day, or $2,850 for thirty days.

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Managing Federal Death Penalty Cases: An Overview of Legal and Practical Issues

This is the third in a series of *Chambers to Chambers* on legal and practical problems unique to federal capital cases. Previous articles have examined techniques judges have used to handle recurring problems in the areas of jury selection, appointment and compensation of counsel, and compensation of investigators and expert witnesses in such cases. This article will provide an overview of the legal and case-management issues judges can expect to encounter in a capital case once counsel are in place and preparation for trial begins in earnest. It addresses issues that may arise in cases brought pursuant to the Anti-Drug Abuse Act of 1988 (21 U.S.C. §§ 848(e) *et seq.*) or the Federal Death Penalty Act of 1994 (18 U.S.C. §§ 3591 *et seq.*). Judges Avern Cohn (E.D. Mich.), James Hughes Hancock (N.D. Ala.), Reena Raggi (E.D.N.Y.), and Milton Shadur (N.D. Ill.), all of whom have handled federal death penalty cases, have contributed information and assistance for this series. Several other judges with experience in federal capital cases, including Judges Thomas F. Hogan (D.D.C.), Henry C. Morgan, Jr. (E.D. Va.), Frank H. Seay (E.D. Okla), and Joseph E. Stevens, Jr. (W.D. Mo.), provided the Center with case materials relevant to issues discussed in this *Chambers to Chambers*.

Managing Federal Capital Cases Pretrial

Overview

Because of statutory requirements and other legal issues unique to death penalty cases, capital cases present unusual case-management problems and require substantial pretrial planning on the part of the court. Several key management issues arise from the underlying constitutional requirement that when a penalty phase is conducted in a capital case, it must be conducted in a proceeding separate from the trial. While it cannot be known for certain whether a penalty phase will be required until the jury returns its verdict at the guilt phase, most federal death penalty cases that have gone to trial have resulted in guilty verdicts on one or more capital counts, so it makes sense for the court to plan for a penalty phase.

If there is a penalty phase, the relevant statutory provisions require that, except in limited circumstances, it be conducted before the same jury that determined the defendant's guilt.[1] But using a single jury for the guilt and punishment phases of the case means the jury will have to sit for a substantial period of time, and the longer it sits, the greater the chance of losing jurors because of illness or other reasons. For that reason, and because Fed. R. Crim. P. 23(b) ordinarily prohibits the return of a verdict by a jury of fewer than twelve, the court will wish to reduce the length of time its capital jury must serve. This can best be done by minimizing the interval between the trial and punishment phases of the case. As a practical matter, this requires

the court to manage the case before trial in a manner that permits the prosecutor and counsel defending a capital defendant to prepare adequately for two back-to-back trials involving distinct sets of issues and strategies.[2]

In this context, adequate preparation means defense counsel will need sufficient lead time, before the commencement of trial, to investigate both the facts of the case that are relevant to guilt and the related set of facts and issues bearing on the defendant's family, personal, and psychological history that are relevant to the sentencing hearing. *See* 18 U.S.C. § 3593(c); 21 U.S.C. §§ 848 (j) and (m). In addition, if there is one jury and little or no time between the guilt and punishment phases of the case, defense counsel will need to retain and use the services of mental health experts and mitigation experts well before trial. Thus the court should expect defense counsel to file requests for permission to hire such expert witnesses relatively early in the case, and must decide whether to approve them long before it knows whether a penalty hearing will actually be required.

If the court schedules the penalty phase of its capital case to start shortly after the trial phase, it will have to resolve all legal issues bearing on the penalty phase well before trial gets under way. For example, capital defendants are likely to file motions attacking the constitutionality of the statutory framework governing the penalty phase proceeding and many of the aggravating factors the government intends to prove in support of a death penalty.[3] Both parties may request pretrial rulings on the nature of the aggravating factors the government will be permitted to prove at the penalty phase, the kinds of information the government will be permitted to present to the jury in support of its aggravating factors, and whether certain jury instructions should be given, or are required to be given, at the penalty phase. In multidefendant cases involving more than one capital defendant—not an unlikely situation in cases brought under 21 U.S.C § 848(e)(1), the so-called drug kingpin statute—each capital defendant is likely to file a motion seeking a separate penalty phase hearing. Moreover, because issues relating to the defendant's mental, emotional, and psychological makeup are likely to be raised by the defense as mitigating factors in a substantial number of penalty proceedings, it is likely that the government will seek an order for a mental examination of the defendant before trial so that it can prepare to rebut potential defense evidence on these issues. Because penalty phase motions like these often involve new and complex legal issues and can have significant case management consequences if granted, the court will need to allow additional pretrial time for their litigation and resolution.

The following list of district judges who are presiding over or have handled death penalty cases supplements the lists provided in the two previous issues of *Chambers to Chambers* on death penalty matters.

Garland E. Burrell, Eastern District of California (case pending trial)

C. LeRoy Hansen, District of New Mexico (case pending trial)

Malcolm J. Howard, Eastern District of North Carolina (two defendants pled guilty to noncapital offenses)

Marjorie O. Rendell, Eastern District of Pennsylvania (case pending trial)

Charles A. Shaw, Eastern District of Missouri (case pending trial)

James R. Spencer, Eastern District of Virginia (two defendants pled guilty to noncapital offenses; this is Judge Spencer's second federal capital case)

Discovery and pretrial motions

Federal capital cases tend to bring forth a large number of pretrial motions, many involving issues unique to capital litigation. In addition to those pertaining to the penalty phase issues mentioned above, the court may have to rule upon defense motions seeking judicial review of the Attorney General's decision to seek the death penalty against a specific defendant; arguing for dismissal of those counts of an indictment charging multiple violations of a statute authorizing the death penalty on the basis of a single killing; seeking dismissal of the death penalty counts of the indictment on the ground that the Department of Justice has engaged in systematic racial discrimination; and seeking discovery of documents allegedly bearing on this

claim. For its part, the government may file one or more motions seeking an extension of time within which to file a notice of intent to seek the death penalty, a motion to amend the aggravating factors it will seek to prove at the penalty hearing, or a motion to present information at the penalty phase regarding the defendant's alleged involvement in unadjudicated criminal conduct.

Scheduling a trial date and Speedy Trial Act considerations

Judge Shadur suggests that in single-jury cases in which the lawyers must prepare for both phases before the commencement of trial and in which there are a large number of pretrial motions, it is reasonable to expect extensive periods of excludable delay under the Speedy Trial Act. While complexity of a case is not a license for delay, the Act is intended to allow defendants sufficient time to prepare adequately for trial, and a given federal capital case may be so complicated that it is unreasonable to expect adequate preparation for trial within the Act's time limits.

Judge Seay's case, which was initially set for trial forty days from the date of arraignment but ultimately went to trial five months after return of the indictment, is representative of the complexity of these cases. The case involved six defendants, three of whom faced capital charges. In moving for a continuance, defense counsel noted that the government's eighteen-month pre-indictment investigation had produced over 6,000 pages of discoverable documents, arguing that reading at a rate of two minutes per page, counsel would not have time to read the documents before trial unless the case were continued. Counsel also argued for additional time to complete discovery, investigate the facts of the case, gather mitigating evidence, attend to other cases in their practice, develop a relationship of trust with their client, and prepare to try a complex case involving continuing criminal enterprise and conspiracy counts, extensive use of surveillance, and wiretap recordings. Judge Seay granted the first and subsequent motions for continuance under 18 U.S.C. § 3161(h)(8) to "prevent a likely miscarriage of justice." In granting the motions, Judge Seay cited the considerations raised by counsel and the presence of novel questions of law and procedure in the case, and he noted that the court had had to rule on over fifty pretrial motions filed by the defendants, some of which required extended evidentiary hearings.

Because Judge Shadur's case was the first capital case brought under 21 U.S.C. § 848, it involved a number of constitutional and other issues of first impression. In order to allow sufficient time for briefing and deciding these issues, he severed the trial of the two capital defendants from the remaining defendants and set a "long established and absolutely firm" trial date for the capital defendants approximately ten months after indictment. He notes, however, that at this point in time most of the issues judges can expect to encounter in capital cases will not be issues of first impression, and thus a substantially shorter time period between indictment and trial should be closer to the norm.

Of course, every case is different, and each case presents its own scheduling problems. Data collected by the Federal Death Penalty Resource Counsel Project, a program administered by the Administrative Office's Defender Services Division, show that the elapsed time between indictment or death penalty notification and trial in federal capital cases has ranged from two months to twenty-one months.

Government's notice of intent to seek death penalty

An additional factor that may affect the trial court's ability to set a trial date is the requirement found in both 21 U.S.C. § 848(h)(1) and 18 U.S.C. § 3593(a) that the government provide notice to the defendant of its intention to seek the death penalty, including both the statutory and nonstatutory factors it will seek to prove as the basis for the penalty, "a reasonable time before trial." It can take several months for the government to file such notice, largely because a January 1995 protocol issued by the Attorney General requires federal prosecutors to obtain the prior written authorization of the Attorney General before doing so. The protocol, entitled "Federal Prosecutions in Which the Death Penalty May Be Sought," is published at section 9-10.00 of the *U.S. Attorney's Manual*. The protocol permits U.S. attorneys to begin the process leading to a decision by the Attorney General after the filing or unsealing of an indictment charging a defendant with an offense subject to the death penalty, and it sets forth procedures by which they may seek such

authorization. These procedures include the U.S. attorney's submission to the Attorney General of a "Death Penalty Evaluation" and accompanying prosecution memorandum, review of those materials by an internal Department of Justice committee, an opportunity for defense counsel to make submissions in opposition to capital punishment to both the U.S. attorney and the committee, and a final review and decision by the Attorney General on whether to seek the death penalty. Judge Hogan sought to expedite the review process by issuing an order at an early status hearing requiring the government to file any notice of intent to seek the penalty by a date certain.

New materials available from the Center: videotape, audiotape, sample materials

In addition to selected case materials that district court judges who have handled federal death penalty cases under the 1988 Anti-Drug Abuse Act and the 1994 Federal Death Penalty Act have provided to the Center, the following materials are now available:

- *Federal Death Penalty Cases: Legal and Practical Issues,* a videotape of a panel discussion of death penalty case issues held at the Federal Judicial Center's March 1996 Workshop for Judges of the Fourth Circuit. Panelists are Judges Avern Cohn (E.D. Mich.), Henry C. Morgan, Jr. (E.D. Va.), and Milton I. Shadur (N.D. Ill.) (80 minutes)
- *Your First Death Penalty Case,* an audiotape of a panel discussion of death penalty case issues held at the Federal Judicial Center's March 1996 Workshop for District and Circuit Judges of the Tenth Circuit. Panelists are United States District Judge Reena Raggi (E.D.N.Y.), David I. Bruck, Esq. of the Federal Death Penalty Resource Counsel, Columbia, S.C., and David Shapiro, Esq., Assistant United States Attorney, Oakland, Cal. (160 minutes)

These tapes explore in greater depth many of the issues treated in this *Chambers to Chambers*. Judges who want copies of the tapes or sets of the death penalty case materials referred to above should call the Center's Information Services Office at (202) 273-4153.

Monitoring the performance of counsel pretrial

Given the likelihood of a longer pretrial period in a federal capital case and the difficulties that can be encountered in finding qualified defense counsel in such cases, Judge Cohn suggests the court should monitor the performance of counsel carefully and be alert for signs of tension between attorney and client. Unable to contact counsel at will and unable to gauge the amount of work counsel is doing in the case, an incarcerated capital defendant may incorrectly conclude that counsel is not doing an adequate job. Tensions may also arise when defendants are represented by attorneys of a different race. In such instances, the defendant may contact a member of the court's staff or the courtroom deputy clerk with complaints about counsel's performance. An effort should be made to ensure that court staff handle such complaints sensitively and inform the court of them promptly. The court should then do what it can to defuse any attorney–client tensions resulting from misperceptions on the part of the defendant. This may take time but should be viewed as an important aspect of managing a capital case pretrial, Judge Cohn said. He stressed that it will take less time to address such problems as they develop than it will to handle a defendant's eventual request for new counsel or decision to proceed pro se.

Recurring Legal Issues

The following legal issues are likely to arise during the pretrial, trial, and sentencing phases of a federal capital case.

Pretrial mental examination of capital defendant

In *United States v. Vest,* 905 F. Supp. 651 (W.D. Mo. 1995), the government moved for an order directing the three capital defendants to state whether they intended to introduce mental health testimony at the penalty phase of trial, and if so for an order compelling them to submit to a pretrial examination by the government's mental health experts. Reasoning that

21 U.S.C. § 848(m) permits the defendant to introduce information relevant to mental health-related mitigating factors, and that section 848(j) permits the government "to rebut any information received at the hearing," Judge Stevens ruled that if the defendants planned to introduce mental health testimony, they would be compelled to undergo examination by government mental health experts.

Judge Stevens also concluded that a defendant who elects to put his mental status in issue in the penalty phase of a capital case waives the right to refrain from any self-incrimination that may result from a mental exam, and that the waiver avoids Fifth and Sixth Amendment issues that might otherwise arise under *Estelle v. Smith*, 451 U.S. 454 (1981). In *Smith*, the defendant had not expressed an intention to introduce any psychiatric evidence at trial, nor did he do so. Nevertheless, the trial court ordered him to undergo a mental heath examination, and at the defendant's capital sentencing hearing the state presented to the jury information on the issue of future dangerousness resulting from that examination. Because defense counsel was not notified of the examination, and the defendant was not advised of his *Miranda* rights before the examination, the Supreme Court held the defendant's Fifth and Sixth Amendment rights had been violated. The Court stated that "a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468. However, it also noted that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." *Id.* at 472.

Severance of capital and noncapital defendants at trial

District courts have often opted to try single capital defendants separately from their noncapital codefendants in federal death penalty cases. *See, e.g., United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724, *reh'g denied*, 115 S. Ct. 23 (1994); *United States v. Pitera*, 795 F. Supp. 546 (E.D.N.Y. 1992), *aff'd*, 986 F.2d 499 (2d Cir. 1993); *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990), *aff'd*, 19 F.3d 1154 (7th Cir. 1994) (separate trials held for each of two capital codefendants). *But see United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996) (three capital defendants and one noncapital defendant tried together). The Tenth Circuit upheld the conviction of the *McCullah* noncapital defendant in *United States v. Sanchez*, 75 F.3d 63 (10th Cir. 1996). Sanchez contended the trial court had deprived him of an impartial jury and the effective assistance of counsel by failing to grant his motion either to sever his trial from that of the capital codefendants or to impanel a separate, non-death-qualified jury to hear his case, and by refusing to allow him to question prospective jurors during the death-qualification portion of voir dire. The court held these arguments were foreclosed by *Buchanan v. Kentucky*, 483 U.S. 402 (1987), which found the joint trial of a capital defendant and a noncapital defendant to be constitutional under a state capital sentencing scheme that required use of the same jury for the guilt and penalty phases.

Individual voir dire on death penalty attitudes

While existing case law gives the trial court broad discretion in conducting voir dire and does not specifically require individual voir dire of prospective jurors' attitudes toward capital punishment, almost all district judges who have handled federal death penalty cases have permitted individual voir dire of prospective jurors in this area. Judge Shadur believes that jurors are far more inclined to be open and candid when questioned about death penalty attitudes individually at sidebar than when they are questioned en masse, and that individual questioning also eliminates the possibility of an entire venire being tainted when a juror voices prejudiced or prejudicial views publicly.

However, in *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), a case brought under 21 U.S.C. § 848(e)(1)(a), the Fifth Circuit upheld the convictions and death sentences of two defendants who contended that the district court had abused its discretion in limiting individual voir dire on death penalty attitudes to those prospective jurors who had stated, during a group voir dire, that they were either opposed to the death penalty or would automatically vote to impose the death penalty. The appellate court noted that the district court had questioned further, both privately and in detail, those members of the panel who had responded, and that their answers demonstrated that the

district court was successful in obtaining a free flow of information from the venire.

In *United States v. Tipton*, No. 93-4005 (4th Cir. July 8, 1996), and *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996), the Fourth and Tenth Circuits held that inquiry into each prospective juror's views on the specific mitigating factors the defense planned to assert was not required as long as the voir dire was adequate to detect those in the venire who would automatically vote for the death penalty.[4]

Double counting of aggravating factors

In *United States v. McCullah, supra*, the Tenth Circuit held that the district court committed error during McCullah's penalty phase hearing by submitting duplicative aggravating factors to the jury. For example, the court submitted both the section 848(n)(1)(C) statutory aggravating factor, "intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in death of the victim," and the nonstatutory factor, "committed the offenses as to which he is charged in the indictment." The appellate court found that these two factors substantially overlapped one another, as did two other aggravating factors submitted to the jury. Concluding that such double counting of aggravating factors has a tendency to skew the weighing process and create the risk that the death sentence will be imposed arbitrarily, it upheld McCullah's convictions but remanded the case for a new penalty hearing.

In *United States v. Tipton, supra*, the Fourth Circuit found that the district court had made a similar error. In order to recommend the death penalty in 21 U.S.C. § 848(e)(1) cases, the jury must first find as an aggravating factor one of four circumstances listed in section 848(n)(1). The instructions and verdict form used by the district court in *Tipton* had allowed the jury to make cumulative findings of the four circumstances, and it did so. Agreeing with the *McCullah* court, the Fourth Circuit ruled that the cumulative findings were constitutional error, but it found the error harmless. Under proper instructions, the court said, the jury would have found circumstance (n)(1)(A), intentional killing, as the sole basis for its (n)(1) finding, and the jury's verdicts indicated that for each of the murders for which it imposed the death sentence, the evidence clearly supported a finding of the (n)(1)(A) circumstance.

Severance of capital defendants at penalty phase

In *McCullah, supra*, the trial court granted motions for separate penalty phase hearings filed by three capital defendants and held three consecutive penalty phase hearings before the jury that had determined the defendants' guilt. In *Tipton, supra*, however, the district court conducted a joint penalty phase hearing before the jury that determined the three defendants' guilt. Each defendant received the death penalty for one or more violations of 21 U.S.C. § 848(e)(1)(A). The defendants contended on appeal that the district court's denial of their motions to sever their penalty phase hearings violated their Eighth Amendment right to individualized consideration at sentencing. The Fourth Circuit concluded that severance at the penalty phase is a matter of trial court discretion, that such discretion is constitutionally constrained at its outer limits, and that there was no abuse of discretion in the case before it. The court reasoned that the same considerations of efficiency and fairness to the government that militate in favor of joint trials of jointly charged defendants in the guilt phase apply at the penalty phase. It also concluded that while the risks posed by joint penalty hearings to individualized consideration of capital defendants at sentencing outweigh concerns of fairness and inconvenience to the government, those risks were reduced to acceptable levels by the district court's frequent instructions to the jury to consider each defendant individually.[5]

Instructing jury that it is never required to impose a death sentence

The last sentence of 21 U.S.C. § 848(k) mandates that the jury be instructed that, regardless of its findings as to aggravating and mitigating factors, it is never required to impose a death sentence. This requirement is not contained in 18 U.S.C. § 3593(e), however.

Instructing jury on alternatives to death sentence

A capital defendant is likely to be concerned that his jury will worry about the danger he may eventually pose to the community if it does not sentence him to death. Consequently, the defendant may request the jury to be instructed that if it does not sentence him to death, the court will sentence him to life imprisonment without possibility of parole. Both 21 U.S.C. § 848(p) and 18 U.S.C § 3594 provide the court with

this sentencing alternative when a death sentence is not imposed. In addition, in *Simmons v. South Carolina,* 114 S. Ct. 2187 (1994), the Supreme Court held that when a defendant is legally ineligible for parole and the government argues the defendant's future dangerousness as an aggravating factor justifying the death penalty, due process requires the jury be informed that if he is not executed, the defendant will spend the rest of his life in prison. In *United States v. Flores,* 63 F.2d 1342 (5th Cir. 1995), defendant Garza cited *Simmons* for the contention that his jury should have been told that if it decided against a death sentence, his only alternative sentence would be life imprisonment without possibility of parole, since the base offense level for section 848 offenses under the Sentencing Guidelines is life imprisonment. The trial court instead instructed the jury that life without parole was a possible sentence, but not the only other sentence the court could impose, and the jury sentenced Garza to death. The Fifth Circuit held that since the Sentencing Guidelines vest the district court with discretion to adjust a life sentence downward, a life sentence was not the only sentence other than death that Garza might have received, and thus the district court did not err in failing to give Garza's proposed instruction.

On the other hand, Judge Raggi instructed her jury that if it did not return a verdict recommending the defendant be sentenced to death, the court would impose a sentence of life imprisonment without possibility of parole. She proceeded on the theory that, since the jury is performing a sentencing function in a capital case, it should be made aware of all relevant information bearing on its sentencing decision, as is the case when a judge sentences a defendant. Judge Morgan took the middle ground on this issue, instructing his jury, with respect to two of the three capital defendants in his case, that if it did not return a death sentence with respect to those defendants there was a "strong probability" that they would be sentenced to "life in prison without any possibility of parole."[6] Before giving these instructions, both judges had concluded that given the aggravated nature of their defendants' conduct, they were quite likely to impose a sentence of life without parole if the jury did not return a death sentence.

Potential sentencing phase jury verdicts and sentencing options

Under both the 1988 and 1994 Acts, if the jury votes to recommend a death sentence, the court must impose such a sentence.[7] However, the statutes differ with respect to the verdict and sentencing options available to a jury that does not recommend the death sentence. Section 848(k) of the Anti-Drug Abuse Act of 1988 provides that, if the jury finds certain aggravating factors are present in the case, it must then weigh them against any mitigating factors to determine whether to recommend "that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence." Reading this provision together with section 848(l) of the Act, which states that the district court determines the sentence if the jury does not recommend death, both the Eleventh and Fifth Circuits have held that the 1988 Act grants the district court, rather than the jury, the power to sentence the defendant when the jury does not recommend death. *United States v. Flores, supra; United States v. Chandler,* 996 F.2d 1073 (11th Cir. 1993), *cert. denied,* 114 S. Ct. 2724, *reh'g denied,* 115 S. Ct. 23 (1994).

In contrast, section 3593(e) of the 1994 Act expressly requires "the jury by unanimous vote [to] recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." Thus, for section 3591 offenses, the jury can unanimously vote in favor of life imprisonment without the possibility of release, and if it does so section 3594 requires the court to impose that sentence. The jury can also unanimously recommend "some other lesser sentence," but in that case section 3594 provides that "the court shall impose any lesser sentence that is authorized by law."

Notes

1. 21 U.S.C. § 848(i)(1)(A) and 18 U.S.C. § 3593(b)(1) state that the sentencing hearing shall be conducted "before the jury which determined the defendant's guilt." However, both statutes permit the sentencing hearing to be conducted before a separate jury if the defendant was convicted on a plea of guilty or after a bench trial, if the jury which determined the defendant's guilt has been discharged for good cause, or if resentencing is necessary.

2. The Supreme Court has observed that "[a] capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial." *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

3. The constitutionality of 21 U.S.C. § 848(e)(1)(A) has been upheld in *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995); *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114. S. Ct. 2724, *reh'g denied*, 115 S. Ct. 23 (1994); *United States v. Pitera*, 795 F. Supp. 546 (E.D.N.Y. 1992), *aff'd*, 986 F.2d 499 (2d Cir. 1993); *United States v. Pretlow*, 779 F. Supp. 758 (D.N.J. 1991); and *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990), *aff'd*, 19 F.3d 1154 (7th Cir. 1994). These courts have rejected arguments that section 848(e)(1)(A) is unconstitutional because it fails to narrow the class of persons eligible for the death penalty, because the evidentiary standard articulated in section 848(j) does not ensure a sufficient level of heightened reliability, because section 848(q) does not provide for meaningful appellate review, and because specified aggravating factors are impermissibly vague or duplicitous. In *United States v. Davis*, 904 F. Supp. 554 (E.D. La. 1995), the court denied motions filed by two capital defendants charged with violations of 18 U.S.C. §§ 241 and 242 alleging that the capital punishment provisions of the Federal Death Penalty Act of 1994 are unconstitutional. No cases under the 1994 Act have yet been decided by the U.S. courts of appeals.

4. In *Tipton*, the district court conducted portions of the voir dire out of the presence of the three capital defendants, without their objection. On appeal, the defendants argued this violated their constitutional right to be present throughout the voir dire process, and the government responded that the defendants had effectively waived any such right as had existed. The district court had conducted jury selection in a series of steps designed to accommodate the 250-person venire in the case. It first asked the entire group of prospective jurors questions concerning nonsensitive sources of possible disqualifying bias in open court, with counsel and all defendants present, and handled follow-up questions and resulting challenges for cause at the bench. Next, it questioned the remaining jurors on their attitudes toward the death penalty and racial matters in chambers, individually, with only counsel and the prospective juror present. The court ruled on any challenges for cause based on those questions while in chambers. Selection of the jury then took place in open court, with all defendants again present and able to consult with counsel. The Fourth Circuit declined to decide the waiver issue but assumed without deciding that "error did occur in the form of a 'deviation' from the constitutionally-grounded legal rule that presence was required throughout the proceedings at issue." It also concluded that any such error did not warrant correction as plain error.

5. In the discussion of death penalty case issues contained in the Center audiotape *Your First Death Penalty Case* (see box page 4), the panelists raise a related question: Assuming the court grants severance of capital defendants at the penalty phase, how does it decide the order in which the penalty-phase hearings will be held? Presumably, no defendant would want his penalty-phase hearing conducted last.

6. The third defendant requested that the instruction not be given in his case.

7. *See* 18 U.S.C. § 3594; 21 U.S.C. § 848(l). While section 848(k) requires that a jury's vote to recommend the death sentence must be unanimous, it contains no corresponding requirement that a jury must unanimously decide *against* a death sentence in order to return a lesser verdict. In *Chandler*, the trial court submitted the following verdict form to the jury:

> We the jury unanimously vote to recommend, and do unanimously recommend that
> ___ a sentence of death *be imposed*
> ___ a sentence of death *not be imposed*
> upon defendant David Ronald Chandler.

The Eleventh Circuit rejected the argument that this verdict form coerced a verdict of death. However, Judge Shadur notes that the form incorrectly suggests to the jury that they must unanimously decide against a death sentence, and he stresses that even one juror holdout is enough to preclude a death sentence.

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