OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
POST OFFICE & COURTHOUSE BUILDING
BOSTON, MASSACHUSETTS 02109

ROBERT J. SMITH, JR.
CLERK

TELEPHONE:
(617) 223-9165

December 20, 1991

Mr. Abel Mattos
Court Administration Division
Administrative Office-U. S. Courts
Washington, D. C. 20544

Dear Abel:

As you requested and in accordance with your conversation with Judge Tauro, I am enclosing herewith the following documents relating to our Expense and Delay Reduction Plan:

(1) Cover Memo from Civil Justice Advisory Committee to the Court with correspondence from Senator Biden and his Staff Director.

(2) Report of the Civil Justice Advisory Group which was presented to the court for consideration on November 18, 1991.

(3) Excerpts from the minutes of the November 18, 1991 meeting of the court which considered the Report.

(4) A substitute copy of the Expense and Delay Reduction Plan adopted by the Court on November 18, 1991.

If there is anything else you may need in your consideration, please do not hesitate to contact me.

Sincerely,

Bob

Robert J. Smith, Jr.
Clerk

RJS/jal
Enclosures

M I N U T E S

SPECIAL MEETING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

November 18, 1991

A special meeting of the United States District Court for the District of Massachusetts was held in the third floor conference room of the United States Post Office and Courthouse in Boston, Massachusetts, on November 18, 1991, with Chief Judge Freedman presiding and District Judges Tauro, Skinner, Mazzone, Keeton, Zobel, Young, Wolf, Woodlock, Harrington, Senior Judge Nelson and Magistrate Judges Cohen, Alexander and Bowler in attendance.

This special meeting of the District Court was held for a discussion of the Massachusetts Civil Justice Reform Plan. Judge Tauro, a member of the Civil Justice Reform Committee which prepared the Plan, led the discussion regarding it. Professor Arthur R. Miller of Harvard Law School, the Reporter for the Advisory Group, and his assistant were in attendance.

Part II -- the Expense and Delay Reduction Plan itself -- as set forth in the preliminary draft dated October 21, 1991 with several amendments made during the course of the discussion, was approved by the Court.

This final Amended Plan will be distributed to the Court in the next several days and will be published in West's Federal Supplement and in Lawyer's Weekly for comment from the Bar.

The final Amended Plan will not become effective until formally adopted in accordance with the District Court's Local Rules.

Part I -- the Assessment of the Docket -- as set forth in the preliminary draft dated October 21, 1991, was not voted upon by the District Court.

Part I -- the Assessment of the Docket -- will be redrafted by Judge Tauro to eliminate any editorial comment relating to the delay factor in the District of Massachusetts and to strike the statistical charts which are in the appendices to the preliminary draft. The edited Part I will be published as an introduction to the Expense and Delay Reduction Plan itself.

The only meeting in which the District Judge is absolutely required to participate under the Plan is the first meeting -- the scheduling conference in civil cases -- as set forth in

Article 1, Rule 1.02 of the Plan. Rule 1.02 requires that the Judge shall convene a scheduling conference as soon as practicable, but in no event more than sixty days after the appearance of a defendant.

The term "a trial date" as set forth in Rule 1.02(f)(9) was deleted by amendment and in place thereof the term "final pretrial conference date" was approved by the District Court. Rule 1.02(f)(9) now requires that the judge's scheduling order, issued following the conference, shall include a specific deadline for a "final pretrial conference date," rather than "trial date," which should be scheduled to occur within eighteen months after the filing of the complaint, unless a judge finds that the "final pretrial conference date" reasonably cannot be held within that time. The term "trial date" as set forth on Pages 28 and 35 are also deleted and in place thereof the term "final pretrial conference date" was inserted.

The Advisory Group will remain in existence as a continuing body to reassess the workings of the Plan.

EXPENSE AND DELAY REDUCTION PLAN

prepared for the
United States District Court
for the District of Massachusetts

by the
Civil Justice Reform Committee

and
Adopted by the Court on
November 18, 1991

TABLE OF CONTENTS

Part I
Assessment of the Docket

A. Introduction

B. Gathering Information

1. Advisory Group Members' Memoranda 3

2. Statistical Information 3

3. Interviews 3

4. Other Sources 3

C. Analysis of Information

1. Statistical Data 4

2. Non-statistical Information 4

D. Discussion

1. Types of Cases 6
   (a) Criminal Litigation 6
      (i) Complex Criminal Cases 6
      (ii) Criminal Sentencing Guidelines 7
   (b) Asbestos Cases 8
   (c) Prisoner and Pro Se Cases 9
   (d) Civil Rights Cases 11
   (e) Complex Civil Matters 11
      (i) Non-Jury Trials 11
      (ii) Management of Complex Civil Cases 12
   (f) Tort and Contract Cases 13

2. Case Management 14
   (a) District Judges 14
   (b) Magistrate Judges 14
   (c) Senior Judges 15
   (d) Vacant Judgeships 15
   (e) Discovery Disputes 15
   (f) Dispositive Motions 16
   (g) Alternative Methods of Dispute Resolution 16
   (h) Trials 17

3. Conclusions 17

E. Order of Court

Order of Court Adopting Plan 19

Part II
Cost and Delay Reduction Plan

Article I. Pretrial Differential Case Management

Rule 1.01. Definition of a Judicial Officer 21

Rule 1.02. Early Assessment of Cases 21
(a) Scheduling conference in civil cases 21
(b) Meeting of counsel 21
(c) Settlement proposals 21
(d) Joint statement 22
(e) Conduct of scheduling conference 22
(f) Scheduling orders 23
(g) Modification of scheduling order 24

Rule 1.03. Case Management Conference 29
(a) Conduct of case management conference 29
(b) Meeting of counsel 30
(c) Additional case management conferences 30

Article II. Discovery

Rule 2.01. Control of Discovery 34
(a) Cooperative discovery 34
(b) Disclosure orders 34
(c) Discovery event limitations 35

Rule 2.02. Sequencing of Discovery 37
(a) Automatic document disclosure 37
(b) Further discovery 38
(c) Certification of discovery motions 38
(d) Resolution of discovery disputes 38
(e) Removed and transferred actions 38

Rule 2.03. Disclosure of Medical Records in Personal Injury Cases 41
(a) Disclosure by claimants 41
(b) Assertion of privilege 42
(c) Removed and transferred actions 42

Rule 2.04. Copying Expense for Discovery Materials 43
(a) Inspection of Documents 43
(b) Copies of Documents 43

Rule 2.05. Subsequent Stages of Discovery 44
(a) In general 44
(b) Phasing of interrogatories and documents 44
(c) Objections to interrogatories 45
(d) Answers to interrogatories 45

(e) Claims of privilege 45

Rule 2.06. Uniform Definitions in Discovery Requests 47
(a) Incorporation by Reference and Limitations 47
(b) Effect on scope of discovery 47
(c) Definitions 47

Article III. Motion and Party Practice
Rule 3.01. Control of Motion Practice 50
(a) Motion plan 50
(b) Motion practice 50
(c) Unresolved motions 50

Rule 3.02. Addition of New Parties 51
(a) Amendments adding parties 51
(b) Service on new party 51
(c) Limitation on amendment by consent 51

Article IV. Alternative Dispute Resolution
Rule 4.01. Alternative Dispute Resolution 54

Rule 4.02. Settlement 54

Rule 4.03. Other Alternative Dispute Resolution Programs 54
(a) Discretion of judicial officer 54
(b) Mini-trial 55
(c) Summary jury trials 55
(d) Mediation 55

Article V. Control of Trial

Rule 5.01. Final Pretrial Conference 59
(a) Schedule of conference 59
(b) Representation by counsel 59
(c) Meeting of counsel 59
(d) Joint statement 59
(e) Motions to continue 60
(f) Conduct of conference 60
(g) Trial Brief 61

Rule 5.02. Special procedures for Handling Experts 62
(a) Setting terms and conditions 62
(b) Objections to expert witnesses 63

Rule 5.03. Trial 64
(a) Time Limits for Evidentiary Hearing 64
(b) Evidence at the Evidentiary Hearing 64

Article VI. Sanctions

Rule 6.01. Imposition of Sanctions 67

Appendix A

Plaintiff Case Disclosure Form 69

Appendix B

Defendant Case Disclosure Form 70

Part I

Assessment of the Docket

A. Introduction

The Judicial Improvements Act of 1990, Public Law No. 101-650, became effective on December 1, 1990. Title I of the statute consists of the "Civil Justice Reform Act of 1990" (the "Act"), which requires the implementation of a Civil Justice Expense and Delay Reduction Plan (the "Plan") in all district courts within three years following its enactment.

To assist in the development of the Civil Justice Expense and Delay Reduction Plan for the District of Massachusetts, Chief Judge Frank Freedman appointed a Civil Justice Reform Committee consisting of United States District Judges Joseph L. Tauro, Chairman, David Nelson, and William Young. The Committee, in turn, appointed an Advisory Group consisting of attorneys, the Clerk of the Court, magistrate judges, and others, and designated Professor Arthur R. Miller of the Harvard Law School as the reporter for the Group. Professor Miller appointed William L. Leschensky as Assistant Reporter.

The members of the Advisory Group are David Berman, Leo Boyle, United States Attorney Wayne A. Budd, Scott Charnas, Louis M. Ciavarra, Magistrate Judge Lawrence P. Cohen, Walter A. Costello, Jr., John P. Driscoll, Jr., Louis Elisa, Donald R. Frederico, Susan Garsh, Nancy Gertner, Cynthia O. Hamilton, Attorney General Scott Harshbarger, Michael B. Keating, Gael Mahony, Margaret H. Marshall, Richard S. Milstein, Michael E. Mone, Ronald E. Myrick, Rudolph F. Pierce, Magistrate Judge Michael Ponsor, Richard S. Scipione, Terry Philip Segal, Clerk Robert J. Smith, Jr.,

Nicholas C. Theodorou, Gordon T. Walker, Daniel B. Winslow, and Associate United States Attorney Judith S. Yogman.

To meet its obligation to make a "thorough assessment of the state of the court's civil and criminal dockets," the Advisory Group established a preliminary work plan for gathering and analyzing relevant information about the workload and practices of the District Court. The process is ongoing and this document must be viewed as organic in nature. It is anticipated that, as experience is gained in its use, the Plan may be further developed and refined to reflect what is learned.

B. Gathering Information

Section 472(c) of the 1990 Act requires the district's Advisory Group to make "a thorough assessment of the state of the court's civil and criminal docket." The statute directs the Group to:

(1) "determine the condition of the civil and criminal docket";

(2) "identify trends in case filings and the demands being placed on the Court's resources";

(3) "identify the principal causes of cost and delay in civil litigation"; and

(4) "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the Courts."

Accordingly, the Advisory Group has undertaken a detailed, thorough, and ongoing assessment of the Court's docket. This task has provided an opportunity to scrutinize in detail how the Court actually functions and how this district in particular addresses its judicial responsibilities. The components of this assessment include:

1. Advisory Group Members' Memoranda. The Advisory Group met to consider suggestions for formulating the district's Plan on February 19, 1991. At that meeting, members of the Advisory Group were encouraged to prepare memoranda on selected topics of interest to them that relate to the development of a Cost and Delay Reduction Plan. During the following two months, memoranda were received from numerous members of the Group. The members' observations, experiences, recommendations, and proposals have provided valuable insight both into the functioning of the District Court and into the ways of improving its operation.

2. Statistical Information. General statistical information having relevance to cost and delay in the federal courts was obtained from several sources, including the recent comprehensive study of the issue conducted by Louis Harris and Associates. In addition, the Advisory Group was furnished with specific statistical information about the District of Massachusetts. Every effort was made to obtain the most recent, reliable, and particularized statistical data available because it was felt that this information would be most helpful to the Advisory Group and the Committee in developing a Plan. This task was undertaken by the Office of the Clerk under the guidance of Clerk Robert J. Smith, Jr. In addition, the judges in the district provided the Reporter with copies of their standard procedural and pretrial orders.

3. Interviews. Informal interviews were conducted with judicial staff persons and members of the civil and criminal bars of this court.

4. Other Sources. Other sources of information were available to the Advisory Group. These included the professional literature, newspaper and magazine articles, the results of a comprehensive questionnaire that was completed by all district

judges and their courtroom deputies, and the Almanac of the Federal Judiciary.

C. Analysis of Information

1. Statistical Data. The statistical data that was gathered permitted the calculation of case processing times, total disposition times for different categories of civil cases, and provided a number of other general indices of activity and performance.

2. Non-statistical Information. The non-statistical information that has been gathered was considered along with the statistical data to help identify "choke points" in the system, and to determine how cost and delay are affected by current court practices and procedures, and by the ways in which litigants and their attorneys approach litigation. At the same time, the analysis also helped to identify which procedures seem to be effective, and those factors that currently contribute to the fair disposition of controversies without excessive cost and delay.

D. Discussion

A detailed and thorough assessment of the court's docket provides an opportunity to scrutinize in detail how it actually functions and how this district in particular addresses its judicial responsibilities. Nonetheless, the observations inevitably are impressionistic and the data relied on unavoidably are fragmentary. To prepare these comments various sources have been consulted. They are as follows:

(1) Judith Yogman, Chief of the Civil Division in the Office of the United States Attorney has provided a complete set of questionnaires from each judge. The questionnaires elicit information on the practices of each judge and their management tools.

(2) **A computerized report that lists by judicial officer the time interval from filing to disposition by nature of suit and method of disposition of civil cases terminated during the period January 1, 1990 through December 31, 1990.**

(3) **A report prepared by the Administrative Office of the United States Courts' Office of Planning, Evaluation and Statistics entitled "Select Significant Factors in the Workload of the Federal Courts."**

(4) **A joint report prepared by the Federal Judicial Center and the Administrative Office entitled "Guidance to Advisory Groups Appointed under the Civil Justice Reform Act of 1990."**

(5) **A report for each judge in this district of all pending cases that were filed prior to December 31, 1985.**

(6) **A report on median time intervals from filing to disposition of criminal defendants disposed of during the 12 month period ending June 30, 1990.**

(7) **Memoranda submitted by various members of the Civil Justice Advisory Group.**

(8) **Defeating Delay, by the Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, Judicial Administration Division, based upon the American Bar Association's Court Delay Reduction Standards.**

(9) **Judging, by the Honorable Robert E. Keeton, United States District Judge for the District of Massachusetts (West 1990).**

(10) **Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit (April 1991).**

(11) **Informal Interviews of judicial staff persons and members of the civil and criminal bars of this court.**

1. TYPES OF CASES

(a) Criminal Litigation

(i) Complex Criminal Cases

Complex criminal cases involving multiple parties, counts, and frequently difficult or unsettled legal issues often result in protracted pretrial proceedings and lengthy trials. Among the most troublesome cases are those under the Racketeering Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and the Continuing Criminal Enterprise Statute, 21 U.S.C. § 848. These provisions permit a linking of numerous acts and individuals that, in turn, causes problems of proof, which lead to lengthy trials. Charges concerning criminal enterprises involving numerous persons over extended periods of time necessarily will take many trial days before a verdict can be reached. This district has had its share of high visibility protracted criminal cases in recent years, including: (a) U.S. v. Ellis, et al; (b) U.S. v. Angiulo, et al; (c) U.S. v. Levasseur, et al; (d) U.S. v. Clemente, et al; (e) U.S. v. Oreto, et al. Trials in these cases lasted from approximately 50 days to 150 days. In one instance, the trial was conducted in another division of the court, requiring the trial judge and staff to travel between offices for a substantial period of time.

Because of the Speedy Trial Act, priority must be given to criminal cases. As a result of some of the cases cited above, the judges involved have been removed from the random draw of criminal cases and, in at least one instance, from civil cases as well. As a consequence, their colleagues have borne the burden of additional cases being assigned to their criminal and civil dockets. Protracted criminal trials have a stagnating effect on the docket of an individual trial judge, and certainly also can affect the overall balance of the court's docket.

There are other effects as well. Judges who are burdened with a heavy criminal trial are not pressed by the bar to attend to their civil business. Because most lawyers believe the pressure would be counter-productive, they refrain from applying it. Judicial attention to matters other than the particular criminal case tends to diminish as the criminal trial continues. Motions that might well be dispositive are not filed, or are filed less often during such a period. Each long criminal case tends to cause considerable delay to the civil docket of the judge.

Protracted criminal cases demand extensive judicial attention, and that is appropriate. The liberty interests of the defendants require the highest level of concern. But, the attention that consequently is diverted from the civil list, and the resulting reduced ability of the judges to manage other cases, is reflected in the statistics of the court. Although it virtually is impossible for the judges to control the flow of criminal cases, it seems desirable (1) to develop management techniques to improve the efficiency with which they are processed, and (2) to put some mechanism in place to prevent other cases from stagnating.

(ii) Criminal Sentencing Guidelines and Minimum Mandatory Sentences

The Sentencing Reform Act of 1984 and minimum mandatory sentences play a significant role in decreasing the time judges have available to devote to civil matters. As examples, it appears that:

1. Change-of-plea hearings require more time and procedural steps for the entry of a guilty plea and to schedule the preparation and dissemination of the presentence report;

2. Sentencing hearings have become much more complicated and time consuming and also may require evidentiary hearings; and

3. There are fewer guilty pleas and more defendants are going forward with trial.

Every district faces these problems, but they are causes for particular concern in this district. A comparison of recently published figures demonstrates that, in guidelines cases, 78.9% of the defendants in this district were convicted by pleas, as compared to the national average of 87.7%, and as compared to the figure of 91.2% for non-guidelines cases. See United States Sentencing Commission 1990 Annual Report (statistics for period ending August 31, 1990). The plea figures for this district are significantly lower than the national average for the same time period. They also show a decrease over the figure of 83.5% for the prior year ending, December 31, 1989. Given this decrease in pleas for guidelines cases, it is not surprising that the numbers also reflect a corresponding increase in the number of criminal trials in the district.

(b) Asbestos Cases

Until quite recently, the asbestos litigation in this district has represented a significant portion of cases that could be considered delayed. For a period of time, they comprised the oldest group of cases in the District of Massachusetts. Over 2500 of these proceedings were in the system and 87% of them were more than three years old. After years of relative inactivity, these cases came under highly effective management. One judge tracked them, holding conferences and assigning the cases in list form for trial. A settlement of a significant number of these cases finally was achieved in June of 1991.

These cases are not typical of the court's docket. Rather, they represent a unique species of litigation that occupy a significant portion of a single judge's time. In

numbers alone, they represent roughly five times the average judge's caseload. It is significant that, at the time of the recent settlement, the asbestos cases accounted for 2074 of the 2293 civil cases pending in the District of Massachusetts that were over three years old. These cases obviously have skewed the statistics of this district for some time.

Their disposition is to be applauded, but it does not justify ignoring the reasons why these cases went unresolved for so long. Given the current litigation environment, it is quite possible, perhaps even likely, that some other major calamity -- a mass disaster, a product failure, or a widespread toxic event -- may create another special category of cases that will dominate the docket of one of the district's judges.

(c) Prisoner and Pro Se Cases

Prisoner and pro se cases represent ~~a large portion of the civil delay in~~ this district. The addition of the pro se law clerk to the Clerk's Office staff to review and screen theses cases is having some impact on the disposal rate of some of these matters at an early stage in the proceedings. Unfortunately, however, prisoner and pro se cases consume a large amount of judicial attention, as the pleadings and other papers are not in the customary style or format. Judges and their staffs are tested by the unconventional demands of litigants, some of whom may be in custody and generally unresponsive to and unfamiliar with the usual manner in which the court operates. Prisoner cases require significant attention, because staff must sift through large quantities of oftentimes illegible and incoherent filings to reach the merits of the documents. Moreover, the handling of these cases is affected by the budgetary

constraints of the Commonwealth of Massachusetts. The Massachusetts Department of Corrections legal department generally has been understaffed and underfunded. This has had a significant impact, in cases involving the Commonwealth, on the filing of responsive pleadings and dispositive motions by counsel in a timely fashion.

Another problem in dealing with the prisoner and pro se cases is the reluctance of the private bar to accept pro bono appointments. Although the pro se law clerk now is playing an important role in screening out frivolous cases, it is difficult for the court to find attorneys willing to accept those cases that require further attention. In many instances, assignments are rejected by attorneys, including those employed at major law firms in the City of Boston. The paper work and time involved in appointing and reappointing pro bono counsel, many times without success, certainly does not advance the litigation process and the court's work.

There also are logistical and scheduling problems presented by plaintiffs in custody. Oftentimes judges attempt to schedule conferences and hearings on short notice, when they find themselves with unexpected openings in their schedules. Too often, they discover that the time, expense, and extra paperwork involved in obtaining a prisoner's presence in the courthouse for a brief scheduling conference is not warranted or feasible. Subsequently, these cases generally are passed over during routine case management and calendaring.

Prisoner and pro se cases languish, more than most other types of cases, for an inordinate amount of time. Yet, they should be pressed and resolved quickly. There is little or no likelihood that, if left unattended, they will resolve themselves. Furthermore, in a fair proportion of these cases, settlement holds no advantage for

the plaintiff who generally is seeking a moral vindication and, in some instances, a punitive award. For the most part, prisoner cases must be tried or disposed of by judicial activity. Those prisoner cases that have existed on the docket for over three years presumably have been delayed excessively and should be resolved promptly. With the cooperation of the bar, prisoner cases are an ideal category for close case management.

(d) Civil Rights Cases

Civil rights cases instituted by persons not in custody for other than "corrections" reasons also take longer than the norm to resolve. Of all pending civil rights cases in the district, 21.4% are more than three years old. All cases need prompt attention, but civil rights cases generally should have early settlement conferences and quick trial assignments. These disputes often involve ongoing conduct, or the injuries complained of fester and become increasingly intractable over time. These cases, like prisoner cases, are more likely to require a trial to resolve. Again, with the cooperation of the bar, this category of case can benefit from close case management.

(e) Complex Civil Matters

(i) Non-Jury Trials

Approximately 20% of the civil cases presenting complex issues that must be resolved by a judge without a jury are more than three years old.[1] Pretrial

[1]

Banks & Banking	25% over 3 years old
Patent	11% over 3 years old
Truth in Lending	17% over 3 years old
Labor	16% over 3 years old
Land	23% over 3 years old

proceedings, hearings, and rendering opinions in these cases require time and attention that usually cannot be delegated by the presiding judge. Moreover, non-jury trials often lack the cohesiveness that the mere presence of a jury provides. Many present novel and complex legal issues, and often produce records of enormous proportions.

Although burdensome, some of these complex civil matters as intellectually challenging, and that leads judges to want to produce a helpful judicial opinion. These opinions typically require considerable effort and consume a great deal of time. Their production, therefore, may cause a substantial time lag after the matter has been tried.

(ii) The Management of Complex Civil Cases

The Boston school desegregation litigation typifies the ways in which contemporary complex and protracted cases tax the resources of the federal courts. This case, which began in 1972, consumed enormous amounts of the court's administrative resources and has required the attention of the court as recently as May, 1991, nineteen years after the proceeding initially was filed. This litigation was of great public import and received tremendous media attention. It exemplifies the now well-known phenomenon of the utilization of the federal courts to secure compliance with a mandate of the Constitution when the other branches of government appear unwilling or unable to act.

Securities	24% over 3 years old
Social Security	22% over 3 years old

Judges in this district have been obliged to exercise jurisdiction in a number of protracted civil litigations involving judicial intervention over significant periods of time. In addition to the recently concluded asbestos cases, several of the lawsuits pending three years or more are those in which judges have maintained jurisdiction over important governmental institutions -- Boston's Charles Street Jail, the Salem Jail, the Dedham Jail, the Department of Social Services, the Bridgewater Treatment Center, and the Fernald and Belchertown Schools for the retarded. Also, many environmental cases, such as the proceeding involving the clean-up of Boston Harbor, are complex civil cases that will continue to require judicial attention for years to come.

It is impossible to quantify the time drawn away from other matters by these enormous, time-consuming cases. It must be considerable, however, for any judge who is confronted with one of these behemoths. All of the experience in recent decades, now reflected in Federal Rule of Civil Procedure 16, as amended in 1983, and in the successive editions of the Manual for Complex Litigation, seems to demonstrate that these cases can profit from a reasonably high level of judicial management, and require considerable cooperation from the counsel in the case.

(f) Tort and Contract Cases

In 1990, roughly one third of the cases filed in this district were either personal injury or contract matters. (Of the 4,107 cases instituted that year, 618 were contract and 754 were personal injury.) These cases comprise a large portion of the workload, and are affected most by the habits of the attorneys and the management practices of the judges. Various commentators have theorized that simple tort and contract

matters respond best to judicial control, including tracking. Approximately 90% of these cases are settled without a full trial, 32% are resolved before a pretrial conference, 32% are resolved after a pretrial conference, and the balance are settled at or during the trial.

2. CASE MANAGEMENT

(a) District Judges

All civil and criminal cases filed in the District of Massachusetts are assigned upon filing as follows:

(1) In Boston, cases are assigned randomly to all active judges with a half a case load assigned to one senior judge;

(2) In the Western Section, Springfield, all cases are assigned to Chief Judge Freedman; and

(3) In the Central Section, Worcester, civil cases are assigned randomly to the active Boston judges for case management. The district currently is awaiting the appointment of a permanent judge to the Central Section.

Based on this assignment pattern, each judge is responsible for the processing and management of cases pending on his or her own docket. Since each judge has a different demeanor, work habits, and theories on case management, the process varies significantly from one set of chambers to another.

(b) Magistrate Judges

The magistrate judges are not used in a uniform manner in this district. An efficient example of magistrate judge management exists in the Springfield, Massachusetts docket. There, Chief Judge Freedman and Magistrate Judge Ponsor, have a one-to-one relationship. By way of contrast, in Boston the ratio is twelve judges to four magistrate judges, or three to one. Magistrate Ponsor handles all pretrial matters in the cases filed in Springfield. His ability to be consistent

generates predictability and stability for the attorneys.

Magistrate judges represent a resource of enormous potential. Every effort must be undertaken to maximize their utility. Although a one magistrate to one judge relationship is not possible in Boston, there may be ways to reduce the current variant approach to the use of magistrate judges and to improve on their utilization. Pairing magistrate judges with district judges for discovery and pretrial proceedings may be a way to improve the management of cases.

(c) Senior Judges

A variation on the desirability of making effective use of the magistrate judges is found in the relationship this district has with its senior judges. Only one of the senior judges in this district has a caseload and regularly is assigned matters. Other senior judges preside over certain types of trials.

(d) Vacant Judgeships

The district has thirteen authorized active judge positions. As of January 1, 1992, vacancies will exist in four of these thirteen positions. Until these vacancies are filled, the backlog can be expected to increase.

(e) Discovery Disputes

Discovery disputes often are expensive for litigants and time consuming for lawyers. They take up precious judicial resources and are often unnecessary and counter-productive in that they tend to widen the gap between the parties. Improvement in the handling of the discovery process represents the greatest

prospect for reducing cost and delay.

(f) Dispositive Motions

Those judges in the district who hold regular hearings on potentially dispositive motions, and promptly resolve those motions, have fewer older pending cases. Judges who do not conduct hearings tend to have more older pending cases. Reviewing all motions in a timely manner to determine whether they are ripe for resolution, or should be scheduled for hearing, is an important part of the case management process. Moreover, deciding motions as soon as possible after receipt of all opposition papers, or, if no opposition is filed, after the time for filing has elapsed, can serve to advance the litigation.

(g) Alternative Methods of Dispute Resolution

Although the District of Massachusetts has no compulsory arbitration program in place to assist in dispute resolution, a few of the judges employ methods such as summary jury trial in an attempt to resolve civil cases prior to investing the time and expense that are necessary for a full trial. Other mechanisms suggested by various judges as techniques that should be pursued for an earlier resolution of disputes include: agreement to proceed before a magistrate judge for trial, appointment of a master, or consulting with a private arbitrator or alternative dispute resolution firm.

An example of both the possibilities and the current level of utilization of alternative methods of dispute resolution is the court's participation in the Boston Bar Association Federal Court Mediation Program, a voluntary program established with the cooperation of the Bar Association several years ago. The program is

monitored by the Bar Association, which independently maintains a panel of volunteer attorneys who donate their time to serve as mediators to assist the court in resolving civil cases. Although this program has been in place for quite some time, it rarely is used by the judges of this court as an alternative method of attempting to resolve civil cases.

(h) Trials

The timely scheduling of a final pre-trial conference, with some degree of certainty that the case will be reached for trial within 30 days from the date of that conference, will help resolve disputes.

3. CONCLUSION

The development of an effective case management plan presents an enormous opportunity for reducing the delay and cost associated with litigation in the District of Massachusetts. Individualized case management, more effective use of magistrate judges and senior judges, prompt resolution of all motions, especially potentially dispositive motions, and cooperative discovery will alleviate many of the major choke points in the system.

Although the focus in this discussion has been on the court's procedures and the ability of judges to manage cases, each participant in the judicial system -- whether judge, clerk, lawyer, or litigant -- plays an important role in the process. Attorneys who are unfamiliar with the local rules, or continually request continuances or extensions of time, or fail to file timely motions and/or responses, cause delay in the handling of cases and often create additional unnecessary and burdensome

paperwork. All litigation participants must perform their roles as effectively and efficiently as possible to make the system work.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ORDER
November 18, 1991

ORDERED;

That the Civil Justice Expense and Delay Reduction Plan developed by the Civil Justice Advisory Committee of this district pursuant to the requirements set forth in chapter 23 of Title 28, United States Code, as added by section 103(a) of the Civil Justice Reform Act of 1990 be, and hereby is, adopted.

s/ Frank H. Freedman
Chief Judge

s/ Rya W. Zobel
United States District Judge

s/ Joseph L. Tauro
United States District Judge

s/ William G. Young
United States District Judge

s/ Walter Jay Skinner
United States District Judge

s/ Mark L. Wolf
United States District Judge

s/ A. David Mazzone
United States District Judge

s/ Douglas P. Woodlock
United States District Judge

s/ Robert E. Keeton
United States District Judge

s/ Edward F. Harrington
United States District Judge

Part II

Expense and Delay Reduction Plan

Based on the assessment of the dockets of the District of Massachusetts in Part I, as well as numerous other sources, the Advisory Group, consistent with its obligations under the Civil Justice Reform Act, has made recommendations to the Court's Civil Justice Reform Committee to assist it in developing and implementing a constructive, workable Expense and Delay Reduction Plan. The Advisory Group's report included the "recommended measures, rulings and programs," along with an "explanation of the manner in which the recommended plan complies" with the "principles and guidelines" and the "techniques" of litigation management and cost and delay reduction set forth in Section 473 of the Civil Justice Reform Act. The work of the Advisory Group has been considered and adopted by the Committee. The Plan, which follows, was approved and adopted by the full court on November 18, 1991, with the intention that the District of Massachusetts become an early implementation district.

Article I.

Pretrial Differential Case Management

Rule 1.01. Definition of a Judicial Officer.

As used in this Plan, "judicial officer" refers to either a United States District Court Judge or a United States Magistrate Judge.

Comment:

The definition of "judicial officer" used in this Rule is derived from the definition set forth in the Civil Justice Reform Act, 28 U.S.C. § 482.

Rule 1.02. Early Assessment of Cases.

(a) Scheduling conference in civil cases. In every civil action, except in categories of actions exempted by district court rule as inappropriate, the judge shall convene a scheduling conference as soon as practicable, but in no event more than ninety (90) days after the appearance of a defendant or the time that is specified in Federal Rule of Civil Procedure 16, if it is shorter. In cases removed to this court from a state court or transferred from any other federal court, the judge shall convene a scheduling conference within sixty (60) days after removal or transfer.

(b) Obligation of counsel to confer. Unless otherwise ordered by the judge, counsel for the parties shall confer no later than ten (10) days prior to the date for the scheduling conference for the purpose of:

(1) preparing an agenda of matters to be discussed at the scheduling conference,

(2) preparing a proposed pretrial schedule for the case that includes a plan for discovery, and

(3) considering whether they will consent to trial by magistrate judge.

(c) Settlement proposals. Unless otherwise ordered by the judge, the plaintiff shall present written settlement proposals to all defendants no later than ten (10) days prior to the date for the scheduling conference. Defense counsel shall have conferred with their clients on the subject of settlement prior to the scheduling conference and be prepared to respond to the proposals at the scheduling conference.

(d) Joint statement. Unless otherwise ordered by the judge, the parties are required to file, no later than five (5) business days prior to the scheduling conference, a joint statement containing a proposed pretrial schedule, which shall include:

(1) a joint discovery plan scheduling the time and length for all discovery events, that shall

(A) conform to the obligation to limit discovery set forth in Federal Rule 26(b), and

(B) consider the desirability of conducting phased discovery in which the first phase is limited to developing information needed for a realistic assessment of the case and, if the case does not terminate, the second phase is directed at information needed to prepare for trial; and

(2) a proposed schedule for the filing of motions.

(3) certifications signed by counsel and by an authorized representative of each party affirming that each party and that party's counsel have conferred with a view to establishing a budget for the costs of conducting the full course -- and various alternative course -- of the litigation.

To the extent that all parties are able to reach agreement on a proposed pretrial schedule, they shall so indicate. To the extent that the parties differ on what the pretrial schedule should be, they shall set forth separately the items on which they differ and indicate the nature of that difference. The purpose of the parties' proposed pretrial schedule or schedules shall be to advise the judge of the parties' best estimates of the amounts of time they will need to accomplish specified pretrial steps. The parties' proposed agenda for the scheduling conference, and their proposed pretrial schedule or schedules, shall be considered by the judge as advisory only.

(e) Conduct of scheduling conference. At or following the scheduling conference, the judge shall make an early determination of whether the case is "complex" or otherwise appropriate for careful and deliberate monitoring in an individualized and case-specific manner. The judge shall consider assigning any case so categorized to a case management conference or series of conferences under Rule 1.03. The factors to be considered by the judge in making this decision include:

(1) the complexity of the case (the number of parties, claims, and defenses raised, the legal difficulty of the issues presented, and the factual difficulty of the subject matter);

(2) the amount of time reasonably needed by the litigants and their attorneys to prepare the case for trial;

(3) the judicial and other resources required and available for the preparation and disposition of the case;

(4) whether the case belongs to those categories of cases that:

(A) involve little or no discovery,

(B) ordinarily require little or no additional judicial intervention, or

(C) generally fall into identifiable and easily managed patterns;

(5) the extent to which individualized and case-specific treatment will promote the goal of reducing cost and delay in civil litigation; and

(6) whether the public interest requires that the case receive intense judicial attention.

In other respects, the scheduling conference shall be conducted according to the provisions for a pretrial conference under Federal Rule of Civil Procedure 16 and for a case management conference under Rule 1.03.

(f) Scheduling orders. Following the conference, the judge shall enter a scheduling order that will govern the pretrial phase of the case. Unless the judge determines otherwise, the scheduling order shall include specific deadlines or general time frameworks for:

(1) amendments to the pleadings;

(2) service of, and compliance with, written discovery requests;

(3) the completion of depositions, including, if applicable, the terms for taking and using videotape depositions;

(4) the identification of trial experts;

(5) the disclosure of the information regarding experts, as contemplated by Federal Rule of Civil Procedure 26(b)(4)(A)(i);

(6) the filing of motions;

(7) a date for a settlement conference, to be attended by trial counsel and, in the discretion of the judge, their clients;

(8) one or more case management conferences and/or the final pretrial conference;

(9) a date for a final pretrial conference, which shall occur within eighteen months after the filing of the complaint;

(10) the joinder of any additional parties;

(11) early and binding disclosure of expert witnesses;

(12) submission of an affidavit of the expert witness' statement in advance of his or her deposition; and

(13) any other procedural matter that the judge determines is appropriate for the fair and efficient management of the litigation.

(g) Modification of scheduling order. The scheduling order shall specify that its provisions, including any deadlines, having been established with the participation of all parties, can be modified only by order of the judge, or the magistrate judge if so authorized by the judge, and only upon a showing of good cause supported by affidavits, other evidentiary materials, or references to pertinent portions of the record.

Comment:

The most effectively managed cases often are those in which a relatively early scheduling conference is convened by the judge, and in which a case-specific scheduling order is worked out with substantial input from the parties. Experience demonstrates that scheduling orders can not be expected to work well if one or both litigants do not seriously believe that the order will be enforced. If a routine form order is issued, without actual participation by the parties, it is quite likely that it will have to be modified later to suit the particular characteristics of the case. To make it clear to all participants that the scheduling procedure is to be taken seriously, Rule 1.02 calls for the conference to be conducted and the order to be issued by a district judge. This was thought more likely to produce a more reliable schedule because if the process were handled by a magistrate judge, the district judge, whose schedule ultimately will determine when the case is tried, might be more likely to revise it or be more receptive to an application for modification by a party who is unhappy with it.

The Civil Justice Reform Act requires the court to consider including a method of "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management" to the needs of the particular case. This may be accomplished by flexible scheduling that relies on judicial discretion. Although emphasizing the use of judicial discretion will require the expenditure of a judge's time, it is felt that resort to a practice of standard procedures and deadlines actually could increase costs and delay by generating additional hearings and conferences concerning the fairness of the application of the deadlines and procedures to the individual case.

Even a schedule of presumptive deadlines and procedures that may be rebutted upon the showing of good cause would be too restrictive. Some cases need more judicial management than others, and some may need none at all. The procedures adopted by the court should be designed to allow the judicial officer to make an early assessment of each case filed and to identify those actions that may be amenable to settlement or other alternative disposition techniques. Arguably, a schedule of presumptive deadlines would put counsel on notice of a general time framework for resolving a dispute deemed to be "complex" or otherwise appropriate for particularized management. But it also would tend to decrease the valuable exercise of a judge's discretion and insight with respect to a particular case. Presumptive deadlines should not be necessary if the scheduling conference and case management conferences are used wisely.

A scheduling conference is required for every civil action filed, with the exception of those categories of cases that expressly are exempted by local rule because they do not warrant the use of any automatic management procedures. Over-management is

as undesirable as under-management. Rule 1.02 is the only procedure mandated by these rules. Further management by a judicial officer is a matter of discretion to be exercised on the basis of the circumstances of individual cases.

An individual judge may make greater or lesser use of the options provided by Rule 1.02. Some judges may elect to assign a large number of cases to a case management program. Others might employ a higher threshold, assigning only those cases that they anticipate would benefit most from specific, tailored, individual attention. Subdivision (e) lists six factors that a judge may consider in deciding whether to assign a given case to further case management.

The attorneys must take seriously their pre-conference obligations under subdivisions (b), (c) and (d) of Rule 1.02. This is critical to the success of the scheduling conference procedure. Unless they come to the conference prepared, as prescribed by this Rule, time will be wasted and the conference will not be fully effective. The court must enforce the performance of these obligations by counsel.

The four core objectives that the Civil Justice Reform Act identifies for effective case management are (1) to explore the parties' receptivity to and the propriety of settlement, (2) to identify or formulate the principal issues in contention, thereby narrowing the contested legal or factual issues, and possibly paving the way for more expedited discovery and even settlement, (3) to prepare a discovery schedule and plan that sets out concisely and firmly the requirements of litigants, counsel, and the court, and (4) to set time limits for the completion of discovery. The purpose of the Rule 1.02 conference is to provide the judge with sufficient information to meet these objectives, and to tailor an appropriate scheduling order.

Subdivision (f) lists thirteen specific items to be included in the scheduling order. However, a judge may determine that certain of these measures are unnecessary or are premature or may suggest the use of other case management procedures. Therefore, the options listed should not be applied in a rote manner in the order. The exercise of case specific judicial discretion should be the foundation of the scheduling order.

The date for the final pretrial conference, or the trial itself, should be set as early as possible. By moving cases toward trial, the court meets its basic obligation to litigants seeking relief in the federal court system. Further, it is recognized widely that establishing firm completion dates is among the most effective methods for prompting settlement. The final pretrial conference or trial date may be set according to such criteria as case complexity (with simple cases having time priority) or specific "case events" that signal the trial date. The Civil Justice Reform Act suggests a standard of eighteen months after the filing of the complaint. Exceptions to the eighteen month time limit may be necessary if the judge determines that it is impossible to schedule the case within that time because of its complexity, or because of other special circumstances.

Rule 1.02(f) requires that a date for a final pretrial conference be set at the time of the scheduling order. Setting a firm trial date early in the case can be beneficial. Realistically, however, it may not be possible to fix trial dates with any certainty only two or three months after the case has been instituted. Perhaps the most important characteristic of scheduling orders is that they be reliable, so that they are unlikely to be modified at a later date. This rule reflects the view that, in some cases, it is better to set a reliable date for a final pretrial conference and then to establish a

practice of setting actual trial dates as soon after the final pretrial conference or, close of discovery, as reasonably is possible. If attorneys understand that it is the practice in this district for cases to be tried within a month or two after the final pretrial conference, setting a reliable date for that conference will have many of the same beneficial effects as would setting a trial date at the scheduling conference.

Reporter's Notes to Rule 1.02

1. The Federal Rules of Civil Procedure establish consistent and uniform time limits for several relevant procedures:

Federal Rule 4(e) - requires that process be served within 120 days after the filing of the complaint.

Federal Rule 6 - sets time limits generally.

Federal Rule 12(a) - establishes the time limit for answering.

Federal Rule 15(a) - prescribes the time limit for amending pleadings.

Federal Rule 56 - provides the time limit for summary judgment.

There is no Federal Rule, however, that establishes a consistent and uniform time limit for discovery or pretrial management.

2. Relevant Local Rules of the United States District Court for the District of Massachusetts currently provide for the categorization of actions, time limits, and other differential case management techniques.

(a) Local rules that provide for the categorization of actions include:

Local Rule 3.1 - requires the party filing the initial pleading also to file a civil cover sheet and the local category sheet.

Local Rule 16.2 - identifies certain categories of actions that are exempt from the scheduling and planning provisions of Federal Rule 16(b).

Local Rule 40.1 - divides all civil cases filed into five categories based upon the "nature of the suit," for purposes of assignment, and divides criminal cases into three categories based on "complexity" and "nature of suit."

(b) Local rules that provide for time limits include:

Local Rule 4.1 - provides that process must be served within 120 days (consistent with Federal Rule 4(e)).

Local Rule 7.1 - provides that opposition to a motion must be submitted within 14 days.

Local Rule 41.1 - calls for dismissal for want of prosecution after 1 year of inactivity.

Local Rule 81.1 - sets forth time limits with respect to removal of an action from state to federal court.

(c) Local rules that provide for miscellaneous differential management techniques include:

Local Rule 40.1 - provides that "related" civil cases are assigned to the same judge.

Rule 1.03. Case Management Conference.

(a) Conduct of case management conference. The case management conference shall be presided over by a judicial officer who, in furtherance of the scheduling order required by Rule 1.02, may:

(1) explore the possibility of settlement;

(2) identify or formulate (or order the attorneys to formulate) the principal issues in contention;

(3) prepare (or order the attorneys to prepare) a discovery schedule and discovery plan that, if the presiding judicial officer deems appropriate, might:

(A) identify and limit the volume of discovery available in order to avoid unnecessary or unduly burdensome or expensive discovery;

(B) sequence discovery into two or more stages; and

(C) include time limits set for the completion of discovery;

(4) establish deadlines for filing motions and a time framework for their disposition;

(5) provide for the "staged resolution" or "bifurcation of issues for trial" consistent with Federal Rule 42(b); and

(6) explore any other matter that the judicial officer determines is appropriate for the fair and efficient management of the litigation.

(b) Obligation of counsel to confer. Prior to the case management conference, the judicial officer may require counsel for the parties to confer for the purpose of preparing a joint statement containing

(1) an agenda of matters that one or more parties believe should be addressed at the conference; and

(2) a report advising the judicial officer whether the case is progressing within the allotted time limits and in accord with the specified pretrial steps.

This statement is to be filed with the court no later than five (5) business days prior to the case management conference.

(c) Additional case management conferences. Nothing in this rule shall be construed to prevent the convening of additional case management conferences by the judicial officer as may be thought appropriate in the circumstances of the particular case. In any event, a conference should not terminate without the parties being instructed as to when and for what purpose they are to return to the court. Any conference under this rule designated as final shall be conducted pursuant to Federal Rule of Civil Procedure 16(d).

Comment:

Rule 1.03 gives the court general authority to continue its management of a case, providing for one or more pretrial conferences along the lines prescribed by Federal Rule 16. Whether, when, and how frequently to employ this procedure is left to the judicial officer in charge of the pretrial processing of the case. No mandatory case management conference is prescribed by Rule 1.03. Many cases simply will not require any formal judicial control beyond the scheduling conference.

In arriving at a case management plan, the judicial officer should recognize that, although cases may be classified according to general notions of complexity, each case is unique and may require procedures tailored to fit its specific characteristics. The strategy developed by the judge for each case should be "event-oriented," with

certain litigation events viewed as important benchmarks in ascertaining case progress, limit the periods of time between case events, and incorporate methods to supervise and control these intervals in order to make them more productive.

The scheduling conference is intended to provide an early opportunity for the litigants and their attorneys to narrow the areas of inquiry to those that truly are relevant and material, to establish priorities for completion of the most important tasks as quickly as possible, particularly any that might be dispositive of the action, and to devote attention to weighing the value of uncovering every single item of "relevant" material against the value of resolving the dispute more fairly, more quickly, and less expensively.

In many instances, it will be desirable for the judicial officer to convene a case management conference after the parties have conducted some discovery. That will enable the judicial officer to ascertain the progress that is being made and the kinds of problems the case is likely to present. In advance of the conference, the judicial officer should become familiar with the case file in order to be able to discuss scheduling and other issues with counsel on an informed basis. In that setting, any resulting order will be credible and recognized by counsel as being firm, absent a demonstration of good cause for its modification. The judge should be willing to modify an order to accommodate any legitimate problems it may create, but should be unwilling to do so merely because one side or the other, or even all the parties, file a motion alleging in some conclusory fashion that they "need more time."

The Civil Justice Reform Act suggests certain methods by which the judicial officer, at an early date, may become involved in and manage the pretrial process,

assessing and planning the progress of the case. These are "setting early, firm trial dates," "authority to control motion practice," "authority to control discovery." Of course, it is imperative that the case be kept moving toward trial.

It should be a guiding principle that, before any meeting between the judicial officer and the parties is adjourned, the judicial officer should give counsel a date to return, with clear instructions as to what will be expected of them at that time. This practice should be observed whether the "meeting" is denominated a case management conference, a status conference, or occurs for any other purpose.

One objective of the Civil Justice Reform Act is to thwart attempts by wealthy or powerful litigants to impede appropriate discovery by litigants with more modest resources. Federal Rule 26 already provides considerable authority to control discovery. The Civil Justice Reform Act gives district judges and magistrate judges the additional authority to control the extent of discovery, the time for its completion, and to ensure compliance with appropriate requested discovery in a timely fashion.

The Civil Justice Reform Act also provides the judicial officer with the authority to streamline motion practice by setting deadlines for filing motions as well as target dates for deciding them. That should be part of the objective of any case management effort under Rule 1.03.

Reporter's Notes to Rule 1.03

1. Relevant Local Rules of the United States District Court for the District of Massachusetts include:

> **Local Rule 16.2 - states that a motion for the continuance of a trial, evidentiary hearing, or any other proceeding, will be granted only for good cause.**
>
> **Local Rule 37 - provides that prior to filing any discovery motion, counsel for each of the parties shall confer in good faith to narrow the areas of disagreement to the greatest possible extent.**

2. It may be desirable for the judicial officer to require in advance of the case management conference that, in addition to preparing a suggested case management plan, the counsel complete and submit a Case Disclosure Form ("CDF") to the judicial officer. (See Appendix A: "Plaintiff Case Disclosure Form" and Appendix B: "Defendant Case Disclosure Form.") Like the case management plan, the purpose of the CDF would be to require the lawyers to analyze and explain their case with considerable care. But, the CDF also requires the lawyers to disclose additional information that may be of use to the judicial officer in evaluating and managing the case that may not appear in counsels' suggested case management plans.

3. For a discussion of the managerial techniques that have been incorporated into local court rules, see generally Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal Courts, 64 Va.L.Rev. 467 (1978).

4. The Manual for Complex Litigation, Second (1985) suggests a series of four pretrial conferences: the first to assume control of the case and to handle preliminary matters such as pleading and the joinder of parties and claims; the second to plan discovery; the third to control the discovery process and provide for pretrial briefs; and the last to plan the details of the trial. The original Manual did the same. The Manual also recognizes that these procedures must be altered to fit the needs of each case.

5. For an analysis of the successes and problems faced by the courts in cases in which some of the Manual's procedures have been utilized, see Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv.L.Rev. 1001 (1974).

Article II.

Discovery

Rule 2.01. Control of Discovery.

(a) Cooperative discovery. The judicial officer should encourage cost effective discovery by means of the voluntary exchange of information among litigants and their attorneys. This may be accomplished through the use of:

(1) informal, cooperative discovery practices in which counsel provide information to opposing counsel without resort to formal discovery procedures; or

(2) stipulations entered into by the parties with respect to deposition notices, waiver of signing, and other matters, except that the parties may not enter into stipulations extending the time for responding to discovery requests or otherwise modify discovery procedures ordered by the judicial officer.

(b) Disclosure orders. The judicial officer may order the parties to submit at the scheduling conference, or at any subsequent time the officer deems appropriate, sworn statements disclosing certain information to every other party. At the discretion of the judicial officer, this order may direct the submission of:

(1) a sworn statement from a claimant, whether plaintiff, third-party plaintiff, cross-claimant, or counterclaimant, that:

(A) itemizes all economic loss and provides a computation of damages for which recovery is sought, if any, sustained prior to the date of service of process;

(B) identifies all persons then known to the claimant or the claimant's attorney who witnessed or participated in the transaction or occurrence giving rise to the claim or otherwise known or believed to have substantial discoverable information about the claim or defenses, together with a statement of the subject and a brief summary of that information;

(C) identifies all opposing parties, and all officers, directors, and employees of opposing parties, from whom statements have been obtained by or on behalf of the claimant regarding the subject matter of the claim; and

(D) identifies all governmental agencies or officials then known to the claimant or the claimant's attorney to have investigated the transaction or occurrence giving rise to the claim; and

(2) a sworn statement from a defendant, whether the direct defendant, third-party defendant, cross-claim defendant, or counterclaim defendant, that identifies:

(A) all persons then known to the defendant or the defendant's attorneys who witnessed the transaction or occurrence giving rise to the claim or otherwise is known or believed to have substantial discoverable information about the claims or defenses, together with a statement of the subject and a brief summary of that information;

(B) all opposing parties, and all officers, directors, and employees of opposing parties, from whom statements have been obtained by or on behalf of the defendant regarding the subject matter of the claims or defenses; and

(C) all government agencies or officials then known to the defendant or the defendant's attorneys to have investigated the transaction or occurrence giving rise to the claims or defenses.

Noncompliance may be excused only by order of the judicial officer.

(c) Discovery event limitations. Unless the judicial officer orders otherwise, the number of discovery events shall be limited for each side (or group of parties with a common interest) to five (5) depositions, thirty (30) interrogatories, and two (2) requests for production.

Comment:

Discovery costs often account for a significant portion of the expense of litigation. The Civil Justice Reform Act requests that the district court consider alternative methods of obtaining effective discovery to reduce cost and delay in civil litigation. The Reform Act also indicates that each district's Plan should include procedures that encourage (i) cost-effective discovery and (ii) conservation of judicial resources.

The provisions of Rule 2.01 allow the judicial officer to exert early control over the discovery process. Specifically, the judicial officer should (1) encourage the parties to exchange voluntarily certain items on an informal basis, (2) obtain a joint discovery plan from counsel, (3) consider discovery motions only after the moving party first has attempted to deal with opposing counsel, and (4) determine whether the suggested numerical limits on discovery events are appropriate for the particular

case. As more fully set forth in Rule 2.02, the judicial officer also has control over the sequencing of discovery.

Many aspects of cooperative discovery also are being considered by the Federal Rules Advisory Committee at this time and proposed rule changes have been published for comment. Proposals for forms of automatic disclosure also have been made by others. Because the notion may appear revolutionary to some members of the bar, the judicial officer may have to make clear that compliance is expected.

In a given situation, a fixed number of interrogatories and requests for production of documents may be too arbitrary to be workable or fair. Subdivision (c), therefore, provides for judicial discretion with respect to modification. Some cases will require more than five depositions and thirty interrogatories. The judicial officer should maintain control over discovery and exercise discretion on a case-by-case basis and should not automatically impose the constraints set out in Rule 2.01(c). Rather, decisions about limiting the number of discovery events, questions regarding any further discovery, and the manner for resolving any discovery disputes should be addressed by the judicial officer at the case management conference.

Delays caused by discovery abuse may be remedied by effective enforcement of the 1983 revisions to Federal Rule 26. Delays also will be reduced if the deadlines contained in tailored scheduling orders are enforced, and if litigants and their attorneys come to understand that the provisions of the discovery rules and of discovery orders ordinarily will be enforced as written.

Reporter's Notes to Rule 2.01

1. Relevant Local Rules of the United States District Court for the District of Massachusetts include:

> Local Rule 33-36 - indicates that the maximum number of interrogatories that may be served by a party during the course of discovery shall be thirty (30) unless leave to file a specified larger number is granted by the court.
>
> Local Rule 37 - provides that prior to filing any discovery motion, counsel for each of the parties shall confer in good faith to narrow the areas of disagreement to the greatest possible extent.

2. The local rules of fifty-two federal district courts, including the District of Massachusetts, require a conference between the parties prior to their making any discovery motions.

3. Some incremental benefit might be achieved by amending current Local Rule 33-36 to impose numerical restrictions on the number of Federal Rule 34 requests for documents and tangible items as presently are imposed on interrogatories. But, it is important that unreasonably low numerical restrictions on discovery requests be avoided since they might well result in delay caused by the need for routine motions for leave to serve additional discovery.

Rule 2.02. Sequencing of Discovery.

(a) Automatic document disclosure. Before any party may initiate any discovery, that party must submit to the opposing party a description, including the location, of all documents that reasonably are likely to bear substantially on any of the claims or defenses in the action. By agreement of the parties, copies of documents may be submitted to the opposing party in lieu of a description. Documents subject to automatic disclosure shall include:

(1) any contract between the party and any other party to the action that concerns the dispute;

(2) any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(3) any report of an expert who may be called at trial;

(4) any report by an insurance agent or investigator not protected by Federal Rule 26(b)(3); and

(5) any other documents that the judicial officer determines are appropriate.

The disclosure obligation provided for in this rule is reciprocal and continues throughout the case.

(b) Further discovery. After the automatic document discovery required by subdivision (a) has been completed, any requests that the parties may make for interrogatories, depositions, or the production of additional documents shall be by discovery motion. All requests for extensions of deadlines for the completion of discovery or for postponement of the trial must be signed by the attorney and, if the judicial officer should elect, the party making the request.

(c) Certification of discovery motions. The judicial officer shall not consider any discovery motion that is not accompanied by a certification that the moving party has made a reasonable and good-faith effort to reach agreement with opposing counsel on the matters set forth in the motion. In evaluating any discovery motion, the judicial officer may consider the desirability of conducting phased discovery, limiting the first phase to developing information needed for a realistic assessment of the case. If the case does not terminate, the second phase would be directed at information needed to prepare for trial.

(d) Resolution of discovery disputes. Counsel shall confer in order to resolve all discovery disputes. Any dispute not so resolved shall be presented to a judicial officer.

(e) Removed and transferred actions. In all actions removed to this court from a state court or transferred to this court from another federal court, the filing required by subdivision (a) shall be made as prescribed in that subdivision, and if discovery was initiated prior to the action being removed or transferred to this court, then the filing required by subdivision (a) shall be made within twenty (20) days of the date of removal or transfer.

Comment:

There are certain basic types of information that are discovered in virtually every case and ordinarily must be disclosed before the parties can enter serious settlement negotiations. This material usually should be readily available to the respective parties without need for formal discovery proceedings, and should be provided automatically at the outset of the litigation. For example, discovery may proceed in a more orderly fashion, and be less time-consuming and expensive, if counsel are able to determine the types and locations of documents early in the process. This initial

discovery phase should be conducted automatically, without need for a request.

After this first wave has been completed, additional "waves" of discovery on various aspects of the case may be conducted. The judicial officer may order additional discovery or disclosure of a basic and preliminary nature that may include, the identity and location of witnesses to be examined, the production of certain physical evidence, or a computation of damages. This may avoid the possibility that a great deal of very expensive discovery is conducted on issues that never have to be tried.

Defendants in actions for damages always are entitled to learn the out-of-pocket losses for which recovery is sought. Indeed, they cannot seriously consider settlement until they are given this information. Similarly, plaintiffs seeking damages typically are entitled to learn how much liability insurance is available, and often need that information to form an idea of what they can realistically expect in settlement.

There rarely is a valid justification for a plaintiff to resist quantifying economic loss before or shortly after bringing suit, or for needing months of discovery proceedings to get them to disclose that information. Requiring plaintiffs and their counsel to compile this information, even though it is preliminary, before bringing suit or very shortly thereafter will save time and expense. Disclosure of insurance coverage also will have the salutary effect in some cases of making plaintiffs more realistic about what to expect from their lawsuit.

Similarly, a litigant almost always is entitled to learn the identity of witnesses to or participants in the events that are central to the litigation, the identity of officials

who were involved, and whether the opposing party has received statements from any agents or employees. Rule 2.02 authorizes the court to order these matters disclosed.

Securing this type of basic information is the essential first step in a litigant's investigation of the merits of the claims and defenses. Rather than having to go through months of needless discovery in order to learn who the witnesses are and what public documents are available, the parties should disclose that information, to the extent they have it, at the outset of the process. This early disclosure approach is valuable in preventing ineffectual discovery early in the action and in avoiding postponements that otherwise may result from belated discovery of witnesses and documents during the final phase of the pretrial process.

Of course, there is always the possibility that a rule requiring pre-discovery disclosure would be counterproductive to the purposes of the Cost and Delay Reduction Act, which is why Rule 2.02 does not mandate it in all actions. There is no reason to require extensive disclosure when it is not necessary. The careful exercise of discretion is essential.

Along the same lines, the parties should be permitted to define the scope of the discovery they want and can afford by tailoring their own discovery requests, which can be calibrated to the circumstances of individual cases. Any "automatic" discovery is likely to overreach in some cases. It therefore may be to everyone's benefit if counsel can agree to produce certain categories of documents, without taking the time to decide which ones are "reasonably likely to bear substantially on the claim or defenses," and without going through the time consuming process of describing each

one. Furthermore, parties should be allowed to agree to curtail the amount of discovery that otherwise might occur under a no-exception automatic discovery process.

Subdivisions (c), (d), and (e) deal with procedural matters and are largely self-explanatory. As indicated in subdivision (d), it is hoped that disputes can be worked out without recourse to the court. Otherwise the basic objective of Rule 2.02 will be undermined.

Reporter's Notes to Rule 2.02

1. The procedures described in the Manual for Complex Litigation, Second (1985) should be consulted for guidance in the application of the principles of waves of discovery in complex litigation. (See generally id. at § 21.4).

Rule 2.03. Disclosure of Medical Records in Personal Injury Cases.

(a) Disclosure by claimants. Fourteen (14) days after an issue is joined by a responsive pleading, a claimant, whether plaintiff, third-party plaintiff, cross-claimant, or counterclaimant, who asserts a claim for personal injuries shall serve defendant, whether the direct defendant, third-party defendant, cross-claim defendant, or counterclaim defendant with

(1) an itemization of all medical expenses incurred prior to the date of service of the pleading containing the claim for which recovery is sought. If the claimant anticipates that recovery will be sought for future medical expenses, the itemization shall so state, but need not set forth an amount for the anticipated future medical expenses;

(2) a statement that either

(A) identifies a reasonably convenient location and date, within no more than fourteen (14) days, at which the defendant may inspect and copy, at the defendant's expense, all non-privileged medical records pertaining to the diagnosis, care, or treatment of injuries for which recovery is sought; or

(B) identifies all health care providers from which the claimant has received diagnosis, care, or treatment of injuries for which recovery is sought together with executed releases directed to each provider

authorizing disclosure to the defendant or its counsel of all non-privileged medical records in the provider's possession.

(b) Assertion of privilege. Insofar as medical records are not produced in accordance with subdivision (a)(2) on the ground of privilege, the claimant shall identify the privileged documents and state the privilege pursuant to which they are withheld.

(c) Removed and transferred actions. In all actions removed to this court from a state court or transferred to this court from another federal court, claimants seeking recovery for personal injuries shall provide the information and materials described in subdivision (a) within thirty (30) days after the date of removal or transfer.

Comment:

In personal injury cases, effective settlement analysis usually cannot begin until the claimant's medical bills and pertinent medical records have been made available to the defendant. Good practice dictates that suit not be filed until a personal injury plaintiff's counsel has assembled and reviewed the relevant medical records and bills. Certainly, the plaintiff's attorney should not wait to examine the medical records until the defendants have issued subpoenas seeking their production to the health care providers.

In order to obtain medical information under present practice, a defendant first must identify through interrogatories or deposition the persons and the institutions that have treated the plaintiff for the injuries allegedly sustained from the defendant's conduct and then issue "keeper of records" deposition notices to those persons and institutions in order to obtain their records. The process often is complicated by the keepers' refusal to comply with the subpoena until a court has issued an order directing them to do so. Frequently, additional delay results because the plaintiff's attorney insists that their production be postponed until he has had a chance to review them to determine if any portions are privileged. As a result, it can

take several months for the defendant to obtain the medical records that are needed for meaningful settlement analysis.

Rule 2.03 is designed to eliminate delays in the commencement of settlement analysis. Plaintiffs and their attorneys typically are entitled to see and copy records upon request. It is not unreasonable, therefore, to require that exchange of information at the beginning of the litigation rather than months later. Rule 2.03 should have the effect of advancing the date at which settlement realistically can be considered, reduce the number of formal discovery requests that have to be served and answered in personal injury cases, limit the number of discovery motions that have to be made, and secure the disclosure of obviously relevant and discoverable information earlier rather than later.

Reporter's Notes to Rule 2.03

1. The "Suggested Local Rule" entitled "Pretrial Disclosure" set forth at page 16 of the Federal Judicial Center's January 16, 1991 memorandum entitled Implementation of the Civil Justice Reform Act of 1990 may be unrealistic in the type of pleading system called for by Federal Rule 8 and likely to generate litigation about the adequacy of a party's compliance with the rule, motions for leave to serve discovery notwithstanding non-compliance with the rule, or motions to dismiss complaints or for more definite statements of claims or defenses. In view of these potential difficulties with rules contemplating automatic discovery, an effort has been made to draft Rule 2.03 so that the parties can know easily whether or not they have complied with it and to limit its scope to what realistically can be accomplished in the context of real-world litigation.

Rule 2.04. Copying Expense for Discovery Materials.

(a) Inspection of documents. Except as otherwise provided in an order entered pursuant to Federal Rule of Civil Procedure 26(c), all parties to an action shall be entitled to inspect documents produced by another party pursuant to Federal Rule of Civil Procedure 33(c) or 34 at the location where they are produced.

(b) Copies of documents. Except as otherwise provided in an order entered pursuant to Federal Rule of Civil Procedure 26(c), upon request of any party, and upon that party's agreement to pay the copying costs at the time of delivery, a party

who produces documents pursuant to Federal Rule of Civil Procedure 33(c) or 34 shall provide copies of all or any specified part of the documents. No party shall be entitled to obtain copies of documents produced by another party pursuant to Federal Rule of Civil Procedure 33(c) or 34 without paying the costs thereof.

Comment:

This provision is declaratory of present practice and is designed to emphasize to attorneys their responsibility in drafting discovery requests and the economic consequences of doing so carelessly. It reflects a simple proposition. Parties who expect to bear none of the expense attendant upon their discovery requests are more likely to draft overly broad and needlessly expensive requests than those who know that some of the cost will be imposed on them.

Reporter's Notes to Rule 2.04

1. In cases involving voluminous discovery documents that are to be shared among numerous parties, it may be to the parties' benefit to establish a document depository as suggested in the Manual for Complex Litigation, Second (1985). The depository should provide the parties with efficient and economical access to the documents for examination and duplication. Especially in cases in which problems associated with production and use of the documentary materials have developed, the judicial officer may recommend a central depository to the parties. The document depository need not be located at the courthouse or be supervised by the court. Each side may decide to keep its own depository or the parties may arrange to have the depository located at some other convenient site and share expenses. Costs may be defrayed by charging for photoduplication and facsimile transmission equipment use at the depository site.

Rule 2.05. Subsequent Stages of Discovery.

(a) In general. In order to facilitate settlement and the efficient completion of discovery, the judicial officer has discretion to structure the remaining discovery in the action.

(b) Phasing of interrogatories and document requests. After the initial document and disclosure phase of discovery, use of interrogatories and demands for production of documents by parties shall be phased by the judicial officer so that:

(1) at the commencement of discovery, interrogatories will be restricted to those seeking the names of witnesses with knowledge or information relevant to the subject matter of the action, the computation of each category of damages alleged, and the existence, custodian, location, and general description of relevant documents and other physical evidence, or information of a similar nature;

(2) during discovery, interrogatories other than those seeking information described in subparagraph (1) may be served only if they represent a more practical method of obtaining the information sought than a request for production or a deposition; and

(3) interrogatories seeking information about the claims and contentions of the opposing party may be served, unless the court has ordered otherwise, but interrogatories seeking the names of expert witnesses and the substance of their opinions also may be served, if this information has not been obtained previously.

(c) <u>Objections to interrogatories.</u> When an objection is made to any interrogatory, or sub-part thereof, or to any document request under Federal Rule of Civil Procedure 34, it shall state with specificity all grounds upon which the objecting party relies. Any ground not stated in an objection within the time provided by the Federal Rules of Civil Procedure, or any extensions thereof, shall be deemed waived. No part of an interrogatory shall be left unanswered merely because an objection is interposed to another part of the interrogatory.

(d) <u>Answers to interrogatories.</u> Whenever a party answers any interrogatory by reference to records from which the answer may be derived or ascertained, as permitted in Federal Rule of Civil Procedure 33(c):

(1) the specification of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought;

(2) the producing party shall make available any computerized information or summaries thereof that it either has, or can adduce by a relatively simple procedure, unless these materials are privileged or otherwise immune from discovery;

(3) the producing party shall provide any relevant compilations, abstracts, or summaries in its custody or readily obtainable by it, unless these materials are privileged or otherwise immune from discovery; and

(4) the documents shall be made available for inspection and copying within ten (10) days after service of the answers to interrogatories or at a date agreed upon by the parties.

(e) <u>Claims of privilege.</u> When a claim of privilege is asserted in objection to any interrogatory, or any sub-part thereof, or any request for production of a document, and an answer is not provided on the basis of that assertion, the attorney asserting the privilege shall identify in the objection the nature of the privilege that is being

claimed. If the privilege is being asserted in connection with a claim or defense governed by state law, the attorney asserting the privilege shall indicate the particular privilege rule that is being invoked.

Comment:

After completion of the mandatory document/disclosure phase, the judicial officer and counsel may find it useful to participate in defining two or more subsequent stages of discovery. The first of these is whatever additional discovery is needed for assessment of the case before any realistic settlement efforts can occur. Since the majority of cases settle before trial, it may be desirable to defer costly discovery not necessary to promote the settlement process. Subsequent stages of discovery should be undertaken only if efforts have failed to dispose of the case. Thus, the discovery following the disclosure called for under Rules 2.02 and 2.03 should be tailored to allow the parties to obtain information that has become necessary as the case has evolved. Should the case not be settled, the final phase of discovery would be directed at that additional information needed to prepare for trial.

In accord with these guiding principles, this Rule allows a judicial officer to "phase" discovery. Additional provisions relate to streamlining the discovery process -- as the case progresses. For example, interrogatories will be limited to those instances when no "more practical method" exists for obtaining the same information and objections to interrogatories not stated will be deemed waived. The Rule also requires that when interrogatories are answered by referring to other parts of the record, that these references be clear, precise, and responsive so that the other side is able to locate the answer to the question posed quickly, and that any document referred can be produced and made available for inspection and copying

with a minimum of delay.

Reporter's Notes to Rule 2.05

1. For a discussion of the considerations motivating the decision to separate discovery into two stages, see Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253, 253-77 (1985).

2. For highly technical disputes that are likely to involve divergent viewpoints from experts retained by the parties, it may be desirable to appoint an expert to help define discovery issues. Federal Rule of Evidence 706 gives courts the inherent authority to appoint experts to assist in carrying out court functions, and authorizes payment to be allocated to the parties. This device especially might be useful for some patent or antitrust suits. The judicial officer may issue an order appointing a court expert and instructing each side to define the technical questions and to meet with the expert to decide what the discovery process should entail. After gathering the necessary information from the parties, the expert could establish specifications for tests, and otherwise shape the foundations for reports by all experts and the development of those documents. The court appointed expert might prepare a statement of his or her opinion on the technical issues for the parties.

3. In order to avoid some discovery disputes, for example, over the form and content of interrogatories and requests for production of documents, the court might endorse "form interrogatories" and "form requests" that could be used by parties in particular types of cases.

Rule 2.06. Uniform Definitions in Discovery Requests.

(a) Incorporation by reference and limitations. The full text of the definitions set forth in paragraph (c) is deemed incorporated by reference into all discovery requests, but shall not preclude

(1) the definition of other terms specific to the particular litigation;

(2) the use of abbreviations; or

(3) a more narrow definition of a term defined in paragraph (c).

(b) Effect on scope of discovery. This rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure.

(c) Definitions. The following definitions apply to all discovery requests:

(1) Communication. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

(2) Document. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

(3) Identify (With Respect to Persons). When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need by listed in response to subsequent discovery requesting the identification of that person.

(4) Identify (With Respect to Documents). When referring to documents, "to identify" means to give, to the extent known, the

(A) type of document;

(B) general subject matter;

(C) date of the document; and

(D) author(s), addressee(s), and recipient(s).

(5) Parties. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) Person. The term "person" is defined as any natural person or any business, legal, or governmental entity or association.

(7) Concerning. The term "concerning" means referring to, describing, evidencing, or constituting.

(8) State the basis. When an interrogatory calls upon a party to "state the basis" of or for a particular claim, assertion, allegation, or contention, the party shall:

(A) identify each and every document (and, where pertinent, the section, article, or subparagraph thereof), which forms any part of the source of the party's information regarding the alleged facts or legal conclusions referred to by the interrogatory;

(B) identify each and every communication which forms any part of the source of the party's information regarding the alleged facts or legal conclusions referred to by the interrogatory;

(C) state separately the acts or omissions to act on the part of any person

(identifying the acts or omissions to act by stating their nature, time, and place and identifying the persons involved) which form any part of the party's information regarding the alleged facts or legal conclusions referred to in the interrogatory; and

(D) state separately any other fact which forms the basis of the party's information regarding the alleged facts or conclusions referred to in the interrogatory.

Comment:

The definitions in Rule 2.06 are to be used to standardize to some extent the language of discovery requests by defining carefully terms that are used frequently -- "communication," "document," "identify," "parties," "person," "concerning," and "state the basis." One of the basic problems with discovery is that too little effort is made to serve properly drafted and well-thought-out requests. Indeed, in many instances, the best way to avoid needless discovery disputes might be for the party seeking discovery to serve several narrowly worded but well-focused discovery requests instead of a single global request intended to "cover all bases." The latter type of request often ends up being so ambiguous and broad that no adequate response can be made and it virtually invites objection. Counsel must recognize that properly drafted and painstakingly tailored discovery requests are the very foundation of successful pretrial processing of the case.

Reporter's Notes to Rule 2.06

1. This Rule has been adapted from the Southern and Eastern Districts of New York's Local Rule on Uniform Definition of Discovery requests. Uniform instructions and definitions for use in responding to interrogatories and document request have proved successful in those districts.

2. It is envisaged that Rule 2.06 will be enlarged from time to time as other standard terms are identified.

Article III.

Motion and Party Practice

Rule 3.01. Control of Motion Practice.

(a) Plan for the disposition of motions. At the earliest practicable time, the judicial officer shall establish a framework for the disposition of motions, which, at the discretion of the judicial officer, may include specific deadlines or general time guidelines for filing motions. In arriving at this framework, the judicial officer may consider the parties' proposals for the filing of motions contained in the joint statement required by Rule 1.02(d). In accordance with the framework established by the judicial officer, counsel shall submit an agreed schedule for the filing of motions, which may be amended from time to time by the judicial officer as required by the progress of the case.

(b) Motion practice. No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue. Any memorandum in support of a motion or in response thereto shall not exceed twenty (20) pages, unless otherwise ordered. Motions may be decided without oral hearing.

(c) Unresolved motions. The court shall rule on motions as soon as practicable, having in mind the reporting requirements set forth in the Civil Justice Reform Act.

Comment:

The guiding principle expressed in Rule 3.01 is that by setting target dates, the delay associated with motion practice is likely to be reduced. Thus, this Rule is consistent philosophically with the earlier Rules relating to scheduling and case management conferences and discovery. The deadlines do not have to be established at the outset of the case, but may be set at appropriate times throughout the litigation as motions are filed and decided. Furthermore, it is not necessary that all motions of a certain type be considered to require identical time frames. Once again, the complete cooperation of counsel is critical and must be assured by the court. Rule 3.01(c) is designed to reduce the delay and cost that is a necessary consequence of the inability to resolve motions in timely fashion. This may be the result of the

number of motions filed, the length or complexity of individual motions, motions that are not dispositive of an issue, untimely motions, or occasional delay in the resolution of motions.

Reporter's Notes to Rule 3.01

1. A possible alternative proposal is to require that all motions be conferenced briefly before they can be filed. This is the rule in the Southern District of New York. The ten to fifteen minute conference that the procedure entails may resolve matters often enough to be worth the expenditure of parties' and judges' time. Pre-motion conferences on discovery motions can be handled slightly differently from other motions (e.g., heard only on one afternoon with the parties simply writing or calling chambers to get on a list and then appearing that afternoon and waiting their turn).

Rule 3.02. Addition of New Parties.

(a) Amendments adding parties. Amendments adding parties shall be sought as soon as an attorney reasonably can be expected to have become aware of the identity of the proposed new party.

(b) Service on new party. A party moving to amend a pleading to add a new party shall serve the motion to amend upon the proposed new party at least ten days in advance of filing the motion, together with a separate document certifying that the motion has been so served and stating the date on which the motion will be filed. No motion to amend a pleading to add a new party shall be accepted for filing unless it is accompanied by a certificate of the type described in this provision.

(c) Limitation on amendment by consent. An amendment of a party's pleading to add a new party may not be made by written consent of the adverse party more than three months after the filing of the party's initial pleading, unless the proposed new party also consents in writing and the judicial officer approves the proposed amendment.

Comment:

It is becoming more common for plaintiffs to bring suit against defendants seriatim. One defendant will be sued. The litigation will progress. Another defendant will be added. The litigation will progress some more. Another defendant will be added. And the pattern will continue. This may occur because the plaintiff

cannot ascertain the identity of all the defendants before bringing suit, or simply because the plaintiff's attorney has undertaken only minimal pre-suit efforts to identify potential defendants. It also may be used tactically as a way of intentionally building a case against "target" defendants, without allowing them an opportunity to participate in discovery proceedings.

Whether planned or not, however, the late addition of parties inevitably delays the case and generates unnecessary procedural litigation. Each time a new defendant is added, that party must be given time to "get up to speed" and then to prepare a defense. A newly added defendant often must repeat much of the pretrial discovery that already has been conducted by other parties having interests diverse from those of the added party's interest. In addition, the process of adding parties generates litigation issues -- for example, the proper use that may be made of discovery taken prior to the addition of the late defendant, the amount of time needed to give the new defendant fair opportunity to prepare, and the need for modification of previously entered orders.

Sometimes, information readily available to the plaintiffs or their attorneys is fully adequate to permit them to know well in advance of initiating suit who the potential defendants were and to determine whether or not each should be sued. Yet, cases that are quite uncomplicated may take inordinate amounts of time to bring to resolution. Rule 3.02 establishes a procedure for controlling the adding of parties in a way that permits the practice when needed but without excessive delay.

Except in extraordinary circumstances, no motion to amend a party's pleading to add a new party should be allowed more than three months after the party's initial

pleading was filed unless a showing is made, by affidavit or otherwise, that the moving party: (1) was not aware, and with due diligence reasonably could not have been aware, of the identity of the proposed new party, or (2) was not aware, and with due diligence reasonably could not have been aware, of facts sufficient to put that party on notice of the claim against the proposed new party. For these purposes, the expiration of the applicable statute of limitations on claims against the proposed new party should not in and of itself constitute extraordinary circumstances

Reporter's Notes to Rule 3.02

1. Rule 3.02 is not designed to undermine the liberal amendment policy of Federal Rule of Civil Procedure 15, but to provide some guidance as to when leave to amend should be "freely given" and to encourage the early addition of parties. See generally Donnici, The Amendment of Pleadings -- A Study of the Operation of Judicial Discretion in the Federal Courts, 37 S.Cal.L.Rev. 529 (1964).

Article IV.

Alternative Dispute Resolution

Rule 4.01. Alternative Dispute Resolution.

The judicial officer shall encourage the resolution of disputes by settlement or other alternative dispute resolution programs.

Rule 4.02. Settlement.

At every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance that may be appropriate in the circumstances. Assistance may include a reference of the case to another judicial officer for settlement purposes. Whenever a settlement conference is held, a representative of each party who has settlement authority shall attend or be available by telephone.

Rule 4.03. Other Alternative Dispute Resolution Programs.

(a) Discretion of judicial officer. The judicial officer, following an exploration of the matter with all counsel, may refer appropriate cases to alternative dispute resolution programs that have been designated for use in the district court or that the judicial officer may make available. The dispute resolution programs described in subdivisions (b) through (d) are illustrative, not exclusive.

(b) Mini-trial.

(1) The judicial officer may convene a mini-trial upon the agreement of all parties, either by written motion or their oral motion in open court entered upon the record.

(2) Each party, with or without the assistance of counsel, shall present his or her position before:

(A) selected representatives for each party, or

(B) an impartial third party, or

(C) both selected representatives for each party and an impartial third party.

(3) An impartial third party may issue an advisory opinion regarding the

merits of the case.

(4) Unless the parties agree otherwise, the advisory opinion of the impartial third party is not binding.

(5) The impartial third party's advisory opinion is not appealable.

(6) Neither the advisory opinion of an impartial third party nor the presentations of the parties shall be admissible as evidence in any subsequent proceeding, unless otherwise admissible under the rules of evidence. Additionally, the occurrence of the mini-trial shall not be admissible.

(c) Summary jury trials.

(1) The judicial officer may convene a summary jury trial:

(A) with the agreement of all parties, either by written motion or their oral motion in court entered upon the record, or

(B) upon the judicial officer's determination that a summary jury trial would be appropriate, even in the absence of the agreement of all the parties.

(2) There shall be six (6) jurors on the panel, unless the parties agree otherwise.

(3) The panel may issue an advisory opinion regarding:

(A) the respective liability of the parties, or

(B) the damages of the parties, or

(C) both the respective liability and damages of the parties.

Unless the parties agree otherwise, the advisory opinion is not binding and it shall not be appealable.

(4) Neither the panel's advisory opinion nor its verdict, nor the presentations of the parties shall be admissible as evidence in any subsequent proceeding, unless otherwise admissible under the rules of evidence. Additionally, the occurrence of the summary jury trial shall not be admissible.

(d) Mediation.

(1) The judicial officer may grant mediation upon the agreement of all parties, either by written motion or their oral motion in court entered upon the record.

(2) A mediator may be selected and assigned to the case who shall be qualified and knowledgeable about the subject matter of the dispute, but have no specific knowledge about the case. The mediator shall be compensated as agreed by the parties, subject to the approval of the judicial officer.

(3) The mediator shall meet, either jointly or separately, with each party and counsel for each party and shall take any other steps that may appear appropriate in order to assist the parties to resolve the impasse or controversy.

(4) The mediation shall be terminated if, after the seven (7) day period immediately following the appointment of the mediator, any party, or the mediator, determines that mediation has failed or no longer wishes to participate in mediation.

(5) If an agreement is reached between the parties on any issues, the mediator shall make appropriate note of that agreement and refer the parties to the judicial officer for entry of a court order.

(6) Mediation proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the mediation by any participant, mediator, or any other person present at the mediation shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

Comment:

Active judicial case management should include the ability to explore alternative means of resolving disputes. The Civil Justice Reform Act, therefore, suggests that authorization be granted to refer appropriate cases to alternative dispute resolution programs. These programs may include those already designated for use in this district, or programs that the judicial officer, in his or her discretion, believes hold promise of success. The most commonly employed approaches are set out in Rules 4.02 and 4.03.

Rule 4.03 expressly authorizes the use of three widely used modes of alternative dispute resolution. Their specification is not intended to suggest that they are

exclusive; as indicated in subdivision (a) of the Rule, the court has plenary discretion in this matter.

In a mini-trial, selected representatives for each party, or an impartial third party, are presented with an abbreviated version of the parties' positions. After hearing the presentations, the merits of the dispute are discussed, and a non-binding advisory opinion is issued. Like the summary jury trial, a mini-trial is a means of providing the disputants with an early evaluation of their respective cases, and thereby fosters the development of a basis for realistic settlement negotiations.

The summary jury trial provides a procedure in which an informal verdict is rendered by mock jurors who have heard the parties' arguments. A summary jury trial, therefore, is essentially a device for early case evaluation and the development of realistic settlement negotiations.

Mediation calls for the appointment of an impartial third party by the court in an effort to assist in reconciling a civil dispute. The impartial mediator, working with the parties and their representatives, may offer interpretation and advice and allow the parties to reach a mutually acceptable agreement as to particular issues, or the entire controversy.

The value of mediation, unlike summary jury trials, is that mediators bring professional experience to bear that can compensate for the abridged nature of the proceedings. More important, good mediators can be persuasive advocates of settlement, unlike a summary jury trial, which does not directly further the negotiation process. The court should be more active in encouraging the use of the Boston Bar Association's federal mediation program. Perhaps parties could be asked

at an early case management conference to agree to submit to the process. Although mediation works best after basic discovery is completed, a case management conference might be used to encourage voluntary and prompt document production and to identify a limited number of depositions essential to the mediation process. That could place mediation on an accelerated track, and possibly result in early settlement.

Reporter's Notes to Rules 4.01-4.03

1. Some doubt previously had been raised whether summary jury trial is a permissible procedure in the federal courts. See Hume v. M&C Management, No.C87-3104 (N.D.Ill., Feb. 15, 1990). The authority for a summary jury trial does appear to be embraced in Federal Rules of Civil Procedure 1 and 16 and in the court's "inherent power to manage and control its docket." The specific reference to summary jury trial in Section 473(a)(6) of the Civil Justice Reform Act should eliminate any doubt that have existed.

2. The literature on alternative dispute resolution has become voluminous. For observations on the subject by one of the original proponents of the movement, see, e.g., Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 119-33 (1976). See also Recent Developments in Alternative Forms of Dispute Resolution, 100 F.R.D. 512 (1984); Lambros, Summary Jury Trial and Other Methods of Dispute Resolution, 103 F.R.D. 461 (1984).

Article V.

Control of Trial

Rule 5.01. Final Pretrial Conference.

(a) Schedule of conference. The judicial officer may set a new date for the final pretrial conference if that officer determines that resolution of the case through settlement or some other form of alternative dispute resolution is imminent.

(b) Representation by counsel; settlement. Unless excused by the judicial officer, each party shall be represented at the final pretrial conference by counsel who will conduct the trial. Counsel shall have full authority from their clients with respect to settlement and shall be prepared to advise the judicial officer as to the prospects of settlement.

(c) Obligation of counsel to confer. Unless otherwise ordered by the judicial officer, counsel for the parties shall confer no later than fifteen (15) days prior to the date of the final pretrial conference for the purpose of preparing, either jointly or separately, a pretrial memorandum for submission to the judicial officer.

(d) Pretrial Memorandum. Unless otherwise ordered by the judicial officer, the parties are required to file, no later than five (5) business days prior to the scheduling conference, a pretrial memorandum which shall set forth:

(1) a concise summary of the evidence that will be offered by:

(A) plaintiff;

(B) defendant; and

(C) other parties;

with respect to both liability and damages (including special damages, if any);

(2) the facts established by pleadings or by stipulations or admissions of counsel;

(3) contested issues of fact;

(4) any jurisdictional questions;

(5) any questions raised by pending motions;

(6) issues of law, including evidentiary questions, together with supporting authority;

(7) any requested amendments to the pleadings;

(8) any additional matters to aid in the disposition of the action;

(9) the probable length of the trial;

(10) the names of witnesses to be called (expert and others); and

(11) the proposed exhibits.

(e) Motions to continue. Motions to continue discovery and pretrial conferences will not be entertained unless the date and time of the pretrial conference is set out in the motion as well as a statement of how many other requests, if any, for continuances have been sought and granted.

(f) Conduct of conference. The agenda of the final pretrial conference, when possible and appropriate, shall include:

(1) a final and binding definition of the issues to be tried;

(2) the disclosure of expected and potential witnesses and the substance of their testimony;

(3) the exchange of all proposed exhibits;

(4) a pretrial ruling on objections to evidence;

(5) the elimination of unnecessary or redundant proof, including the limitation of expert witnesses;

(6) a consideration of the bifurcation of the issues to be tried;

(7) the establishment of time limits and any other restrictions on the trial;

(8) a consideration of methods for expediting jury selection;

(9) a consideration of means for enhancing jury comprehension and simplifying and expediting the trial;

(10) a consideration of the feasibility of presenting direct testimony by written statement;

(11) the exploration of possible agreement among the parties on various issues and encouragement of a stipulation from the parties, when that will serve the ends of justice, including:

(A) that direct testimony of some or all witnesses will be taken in narrative or affidavit form, with right of cross-examination reserved, rather than "orally in open court" as is the right of each party under Federal Rule of Civil Procedure 43(a);

(B) that evidence in affidavit form will be read to the jury by the witnesses, or by counsel or another reader with court approval; and

(C) that time limits shorter than those set forth in Rule 5.03 be used for trial; and

(12) a consideration of any other means to facilitate and expedite trial.

(g) Trial Brief. A trial brief, including requests for rulings or instructions, shall be filed by each party five (5) calendar days prior to the commencement of trial. Each party may supplement these requests at the trial if the evidence develops otherwise than as anticipated.

Comment:

The Civil Justice Reform Act does not expressly require a final pretrial conference. But to be effective in controlling cost and delay, a comprehensive plan should cover this aspect of case management. This Rule is an elaboration on Federal Rule of Civil Procedure 16(f). It provides that an elective final pretrial conference be held in any case that has not been resolved fifteen days in advance of the scheduled trial date, unless the judicial officer finds that settlement is imminent.

The focus of the final pretrial conference will be different than that of the scheduling conference and any subsequent case management conferences. The emphasis will be on "nailing down" the practical elements of trial -- the facts that have been established and those that remain to be established, the issues to be tried, the evidence to be offered, the relevant time limitations, and, if necessary, the details of selection of a jury.

The agenda of the final pretrial conference must be tailored to the individual case. Toward this end, the parties should meet to prepare a "Pretrial Memorandum." This joint statement, analogous to the joint statement required before the scheduling conference (see Rule 1.02(d)), shall set forth the basic information needed to prepare

for trial. The joint statement is advisory, but should assist the judicial officer to set the agenda of the final pretrial conference.

The issues to be addressed at the final pretrial conference are left to the discretion of the judicial officer, but subsection (f) of this Rule sets out twelve agenda items that potentially may be relevant. Acknowledging the conventional wisdom that firm trial dates are the most effective method for prompting settlement, motions to continue discovery and delay the final pretrial conference should not be allowed except for the most exceptional reasons.

Reporter's Notes to Rule 5.01

1. A large body of literature and experience exists that can be tapped for concrete methods and techniques that judges have used and found effective in specific situations or particular cases. A judicial officer may experiment with specialized techniques at trial. They may be provided with notebooks containing key exhibits. Jurors may be permitted to take notes, pictures of each witness may be mounted in front of the jury box as she or he testifies, and pictures then may be permitted to be taken into the jury room so jurors can recall each witness.

2. For a discussion of innovative trial techniques, see, e.g., H. Reasoner, J. Murchison, Jr. & W. Tomlin, Innovative Judicial Techniques in Complex Litigation, The American College of Trial Lawyer's 40th Annual Spring Meeting 2 (Palm Desert, California, March 1990); Bilecki, A More Efficient Method of Jury Selection for Lengthy Trials, 73 Judicature 43 (1989); G. Bermant, J. Cecil, A. Chaset, E. Lind & P. Lombard, Protracted Civil Trials: Views from the Bench and the Bar 47-53 (Federal Judicial Center 1981).

Rule 5.02. Special procedures for Handling Experts.

(a) Setting terms and conditions. At the final pretrial conference, the judicial officer shall consider:

(1) precluding the appearance of witnesses not identified previously;

(2) precluding use of any trial testimony by an expert at variance with the written statement and any deposition testimony;

(3) making a ruling concerning the use of depositions, including videotaped

depositions; and

(4) making a ruling on the admissibility of expert testimony at the trial.

(b) Objections to expert witnesses. A party who intends to object to the qualifications of an expert witness, or to the introduction of any proposed exhibit, shall give written notice of the grounds of objection, together with supporting authority, to all other parties within three (3) days following the final pretrial conference.

Comment:

Experts play a very significant role in many of today's cases and for a number of reasons expert testimony frequently may present special challenges. This might be true, for instance, in some patent cases, antitrust suits, or other disputes involving evidence of a highly technical nature. Rule 5.02(a) provides four techniques for handling expert testimony at trial that the judicial officer may consider employing. They expressly authorize the judicial officer to set terms and conditions for handling experts, and to address matters that appropriately may be dealt with before trial, including making sure that any objections to expert testimony on the basis of qualifications are heard beforehand.

Reporter's Notes to Rule 5.02

1. Some consideration might be given to limiting the number of experts to be heard at trial and to appointing an expert to act a special advisor to the court during trial, especially when it is anticipated that there will be divergent expert testimony in highly technical or complex litigation. See Manual for Complex Litigation, Second (1985). The court has considerable flexibility in deciding how to use the expert. For example, if employed early in the process, the expert can work with counsel in shaping discovery. The expert, therefore, could continue to function as an advisor to the judicial officer, subject, of course, to limitations that assure the parties a fair hearing on the expert's advice to the court.

Rule 5.03. Trial.

(a) Time limits for evidentiary hearing.

(1) Absent agreement of the parties as to the time limits for the trial acceptable to the court, the court may order a presumptive limit of a specified number of hours. This time shall be allocated equally between opposing parties, or groups of aligned parties, unless otherwise ordered for good cause.

(2) A request for added time will be allowed only for good cause. In determining whether to grant a motion for an increased allotment of time, the court will take into account:

(A) whether or not the moving party has

(i) used the time since the commencement of trial in a reasonable and proper way, and

(ii) has complied with all orders regulating the trial;

(B) the moving party's explanation as to the way in which the requested added time would be used and why it is essential to assure a fair trial; and

(C) any other relevant and material facts the moving party may wish to present in support of the motion.

The court will be receptive to motions for reducing or increasing the allotted time to assure that the distribution is fair among the parties and adequate for developing the evidence.

(b) Evidence at the evidentiary hearing.

(1) Each party shall give advance notice to the judicial officer and the other parties, before jury selection, of the identity of all witnesses whose testimony it may offer during trial, whether by affidavit, deposition, or oral testimony.

(2) Not later than two (2) court days before it seeks to use the testimony of any witness, or on shorter notice for good cause shown, a party shall advise the court and all other parties of its intent to use the testimony of the witness on a specified day.

(3) Except for good cause shown, no party shall be allowed to:

(A) use the testimony of a witness other than the witnesses already listed on the filing with the court before trial commences; or

(B) introduce documentary evidence, during direct examination, other than those exhibits already listed with the court and furnished to the

other parties before trial commences.

Comment:

Time limits provide an incentive to make the best possible use of the limited time allowed for trial of the case. If the parties are not able to agree upon time limits for the trial, the court, after inviting submissions from the parties, may prescribe presumptive limits that are subject to modification for good cause shown. The parties will have an incentive to agree upon a schedule of time limits since those that the court otherwise will impose may not serve the parties' mutual interests in achieving a shorter, less expensive, and better quality trial.

Because presumptive allotments of time probably will be stated as a total number of hours, each party will be free to allocate time as that party chooses among different uses as long as its total allotment is not exceeded. By not allocating times for particular witnesses or proceedings, the proposal avoids the increased cost and delay associated with proceedings to reallocate time whenever the presumptive allotments are not appropriate to the case.

An explicit purpose of this provision is to create an incentive for using trial time exclusively on issues material to a disposition on the merits. The court should construe Rule 5.03 equitably and flexibly so that any party who makes proper use of time throughout the trial should be assured that an extension will be allowed if more time is needed to present all its evidence adequately.

Reporter's Notes to Rule 5.03

1. Judge Keeton has advocated a number of nontraditional trial practices. He sets out the general considerations underlying some of his innovative suggestions in

Keeton, The Functioning of Local Rules and the Tension with Uniformity, 854 U.Pitt.L.Rev. 853 (1989) and includes model orders covering every phase of litigation.

Article VI.

Sanctions

Rule 6.01. Imposition of Sanctions.

Failure to comply with any of the directions or obligations set forth in, or authorized by, this Plan may result in dismissal, default, or the imposition of other sanctions consistent with the provisions of Federal Rule of Civil Procedure 16(f) deemed appropriate by the judicial officer.

Comment:

District courts have broad discretion, within the limits prescribed by the Federal Rules Civil Procedure and Title 28, to impose sanctions when a party fails to comply with its obligations. Rule 6.01 is a general provision expressly authorizing the imposition of sanctions for noncompliance with any of the rules contained in the Plan. The Rule does not provide a schedule of penalties corresponding to types of sanctionable conduct, but relies on the sound discretion of the judicial officer to determine when a sanction is appropriate and to tailor the sanction to the particular situation.

Essentially declaratory of present practice, Rule 6.01 is designed to emphasize to parties and their counsel that they have a duty to act in a timely and responsible manner and to indicate that there may be consequences for not doing so. Because it is based on the fact of noncompliance with the Plan, Rule 6.01 authorizes sanctions whether the noncompliance was the result of neglect or willful misconduct.

It is anticipated that, if all participants know that the court will impose sanctions when warranted, it will provide an incentive for them to act in an appropriately responsible manner. If the sanctions authorized by this Rule are used as a means for assuring compliance with the procedures and techniques set forth in this Plan, rather

than as a substitute for the planning process, it should advance the Plan's purpose to reduce expense and delay in litigation.

Rule 6.01 is not intended to confer any additional power on the presiding judicial officer -- it is merely an explicit statement of the court's inherent power to enforce its rules. Accordingly, Rule 6.01 is not intended to be inconsistent with any federal law or the Federal Rules of Civil Procedure nor is it intended to change any party's substantive rights.

Reporter's Notes to Rule 6.01

1. The procedures described in the Manual for Complex Litigation, Second (1985) should be consulted for guidance in the application of the principles for imposing sanctions in complex cases. (See generally id. at § 42.2)

2. An analysis of the use of monetary penalties for noncompliance with pretrial orders can be found in Brazil, Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions, 1981 Am.B.Found.Research J. 873, 921-55; Peckham, The Federal Judge as Case Manager: The New Rule of Guiding a Case from Filing to Disposition, 69 Calif.L.Rev. 770, 800-04 (1981). See also 5A Wright & Miller, Federal Practice and Procedure: Civil 2d §§ 1331-1338 (1990); Rodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure (Federal Judicial Center 1981).

3. For a discussion of the imposition of sanctions based on authority granted in a district court's local rules, see Miranda v. Southern Pacific Trans. Co., 710 F.2d 516 (9th Cir. 1983) (upholding district court's authority to impose sanctions against the parties and attorneys for violation of court rules. The local rule at issue, C.D.Cal.R. 28, provided that: "[t]he violation of or failure to conform to any of these local rules shall subject the offending party and his attorney, at the discretion of the court, to appropriate discipline, including the imposition of costs and such attorney's fees as the court may deem proper under the circumstances.").

Appendix A

Plaintiff Case Disclosure Form

1. Describe in 200 words or less the basis of your lawsuit.
2. Identify all legal theories of recovery and for each legal theory specify the facts that support your claim.
3. Describe all damages you claim to have suffered, the cause of the alleged damages and how the amount of the damages was calculated.
4. If you cannot describe any portion of your damages, state what information you need and from whom you need it to make such a determination.
5. Identify all individuals with knowledge of the facts alleged in the complaint.
6. Attach copies of any and all contracts or other documents that form the basis of your lawsuit.
7. Attach all documents that contain any admissions of the defendant(s).
8. Identify any depositions you now believe are necessary in this matter.
9. Identify all documents in the possession of the defendants you need to prepare your case. Documents must be described with specificity and requests that "relate or pertain to" are unacceptable.
10. State when you will be ready for trial.
11. State whether you are willing to waive or limit discovery in exchange for an earlier trial date.
12. State any facts you believe are not in dispute.
13. State your settlement demand.

Appendix B

Defendant Case Disclosure Form

1. Describe in 200 words or less the basis of your defense to plaintiff's lawsuit.

2. Identify each defense to plaintiff's lawsuit and for each defense, specify the facts that support your position.

3. Identify all individuals with knowledge of the facts alleged in the Complaint.

4. Attach copies of any and all contracts or other documents that form the basis of your defenses.

5. Attach all documents that contain any admissions of the plaintiff.

6. Identify any depositions you now believe are necessary in this matter.

7. Identify all documents in the possession of the plaintiffs you need to prepare your case. Documents must be described with specificity and requests that "relate or pertain to" are unacceptable.

8. State when you will be ready for trial.

9. State whether you would be willing to waive or limit discovery in exchange for an earlier trial date.

10. State any facts you are willing to stipulate to.

11. What do you offer, if anything, to settle this case or any portion of it.