PILOT PROGRAM:

CASE MANAGEMENT, DISCLOSURE/DISCOVERY, AND MOTION PRACTICE

JANUARY 1992

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I. THE PURPOSES OF THIS DOCUMENT

In November of 1991 the Advisory Group to this court, appointed pursuant to the CJRA, recommended implementation of a pilot (experimental) program that would include innovative approaches to case management, disclosure/discovery, and motion practice. The Advisory Group devoted a great deal of time and energy to the development of the recommended program, which is both sophisticated and creative. As the court began considering the details of the proposal, however, several questions arose. As deliberations progressed, it became clear that the pilot program, as proposed, implicated a number of difficult issues that the court wanted to explore further before fixing the details of the pilot system.

One of the principal purposes of this document is to identify and discuss the large number of policy choices that must be made in connection with the design of this pilot program. In doing that, this document also serves as an agenda for the series of meetings in which the judges and the Advisory Group expect to work out, in constructive dialogue, the details of the case management system that will be implemented in the pilot program by July 1, 1992.

To define the context in which these matters should be considered, this document begins by describing, in Section II, the core components of the theory underlying the basic structure of the pilot program. Section III summarizes briefly the system that the Advisory Group has proposed and points to some of the difficulties that might attend implementing that system. Section IV raises the issue of including two management tracks in the pilot. Section V addresses the discretion and flexibility to be accorded the judges participating in the pilot. Thereafter, the paper describes in some detail a possible alternative approach that would involve the creation of a two track management system (in contrast to the one track system contemplated by the Advisory Group). The Standard Track is discussed in Section VI and the Complex Track is described in Section VII. In the course of these descriptions, we identify a large number of issues that must be resolved before any pilot program of this kind should be implemented. Finally, Section VIII addresses additional issues such as the appropriate decision-makers for assigning cases to tracks, criteria for that determination, types of cases to be excluded from the pilot or to be automatically assigned to a particular track, the integration of ADR programs into the pilot, treatment of removed and transferred cases, and the role of magistrate judges in the pilot.

II. THE THEORY THAT INFORMS THE MAJOR COMPONENTS OF THE PILOT PROGRAM

Our task is to try to design approaches to civil litigation that will enable parties who are proceeding in good faith to reduce the expense and to increase the speed of resolving their disputes. The Advisory Group and the court believe that unnecessary expense and delay result when counsel and litigants rely primarily on formal motion work and formal discovery to determine what the essence of the claims and defenses are in any given case and to identify the most significant evidence that supports them. It has become traditional for pleadings to simultaneously overstate and undercommunicate. It also has become traditional to respond to the relative opaqueness of pleadings by filing motions and launching broad discovery campaigns. Moreover, there appears to be a tendency to pay relatively little attention to civil cases in their early pretrial stages, a tendency caused in part by the fact that most lawyers necessarily are responsible simultaneously for large numbers of cases, and by lawyers' understandable inclination to put out their hottest fires first (attend primarily to the cases closest to trial). As a result, counsel often postpone efforts to aggressively evaluate civil cases until some external event or deadline compels them to do so. When aggressive case evaluations are postponed, opportunities to settle early are lost and discovery and motion work are not as focused and productive as they might otherwise be. Finally, the Advisory Group and the court are concerned that early in the pretrial period clients often are not as heavily involved in decision-making about how to their handle their cases as they might be. Greater early client involvement in basic decisions about what to do with civil cases could create opportunities to better capitalize on clients as sources of evidence, solution options, economic discipline, and common sense.

The fundamental purpose of the case management program recommended by the Advisory Group and the variations on it that are discussed in this paper is to replace the traditional approaches that rely on motions and formal discovery with a system in which parties are compelled, very early in the pretrial period, to disclose core information about the case, to have meaningful, meaty, informal dialogue about both the merits of the case (what it is really about and what the important evidence is likely to be) and about how to position it most efficiently for disposition (by settlement, motion, or trial), and to propose detailed case development plans that reflect the clients' cost-benefit analyses and that include specific limits on formal discovery. In other words, we want the parties to put the key information on the table and to talk, early in the life of the case, instead of doing nothing or routinely filing motions and launching barrages of formal discovery.

III. THE PILOT CASE MANAGEMENT SYSTEM PROPOSED BY THE ADVISORY GROUP

The 1991 Report of the Advisory Group sets forth in some detail the case management system as originally proposed. Rather than repeat here those details, we simply summarize that system's core provisions. First, there would be only one management track. So the same deadlines and obligations would attach to every suit handled by the participating judges (absent a case-specific order to the contrary). Second, the rules would compel expedited service of process (within 30 days). Third, discovery would be prohibited until after the initial case management conference. Fourth, within 52 days of the filing of the complaint, counsel would be required to meet and confer and to discuss a long list of matters that would be set out on a court-ordered (and standardized) check list. Fifth, based on their meet and confer conversations, counsel would be required to file, jointly if feasible, a relatively detailed case management proposal. Sixth, the assigned judge and an assigned magistrate judge would jointly host the first of two early case management conferences 60 days after the complaint was filed. At that first conference the court would review the parties' reports from their meet and confer session and would consider their case management proposal(s). Seventh, it appears that the Advisory Group's expectation is that, in most cases, the court would impose a disclosure obligation on the parties at this first conference. The court would be expected to fix the scope and timing of that obligation on a case-by-case basis. Eighth, the court would schedule a follow-up case management conference to follow promptly after completion of the parties' disclosures (presumably 30-60 days later, so about 120 days after the complaint was filed). Ninth, at that second early case management conference, the court would review compliance with the disclosure obligation, then, based in part on what was learned through the disclosure process, the court would consider fixing limits on discovery, scheduling specified motions, and setting deadlines for completion of various other pretrial undertakings. The court also would fix the date for a mandatory settlement conference with the assigned magistrate judge; that conference would be scheduled for the earliest practicable date.

In considering the specifics of this creatively designed system, some of the judges have developed some questions and concerns. One is about the court's capacity to hold two substantial case-management conferences early in the life of all (or most) civil cases. Another is about whether the court has the resources to commit, in most civil cases, two judicial officers (a district judge and a magistrate judge) to one or two lengthy early case management conferences. An additional concern is about how productive both the meet and confer session and the first case management conference are likely to be if they are held before any cross-party disclosures are made and before any discovery is undertaken. Stated differently, some judges wonder whether

postponing both the disclosures and initial discovery would needlessly compromise the productivity of both the meet and confer session and the first judicially hosted conference. Finally, some judges wonder whether it is wise to attempt to fit all cases into one case management system, as opposed to designing two management tracks, one for standard cases and one for complex cases.

IV. SHOULD THE PILOT SYSTEM INCLUDE TWO MANAGEMENT TRACKS?

Among the many issues addressed in this paper, the one that is the most difficult and that has the most significant implications for the other matters to be considered here is this: **should the pilot include two case management tracks, one for standard cases and a different track for complex cases, or should the pilot include only one track?**

The Advisory Group has proposed a single track which could be applied flexibly. Substantial arguments can be advanced in favor of this approach. Nonetheless, the court may want to consider building two tracks into its pilot project. Whether a two-track system would be wise or not depends, in appreciable part, on (1) how different the management systems are for the two tracks, (2) whether most of the major differences between the two systems seem essential to sound management approaches to the kinds of cases involved, and (3) the magnitude and surmountability of the administrative and other problems that are likely to be occasioned by an effort to run a two-track system.

The major differences between the two tracks relate to the disclosure obligation. In the standard track that is described in detail in this paper, I recommend that we impose by rule a uniform and relatively substantial disclosure obligation and that we require parties to complete their disclosures before both an early meet and confer session and the initial case management conference hosted by a judge. In the complex cases, by contrast, I recommend that the parties not be required to make any disclosures before the initial case management conference and that that conference occur somewhat earlier than it would in the standard track cases (by day 90 as opposed to day 115, see proposed time lines, infra at 25 and 31).

In addition to deciding whether we should have two tracks and what the content should be of the case management system(s), there are a number of other issues that we need to address as we design our case management pilot. Some of those issues arise only if we have two tracks (e.g., who should decide to which track individual cases should be assigned and what criteria should be used in making that decision). Other issues must be addressed regardless of whether we opt for two tracks or only one (e.g., what roles magistrate judges ought to play in this experiment). Because how we resolve the threshold questions about the tracks and their

contents will have a significant impact on our thinking about all of these other issues, we do turn to these other issues in the second half of this document. In the first half we describe the two case management tracks that we recommend, identifying issues that need to be resolved along the way.

V. DISCRETION AND FLEXIBILITY IN THE PILOT PROGRAM GENERALLY

All of the rules set forth for pilot cases apply **presumptively**, meaning that they can be lifted or modified, but only on order of the assigned judge. If the pilot judges were to decline to apply the rules in a large number of cases, or were to modify the rules in a wide range of ways in a large number of cases, it would be virtually impossible to draw reliable conclusions from this pilot project. Were that to happen, the court would be unable to meet its obligations under the CJRA. For this reason, the pilot judges have agreed that they will decline to apply the pilot program rules, or will agree to modify them, only on a showing that, in the particular case in question, the interests of justice clearly would be harmed if the rules were enforced.

Petitioning for Relief from Specific Pilot Obligations

Individual parties, through counsel, may petition the assigned judge to modify or decline to apply any aspect of the pilot rules. I recommend that such petitions be subject to the following rules. They shall be filed as far in advance as possible of the date of the earliest of the implicated obligations, and in any event no fewer than seven court days before that date. Failure to file a petition in conformity with this timing requirement may be deemed a waiver of the right to seek modification of the pilot rule in question. Moreover, such petitions may be filed only if:

A. counsel certify that they have discussed the rationale for and objectives of the pilot program with their client and have considered with their client the impact on both cost and delay that the proposed modification of the pilot rules would entail (such certifications must be signed by both counsel and client), and

B. counsel certify that they have explained to counsel for all other parties the rationale for their proposed modification of the rules, have considered the views about the matter that other counsel have expressed in reaction to the proposal, and have shared those views with their own client (this certification also must be signed by both counsel and client), and

C. counsel set forth in their petitions both their rationale for the proposed change(s) in the rules and the views of other counsel in the case about those proposed changes, and

D. counsel set forth with specificity in their petitions what they propose in lieu of the requirement that they want the court to lift or modify, e.g., identify the proposed alternative date by which service would be effected, or the proposed alternative scope of the disclosure obligation.

One separate issue that the court may want to address is whether, or under what circumstances, petitions like these should be considered in the first instance by magistrate judges. There is a substantial discussion of other issues related to magistrate judges infra at 43-44.

VI. OUTLINE OF PILOT PROCEDURES FOR STANDARD [MAINSTREAM] CASES

A. **Accelerated deadlines for serving complaint**. Options:

1. The Advisory Group recommended that plaintiffs be required to serve defendants within 30 days.

2. General Order 26 requires that the complaint be served within 40 days for cases assigned to ENE.

3. Under Local Rule 235-10, failure to serve the initial pleading within 40 days shall be presumptive evidence of lack of prosecution, thus justifying, presumptively, dismissal on that ground.

B. **Should the rules also set early presumptive deadlines for adding parties and claims? see below, in section devoted to the meet and confer agenda.**

C. **What should the relationship be (relative timing) between the exchange of core information and the meet and confer?**: options:

1. simultaneous, e.g., bring witness lists and key documents to the meet and confer session; or

2. exchange core information before holding the meet and confer session. This would have the advantage of making the meet and confer a richer interchange and would make the meeting more realistically productive, e.g., in determining how much additional

discovery is appropriate, or whether to drop or settle certain claims, etc.; or

3. meet and confer before exchanging core information. The advantage of this alternative would be that the parties might negotiate away part of the case at the meet and confer, or find its center and agree to postpone the peripheral parts, thus be in a better position to determine what the core information consists of, avoiding unnecessarily broad productions of information and reducing the likelihood that something important would not be produced (e.g., because one lawyer did not understand that something was in fact a part of his opponent's case; the more complex the case, the greater the advantage might be of this approach).

D. **What should the relationship be (relative timing) between the exchange of core information and the initial case management conference?**

1. **The Advisory Group has recommended that there be no disclosure before the initial case management conference (day 60 under its scheme), and that at that conference the judge determine (1) whether a disclosure obligation should attach, (2) what the extent of any such obligation should be, and (3) what impact any disclosures should have on formal discovery.**

2. Are these recommendations wise, especially for "standard" cases?

   a. The issue framed by this question plays a major role in my recommendation that we have two tracks, one for standard cases and one for complex cases.

   b. I recommend that we require disclosure **before the initial case management conference** in standard track cases, in order to make that conference more productive and in order to enrich the lawyers' preconference meet and confer discussions.

   c. By contrast, in the "complex" cases it may be wise to require no disclosures, or only disclosure of more limited kinds of information, before the initial case management conference. I fear that in complex cases there may be great difficulties making pre-conference

disclosures, or making them meaningful. The scope of the burden imposed by the disclosure requirement may be huge in complex cases, and it may make little sense, as part of an overall case management strategy, to compel this expenditure of effort very early in the pretrial period, when so little is defined about the real boundaries of the case.

E. What should the relationship be (relative timing) between formal discovery, on the one hand, and, on the other, (1) the disclosure of core information, (2) the meet and confer, and (3) the initial case management conference with the court?

1. The Advisory Group proposal would prohibit all discovery until after the initial case development conference. Is this a wise idea? Options might include:

   a. permitting only that discovery on which parties can agree (before the initial case management conference) and that does not duplicate information that is subject to the duty of disclosure;

   b. prohibiting discovery (even by stipulation) before the meet and confer session, but permitting it [**only on stipulation? even without a stipulation?**] after that session but before the initial case management conference.

   c. prohibiting discovery (even by stipulation) only before the parties make the disclosures required by the rules of the pilot program (independent of whether they have met and conferred), but permitting it between then and the initial case management conference **[only on stipulation, or even without stipulation]?**

   d. prohibiting discovery (even by stipulation) until both the disclosures have been made and the meet and confer session has been held (but permitting it between then and the initial case management conference, **[only on stipulation? even without stipulation?**).

2. For the standard track cases, I recommend that:

   a. we require the parties to make their disclosures before the meet and confer session

and before the initial case management conference,

b. we prohibit discovery (even by stipulation) before the meet and confer,

c. permit discovery, but only by stipulation, after the meet and confer and before the initial case management conference.

(see time line, infra at p. 25)

F. **Should the rules for the pilot cases in the standard [or complex] track regulate the filing of motions before the initial case management conference?**

The filing of motions could threaten the heart of the system envisioned in this pilot: a system in which the disclosure of core information and a long, structured conversation between opposing counsel early in the pretrial period are required in order to compel much richer communication (than pleadings provide) early in the pretrial period about what the case really is about and what the fundamental underpinnings are for each side's position. Armed with this information, the parties should be in a position to consider the feasibility of early settlement and to formulate case development plans that are as cost-effective as possible. Thus the system here envisioned departs rather substantially from the traditional system in which counsel could expect to communicate little and to rely primarily on formal, expensive and time-consuming motions and discovery to shape the case and to expose the core material on which it is based.

In order to encourage counsel to adopt a new way of thinking about early case development, and to discourage degeneration into formal motion fights before less expensive, more direct means of communication have been tried, should the court prohibit [presumptively] certain kinds of motions in the standard track [and in the complex track?] cases before the initial case management conference?

One significant quid pro quo for prohibiting or limiting motion work before the initial case management conference would be to prohibit or severely limit formal discovery (except by stipulation) in that same time period (before the first case management conference).

See next page for list of options re limiting motions before the initial case management conference:

Options:

1. Prohibit all motions related to the merits of the case before the initial case management conference (this would preclude, absent specific permission from the judge, motions under Rule 9, Rule 11, Rule 12(b)(6), Rule 12(c), Rule 12(e), Rule 12(f), Rule 15, Rule 41, Rule 55, and Rule 56.

2. Permit only motions challenging jurisdiction (personal or subject matter?) or motions to compel joinder of parties (Rule 19) before the initial case management conference (this would preclude, presumptively, all the motions listed in option (a), above, plus motions under Rule 12 challenging venue, insufficiency of process, and insufficiency of service of process).

3. Prohibit only motions based on Rule 12(b)(6) and Rule 56?

4. Prohibit only motions based on Rule 12(b)(6)?

Note: under the system envisioned here, parties could file presumptively prohibited motions only with the permission of the assigned judge. The court might want to consider establishing rules to regulate how such permission is sought, e.g., through letter briefs of no more than 5 pages rather than full motion papers.

G. **Mandatory early exchange of core information. What should the content (scope) of this obligation be in standard track cases?**

1. **Options**:

   a. adopt whatever the Advisory Committee on Civil Rules ends up proposing, which likely will involve the concept of evidence that "bears significantly on" any claim or defense.

   b. describe or produce documents and identify persons with knowledge that is "relevant" to any claim or defense (plus what Advisory Com. recommends re damages and insurance)

   c. describe or produce documents and identify persons with knowledge that "supports" (or tends to support) any claim made or defense asserted by the disclosing party (plus what Advisory Com. recommends re damages and insurance)

d. describe or produce documents and identify persons with knowledge that the disclosing party "intends to use" in the prosecution or defense of any aspect of the suit (plus what Advisory Com. recommends re damages and insurance)

2. One **major issue** here is: **in standard cases** (not complex matters) should parties be required (absent a contrary stipulation?) in the early disclosures to produce not just descriptions of categories of documents, but at least some of the core documents themselves?

   a. For example, would it be wise/useful to require parties to produce in their early disclosures the documents that are known to them after an inquiry that is reasonable under the circumstances (including the applicable time constraints) and that they perceive as tending to support their position on the merits?

   b. We might want counsel to actually produce documents in this category, while giving them the choice of either producing or simply describing by category other documents that might either be relevant to or that might bear significantly on any claim or defense. The purpose of this suggestion is to get some documents actually on the table (not just described by category) very early in the pretrial period and before the first case management conference. The theory is that early in the pretrial period counsel are more likely to find the documents that tend to support their client's position (this is debatable, or course) **and** that they are less likely to resist putting these kinds of documents on the table. If we make them put these documents on the table, it might be fair to permit them not to conduct exhaustive searches early for documents that only might be relevant to the case but tend to help the opposition. So they could produce the documents that tended to support their position and simply describe by category other documents that they might not have had time to review.

c. An alternative approach might be to force, by rule, counsel/parties to conduct a good faith search before the meet and confer, but to make it clear that because of the time constraints the court does not expect that search to be totally exhaustive, then to make the parties produce (or to make available for inspection and copying), at or before the meet and confer, everything that they find (in this somewhat limited search) that appears (1) relevant or (2) likely to bear significantly on determination of any claim or defense. This approach might yield documents in which opposing counsel/parties would have more confidence (be less fearful that their opponent is hiding some real smoking guns or at least significant documents without which the lawyer receiving the documents would feel that he/she could not make sound judgments about either settlement or discovery and motion work). We may not be able to reduce discovery and motion work by very much through the disclosure/dialogue process unless the receiving lawyer has some confidence in the balance/reliability of her opponent's disclosure.

3. **Should we build into our pilot systems a set of incentives and sanctions to encourage compliance with the disclosure requirements?**

a. Should we build in a certification requirement, tracking the proposal by the national Advisory Committee for Rule 26(g) [would require a signature on every disclosure; that signature would constitute a certification that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete and correct as of the time it is made]?

b. Should we explicitly authorize motions to compel full compliance with the disclosure obligation, as recommended by the national Advisory Committee in Rule 37(a).

If so, I urge that we prohibit such motions until after the meet and confer session and that we require that such motions be

accompanied by a certification that (1) the moving party has discussed the perceived shortcomings of her opponent's disclosures with opposing counsel at the meet and confer session and (2) has explained the basis for her perception that the disclosure does not comply with the rule and (3) despite these efforts, the additional disclosures that are perceived as mandated have not been made.

c. Should we explicitly incorporate the sanctions provisions that are recommended by the national Advisory Committee [as proposed Rule 37(c)]?

Failure to disclose without substantial justification, unless harmless, shall preclude the party from presenting the evidence at trial or in connection with a motion, and if the adverse party learns of the evidence despite the failure to disclose and chooses to introduce that evidence at trial, that party may point out at trial that its opponent failed to make the disclosure required by the rule. In addition, the court may impose other sanctions, which may include attorneys fees, an order precluding the party who failed to make the disclosure from conducting discovery, and/or any of the sanctions authorized in paragraphs (A) through (C) of Rule 37(b)(2) [these include striking pleadings or parts of them, entering findings of fact in favor of an opposing party, entering a judgment of default, etc.]

4. **Should we explicitly prohibit counsel from avoiding or reducing the disclosure obligation by stipulation?**

There is some evidence that in Los Angeles and Miami counsel very often agree simply not to make the disclosures that are required by local rule.

H. **At the meet and confer session**, counsel should be required to address explicitly each one of the subjects listed below that has any bearing on the case at hand (**check list**); they also should be required to prepare and file, at least five court days before the initial case management conference with the judge, a report (on a standardized format that we should provide, to increase the likelihood that counsel will in fact address every topic) that sets forth the results of their conversations on each of these topics:

1. **what the case really is about.**

In this conversation, counsel shall describe the central facts/events that underlie their client's position in the case; counsel shall identify (as best they can at this juncture) which of their claims/defenses are the most significant; for each such claim/defense, counsel shall identify the key evidence then known that tends to support their client's position. We must make it clear that counsel must propose a plan, not simply describe their conversations or report that no agreement was reached with respect to certain matters.

2. **explore actively the possibility of settling the case.**

If no settlement can be reached, identify the principal obstacles (informational or other) to negotiating a settlement and set forth a plan for overcoming those obstacles. At a minimum, identify the key information/evidence that needs to be developed (exchanged or discovered) in order to equip the parties to generate appropriate positions re settlement. Propose a process and a schedule for developing that information.

3. **plans and deadlines for serving additional parties and for bringing any counterclaims or cross-claims**

a. should the pilot program include presumptive, short deadlines for accomplishing such activities, e.g.,

(1) parties shall have no more than 40 days from receipt of service to answer or otherwise appear and to file and serve any counterclaim or cross-claim they may have; and

(2) parties shall have no more than 40 days after being served with a complaint, counterclaim or cross claim in which to bring any new party into the action.

b. should the parties in the pilot cases be prohibited from extending by stipulation, without court order, the deadlines for filing pleadings (General Order 26, governing ENE, currently contains this prohibition)? Local Rule 220-10 permits parties to extend deadlines

fixed by the FRCP for up to 60 days by stipulation, without the court's permission, unless specifically constrained by rule or case-specific order.

4. **plans and deadlines for amending already-filed pleadings**
should the pilot program set short, presumptively applicable deadlines for such amendments?

5. **disputes about jurisdiction (personal and/or subject matter) and/or venue**

should the pilot rules explicitly declare that a party waives challenges to such matters unless they are presented by motion at the time the party first appears in the case?

6. **designation of lead, liaison, and/or committees of counsel for plaintiffs and defendants**

7. **determine whether the case is related to any others, state or federal, filed or likely to be filed.**

If so, identify the related cases, the courts in which they are filed or likely to be filed, and the judges to whom they have been assigned; describe briefly what those cases are about; and make a recommendation as to whether the cases should be formally related for some or all purposes and whether discovery conducted in other cases may be used in the case at bar.

8. **discuss who should attend the case management conference**

which lawyers? whether clients ought to attend? if clients ought to attend, which particular representatives of institutional clients? whether representatives of insurance carriers who are not parties but who arguably afford some relevant coverage ought to be present, and, if so, how their participation can be encouraged?

we may want to require, by rule, attendance by clients, at least by telephone (unless excused on good cause shown); if so, we should not give the impression, through the way this check list is written, that anyone other than the judge can decide that a client need not attend.

9. **discuss whether it would be constructive to present at the initial case management conference case development budgets (signed by clients?) or more general cost/expense projections.**

   we may want to require by rule the submission of case development budgets or more general cost/expense projections, and we may want to require that such documents be signed by clients; I strongly suspect that counsel will virtually never agree that such documents should be submitted and that if we think they would be a valuable part of this process, we will be compelled to require them by rule (see further discussion of this sensitive issue at p. 29-30 infra).

10. **exchange arguably applicable insurance policies and consider whether additional carriers might be involved**

11. **utilization of alternative dispute resolution and/or issue-focusing techniques**

    should we require counsel to file a writing signed by their clients that indicates that the lawyer has explained the ADR options to the client, and the economics of those options?

12. **discuss whether the parties will consent to have the case assigned to a magistrate judge for all pretrial and trial purposes** (with appeal directly to the 9th Circuit); if so, discuss whether the parties agree on which magistrate judge they would like to be assigned to the case.

13. **discuss whether the case should be assigned to a magistrate judge or to a special master for:**

    a. all pretrial purposes (except dispositive motions)

    b. all discovery

    c. settlement

    d. specified, focused pretrial tasks (related to discovery or otherwise)

14. **the utility and timing of motions under Rules 12, 19, and 56**

    a. Should we require counsel to consider (and report to the court) the wisdom of prohibiting all motions directed at the merits of the case until after a period devoted to developing and sharing information and to discussing settlement?

    b. Should we require counsel to consider (and report to the court) whether early resolution of specified motions is likely to be necessary before settlement negotiations can be productive? Or whether early resolution of a motion is really likely to have a significant effect on the scope of discovery? Why? Which motions? If so, counsel should be required to identify the discovery that is necessary for resolution of the specified motions, and to propose a plan (including time frame) for conducting that discovery.

15. **issues unique to class actions** (e.g., discovery necessary to prepare for certification, timing of certification motion, relation between class discovery and merits discovery, etc.)

16. **disclosing information independent of formal discovery** (compliance with mandatory disclosure requirements; possibility of exchanging even more information informally, without necessity of discovery)

17. **formulating a cost-effective discovery plan**, including setting discovery priorities and establishing limits on use of various discovery tools; shaping early discovery to position the parties for productive settlement negotiations as early as possible

    a. As part of this process, counsel should be required to describe specifically any discovery that already has been completed (this could be substantial in cases that have been removed from a state court or that are closely related to other actions) or that has been conducted in related cases and that might be useable in the case at hand.

b. Counsel also should be required to attempt to identify factual matters to which they can stipulate, or to which they likely will be able to stipulate, or as to which, for any other reason, they can put discovery on the back burner.

c. **Should we require counsel to discuss specifically whether the case lends itself to a two-stage discovery/case-development plan, the first of which would be designed to get to the center of the case as quickly as possible (by motion, informal exchange of key information, and/or discovery), so as to set up serious settlement negotiations, and the second stage of which would be reached only if the parties failed to achieve settlement?**

d. **Or should we simply require counsel to submit a two stage discovery/case development plan, excusing them only on a showing of good cause?**

If so, we should require counsel to identify, before the initial case management conference, the discovery, informal information development, and/or motion work that really must be done before serious exploration of settlement.

e. **Should we require counsel to propose specific discovery limitations, and should we require them to propose such limits for each discovery tool?**

(1) We could list each discovery tool on this checklist, with a box/space next to each tool, where counsel would be required to propose limits, then in the order the court issued after the initial case management conference, the court would enter the limits it selected for each tool. In the pilot cases, I think we should require the initial case management order to set forth at least some limits on discovery (i.e., in addition to limiting the time within which discovery could be completed). E.g.:

(a) **depositions:** number (per side, per party, total): _____

(b) depositions: limit on length (in hours or days?) of each deposition: _____

(c) **interrogatories:** limit on number: _____

(d) interrogatories: limit on purposes for which they could be used, or subjects they could address _____

(e) **contention interrogatories:** should they be permitted at all? if so, how many, with respect to which issues, and at what stage(s) of the case;

(f) **requests for admission:** limit number _____

(g) requests for admission: limit purposes or subjects or issues as to which they could be used

i) **should we require stipulations to foundational matters as to documentary evidence, except when the document is really important and when there is a serious, principled basis for questioning its authenticity, and thus should we prohibit use of requests for admission simply to establish the authenticity of documentary evidence, absent court order?**

(h) **document requests:** limit number, establish timing, limit subject matters???

(2) **expert discovery:**

(a) limit number of experts and/or

(b) limit number of issues or matters as to which experts might be called;

(c) discuss whether parties will exchange written reports by the experts and whether such reports might be used in lieu of depositions.

(d) discuss timing of expert discovery: e.g., if crucial to settlement, should there be some discovery from experts very early in the pretrial period, followed by settlement negotiations, followed by additional discovery from the same experts if necessary for final trial preparation?

18. **strategies for containing expenses occasioned by use of experts** (e.g., exchanging written reports prior to depositions, using written reports in lieu of depositions, using video-taped depositions in lieu of live trial testimony, using written reports in lieu of direct examination at trial, etc.)

19. **developing systems to keep discovery disputes to a minimum and to resolve discovery disputes as quickly as possible, preferably without judicial intervention**

    a. should we require counsel to speak with opposing counsel before noticing depositions, to avoid scheduling friction?

    b. should we prohibit any discovery that has not been the subject of discussion between counsel in some meet and confer process?

    c. should we prohibit the filing of discovery motions without judicial permission?

    d. should we prohibit the filing of formal discovery motions, as opposed to five page letter briefs on a shortened hearing schedule, e.g., ten days, without judicial permission?

20. **protective orders:** counsel should be required to draft such orders at the meet and confer session, or promptly thereafter, and to file proposed protective orders at least 5 court days before the initial case management conference. Counsel also should be required to propose such orders jointly, and to set forth for separate argument (in writing) only those specific, limited aspects of the order as to which they disagree.

21. **staged resolution or bifurcation of issues**; in addition to the matters covered above, in connection with motions and with two-stage case development, counsel should discuss whether it makes sense to bifurcate (or trifurcate) some issues either for trial only or for both trial and pretrial/discovery purposes. The report they write for the court should identify which issues or matters, if any, should be bifurcated, for which purposes, and why bifurcating makes sense.

22. **special procedures or schedules for expediting resolution of motions** (e.g., letter briefs simultaneously exchanged on stipulated shortened schedules)

23. **suggest the kind and frequency of contact the judge should have with the case in the pretrial period, and whether that contact should be in part by a magistrate judge** (e.g., frequency of status or case development planning conferences)

24. **recommend deadlines/dates for completion of non-expert discovery, disclosure of experts, discovery from experts, motions related to the merits of the case, motions in limine, the final pretrial conference, and trial.**

I. **In the standard track cases, should clients be required, presumptively, to attend (in person or by telephone?) the initial case management conference?**

Options (in addition to requiring client attendance):

1. Require clients only to sign the case management proposals that are filed after the meet & confer.

2. Require clients to attend only if the court issues a case-specific order to that effect (under this option the presumption would be that clients would not be required to attend).

3. Presumptively require client attendance only in the complex cases.

J. **In the standard track, should representatives of insurance carriers (who are not parties) be actively encouraged or presumptively required to attend the initial case management conference?**

1. it is not at all clear that there is authority to compel the participation of a non-party, but we might consider ways to actively encourage such participation.

2. one need, early in the life of some cases, is to get the attention of the assigned claims adjuster or insurance executive -- to get that person to start paying serious attention to the case.

3. but perhaps in standard track cases attendance by non-party carriers should be pursued only on a case-by-case basis, e.g., if, as a result of the meet and confer, the parties strongly urge participation of representatives of carriers.

a stronger argument in favor of seeking attendance by representatives of non-party carriers might be made in the complex cases.

K. **The mechanics of motion practice in standard track cases: should the pilot include some or all of the Advisory Groups's recommendations with respect to motion practice?**

1. Tentative rulings:

   a. By only some of the pilot judges?

   b. By all the pilot judges, but only on certain kinds of motions, e.g., formally briefed (28 day) discovery motions, or motions under Rule 12?

   c. Only on those motions that the individual judge selects for this procedure (decision should be made a week in advance of the date set for oral argument).

2. Notification in advance (at least two days) of date set for oral argument if judge already has decided the motion and that oral argument will be unnecessary.

3. Limit papers that shall be filed in connection with motions

   a. eliminate, as separate filings, the (a) notice of motion, (b) formal motion itself, and (3) proposed order. Require the moving party to set forth in its memorandum what the date and time is for the hearing on the motion and to specify, in a separate initial section, what relief it wants through the motion.

   b. no memos or letters shall be permitted after the reply (but cases published after the memos are filed could be brought to the court's attention without editorial comment or advocacy).

4. Specify that the only papers that may be submitted in seeking an order shortening time are declarations.

5. Uniform limit of 25 pages for memoranda supporting motions (prohibit less generous limits except in individual case-specific orders, but make it clear that judges could require letter briefs of no more than five pages in connection with discovery disputes).

6. Issue rulings on motions within 45 days of hearing (or from the date the matter is otherwise deemed submitted). Judge would be required to notify parties if the judge was not able to meet this deadline, and would be required to explain why he/she could not meet it.

7. Require fax or next day hand delivery of all papers filed in connection with motions that will be heard/submitted on less than 28 days' notice.

L. **Measures to firm up civil trial dates.**

1. Short cause trial weeks: Should some or all of the pilot judges set aside one or two weeks annually to try short cause matters (two days or less to try? three days or less to try?)?

   a. In each of the past two years all of the district judges have tried about 35 civil cases that have consumed two days or less of trial time. In each of those years the district

judges have tried between 10 and 17 additional civil cases that consumed three days of trial time. Whether the number of such trials would increase or decrease if the "short cause trial weeks" plan were adopted is not clear.

b. What role, if any, should magistrate judges play in such short cause trial weeks?

c. If the district judge could not try one of these cases during the week(s) set aside for this purpose, should the case be referred for trial to a magistrate judge, and if the parties refused to consent, then to a senior judge?

2. Use of magistrate judges and senior judges as back up trial judges if the assigned district judge cannot try a case on the day set.

a. Should such cases be referred to magistrate judges for trial?

b. Then referred from a magistrate judge to a senior judge only if the parties refuse to consent?

c. Or should these cases be referred directly to senior judges?

M. **Time lines:** How we resolve some of the issues raised in the preceding sections should depend in part on how we fix the time line for these obligations: we can demand more if we allow more time.

1. The time line proposed by the Advisory Group, at p. 39, is much faster than the time line set forth below (e.g., they recommend that the initial case management conference be held by Day 60), but under the Advisory Group proposal there would no disclosure before the initial case management conference.

2. I propose the following time line for the standard track cases:

Day 1: Complaint filed; if case is assigned to a participating judge, it is designated a pilot case and a magistrate judge also is assigned.

By Day 10: Case assigned to "standard" track or to "complex" track.

Track-specific rules re disclosure, meet & confer, discovery, and case management conference become applicable. Notice re same mailed by clerk's office to counsel for plaintiff, who must serve notice on other parties.

By Day 40: Service on all defendants must be effected.

By Day 80: Each party must have made the disclosures required by the pilot case rules.

By Day 95: Counsel must have completed the meet and confer process.

By Day 100: Counsel must have filed and served the report from the meet & confer session and their proposed case management plans.

By Day 115: The court will have conducted the initial case management conference, which will be followed promptly by the case management order. Among many other things, that order will set specific limits on remaining discovery, announce whether the case will be subject to a two-stage development plan, and fix dates for the major pretrial undertakings and for trial.

VII. THE MANAGEMENT TRACK FOR COMPLEX CASES

A. Accelerated deadlines for serving complaint.

I recommend that there be such deadlines in this track and that they be the same as for the standard track (e.g., all defendants must be served within 40 days of the filing of the complaint).

B. Should there be presumptive early deadlines for adding parties or claims, or for filing counterclaims or cross-claims?

These matters are difficult to prescribe abstractly for complex cases and might be best left to the judgment of the assigned judge, exercised in connection with the initial case management conference.

One alternative might be to set deadlines for adding parties or claims for the complex cases that are more generous than such deadlines for the standard cases, permitting parties to petition for extensions where necessary.

C. Should there be a presumptive duty of disclosure in complex cases?

1. I am inclined to the view that in complex cases it would be essentially impossible to comply with the disclosure obligation as set forth by the national Advisory Committee. If that is an accurate prediction, should we completely abandon in complex cases the idea of disclosure before the initial case management conference, and ask the judge at that conference, based on learning through the meet and confer process, to fix the scope and timing of disclosures?

    a. If we ask the judges to fix the scope of the disclosure obligation on a case by case basis for those suits that are in the complex track, should we compel the judges to order at least some disclosure, or should we permit them to leave all the information gathering to formal discovery?

b. In complex [or standard?] track cases, should we permit the judge, over the objection of a lawyer, to impose a disclosure obligation that exceeds the scope of the obligation imposed by the pilot program rules? If so, should there be any rule-based limits on the extent of the disclosure obligation that the pilot judges could impose?

2. Even if we ask the pilot judges to fix most of the boundaries of the disclosure obligation in the complex cases at the initial case management conference, should we also, by rule, presumptively impose a disclosure obligation of some kind in these cases (i.e., a duty to disclose before the meet and confer and the initial case management conference)?

a. One way to frame this issue is:

In complex cases, are there kinds of information that would both (a) be feasible to find in relatively short time frames (e.g., within a month or so of learning about the filing of the case) and (b) substantially enhance the productivity of the meet and confer session and the initial case management conference?

(1) Insurance policies?

(2) Documents directly implicated by the pleadings, e.g. commercial contracts, patents, annual reports, offering circulars, etc.

b. An alternative approach that I think I favor:

In complex cases, do not impose by rule even a limited disclosure obligation, but, instead, require counsel to consider in detail at the meet and confer session what kinds of information should be shared through a disclosure process and what kinds should be developed through formal discovery. After the meet and confer, counsel would required to present to the court a plan in which they would identify the information that they propose be **disclosed** and the information that they propose be **discovered.** They also would propose a time frame/sequence for the disclosures.

The rule also should require a separate justification for each kind of information that counsel propose be developed through discovery

rather than simply shared through disclosure.

D. **There should be an extensive meet and confer session in complex cases before the initial case management conference.**

1. All of the subjects on the check list for standard cases should be covered.

2. In addition, counsel would be required to devote substantial effort to framing detailed recommendations about the scope and the timing/sequence of the disclosure obligation, as well as to justifying the discovery they recommend.

E. **What discovery activity, if any, should be permitted in complex cases before the meet and confer session? before the initial case management conference?**

1. The Advisory Group recommends that, absent a case specific court order, no discovery be permitted before the meet and confer session. I concur in this recommendation in complex cases.

2. Should discovery be permitted between the meet and confer session and the initial case management conference?

   a. The answer might depend on how promptly the conference with the court can be held and/or on whether the parties stipulate to the discovery in question.

   b. I would hope that the meet and confer sessions would be held within 60 days of the filing of the complaint, that the reports and recommendations arising out of those sessions would be filed within ten days thereafter, and that the initial case management conferences would be held no later than 90 days after the filing of the complaint. If we can structure the pilot for complex cases on this kind of a schedule, I would urge that no discovery be permitted prior to the case management conference except by stipulation.

F. **Should the pilot rules for complex cases regulate/prohibit (presumptively) motions of certain kinds, or of all kinds, before the initial case management conference?**

1. See discussion supra, at p. 9-10.

2. The argument for presumptively prohibiting (before the first case management conference) at least certain kinds of motions directed to the merits (e.g., Rule 12(b)(6) motions) seems even stronger with respect to complex cases.

3. Again, one significant quid pro quo for prohibiting or limiting early motion work would be prohibiting or severely limiting early discovery (discovery might well be prohibited, except by stipulation, before the initial case management conference).

G. **Who should attend the initial case management conference in complex cases?**

1. In more complex and expensive cases, the arguments are stronger that we should compel, presumptively, direct client participation, by phone or in person, in these conferences.

2. Similarly, stronger arguments can be made in complex cases for actively encouraging the participation of representatives of insurance carriers who are not formal parties to the action (it is not at all clear that there is authority to compel such participation by a non-party).

H. **In complex cases (and/or in standard track cases), should the pilot rules require the submission (at the initial case management conference) of budgets, signed by clients?**

1. Budgeting, billing, and expenses are extremely sensitive subjects.

2. The purpose of a proposal like this is to provide additional assurances that counsel and client are making cost-effectiveness decisions early in the pretrial period and to increase access to clients, at this early stage, as sources of economic discipline.

3. Because of the sensitivities involved in this subject, the court may want to consider alternatives to the submission of budgets; the alternatives might include:

   a. filing such budgets under seal.

   b. not filing budgets at all, but including statements of projected costs/fees in the pre-conference submissions.

   c. instead of filing budgets or projections of costs/fees, filing certifications (signed by counsel and client) that budgets or projections have been discussed with and approved by the client.

I. **The mechanics of motion practice in complex cases: should the pilot include some or all of the Advisory Groups's recommendations with respect to motion practice?** (see discussion of these recommendations in connection with standard track cases, above at 22-23).

J. **With respect to complex cases, are there measures that we can/should include to firm up trial dates?**

I do not recommend either of the proposals that have been made for standard track cases:

1. the short cause trial weeks obviously are not applicable to complex cases, and

2. it would seem unwise, in complex cases, to use other judges (magistrate or senior) to pinch hit at the last minute for trial purposes.

   a. a judicial pinch hitter would have much more difficulty, in complex cases, developing an adequate understanding of the case at the last minute; and

   b. trying a long case would severely disrupt the judicial pinch hitter's ability to meet his/her earlier made calendar obligations.

K. **Time lines for complex cases:**

Day 1: Complaint filed; if case is assigned to a pilot judge, it is designated a pilot case and a magistrate judge also is assigned.

By Day 10: Case has been assigned to "complex" track. Notice of this assignment is sent by clerk's office to counsel, along with copies of all relevant special rules and requirements; plaintiff's counsel must serve the notice and the related material on all other parties.

By Day 40: Service on all defendants must be effected.

By Day 70: Counsel must have completed the meet and confer process.

By Day 80: Counsel must have filed and served the report(s) reflecting the work done at the meet and confer session and their proposals for disclosure, discovery, and case management.

By Day 90: The court will have conducted the initial case management conference, which will be followed promptly by the case management order. Among many other things, that order will fix the scope and timing/sequence of the parties' disclosure obligations, articulate limits on discovery, announce whether the case will be managed under a two-stage discovery/case development plan, set the date for the next case management conference and describe what counsel are expected to have accomplished by then, and fix the deadlines for other major pretrial undertakings.

VIII. ADDITIONAL ISSUES/MATTERS

A. **Who should decide, initially, which track is appropriate for given cases?**

1. The answer might depend, in part, on what criteria we ask the decision-makers to apply, and on how subtle we think making these decisions is likely to be.

2. This decision needs to be made at the time the complaint is filed, or shortly thereafter, because the nature and extent of the time-pressured obligations that will be imposed on counsel will depend, in part, on which track the case is in.

3. What are the options with respect to these questions?

   a. Self-designation by counsel for plaintiff at time of filing or within a short period thereafter (e.g., ten calendar days).

      (1) If we were to adopt this kind of system, we might want to limit the lawyers' freedom with respect to self-designation by setting forth some objective criteria that would have to be satisfied in order for the case to be designated "complex".

      (2) In addition, we might want to have someone within the court review each designation, or each designation of a "complex" case, within a few days of the self-designation.

      (3) It appears that we would have between 200 and 250 civil filings each month for the court as a whole that might be subject to the pilot program. If half of the judges participate in the pilot, there would be between 100 and 125 new cases each month that might be subject to the pilot. Some of those (perhaps 10% - 15%?) would be designated for arbitration, and thus would be assigned automatically to the standard track. A few would be filed as class actions, and thus would be assigned automatically to the complex track. A few others would be excluded automatically, e.g., because the plaintiff is proceeding

in pro per or because plaintiff is petitioning at the outset for a TRO. But even taking these matters into account, I would guess that there would be between 85 and 125 cases each month that would have to be assigned to one of the two tracks.

(4) If we permit plaintiff's counsel to self-designate, and if we decide to review, absent a complaint from opposing counsel, only the designations into the "complex" track, the number of such reviews that would be necessary (court-wide) each month should be relatively small (guessing: 20-40). If seven judges participate in the pilot, there would be somewhere between 3 and 7 designations to review per judge per month. At that level, it would seem that the most appropriate person to do the reviewing would be the assigned judge.

(5) If the court were to review (or make initially) every designation (to either the standard or the complex track), and if seven judges were participating in the pilot, there might be somewhere between 12 and 20 designations to review (or to make initially) per chambers each month. If the assigned judges did not want to review that many cases for this purpose, the alternatives might include their law clerks, their courtroom deputies, a magistrate (e.g., if a magistrate judge were assigned randomly at the time of filing, he or she might be assigned this task), or someone from central staff (who would have to be specially trained), or the Director or Deputy Director of ADR Programs.

(6) One downside to self-designation is that it probably would result in more motions challenging the designation than would be filed if the court initiated the designation.

(7) Another downside to self-designation is that plaintiff's counsel might use the designation to try to gain some tactical advantage or to try to avoid disclosure obligations or to try to impose disclosure

obligations unreasonably on a defendant. If there are significant differences between the two tracks in obligations, speed of access to evidence, level of judicial attention, and/or amount of work imposed on counsel, we should expect some manipulation of the designation process by counsel, and some fights between counsel about which track is appropriate. One way to reduce these potential problems is to have the court do the designating. Of course, there still would be some challenges to the track selected, but there probably would be appreciably fewer such challenges than there would be under a system of self-designation.

b. A second option is to have the assigned judge, or someone in his/her chambers (e.g., law clerk or courtroom deputy), make each designation. This probably would involve reviewing, shortly after the complaint is filed, somewhere between 12 and 20 cases per chambers per month.

c. third option is to have the assigned magistrate judge do the designating.

d. fourth option would be to centralize (for the whole court) the task of designating cases in:

   (1) one magistrate judge

   (2) Director or Deputy Director of ADR Programs

   (3) a specially trained member of the clerk's office.

   This would compel someone to review between 80 and 125 cases per month. If each such review consumed 15 minutes, someone would have to commit between 20 hours and 30 hours per month (2-4 working days) to this work.

   Centralization risks removing the judge and his/her staff from one potentially useful early contact with the case and seems inconsistent with our overall effort to encourage as much pro-activism as possible in case-specific management by the assigned judge.

On the other hand, at some point in the future the court might want to set up procedures under which a law-trained professional like our Director or Deputy Director of ADR Programs has some interaction (e.g., a telephone conference) with counsel early in the life of most civil cases, for the purpose of helping inform the litigants' and/or the court's decisions about whether to use an ADR program and, if so, which one.

B. **What criteria should be used to identify the cases to be presumptively designated for the "complex" track?**

1. Can we articulate rigid criteria (like we have for the arbitration program)? Or will the judgments require more fluid interplay between a substantial number of factors, not all of which will cut in the same direction in every case?

2. What the criteria ought to be, and how rigid we can be about them, should be determined largely by reference to the differences between the two tracks and the consequences of a case being assigned to one of the tracks and not the other.

3. What are the kinds of factors that we might want to consider in determining whether a case should be assigned to the "complex" track? **The key factor is how complex/dense the development of the evidence will be.** We also should try to weed out (of the standard track) those cases where, for reasons other than the density of the process of developing the evidence, it will be impossible to comply with the time deadlines prescribed for the standard track.

4. Our goal, presumably, is to find objective factors that would permit us to identify the cases in which it is most likely that the complexity of the process of developing the evidence, or some other consideration, would make it unwise to subject the case to the time constraints and disclosure duties that would be imposed routinely on cases in the standard track.

5. The criteria that we might consider using could include:

   a. number of parties (focusing on which parties are likely to be necessary sources of information/evidence; often the number of

defendants will be more important for these purposes than the number of plaintiffs)?

b. number of claims or causes of action?

c. number of counterclaims and/or cross claims?

d. nature of claims (or counter-claims/cross-claims)?

e. length of pleadings (number and complexity of factual allegations in pleadings)?

f. are the relevant legal theories or norms relatively straightforward (e.g., tort or contract claims), or are they likely to require counsel to develop a great deal of complex factual evidence (e.g., a RICO claim, some intellectual property claims, some securities claims, some antitrust claims, etc.)?

g. is disposition of the case likely to require extensive involvement by a substantial number of experts?

h. class action (assigned automatically to the complex track)?

i. multi-district action?

j. several related actions?

k. politically sensitive? high visibility?

l. nature/magnitude of relief sought (high stakes? is plaintiff seeking an answer to a complex legal question, e.g., re coverage)? **Should cases in which the only relief sought is equitable (injunctive?) be assigned automatically to the complex track?**

m. size of the law firms or what is known about the kinds of cases in which they generally are involved?

n. size/nature of the parties, what is known about the quantity of relevant information they are likely to have, what is known about how widely dispersed that information is likely to be?

C. **Certain kinds of cases**, some identified presumptively by subject matter designation on civil cover sheet, **should <u>not</u> be subject to either version of the pilot program.**

1. The following kinds of cases would not be subject to the procedures of the pilot program, unless specifically so ordered by individual judges:

1. recovery of overpayment and enforcement of judgment (150)
2. medicare act (151)
3. recovery of defaulted student loans (152)
4. recovery of overpayment of veterans benefits (153)
5. prisoner petitions (510 - 550)
6. forfeiture/penalty (610 - 690)
7. bankruptcy (422 and 423)
8. social security (861 - 865)
9. state reapportionment (400)
10. deportation (460)
11. selective service (810)
12. freedom of information act (895)
13. appeal of fee determination under equal access to justice (900)
14. constitutionality of state statutes (950)

[there are several additional categories of cases on the civil cover sheet that it might be wise to exclude, presumptively, from the pilot; we should review all these categories with other members of the court and with the Advisory Group]

2. **What procedures should apply to the cases in the categories just listed?**

a. For some, e.g., prisoner petitions, the court has established special procedures. Cases in those categories that happen to be assigned to pilot judges would continue to be processed in accordance with those special procedures.

b. Those categories of cases on the above list that are not already subject to special procedures will be processed by the pilot judges in whatever manner they feel is appropriate and consistent with the Federal Rules of Civil Procedure; at a minimum, each such case must be the subject of a scheduling order issued early in the pretrial period in compliance with Rule 16.

3. **Cases that involve motions for TRO's or preliminary injunctions very early in the pretrial period:** Regardless of subject matter category, should the special obligations imposed by the pilot rules presumptively not apply to any case in which a party petitions for a TRO at the time of filing the complaint [or within 30 days of the filing of the complaint]? what about petitions for preliminary injunctions? If we have a two-track system, can we identify and separate out the TRO/preliminary injunction cases at the outset? Is a General Order that says cases that seek TRO's at the outset are not subject to these rules sufficient notice to the parties, the clerk's office, and the judges? In such cases, should the assigned judge determine, in connection with his or her consideration of the papers related to the motion for immediate equitable intervention, whether, to what extent, and when the matter should be subject to pilot program rules?

4. **Cases in which the plaintiff or the lead defendant [or any served party?] is proceeding in pro per.** Should these cases be included in the pilot?

D. **Some kinds of cases could be assigned automatically to one track or the other.**

For example, class actions would be assigned automatically (at the time of filing) to the complex track and cases that are designated for the arbitration program automatically would be assigned to the standard track (see below for discussion of arbitration cases).

E. **What effect, if any, should the fact that a given case is assigned to one of the court's mandatory (and non-binding) ADR programs (arbitration or ENE) have on the workings of the pilot case management rules/procedures?**

1. All cases assigned to **arbitration** should automatically be designated for the standard track (regardless of any other criteria). We think that the requirements of the standard track are consistent with the demands of the arbitration program, so we recommend that the pilot judges apply the standard track rules and procedures to cases that are designated for arbitration. If the cases are not disposed of by settlement or motion before the arbitration hearing, that hearing should be held.

a. The rules for such cases should make it clear that no discovery will be permitted after the arbitration hearing except on order of the assigned judge for good cause shown (and that parties who by stipulation but without court order engage in discovery during that period will not be able to use the fruits of such tardy discovery at trial and will get no help from the court if they encounter discovery disputes).

b. If a request for trial de novo is filed after the hearing, the case should be promptly returned to the standard management track by holding a status conference within 30 days of the filing of the de novo demand; the court should set the trial date at that status conference. If the pilot judges set aside a week or two for trial of "short causes," the judges may want to set most/all cases that have been to arbitration for trial during their short cause week(s).

2. How to integrate the **ENE** program with cases that are subject to the pilot procedures is a more complex question.

a. Some of the purposes of ENE (e.g., accelerating lawyer/client attention to the case and communication across party lines) will be served by the case management pilot, but there are other important contributions that ENE can make that the pilot case management system cannot, most notably providing a frank early evaluation of the case and an early, meaningful opportunity to engage in settlement negotiations with the aid and encouragement of a neutral. In addition, the communication across party lines about the merits of the case is likely to be much richer and more detailed in an ENE session than in either a meet and confer session between the lawyers (without a neutral or their clients) or a conference hosted by the assigned judge. ENE also offers, realistically, more meaningful opportunities for participation by clients and, to a lesser extent, witnesses (thus ENE offers opportunities for catharsis by clients and for learning from percipient or expert witnesses that the court's conferences probably will not

offer). Because ENE can make contributions that the procedures contemplated in the pilot program are not likely to make, it would not be wise to remove cases from the ENE program simply because they have been assigned to the pilot program.

b. On the other hand, the overlap of some of the functions of the two processes, and the roughly parallel timing (in theory) of the ENE session and the first case management conference, make the task of sensibly integrating the two programs more challenging. We propose the following:

(1) For cases assigned to the standard track and to ENE the optimal sequence might be:

(a) accelerated service [within 40 days, as per Gen. Order 26];

(b) parties exchange the information required under the standard track;

(c) counsel meet and confer, go through check list.

(d) counsel draft report from meet and confer session, and prepare case management plans, then deliver both documents to both the evaluator and the court (these documents could substitute for the written evaluation statements required by General Order 26).

(e) the evaluator holds the ENE session;

(f) any stipulations entered during the ENE session about facts or law, about further exchanges of information, about motion practice or discovery, or about using an ADR process, are committed to a writing that is filed with the court;

(g) the assigned judge hosts the case management conference.

Occasionally there is a delay in holding the ENE session, because, e.g., we can't find an evaluator who is free of conflicts of interest, or because the parties and the evaluator decide to postpone the session until after certain discovery or motion work is completed, or because an important party cannot be promptly served, etc. The median time between the filing of the complaint and the ENE session has been about 110 days. That means that many ENE sessions occur more than 110 days after the filing of the complaint. **We might well not want to hamstring the judges in the pilot to wait for the ENE process in such cases.** At a minimum, we will have to set up very good lines of communication between the ADR staff and the judges in the pilot, so the latter can know when it appears that the ENE session will be delayed. If we have serious ambitions for holding the initial case management conference appreciably earlier than 110 days after the filing of the complaint, we will have to reverse the order set forth above and have that conference before the ENE session. The disadvantages of that sequence include eliminating the possibility that the case will settle as a result of the ENE session before the initial case management conference and eliminating the possibility of the judge benefitting from the fact that the parties learn a lot about their case at the ENE session and sometimes fashion sensible stipulations about the case development process.

(2) Cases assigned to the complex tract and to ENE:

(a) If we can in fact hold the initial case management conference early in such cases (e.g., within about 90 days of the filing of the complaint), then it might make sense to postpone the decision about whether there should be an ENE session in these cases, and, if so, when, until that initial conference. At that conference the judge, with inputs

from the lawyers, clients, and the court's ADR Director or Deputy Director, could determine whether going forward with ENE, or perhaps some modified version of it, is sufficiently likely to be productive.

(b) If we end up not holding the initial case management conferences in these complex cases until appreciably later (e.g., 200 days after the complaint is filed), then perhaps the ENE process should simply go forward under the normal provisions of General Order 26.

(c) It might be unwise/infeasible to make the decision about whether to postpone the ENE session on a case-by-case basis (in the complex case track). If so, we should write a presumptive rule for complex cases (I suggest that it be to postpone the session) that individual judges would be free to change in cases where they felt the presumptive sequence should be reversed.

F. **How should cases that have been removed from state court to federal court be treated in our pilot?**

1. Should they be excluded from it altogether?

2. Should the time lines be advanced for such cases?

3. If some discovery already has been done in state court, what effect should that have on the disclosure obligation?

G. **How should cases that are transferred to this court from another federal court be treated in our pilot?** See above.

H. Issues related to the roles magistrate judges might play in our pilot case management project:

1. Should every case that is subject to the pilot be assigned randomly at the time of filing not only to a district judge, but also to a magistrate judge?

   If so, should certain matters routinely be referred to the assigned magistrate judge, or should there be an understanding that if the assigned judge decides to refer any aspect of the case to a magistrate judge, the magistrate judge who was assigned randomly at the outset would be the magistrate judge to whom the work would be sent?

2. Should we experiment with different presumptive roles for assigned magistrate judges?

   a. Should the magistrate judge in some (half?) of the pilot cases be assigned responsibility for all pretrial matters (except dispositive motions), while in other pilot cases the district judge would retain responsibility for case management but delegate some or all responsibility for discovery?

   b. Should the presumptive role of the assigned magistrate judge vary between the standard case track and the complex case track?

      (1) For example, should magistrate judges be given responsibility for all discovery disputes in all cases <u>in the standard track</u>? or should the magistrate judges in those cases be given responsibility for all pretrial case management, discovery, and settlement (but not dispositive motions), leaving responsibility in the district judge only for dispositive motions and trial?

      (2) <u>In the complex cases</u>, should there be no presumptive role for the magistrate judge (so the magistrate judge would be used in such cases only if the district judge decided, in a specific situation, to refer some matter to the magistrate judge)? Or, in the complex cases should an assigned magistrate judge attend the initial case management conference(s), along with the

district judge (the Advisory Group recommended that the assigned magistrate judge attend the case management conference in every case, complex or otherwise). If there are two early case management conferences in complex cases, should the assigned magistrate judge attend both of these conferences, or only the second, which would take place after the exchange of core information and at which the court would make key decisions about motion practice and discovery?

3. Would the random assignment of magistrate judges at the time of filing encourage or discourage consents to magistrate judges for trial? Would it have any negative or positive effect on the court's provision of settlement services? Under the current system, parties can forum shop for the magistrate judge of their preference either for trial or for settlement; it is not clear that this fact is widely known in the bar. If we adopt a system of randomly assigning magistrate judges at the outset, will parties feel that they cannot forum shop? if so, will that discourage consents? Since the pilot programs are to be an experiment, and since we really don't know the answers to these questions, maybe we should try assignments at the outset, coupled with aggressive educational efforts, and see what happens.

4. What additional steps should be taken, if any, to assure that counsel and parties with cases in the pilot programs in fact give meaningful consideration to whether they should consent to full jurisdiction (including trial) by a magistrate judge?

   a. Presumptive consents?

   b. Certifications by counsel, signed by clients, that the matter has been discussed and the pros and cons considered?

   c. "Publishing" directly in each case to each party a description of the advantages of consent (forum shopping, really firm and early trail dates, etc.)?

5. Should certain kinds of cases, e.g., diversity cases, be assigned randomly at the time of filing to a magistrate judge (and not to a district judge), and should that magistrate judge be presumptively

responsible for all pretrial and trial matters, so that only if a party objected would dispositive motions and trial be assigned to a district judge? Should the court experiment with this idea by having half of the diversity cases that are in the pilot program assigned to magistrate judges and the other half assigned to district judges?

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