MANUAL

FOR

COMPLEX LITIGATION

SECOND

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1985

The Manual for Complex Litigation, Second, has been produced under the auspices of the Federal Judicial Center. The analyses and recommendations are those of the Manual's Board of Editors. The Federal Judicial Center speaks on matters of policy only through its own statutorily-created board.

PREFACE AND DEDICATION

In his famous address at the 1906 meeting of the American Bar Association, Dean Roscoe Pound described this country's judicial system as follows:

> The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. . . . So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules and law and procedure exactly as the professional football coach with the rules of the sport. . . .
>
> The effect of our exaggerated contentious procedures is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful.*

The Manual for Complex Litigation, Second, is dedicated to the many judges and lawyers who have answered Dean Pound's challenge by developing procedures to resolve enormously complex litigation in a just, speedy, and inexpensive manner without loss of the protections afforded by the adversarial system of justice.

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* 35 F.R.D. at 281-82. The full text of Dean Pound's speech, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," is reprinted at 35 F.R.D. 273 (1964).

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10. PURPOSE AND USE OF MANUAL.[1]

Like its predecessors, this Manual "contains neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial or pretrial procedure must be cast."[2] Rather, after setting forth the basic principles that characterize the fair and efficient resolution of complex litigation, it then describes various procedures that have successfully implemented those principles and identifies certain practices that have caused difficulties.

In some sections the Manual describes alternative procedures that may be used in particular cases to cope with the same problem. The various techniques suggested, however, either have been used regularly with success or deserve, in the opinion of the Board of Editors, further use and experimentation in appropriate cases. The Manual has been developed as a result of the efforts of judges and lawyers to improve existing practices and their willingness to innovate when confronted with the challenge of difficult problems; its suggestions are not intended to discourage this process. The various procedures are recommended in the sense that they should serve as a helpful starting point in planning a program to resolve the litigation in the most just, speedy, and inexpensive manner practicable under the circumstances.

The Manual is intended primarily for use in complex civil litigation in federal courts. However, the principles of management and many of the techniques it describes may be useful in criminal cases, in state courts, and in routine federal civil litigation. Indeed, amendments to Fed. R. Civ. P. 16 direct that time limits and other controls such

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1. Reference: MCL Foreword, Introduction.

2. Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 355 (1960).

as those described in the Manual be imposed in virtually all civil cases. Although focusing upon the court's role in the management of litigation, the Manual is also designed to be of use to counsel, who have a major role in formulating (as well as the central role in executing) any successful plan for the fair and efficient resolution of a case.

This publication is called the Manual for Complex Litigation, Second, or MCL 2d, to signify that it is based upon, but constitutes a major revision of, earlier editions of the Manual. Like its predecessors,[3] MCL 2d does not represent the final word on proper management of complex litigation; it is to be scrutinized, evaluated, and periodically revised on the basis of new developments and experiences.[4]

MCL 2d is divided into four parts. This part contains a brief description of the purpose and use of the Manual. Part II, "Management of Complex Litigation," begins with a discussion of some basic principles of effective management generally applicable in all complex cases and then describes various procedures to be considered in implementing these principles as litigation proceeds through its pretrial stages to resolution by trial, summary disposition, or settlement. Part III provides additional commentary and suggestions on the application of these principles and techniques in particular situations—in class actions, in litigation involving more than a single case, in criminal proceedings, and in several types of cases that are frequently treated as

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3. After a period of usage the Handbook, supra note 2, was superseded by the Manual for Complex and Multidistrict Litigation. The editors of the Manual for Complex Litigation (as it was later retitled) recognized at the outset the need for periodic revision and sought, through five editions and other interim supplements, to note new decisions of significance and to incorporate the evolving techniques developed by judges and lawyers when handling complex litigation.

4. Comments and suggestions from judges and lawyers are welcomed. They should be sent to:

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1120 Vermont Avenue, N.W.
Suite 1002
Washington, D. C. 20005.

complex litigation. Finally, some checklists, sample orders, reference tables, and a discussion of sanctions are included in Part IV as supplementary materials. Within each part, the separate sections are identified numerically for convenient reference. In view of the substantial reorganization of the Manual, the numbering system for MCL 2d differs from that used in earlier editions, but cross references are provided both by footnotes at the beginning of each section and by the table at § 43.

Judges and attorneys generally familiar with the principles and procedures involved in management of complex litigation may find that MCL 2d is most conveniently used by first reading the comments in § 33 applicable to the particular type of litigation and then using the checklists in § 40 as a quick reference to the sample orders and more detailed discussions of the subjects that warrant special attention.

Part II. Management of Complex Litigation.

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Fair and efficient resolution of complex litigation depends upon effective control and supervision by the court, dedication and professionalism of counsel, and the collaboration of the judge and the attorneys in developing, implementing, and monitoring a positive plan for the conduct of pretrial and trial proceedings.

20.1 JUDICIAL SUPERVISION.[1]

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Lawyers and judges are virtually unanimous both on the critical need for early, active involvement by the judiciary in managing complex litigation and on the characteristics of effective judicial control and supervision. Even those who have criticized some constraint imposed by a judge when exercising these powers have generally acknowledged the propriety, if not the necessity, of judicial control to promote the efficient conduct of the litigation. The accord regarding judicial involvement in

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1. Reference: MCL 1.10.

complex cases does not evidence any disparagement of the adversarial system or of the competency of the bar. Rather, it stems from an awareness that the tensions between an attorney's responsibilities as an advocate and as an officer of the court frequently are aggravated in complex litigation and that the tactics of counsel may waste time and expense if the judge passively waits until problems have arisen.

Although not without limits, the explicit and implicit powers of the court enable the judge to exercise substantial control and supervision over the conduct of the litigation. The Federal Rules of Civil Procedure contain numerous grants of authority that supplement the inherent power of the court to manage litigation. Of particular importance are those contained in Rules 16, 26, 37, and 42. Fed. R. Civ. P. 16(c)(10) specifically authorizes action to be taken with respect to "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."

The extra attention given by the judge to a complex case in its early stages will encroach upon the time immediately available to attend to other litigation. However, even greater expenditures of judicial time and energy will almost certainly be required later if complex litigation proceeds unattended and unsupervised. In unusual situations, the demands created by a case of great complexity may be so extreme that special assistance, such as relief from some or all other case assignments for a period of time, may be warranted.[2]

20.11 Early Identification and Control.[3]

Judicial supervision is most necessary and beneficial early in the litigation, before major problems arise. An initial conference with counsel prior to filing of responses to

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2. See Resolution adopted by the Judicial Conference of the United States, Reports of the Judicial Conference 1971, p. 72-73.

3. Reference: MCL 0.20-0.23.

the complaint frequently will be desirable, and special procedures even before this conference may be useful.

The judge, therefore, should be alerted as soon as possible to the filing of a case that constitutes, or may develop into, complex litigation. Many courts require the Clerk's office to notify the judge immediately of the filing of certain types of cases—such as class actions, antitrust and securities cases—that typically merit special judicial attention. Whether a case will require increased judicial supervision, of course, may not be apparent from the docket sheet or the complaint itself. Counsel should be encouraged to make known their belief that a case may warrant treatment as complex litigation. Several courts have a local rule requiring plaintiff's counsel to provide, at the time of filing the complaint, information—such as the names of opposing counsel and a description of all related litigation—that helps to identify complex litigation and enables the judge to make preliminary plans for the case.

20.12 Assignment to Single Judge.[4]

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Complex litigation should ordinarily be assigned to one judge for all purposes, including all pretrial proceedings. Failure to do so may result in a lack of the continuity and consistency of judicial supervision that is vitally important to efficient management of the case.

Each multi-judge court should determine for itself whether complex cases should be assigned according to the court's regular plan for case assignment or by considering other factors such as the caseloads and special experiences of the individual judges.[5]

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4. Reference: MCL 0.30, 1.95, 5.00-5.22.

5. See "Bar Harbor Resolution," adopted by the Judicial Conference of the United States, Reports of the Judicial Conference 1971, p. 70-74.

In courts in which actions are not assigned automatically to a specific judge upon filing, an individual assignment nevertheless should be specially made as soon as a case is identified as complex litigation.

20.121 Recusal.

Complex litigation often involves many parties and law firms, not all of whom may be known when a case is first filed.[6] The judge to whom a complex case is assigned should check carefully, on a continuing basis as necessary, not only for existing problems of recusal or disqualification, but also for potential problems that may arise because of the joinder of additional parties, the assignment of other related cases, or the identification of class members.[7] Reassignment, when warranted, should be accomplished as promptly as possible, and the judge to whom the litigation is to be reassigned should make a similar inquiry into problems of recusal or disqualification before notice is given of the reassignment.

20.122 Other Judges.

Although one judge should provide overall supervision of the litigation, other judges may be called upon for special purposes, such as to conduct settlement discussions and to review claims of privilege. Moreover, after a period of consolidated or coordinated pretrial proceedings, severable claims or cases may be identified that other judges can handle as efficiently.

20.123 Related Litigation.

Complex litigation frequently involves two or more separate, but related, cases. All of these cases that are pending or may later be filed in the same court, whether or

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6. To aid in identifying potential problems of disqualification, counsel should submit a list of all companies affiliated with the parties and all attorneys and firms associated in the litigation.

7. See In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir. 1982), aff'd under 28 U.S.C. § 2109 sub nom. Arizona v. United States District Court, 459 U.S. 1191 (1983) (disqualification of judge, five years after suit instituted, upon discovery that spouse owned stock in a few of the more than 200,000 class members).

not in the same division, should be assigned at least initially to the same judge.[8] Pretrial proceedings in these cases should ordinarily be coordinated and their consolidation for pretrial and trial purposes under Fed. R. Civ. P. 42 will often be appropriate. Even if filed in more than one division of the court, cases may be coordinated or consolidated for pretrial purposes, and frequently they may be transferred to a single division under the discretion granted by 28 U.S.C. § 1404(b). Transfer to the district judge of related adversary proceedings in bankruptcy, including proceedings to determine the dischargeability of debts, may also be needed to avoid conflicts and delays.[9]

Whether the same judge should handle related criminal and civil cases is less clear. From the standpoint of efficiency and coordination—especially important when such cases are pending at the same time—assignment to a single judge is usually preferable. Other factors, such as the possibility that extensive judicial supervision of pretrial proceedings in the civil litigation may be needed during the time the criminal trial is being conducted, may suggest that the cases be handled by different judges.

Management problems are compounded when related cases are pending in other courts. Cases in other federal courts may be transferred by such courts under 28 U.S.C. § 1404(a) or § 1406 or, for pretrial purposes, by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407. Cases originally brought in other courts, federal or state, may be refiled following voluntary dismissal or dismissal based on forum non conveniens. Nevertheless, transfer of all cases to a single court for centralized management is not always possible. In such circumstances, the affected courts should attempt—whether directly between the judges involved or indirectly through counsel—to coordinate proceedings to the extent practicable in order to minimize conflicts and

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8. Many courts have a local rule that automatically provides for assignment of related cases to a single judge, typically the judge receiving assignment of the earliest filed case.

9. See, e.g., In re Flight Trans. Corp. Securities Litigation, 730 F.2d 1128 (8th Cir. 1984), cert. denied, 105 S. Ct. 1169 (1985).

inconsistent rulings. This coordination sometimes has been accomplished through parallel orders, joint pretrial conferences and hearings at which both judges presided, or designation of a "lead" case in the litigation. For further suggestions concerning the handling of multiple litigation, see § 31.

20.13 Appropriate Supervision.[10]

As already discussed, judicial involvement should begin early in the litigation. Effective judicial management generally has the following additional characteristics:

* **it is active:** The judge attempts to anticipate problems before they arise and does not wait passively for matters to be presented by counsel. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a plan for conduct of the litigation frequently must come from the court.

* **it is substantive:** The judge's involvement is not limited to procedural matters. Rather, the judge becomes familiar at an early stage with the substantive issues in order to play a more constructive role in issue identification and pretrial management.

* **it is timely:** The judge promptly decides disputes that may substantially affect the course or extent of further proceedings. The content of a ruling is often less important than the fact that it is made without delay.

* **it is continuing:** The judge periodically monitors the progress of the litigation to assure that schedules are being followed and to consider any needed modifications in the program. The judge may call for interim reports between scheduled conferences.

* **it is firm, but fair:** The judge expects schedules to be met and imposes appropriate sanctions for derelictions and dilatory tactics. Time limits and other controls, however, are not imposed arbitrarily or without considering the views of counsel and are subject to revision when warranted by the circumstances.

The judge has a vital role in developing and monitoring an effective program for the orderly conduct of pretrial and trial proceedings. Although components and details of the plan will vary with the circumstances of the particular case, each plan should set forth an appropriate schedule under which the case is to proceed to resolution, whether by settlement, summary disposition, or trial. The need for time limits,

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10. Reference: MCL 0.60, 1.10, 3.10.

realistically set and fairly enforced, can hardly be overemphasized. Indeed, a firm but realistic trial date, coupled with immediate access to the court in the event some dispute cannot be resolved by cooperation among counsel, may itself suffice in litigation involving experienced attorneys who work well with one another. Unfortunately, such situations are rare in complex litigation; and ordinarily the plan should prescribe a series of procedural steps giving direction and order to the case as it progresses through pretrial proceedings to trial, summary disposition, or settlement. In some cases the court may be able to establish an overall program for the conduct of the litigation at the outset; in others, the plan must be developed and refined in successive stages. The more prudent course is to err on the side of over-inclusiveness in the plan rather than risk omission of critical elements.

The attorneys have a significant part in developing the plan for conducting the litigation. They will be far more familiar than the judge with the facts and problems of the case and, of course, will be primarily responsible for executing the plan. The judge should provide supervision and direction in a manner that recognizes the enormous burdens placed on counsel by complex litigation; mutual respect and cooperation should be fostered not only between the court and the attorneys but also among the attorneys.

20.14 Use of Magistrates and Masters.[11]

Judicial supervision in complex litigation should ordinarily be exercised directly by the judge rather than by referral to a magistrate or master, even in courts that routinely make such referrals for discovery or other pretrial purposes.[12] Referrals may cause additional costs and delays when reviews by the judge are sought, dilute the impact of suggestions given to counsel during pretrial proceedings, impair supervisory

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11. Reference: MCL 3.20, 3.21.

12. This section is concerned with referrals for supervisory purposes and is not intended to discourage the appointment of magistrates, masters, or court-appointed experts for other purposes, such as to collect, assimilate, and present complicated evidentiary matters. See § 21.5.

consistency and cohesiveness as the case proceeds to trial, create greater reluctance to try innovative procedures that might aid in resolution of the case, and result in insufficient familiarity by the judge with the case at the time of trial. Appointment of a master, moreover, involves special costs in the form of compensation and expenses that the parties may be unable or unwilling to bear.

Notwithstanding this general admonition, however, referral to a magistrate or master may be useful in some situations. For example, referral may be appropriate—

* of discrete matters that can be handled effectively by a different person. Referrals sometimes have been found to be useful in handling certain discovery problems (for example, claims of privilege and protective orders), in conducting a hearing on issues of personal jurisdiction, in assisting counsel with formulation of stipulations and statements of contentions, and in facilitating settlement discussions.[13]

* of problems arising during depositions when an immediate telephonic ruling is needed and the judge is not available.

* if, due to the unusual magnitude of the supervision needed in the complex case, failure to make referral would result in inattention or undue delay. Continuing supervision and timely rulings are ordinarily more important than personal supervision by the judge.

If matters are to be referred, the court should enter an order that adequately describes what is being referred and, to the extent not covered by existing rules, the authority of the magistrate or master to make rulings and the procedures for obtaining review by the judge. The court should call for frequent status reports from the magistrate or master.

13. See W. Brazil, G. Hazard & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983).

20.2 ROLE OF COUNSEL.

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20.21 Responsibilities in Complex Litigation.[14]

Judicial involvement in the management of complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, such litigation places greater demands upon counsel in their dual, and sometimes conflicting, roles as advocates for a client and as officers of the court.

Complex litigation may put additional pressures upon attorneys for many reasons. The enormity of the monetary amounts or values at stake may increase the anxieties of clients and counsel. Extensive discovery and prolonged trial may tax the resources of clients and counsel. With numerous other attorneys involved, many of whom may be strangers, communications may be hampered and the establishment of mutual trust impeded. When scheduling and personal conflicts arise, the same degree of accommodation extended in routine cases may not be possible. The case may be transferred to another court, with which counsel are less familiar; travel time and costs may increase greatly. Some attorneys may be empowered to act on behalf of parties who are not their clients; this may impose added logistical problems and fiduciary concerns.

Increased responsibilities as advocates should not be allowed to diminish the attorneys' responsibilities as officers of the court. Counsel can and should be expected to work cooperatively and professionally with each other and with the court. Active,

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14. Reference: MCL 1.93.

creative participation by the attorneys in planning for efficient handling of the complex case is no less a part of the duty owed to the court than is their timely execution of the details of that plan. Even if large amounts are at stake, counsel must be prepared to stipulate to matters not in genuine dispute, and, indeed, to avoid all unnecessary contentiousness. They should communicate freely with one another and resolve informally most disputes regarding discovery without the need for judicial rulings. Cooperation, courtesy, and professionalism by counsel should be expected and required in all litigation; but they are particularly important in complex cases.

Counsel in complex litigation should also keep in mind the directives of Fed. R. Civ. P. 26(g). The signature of counsel on a discovery request, response, or objection constitutes a certification that "to the best of his knowledge, information, and belief formed after a reasonable inquiry" it is "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" and is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." In essence, attorneys are under an obligation to "stop and think" before preparing requests for or responses to discovery, and to weigh potential benefits against the cost. In limiting the frequency or extent of discovery, moreover, the court is called upon by Rule 26(b)(1) to consider whether the discovery sought could be obtained in a "more convenient, less burdensome, or less expensive" manner.

20.22 Coordination in Multi-Party Litigation: Lead/Liaison Counsel; Committees.[15]

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Complex litigation often involves numerous parties, many of whom have common or similar interests but separate counsel. Traditional procedures—which assume that all papers and documents are served on all attorneys and that each attorney will file motions, present arguments, and conduct examinations—may result in enormous waste of time, money, and energy, as well as in confusion and indirection.

In some cases the attorneys on their own coordinate their activities to eliminate any significant problems among themselves or to their clients, other counsel, and the court. More often, however, the court should itself institute special procedures under which the practices normally incident to individual representation are reshaped in the interests of economy and efficiency. Although details vary, the basic approach is to select and empower, by court order if necessary, one or more attorneys to act on behalf of other counsel and parties in handling particular aspects of the litigation.

20.221 Organizational Structures.

Various names, often suggestive of the nature of powers and responsibilities, have been given to counsel charged with acting during the litigation not only on behalf of their own clients, but also for a group of other attorneys and parties similarly situated.

* **Liaison counsel** is a term generally used to describe attorneys whose primary duties for the group involve essentially administrative matters, such as communications with other counsel and the court. Typically they receive

15. Reference: MCL 1.90-1.92, 4.53.

various notices, orders, motions, and briefs on behalf of the group, and then make appropriate distributions within the group. They may initiate and convene meetings of the group, give notice of and report on major developments in the case, and otherwise aid in coordinating activities and positions. Such counsel may act for the group in managing document depositories and in resolving scheduling conflicts. An attorney with offices in the same locality as the court is usually selected as liaison counsel.

* **Lead counsel** ordinarily have major responsibility for formulating and presenting positions on substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing plans for conduct of the litigation, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.

* **Trial counsel** may be selected to serve as principal attorneys for the group at trial in presenting arguments, making objections, conducting examination of witnesses, and generally organizing and coordinating the work of the other attorneys on the trial team.

* **Committees of counsel**—which may be given such names as steering committees, coordinating committees, management committees, executive committees, discovery committees, and trial teams—may be formed to serve a wide range of functions. Particularly in cases in which the interests and positions of group members are similar but not identical, a committee of counsel representing the different interests may give valuable guidance to lead counsel. Committees may be formed to carry out various tasks assigned by lead counsel, such as preparation of briefs or conduct of portions of the discovery program, but care must be taken to avoid unnecessary duplication of efforts. See § 24.2.

The types of appointments and the particular responsibilities to be assigned in multiparty cases will depend upon many factors, of which the most important is the number of parties having separate but compatible positions in the litigation. In some cases both lead and liaison counsel may be appointed for the plaintiffs, with only liaison counsel appointed for defendants. One attorney may perform the combined roles of liaison, lead, and trial counsel, or these responsibilities may be performed by different attorneys. The functions of lead counsel may be handled by one person or by several, although the number should not be so large as to hamper the unity of direction that is needed. Committees should not be formed to accomplish tasks that one lawyer can perform satisfactorily.

20.222 Powers and Responsibilities of Lead and Liaison Counsel.

The functions of lead, liaison, and trial counsel, and of each committee, should ordinarily be memorialized either in a court order or in a separate document drafted by the affected counsel.[16] This writing not only clarifies responsibilities within the group but also informs other counsel and the court of the basic powers and authority conferred. However, any attempt to detail these functions precisely or to draw an indelible line separating those decisions that may be made unilaterally by the designated counsel from those that may be made only with concurrence of an affected party may be impractical and indeed unwise. Designated[17] counsel usually should attempt to work through consensus rather than relying upon terms of the court's appointment order when making decisions that may have a critical impact on the litigation, such as making admissions on arguably disputed facts.

Counsel selected for a position of leadership have an obligation to maintain appropriate communication with other attorneys in the group, periodically informing them of the progress of the litigation and consulting with them when major decisions affecting their clients must be made.[18] Sound judgment is required concerning the extent of these communications—too much may defeat the objectives of efficiency and economy, while too little may infringe improperly upon the rights of the parties. Sound judgment likewise must be exercised in resolving disputes that may arise within the group, or indeed within a committee of counsel. Counsel should seek accord through

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16. See Sample Order, § 41.31.

17. For convenience, MCL 2d uses the term "designated counsel" to refer to all attorneys who provide service in the litigation on behalf of a group of parties. The term includes lead counsel, liaison counsel, and members of committees, whether selected by the litigants or appointed by the court.

18. Communications among designated counsel, other attorneys on whose behalf they act, and their respective clients ordinarily should not be deemed a waiver of the work-product rule or the attorney-client privilege. Although unnecessary, a specific order of the court may be sought to allay any concern on this matter.

persuasion and compromise. However, if substantial consensus cannot be achieved and if a single position need not be taken by all members of the group, members may proceed on that matter individually or by sub-groups rather than being bound by majority vote. Moreover, the conduct of examination of deponents and other witnesses by or through lead counsel should not preclude non-duplicative examination by another attorney with respect to matters peculiar to that attorney's client.

Because they communicate more frequently with opposing counsel and likely will be more familiar with developments in the case, designated counsel may be in the best position to initiate, conduct, and evaluate settlement discussions for the group. They must be aware, however, of the limitations on their authority to act on behalf of the group on such matters, as well as the potential for conflict between the interests of their own clients and those of other parties in the group, and should not attempt to enter into binding settlements without specific authority.[19] Nor should they, without authorization of the court, allow settlement discussions to interfere with their responsibility to see that the litigation proceeds on schedule through the pretrial proceedings toward trial.

20.223 Compensation.

In fairness, expenses incurred and fees earned by special counsel and committees should not be borne solely by their own clients, but rather should be shared equitably by all benefiting from their services and relieved from similar obligations. If possible, the terms and procedures for payment should be established by agreement among counsel. If a consensus cannot be reached, however, the judge has the power and duty to order fair reimbursement and compensation.[20] Whether done by agreement or court order,

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19. Major difficulties may arise if, shortly before trial, offers of partial settlement are made to clients of attorneys who have played key roles in preparation of the case. Counsel who accept such roles should understand that their responsibilities in the litigation may survive the dismissal of their own client.

20. See In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977).

these procedures should be established before substantial services are rendered and provision should be made for periodic billings during the litigation or for creation of a fund through advance assessments of members of the group. The agreement or order should provide that parties entering partial settlements make appropriate contributions with respect to services already rendered by designated counsel, and in some cases may appropriately require contributions from parties in later filed or assigned cases who benefit from the work of special counsel.

When fees and expenses are to be allocated to co-parties, just as when counsel seeks their recovery against adverse parties, the court should require at the outset that contemporaneous time and expense records be kept and may also require that these be periodically filed under seal.[21] Designated counsel should limit the number of persons who will seek remuneration for participation at conferences, in depositions, on briefs, and on other work. The court should make clear at the first pretrial conference that compensation will not be approved for unnecessary participation or duplication of activities.

20.224 Court's Responsibilities.

To the extent justified by the circumstances, the court should oversee case management arrangements by selecting attorneys to be responsible for various duties, prescribing their functions, and providing for their compensation.

Few decisions by the court in complex litigation, however, are as potentially significant and sensitive as those that control the degree of participation by counsel. Attorneys are anxious to ensure that their clients' interests will not be jeopardized through ineffective representation; moreover, they may be affected by personal considerations involving pride, jealousy, and potential remuneration. Judges naturally and properly prefer to give special consideration to the suggestions of counsel in such

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21. See Sample Order § 41.32.

matters. Unfortunately, in some cases substantial problems have arisen that might have been avoided had the court not accepted uncritically an organizational plan proposed by the attorneys or so readily approved an arrangement that appeared to have a concurrence of a "majority" of those affected. The court should make an independent assessment of the functions, identities, and organization of designated counsel, considering but not necessarily adopting the views of counsel. An evidentiary hearing may be needed in some cases.

Attorneys should not be selected or approved by the court to serve in these positions unless they have the resources, the commitment, and the ability to accomplish the assigned tasks. They should be able to command the respect of their colleagues and work cooperatively with opposing counsel and the court. Although prior experience in similar roles in other litigation is usually valuable, it may demonstrate that an attorney is ill-suited for such an assignment or it may have left personal antagonisms that will be counterproductive in the present case.

If fees are to be allocated to co-parties or sought from adverse parties, the court may wish to inquire into normal or anticipated billing rates and should be sure that agreements regarding proposed appointments have not been induced through improper understandings concerning the assignment of work to be performed during the litigation.[22] The court should approve neither more committees nor more persons on a committee than are needed to do the job.[23] If the litigation involves separate related actions, the court may consider the number of suits and the extent of their progress prior to coordination and consolidation, but should also be aware that cases may have been filed as separate actions or instituted or pursued precipitately in order to gain leverage in

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22. See, e.g., In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), aff'd in part and rev'd in part, 751 F.2d 562 (3d Cir. 1984).

23. Properly controlled, division of work among several firms may, however, not only facilitate preparation for trial, but also spread the risk of litigation and thereby foster enforcement of federal statutory policies by private litigants. Id. at 584.

the appointment of designated counsel and committees. If there are major problems in deciding upon a proper organization of counsel and the judge believes it would be imprudent to probe personally into their private understandings and discussions, the matter may be referred to a magistrate, or perhaps a master, for investigation and recommendation.

20.225 Related Litigation.

If related litigation is pending in other federal or state courts, the judges involved should consult and endeavor to enter joint or parallel orders governing the use and compensation of common committees and counsel.[24] Even if such orders are not feasible, the judge may urge or direct counsel to confer with the attorneys involved in the other courts in an effort to reduce duplication and potential conflicts and to achieve the benefits of efficiency and economy through coordination and sharing of resources. In any event, the courts should exchange copies of orders that might affect proceedings in other courts. For further discussion, see § 31.

20.23 Disqualification.

Counsel in complex litigation should be alert to the possibility of their disqualification because they may become material witnesses at trial or because an adverse party is a current or former client.[25] Each law firm should make an early, thorough inquiry—preferably before accepting representation—to determine whether any of its partners or associates are presently representing another party on any matter or have previously represented another party on a matter substantially related to the present litigation. This investigation should include not only persons and companies formally aligned as adverse parties, but also companies and organizations affiliated with

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24. See Sample Order, § 41.51.

25. Disqualification is most often premised upon the attorney's obligation to preserve a client's secrets. See, e.g., Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977) (former client); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) (current client).

such parties, co-parties whose posture might change as the litigation progresses, and persons or companies that might later be added as parties.[26] Firms should also take steps to guard against creation of disqualifying conflicts as a result of acceptance of new clients or employment of new partners or associates during the course of the litigation. These inquiries and safeguards are particularly important with respect to attorneys seeking to represent a class or to act as lead counsel in multi-party litigation.

Questions about possible disqualification—including such matters as whether all members of the firm will be disqualified,[27] whether associated counsel will also be disqualified,[28] and whether a firm may continue in the litigation because of consent,[29]

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26. Thus far, class members have not usually been treated as "parties" for the purpose of determining disqualification of attorneys. Whether this approach will continue to be followed is not clear, particularly in view of In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir. 1982) (holding judge to be disqualified because of spouse's ownership of stock in class members), aff'd under 28 U.S.C. § 2109, sub nom. Arizona v. United States District Court, 459 U.S. 1191 (1983).

27. Timely erection of a "Chinese wall" to isolate attorneys with a prior relationship to an adverse party from other members of the firm may in some circumstances avoid disqualification. See, e.g., LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983); Central Milk Prod. Coop. v. Sentry Food Stores, Inc., 573 F.2d 988 (8th Cir. 1978); Kasselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977); but cf. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (simultaneous representation impermissible despite "Chinese wall"). As to whether the entire firm is disqualified if one of its members will be a key witness, compare In re Rappaport, 558 F.2d 87 (2d Cir. 1977), with Bottaro v. Hatton Assoc., 680 F.2d 895 (2d Cir. 1982).

28. See Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977); but see State of Arkansas v. Dean Food Prods. Co., 605 F.2d 380 (8th Cir. 1979); Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979).

29. See, e.g., Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981); cf. Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978), cert. denied, 439 U.S. 955 (1979).

hardship,[30] or waiver of the right to object[31]—should be addressed as soon as they become known and should be resolved promptly. The pendency of such disputes may divert attention from pretrial preparations directed towards the merits of the litigation, and additional delays may result if appellate review is sought[32] or if replacement counsel are precluded from using the work product of the disqualified firm.[33] Because of the disruption such motions may produce, spurious motions to disqualify have sometimes been filed without appropriate investigation and study, primarily as a device to harass and delay. In such circumstances, appropriate sanctions should be imposed by the court under 28 U.S.C. § 1927 or Fed. R. Civ. P. 11.[34]

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30. The "substantial hardship" exception is frequently cited as a basis for permitting counsel to continue if the need for such attorney to testify on behalf of the client arises late in the litigation. This exception is not, however, available if the likelihood of such testimony should have been anticipated earlier in the case. See General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704 (6th Cir. 1982).

31. See, e.g., City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio), aff'd, 573 F.2d 1310 (6th Cir. 1977), cert. denied, 435 U.S. 996 (1978).

32. An order overruling a motion to disqualify counsel in a civil case is not immediately appealable as a matter of right, Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981); nor is an order granting such a motion in a criminal case, Flanagan v. United States, 465 U.S. 259 (1984), or in a civil case, Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985). Petitions for writs of mandamus may, however, be filed even if there is no right of appeal.

33. The extent to which the work product of disqualified counsel may be turned over to new counsel involves a balancing of factors. See First Wisconsin Mortg. Trust v. First Wisconsin Corp., 584 F.2d 201 (7th Cir. 1978) (en banc); International Business Machines Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978).

34. See Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983); North American Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293 (S.D.N.Y. 1979), aff'd, No. 79-7564 (2d Cir. Jan. 28, 1980).

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21.1 PRELIMINARY MATTERS.[1]

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Immediately upon assignment of potentially complex litigation, the judge should review the complaint and other documents in the case file, ascertain from the Clerk's office whether there are related cases assigned to other judges of the court, and make preliminary determinations concerning management of the case.

21.11 Reassignment.

Reassignment, if appropriate because of related litigation pending in the same court or because of recusal or disqualification problems, should be accomplished immediately. Judges to whom the litigation might be reassigned should check for problems of recusal before notice of the reassignment is given. See § 20.121.

21.12 Scheduling of Initial Conference.

The court should determine when to hold the initial conference with counsel. In some cases the judge may already know (or can learn from plaintiff's counsel) who will be representing the defendants, so that notice of the conference and of any interim administrative measures may be given even before responses to the complaint are filed. The first conference should be held early in the litigation, well before the end of the 120 day period for entry of the scheduling order mandated by Fed. R. Civ. P. 16(b). However, if the conference is held too quickly, counsel without prior familiarity with the controversy may be limited in the contributions and insight they can provide the court.

In its notice of the conference, which should ordinarily be directed to the attorneys in all related cases that possibly might be consolidated or coordinated, the court should either indicate the potential topics to be considered or establish a procedure

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1. Reference: MCL 1.00, 1.94, 5.02.

by which the attorneys are to submit or suggest a proposed agenda.[2] The notice, which may direct counsel to become familiar with the principles and suggestions contained in the Manual, typically should require them to confer in advance in an effort to formulate one or more plans for clarifying the issues and conducting discovery. To reduce the length of the conference and better prepare the court, counsel may be directed to submit written statements of their preliminary viewpoints concerning the nature and dimensions of the lawsuit and the major problems likely to be encountered in management of the litigation.[3]

21.13 Interim Measures.

The court may sua sponte institute special procedures at the outset of the case, subject to revision or rescission at the initial conference.[4] For example, in advance of the initial conference the judge may—

* suspend temporarily some local rules, such as those requiring the appearance or association of local counsel or setting a deadline for joining new parties.[5]

* create a single master file for the litigation, eliminating the need for multiple filings of the same type of document when several related cases have common parties.

* extend the time for filing responses to the complaint until after the initial conference, making unnecessary any individual requests for extensions.

* reduce under Fed. R. Civ. P. 5 the number of parties upon whom service of documents must be made.

* preclude or suspend discovery requests and responses until after the initial conference, except as permitted by the court in exceptional circumstances.

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2. See Sample Order, § 41.2.

3. Reports at this stage should not have any binding effect upon the parties, and the court may wish to provide that opposing parties will be precluded from using them as admissions under Fed. R. Evid. 801(d)(2) or in later arguments to the court.

4. See Sample Order, § 41.2.

5. Rule 3 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation provides that parties in actions transferred under 28 U.S.C. § 1407 may continue to be represented in the transferee district by existing counsel, without being required to obtain local counsel.

* limit the length of briefs and eliminate tables of contents and lists of authorities.

* order that documents and other evidence not be destroyed without leave of court.[6]

21.14 Class Actions.[7]

The judge should promptly identify cases that include claims by or against a class.[8] The decision whether to certify a class will usually have a substantial impact upon further proceedings in the litigation, including the scope of discovery, the definition of issues, the length and complexity of trial, and the opportunities for settlement. Therefore, at the initial conference the court should establish a schedule for resolving the issue of class certification, bearing in mind the mandate of Fed. R. Civ. P. 23(c) that this decision be made "as soon as practicable." Before setting a date for submission of the issue, the court should ascertain what discovery on class questions is needed and how such discovery may be conducted most efficiently and economically; and in some complex cases more time may be required than is provided by local rules. For a detailed discussion of the principles and procedures involved in management of class actions, see § 30.

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6. Preservation orders may impose burdens on the parties and be difficult to implement. Early consideration should be given to relieving parties from the hardship of overly broad preservation orders. See § 21.442.

7. Reference: MCL 1.40.

8. To facilitate identification and early resolution of class questions, many courts by local rule require that the initial pleadings presenting class claims be conspicuously labelled as such and include detailed allegations with respect to the requirements of Fed. R. Civ. P. 23. See, e.g., Local Rules 18.1, 18.2, United States District Court for the Central District of California.

21.2 CONFERENCES.[9]

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Conferences of the types described in Fed. R. Civ. P. 16 and 26(f) provide the primary means for exercise of judicial supervision and control during pretrial proceedings. These conferences should not be conducted as a formalistic ritual, but in the most productive and meaningful manner possible. Their timing, form, and scope should be the result of careful planning by the court, with the aid of counsel at least after the initial conference. Both the judge and the attorneys should be well prepared by prior study to give knowledgeable consideration to the subjects to be addressed at the conferences, including those specified in Fed. R. Civ. P. 16(c). Notice of a conference, therefore, should indicate its purposes and either list the items to be covered or provide a procedure for developing an agenda.

21.21 Timing and Frequency.

At a minimum, an initial conference should be held in each case and, if the case is not resolved by summary disposition or settlement, the court should convene a final pretrial conference.

* The initial conference, described in greater detail in § 21.24, is held early in the litigation (see § 21.12) and, among other matters, should result in the scheduling order prescribed by Fed. R. Civ. P. 16(b) and, to the extent feasible, in a discovery order under Rule 26(f).

* The final pretrial conference, described in greater detail in § 21.6, is held shortly before trial for the purposes indicated in Fed. R. Civ. P. 16(d). More than one such conference may be needed, particularly if more than one trial is to be held.

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9. Reference: MCL 0.40, 1.00, 1.11, 1.20, 1.60, 1.95, 2.00, 2.80, 3.00, 4.00.

Complex litigation ordinarily will require additional intervening conferences during the progress of pretrial proceedings. The label given such a conference—status conference, discovery conference, or simply pretrial conference—is a matter of personal preference. Whether these additional conferences should be held at regular intervals, or as particular phases of the proceedings have been completed, or in response to suggestions of counsel as the need arises, will depend upon the circumstances of the case, but is a subject that should be addressed at the initial conference and considered again at subsequent conferences.[10] At each conference the court should set the approximate time, if not the actual date, for the next conference.

21.22 Form.

The manner in which a specific conference may be conducted most productively depends upon many factors, not the least of which are the personalities of the judge and the attorneys. The conference may be held in the courtroom or in chambers, in person or by telephone, with the formalities of an evidentiary hearing or quite informally. Conferences in any given case may take different forms, each being conducted in a manner suitable to the current needs of the litigation.

Although "off-the-record" discussions tend to promote a more candid exchange of views and benefit the planning process, recording of conferences may eliminate later disagreements—particularly if oral directions or rulings are to be made by the judge at the conference—and indeed may be required if requested by counsel.[11] Decisions, time limits, and other matters announced during pretrial conferences should be memorialized by transcription of the proceedings, by entries on motions or dockets, or by separate

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10. Status reports may be used to keep the court advised of the progress of the case between conferences.

11. See Commercial Credit Equip. Corp. v. L & A Contr'g Co., 549 F.2d 979 (5th Cir. 1977); National Farmers' Org. Inc. v. Oliver, 530 F.2d 815 (8th Cir. 1976).

orders, and counsel may be directed to submit proposed orders incorporating the court's oral rulings.

21.23 Attendance.

Conferences with the judge are customarily attended by at least one attorney for each party. In some complex litigation, however, the court may decide to depart from this model and—

* relieve some counsel from an obligation to attend, either because their interests will be fully represented by others in the litigation or because they have little interest in the matters to be discussed at a particular conference. The court may appropriately limit the number of attorneys whose participation at the conference will be compensated in any fee award that it may later make.

* provide for the attendance of a magistrate or master to whom matters to be discussed at the conference have been, or may be, delegated or referred. Counsel involved in related litigation in other courts may also be invited.

* call for attendance of the parties themselves.[12] Although the presence of clients may encourage exaggerated contentiousness by counsel, their attendance may be helpful in settlement discussions and in narrowing issues that might significantly affect the potential costs of further proceedings.

21.24 Initial Conference.

The initial conference should set the proper tone and direction for the remainder of the litigation. A tentative agenda should have been established, and appropriate preparatory steps taken by counsel. See § 21.12. At the conference the attorneys should be given an opportunity to supplement any written reports previously submitted, stating their views on the nature and potential dimensions of the litigation, the major procedural and substantive problems likely to be encountered, and procedures for efficient management of the case. The initial conference is often the first opportunity for the court to assume control over management of the case; the judge should conduct it with firmness and fairness, curtailing undue repetition and contentiousness by counsel, insisting

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12. As to the court's authority to order attendance by clients, see In re LaMarre, 494 F.2d 753 (6th Cir. 1974).

upon professional courtesy, and promptly making any rulings that may appropriately be made.

The primary objective of the conference is to develop (subject to later revision and refinement) a plan for a just, expeditious, and inexpensive resolution of the litigation. This program should include schedules and other procedures for identifying and resolving disputed issues of law, clarifying and narrowing disputed issues of fact, conducting discovery in an efficient and economical manner, and preparing for trial if the case is not resolved by settlement or summary disposition. Coordination or consolidation with any related litigation should be considered, and, when appropriate, measures should be taken to facilitate communication and coordination among counsel and with the court. The conference should result in an order that serves the purposes of Fed. R. Civ. P. 16(b) and 26(f). More than one conference may be required to accomplish all of these objectives.

Although the format and agenda for the conference must be tailored to the needs and circumstances of the case, among the topics that may be appropriate for consideration are the following:[13]

* problems of recusal or disqualification of the judge, present and potential. (§ 20.121) Inquiry may also be made into possible disqualification of counsel. (§ 20.23)
* coordination with related litigation in the same or other courts, and provision for later filings, removals, or transfers. (§§ 20.123, 31)
* use of magistrates, masters, or other judges in providing judicial supervision. (§§ 20.122, 20.14)
* cooperation and coordination among counsel. (§ 20.21)
* appointment of liaison/lead/trial counsel and special committees. (§ 20.22)
* maintenance of time and expense records of counsel. (§§ 20.223, 24)
* reduction in filing and service requirements through master file and orders under Fed. R. Civ. P. 5. (§§ 21.13, 21.32)

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13. See also Checklist, § 40.1.

* suspension or revision of local rules. (§ 21.13)

* methods to identify and resolve disputed issues of law, including limitations on joinder of parties and additional pleadings. (§§ 21.32, 21.33)

* applicability and enforceability of arbitration clauses.[14]

* plans for prompt determination of class action questions, including discovery and briefing schedules. (§ 30.1)

* procedures to clarify and narrow issues of fact. (§ 21.33)

* management of discovery (§ 21.4), including such matters as:
  —preservation of evidence
  —use of document depositories and computerized storage
  —adoption of uniform numbering system for documents
  —informal discovery and cost-reduction measures
  —protective orders and special procedures for handling claims of confidentiality and privilege
  —controlling discovery through various limitations upon form, scope, and sequencing

* procedures to facilitate prompt and efficient resolution of discovery disputes. (§§ 21.423, 21.456)

* inquiry into potential expert testimony, summaries, and sampling evidence. (§§ 21.48, 21.51)

* preliminary planning for trial (§§ 21.6, 22), including the possibility of separate trials, potential techniques to shorten the length of trial and make presentation more understandable, and possible referral to a magistrate or master. (§ 21.5)

* establishment of a tentative or firm trial date, with schedules and deadlines for completing various pretrial phases of the case, including the time for the next conference.

Possible settlement of the litigation should be discussed at the first conference, as well as later ones. Although settlement should always be encouraged, these discussions do not justify suspending discovery or delaying other pretrial processes, and caution should be exercised when settlement is discussed prior to resolution of any class certification questions. See § 30.45. The court should impose a continuing duty on all parties to disclose promptly any kind of settlement. See § 23.23.

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14. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985); Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985); Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1 (1983).

21.3 FORMULATION OF ISSUES.

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21.31 Interrelationship with Discovery.[15]

To the extent that critical issues of law and fact are apparent or readily definable at the outset, the court should not hesitate to resolve issues of law through early rulings on appropriate motions and to direct that discovery be focused upon facts relating to the remaining issues.

Frequently, however, the real issues between the parties, as well as the nature of the claims and defenses, may be clouded by imprecise or broad allegations tolerated by notice pleading. Efforts to clarify and narrow the issues will likely be met by resistance from the plaintiffs, the defendants, or both—the plaintiffs asserting that this cannot be done fairly until after substantial discovery, and the defendants contending that this is not practicable until after refinement of the plaintiffs' claims. Nonetheless, the judge must insist upon some definition and structuring of issues, albeit tentative, to form the basis for efficient initial discovery.

Attempts to define all issues prior to any discovery are ordinarily as unproductive as attempts to complete all discovery prior to any formulation of issues; the two are typically interrelated. Discovery based upon the preliminary definition of issues may lead to a revision of those issues, which in turn may call for changes in the conduct of discovery. The court nevertheless should use the pleadings and the positions of the parties, as developed for the initial conference, as a starting point for identifying the

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15. Reference: MCL 1.20, 1.30, 1.60, 1.80, 2.10.

issues on which to construct the discovery plan. Regular reevaluation will be necessary to assure that issue refinement and conduct of discovery proceed in tandem.[16]

21.32 Pleading and Motion Practice.[17]

To aid in clarifying the issues, the court should establish a schedule for the filing of all pleadings in the case, including counterclaims, cross-claims, third-party complaints, and amendments to existing pleadings. The schedule may provide for a suspension in the filing of certain pleadings if statutes of limitations present no problems. The schedule may also set a deadline (after a reasonable period for discovery) for adding new parties, claims, or defenses. Relief from such deadlines should be allowed only upon a showing of good cause,[18] particularly if an extension would affect the rights of the parties or the potential scope or extent of further discovery or trial.

The court should ordinarily establish procedures under which existing discovery materials will be made available to, and usable against, parties added during the course of discovery. See § 21.453. To reduce unnecessary paperwork, courts sometimes enter orders providing that specified pleadings, motions, and orders, unless specifically disavowed by a party, are "deemed" filed in cases later brought, transferred, or removed, without actually filing the document. See Sample Order, § 41.52. Limitations on the length of briefs, together with elimination of lists of authorities, are frequently imposed.

Frivolous motions under Fed. R. Civ. P. 11, 12, and 56—such as those filed to delay or confuse the proceedings or to "educate" the court without a good faith belief in their merit—should not be countenanced. However, potentially meritorious motions—particularly those which, if granted, would substantially affect further proceedings in the litigation—should be welcomed by the court and given prompt attention. The court

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16. See United States v. American Tel. & Tel. Co., 461 F.Supp. 1314 (D.D.C. 1978).

17. Reference: MCL 1.20, 1.30, 1.60, 1.80, 2.11.

18. For example, relief may be warranted when requested promptly after obtaining new information in the latter stages of discovery that has been diligently conducted.

should not be reluctant to grant full or partial summary judgment when warranted by facts that, after the adverse party has had adequate notice and opportunity for discovery, are shown not to be in genuine dispute. Because of the number of counsel involved and the time that may be needed, oral arguments and evidentiary hearings on these motions in complex cases should ordinarily be held in conjunction with other conferences in the case or by special setting, rather than as part of a regular motion docket or calendar call of the court.

21.33 Techniques to Clarify, Narrow, and Resolve Issues.[19]

Among the various methods that have been successfully used, singly or in combination, to help clarify, narrow, and resolve issues in complex litigation are the following:

* non-binding statements of counsel, such as those that may be required at the initial conference. See § 21.12. These may be updated periodically by written reports or oral statements at later conferences.

* voluntary abandonment of tenuous claims or defenses by the parties, often after probing by the court into the likelihood of success and the potential disadvantages of pursuing such contentions.

* requiring counsel to list the essential elements of the cause of action. This discipline, designed to clarify the claims, may assist in identifying elements in dispute and frequently results in abandonment of essentially duplicative theories of recovery.

* formal amendments to the pleadings, including those resulting from an order under Fed. R. Civ. P. 12 striking allegations or requiring a more definite statement.

* use of the court's powers under Fed. R. Civ. P. 16(c)(1) to eliminate insubstantial claims or defenses.[20] The 1983 revision to the Rule was intended to confirm the power of the court to act without formal motion.

* contention interrogatories, especially when served after adequate opportunity for discovery.

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19. Reference: MCL 1.20, 2.11, 4.10, 4.11, 4.12.

20. See, e.g., Diaz v. Schwerman Trucking Co., 709 F.2d 1371 (11th Cir. 1983); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349 (5th Cir. 1983); Holcomb v. Aetna Life Ins. Co., 255 F.2d 577, 580-81 (10th Cir.), cert. denied, 358 U.S. 879 (1958).

* rulings on motions for full or partial summary judgment. Rule 56(d) permits the court, even when such a motion is denied, to define the issues that remain in genuine dispute.

* sanctions for violations of Fed. R. Civ. P. 16, 26, and 37 in the form of precluding certain contentions or evidence.

* requiring with respect to one or more issues that the parties present a detailed outline of their contentions, with supporting facts and evidence. When these statements are required after completion of discovery, the court typically orders, well in advance of trial, that the parties will be precluded at trial from raising other issues or contentions and from offering additional evidence absent good cause.

* requiring the parties to present in advance of trial proposed instructions in jury cases, or proposed findings of fact and conclusions of law in non-jury cases.

* conducting preliminary hearings under Fed. R. Evid. 104 on the admissibility of evidence.

* conducting a separate trial under Fed. R. Civ. P. 42(b) of issues that may render unnecessary or substantially alter the scope of further discovery or trial on one or more other issues. Special verdicts and interrogatories from the jury may be helpful and on some issues the parties may waive jury trial.

* certifications under 28 U.S.C. § 1292(b) and Fed. R. Civ. P. 54(b) to obtain early appellate resolution of critical issues.

To define the issues in complex cases in a manner that will be fair to all parties and reduce the expense of litigation is difficult. Counsel will likely disagree as to how this should be accomplished. However, issues that affect the scope or extent of discovery or trial--such as the statute of limitations, res judicata, and releases--should be determined as soon as possible. For a discussion of some of these issues in particular types of litigation, see § 33.

21.34 Summary Judgment.[21]

Motions under Fed. R. Civ P. 56 deserve special mention because of the vital role they often play in defining, narrowing, and resolving issues in the case. Summary judgment may eliminate the need for further proceedings or, if only "partial," at least

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21. Reference: MCL 1.20, 1.40, 2.11.

reduce the scope of additional discovery or trial. If counsel are uncooperative in entering stipulations, the court may invoke the often overlooked provision of Rule 56(d):

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Even if the motion is denied in its entirety, the parties' formulation of their positions with respect to the motion may be valuable to themselves, to opposing counsel, and to the court in clarifying the issues and identifying those on which further discovery should be conducted.[22]

The standards for determining the merits of a Rule 56 motion—for deciding whether material facts are in genuine dispute—are the same in complex cases as in routine litigation.[23] Legal issues that depend directly upon "hard" or objective facts are, of course, more susceptible to summary judgment than those that involve subjective matters or conclusions to be drawn from underlying facts. Even in the latter situation, however, summary judgment may be granted in appropriate circumstances.[24]

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22. The court, however, should discourage the filing of Rule 56 motions designed merely to "educate" the court, contrary to the good faith requirements of Rules 7 and 11. See also the special sanctions available under Rule 56(g). Ordinarily the court should discourage the filing of motions that seek a ruling on a particular legal theory if the ruling would not shorten discovery or trial, clarify the issues, or facilitate settlement. Such contentions are presented more efficiently in the final pretrial briefs.

23. See Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1110-12 (5th Cir. 1979); see generally Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465 (1984).

24. Compare Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), with Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962). For a survey of issues in antitrust and securities cases on which summary judgment has been granted, see W. Schwarzer, Managing Antitrust and Other Complex Litigation, § 2-3(B)(3) (1982).

The procedures for considering Rule 56 motions are prescribed in the rule itself. In many complex cases, however, substantially greater notice than the 10-day minimum specified in Rule 56(c) may be needed, and there is little reason to insist that the opposing parties seek additional time for discovery through the procedures of Rule 56(f). Rather, the judge at the initial conference (and at later conferences, as appropriate) should attempt to ascertain what issues are or may become appropriate for summary judgment and establish, at least tentatively, a schedule for filing and submitting such motions. The schedule should afford the parties an adequate opportunity for discovery and presentation of relevant evidence but, to avoid unnecessary pretrial activities, should call for submission as early as may be done fairly.[25]

In determining whether a genuine dispute exists concerning some fact on which the Rule 56 motion depends, the court is to consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits."[26] Fed. R. Civ. P. 56(c). According to Rule 56(e), the affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[27] These

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25. In cases brought as class actions under Fed. R. Civ. P. 23, the timing for presentation and consideration of a Rule 56 motion should take into account the schedule for determining whether the case is to be maintained on behalf of or against the class. Although there is substantial precedent for granting summary judgment (or a Rule 12 motion) prior to any determination of the class allegations, such an order will result in a judgment that does not bind the class and may also cause complications in appellate proceedings as a result of mootness or lack of standing. See § 30.11.

26. In the court's discretion, an evidentiary hearing under Fed. R. Civ. P. 43(e) may also be held to determine whether a genuine factual dispute exists. See, e.g., County of Oakland v. City of Berkley, 742 F.2d 289, 297-298 (6th Cir. 1984) (evidentiary hearing to clarify vague affidavits submitted in connection with summary judgment motion); Utah v. Marsh, 740 F.2d 799, 801 n.2 (10th Cir. 1984) (evidentiary hearing held after failure of parties to stipulate; summary judgment supported by uncontradicted evidence). See also 9 C. Wright & A. Miller, Federal Practice and Procedures: § 2416 (1971).

27. The requirements of personal knowledge and admissibility in evidence presumably apply also to the use of depositions and interrogatory answers.

provisions, although also applicable in routine litigation, have particular significance in cases involving thousands of pages of discovery materials as well as major disputes concerning the admissibility of various items in those documents or in affidavits. Therefore, in setting a schedule for Rule 56 motions, the court should consider establishing procedures to highlight the evidence upon which some claimed factual dispute is based and to resolve critical problems of admissibility. To accomplish the former, the court may direct the filing of briefs or statements of facts or contentions, perhaps requiring references to source materials, with provision that the parties shall be precluded from presenting matters not included therein;[28] to accomplish the latter, it may conduct a hearing under Fed. R. Evid. 104 to determine the admissibility of the challenged evidence.[29]

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28. Filing a brief or statement pursuant to a preclusionary order is equivalent to filing admissions under Fed. R. Civ. P. 36. Absent such a direction, parties may on appeal assert a factual dispute based on discovery materials never called to the attention of the trial court. See Keiser v. Coliseum Properties, Inc., 614 F.2d 406 (5th Cir. 1980).

29. In re Japanese Elec. Prods. Antitrust Litigation, 723 F.2d 238, 259-60 (3d Cir. 1983) (explicitly approving the use of both procedures in protracted cases to create a record for considering summary judgment motions), cert. granted, 105 S. Ct. 1863 (1985).

21.4 DISCOVERY.

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21.41 Interrelationship with Issues.

The general rule stated in Fed. R. Civ. P. 26(b)—permitting discovery "of any matter, not privileged, which is relevant to the subject matter" of the litigation—does not preclude consideration of the issues when planning a discovery program. The same section of Rule 26 recognizes an objection to discovery of information that would be

neither admissible in evidence nor reasonably calculated to lead to admissible evidence.[30] Subsections (a), (c), and (d) of Rule 26 have long empowered the court to control the scope, extent, frequency, and sequence of discovery. The authority and responsibility of the judge to exercise appropriate control over the discovery process, recognized by the Supreme Court in Herbert v. Lando,[31] have been given additional emphasis by amendments to Rule 16 and 26.

Early identification of major issues in the litigation, as discussed in § 21.3, usually is essential to the formulation of a fair plan for conducting discovery. Although subject to modification on the basis of information learned in the initial discovery period, this preliminary delineation of key issues provides a foundation for imposing appropriate controls and limitations to make discovery more efficient.

The court should not, however, necessarily limit discovery to issues that should be resolved early in the litigation, like those under Fed. R. Civ. P. 23 or those involving a special defense such as the statute of limitations. For example, limiting inspections to documents bearing on a primary issue may be wasteful if the same set of records may be relevant to secondary issues. Similarly, in deposing a witness knowledgeable about both critical and marginal issues, counsel should not be restricted to the critical issues if examination on the other subjects would not unduly lengthen the deposition.

Limitations on the scope or form of discovery based on the early delineation of the issues should be imposed in such a way that, if a broadening of issues is later justified, the additional discovery will be supplemental rather than duplicative. The discovery program, in essence, should take into account the potential benefits and costs of alternative approaches. For example, in deciding whether to defer discovery on damages until a determination of the liability questions, the court should compare the

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30. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350-54 (1978).

31. 441 U.S. 153, 177-78 (1979).

benefits to be derived from this approach if there is a finding of no liability with the additional time and costs of damage discovery if there is a finding of liability, as well as the possible need for this evidence in negotiating or evaluating settlement of the litigation.[32] For these reasons, the judge should seldom approve a plan of discovery that unduly postpones discovery regarding damages; and, indeed, the court should often consider questions of law regarding the measure of damages at an early stage.

21.42 Planning and Control.[33]

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The importance of effective planning and control of discovery in complex litigation can hardly be overemphasized. Procedures should be adopted to facilitate the orderly, cost-effective acquisition of information and materials and the prompt resolution of discovery disputes. Unfortunately, no single format can be prescribed for all cases; the discovery program must be tailored to the circumstances of the case, a task that depends upon the collaborative, creative efforts of the judge and the attorneys.[34] Moreover, the discovery plan should be periodically monitored and evaluated, and revised when merited by the circumstances.

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32. The reverse approach—conducting discovery on damages before discovery on liability—has led to early settlement in some cases.

33. Reference: MCL 0.50, 0.60, 1.22, 1.50, 1.501, 1.70, 1.93, 1.95, 2.20, 2.30, 2.40, 2.80, 3.10, 3.21.

34. If related cases are pending in more than one court, overlapping discovery should be coordinated to avoid duplication and conflicts, as by formulating a joint discovery plan for all cases or by agreeing that one of the cases will be treated as the lead case, with its discovery plan serving as the starting point for development of supplemental plans in the other courts. See § 31.

21.421 Limitations.

Many types of explicit and implicit controls may be imposed on the discovery process, including time limits, sequencing of discovery, and limits on quantity.[35] They may be used singly or in combination as the circumstances of the litigation warrant.

Time limits/deadlines/schedules. One of the common methods for controlling discovery is by fixing in a pretrial order when certain actions are to commence or be completed. See Sample Order § 41.33. These time limits force counsel not only to proceed diligently but also to be selective in conducting their discovery. In some cases the court at an initial conference can determine a fair period for discovery[36] and set a firm trial date or a cut-off date for all discovery.[37] Frequently, however, although tentative or target dates for trial or completion of discovery may be established for planning purposes, the initial schedules or deadlines should focus upon particular segments of discovery that are to be undertaken in some sequence like those described below. Although deadlines are usually an important part of an effective discovery program, two caveats should be noted: (1) the court must make rulings promptly, for further discovery will frequently be delayed or impaired until existing disputes are resolved;[38]

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35. Under Fed. R. Civ. P. 26(b)(1), the court may limit discovery either pursuant to motion or on its own initiative. Schedules and limitations should, however, be adopted only after the court has consulted with counsel.

36. The court, however, should view with caution the estimates made by counsel at an early conference regarding the time required for various stages of the discovery program. Exaggerations, both of immediate readiness for trial and of the extent of discovery that will be needed, are quite common. As to the power of the court to set deadlines for completion of discovery, see Fed. R. Civ. P. 16(b) and In re Fine Paper Antitrust Litigation, 685 F.2d 810 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983).

37. A trial date should not be used to control discovery unless the judge is prepared to conduct the trial at approximately the time indicated, absent exigent circumstances; nor should a final cut-off of all discovery be set so far in advance of the trial date that significant evidence is likely to be discovered between the cut-off date and the trial.

38. Schedules should usually make allowance for delays in the discovery process and other contingencies and, under Fed. R. Civ. P. 16(b), may be modified upon a showing of good cause.

and (2) in cases involving many attorneys, the mere imposition of a time limit may not result in self-imposed selectivity but rather increase the costs of litigation and indeed be used as a tactical device against parties with more limited resources.

Sequencing of Discovery. Another common control is to mandate, typically through the establishment of time schedules (which may overlap or be discrete), that discovery be conducted in a prescribed sequence. Among the sequences that have been useful are the following:

- **"Wave" discovery.** Discovery generally proceeds in a more orderly fashion if counsel first determine the types and locations of documents and other physical evidence (including pertinent information concerning the storage and retrieval of computerized data) and the identity and location of witnesses to be examined. This "first wave" of discovery may be conducted on an informal basis, or pursuant to a standing order or local rule calling for disclosure of evidence supporting a party's position without need for a discovery request, or by interrogatories, depositions, and document production as needed. After this has been completed, additional "waves" of discovery on the merits may be conducted. Although the details and formalities vary, this approach to discovery is valuable in preventing early, ineffectual discovery and in avoiding postponements that otherwise may result from belated discovery of witnesses and documents in the final pretrial processes.

- **Subject matter priorities.** The parties may be directed to conduct discovery on certain issues, or for particular time periods or geographical areas, before discovery on other issues, time periods, or areas. For example, discovery on matters relating to class action allegations frequently are given priority.[39] See, however, the discussion in § 21.41 concerning the interrelationship between the discovery program and issue delineation.

- **Sequencing by parties.** Although discovery by all parties ordinarily proceeds concurrently, sometimes one or more parties should be allowed to proceed first. For example, if summary judgment on some issue may be appropriate early in the litigation, but the opposing party needs some time and discovery before responding to the motion, that party may be given priority in conducting discovery. The court may establish periods in which particular parties will be given exclusive or preferential rights to take depositions,

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39. If evidence pertinent to class allegations will also be relevant even if a class is not certified, limiting discovery to the class questions may be inefficient and, indeed, result in fruitless squabbles over whether particular requests for information are sufficiently related to the authorized discovery.

and in multiple litigation may direct that discovery be conducted in some cases before others.[40]

* **Forms of discovery.** Sometimes the court prescribes a sequence for particular types of discovery—for example, first, requests for documents; then depositions; finally, interrogatories and requests for admissions.

Even if the court directs that discovery be conducted in a specified sequence, leave should be granted for good cause to vary from the indicated order, as when emergency depositions are needed for witnesses in ill health or about to leave the county.

Limits on Quantity. Many courts by local rule limit the number of interrogatories, subject to modification for good cause shown. Other limitations on the quantity of discovery—such as the number of depositions allowed with respect to some issue, or the length of examination of one or more deponents[41]—may also be valuable in avoiding unnecessary discovery. Although such limitations have often been imposed only after abuse of the discovery process has become apparent, they may be of greater benefit if imposed in advance as a part of a discovery program under Fed. R. Civ. P. 26(f). The limits should be reasonable, with the need for discovery balanced against the time and costs involved. The views of the parties should be considered before any such special limitations are imposed, and modification of the limits should be allowed for good cause shown. When limits are put on discovery of voluminous transactions and other events, statistical sampling techniques may be used to measure whether the results of the discovery fairly represent what unrestricted discovery would have been expected to produce.

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40. Sometimes "common" discovery is ordered to proceed in a specified sequence, but without similarly limiting "individual" discovery in the various cases.

41. A gross limit on the length of a deposition may be troublesome because of the impact of dialogue among counsel and other delays. Specification of the number of hours of actual examination, exclusive of such interruptions, has generally been more satisfactory.

21.422 Other Practices To Save Time and Expense.

Controls on the timing, sequence, and quantity of discovery are not the only ingredients of an efficient discovery program. Counsel should be expected to conduct discovery in ways that minimize delays, costs, and inconvenience to their clients, to opposing counsel and parties, and to others involved in the discovery program.[42] Cooperation and innovation are critical to the achievement of this objective. Among the practices that have been used effectively in the discovery process are the following:

- **Stipulation under Fed. R. Civ. P. 29.** The parties can facilitate discovery by entering stipulations with respect to deposition notices, waiver of signing, and other matters. Rule 29 permits modification of the discovery rules by agreement of counsel except for extensions of time for responding to discovery requests or when otherwise ordered by the court.

- **Informal discovery.** Counsel provide information to opposing counsel without resort to formal discovery procedures. In particular, documentary evidence is frequently made available voluntarily by experienced counsel who know the types of documents that will likely be requested and must be disclosed. Informal interviews with possible witnesses may also be arranged; this procedure may be very efficient in obtaining background information, in conducting "first wave" discovery, and in verifying, authenticating, or explaining documents.[43]

- **Automatic disclosure.** By local rule or standing order, some courts require the parties early in the litigation, without waiting for a discovery request, to identify the witnesses and documents they expect to use in establishing the claims on which they have the burden of proof.

- **Reducing deposition costs.** Substantial savings may be realized if, when feasible, depositions are taken by telephone, by electronic recording devices, and by arranging for deponents to come to central locations. Likewise, parties may forego attending a deposition in which they have only a minor interest if a procedure is established for supplemental questions—as by telephone, by written questions, or by revival of examination in person—in the event that, after a review of the transcribed deposition, they find further inquiry necessary. See § 21.45 for additional discussion regarding deposition practices.

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42. See Fed. R. Civ. P. 26(b)(1) (court shall limit discovery which is "obtainable from some other source that is more convenient, less burdensome, or less expensive").

43. Counsel may subsequently file requests for admissions to assure that the results of informal discovery are usable at trial.

* **Discovery from other litigation and sources.** When information is available from other litigation,[44] or from discovery conducted by others in the same litigation, the parties may be required to review those materials before additional discovery is undertaken.[45] If those materials will be usable as evidence in the present litigation,[46] the parties may be limited to supplemental discovery. Cost-savings may also be realized through coordination of "common" discovery in related litigation pending in other courts, as by using joint notices of depositions.

* **Joint discovery requests and responses.** In multiple-party cases in which lead counsel are not designated, parties with similar positions nevertheless may be required to construct a single set of interrogatories, request for production, or request for admissions. If voluminous materials are to be produced in response, the responding party may be relieved of the requirement of furnishing copies to each discovering party. For further discussion, including use of document depositories, *see* § 21.44.

* **Modified discovery responses.** When information similar to that described in a discovery request can be produced with substantially less time and expense, the responding party should make that fact known and seek agreement to production in a modified form. For example, information sought on a calendar year basis may be readily and inexpensively available on a fiscal year basis. Similarly, if some requested information can be produced promptly but additional time will be needed for other items, an immediate response should be made, including the information presently available and indicating when the supplemental materials will be produced. In some cases formal discovery requests should be prepared only after counsel have informally discussed what information is needed and how it can be produced most efficiently.

* **Combined discovery requests.** Several forms of discovery may be combined into a single request. For example, a party may first be asked to admit a particular fact under Fed. R. Civ. P. 36; if not so admitted, the party is then asked to respond under Rule 33 by stating its understanding of that fact and by indicating whether it has any evidence to support that position. If there is evidence, the party is then asked to identify and produce under Rule 34 any documentary evidence bearing on that matter, and to identify the persons having knowledge of the matter for possible deposition under Rule 30 or 31. This technique eliminates the need for documentary or deposition evidence on matters that the opposing party

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44. Access to materials and testimony given in other cases may be impeded because of confidentiality orders, restrictions on access to grand jury materials, and other limitations. See §§ 21.43 and 31 for further discussion.

45. The parties may also be required to exhaust other sources of information, such as governmental studies, before proceeding with formal discovery.

46. Interrogatory answers, depositions, and testimony given by a party in one action ordinarily are usable against that party in another case under Fed. R. Evid. 801(d)(2). The parties will often stipulate to the admissibility of information obtained from third parties.

admits or is unable to refute. Ordinarily, more time should be allowed for responding to a combined discovery request; even so, less time may be involved than for the traditional separate discovery requests.

* **Conference depositions.** If several persons have partial knowledge of a subject and credibility is not a substantial question, a "conference deposition" may be feasible. Each witness is sworn, and the questions are then directed to the group or referred to those having the information sought.[47] This procedure, with its obvious savings in time and expense, may be useful in ascertaining background matters, in identifying and explaining documents, and in examining reports compiled by several persons.

21.423 Resolution of Discovery Disputes.

To the extent possible, counsel should resolve discovery disputes without intervention by the court.[48] The discovery plan, however, should include procedures for obtaining rulings by the judge on those disputes which the parties are unable to resolve.

Although a ruling on many discovery disputes may be deferred until the next scheduled conference, controversies sometimes arise that, if not promptly decided, will critically disrupt the discovery program—perhaps delaying the scheduled completion of discovery or the trial itself or causing substantial expense to the parties. The court should give expedited—and, if possible, immediate—attention to such critical discovery problems. The disputes may often be presented to the judge by counsel orally, either in person or by telephone, and a ruling may be made at the conclusion of the arguments. Indeed, many courts have concluded that written motions and briefs on discovery matters may be restricted in length, if not eliminated, by providing for prompt, informal

47. Persons in other locations to whom some inquiry should be directed may be scheduled to be "on call," as needed, for a telephone deposition during the conference deposition.

48. By local rule or special order many courts forbid filing of discovery motions except on matters that remain in dispute after negotiations between counsel have reached an impasse.

conferences before discovery disputes are presented in written motions.[49] As discussed in § 20.14, referral of discovery disputes to a magistrate or master—although not generallyrecommended—is preferable to a prolonged delay caused by unavailability of the judge, and in some cases it may be a practical necessity.[50]

The judge has inherent authority,[51] as well as explicit authority by statute[52] and rules,[53] to impose sanctions for discovery abuses.[54] Imposition of sanctions for improper conduct, however, should be viewed as a component of—not an alternative to—a plan for orderly conduct of discovery in a complex case. Counsel should understand that, when warranted, sanctions tailored to the gravity of the misconduct will be imposed, and that schedules will not be altered when caused by a party's own derelictions. The judge should also emphasize that counsel are expected to act cooperatively and professionally, that petty bickering will not be tolerated, and that progress of the case towards trial will not be side-tracked by ancillary proceedings created by motions for sanctions.

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49. A brief written record of the nature of the dispute and of the ruling should be prepared after the conference, or the conference may be recorded by a court reporter. When an immediate ruling is needed during a deposition and the judge is available for a telephonic conference, the discussions and rulings may be recorded by the court reporter and included in the deposition itself.

50. See W. Brazil, G. Hazard & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983) (based upon experience in United States v. American Tel. & Tel. Co., 461 F.Supp. 1314 (D.D.C. 1978); 552 F.Supp. 131 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983)).

51. Landis v. North American Co., 299 U.S. 248 (1936).

52. 28 U.S.C. § 1927.

53. See, e.g., Fed. R. Civ. P. 7, 11, 16, 26, 37, 41, and 55.

54. For a discussion of sanctions, see § 42; also see W. Schwarzer, Managing Antitrust and Other Complex Litigation, Chapter 8 (1982).

21.43 Privileges and Other Confidential Information.[55]

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Attention should be given at an early conference, preferably before substantial discovery begins, to the possible need for procedures to handle information that may be subject to true privileges (for example, attorney-client, self-incrimination) or to protections from discovery on some other basis (for example, work product, trade secrets, individual privacy). The need for advance planning is heightened because these claims may substantially disrupt the discovery schedule despite the highest degree of professionalism and cooperation by the attorneys.[56] Consideration should be given not only to the rights and needs of the parties, but also to the existing or potential interests of others not represented in the litigation.[57]

21.431 Limited Disclosure; Confidentiality Orders.

Parties frequently resist discovery, requesting that under Fed. R. Civ. P. 26(c)(7) "a trade secret or other confidential research, development, or commercial information

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55. Reference: MCL 3.21.

56. Entitlement to non-disclosure or limited disclosure may be lost or impaired by seeking protection only after the information has been provided, even when produced under special confidentiality agreements made by counsel. As to whether protection is afforded when information is produced under a court order prohibiting disclosure, see Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984); Tavoulareas v. Washington Post Co., 737 F.2d 1170 (D.C. Cir. 1984); In re Continental Illinois Sec. Litigation, 732 F.2d 1302 (7th Cir. 1984); In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981). Also see 15 U.S.C. § 1321(c)(2), providing that civil investigative demands supersede "any inconsistent order . . . preventing or restraining disclosure of such product of discovery."

57. Discovery is often sought of information in which non-parties have privacy interests; and requests for access to protected information may be made by the news media, by governmental investigators, by public interest groups, and by parties in other, similar litigation then pending or later instituted. Many of the problems are addressed in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F.Supp. 866 (E.D. Pa. 1981). See also Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1 (1983), and Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984).

not be disclosed or be disclosed only in a designated way." Such objections are typically handled by entry of a protective order incorporating terms suggested or agreed to by the parties.[58] These orders usually specify that information claimed to be confidential will be provided to opposing counsel during the discovery process on condition that the information not be disclosed by them, without court order, except to certain persons for particular purposes. Counsel receiving confidential materials are generally forbidden from making disclosures other than at trial or in preparing for trial or settlement. For example, counsel are ordinarily permitted to disclose such information to assistants in their offices and to potential expert witnesses. Whether disclosure to the clients themselves is permitted will depend upon the circumstances of the case, balancing the client's "need-to-know" for purposes of the litigation against the risks and consequences of misuse. In any event, those to whom disclosure is made are usually required to agree in writing to abide by the terms of the order limiting further disclosure. For additional protection, the information may be sealed or, under Fed. R. Civ. P. 5(d), exempted from filing with the court.

A procedure should be established to deal with challenges to a confidentiality designation and with requests for permission to make additional disclosures. The parties, of course, should attempt to resolve their differences without the need for court involvement. If a court ruling is needed, the information in dispute may be reviewed by the judge and, if necessary, a hearing held. If the materials are voluminous and cannot be presented through a few samples or specimens, the dispute may be referred to a magistrate or master for consideration and report. The order usually provides that, if a party desires to make some disclosure not clearly permitted by the order (for example, during a deposition of some witness not privy to the information), advance notice will

58. See Sample Order, § 41.36.

be given to the other parties and that, if not resolved by agreement, the dispute may be presented to the court for a ruling before disclosure.

These "umbrella" protective orders, carefully drafted to suit the circumstances of the case, greatly expedite the flow of discovery material while affording protection against unwarranted disclosures.[59] However, major problems may arise with disposition, "declassification," and third-party access later in the proceedings or even after the termination of the litigation.[60] In the protective order the court should reserve authority to make later modifications if justified by the circumstances.

Such modifications may be needed to facilitate the discovery plans of related litigation. As discussed in § 21.422, substantial savings in time and expense may often be achieved by using information gathered in similar litigation. Indeed, counsel may be required to seek access to such materials before undertaking new discovery. See Fed. R. Civ. P. 26(b)(1)(i). If this information, however, is subject to a protective order in the other case,[61] the parties may not be able to obtain it without presenting a

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59. Items produced under a claim of confidentiality should be identified with some special marking at the time of production. If numerous documents are involved, a log may be maintained describing the documents and identifying the persons having access to them. Copying of particularly sensitive documents may be prohibited or tightly controlled. See Sample Order, § 41.36-¶9.

60. The problems of preserving protection for documents produced under confidentiality orders are aggravated by the understandable tendency of counsel to err on the side of caution by designating any possibly sensitive documents as confidential under the order. The time saved by excessive designations, however, may be more than offset by the difficulties of later opposing some request for access or disclosure. Although the judge, in the interest of reducing the time and expense of the discovery process, should be somewhat tolerant of this practice, counsel should not mark documents as protected under the order unless they are at least arguably subject to protection. The designation of a document as confidential may be viewed as equivalent to a motion for protective order and subject to the sanctions of Fed. R. Civ. P. 26(g).

61. Protective orders may, of course, authorize disclosure of confidential documents to counsel in other related cases. Moreover, the terms of a protective order ordinarily do not prevent the party who furnished the confidential information from being ordered to produce the same information in another case. The party who obtained the confidential information, if subject to the jurisdiction of the court, could presumably be required to join in, or not oppose, a request for modification of the order.

request to the other court for modification of the order and release of the information, subject to appropriate restrictions on further use and disclosure.[62] Informal communications between the two judges may be productive in arriving at an accommodation that gives appropriate consideration to the interests of all involved.[63]

21.432 Claims for Full Protection.

Confidentiality orders do not solve the problems created when the information sought is allegedly protected against any disclosure under the attorney-client privilege, or as protected "work product," or under the Fifth Amendment. The judge should explore with counsel at an early conference whether, to what extent, and in what manner, any such claims will likely arise during discovery. Problem areas may thereby be identified in advance, and their potentially disruptive effects on discovery either minimized by providing for early briefing and judicial consideration or even avoided through appropriate sequencing of discovery.[64] Counsel should be cautioned that even absolute protection against disclosure of the contents of documentary materials does not ordinarily foreclose discovery of the existence of the documents and a sufficient description of them to enable opposing counsel and the court to assess the merits of the claimed protection. Listings analogous to the index described in Vaughn v. Rosen[65] are frequently required when privileges are claimed. If voluminous materials are involved

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62. See Wilk v. American Medical Ass'n, 635 F.2d 1295 (7th Cir. 1980) (protective orders should ordinarily be modified on request from other litigants, subject to appropriate conditions as to further use and cost). See also § 31.13.

63. The role of the two courts is not unlike that involved when access to grand jury materials is sought for use in proceedings in another court.

64. Potential Fifth Amendment claims are, of course, one reason why discovery in civil litigation frequently is stayed, in whole or in part, until termination of related criminal proceedings. However, conclusion of the criminal case will not necessarily avoid further assertions of the privilege against self-incrimination. Termination of the criminal proceedings may also result in limited access to grand jury materials and in availability of information under the Freedom of Information Act, 5 U.S.C. § 552.

65. 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

and the dispute cannot be resolved by review of a few samples or specimens, the court may wish to refer the matter to a magistrate or master for appropriate hearings and report.[66] Ordinarily, however, claims of privilege should be presented directly to the judge for a ruling.

Agreement between the parties that the failure to claim a privilege will not be deemed to waive the privilege with respect to other documents involving the same subject matter may facilitate the discovery process. However, the efficacy of such agreements in other proceedings, even if approved by the court, is not clear.

21.44 Documents.[67]

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Complex litigation frequently involves a large number of documents. Efficient management of such documents during discovery and at trial requires special attention by the attorneys and the judge at the outset of the case and continually thereafter as the case proceeds to trial. Fortunately, many of the problems associated with the production and use of documentary materials may be eliminated or alleviated by careful planning.

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66. Although in camera review by the court may be necessary to rule on a claimed privilege, the party seeking protection may not, especially in a non-jury case, want the trial judge to see the document. In such circumstances, the party may request that the question be referred to a magistrate, master, or another judge. Since judges are accustomed to reviewing matters that may not be admissible, counsel should restrict such requests to the most sensitive, potentially prejudicial materials and be prepared to indicate, at least in general terms, the basis for their request, which is addressed to the discretion of the court.

67. Reference: MCL 1.50, 2.50, 2.70-2.716, 3.50.

21.441 Identification System.

Before any documents are produced under Fed. R. Civ. P. 33(c) or 34 or used in depositions, counsel should develop a system for numbering (or otherwise identifying) all documents that may later be produced or used in the litigation. Each document should be assigned a unique identifying designation that will be used by all parties throughout the case, including depositions and trial.[68] The same identification number should not be assigned to more than one document and the same document should not receive more than one identification number unless counsel have reason to refer to different copies of the same document. To avoid later disputes, a log should be kept indicating which documents have been produced, when, and to whom.[69]

21.442 Preservation.

Before commencement of discovery—indeed, perhaps even before the initial conference—an order should be entered providing for the preservation and non-destruction of records that may be related even remotely to the litigation.[70] Such orders, however, may interfere unnecessarily with the normal records-destruction policies of the parties, be difficult to implement perfectly, and cause undue hardship when applied to many data-processing systems.[71] Therefore, a preservation order should allow destruction after appropriate advance warning to opposing counsel and should exclude documents whose cost of preservation is shown to outweigh substantially their relevance in the

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68. Many courts customarily give new identification designations to documents offered at trial, often by assigning sequential numbers to one side and sequential letters to the other. However, exhibits need not be identified according to the party who offers the evidence, and a common system for all documents usually is less confusing if many exhibits and parties are involved.

69. A record of the documents copied by opposing counsel may also be useful.

70. See Sample Order, § 41.34.

71. Revision of existing computer programs to provide for longer retention, even if possible, sometimes is prohibitively expensive. In such situations, however, print-out and retention of "hard copies" or duplication of data bases at periodic intervals before deletions occur may be feasible.

litigation, particularly if copies of the documents are filed in a document depository or if there are alternative sources of information. As issues in the case are narrowed, consideration may be given to reducing the scope of the order.

21.443 Coordinated Requests and Response.

Even if lead counsel or committees are not appointed, similarly situated parties should ordinarily be required to confer and present a joint request for production of documents and to conduct their examination at the same time and place. If extensive copying will be involved, counsel should consider whether economies may be achieved by sharing copies rather than making a set for each. The court should not hesitate to impose appropriate sanctions on responding parties who fail to comply with the dictates of Fed. R. Civ. P. 33(c) and 34.[72]

21.444 Document Depositories.

Central document depositories may be of great value in the efficient, economical management of voluminous documents. By depositing documents at one or more convenient locations, counsel may reduce substantially the expensive, burdensome, time-consuming, and wasteful efforts that otherwise may result when many parties attempt to review documents located in widely separated places. Use of a depository also facilitates a determination as to what documents have been produced and what information is in them, avoiding the disputes about those matters that sometimes occur.

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72. The last sentence in Rule 34 provides that "a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." A response under Rule 33(c) is "to specify the records from which the answer may be derived or ascertained" and "in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained." The Advisory Committee's Notes to Rule 33(c) emphasize that, if the information sought exists in the form of compilations and summaries, these should be made available to the interrogating party.

Counsel are usually able to agree on details regarding the location[73] and operation of document depositories, including procedures for acquisition, numbering, indexing, and storage, as well as provisions defining when and by whom documents may be examined or copied. Occasionally some party will oppose filing documents in a central depository; in such circumstances, the court should determine whether to exercise its power under Fed. R. Civ. P. 26(c)(2) to order production at the depository (or at places designated by the requesting parties) or to provide, as an alternative to the depository, that the producing party bear the expense of making copies for other parties. Defraying the expense of depositories, which sometimes are maintained for the use of all parties and sometimes are established separately for each side, is also a matter upon which counsel can ordinarily agree; if not, the dispute may be presented to the court for resolution based upon the benefits to be derived from use of the depository. If document depositories have been established in related cases in other courts, counsel may be able to arrange for their joint use, sharing the expense; likewise, consideration should be given to the requests of litigants in other cases to use a depository established in the pending case.

Building on the growing use of computerized litigation-support systems for storage and retrieval of documentary evidence, counsel should consider in appropriate cases establishing joint computer-based depositories, at least with respect to indices, abstracts, and currently-generated documents, subject to the development of a protocol to protect "work product" uses that each may wish to make of the materials.

21.445 Evidentiary Foundation for Documents.

The production of documents, either in the traditional manner or by filing in a document depository, often will not provide the foundation for determining the admissibility of those documents as evidence for purposes of trial or summary judgment.

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73. Arrangements sometimes can be made to establish a document depository in the courthouse. Planning should be coordinated through the Clerk's office.

Effective management of documents, therefore, should also include consideration of other measures—such as stipulations, admissions, or depositions—by which the foundation for admissibility may be established.[74]

21.446 Discovery of Computerized Data.

The potential benefits that may be derived from computerized data—as well as the problems such data may create—are substantial both in the discovery process and at the trial. At the outset of the litigation the court should inquire into the existence of computerized data and processes for its retrieval. Under Fed. R. Civ. P. 34 discovery may be obtained of "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."[75] Accordingly, a party may be required not only to furnish pre-existing hard copies of computerized data but also to provide new print-outs of pertinent items or of data bases. Sometimes a party should be required to provide this information in machine-readable form, so that the data may be stored by the discovering parties for later analysis on their own computers without the time, expense, and potential for errors that would result if data from a print-out were re-entered manually.[76]

Parties sometimes request production in a form that can be created only at substantial expense for additional programming; if so, payment of such costs by the

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74. In multi-party cases responses of a party to a request for admission or to an interrogatory normally are admissible only against the answering party. But see In re Japanese Elec. Prods. Antitrust Case, 723 F.2d 238, 285 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1985).

75. This requirement is also implicit in Rule 33(c), authorizing parties to answer interrogatories by making records available, since that option is available only if "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served" and the requesting party is to be afforded "reasonable opportunity to examine . . . and make copies" of the records.

76. See National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257 (E.D. Pa. 1980).

requesting party should be made a condition to production.[77] Although trade secrets, privileged information, and trial preparation materials may require protection, and indeed the methodology of a company's computer system may itself be a valuable asset that should not be handed over to others without good reason, protective orders under Rule 26(c) may be entered by the court to prevent abuse or misuse.[78]

Materials not previously computerized are often encoded by counsel in anticipation of or during complex litigation. Frequently the objective will be to produce studies and tabulations for introduction in evidence or for use by experts. In such situations, discovery should usually be allowed in essentially the same manner as for pre-existing computerized materials, subject, however, to appropriate protection of "work product" materials.[79] If production is required, provision ordinarily should be made for those who benefit from the computerization process to share the expense. As discussed in § 21.444, in appropriate cases counsel may be able to agree upon a system for establishing a common computerized depository.

The discovery program should also include inquiry into those facts that will affect the use of computerized data at trial either as direct evidence or as information relied upon by experts. In part, the same kinds of questions must be considered as with non-computerized records because the Federal Rules of Evidence have been written to

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77. Indeed, parties obtaining information from another's computerized data typically are required to bear any special expense incident to this form of production. Only the actual direct costs should be charged. By obtaining an estimate of the cost in advance, counsel may bring exaggerated costs to the court's attention or consider less expensive alternatives.

78. If the parties are unable to agree on safeguards and the judge is not sufficiently familiar with the technology, the matter may be referred to a special master or to a court-appointed expert.

79. Courts have been reluctant to require production of records computerized for "litigation support" purposes with no expectation of producing tabulations for introduction in evidence or for use by expert witnesses, recognizing that the decision as to which records to computerize may itself deserve protection as work product.

accommodate both types of evidence.[80] However, special inquiry must also usually be made into matters affecting the accuracy of the data output. Notwithstanding the capacity of computers to make tabulations and calculations involving enormous quantities of information--and to do so more quickly and reliably than if done manually—several sources of potential errors of great magnitude exist. The more common include incorrect or incomplete entry of data, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunction.

The proponent of computerized evidence has the burden of laying a proper foundation by establishing its accuracy.[81] Exploring matters relating to the reliability of such data for the first time at trial, however, may waste time and either be unfair to the parties against whom they are offered or result in elimination of evidence that (had problems been identified and corrected earlier) would have been beneficial in expediting trial and understanding the issues. Therefore, well in advance of trial, appropriate discovery should be undertaken concerning the reliability of computerized evidence that may be used later. This will usually include inquiry into the accuracy of

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80. A good example is found in the so-called "business records" exception to the hearsay rule. Fed. R. Evid. 803(6) provides an exception to the proscription against hearsay for a "data compilation, in any form," which otherwise satisfies the requirements of that rule and, accordingly, will typically cover computer print-outs used by a company to record its weekly sales figures. Moreover, a new print-out of such data specially made for trial purposes may be shown to be an "original" under Rule 1001(3) of the machine-readable records that qualify for the exception of Rule 803(6). Non-computerized records that meet the standards of Rule 803(6) may be computerized during pretrial proceedings and a print-out used under Rule 1006 in lieu of the individual records.

81. The proponent, however, is not required to prove that the tabulation is free from all error or possible error. Authentication under Fed. R. Evid. 901(b)(9) is provided by "evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result," but the standard under Rule 901(a) is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The ultimate issue as to whether a summary under Rule 1006 is accurate is, according to Rule 1008, "for the trier of fact to determine as in the case of other issues of fact." Accordingly, the existence or possibility of errors usually affects only the weight, not the admissibility of the evidence, except when the problems are so significant as to call for exclusion under Rule 403. Of course, if computerized data provided by a party are offered against that party, inquiry into the accuracy of the data may be unnecessary.

the underlying source materials, the procedures for storage and processing, and some testing of the reliability of the results obtained. If it is impracticable to identify and correct all errors, counsel should nevertheless attempt to ascertain and stipulate the statistical probability of the range of error.[82]

21.447 Discovery from Third Parties.

Discovery of documentary evidence in the possession of persons not parties to the litigation is more difficult because of the inapplicability of Fed. R. Civ. P. 34. Although production may be required through use of a subpoena duces tecum under Fed. R. Civ. P. 45 for the taking of a written or oral deposition, it may be necessary to submit objections and motions to compel to a judge in the district of the deponent's residence. Moreover, Rule 45 does not explicitly authorize the court to require the deponent to provide materials (such as computer print-outs) that do not currently exist. Accordingly, voluntary agreements play a significant role in procuring information from third parties and the court will frequently be asked to impose appropriate safeguards under Fed. R. Civ. P. 26(c) regarding the use of such discovery. The third party should be served with the subpoena duces tecum (and a copy given other parties[83]) sufficiently in advance of the date specified for production for the third party to collect the documents and for the court to rule on any objections; as when documents are requested from parties under Rule 34, a minimum of thirty days should ordinarily be provided, particularly if numerous documents are requested. Consideration should also be given

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82. With very large quantities of data, verification and correction of all items may not be feasible. In such cases, verification may be directed towards a sample of the data. Then, instead of correcting any errors detected from the sample—which might lead to the erroneous presentation of the compilation as free from error—evidence may be given (or stipulations entered) as to the projected effect of such observed errors upon the compilation as a whole.

83. Sometimes parties have not given notice to opposing counsel of deposition subpoenas served on third parties merely to gain access to records, contending that no actual deposition was anticipated. Unlike the procedure for subpoenas for trial, this practice appears to be contrary to the letter and spirit of the rules.

to possible acquisition of the same information through other sources, such as from other litigation in which the third party may have been involved and from government agencies using requests under the Freedom of Information Act.

21.45 Depositions.[84]

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Litigators generally consider oral depositions taken pursuant to Fed. R. Civ. P. 30 as the most effective method of discovery. Deponents do not have the opportunity of reviewing with an attorney the implications of their responses before answering. Based on the answers received, examining counsel may pursue fruitful lines of inquiry and abandon others. Counsel can also assess the impression that the deponent will make on the judge or jury while testifying.

Attorneys may, however, be tempted to depose virtually all persons with some knowledge concerning the case. Unless appropriate limitations and procedures are established in advance, the deposition process may unduly prolong pretrial proceedings and result in enormous costs to the litigants, far outweighing the actual value of the discovery.[85] Under Fed. R. Civ. P. 26 the attorneys and the judge have an affirmative duty to curtail excessive discovery of all types, including depositions.

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84. Reference: MCL 1.20, 1.44, 1.93, 2.31, 2.32.

85. In view of the time and expense of travel, together with the cost of court reporting, taking depositions often constitutes the major expense of litigation.

21.451 Limitations.

Limits on the number or length of depositions will be needed in some cases. Such limitations may be imposed indirectly by fixing an early date for trial or completion of discovery or by prescribing a relatively short period within which depositions are to be taken. However, in litigation with many attorneys, curtailing the period for depositions may not result in reducing the number of depositions, but rather increase expenses through cost-inefficient concurrent depositions[86] and prejudice parties with limited resources.[87] Accordingly, the discovery plan in some cases may contain specific limits on the number or length of depositions of certain types of witnesses or, indeed, may require that court approval be obtained for each deposition.[88] For example, depositions of putative class members should ordinarily be allowed only with court approval, with a limit placed on the number and length of such depositions. Likewise, a reasonable limitation on the length of a deposition of an expert under Fed. R. Civ. P. 26(b)(4)(A)(ii) may be warranted in addition to requiring payment of fees under the cost-shifting provisions of Rule 26(b)(4)(C).

Such direct limits on depositions should not be imposed by the court without considering the views of counsel. When merited by the circumstances of the case, however, the judge has the power to establish such limitations under Rule 26(b), (c), and (f), exercising a discretion similar to that conferred for trial purposes under Fed. R. Evid. 403. Indeed, although attorneys are called upon to exercise self-restraint under Rule 26(g), the imposition of limits by the court may dissipate their concerns

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86. Despite their cost, such "multi-track" depositions are a practical necessity in expediting many complex cases. See § 21.454.

87. This caveat is not intended to discourage the court from setting an early trial date and establishing various pretrial deadlines that the parties can meet if they proceed expeditiously and selectively. Schedules alone, however, will not necessarily eliminate excessive deposition discovery.

88. As discussed in § 21.421, limits on the hours of actual examination by each party may be preferable to gross limits on the length of the deposition.

about possible malpractice claims resulting from voluntary reductions in the deposition program.

21.452 Cost-saving Measures.

Attention should also be given to use of stipulations under Fed. R. Civ. P. 29 and other techniques described in § 21.42 that can reduce the expense of depositions taken in the traditional manner. Worthy of special consideration are the following:

* **Informal interviews.** Informal interviews of potential witnesses may be arranged by mutual consent of counsel. This procedure may be useful with respect to those persons who, having only limited knowledge or involvement, are not likely to be called a witnesses at trial, when the primary purpose of the deposition would be to avoid surprise. If counsel desire, the witness may be sworn and the interview recorded electronically for possible use later in the case.[89] In addition, the interviews may be converted by agreement or court order into a non-stenographic deposition under Fed. R. Civ. P. 30(b)(4).

* **Non-stenographic depositions.** Tape-recording of depositions under Fed. R. Civ. P. 30(b)(4) is increasingly common, even in complex litigation, because of the savings in the expense of court reporters.[90] Counsel should be encouraged to make liberal use of this procedure, accompanied by a stipulation (with the deponent's consent) waiving presentation to the deponent. Disputes over the accuracy of transcripts of a tape-recording prepared in an attorney's office have thus far not arisen more frequently than similar disputes regarding depositions taken in the traditional manner. Indeed, with the concurrence of the deponent, a written transcription often may be deferred until some need for it arises and, even then, only parts of the deposition may need to be transcribed. If they wish, both sides may record the depositions.

* **Telephonic depositions.** Significant economies may be realized when telephonic depositions under Fed. R. Civ. P. 30(b)(7) are feasible. For example, supplemental examination by parties not present when a person was first deposed may often be accomplished effectively by telephone.

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89. Although, absent an order converting it into a deposition, the interview probably could not be used as substantive evidence under Fed. R. Evid. 801(d)(1)(A), it still could be used to impeach inconsistent testimony given by the person at trial.

90. Moreover, in some circumstances playing a recording of the deposition of a key witness may be preferable to reading the transcript. Dramatic recitations of depositions are not uncommon and, even when the reader makes every effort to be faithful to the task, there may be significant differences in emphasis, inflections, pauses, and the like that bear upon the meaning or credibility of the deponent's testimony. Accordingly, tape recordings sometimes are made of key depositions as an adjunct to stenographic reporting for the same reason as (but at less cost than) videotaping. If tapes are played at trial, they should be edited to eliminate irrelevant portions.

Through use of speaker phones and conference calls, distant witnesses[91] may be examined by counsel from their own offices, with the court reporter located with the witness or, by stipulation, at one of the attorneys' offices.[92] Depositions by telephone are most often used, except when mandated by cost or time[93] considerations, in examinations that are expected to be relatively brief and do not involve inquiries into the contents of numerous documents. To assure that deponents are not coached during the deposition, ground rules may be desirable, specifying who may be present with the deponent during the examination. Facilities are available in many cities for conducting depositions by teleconferencing.

* **Conference depositions.** In special situations several persons may be deposed at the same time, as in a conference setting. See § 21.422.

* **Written questions.** In some circumstances the rarely used procedures of Fed. R. Civ. P. 31, for depositions upon written questions, may be a very cost-effective means for obtaining evidence usable at trial. For example, Rule 31 depositions, less expensive than their Rule 30 counterpart, may be directed to third parties and used at trial against all parties in order to provide the evidentiary foundation for documents in dispute.[94] Rule 31 questions may also be useful in follow-up examinations by absent or later-added parties of persons whose regular depositions have already been taken.

* **Reductions in copies.** Counsel should be urged, particularly if document depositories are established, to reduce the number of copies of deposition transcripts that are ordered.[95] If a deposition turns out to be of no value, the parties should stipulate that no transcript be made. Although the savings from these measures may appear to be trivial, in the course of extended litigation they can substantially reduce the litigants' costs.

* **Limited attendance.** In multi-party litigation counsel should limit the number of attorneys who will be present at the depositions, a measure that reduces costs and also tends to expedite the conduct of examination. The judge can encourage this salutary practice by (1) placing controls on

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91. Telephone depositions may be particularly economical when deposing willing witnesses located in a foreign country. See § 21.485.

92. Further savings may be achieved if telephonic depositions are recorded by non-stenographic means.

93. Telephonic depositions have been useful in avoiding last-minute continuances (or interruptions during trial) when deposition testimony became unexpectedly necessary.

94. On the other hand, interrogatories may be directed only to parties, and the answers are generally usable as evidence only against the responding party. This latter limitation may be an important consideration in multi-party cases.

95. The judge should consider waiving the requirement for filing the original with the court, weighing, however, the possible utility of the information to persons in related litigation.

allowable fees in cases in which fees may be subject to award or review by the court,[96] and (2) entering an order for deferred supplemental depositions as described below. Non-attending counsel may, of course, suggest topics for examination to colleagues who will be attending, and Fed. R. Civ. P. 30(c) provides a mechanism for the court reporter to ask written questions previously prepared and sealed by non-attending parties. Non-attending counsel may also listen to key depositions by telephone and at recesses suggest to their representatives additional questions. Although expensive, counsel may also arrange for computer-assisted stenographic reporting in which the court reporter's stenographic notes are telephonically transmitted and immediately printed at terminals located in attorneys' offices in other cities.

21.453 Deferred Supplemental Depositions.

In multi-party cases the court should consider entering an order under which parties are relieved in whole or in part from the risks of non-attendance at depositions.[97] Although the precise terms vary, such orders often provide that a copy of the deposition transcript will be made available promptly to non-attending parties, who within a specified period thereafter may conduct supplemental examination of the deponent, either by appearing in person at a designated time for resumption of the deposition or by presenting the questions in written form under Fed. R. Civ. P. 31 or in a telephonic deposition under Fed. R. Civ. P. 30(b)(7). Whether the absent party is given the automatic right to require resumption of the adjourned deposition or—as is usually preferable—must show cause why resumption is necessary depends on the circumstances of the case and should be specified in the order. The order may also indicate whether the initial examination is usable in evidence if the deponent later becomes unavailable for supplemental examination.

These procedures are designed to relieve parties, particularly those with limited financial resources, from incurring the expense of attending depositions in which their

96. For example, the court may indicate that no more than two attorneys for one group of similarly situated parties attending a deposition will be awarded fees or expenses against opposing parties, from settlement funds, or as a charge against co-parties. Exception may be made for special circumstances or when awards are sought against opposing parties who did not exercise similar restraint.

97. See Sample Order, § 41.38.

interest is minimal or will likely be adequately protected by others in attendance. They should not be used as a tactical device to harass witnesses or to inconvenience other parties. Litigants with a substantial interest in a deposition should attend the initial deposition or have their positions represented by other counsel.

By the same or a separate order, the court may provide for the use of depositions against persons who may later become parties to the litigation by amendment of the pleadings or by the filing, removal, or transfer of other related cases. The order may state that all previously taken depositions will be deemed usable against new parties unless, within a specified period after their inclusion in the proceedings, such parties show cause why that should not occur.[98] Like other parties who have not attended a deposition, the new parties are typically given a specified period of time to conduct supplemental examination of the deponents, although the court may require that some need for additional questioning be shown.[99]

21.454 Scheduling.

Proper scheduling of depositions involves two types of inquiries. First, when should depositions be taken relative to other discovery, and what time limits should be set? Second, how should depositions be arranged to minimize the time and expense of the process as well as the inevitable personal and professional conflicts of the attorneys and witnesses?

Ordinarily, all parties are expected to proceed concurrently with discovery. If numerous depositions are anticipated, however, one or more particular time periods may

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98. Even if depositions do not automatically apply to new parties or if the court on motion should make an exception for some particular deposition, a repetition of the earlier examination should not be necessary. Deponents may be asked at the new deposition whether their earlier testimony is true and to adopt it as their current testimony, subject to additional examination by the new parties. Another option is for counsel, after joinder of new parties, to submit a Rule 31 question to deponents asking whether they adopt their prior deposition testimony.

99. If a deponent has died or for other reasons no longer is available, Fed. R. Civ. P. 32(a)(4) and Fed. R. Evid. 804(b)(1, 4) may serve as a basis for admissibility.

be set aside in which designated parties are given either exclusive or preferential rights to schedule depositions, subject to exceptions for emergency situations. This procedure facilitates the scheduling of depositions in a desired logical or geographical sequence.[100] Moreover, through arrangements with deponents, depositions often may be scheduled in a convenient central location, such as the place where a documentary depository is situated.

In many complex cases, depositions cannot be scheduled at times convenient to all counsel. Rather than resolving conflicts by attempting to reschedule a deposition, the attorneys should arrange for participation at the deposition by others in their offices or by having their interests represented by similarly situated litigants. Moreover, to meet discovery deadlines, it may be necessary to conduct depositions on a "multiple track" basis,[101] with depositions of several different witnesses being taken at the same time in one or more locations.

21.455 Coordination with Related Litigation.

Discovery programs in related cases pending before the same judge should be coordinated to avoid conflicts and duplication. If the cases are pending before different judges, counsel should nevertheless attempt to establish compatible plans for deposing common witnesses. Even if coordinated plans cannot be arranged, duplicate depositions may be avoided by the use of joint notices and cross-notices for common witnesses, and parties with similar interests may make arrangements to cover for one another.

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100. Sometimes, particularly if the litigation resources of the parties are substantially disproportionate, one side will attempt to schedule depositions in widely separated places for the primary purpose of causing difficulties for their adversaries. If this happens, the court's assistance may, of course, be sought by a motion for a protecive order.

101. Concurrent depositions may be more expensive than sequential depositions if the latter are conveniently arranged, and may cause communication problems in exchanging pertinent information obtained during the examinations. In many cases, however, the multiple track approach may be necessary if the litigation is to be concluded in a reasonable length of time.

Examination regarding subjects of interest only to particular cases may be deferred until the conclusion of direct and cross-examination into the matters of common interest.

Economies may also be achieved when parties in the present litigation have access to depositions previously taken in other litigation. Depositions of party opponents and their employees are generally usable against such parties under Fed. R. Evid. 801(d)(2) without re-deposing. In other situations, such as those involving third parties or a party's own witnesses, a new deposition under Fed. R. Civ. P. 30 or 31 may be necessary, but the answers given at the earlier deposition may be adopted as the current testimony of the witness, subject to any necessary supplementary examination. Telephonic non-stenographic depositions may be used for this purpose at little cost to either side.

21.456 Judicial Review; Ground Rules.

Aside from overuse, the greatest problems with depositions are contentious, interruptive dialogues among counsel and improper directions and suggestions to the deponents. Imposing sanctions after a deposition is concluded may have a prophylactic effect for later depositions, but may not cure the damage that has already occurred. Three steps should be taken to minimize these problems and to resolve other issues that may legitimately interfere with the conduct of depositions, such as claims of privilege.

First, counsel must understand—and, if necessary, be reminded of—the provisions of Fed. R. Civ. P. 30 and 32. Objections should ordinarily be made only as to the form of the questions or answers.[102] Except when a privilege is claimed, the deponent should answer even objectionable questions, subject only to the right to suspend the deposition to seek a court ruling terminating it or limiting its scope in those rare

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102. Although most objections are not waived by failure to object during the deposition, some counsel prefer to make objections at the time to serve as a reminder later. However, objecting counsel should make their objections concisely, without argument, and then indicate that the witness should answer. Objections that suggest the response are clearly improper.

situations when it is being "conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress."[103]

Second, to the extent possible, potential problems to be encountered at a deposition should be anticipated and, if necessary, presented for a prior ruling. This includes such matters as the need for interpreters; who may be present during the deposition; the order and length of examination, particularly if time is limited; and the resolution of claims of privilege.

The third step is to provide for prompt resolution of those unanticipated major disputes that cannot be resolved by counsel and, if deferred, will significantly interfere with the conduct of the deposition. Because most disputes can be quickly resolved by telephone, with the arguments of counsel and the ruling being transcribed by the court reporter, this procedure should be used whenever possible. If the judge is not immediately available, suspending the deposition until the judge's next recess, if necessary, is generally preferable to terminating the deposition or referring the dispute to another judge. Providing such access has rarely proved burdensome to the court, for the knowledge that the judge is available tends to discourage conduct requiring judicial intervention. The burden on the court may actually be reduced, and the efficiency of the discovery program is significantly improved. In special circumstances, a judge or magistrate may be needed to preside at a deposition; the judicial officer may, however, need to be present only briefly, setting the tone and making a few early rulings.

Special problems may arise when depositions are held outside the district where the case is pending. Disputes between the parties may be presented either to the judge

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103. Fed. R. Civ. P. 30(d). Arguably Fed. R. Civ. P. 26(b)(1) permits a deponent to refuse to answer questions that would be neither admissible nor reasonably calculated to lead to admissible evidence. The better view is that, unless the situation warrants a motion for termination on the basis of bad faith or oppression under Rule 30(d), the deponent should answer the questions.

to whom the case is assigned or to a judge where the deposition is being held.[104] In complex litigation, particularly if procedures have already been established for expedited consideration by telephone, such matters should ordinarily be decided by the judge to whom the case is assigned. Therefore, the deposition-district judge should usually refer the parties to the forum-district judge.[105] If, however, the dispute arises because of difficulties with a reluctant or uncooperative non-party deponent, resort must be had to the deposition-district judge. Fed. R. Civ. P. 37(a)(1), 37(b)(1). Even in this situation, the judge to whom the case is assigned may have or be able to obtain authority to act as a deposition judge in the deposition district,[106] and indeed may be able to exercise those powers by telephone.[107] In any event, the deposition-district judge may always confer with the forum-district judge by telephone and thereby expedite a ruling.

The procedures to be followed at depositions are sometimes embodied in a statement of principles and ground rules adopted by the court to guide counsel and

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104. Fed. R. Civ. P. 26(c), 30(d), 37(a)(1), 45(f). For a discussion of the powers of the respective courts, see 8 C. Wright & A. Miller, Federal Practice and Procedure: § 2287.

105. The Advisory Committee Note to Fed. R. Civ. P. 37(a)(1) states that in these circumstances the court to which the motion is first addressed may remit the movant to the other court.

106. In multidistrict litigation under 28 U.S.C. § 1407, "the judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions." In other cases arrangements may sometimes be made for an inter-district or inter-circuit assignment, enabling the judge to whom the case is assigned to act as deposition judge in another district.

107. See In re Corrugated Container Antitrust Litigation, 644 F.2d 70 (2d Cir. 1981), upholding in part the imposition of contempt sanctions for failure of a deponent to obey the directions of the judge. Although this was not mentioned by the Second Circuit, the directions in question had been given telephonically by a judge acting under 28 U.S.C. § 1407. See In re Corrugated Container Anti-trust Litigation, 620 F.2d 1086 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Corrugated Container Antitrust Litigation, 662 F.2d 875 (D.C. Cir. 1981) (upholding power of transferee judge to impose sanctions telephonically, although setting aside contempt finding on the particular facts).

deponents.[108] This practice may be particularly useful if some of the depositions will be conducted by attorneys not intimately involved in the litigation. The ground rules may cover such matters as Rule 29 stipulations, limitations on who may be present and how many attorneys may question the deponent, restrictions against improper instructions and objections, procedures for obtaining court rulings, provisions relating to rescheduling for deferred supplemental examination, authorization for non-party documents to be produced under the protection of the confidentiality order, practices to be followed with videotaped depositions, explanation of the identification system used for exhibits, and other instructions regarding documentary evidence. Depositions may be significantly expedited by requiring that, unless surprise is important for impeachment or similar purposes, opposing counsel and the deponent shall be notified in advance of the documents about which the deponent will be examined. Extra copies of key documents should usually be provided at the deposition for opposing counsel and the deponent.

21.46 Interrogatories.[109]

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Many courts have local rules restricting the number of interrogatories that may be propounded without a court order, and some judges require that special need be shown before any interrogatories may be served. The reasons for such strictures are well known: interrogatories may be unnecessarily numerous and may be prepared merely

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108. See Sample Order, § 41.38. Some courts have adopted such guidelines in the form of local rules.

109. Reference: MCL 1.501.

by following a form, without careful thought about discovery needs in the particular case; the actual value for discovery or trial purposes of artfully-worded answers may be outweighed by the time and expense of preparing questions and responses; and interrogatories often lead to protracted disputes concerning the burdensomeness of the requests or the sufficiency of the answers, further increasing the expense of discovery. In complex litigation this imbalance between the benefits and the cost may be substantial, particularly in view of the limitations on evidentiary use of interrogatory answers in multi-party cases. Accordingly, interrogatories should ordinarily not be used as a general discovery device for inquiring into all factual and legal aspects of the case.

Carefully considered, thoughtfully composed, and selectively used interrogatories may, however, be very worthwhile. They can be a relatively inexpensive method of discovery. Particularly in cases such as Title VII and antitrust litigation, in which critical evidence may be available only in the opponent's files, incisive interrogatories may not only lead to the early disclosure of information but also help to focus and confine later discovery. Interrogatories provide an efficient means for obtaining information known in part by a number of persons employed by an adversary. For the answering party, interrogatories have the advantage of permitting thorough investigation and careful thought before responding to critical questions.

If interrogatories are to play a salutary role in the discovery process, counsel must appreciate their professional responsibilities, both in asking questions and in drafting responses. To emphasize their obligations, the court may require attorneys to append to interrogatory requests, answers, and objections a certificate incorporating the language of Fed. R. Civ. P. 26(g).[110]

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110. In view of the provisions of Fed. R. Civ. P. 26(g), a certificate by counsel should be appended to the client's answers to interrogatories under Rule 33.

21.461 Interrogatories as Preliminary to Other Discovery.

Interrogatories may be effectively used to determine—as a prelude to orderly planning of further discovery—the existence, identity, and location of witnesses, documents, and other tangible evidence. This form of discovery is especially useful in obtaining information about systems and programs for the storage and retrieval of computerized data when the requesting party may need assistance from an expert in formulating precise questions and the answering party may need time and special guidance to respond. Under Fed. R. Civ. P. 26(e)(1), counsel have a duty to supplement responses regarding newly-discovered witnesses; the court should consider imposing under Rule 26(e)(3) a similar duty with respect to summaries, governmental studies, and other materials as to which a continuing obligation of disclosure may be needed.

21.462 Expert Testimony.

Fed. R. Civ. P. 26(b)(4)(A)(i) contemplates that discovery of expert witnesses will normally be by interrogatories. Although, as discussed in § 21.481, depositions of experts ordinarily should be permitted in complex litigation, the information derived from interrogatory answers may be helpful in planning the deposition examination of the experts, and the continuing duty to supplement responses under Rule 26(e) may be valuable in informing counsel of the employment of new experts and changes in opinions or theories of those previously examined.

21.463 Contention Interrogatories.

So-called contention interrogatories may sometimes be used to define issues in the case. According to Fed. R. Civ. P. 33(b),

> An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

The other procedures discussed in § 21.33 are usually more productive as means for clarifying and narrowing the issues and the contentions of the parties. If interrogatories

are used for this purpose, the court should determine, after hearing from counsel, when such interrogatories should be permitted and the particular subjects to which they should be addressed. Without such controls, substantial time, money, and energy may be wasted on contention interrogatories that are either premature or overinclusive.[111]

21.464 Interrogatories as Preliminary to Rule 56 Motions.

Interrogatories occasionally are used, in conjunction with requests for admission under Fed. R. Civ. P. 36, to provide the foundation for presenting summary judgment motions based on specific, discrete facts. Whether certain facts are genuinely in dispute may be difficult to ascertain from the depositions and affidavits; and in response to Rule 36 requests, the opposing party may state that, although reasonable inquiry has been made, it can neither admit nor deny the truth of particular matters that depend upon the credibility of third persons. In these situations, interrogatories asking whether the party knows of any contradictory evidence may be valuable in establishing those matters for purposes of Fed. R. Civ. P. 56. Interrogatories may also be used to ascertain what parts of the requested admission caused the other party to deny it and what the other party claims the true facts to be.

21.465 Procedures to Improve Utility and Reduce Burdensomeness.

In addition to limiting the number, timing, and scope of interrogatories, the court may adopt other practices to make interrogatories more effective and economical as a discovery tool, such as the following:

* **master interrogatories; precluding duplicate requests.** Similarly situated parties may be required to confer and develop a single or master set of interrogatories to be served on a given party. If interrogatories have already been served by one party, other parties should be prohibited from

111. Courts differ as to who should sign answers to contention interrogatories. Some require that counsel personally sign the response. Another approach is for the party to respond by stating in substance, "I have been advised by my attorneys that . . . ;" this, however, might waive the attorney-client privilege.

asking the same questions, for under Fed. R. Evid. 801(d)(2) the use of interrogatory answers depends on the identity of the party who gave the answers, not on the identity of the party who asked the questions.

* **use of interrogatories from other litigation.** Parties may also be prohibited from asking interrogatories that an adversary has already answered in other litigation when such answers are available or may be made available by the adversary. As previously discussed, admissibility under Fed. R. Evid. 801(d)(2) depends on the identity of the responding party.

* **successive responses.** If some questions will require substantially more investigation than others, the responding party should provide answers in stages as the information is obtained, rather than seek additional time for the first response. The court may give advance approval to this practice under Fed. R. Civ. P. 29.

* **modified responses.** Interrogatories frequently seek information that the other party does not have or can obtain only with the expenditure of much time and money, although similar information may be available or obtainable relatively quickly and expensively. For example, information may be requested on a calendar year basis when compilations exist for fiscal years, or records may reflect compensation rates and overtime paid but not hours of overtime as requested. In such circumstances, the responding party should make known the existence of the alternative information before filing a response that the information is not available or an objection based on the burdensomeness of the request.

* **early resolution of disputes.** The parties may be required to object promptly to interrogatories, rather than waiting until the time for filing answers. This practice is especially important when, as often is necessary in complex litigation, more than the standard 30-day period is allowed for filing answers. The parties should attempt to resolve all objections, for example, by modifying or clarifying the troublesome interrogatories. If negotiations are unsuccessful, the parties should present their dispute to the court in a clear and concise manner, avoiding lengthy motions and briefs. If this is done, the court should be able to make a ruling before any major disruption in the discovery schedule occurs.

21.47 Stipulations; Requests for Admission.[112]

Stipulations of fact obtained under Fed. R. Civ. P. 36 or by other methods play a vital role in reducing the time and expense both of pretrial proceedings and of the trial itself. Although premature efforts to extract stipulations may be counter-

112. Reference: MCL 3.30, 3.60.

productive,[113] the judge should take an active part in promoting stipulations of facts that, after an appropriate opportunity for discovery has been afforded, should no longer be seriously in doubt. Admission should be expected not only of facts of which each party has personal knowledge, but also of those that can be established by the testimony of others. If the parties insist, facts of the latter type may be shown as "uncontested," "uncontroverted," or "conceded," rather than as "admitted," but with the same ultimate effect in the litigation. Admissions may be sought with respect both to the facts of the case and to matters that affect the admissibility of other evidence, such as the authenticity of records and the foundation requirements for exceptions to the hearsay rule under Fed. R. Evid. 803(6) and similar provisions.

The court will foster the stipulation process by stressing the distinction between conceding the truth of some fact and agreeing to its admissibility or weight. Counsels' obligation to admit an uncontroverted fact does not affect their right to object to its admissibility or to contest its probative value. Indeed, if a party contends that some fact is irrelevant or otherwise inadmissible, the court has more reason to expect a concession as to its truth without the exhaustive investigation and discovery that might be warranted for an obviously critical fact. Admissions as to the accuracy of tabulations and compilations may be useful even though a substantial challenge may be made to the methodology or significance of the study.[114]

Use of Fed. R. Civ. P. 36 to obtain admissions has the advantage that the procedures, responsibilities, and consequences are prescribed in the rule itself. Rule 36, however, has its disadvantages. As discussed in § 21.464, complementary or

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113. Consideration should be given, however, to the early use of the combined discovery request described in § 21.422, in which a party may admit that particular facts are true in lieu of proceeding with other discovery regarding those matters.

114. Caution should be exercised in requiring a party to admit the accuracy of voluminous data or summaries of the same. As discussed in § 21.446, a response based upon some limited study may be more appropriate even though this results in a summary with known errors.

supplementary interrogatories may be needed if a party in good faith declines to admit the truth of some fact that depends on the credibility of other witnesses. In addition, like interrogatories, Rule 36 admissions are usable only against the party to whom they were directed,[115] a serious limitation in multi-party litigation. Moreover, unless a cross-request is filed, the fact will not stand as admitted by the requesting party. More important, notwithstanding the precatory language of the rule,[116] parties often deny a requested admission without indicating that portions of the stated fact are true. Relatively trivial disagreements may result in unexplained general denials, leaving the nature of the dispute unstated.

For these reasons many courts prefer the procedure in which counsel are required to negotiate on a stipulation, stating those matters on which they agree and perhaps also those which are in dispute. As discussed earlier, the stipulation may indicate simply that certain facts are uncontested, rather than admitted, or that the admissions are made for some limited purpose.

The limitations of Rule 36 and the difficulties often encountered when busy, zealous attorneys attempt, even in utmost good faith, to negotiate stipulations of fact have led to the widespread use of a third method for arriving at stipulations and admissions. Counsel for one side, typically the plaintiff, are ordered by the court to draft a series of numbered, narrative statements of objective facts which they believe can be established, avoiding to the extent possible all argumentative language, labels,

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115. Unlike interrogatories, Rule 36 admissions may be used only in the case in which made. In multiple litigation that is not consolidated, requests under Rule 36 should therefore be made in all cases and Rule 36 requests answered by a party in prior litigation should be renewed. A simple new request that asks the party to admit each matter previously admitted should suffice.

116. "[W]hen good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder." Fed. R. Civ. P. 36(a).

and legal conclusions.[117] Opposing counsel must then indicate which of the proposed facts are admitted (or will not be contested) and which are disputed, specifying the nature of the disagreement by appropriate interlineation or deletion, as well as drafting narrative statements of additional facts that they believe can be established. The newly-added statements are then returned to the first party for admission (or non-contradiction) or for specific disagreement. A consolidated statement reflecting what is agreed and what remains in dispute is then filed with the court as a stipulation of the parties.

Special provisions are usually included in the order regarding objections to the admissibility of the uncontested facts. Although, as discussed earlier, the parties are not permitted to refuse to admit the truth of some fact merely because they contend it is inadmissible in evidence, these orders often require that objections be noted on the consolidated statement, though sometimes they permit objections on the ground of relevancy to be made at trial.

This procedure for developing the agreed and disputed facts is frequently employed as one of the final steps before trial, coupled with a provision precluding a party from offering at trial evidence of any fact not included in the narrative listing, except for good cause shown. It may, however, also be used earlier in the litigation (after an appropriate period for discovery) with respect to specified issues, such as a class certification hearing or a Rule 56 motion. Whether all facts that the party would propose to prove must be listed—or only those that may possibly be admitted and, if admitted, would reduce the scope of evidence to be presented—will depend upon the circumstances of the case. The more extensive the required listing, the greater the opportunity to narrow the facts that remain for proof at trial; however, the judge

117. See Sample Order, § 41.6.

should weigh the potential for reduction in the length and cost of trial against the time and expense expended in identifying facts that will probably remain in dispute.

The degree to which stipulations can be obtained may depend not so much on the procedures used as on the attitude of the parties. Attorneys are sometimes reluctant to make concessions that will in any way ease their opponents' burden. The judge can play an important role in helping counsel to recognize that, in addition to fulfilling their responsibilities as officers of the court, they will usually best serve their clients' interests by making appropriate concessions and admissions. The refusal to stipulate provable facts almost never results in a failure of proof and almost always imposes additional costs on both sides in discovery, in trial, or both. Fed. R. Civ. P. 37(c) authorizes the court to charge these costs to a party who unjustifiably refuses to make an admission; the court may also apply these cost-shifting provisions to requests made in developing a consolidated statement of agreed facts.

The parties may also be reminded of the tactical disadvantages of contesting at trial some matter on which their opponents will certainly prevail or, indeed, of being confronted at trial with an earlier denial of some matter that could not have been fairly disputed. Since an angry client, rather than the attorney, is often the person responsible for an "admit nothing" posture in the litigation, the court may direct that the clients themselves attend a conference at which the desirability of early stipulations is discussed. Appointment of a master to assist the parties in arriving at stipulations may also be useful in some cases.

Counsel may be more willing to enter early stipulations if provision is made, analogous to that in Fed. R. Civ. P. 36(b), for timely withdrawal from an incorrect stipulation on the basis of newly discovered evidence when no substantial prejudice to other parties would result. They may also be willing to enter into stipulations for particular purposes, such as for preliminary injunction hearings, Rule 56 motions, or trials of special issues under Fed. R. Civ. P. 42(b), even though they may decline to

make such stipulations for other purposes. These limited or conditional concessions may expedite the litigation significantly.

The court may also be able to use the judicial notice procedure provided by Fed. R. Evid. 201 to eliminate the need for some fact-finding at trial. With respect to matters "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," an appropriate request may be filed with the court under Fed. R. Evid. 201, forcing opposing counsel to indicate why they refuse to stipulate such matters.

21.48 Special Problems.[118]

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In addition to the timing, scope, extent, and form of discovery, a number of other special topics should be considered in the discovery plan because of their potential importance in pretrial proceedings or at the trial itself. Some of the more significant of these are discussed in this section.

21.481 Discovery into Expert Opinions.

Scheduling. As early as the initial conference, the court should attempt to identify the subjects on which the parties will or may offer expert opinions, and establish timetables for disclosure of the information specified in Fed. R. Civ. P. 26(b)(4)(A)(i). Of course, some refinement of the issues and preliminary investigation and discovery may be needed before litigants can decide whether to use an expert, and whom to employ, and the decisions of some parties may depend upon the expert opinions that other parties may offer. These considerations, however, affect only the dates specified

118. Reference: MCL 2.60, 2.70, 2.71, 3.40.

for making these decisions and disclosures, not the need for appropriate deadlines to be set early in the litigation. Whether made concurrently or sequentially by the parties, these disclosures should be made sufficiently in advance of trial for the parties to conduct supplemental discovery and for the court to consider, if warranted, selection of a court-appointed expert under Fed. R. Evid. 706.

Opinions of experts are often modified and refined in the light of further studies and opinions expressed by other experts. Although Fed. R. Civ. P. 26(e)(1) imposes a duty to keep opposing counsel advised of these changes, the court may wish to establish some final cut-off date, by which time all additional studies must be disclosed to be usable at trial, at least on direct testimony.

Form and Contents. Discovery of expert opinions is, according to Fed. R. Civ. P. 26(b)(4)(A)(i), normally to be conducted by interrogatories. However, the parties should ordinarily be required to obtain and disclose written reports from their experts and be allowed to depose orally their adversaries' experts as permitted under Rule 26(b)(4)(A)(ii). If these depositions are conducted in the usual manner, by allowing all counsel the opportunity for examination, the court may need to set time limits. Otherwise, unduly prolonged examinations may result, notwithstanding the cost-shifting provisions of Rule 26(b)(4)(C). Because the principal reason for allowing a deposition is to provide a better understanding of the expert's opinion than may be afforded by interrogatory answers, some courts have directed that the proponent of the expert conduct the major portion of the deposition examination, in the nature of a preview of the trial testimony, with opposing counsel allowed only limited examination, primarily for clarification and explanation. The court should, however, consider the views of counsel before deciding on the most appropriate method for conducting discovery of experts.

Full disclosure should be made, either by interrogatory answer or in deposition, of the underlying facts or assumptions upon which opinions of the experts are based. Disclosure of all such materials, even if inadmissible at trial, enables the court to

consider in advance of trial whether experts in the field reasonably rely upon that type of data and whether any limiting instructions may be needed with respect to disclosure of such underlying data at trial.[119] Likewise, counsel should disclose any materials, such as publications and treatises satisfying Fed. R. Evid. 803(17) or 803(18), that may be offered at trial as substantive evidence through the experts.

Rarely do controversies arise regarding production of final reports prepared by experts to summarize the testimony they will give at trial. Indeed, in lieu of interrogatory answers or as a prelude to depositions, many courts routinely require the exchange of these reports, together with the underlying data upon which the opinions are based. Disputes do, however, sometimes occur with requests for preliminary reports,[120] for studies made but discarded or not relied upon, and for communications from the attorneys or parties to the expert. Disclosure is often resisted on the basis that these items are beyond the scope of Fed. R. Civ. P. 26(b)(4)(A) or are protected as work product materials under Rule 26(b)(3). In general, the courts have tended to require pretrial disclosure of those matters that at trial would be appropriate in cross-examination of the witness and would not be protected as work product or by the attorney-client

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119. Under Fed. R. Evid. 703 experts are permitted to express opinions based upon inadmissible data if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." In such situations, disclosure of the underlying inadmissible data ordinarily will be permissible under Rule 705, not as substantive evidence but to explain the reasons for the conclusions reached. If the dangers of misuse of the data by the jury, even with appropriate limiting instructions from the court, are sufficiently serious, the expert may be limited to a general reference to the nature of such data, avoiding any detailed description.

120. In an effort to delay disclosure, counsel sometimes instruct their experts to prepare only "preliminary" reports until shortly before trial.

privilege.[121] If necessary, the court may conduct an in camera inspection to redact core work product materials.[122]

Court-appointed Experts. Like those employed by the litigants, court-appointed experts are subject to appropriate discovery. Fed. R. Evid. 706 requires that the parties to be advised of the expert's findings and permits any party to take the expert's deposition. The court should not place time limits upon such examinations without a demonstration that limits are necessary to prevent abuse.

Hearings under Fed. R. Evid. 104. Most objections to expert opinions affect the weight to be accorded such opinions rather than their admissibility. In unusual situations, however, an objection to the qualifications of an expert, to the subjects on which opinions may be offered, or to the reasonableness of reliance upon particular data may have sufficient merit and such potential effect upon further proceedings in the case as to justify a special hearing by the court under Fed. R. Evid. 104 in advance of trial.[123]

21.482 Governmental Investigations.

Early in the proceeding the court should inquire about the existence of governmental studies involving matters relevant to the litigation. Access to these studies and to evidence gathered in the course of such investigations will often reduce substantially the need for further discovery and may also assist in defining and narrowing the issues. Studies that are not matters of public record may sometimes be obtained

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121. The decision to have an expert testify using materials otherwise protected by the attorney-client privilege may be treated as waiving the privilege. Cf. S & A Painting Co. v O.W.B. Corp., 103 F.R.D. 407 (W.D.Pa. 1984) (privileged items actually used by witness during deposition subject to disclosure under Fed. R. Evid. 612).

122. See Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984).

123. For an illustration of this procedure, along with an extensive discussion of many of the principles affecting expert testimony, see In re Japanese Elec. Prods. Antitrust Litigation, 723 F.2d 238, 275-84 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1985), aff'g in part and rev'g in part, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 513 F. Supp. 1100 (E.D. Pa. 1981), in which objections to critical expert opinions were addressed in a Rule 104 hearing and only the admissible opinions considered in ruling on motions for summary judgment.

by voluntary agreement with the agency, by subpoena, or by requests under the Freedom of Information Act.

Factual findings of the governmental agency may be usable in evidence in the current litigation under Fed. R. Evid. 803(8)(C). Special discovery may be needed concerning those matters that affect admissibility, especially those bearing upon the "trustworthiness" of such findings. If serious doubts are raised as to the admissibility of the findings, a pretrial hearing under Fed. R. Evid. 104 may be desirable.[124] Although the evidence presented during the governmental inquiry is not rendered admissible by Fed. R. Evid. 803(8)(C), it may be admissible under other evidentiary rules. For example, business records may have been produced that are admissible under Fed. R. Evid. 803(6), and statements that were made by parties to the current litigation may be introduced against them under Fed. R. Evid. 801(d)(2).

Access to grand jury materials may greatly reduce the time and expense of discovery in related civil litigation. Notwithstanding the general rule of secrecy in Fed. R. Crim. P. 6, disclosure may be authorized by the court upon the requisite showing of a particularized need.[125] Although the policy against disclosure applies both to the testimony given to the grand jury and to documents subpoenaed or otherwise obtained for use by the grand jury, courts have tended to be more lenient in authorizing disclosure

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124. See In re Japanese Elec. Prods. Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1985), approving the procedure (but not all of the evidentiary rulings) in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (E.D. Pa. 1980).

125. See Illinois v. Abbott & Assocs., Inc., 460 U.S. 557 (1983), holding that the special statutory authorization under which state attorneys general may obtain grand jury materials relevant to antitrust actions, 15 U.S.C. § 15f(b), does not eliminate the requirement to show a particularized need. A two-step process is involved if the civil litigation is pending in a court different from that in which the grand jury was empanelled, and close attention should be given to the principles discussed in Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979), and the procedures of Rule 6. See also United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) (particularized need required for federal attorneys to obtain materials for use in civil litigation).

of the documentary materials.[126] Moreover, discovery from private parties of otherwise unprivileged matters[127] is not precluded by Rule 6 merely because such materials may also have been disclosed to grand juries. Persons subpoenaed by the grand jury often make copies of documents before furnishing originals to the grand jury and may retain such copies in a collection, facilitating production under Fed. R. Civ. P. 33(c) or 34. Materials furnished to a grand jury remain the property of the persons producing such documents, and they may consent to inspection by other persons.[128]

21.483 Summaries.

Voluminous or complicated data of an admissible[129] character should be presented at trial, whenever possible,[130] through summaries, tabulations, charts, graphs, or extracts. Sometimes these compilations are offered under Fed. R. Evid. 611(a) merely as aids in understanding data contained in other exhibits admitted in evidence. More often they will be received as substantive evidence under Rule 1006, in which event the underlying data usually should not be separately introduced; a few examples of the source materials may, however, be helpful in understanding the nature and limitations of the summaries.

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126. See, e.g., In re Grand Jury Proceedings (Miller Brewing Co.), 717 F.2d 1136 (7th Cir. 1983).

127. If grand jury testimony is compelled through grant of "use immunity," the witness may still be able to claim the privilege against self-incrimination in subsequent civil litigation. Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

128. See United States v. Penrod, 609 F.2d 1092 (4th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

129. Fed. R. Evid. 1006 is not a rule of admissibility but rather an exception to the "best evidence" rule, permitting accurate summaries to be used in lieu of voluminous originals under the conditions stated. If the originals would not have been admissible, neither will a summary under Fed. R. Evid. 1006, no matter how accurate.

130. Counsel in jury cases usually recognize the need for summaries, but in non-jury cases sometimes introduce raw data for the judge's consideration. Summaries are useful in both types of cases; indeed, the trial judge is not required to "[wade] through a sea of uninterpreted raw evidence." See, e.g., Crawford v. Western Elec. Co., 614 F.2d 1300, 1319 (5th Cir. 1980).

The fair and efficient use of compilations and other summaries at trial requires that opposing parties have access to the exhibits to be offered (as well as to the underlying data) sufficiently in advance of trial to ascertain their accuracy. To the extent feasible,[131] pretrial verification procedures should be used to eliminate errors, leaving for the trial only disputes as to the weight and significance of the evidence. Serious questions regarding admissibility may be considered in a pretrial hearing under Fed. R. Evid. 104. The comments in § 21.446 should be consulted when summaries involve computerized evidence.

21.484 Sampling Techniques.

Statistical methods may often be used to estimate, to specified levels of accuracy, the characteristics of a "population" or "universe" of events, transactions, attitudes, etc., by observing those characteristics in a relatively small segment, or "sample," of the population. The use of sound sampling techniques, in lieu of discovery and presentation of data from the entire "population," may produce substantial savings in the time and cost of litigation. In some cases, sampling techniques may provide the only practicable means to collect and present highly relevant data.

Whether estimates obtained by sampling are reliable—a prerequisite to their use in litigation—will depend upon the procedures employed in selecting the sample and in obtaining information from or about the sample. The proponent of such evidence has the burden of establishing conformity with generally recognized statistical standards, a task that will ordinarily involve expert testimony. This showing, including disclosure of all underlying data and documentation, should be made well in advance of trial.

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131. As discussed in § 21.446, to require an opponent to verify an entire study of voluminous data or to eliminate from an exhibit those errors detected on a review of some sample of the data may not be fair. In such cases, however, the extent of projected errors may often be estimated and disclosed to the jury, thereby eliminating the need to examine individual errors one-by-one.

Polls and surveys—a species of sampling that involves interrogation of individuals about such matters as their observations, actions, attitudes, beliefs, or motivations—require special attention. The parties should be required, before conducting any poll, to provide other parties with an outline of the proposed form and methodology, including the particular questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process. The parties should attempt to resolve any disagreements concerning the manner in which the poll is to be conducted, and a meeting between the experts engaged by the litigants may produce a mutually acceptable plan. Of course, the results and any opinions based on the poll should be disclosed promptly after it has been taken.

Objection is sometimes raised that a poll, although conducted according to generally accepted statistical methods, involves impermissible hearsay. Just as an accurate summary will not be admissible if the data summarized are inadmissible, a statistically sound poll will similarly not be admissible if what it estimates is inadmissible. Polls, however, are most frequently used in situations where the issue is what people believe, not the truth of what they believe. In such situations, their statements about those beliefs would be admissible under Fed. R. Evid. 803(3) and therefore the poll, if conducted properly, would also be admissible. Likewise, surveys sometimes inquire into tests or experiments being conducted by those interviewed, and their contemporaneous reports would be allowable under Rule 803(1). In many instances, what is relevant is what those polled have to say, not the truth of their statements, in which event the statements do not constitute hearsay under Rule 801(c). In the rare situation when a poll involves inadmissible hearsay statements, experts may nevertheless be allowed under Rule 703 to express opinions based upon results of the survey.

21.485 Extraterritorial Discovery.

Although authorized by statutes and rules, obtaining evidence outside the United States may be costly and time-consuming. Legitimate disputes may occur regarding the

fairness of translations.[132] However, the most serious problems, sometimes not appreciated by American lawyers and judges, arise because many countries view the type, form, or scope of our evidentiary processes—particularly during pretrial proceedings—as inconsistent with, or contrary to, their own laws, customs, and national interests.[133] The following factors are generally involved in determining whether discovery will be allowed to any degree, whether the manner or extent of permissible discovery will be limited (and, if so, whether what is obtained will be usable in the litigation), and how long the process will take:

* **laws of the United States.** The procedures for obtaining evidence from other countries are prescribed in part by the Federal Rules of Civil Procedure, particularly Rules 28(b), 44(a)(2), and 45(e)(2); in part by statutes, particularly 28 U.S.C. §§ 1781, 1783, and 1784; and in part by agreements entered into by the United States with other countries, particularly the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[134] Attention must also be given to applicable decisional law,[135] as well as to the Federal Rules of Evidence.

* **laws and attitude of the foreign country.** The extent and form of pretrial discovery that will be compelled or even permitted by other sovereigns vary widely. Within a particular country the rules may differ based on

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132. Fed. R. Civ. P. 43(f) authorizes the court to appoint an interpreter of its own selection and determine the amount and method of compensation. Whether this applies to the translation of pre-existing documentary materials is not clear. If disputes between the parties regarding translations are not resolved by agreement, the court may appoint an expert under Fed. R. Evid. 706. In selecting an interpreter or court-appointed expert, the judge should seek, to the extent possible, a person satisfactory to all parties.

133. In civil law jurisdictions, in which the role of gathering and presenting evidence is assigned to the courts and not the litigants, taking a deposition may be considered as the performance of a judicial act by another sovereign. Many common law jurisdictions do not tolerate pretrial inquiries for "discovery" purposes. See, e.g., Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] All E.R. 434 (H.L. 1977). See generally Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, 13 Int'l Law. 5, 6-7 (1979).

134. March 18, 1970 (entered into force for the United States October 7, 1972), 23 U.S.T. 2555, T.I.A.S. No. 7444. [reprinted in 28 U.S.C.A. following § 1781 and 8 Martindale-Hubbell Law Directory Part VII, "Selected International Conventions." See generally Restatement of Foreign Relations Law (Revised), § 483.

135. See, e.g., Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982); Societe Internationale v. Rogers, 357 U.S. 197 (1958); In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977).

the nature and identity of the person or body from which the discovery is sought and on the type of information sought. For example, the breadth of discovery may depend on whether the evidence is testimonial or documentary.[136] Some countries not only refuse to compel a witness to provide evidence, but also prohibit the voluntary production in any manner of some items of evidence. The attitude of the other country may also be affected by the current state of its diplomatic relationship with the United States and by the nature of the litigation. This latter factor is particularly important if the American litigation involves claims that are inimical to the law or policies of the foreign country.

* **position of the person or body from which discovery sought.** Is discovery sought from a national of the United States, of the country in which the discovery is to be conducted, or of another country? From a party to the American litigation or otherwise subject to the jurisdiction of the American courts? From an instrumentality or arm of the foreign country? From a person or body willing, at least if not violative of the laws of the other country, to provide the information? These factors may be critical in determining whether the evidence can be obtained in a particular country and, if so, by what method.

* **posture of the litigants.** A key question is whether the parties to the litigation will cooperate in securing the extraterritorial discovery by entering into stipulations under Fed. R. Civ. P. 29 to facilitate the procedures.[137] The unwillingness of a litigant with foreign connections or interests to enter into stipulations may not, however, reflect an uncooperative attitude but may be motivated by its desire to comply with the laws and customs of another country.

Sometimes the parties will not be able to obtain evidence located in other countries. Therefore, the need for such evidence should be explored early in the proceedings, not only because of the time that may be required to obtain the evidence, but also because of the possibility that alternative methods of proof will be necessary. The Department of State and the appropriate American Embassy or Consulate can provide

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136. For example, as of 1984 all countries party to the Hague Convention except the United States, Czechoslovakia, and Israel have declared that they will not execute letters rogatory for the purpose of obtaining pretrial disclosure of documents.

137. Stipulations for non-stenographic and telephonic depositions under Fed. R. Civ. P. 30(b)(4, 7) also may be valuable; these variants, however, may be ordered by the court on motion even in the absence of accord between the parties. Stipulations should also be sought regarding questions of admissibility because the discovery may not be in the question-and-answer form traditional in American litigation. See Fed. R. Civ. P. 28(b).

valuable assistance to the parties in planning for the conduct of discovery in foreign countries.[138]

Depositions. Fed. R. Civ. P. 28(b) establishes three procedures for taking depositions in other countries. The "notice" method of Rule 28(b)(1) is generally equivalent to the typical domestic deposition in which, independent of any judicial or other governmental involvement, the deponent is called upon to answer written or oral questions under oath or affirmation after notice by a litigant under Fed. R. Civ. P. 30 or 31. Under the "commission" method of Rule 28(b)(2), the American court appoints the person—typically an American consular officer—to administer the oath and preside over the deposition, with the consequence that the deposition will be viewed as not merely a private matter between the parties. Even in countries in which either or both of these two procedures are permitted, no element of compulsion will ordinarily be available if the witness refuses to attend or answer questions. The third and more traditional method, pursuant to "letters rogatory" (or letters of request) under Rule 28(b)(3), implicates the governmental powers of the two countries. The American court requests—it is only a request—the assistance of the court or other agency of the foreign country to secure evidence from the deponent, including such sanctions to compel production as would be available in like matters in the courts of that country.[139] The foreign country ultimately decides whether to require a reluctant deponent to provide

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138. The Office of Citizens Consular Services, Department of State, Washington, D.C., often can provide current information regarding such matters as reservations and declarations under the Hague Evidence Convention and practices in non-signatory countries, and, in general, can give helpful suggestions as to the procedures to be followed in particular countries. Valuable reference materials can be found in 22 C.F.R. §§ 92.4(a), 92.49-71 (1982) and 1 U. S. Dept. of Justice, Civil Division Practice Manual §§ 3-12.15 (1976) [hereinafter "DoJ Practice Manual"]. See also 8 C. Wright & A. Miller Federal Practice and Procedure § 2083; 4 J. Moore, J. Lucas & G. Grotheer, Federal Practice ¶¶ 28.03-28.08 [hereinafter "Moore's Federal Practice"].

139. For samples of a letter rogatory, see United States v. Reagan, 453 F.2d 165, 168 (6th Cir. 1971), cert. denied, 406 U.S. 946 (1972); DoJ Practice Manual, §§ 3-12.27, 3-12.28. The Practice Manual cautions against use of archaic or technical language found in many published forms.

the requested information and, indeed, whether and when to honor and execute the letter rogatory.[140]

As indicated, countries differ regarding the extent to which and the circumstances under which depositions by the three methods authorized by Fed. R. Civ. P. 28 will be permitted. However, the Hague Evidence Convention details procedures to be followed under the various methods in those countries that are signatories.[141] Under the Convention, the American court can communicate directly with a "Central Authority" designated in a contracting country without following diplomatic channels.[142] Although the judicial authority executing the request routinely will apply its own procedures,[143] special requests—for example, for a verbatim transcript or for answers in writing and under oath—are to be honored unless incompatible with its own laws. Unfortunately for American litigants, the effect of the Convention is reduced substantially by numerous reservations and declarations of the signatories, with many nations having exercised reservations on private-party depositions and a majority having declared they will not

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140. A letter rogatory may yield evidence in two months or two years, depending on the foreign jurisdiction. The Office of Citizens Consular Services, Department of State, often can provide information as to recent experiences in particular countries.

141. Many countries not parties to the Convention, such as Switzerland and Canada, routinely execute letters rogatory from United States courts.

142. See also 28 U.S.C. § 1781(b)(2). Transmittal of letters rogatory to some countries has been simplified by the 1981 Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents, October 5, 1981 (entered in force for the United States October 15, 1981), 527 U.N.T.S. 189, T.I.A.S. No. 10072 [reprinted in 8 Martindale-Hubbell Law Directory, Part VII, "Selected International Conventions"].

143. Although the practices followed in different countries to gather and record evidence vary widely, "evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules." Fed. R. Civ. P. 28(b); see also the accompanying Note of the Advisory Committee.

execute letters rogatory issued "for the purpose of obtaining pre-trial discovery of documents as known in common law countries."[144]

The most efficient method for taking the deposition of a willing deponent, if foreign law permits,[145] will usually be by notice under Fed. R. Civ. P. 28(b)(1), coupled with appropriate stipulations under Rules 29 and 30. If this procedure is prohibited, foreign law may allow the deposition to be taken by commission under Rule 28(b)(2) or by telephone under Fed. R. Civ. P. 30(b)(7), or the witness may be willing to travel to another country that does not impose such a restriction. Issuance of both a commission and a letter rogatory, as authorized by Rule 28(b), may be a useful measure to guard against the risk that a proposed deponent may not remain willing to testify voluntarily.

Under 28 U.S.C. § 1783 a federal court can require the appearance "before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner."[146]

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144. These reservations do not mean that such requests will never be honored; rather, they are intended to negate any responsibility to honor these requests as a treaty obligation. A number of law review articles survey the Convention's provisions. See, e.g., Myrick & Love, Obtaining Evidence Abroad for Use in United States Litigati 35 Sw. L. J. 585, 592-97 (1980); Augustine, Obtaining International Judicial Assist under the Federal Rules and the Hague Convention on the Taking of Evidence A in Civil and Commercial Matters, 10 Ga. J. Int'l & Comp. L. 101, 120-33 (1980

145. For example, in Japan and Turkey a deposition on notice is permissib an American citizen. Swiss law, however, makes it a crime to take any d that country without governmental authorization.

146. The subpoena is served under Fed. R. Civ. P. 45(e)(2) and f Fai appear as ordered may lead to a finding of contempt. 28 U.S.C. § 178 relax their restrictions when a citizen of the United States is to b

Sanctions will sometimes be appropriate against a party to the litigation which fails to provide information that it has in another country.[147]

Blocking Laws. Efforts to obtain or compel production of documents located outside the United States may present special problems because of the increasing number of special foreign nondisclosure laws.[148] Nevertheless, despite claims that production would subject the complying party to liability under foreign law, most American courts have held to be discoverable relevant documents in the possession or control of parties before the court or of American citizens or residents within the reach of the court's subpoena powers.[149] However, in deciding what penalties to impose for non-compliance, the courts have considered the good or bad faith efforts of the defaulting party,[150] the national interests at stake,[151] and, in general, the various factors enumerated in Restatement (Second) of Foreign Relations Law § 40 (1965).[152] For special provisions

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147. See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982); cf. Societe Internationale v. Rogers, 357 U.S. 197 (1958).

148. See Batista, Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation, 17 Int'l Law. 61 (1983). Note, Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position, 50 Fordham L. Rev. 877 (1982); Note, Foreign Non-Disclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 Yale L. J. 612 (1979).

149. See, e.g., In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979). The provisions of 28 U.S.C. § 1783 apply to the production of documents as well as to testimonial evidence. See also In re Grand Jury Proceedings (Cid), 767 F.2d 1131 (5th Cir. 1985) (defendant required to execute consent to disclosure of foreign documents despite Fifth Amendment claims).

150. Societe Internationale v. Rogers, 357 U.S. 197 (1958); In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977).

151. Weight is given to the nation's interest in effective enforcement of its criminal laws, In re Grand Jury 81-2, 550 F. Supp. 24 (W.D. Mich. 1982), and in government-initiated civil proceedings, United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

152. See United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983). The factors suggested in the Restatement for determining appropriate sanctions have been used by some courts in deciding whether to issue the initial order compelling discovery. See SEC v. Banca Della Svizzeria Italiana, 92 F.R.D. 111, 117 (S.D.N.Y. 1981).

regarding use of foreign documents, see 28 U.S.C. §§ 1740, 1741, 1745; Fed. R. Civ. P. 44(a)(2); and Fed. R. Evid. 902(3).

Judicial Control. To facilitate the process of obtaining extra-territorial discovery in the case before it, as well as to avoid friction with other countries that may impede discovery needed by other American litigants in the future, the court should order that no discovery be undertaken in other countries without advance approval and that the procedures of the Hague Convention be utilized if available.[153] Applications for such discovery should be as specific and detailed as possible, and should indicate all alternative methods for obtaining the information. In most cases the proposed discovery should be limited to that which is actually needed for trial. The court should be reluctant to authorize "investigatory" discovery, and should ordinarily eliminate general requests, such as for "all other documents relevant thereto." The court's findings, specifying what is permitted and why it is needed, should be incorporated into a separate order that can be presented to foreign authorities, even if "letters rogatory" are not being issued. The latest edition of the Restatement, Foreign Relations Law of the United States (Revised), § 437, with Reporters' Notes, should be consulted for further guidance.

Under existing policies,[154] federal judges are precluded from traveling abroad to control the conduct of depositions. For this reason, the court should adopt in advance appropriate guidelines to govern such depositions within the bounds permitted by the laws of the other country. See § 21.456. Moreover, if permissible under the laws and customs of that country, the judge may give attention by telephone to disputes between the parties or appoint a special master to supervise the deposition personally. Before

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153. The Hague Convention is not applicable to discovery from a foreign party conducted in the United States. See In re Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729 (5th Cir. 1985); In re Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985).

154. Reports of the Proceedings of the Judicial Conference of the United States (1980), p. 4.

either of these procedures are employed, clearance should be sought through the Office of the Citizens Consular Services, Department of State.

21.5 SPECIAL REFERRALS.[155]

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Well in advance of the final pretrial conference, the court should consider submitting complicated factual disputes to an expert appointed under Fed. R. Evid. 706, to a master appointed under Fed. R. Civ. P. 53, or to a magistrate designated under 28 U.S.C. § 636(b)(1)(B).[156] Although the three types of referrals involve different procedures and consequences, they are all designed to enhance or facilitate the fact-finding process by having some complicated issue studied before trial by someone selected by the court because of his or her objectivity, expertise, or other special qualifications.

Even in complex litigation, use of these procedures is the exception and not the rule. Counsel may view such referrals as infringing on their prerogatives,[157] as encroaching on the right to a jury trial, or as imposing additional time and expense. Moreover, in some cases selection of a truly neutral person to serve as court-appointed expert or master may be difficult, if not impossible, with the result that the appointment may tend to predetermine the outcome of the case.

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155. Reference: MCL 2.60, 3.20, 3.21, 3.30, 3.40.

156. This section of the Manual is primarily concerned with referrals of disputes of a factual nature that will be subject to proof at trial. Use of masters and magistrates to exercise judicial supervision over all or specified portions of the pretrial proceedings or to perform administrative functions is discussed in other sections. See, e.g., §§ 20.14, 21.423, 21.432. Nor does this section deal with situations in which a magistrate is by consent exercising the powers of the district judge over the entire case under 28 U.S.C. § 636(c).

157. The same objection will often be raised when, as permitted by Fed. R. Evid. 614, the judge calls or examines witnesses at trial.

Such referrals may, however, be merited in cases presenting special problems, such as complicated financial controversies which involve detailed scrutiny of voluminous records, scientific disputes about which experts in the same field have widely divergent opinions, or other technical matters which will be difficult to explain in the normal trial setting. Utilized properly, the neutral expert may assist materially in clarifying these issues and may also facilitate settlement discussions.

The court should formalize any referral by instructions specifying the issues to be investigated, any special procedures to be followed, and when the report is to be completed. A useful technique is to have the expert, master, or magistrate attend one or more conferences with the court and counsel at which these matters are discussed. Ex parte communications between the expert, master, or magistrate and the court or individual litigants should ordinarily be prohibited.

21.51 Court-Appointed Experts.[158]

The procedures governing court-appointed experts are set forth in Fed. R. Evid. 706. Like other witnesses, and unlike masters and magistrates, the court-appointed expert is (1) not limited in forming opinions to information presented by the parties at a hearing, (2) subject to pretrial discovery, including deposition,[159] and (3) typically called to testify at trial in person, subject to full cross-examination by the parties. Opinions of court-appointed experts are not entitled to any greater weight than is warranted by their knowledge, expertise, and thoroughness. Disclosure of the fact of court appointment is discretionary with the court. Use of court-appointed experts is not

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158. Reference: MCL 3.40.

159. The data on which the court-appointed expert's opinion is based, like that used by experts employed by the parties, should be made available before trial and, indeed, in the absence of exceptional circumstances, a written report of those conclusions should be filed with the court during pretrial proceedings. Although the court should be cautious in setting a limitation on the length of the deposition of such experts absent a demonstration that a limit is needed to stop abuse, the time for taking the deposition is properly a matter for the judge to determine after hearing from the parties.

a radical departure from the traditional adversary model for litigation and in appropriate cases should be considered by the judge, even if not requested by the parties. Judicial appointment of an independent expert may be particularly useful when experts employed by the litigants have widely divergent opinions and well-recognized intermediate schools of thought are not represented by such experts.[160]

Although court-appointed experts may have "a great tranquilizing effect" on the other experts[161] and may facilitate settlements or concessions, the objective of such an appointment is a more understandable trial, not a shorter one. Indeed, the trial itself may be lengthened by the testimony of a court-appointed expert. Referral to a master or magistrate, if permissible, is more likely to shorten the trial. Appointment of an expert also entails additional cost to the litigants under Fed. R. Evid. 706(b),[162] an expense of litigation that can be avoided if the matter can be referred to a magistrate appointed under 28 U.S.C. § 636(b)(1) or under Fed. R. Civ. P. 53.

The most important factor when the court appoints experts is their selection. Only those whose fairness and expertise in the field cannot be genuinely questioned should be considered, and the court should select someone who can communicate effectively as a witness. Although the appointment is made by the court, every effort should be made to select a person acceptable to the litigants. Once the decision has

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160. See Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976); cf. Chalmette Petroleum Corp. v. Chalmette Oil Distrib. Co., 143 F.2d 826 (5th Cir. 1944) (power, if not responsibility, of court even before Fed. R. Evid. 614 to call essential witnesses). However, if the litigants' experts agree on matters of theory and simply disagree on factual assumptions underlying their opinions, the assistance of a court-appointed expert may not be appropriate or necessary, for the differences in their assumptions may be fairly resolved by the trier of fact.

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

162. Parties with limited financial resources sometimes request court appointment of an expert in lieu of privately engaging their own, with the expectation that fees may be charged to their adversaries or paid from funds that may be recovered in the litigation. The judge should be wary of making an appointment under Fed. R. Evid. 706 if, in effect, the expert will be on a contingent fee basis.

been made to make an appointment under Fed. R. Evid. 706, the parties will often be able, with the assistance of their own experts, to agree on one or more persons who will be satisfactory. Concurrent nominations by the parties, a procedure recognized in Rule 706, will usually result in lists containing several names in common. The court may also call on professional organizations and academic groups to provide a list of qualified, willing, and available persons, and give the parties a limited number of peremptory challenges to those on the list. Persons related to any judge of the court within the degrees mentioned in 28 U.S.C. § 458 should not be appointed even with agreement of the parties.

21.52 Masters.[163]

The provisions governing the appointment and use of special masters in resolving factual disputes are contained in Fed. R. Civ. P. 53.[164] The master's findings must be based upon evidence presented at a hearing conducted essentially like a trial,[165] with subpoena powers enforceable through the court. These findings are to be received in evidence at the trial by means of a written report. The parties have access to the master's report prior to the trial and limited rights to present objections to the court; they may not, however, conduct other pretrial discovery with respect to the master's findings or examine the master at the trial. Under Rule 53(e)(4) the parties may

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163. Reference: MCL 2.60, 3.20.

164. Whether Rule 53 is a source of authority for using special masters to supervise discovery and other pretrial proceedings—a subject discussed in § 20.14—is not clear. See W. Brazil, G. Hazard & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983), pp. 315-388.

165. The master is to "rule upon the admissibility of evidence unless otherwise directed by the order of reference," Rule 53(c); and the 1983 amendment to Rule 53(c) is intended to incorporate the Federal Rules of Evidence. Although, unlike the court-appointed expert, the master is not authorized to conduct a private investigation into the matter referred, masters are expected to utilize their personal expertise and knowledge in evaluating the evidence and are not precluded from conducting a "viewing" such as that permitted for judges and juries. See Ruiz v. Estelle, 679 F.2d 1115, 1159-63 (5th Cir.), amended in part and vacated in part on other grounds, 688 F.2d 266 (1982), cert. denied, 460 U.S. 1042 (1983).

stipulate that the master's findings are to be final, subject only to review on questions of law. Even without the stipulation, the master's findings in non-jury cases are binding "unless clearly erroneous."

These provisions, however, must be read in the light of La Buy v. Howes Leather Co.[166] and its progeny. In non-jury cases, the authority to make a referral under Rule 53, at least if not consented to by the parties, is limited. The stated rule for non-jury cases is that "reference shall be made only upon a showing that some exceptional condition requires it." Fed. R. Civ. P. 53(b). Under La Buy, the general complexity of the litigation, the projected length of trial, and the congestion of the court's calendar do not constitute exceptional conditions.

La Buy does not wholly preclude referrals under Rule 53 in non-jury cases. "Matters of account" and—by an amendment to the Rule after La Buy—"of difficult computation of damages" are specifically authorized. Disputes regarding settlements—their approval or administration—and attorneys' fees may also come within these special exceptions. Similarly, a master may be appointed to monitor implementation of decrees.[167] With consent of the parties, the court may designate a magistrate to act as special master in any civil case without regard to the normal limitations of Rule 53(b). 28 U.S.C. § 636(b)(2); Fed. R. Civ. P. 53(b) (1983). Employment discrimination cases, if not scheduled for trial within 120 days after issue has been joined, may be referred to a master under Rule 53. 42 U.S.C. § 2000e-5(f)(5).

Use of a special master (unless a magistrate is designated) involves the same problems of selection and extra costs that have been discussed with respect to court-appointed experts. If the principal task of the master will be to collect, assemble, and

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166. 352 U.S. 249 (1957), aff'g 226 F.2d 703 (7th Cir. 1955).

167. See, e.g., Ruiz v. Estelle, 679 F.2d 1115, 1159-63 (5th Cir.), amended in part and vacated in part on other grounds, 688 F.2d 266 (1982), cert. denied, 103 S. Ct. 1348 (1983).

distill voluminous data presented by the parties, and the primary qualifications are objectivity and familiarity with evidentiary hearings rather than expertise in some technical field, the parties will often agree to appointment of a magistrate. In jury cases, however, unless a stipulation is made under Rule 53(e)(4) for the findings to be final, the court should be reluctant to appoint a magistrate as special master, lest at trial the court appear to be taking a partisan role. The clerk and deputy clerks are not to be appointed as masters "unless there are special reasons requiring such appointment which are recited in the order." 28 U.S.C. § 957.

21.53 Magistrates under 28 U.S.C. § 636(b)(1).[168]

The provisions governing referrals of factual disputes to magistrates, other than in their role as special masters, are contained in 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72 (1983), and local rules of the court. Like a special master, the magistrate acting under these provisions makes factual determinations based upon evidence presented at an adversarial hearing and submits proposed findings (together with recommendations) by written report to the court and the parties. The parties have no right to engage in discovery from, or to cross-examine, the magistrate. Unlike the report of special masters in non-jury cases, the magistrate's findings (other than on what are described generally as non-dispositive pretrial disputes) are, on timely objection[169] by a party, subject to de novo determination by the judge, which may include taking further evidence. There is no explicit authority for the parties' stipulating to be bound by the magistrate's findings.

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168. This section does not cover situations in which, by consent, the magistrate is assigned the entire case under 28 U.S.C. § 636(c).

169. Even in the absence of an objection, the judge may have an obligation to conduct a careful and complete review of the report, and findings not objected to can perhaps be attacked on appeal on grounds of plain error or manifest injustice. See, e.g., Nettles v. Wainwright, 677 F.2d 410 (5th Cir. 1982).

28 U.S.C. § 636(b)(1)[170] generally describes the types of factual disputes that may be so referred, including motions for injunctive relief, motions for certification of class actions, and prisoner petitions challenging conditions of confinement. Although the statute is not clear, other similar issues—such as disputes involving personal jurisdiction and venue—probably may also be referred to a magistrate for evidentiary hearing and proposed findings and recommendations.

The statute was written with non-jury issues in mind; the law is unsettled whether and how referrals of jury issues may be made. Even if permissible, the court should be cautious in making such a referral because the jury may perceive that the court, through the magistrate's report, is favoring one of the parties on a disputed issue of fact.

The preceding discussion has been directed towards referrals under 28 U.S.C. § 636(b)(1)(B, C). Under § 636(b)(1)(A), non-dispositive pretrial matters may be referred to a magistrate for actual rulings, subject to reconsideration by the judge when "the magistrate's order is clearly erroneous or contrary to law." For example, the court may refer to the magistrate matters relating to supervision of discovery or particular disputes, like extensive claims of privilege, which arise during discovery. Presumably, the magistrate may also conduct a pretrial hearing under Fed. R. Evid. 104 to determine the admissibility of evidence at the trial. As discussed in § 20.14, delegation to a magistrate of overall supervisory responsibilities in complex cases is not generally recommended. Moreover, specific matters should be referred only after the court considers both the possibility of delay caused by the filing of objections to the magistrate's decisions and the restrictions on the judge's power to alter rulings that are not clearly erroneous or contrary to law.

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170. Also see **Rule 10** of the Rules Governing Section 2254 and Section 2255 Proceedings.

21.54 Other Referrals.[171]

Other special resources, such as referral to a private or governmental technical body, use of an advisory jury of experts in a non-jury case, or consultation with a confidential "adviser" to the court, may be considered in complex litigation. However, unless specifically authorized by statute[172] or agreed to by the parties, the court should be cautious in experimenting with such procedures in cases in which, if the judge is held to be in error, a lengthy and costly retrial might be required. The referral procedures authorized by statute or rule—court-appointed experts, masters, and magistrates—should be adequate in most cases to enable the fact-finder to understand the issues to be resolved. These comments are not intended to inhibit innovative uses of these recognized procedures, such as appointing a team of experts to serve under Fed. R. Evid. 706. However, these procedures should not be used to displace the parties' right to a resolution of disputes through the adversarial system, but rather should be utilized to make that system more effective and efficient when complicated issues are involved. See § 23.12 for a discussion of special techniques that may be useful in facilitating settlements.

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171. Reference: MCL 2.60.

172. E.g., 35 U.S.C. § 302 (reexamination of patents).

21.6 FINAL PRETRIAL CONFERENCE; PREPARATION FOR TRIAL.[173]

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"[A] plan for trial, including a program for facilitating the admission of evidence," should be formulated at the final pretrial conference, which is to be "held as close to the time of trial as reasonable under the circumstances." Fed. R. Civ. P. 16(d). In complex litigation, many components of this trial plan and program should have been determined, at least tentatively, earlier in the pretrial proceedings. At the final conference, however, the court should confirm, revise, or establish directions regarding the time, place, and structure of the trial, and should make final plans for conducting the trial in the most efficient, effective, and economical manner practicable under the circumstances. With discovery complete, many rulings of the court already made, and the trial approaching, settlement negotiations often may be productively undertaken or renewed at this point.

21.61 Date and Place of Trial.[174]

The date and place of trial should be set forth in the final pretrial order. In fixing the date, the court should consider not only the time needed by counsel to

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173. Reference: MCL 3.30, 3.60, 3.70, 4.00, 4.10, 4.11, 4.12, 4.121, 4.20, 4.21, 4.22, 4.23, 4.30, 4.50, 4.57, 4.70.

174. Reference: MCL 3.70, 5.02, 5.22.

prepare for an efficient trial, but also the other litigation scheduled before the judge. Only in the most compelling circumstances should a continuance of any significant length be granted after the final pretrial conference.[175]

Special attention should be given to the status of any cases from other divisions or districts that may have been coordinated for pretrial purposes and to any unresolved motions challenging venue or personal jurisdiction.[176] If a consolidated trial of such cases is desirable,[177] the court should consider ordering transfers under 28 U.S.C. § 1404 or § 1406, or seeking consents from the parties for trial in the district under Fed. R. Civ. P. 77(b). If consolidation for trial cannot or should not be ordered, the court should consider whether the cases should be returned for trial to the courts in which they were filed (as, for example, by suggesting remand of cases transferred for pretrial under 28 U.S.C. § 1407) or whether such a decision should be deferred (for example, because of the possibility of settlement or other resolution after a trial of other cases). If the judge decides to return a case to another court for trial, the pretrial order should indicate the nature and expected duration of additional discovery that may be needed,[178] the estimated time before the case will be ready for trial, and the major rulings that, if not revised, will affect further proceedings. See § 31.12.

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175. The court may consider imposing a deadline in class actions after which it will not permit partial settlements that might cause a continuance of the trial. See § 23.21.

176. In litigation involving multiple cases brought in different jurisdictions transferred for pretrial purposes under 28 U.S.C. § 1407, rulings on motions attacking venue or personal jurisdiction in particular cases are frequently deferred until the time comes to determine the structure of the trial. At that time, such motions are often withdrawn because the litigant is a party in other cases in which those problems do not exist or because of the potential for transfer under § 1404 or 1406.

177. See discussion in § 21.631.

178. In most cases transferred under 28 U.S.C. § 1407, substantially all discovery will be completed before remand. In some cases, however, such as aircraft disaster litigation, discovery regarding damages may have been deferred and must be conducted in the transferor district after remand.

21.62 Reevaluation of Jury Demands.

In most complex litigation one or more of the parties will have made a timely demand under Fed. R. Civ. P. 38 for a jury trial, typically without any designation as to specific issues for which a jury trial is sought. No later than the final pretrial conference, the court and counsel should consider, as Fed. R. Civ. P. 39 permits, which of the issues to be set for trial are ones (1) as to which no one has sought a jury trial, (2) as to which there is no entitlement to a jury trial, whether on traditional grounds or for reasons of complexity that implicate due process concerns,[179] (3) as to which a jury demand may be withdrawn by mutual consent, (4) as to which a late jury demand should be allowed, or (5) as to which an advisory jury may be useful.

In examining these questions, the judge and the attorneys should be issue-oriented. On certain issues, no right to a jury trial may exist or the parties may all agree, on reflection, that a non-jury trial is preferable; on other issues, a jury may be used either as the fact-finder or as an advisory jury. If both jury and non-jury issues are to be tried, the court should determine whether Beacon Theatres, Inc. v. Westover[180] requires that the jury issues be given priority of decision.[181] The court should determine whether the issues for a jury trial are so interrelated that severance for trial before

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179. Compare In re Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980), with In re U. S. Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980); see also Cotten v. Witco Chem. Corp., 651 F.2d 274 (5th Cir. 1981), cert. denied, 455 U.S. 909 (1982). The debate as to a "complexity" exception to the Seventh Amendment likely will continue until a definitive Supreme Court ruling. In any event, the various procedures and techniques described in the Manual, when appropriately selected and creatively adapted according to the circumstances of the litigation, should be helpful in virtually all cases, no matter how complex, in assisting the jury to understand the evidence and applicable rules of law.

180. 359 U.S. 500 (1959).

181. Even if jury issues are to be given priority under Beacon Theatres, the judge may hear evidence at the same time on related non-jury issues, later affording the parties the opportunity to supplement the record with evidence relevant only to the non-jury issues and deferring a decision on the non-jury issues until after the verdict has been returned.

separate juries would be unwise or impermissible. See § 21.632. At the final pretrial conference the parties should also consider agreeing, if the jury is not unanimous, to accept a majority verdict under Fed. R. Civ. P. 48 or to waive a jury under Rule 39 and accept a decision from the judge based on the same evidence.[182]

21.63 Structure of Trial.[183]

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In the traditional trial, all issues in a single case are resolved by a general jury verdict (or non-jury findings by the court) after the plaintiff and the defendant have sequentially presented their evidence in chief and in rebuttal. Variations from this standard model—particularly those involving consolidation of cases for joint trial under Fed. R. Civ. P. 42(a), severance of claims and issues for separate trials under Rule 42(b), and use of special verdicts and interrogatories under Fed. R. Civ. P. 49—may be essential to the "just, speedy, and inexpensive determination" of complex litigation as called for by Rule 1.

Suggestions by counsel for structuring the trial will likely be influenced by strategic considerations. For example, plaintiffs may propose that they select one or more relatively short "test cases" for trial, expecting to be able to use—but not have used against them—the principles of collateral estoppel. Conversely, the defendants may suggest a single trial involving all issues and all parties, anticipating that the length and complexity of such a trial may hopelessly confuse the fact-finder or at least lead to a compromise verdict, and may force inadequately prepared plaintiffs to accept

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182. Although such stipulations may also be obtained after the case has gone to trial, the parties may be more amenable to these agreements before trial begins.

183. Reference: MCL 1.60, 4.12, 4.121, 5.02.

a minimal settlement. In other circumstances, the positions of the parties may be reversed or even coincide, although not necessarily in a manner that best serves the interests of the court and the public.

The court should not take a passive role in determining how the trial should be structured. Instead, the judge should actively explore with counsel various alternatives for trial, and then decide on a structure that, consistent with fairness to all litigants and preserving their Seventh Amendment rights, should resolve the litigation in an efficient manner, minimizing the risk of unnecessary trial time. Several techniques may be used, singly or in combination, to achieve this objective.

21.631 Consolidation.

Pretrial proceedings in complex litigation are often focused upon a lead or primary case; the failure to explore fully the possibilities of consolidation of other cases for trial has sometimes necessitated additional trials that could have been avoided. Utilizing Fed. R. Civ. P. 42(a), the court should consider consolidating all cases pending in (or transferable to) the court for joint trial of those issues on which essentially the same evidence probably will be presented. Class actions may be consolidated with cases instituted by opt-outs or others.[184] Consolidation may also be appropriate even though some issues or cases are to be tried to a jury while others are for non-jury trial.

Whether consolidation is permissible or desirable will depend upon the nature and extent of the non-common evidence to be presented at such a trial. Fed. R. Civ. P. 42(b) may often be used to isolate for an initial joint trial particular issues on which all or most of the evidence will be common to all cases, while reserving non-common issues

184. Care should be taken in such situations to assure that counsel for parties in the non-class actions are not precluded from participating, at least in a supplementary role, in the presentation of evidence and arguments at trial. Special caution should be exercised if major conflicts exist between the basic trial positions of those obliged, by reason of consolidation, to join forces at trial.

for subsequent individual trials.[185] If most of the proof will be common but some evidence admissible in one case should not be heard in others, a multiple-jury format may be considered.[186]

21.632 Separate Trials.

Whether the litigation involves a single case or many cases, severance of certain issues for separate trials under Fed. R. Civ. P. 42(b) is often useful. This procedure enables the parties, the judge, and the jury to focus their attention on particular issues, thus reducing the length of trial and enhancing the ability of the fact-finder to understand the evidence.[187] Moreover, the results of the first trial may eliminate the need for further proceedings—for example, if a statute of limitations defense is upheld—or may substantially reduce the extent of such proceedings—for example, if a particular measure of damages is found applicable. The advantages of separate trials should, however, be weighed against the potential for increased cost and inconvenience, particularly if the same witnesses may be needed to testify at both trials.

Special care must be taken in deciding how, and in what order, issues in jury cases can most effectively be severed for separate trials. First, Beacon Theatres, Inc. v. Westover should be studied if the case involves both jury and non-jury issues.[188] Second, for reasons of fairness and efficiency, if not to comply with constitutional

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185. For example, in some mass disaster litigation, all cases might be consolidated for a trial on liability issues, while reserving damage questions for later individual trials.

186. Multiple juries have been used most often in lengthy criminal cases in lieu of granting a motion for severance. There is, of course, a practical limit on the number of juries that can be utilized at the same time without running the risk of a "circus" atmosphere.

187. Through severance the court may be able to conduct a trial on certain issues before discovery has been completed, or indeed even commenced, on other matters.

188. 359 U.S. 500 (1959). Under Beacon Theatres, the right to trial by jury on legal claims may not normally be abridged by a prior determination of equitable claims involving common factual disputes. 359 U.S. at 508-11. Accordingly, non-jury trials should ordinarily be conducted subsequent to, or concurrently with, jury trials involving common issues.

requirements, the issues should not be separated in such a manner that a second jury will (or should) hear basically the same evidence as the first jury and, in effect, may be able by its verdict to overrule that of the first jury.[189] The constitutional questions may generally be answered by a pragmatic focus upon the extent to which the evidence bearing on different issues will overlap.[190] If feasible, the separate trials should be scheduled before the same jury, either by proceeding with a second trial immediately after receipt of the first verdict[191] or by having a brief adjournment before the trial resumes.[192] If the first trial resolves liability issues in favor of the plaintiff, the court should usually call for a short adjournment to permit the parties to explore settlement. Many cases are settled after a finding of liability, obviating any need for a trial on damages.

21.633 Special Verdicts and Interrogatories.

Special verdicts, or interrogatories accompanying a general verdict, are frequently useful in complex jury trials. These procedures may help assure that the jury focuses

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189. See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2390-91; 5 Moore's Federal Practice ¶¶ 42.03[1]-42.03[2]; Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931); Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978).

190. Thus, the trial of "liability" and punitive damages to separate juries would have little utility, even if permissible. Careful analysis of the interplay among various issues is needed. For example, although the issues of statutory violation and of damage in a Section 1 antitrust case should not be presented to separate juries, the court could order a separate trial as to amount of individual damages after a finding of statutory violation which includes a determination of injury and the measure of damages. Compare In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981), cert. dismissed, 462 U.S. 1125 (1983) with Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978); see also Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976).

191. Presenting issues sequentially to the same jury (or to the judge) without any substantial interruption in the proceedings is more a variation in the normal order of proof in a single trial than a severance of issues for separate trials. See § 22.34.

192. The longer the delay between successive trials before the same jury, the greater the likelihood that the jurors may forget the evidence or, indeed, become unavailable or disqualified.

on the proper issues, reduce the length and complexity of the instructions,[193] and minimize the need for, or scope of, retrial in the event an error is committed.[194] The responses of the jury often provide guidance for conducting further discovery, ruling on non-jury issues or motions for summary judgment, trial of remaining issues, or settlement.

Special verdicts and interrogatories should be drafted in a way that aids the jury in understanding and deciding the issues and minimizes the risk of inconsistent findings. The issues should be arranged and presented on the form in a logical and understandable manner. For example, questions common to several causes of action or defenses should be asked only once, and related questions should be grouped together as an aid in giving instructions.[195] Only issues in genuine dispute—not those subject to a directed verdict—should be included as questions on the verdict form. When special verdicts are used, issues not presented to the jury for a finding are converted into non-jury questions; the parties will often agree that certain issues need not be presented to the jury in the special verdict, but may be resolved by the judge after the primary issues have been decided by the jury's verdict.

Some judges and attorneys are reluctant to use the procedures of Fed. R. Civ. P. 49 because of bad experiences in other cases. Almost always, however, these difficulties were caused by inadequate care in drafting the questions submitted to the jury, leading

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193. Unlike the special verdict, a general verdict with interrogatories will actually increase the length and complexity of the instructions; it also presents a greater risk of inconsistent findings. For this reason, except when an amplification of a general verdict is needed on some specific issue (such as a questionable theory of damages), use of Rule 49(a) is ordinarily preferable to that of Rule 49(b).

194. For example, the jury may be asked to make findings on matters that affect legal theories of doubtful merit.

195. As a result of transfers under 28 U.S.C. § 1404 or for other reasons, legal standards affecting similar claims or defenses may differ. Careful drafting of questions on a special verdict form can ease the problems that consolidation would otherwise cause in these situations.

to confusion and inconsistencies. With careful preparation these problems ordinarily can be avoided; and the benefits to be derived from special verdicts and interrogatories will generally warrant the effort.

21.634 Directions as to Structure of Trial.

The final pretrial order should contain clear directions regarding the transfer and consolidation of cases, the issues to be tried and those not to be tried, and any administrative details to implement those decisions. It should include, as appropriate, instructions on the role at trial of counsel in subordinate cases, the timing of additional trials, and procedures for receiving supplemental evidence if jury and non-jury issues are to be tried at the same time. Preliminary planning for the use of special verdicts or interrogatories should begin, subject to revision during trial.

The interplay of these procedures may be vital to resolution of complex litigation in an efficient manner that serves not only the interests of the litigants but also those of the court and the public.[196] The tension between the responsibilities of counsel as advocates for their clients and those incumbent on them as officers of the court may be exacerbated during discussions regarding the structuring of the case for trial; the exercise of good judgment and sound discretion by the judge is essential.

196. For an illustration of the use of these techniques in combination, see In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981), cert. dismissed, 462 U.S. 1125 (1983), in which the jury responses in a special verdict following a joint trial of all cases (including "opt-out" cases) on all issues except individual amounts of damages provided the foundation for summary judgment motions regarding damages.

21.64 Procedures to Expedite Presentation of Evidence.[197]

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A primary objective of the final pretrial conference is to consider measures to expedite the presentation of evidence at trial. These procedures should minimize (if not wholly eliminate) evidence that is irrelevant or would be relevant only on matters not genuinely in controversy, whether substantive or procedural; evidence that may be presented more expeditiously in another form or method, such as through summaries; and evidence that is unnecessarily cumulative.[198] Moreover, the court and counsel should use techniques to avoid interrupting trial for objections, offers of proof, and other evidentiary matters that could have been presented fairly and efficiently before trial.

As a foundation for this planning, the basic disputes between the parties with respect to the issues to be tried must be clarified. Typically many of the "elements" of a cause of action or defense will not be in controversy but may be stipulated, and, when so stipulated, substantial evidence may be eliminated without impairing—indeed enhancing—the ability of the fact-finder to understand the evidence on those matters which are in dispute. This delineation and narrowing of the issues should occur at the final pretrial conference if not accomplished earlier. Attention may then be directed to the proof the parties expect to offer at trial on the contested issues. Drafting

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197. Reference: MCL 3.30, 3.60, 4.00, 4.10, 4.11, 4.20, 4.21, 4.22, 4.23, 4.30, 4.50, 4.56, 4.57, 4.60.

198. On some critical disputes, repetitive testimony may not be unnecessarily cumulative, particularly in view of the inferences that may be drawn from, or indeed the instructions that may be requested with respect to, the failure of a party to present potential witnesses. In the balancing process directed by Fed. R. Evid. 403, weighing "probative value" against considerations of "undue delay, waste of time, or needless presentation of cumulative evidence," the relative significance of the particular dispute to the outcome of the case is often an important factor.

proposed instructions, special verdicts, and interrogatories in advance of the final pretrial conference serves not only to educate the court, but also to focus counsels' attention on the specific issues that are in dispute. See also § 22.433.

21.641 Statements of Facts and Evidence.

To identify the facts in actual dispute and prevent unfair surprise, courts frequently call on the parties to list the facts they propose to establish at trial in support of their respective positions. The procedure described in § 21.47 may be used to ascertain which of the proposed facts are agreed to be true (or whose truth will be conceded or not disputed for purposes of trial) and which are contested. The uncontroverted facts may be taken as established at trial without the need for other proof, and the evidence at trial may focus on, or be limited to, the disputed facts. Courts have often required that the listing of proposed facts be detailed and inclusive and have barred the parties from proving additional facts not so listed (other than for good cause shown or purely for impeachment purposes). Additionally, the parties may be required to annotate their positions by identifying the witnesses and documents to be used in support of the contested facts, with evidence not so identified similarly precluded.

A statement of uncontested and contested facts provides insight into matters on which evidence can be eliminated and facilitates the process of entering findings of fact in non-jury cases. However, the substantial work the attorneys must do to prepare such a statement may not be warranted in some cases, such as those in which evidence to be offered on the facts in controversy will establish the matters not in dispute. Of course, time spent by counsel in listing the facts to be proved is not wasted merely because it may not reduce the length of trial; indeed, one of the benefits of a comprehensive pretrial statement is to assure at least minimal preparation for trial.

Whether or not a statement of uncontested and contested facts is prepared, the parties should be required to exchange, sequentially or concurrently, lists of the witnesses

and documents they plan to offer at trial. Often they are also directed to describe the contents of the direct proposed testimony of the witnesses, either by indicating the subjects on which examination will be conducted, by providing a synopsis of the anticipated testimony, or by noting in detail the expected testimony.[199] Such orders frequently require counsel to categorize the witnesses and documents according to the likelihood of their being offered or according to the major issues they address.

Some procedure should be adopted to eliminate, to the extent possible, the need for evidence merely to establish the admissibility of other evidence. Parties should be required to make known in advance of trial any objections (at least on grounds other than relevancy or redundancy) to documents that other parties plan to offer; absent objections, admissibility should be deemed established without need for supporting evidence.

Counsel should search for ways to present the proposed evidence in the most expeditious form. Introduction of voluminous data will usually be facilitated through use of summaries, samples, governmental studies, or expert opinions. See § 21.48. Qualifications of experts may be shown by introduction of a resumé or vitae; and opinions of experts, at least in non-jury trials, may be presented on direct testimony by adoption of a prepared report under Fed. R. Evid. 611. See § 22.51. Depositions may be shortened by eliminating colloquies and irrelevant or cumulative matters, or through presentation of an agreed summary. Various techniques to expedite the presentation of evidence are discussed in § 22.

21.642 Pretrial Rulings on Objections.

In many complex cases, objections to the admissibility of proposed evidence (or uncontested facts which are to be presented through stipulations or admissions) should

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199. As with statements of agreed and disputed facts, the parties typically will be precluded, except on a showing of good cause, from offering (other than perhaps for purely impeachment purposes) witnesses and documents not listed before trial.

be made and ruled upon in advance of trial. Pretrial rulings on admissibility save time at trial; they may enable parties to remedy objections by eliminating inadmissible portions of offers, obtaining alternative sources of proof, or presenting necessary foundation evidence; and they may narrow the issues and enable counsel to plan more effectively for trial. The failure to make advance objections, if required under this procedure, is usually treated as waiving any objection at trial, other than perhaps on the ground that the proposed evidence is irrelevant or cumulative.

Objections to documentary evidence may be indicated in a response to the listing of such evidence by opposing counsel. Objections to deposition testimony may be noted in the margin of the deposition where the objectionable matter appears, and the court's ruling may be indicated at the same place. Objections to other types of evidence, such as the qualifications or opinions of experts, may be made by means of a separate motion or other written request, describing the nature of the proposed evidence and the grounds of the objection.

Many rulings may be made without argument, though in some situations the court should call for written or oral argument or even a pretrial hearing under Fed. R. Evid. 104, which may itself involve the presentation of evidence. Evidentiary rulings that cannot be made with confidence except in the light of developments at trial may be made on a tentative basis before trial, subject to later revision, or may be deferred for consideration at trial.

The benefits of advance rulings on objections should be weighed against the potential for wasteful pretrial efforts by the court and counsel. For example, to rule on objections within a deposition the judge must read it before trial, perhaps in its entirety, and then hear it again during a jury trial. Moreover, because of developments during trial, the deposition, or portions of it, may not be offered or some of the objections may be mooted or withdrawn. Therefore, in many cases courts make pretrial rulings only on those objections that are considered by counsel sufficiently important

to merit an advance ruling, either because of their critical significance to the outcome of the case or because of their effect on the scope or form of other evidence.

21.643 Limits on Evidence; Principle of Selectivity.

Experienced attorneys generally understand, at least in jury cases, the tactical advantages of being selective in the presentation of evidence. Particularly when encouraged by gentle prodding and suggestions by the judge, they will usually exercise self-restraint. Rarely will formal limits on the quantity of evidence be necessary to complement the restrictions on relevancy that result from the narrowing of issues or from the severance of issues for separate trials.

In some complex litigation, however, it may be necessary for the court to impose direct limits on the extent of evidence. Reasonable limitations on particular forms of evidence—for example, on the number of character witnesses or experts—have long been recognized and upheld in appropriate cases. The provisions of Fed. R. Civ. P. 16(b), coupled with those of Fed. R. Evid. 403 and 611, give the judge the power, if not the duty, to see that the presentation of evidence does not involve "undue delay," "waste of time," "needless presentation of cumulative evidence," or "needless consumption of time." Limits on the quantity of evidence should not be imposed, however, except to the extent they are warranted by the circumstances of the case and will not significantly impair the fairness of trial to any party. The jury may be advised of any such limitations in order to prevent unwarranted inferences from a party's failure to call all possible witnesses.

In the unusual case the court may wish to impose limits in advance of trial[200] on the number of witnesses or documents to be offered on a particular subject or in

200. In some cases the need for limits or the nature of the limits may be determined only as the trial progresses. To the extent, however, that these matters may be fairly appraised and determined before trial, counsel—having advance warning and the opportunity to decide how best to utilize their allotted time—have a less tenable claim of prejudice.

the aggregate, on the length of examination or cross-examination of particular witnesses, or on the total time that may be taken in the presentation of evidence.[201] For the court to make these decisions before trial requires adequate information regarding the nature and extent of the proposed evidence. Statements of agreed and disputed facts, as described in § 21.641, may be utilized for this purpose. The court may also direct the parties, in listing their witnesses, to indicate not only the subjects to be covered, but also the length of time the direct examination of each witness should take, absent time consumed by objections or non-responsive answers. Opposing counsel may be required to indicate the expected length of cross-examination and of any additional subjects (other than those affecting credibility of the witness) they expect to cover with the witness. Guided by these statements, the court may be able to determine whether limits are needed, and, if so, the nature of the limits that would be fair and reasonable. For good cause shown at trial, such as delays caused by witnesses or opposing counsel,[202] a party should be given appropriate relief from the limitations previously imposed. However, pressed into selectivity, counsel have rarely had reason to complain about or request exceptions from limitations on the extent of evidence or the length of trial.

21.65 Briefs and Final Pretrial Motions.[203]

The contentions of the parties on the major legal issues in the case, including those affecting important evidentiary and procedural disputes, should be filed prior to trial. Indeed, these briefs, which may include the statements of agreed and disputed

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201. See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1170-73 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

202. Gross limits on the length of examination of witnesses or the presentation of evidence may be inequitable because a party will be "charged" with the time spent on objections or examination by other counsel. Ordinarily the court should set these limits by fixing the time allowed each party to conduct its examination.

203. Reference: MCL 3.30, 4.10, 4.60.

facts and the lists of witnesses and documents described earlier, should ordinarily be submitted in advance of the final pretrial conference. When so filed and studied before the conference, they provide a sound basis for discussions and decisions on such matters as the issues to be tried to a jury, the structure of trial, and methods to expedite the presentation of evidence. Supplementary pretrial briefs may be filed after the conference on matters needing additional attention, including (if not already submitted) proposed jury instructions and special verdicts.

With discovery complete and decisions reached on the evidence to be presented (and perhaps received) at trial, some additional issues may be ready for summary judgment at the final pretrial conference. To defer such motions and their resolution to the eve of trial, as sometimes occurs, may cause unnecessary expense and inconvenience to counsel, witnesses, jurors, and the court, and may interfere with proper planning for the conduct of the trial. Therefore, except in unusual situations, all motions under Fed. R. Civ. P. 56 should be decided before or shortly after the final conference.

21.66 Final Pretrial Order.

The final pretrial order should recite the various directions and rulings, whether made at the final pretrial conference or earlier, that will govern and control the conduct of the trial. If separate trials are ordered under Fed. R. Civ. P. 42, the order should clearly define the issues to be tried at the initial trial. Any preclusionary orders, preventing the offer of evidence or the proof of facts not enumerated in advance of trial, should be confirmed. Various techniques described in § 22 may be used to facilitate the presentation of evidence and enhance the understanding of the issues by the fact-finder; many of these should be discussed at the final pretrial conference and, as appropriate, incorporated into the final order. See Sample Order, § 41.7. The final pretrial order may be modified to prevent "manifest injustice." Fed. R. Civ. P. 16(e).

No single format can be prescribed for a final pretrial order that will be suitable for all complex cases. Like that for pretrial proceedings, the plan and program for

the trial must be tailored by the judge and attorneys according to the circumstances of the particular litigation. For a checklist of items that often merit attention at the final conference, see § 40.3.

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22.1 ADMINISTRATIVE DETAILS.[1]

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22.11 Trial Schedule.[2]

For lengthy trials the court should establish a schedule indicating the normal hours each day and the days each week when trial will be held, and any days when trial will not be held due to public or religious holidays or for other reasons.[3] The court should advise jurors of this schedule so that they, too, may make personal plans and arrangements; indeed, this information should be provided in general terms as a part of voir dire examination preceding selection of the jury.

There is no consensus within the bench or bar as to the most effective schedule for a long trial. Believing it best to "keep the pressure on,"[4] some judges have conducted trial five or even six days each week, with long hours and short recesses. Other judges have scheduled the trial for four or four-and-a-half days a week[5] or reduced the normal trial hours for one or more days during the week, preferring to give more time during the trial for counsel to prepare for efficient presentation of the case and for court personnel, counsel, and jurors to attend to other business and personal matters. Whatever the schedule, the judge and the attorneys should be punctual, starting

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1. Reference: MCL 4.50.

2. Reference: MCL 4.51.

3. Events during the trial may, of course, necessitate a modification of the schedule. Any such changes should be promptly announced to all concerned, including jurors.

4. This pressure, however, can exact a toll on others, such as jurors and court reporters.

5. To shorten the trial week, the court ordinarily reduces or eliminates the hours of trial on Mondays or Fridays, particularly if there are out-of-town counsel or jurors.

each trial day at the appointed hour and keeping recesses to the specified number of minutes. In jury trials, the court should minimize interruptions by considering such matters as offers of proof, arguments on objections, and special motions outside the normal hours of trial.

The judge should not automatically grant a continuance of the trial merely because an attorney cannot be present; other counsel may be available who can "cover" during the absence. Most courts relieve attorneys and parties from any obligation to be present continuously during the trial and encourage counsel to divide responsibilities for the conduct of the trial, both to save costs and to facilitate the presentation of evidence.[6]

22.12 Courthouse Facilities.

To accommodate large numbers of attorneys, parties, witnesses, and documents, special arrangements may be needed with respect to the courtroom, witness and conference rooms, and facilities for storing documents.[7] Those responsible for allocating space and maintaining the building may require some advance notice to make these arrangements, particularly if any physical alterations will be needed. The parties probably will need access to some of these areas several days before the trial if a large number of exhibits must be moved or if special equipment (such as computers, copying machines, or private telephone lines) will be installed. In such cases the judge should designate the court personnel through whom the parties are to coordinate their activities.

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6. In jury cases the judge should explain at the outset of the trial that the litigants and counsel may be absent from the courtroom from time to time and why this is permitted.

7. In multi-party cases, the large tables common in most courtrooms are often replaced by smaller tables, with signs placed on the tables to identify the parties and attorneys.

22.13 Management of Exhibits.[8]

Documents and other exhibits that may be offered or otherwise used at trial (other than those with respect to which surprise is needed for impeachment purposes) should be pre-marked with an identification number,[9] listed on the forms used in the court to record such evidence,[10] and made available to opposing counsel before being used.[11] This procedure avoids delay during examination of witnesses while an exhibit is marked by the courtroom deputy and passed among counsel. Key documents should be enlarged or copies made for the judge and jury. See § 22.32.

In most cases the court will have adopted procedures at or before the final pretrial conference that require advance disclosure of all potential documentary evidence and of any objections thereto, and that generally preclude the use at trial of any exhibits not so disclosed, except perhaps for impeachment purposes. See § 21.641. To expedite trial, the order may provide that exhibits to which no objection was made are automatically received in evidence either at the beginning of trial or when referred to during the course of trial, without need for formal offer and ruling. If pretrial rulings on objections have been made,[12] the court should state whether these rulings are final

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8. Reference: MCL 4.22, 4.221.

9. As discussed in § 21.441, exhibits should have the same identification designation at trial that they were given during depositions and other pretrial proceedings. If documents are re-identified for trial, the court should permit, if not require, counsel to change references to such documents in depositions, interrogatories, and other items of evidence so that at trial only the current identification designations are used.

10. There is no standard format used in all courts to record documentary evidence offered at trial. In advance of trial the attorneys should obtain from the clerk's office copies of the form used in that court and insert appropriate descriptive and identifying information.

11. Depending upon the circumstances of the case, exhibits may be premarked either before trial begins or as trial progresses, such as a specified number of hours before the expected use of the exhibit.

12. As discussed in § 21.642, the extent to which objections are ruled upon in advance of trial will depend upon the circumstances of the case as well as the nature of the evidence and the objection.

(precluding at trial any re-offer of evidence to which an objection was sustained and any restatement of objections that were denied) or are only conditional (precluding any claim of error unless counsel renews the offer or objection at trial for final ruling).

22.14 Transcripts.[13]

Expedited, daily, or even hourly transcripts may be desirable in complex trials. The extra cost for this reporting will generally be justified, particularly in long trials, by the value of transcripts to counsel when examining witnesses and to the jury if, during deliberations, they have questions regarding the testimony.[14] Moreover, expedited transcripts serve to eliminate delays if needed by the judge to make findings or rule on post-verdict motions or if an appeal is taken. Although in many cases the parties will voluntarily make arrangements for expedited transcripts, the court has the power to call for such transcripts in appropriate circumstances, charging the extra expenses as taxable court costs.[15]

Expedited copy should be edited and indexed on a current basis, while the testimony is still fresh in mind. Typically, one attorney for each side is designated to perform this task, with any controversies promptly submitted to and decided by the judge.

22.15 Conferences During Trial.

No matter how well the trial is planned, matters may arise that interrupt the presentation of evidence. Procedures to minimize these disruptions are generally adopted in jury trials, but may be useful in non-jury cases as well. To supplement the controls

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13. Reference: MCL 4.24.

14. Some courts have made a copy of the transcript available to the jurors, purged of proceedings conducted outside their hearing, for study during the trial or during deliberations. If expedited transcripts are not being prepared, the judge at some point during the trial should so advise the jurors and emphasize the need for them to rely primarily on their own recollections. Otherwise, they may assume that a transcript is available on request and concentrate less closely on the proceedings than they should.

15. See cases cited in 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2677.

established during the pretrial planning process, many courts set aside a short time at the conclusion of each trial day for a conference with counsel.[16] Counsel may then elaborate on arguments that were abridged during the trial and make offers of proof under Fed. R. Evid. 103(a)(2).[17] The judge and the attorneys may formally or informally discuss plans for the next sessions of trial, identifying the witnesses and documents expected to be offered; and the court may be alerted to potential problems that require advance study. The judge can provide guidance and direction to attorneys without the stigma of courtroom admonitions, and in this setting may be able to smooth over personal antagonisms that have arisen between counsel during the heat of trial.[18] Most conferences need last only a few minutes, and, recognizing that counsel frequently will have work to do after the conference to prepare for the next session of trial, the judge should see that the time is spent productively.[19]

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16. A short conference before the trial day begins may also be of value, particularly in indicating last-minute revisions to the order of witnesses or documents or to consider anticipated problems or questions.

17. Frequently, counsel will withdraw their objections or offers in view of later developments during the trial day.

18. The judge, however, must be prepared to admonish attorneys in open court for improper behavior when warranted by the circumstances. To avoid unnecessary prejudice to the attorney's client, such reprimands should ordinarily be preceded by warnings outside the hearing of the jury unless particularly egregious conduct is involved; and they should always be given in a manner that does not suggest any vindictiveness on the part of the court. In the effort to display neutrality, judges sometimes word their remarks as if all counsel are implicated. This approach, however, may be unfair and unnecessary; if only some attorneys deserve criticism, they may be addressed individually by the court in a stern, fair manner without serious risk of reversal.

19. Several attorneys may be working outside the courtroom on different aspects of the case, such as making arrangements with witnesses and reviewing depositions and documents. These attorneys may prepare a variety of special motions and briefs during trial. At the afternoon conferences the court should give these matters prompt attention, making immediate rulings to the extent practicable; otherwise, "paper wars" may erupt, distracting the judge and other counsel and disrupting the flow of the trial.

22.2 CONDUCT OF TRIAL.

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22.21 Opening Statements.[20]

In appropriate cases, and after discussion with counsel, the court may limit the length and scope of opening statements. The attorneys may be required to disclose how they propose to address sensitive issues, and the court may prohibit or restrict discussion of prejudicial information that may not be admissible.[21] The court should determine whether to permit counsel to use charts and other demonstrative exhibits that will not be evidence in the case.[22] Although in multi-party cases the court should permit each party to present opening statements in order to establish its own separate identity with the jury, repetitious narrations of the issues or the anticipated evidence should be prohibited. In non-jury cases, opening statements may be useful in advising the judge of contentions that are being abandoned and the expected order of proof.

22.22 Controls in Multi-Party Cases.[23]

In multi-party cases substantial waste of time, as well as confusion, may result unless a limited number of counsel are given primary responsibility at trial for the examination of witnesses and the presentation of objections and arguments. The court should insist that appropriate arrangements be made, whether formally by designating

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20. Reference: MCL 4.52.

21. In such circumstances, counsel should also be cautioned to alert their adversaries and the court before inquiring into the subject in the presence of the jury.

22. The extent to which such exhibits may be used in opening statements is committed to the sound discretion of the judge. Such exhibits may greatly enhance the jury's understanding of the issues and should ordinarily be permitted in complex cases provided they do not contain inadmissible, prejudicial matters.

23. Reference: MCL 4.53.

one or more attorneys to serve as lead counsel or members of a trial team (see § 20.22), or informally by the attorneys deciding who will be chiefly responsible for the examination of particular witnesses.[24] Other counsel should be afforded an opportunity to conduct supplemental examination, particularly on any matters unique to their clients not already covered in prior examination; but redundant examination merely for emphasis should not be permitted to any greater degree than would be appropriate were only a single party involved.

The court should also order that objections made by one party will be deemed made by all other similarly situated parties unless expressly disclaimed. Other counsel should be permitted to add further grounds of objection, with these grounds similarly being treated as urged on behalf of all parties in the same position in the absence of an express disclaimer.[25]

Particularly in litigation involving charges of conspiracy, counsel may legitimately fear that collegiality and cooperation at trial will be viewed by jurors as evidence of the truth of the allegations. In such situations the court should be tolerant of some efforts by the parties during the course of trial to demonstrate their independence from one another. The judge may instruct the jury that cooperation at trial among counsel has been ordered by the court to avoid redundant examination, and should not be taken

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24. In cases in which the court will have a role to play in awarding fees—either against adversaries, from a settlement fund, or from co-parties—the judge should make it clear that fees will not be approved for unnecessary participation at trial. Lead counsel have the responsibility of assuring that the number of persons participating as members of the trial team is not excessive.

25. To prevent the disruption caused by repeated objections, courts frequently indicate that a party will be treated as having a "continuing" objection to a particular line of examination without the need for further objections. Although such an order, made on the record, has a salutary purpose, new grounds of objection may arise as the examination proceeds. The practice, occasionally followed in some non-jury cases, of precluding objections under the aegis of an order purporting to grant the parties the benefit of all objections that could be made, is of doubtful validity and is not recommended.

as any indication that their clients acted in concert or conspiratorially with respect to the matters at issue in the case.

22.23 Order of Proof.[26]

Counsel should be directed to furnish opposing counsel at a specified time in advance of each trial day with a list of the documents and witnesses to be offered, together with the expected order in which they will be presented. This information expedites trial by enabling the other attorneys to plan their examination, to refresh their recollection regarding exhibits and locate other related documents, and perhaps to have additional persons available for consultation. With respect to depositions, the listing should indicate the portions to be read if not already disclosed or any changes from a previous designation.

There is no accord as to the length of advance notice that is most useful. Too little warning may not provide other counsel enough time to prepare effectively, particularly if they need to consult with persons not immediately available. Too much advance notice may be counterproductive, because intervening developments during trial may cause a party to revise its assessment of the most effective presentation of its evidence and, indeed, to dispense with witnesses or documents once thought critical. For these reasons, some courts have called for a tentative listing of the order of witnesses (and identifying documents to be used with such witnesses) a week or more in advance, directing that any changes be communicated as soon as known and that any last-minute revisions be announced at a conference held before the commencement of the trial day or at the close of the preceding day.

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26. Reference: MCL 4.56.

Special problems may arise when counsel attempt to call adverse parties or their employees as witnesses.[27] Of course, such persons can be called to testify if present at the trial, whether voluntarily or by reason of a subpoena under Fed. R. Civ. P. 45.[28] Arrangements may usually be made among counsel to have these persons present, if adequate notice is given, at the requested time without the need for a subpoena or even if not subject to subpoena. Sometimes, however, a party is unwilling to make available employees who are beyond the subpoena powers of the court. Despite the substantial interference with the conduct of the trial it may cause, this declination appears to be permissible under current rules if such persons will not be present during any part of the trial.[29] In some circumstances, however, courts have used their discretion under Fed. R. Evid. 611 to preclude parties who refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence.

Absent unusual circumstances, counsel should indicate in advance, as for other witnesses, when adverse parties or their employees will be called to testify and endeavor

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27. The stratagem of calling defendants as plaintiff's early witnesses continues to be rather common. The court should be reluctant to interfere with a litigant's decision as to which witnesses to call and in what order. In unusual situations, however, as when counsel calls to the stand an adversary's expert witness before critical items of evidence have been presented and before the party's own expert has testified, the court may decide to exercise its powers under Fed. R. Evid. 611 and direct a different order of presenting the evidence.

28. The court should ordinarily relieve subpoenaed witnesses from any obligation to remain in continuous attendance during the trial, conditioned upon their agreement to report after timely request. If a number of key employees of a litigant are subpoenaed, the court should require the subpoenaing party to make appropriate accommodations in the order of calling them so as not to disrupt the adversary's affairs unnecessarily.

29. Fed. R. Civ. P. 32 permits a deposition to be used by any party if the deponent is more than 100 miles from the place of trial "unless it appears that the absence of the witness was procured by the party offering the deposition". The quoted exception does not prevent parties from using their own depositions merely because they were able to travel to the place of trial but chose not to do so.

to resolve personal and business conflicts. The unprofessional practice of calling upon an adversary in open court, without any prior notification, for production of some employee who is not present—implicitly suggesting that the opponent is hiding evidence by not having the employee available—should not be countenanced by the court.

22.24 Role of the Judge.

At trial, as during pretrial, the judge should set the proper tone by making rulings promptly and by exercising firm, but fair, control over the proceedings. Jurors expect—indeed, depend on—the court to see that the trial proceeds efficiently. Attorneys also, with rare exceptions, are grateful for a trial in which they as well as their adversaries are held to the highest professional standards, even though they may from time to time complain about, object to, or even move for a mistrial based upon, some directive from the judge. Patience and occasional humor—even during courtroom proceedings—may be quite important during a long, stressful, complicated trial.

Active involvement by the judge, however, need not and should not alter counsels' primary responsibility for collecting, organizing, and presenting the evidence. The judge should be sensitive to the right of counsel in an adversarial system to employ legitimate strategies and tactics to benefit their clients, provided this does not impair the fairness and efficiency of trial.

The extent to which the court calls or examines witnesses, as permitted by Fed. R. Evid. 614 and 706, will depend upon the circumstances of the case as well as upon the attitude and style of the particular judge. The judge should use this power with care, seeking to avoid any inference by the jury that the court is taking sides in the case. Prior to involvement in the presentation of evidence, the judge may wish to inquire of counsel outside the hearing of the jury whether they would like to ask omitted questions themselves or believe that the subject can be addressed better by a witness to be called later. In any event, in jury trials the judge should ordinarily refrain from

asking questions, except to clarify an ambiguity, until counsel have completed their interrogation of the witness.

The judge's attitude on matters of courtroom procedure—such as the location from which witnesses are to be examined, the circumstances under which side-bar or bench conferences are permitted, and the mechanics for submitting exhibits to witnesses, the clerk, or the jury—should be ascertained by counsel prior to trial. Some judges have standards or guidelines available on request, a practice that may be particularly helpful if participating attorneys are not familiar with the local customs.

22.3 PRESENTATION OF EVIDENCE.[30]

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A major objective in complex trials is for the issues and evidence to be presented in the most understandable and expeditious manner. This goal may not be shared by all counsel, who naturally are affected by adversarial considerations. Although innovative practices rarely can be tried without some risk of error, imaginative, creative thinking about ways to improve the trial process is essential. Some techniques have been used for many years to simplify and facilitate the presentation of evidence; other procedures, less well tested, may merit consideration in appropriate cases.

22.31 Glossaries; Indexes; Demonstrative Aids.

In many cases the judge and the jurors will find it helpful to have available during the trial a listing of important terms, names, dates, and other matters that are very familiar to the parties and witnesses but to others are foreign, confusing, or

30. Reference: MCL 3.50, 4.21, 4.211, 4.22, 4.221, 4.54.

difficult to remember. To the extent feasible, the parties should develop glossaries and indexes as a joint exhibit.[31] However, such exhibits may also be prepared by the parties separately and received under Fed. R. Evid. 611, not as independent evidence but merely as aids in understanding the other evidence. Similarly, in complicated cases the court should encourage counsel to use charts and other demonstrative aids to explain their positions and contentions. An exhibit presenting the stipulated facts in a logical, understandable sequence may also be valuable.

22.32 Use of Exhibits.

Occasionally counsel wish to offer a document "for the record," yet do not care if it is read by the fact-finder.[32] Ordinarily, however, exhibits important enough to be introduced in evidence should be presented in a manner that will facilitate their consideration by the judge and jurors. Circulating exhibits among jurors after an inquiry has been completed is not a satisfactory solution,[33] particularly if a witness is examined at any length about the contents of some document.

One option is to make enlargements of documents or project them on screens. Enlargements may be expensive, and both methods require a location in the courtroom that will assure readability by the judge and the jurors. Nevertheless, enlargements or projections can be of great value, particularly when counsel need to direct the attention of a witness to particular portions of an exhibit that are not easily described verbally.

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31. Glossaries may be prepared by using the procedure suggested for developing statements of agreed and disputed facts. See § 21.47. If necessary, the court can appoint a magistrate or master to facilitate resolution of disagreements.

32. For instance, a party may want to demonstrate that it can support some assertion summarized in other evidence or may not wish to appear to be hiding something.

33. The court should not permit counsel to "publish" an exhibit to the jury after completing their examination if it would divert the jurors' attention from examination to be conducted by their adversaries.

Another salutary practice is for counsel to provide the judge[34] and the jurors[35] with extra copies of the documents introduced. Although these copies may be distributed when a document is offered or referred to, many courts prefer the practice of maintaining "exhibit books" for the judge and each juror.[36] Those documents that will be referred to periodically by different witnesses during the trial are retained in the books for ready access. Documents to be used less frequently, if numerous, may be distributed and collected by the courtroom clerk on a daily basis, although this practice may cause difficulties if jurors wish to make notes on their copies. An index of the documents—their identification numbers and description—may also be kept in the exhibit books and updated from time to time.

As discussed in § 21.483, every effort should be made to present voluminous data through summaries, both to reduce the time spent in introducing or studying such items and to enhance a proper understanding of their meaning and significance. Ordinarily counsel need not and should not introduce the underlying documents in their entirety, although a few specimens of the source materials may be helpful in understanding both the summary and any limitations or problems arising from the underlying data. Lengthy documents are often redacted to eliminate irrelevant portions.

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34. Copies of documents should be provided to the judge both in jury and non-jury cases.

35. Whether jurors should be provided with copies of all documents or only of particular documents depends on several factors, including the number of documents, their length, and whether their contents are summarized in other exhibits.

36. Each juror is typically provided a private exhibit book, in which marginal notes may be made and items of interest underlined. The prevailing practice has been to require that the these books be kept at the courthouse, but courts differ on whether jurors should have access to their books when the trial is not in progress.

22.33 Use of Depositions.[37]

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If counsel intend to offer numerous or lengthy depositions, they should delete irrelevant, redundant, or otherwise unnecessary portions, especially the colloquies and arguments of attorneys. Rarely will details of a deponent's work and personal history be of any significance in the trial. Prefaces to questions, revisions to the form of questions, and unresponsive answers may usually be purged without affecting the content. Sometimes only a few lines or pages from a lengthy deposition will be needed. Called upon to exercise the same selectivity that would be expected if the witness were to testify in person, counsel can usually reduce most depositions to a small fraction of their full length.

However, an understanding of the true import of some depositions, including the credibility of the deponent, may require consideration of a series of answers and other responses given to similar questions during the course of the deposition. The parties, therefore, should be given some latitude with key witnesses to include more than the deponent's "final" answer and to read portions of the deposition that reflect upon demeanor, attitude, recollection, and other matters affecting credibility.

22.331 Designations and Extracts.

Many courts require counsel to indicate in advance of trial the particular portions of each deposition they will offer.[38] Opposing counsel then indicate additional portions which they want to offer or which, under Fed. R. Civ. P. 32(a)(4), the other party

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37. Reference: MCL 4.21, 4.211.

38. The designation process may be unproductive with respect to a deposition that will be offered virtually in its entirety. However, colloquies and arguments should ordinarily be eliminated when such a deposition is read at trial.

should be required to offer in the interest of fairness. These new designations may lead to further portions being listed. After a series of exchanges between the parties, the portions to be offered will be determined. The designated portions usually will be read at trial in the same sequence in which they appear in the deposition, although another sequence can be adopted if understandable and more logical.

A common and convenient method for making designations is for each party to enclose in brackets on the pages of the deposition, in a distinctive color, the portions to be offered. Opposite the brackets other parties may indicate any objections in abbreviated language, such as "D obj. hearsay, not best evidence." The court's rulings may be indicated in a similar fashion, enabling counsel to read from the original deposition only the admitted portions.

Developments during trial frequently cause changes in the parts of depositions that the parties want to offer, and the court should not require the reading of unimportant materials merely because of some pretrial designation. Ordinarily the court should permit a party to delete portions of its deposition designation even though other parties may then need to revise their counter-designations. Counsel should advise opposing counsel promptly upon deciding to make any changes in deposition designations. Recognizing that the substantial time spent in the pretrial designation process may be unproductive if major changes occur during trial, some courts do not require counsel to designate portions of depositions to be offered late in a long trial until several days before the expected use.

22.332 Summaries.

Depositions may frequently be presented more efficiently and effectively by using succinct summaries rather than verbatim extracts. If directed by the court, counsel can often agree on a fair narrative synthesis of many depositions—a procedure that may be especially valuable if numerous depositions dealing with the same facts are listed

for introduction. However, the court should not require summaries when different inferences about critical matters may be drawn from the deposition transcript.

22.333 Presentation.

Depositions ordinarily should not be read aloud in non-jury cases. The judge can read them outside the courtroom much more rapidly and at times that do not interrupt the flow of trial.[39] Just as in jury trials, however, procedures should be used in bench trials to reduce substantially the length of deposition evidence by purging unnecessary portions or by using summaries. As previously discussed, rulings on objections may be shown on the margins of the depositions where the objections are noted, and the judge may state on the record at an appropriate time any additional comments or explanations that will help to guide further proceedings.

In jury cases, reading of depositions, even when appropriately purged, may be tiring, if not boring.[40] To keep the jury's attention, counsel usually intersperse depositions with other evidence and sometimes engage in dramatic readings of the questions and answers, complete with pauses, changes in inflection, and even feigned surprise at some answer.[41] To the extent the presentation appears to be a fair reflection of what occurred at the deposition itself, the court should ordinarily be tolerant of such practices. In extreme situations, however, the judge may need to give directions regarding the reading of depositions, or even appoint someone to read the deponent's responses.

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39. Deposition transcripts and summaries, when not read aloud, may be filed with the clerk as an exhibit and need not be transcribed by the court reporter.

40. Of course, counsel for tactical reasons sometimes prefer a deposition to be dull.

41. Professional actors have occasionally been hired by counsel to portray deponents; this practice has been justly criticized. On the other hand, problems may also arise if persons actively involved in the litigation, including court personnel, are used to read the testimony of a deponent whose credibility will be vigorously contested.

Tape recordings, often used by court reporters during depositions as a "back up" for their own notes, may be played to the jury on critical points if counsel disagree on matters of inflection, pronunciation, or the like. These recordings, however, may not be of sufficient quality to be played at length in lieu of reading the transcript.

Videotaped depositions do not present these problems and should be welcomed by the court, particularly for key witnesses. These depositions should be purged of unnecessary colloquies and of portions determined before trial to be inadmissible.

22.34 Sequencing of Evidence and Arguments.

The traditional order of trial—opening statements, plaintiffs' evidence, defendants' evidence, rebuttal evidence, closing arguments, instructions to the jury, and then a verdict or court decision on all aspects of the case—is frequently altered in a long trial in which the fact-finder may have difficulty remembering the evidence and the issues. Various techniques have been used to cope with the special problems of comprehension in such litigation. Their utility and suitability will depend, of course, on the circumstances of the particular trial.

* **Evidence presented by issues.** Rather than have evidence presented on all issues for trial first by the plaintiffs and then by the defendants, the court may arrange the issues in some logical order and have both plaintiffs and defendants present their evidence on each issue before moving to the next. This procedure helps to focus attention on the disputes between the parties on an issue-by-issue basis, but may be costly if the same witnesses will be needed at different stages of the case.

* **Arguments presented by issues.** Closing arguments may also be presented in some cases according to a sequence of issues, with both sides giving their arguments on particular issues before proceeding to state their contentions on the next issues. These arguments may be presented without waiting for a decision on the first issues, or may be interrupted for the jury to return its verdict or the court to announce its findings. If coupled with the procedure for presenting evidence according to a sequence of issues, this practice is equivalent to a severance of issues for trial under Fed. R. Civ. P. 42(b).

* **Interim arguments and statements.** In long trials counsel may be permitted periodically to summarize the evidence already presented, identify significant portions of documents being displayed, or indicate what they expect to present in future evidence. Such statements, of course, are not unusual in non-jury cases and, properly controlled, may be of great assistance to jurors. Some courts have allowed brief presentations by

counsel at the start of each week of a lengthy trial; others have permitted explanations as the focus of the evidence moved from one issue to another. Interim jury instructions by the court as the trial proceeds may also be highly beneficial in assuring that jurors understand the issues and any limitations placed on particular items of evidence.

* **Examinations of witnesses jointly.** When each of two or more persons has only partial knowledge concerning some subject, counsel may be permitted to examine them at the same time, with inquiries directed in a logical fashion to the witness who is knowledgeable. This approach probably will not be feasible if serious questions of credibility are involved, and in view of Fed. R. Evid. 615[42] should be undertaken only with the consent of counsel. Expert witnesses, who frequently will be exempted from the provisions of Rule 615, may be examined in immediate sequence, if not at the same time, in order to enhance an understanding of their agreements and disagreements.

22.4 JURY TRIALS.

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22.41 Selection.[43]

Prior to trial the court should decide how many jurors should be summoned and adopt procedures to assure that the voir dire and selection process is conducted fairly and expeditiously.

The number of jurors to summon—neither too few nor too many—will depend upon several factors: the number of principal and alternate jurors to be selected; the number of peremptory challenges to be allowed; the history in the district with respect to excuses

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42. The court should encourage counsel, in the interest of expediting trial, not to seek exclusion of most witnesses from the courtroom. Similarly, if an expedited transcript is being made, the presentation of evidence will be facilitated if counsel agree that the witnesses may review pertinent portions of the transcript before testifying.

43. Reference: MCL 4.40, 4.401, 4.41.

and failures to appear; the potential for an increase in disqualifications or excuses in view of the nature of the case and the expected length of trial; and, to some degree, the particular procedures to be used in voir dire and selection. Particularly if a large number of jurors must be summoned, arrangements should be made for those who are disqualified, excused, or challenged to be used later in trials scheduled before other judges of the court.

Local rules in most courts establish a jury of less than twelve as the norm for civil trials. However, if permitted by the rule, the judge may wish to consider an increase in the size of the jury in some complex cases. With a larger jury the parties may be willing to enter a stipulation under Fed. R. Civ. P. 48 that eliminates or reduces the need for alternate jurors.[44] Absent a stipulation under Rule 48, provision should be made in lengthy trials for a sufficient number of alternate jurors—Fed. R. Civ. P. 47(b) permits as many as six—to minimize the risk of mistrial as a result of incapacity or disqualification of jurors during the course of trial. If alternate jurors are used, the court should consider adopting procedures under which the identity of the principals and the alternates is not disclosed to the jurors until some of them are excused.[45] Withholding this information reduces the possibility that alternate jurors will become

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44. A common technique is to select more than six jurors—seven to twelve, depending on the anticipated length of trial—coupled with counsels' agreement to accept the unanimous verdict of all jurors available for deliberations, provided that at least five or six deliberate.

45. The practice in some courts is for all jurors to be chosen from a single panel, without distinction at the time between principals and alternates. When deliberations are to begin, a random drawing is made to determine who will be designated as alternates and excused. This procedure also tends to reduce disputes if consideration must be given to excusing or disqualifying a juror during trial; however, the agreement of the parties should be obtained in advance in view of the provisions of Fed. R. Civ. P. 47(b) that call for peremptory challenges to be made separately with respect to principal and alternate jurors.

inattentive or alienated, particularly during a long trial.[46]

The court is authorized under 28 U.S.C. § 1870 to permit additional peremptory challenges in multi-party cases and to direct how they are to be exercised. Additional challenges will be warranted in many complex cases, particularly if there are many parties with separate counsel. Both sides in the litigation ordinarily should have the same number of challenges, regardless of the relative number of litigants on each side. Increases in the number of allowable challenges will, of course, necessitate an increase in the number of jurors summoned and in the time for voir dire and selection.

The court should advise the prospective jurors of the expected length of trial and should give appropriate consideration to claims of undue hardship or extreme inconvenience. The prospect of a lengthy trial may result in more requests by jurors to be excused. However, the belief that only a skewed segment of the population will be able to serve on long trials has thus far not been substantiated. Introductory comments by the judge—emphasizing the responsibilities of citizenship and describing the litigation in a manner that stresses the challenge and opportunity for unique service by the jurors, the fact that virtually all will have some hardship or inconvenience if selected, the need for a representative cross-section of the population for the parties to select from, and the prospect that only a portion of those presented to the parties will be selected to serve—may be of great value in reducing the number of requests to be excused and in seeing that a representative panel is submitted to the parties for their consideration.

Before trial the judge should receive for study and consideration suggested questions from counsel to be asked of jurors during voir dire. To reduce the time spent in the voir dire process and to permit advance release of those individuals who would

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46. The judge should consider advising the jurors at an early stage in the trial that some may be excused later, indicating the practical reasons for not disclosing the identity of the alternates, if indeed they have already been determined. Such instructions deter criticism by those who may be excused after lengthy proceedings and do not result in inattentiveness during trial.

be subject to challenge for cause, some courts have mailed questionnaires to the prospective jurors in advance of trial, soliciting information that would otherwise be obtained by examination in the courtroom. However, this procedure may lead to an excessive number of requests to be excused and unexcused absences, as well as inappropriate inquiries by jurors into the case. An alternative method, having many of the advantages and creating fewer problems, involves preparation by the court, with the assistance of counsel, of a set of general questions to be put to the venire at the courthouse after the jurors have received preliminary instructions from the judge concerning the case.

Procedures for conducting the voir dire and selection process vary widely from court to court and judge to judge. Variations exist on such matters as the respective roles of the court and counsel in interrogating jurors;[47] whether inquiries will be directed to the venire, to smaller panels, to jurors one at a time, or by a combination of these methods;[48] whether challenges will be exercised in the hearing of the jurors or privately; whether challenges to a panel will be made by alternate strikes or by presenting all challenges within the panel at the same time, and, if the latter, whether by the parties simultaneously (as by marking challenges on separate lists of the jurors) or alternately; and whether the parties will know the identity, order, and voir dire

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47. The prevailing practice in federal courts is for the judge to conduct most, if not all, of the interrogation of prospective jurors. This method is undoubtedly the most expeditious; whether it is the fairest is a topic vigorously debated within the bench and bar. If the court conducts the examination, it is directed to "permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper." Fed. R. Civ. P. 47(a). If counsel personally examine jurors—whether initially or as a supplement to court-conducted voir dire, and whether by addressing the entire panel or venire or by directing questions to particular jurors—the court should be made aware of the substance, if not the details, of the proposed examination to assure that improper or repetitious questions are not asked.

48. If potentially prejudicial matters of consequence may be disclosed during the process—for example matters involving pretrial publicity of sensitive subjects—at least a portion of the examination should be conducted in small panels or perhaps individually.

information about replacement jurors before they exercise their challenges. Whatever the particular procedures utilized, the voir dire and selection process should be conducted in a manner that sets the proper tone for the whole trial—fairly but efficiently.

If the parties have not so stipulated on their own initiative, the court should urge them to consider agreeing, in the event of a hung jury after an appropriate period of deliberations, to accept a verdict under Fed. R. Civ. P. 48 from a less than unanimous jury or to have the case decided on the same evidence by the court as a non-jury matter under Rule 39(a)(1). The parties may be more amenable to entering such agreements before the voir dire begins than after the jury is selected.

22.42 Note-taking; Questions.

The arguments in favor of permitting jurors to take notes are particularly compelling in long, complicated trials; and the court should facilitate this practice by providing materials and by giving appropriate instructions at the outset of the case. If the jurors receive exhibit books (see § 22.32), blank pages may be included for this purpose; otherwise, individual notebooks may be provided. Most courts require that the notes be left with the courtroom clerk during adjournments; and some have even directed that the notes be destroyed after the verdict. Instructions typically warn the jurors of the danger that they may be distracted from other testimony while taking notes and caution them that notes are not evidence but merely personal aids in understanding and recalling the matters brought out during the trial.

The extent, if any, to which the judge interrogates witnesses under Fed. R. Evid. 614(b) or permits jurors to pose questions to be asked of witnesses is largely a matter of individual philosophy and style. In view of the amounts or values at stake in complex litigation and the potential costs in time and money of retrial, the court has a particular duty to assure that the jury has the evidence it will need to render a fair, just verdict. On the other hand, judicial intervention always creates the danger of an appearance of partisanship. Before assuming too active a role in examination, the judge should

attempt to ascertain whether ambiguities or omissions arising in the testimony of a witness will be corrected through later witnesses.

If interrogation by jurors is permitted, the usual practice is for their questions to be submitted in writing to the judge, enabling the court to consider the propriety of a suggested question outside the jury's hearing. Many subjects that may occur to jurors during counsels' examination of a witness will, of course, be covered in later questions; therefore, courts generally consider questions from jurors only after interrogation by the attorneys has been completed.

22.43 Jury Instructions.[49]

.431 Preliminary Instructions 146
.432 Limiting and Interim Instructions 147
.433 Final Instructions 148
.434 Supplemental Instructions 151

22.431 Preliminary Instructions.

The judge should give preliminary instructions to the jury at the start of the trial, typically before opening statements by counsel. Although dependent on the nature of the litigation, these instructions typically will cover such subjects as:

* **conduct of trial.** Jurors should be informed of the basic steps of trial from opening statements to verdict, and the method by which evidence is presented, including the procedure for raising and resolving questions of admissibility. In some cases, such as those involving charges of conspiracy, the court may wish to inform the jury that cooperation among the litigants at trial has been urged by the court and should not be treated as evidence of concerted action with respect to the matters at issue in the litigation.

* **schedule.** In addition to the hourly and daily schedule established for the trial of the case, the jurors should be advised of any holidays or other planned recesses.

* **precautions to prevent mistrial.** The court should always give the routine warnings against discussion of the case and communications with those interested in the litigation. It may also give instructions regarding publicity from the news media and caution jurors to avoid

49. Reference: MCL 4.60.

their own independent fact-finding investigations, as by viewing the scene of some occurrence or by undertaking experiments or research.

* **pretrial procedures.** The judge should consider describing briefly the various discovery devices that have been used during the pretrial stage of the litigation, such as depositions, document production, and interrogatories. Not only will this information be helpful when such evidence is later introduced, but it also serves to explain why parties have possession of, or know about, various matters involving other persons.

* **functions of jury.** "Boiler-plate" instructions regarding the basic fact-finding functions of the jury—including such matters as the burden of proof, assessing the credibility of witnesses, the use of circumstantial evidence, reliance upon recollection of testimony (and any special procedures for taking notes or asking questions)—are helpful in preparing jurors for the presentation of evidence. Most of these instructions should be repeated in the final jury charge, supplemented by any special explanations (such as use of convictions to impeach credibility) warranted by developments during the trial.

* **preliminary comments on legal principles and factual issues.** If feasible, the judge should highlight in simple language what are expected to be the key factual issues the jury will be called upon to decide and should explain briefly the basic legal principles involved in these disputes. The court should emphasize that these instructions are preliminary—that no effort is made to cover all of the issues or principles—and that the jury will be governed by the final, complete instructions to be given at the conclusion of the case. Recognizing the difficulties in giving such instructions at the start of the case but mindful of the assistance they may provide to the jury, some judges wait to provide this preview until after opening statements by the attorneys, at which time they may also reiterate that counsels' statements are not evidence and that the final instructions will be based on the issues raised by the evidence actually received.

22.432 Limiting and Interim Instructions.

The court frequently gives limiting instructions to the jury during the trial under Fed. R. Evid. 105 on the proper scope of "evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose," in lieu of or in addition to giving such instructions at the conclusion of the case. Indeed, the failure to give limiting instructions in some circumstances, at least if requested, may constitute error. In advance of trial, counsel should submit to the court suggested instructions covering anticipated evidentiary problems.

Interim instructions may go beyond those described in Fed. R. Evid. 105. On many occasions during a long trial an immediate explanation by the judge of applicable legal principles will be far more helpful to the jury than instructions at the close of the case. If the parties are presenting their evidence according to a prescribed sequence of factual issues (see § 22.34), the judge may give preliminary guidance to the jury just before evidence is presented on a given issue or may give a synopsis of the principles of law after the evidence on the issue has been completed. In any event, as with preliminary instructions, the court should caution the jury that these are but interim explanations and that the final, complete instructions on which they will base their verdict will be given just prior to deliberations.

22.433 Final Instructions.

Because planning for final instructions should begin prior to trial, many courts direct counsel to submit proposed instructions as part of the final pretrial briefs. The court should indicate whether it prefers these suggestions in narrative form suitable for reading to the jury or in the form of legal propositions which the judge can reword and incorporate into the balance of the instructions. Counsel are entitled to submit written requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs." Fed. R. Civ. P. 51; Fed. R. Crim. P. 30. Therefore, the judge should be prepared to revise and supplement any draft instructions based on developments during the course of trial.

The rules require that counsel be advised prior to closing arguments of the proposed rulings on their requested instructions. Although the judge may respond to the requests one by one, most judges prefer to provide counsel with the substance, if not the particular words, of the entire charge that they propose to give. Refinements may be suggested by counsel. Working together, the judge and the attorneys are often able to fashion a set of understandable instructions to which, even in complex litigation, there will be few objections. However, after the instructions have been given and

before the deliberations begin, counsel should be provided an opportunity to record, outside the presence and hearing of the jury, any objections to the charge.[50] Under Fed. R. Civ. P. 51 and Fed. R. Crim. P. 30, counsel should state "distinctly the matter to which he objects and the grounds of his objection," and not merely object in general terms to the failure of the court to give the instructions that were requested. Frequently the court will be alerted to the need to give corrective or supplemental instructions based on these objections.

Although some discussion of general principles of law may be helpful as a foundation for understanding by the jurors, the instructions should focus on the issues which the jury is to decide and how those decisions are to be made. Ordinarily, the court need not comment on claims or defenses which have been withdrawn or as to which a directed verdict has been granted. When a special verdict under Fed. R. Civ. P. 49(a) is used, the instructions should be directed to the specific issues to be decided; detailed exposition of legal principles required for a general verdict is usually unnecessary and may be confusing.

To enhance comprehension, many judges provide a written copy of the instructions for the jurors to read as the charge is being delivered orally. For the same reason, as well as to reduce the need for supplemental instructions, many judges furnish copies for the jury's use during deliberations. Both practices have been held to be within the discretion of the judge and have obvious benefits in complex cases. Additionally, each juror may be furnished a copy of the special verdict or interrogatories for reference during the instructions and the deliberations.

The oral charge given by the judge should be complete within itself, not merely referring to matters contained in any written version that may be provided. The judge

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50. Many courts afford counsel the opportunity to make objections to the instructions at the charge conference and expect only supplemental objections to be made after the instructions have been given.

should maintain eye contact with the jurors, sensing when to depart from the prepared text by repeating or rephrasing some portion of the instructions or perhaps by giving an explanatory example of some principle. Minor additions to or deviations in language from the written instructions should not be grounds for reversal, provided the substance of the oral and written instructions is the same and each, standing alone, is correct and comprehensive. The jurors should be told that, in the event of any variations between the oral and written charge, the oral instructions control and govern their deliberations.

An alternative procedure that may be particularly useful in complex cases is to provide jurors with a short topical outline for reference while the instructions are being presented orally, with the oral instructions recorded on tape or transcribed by the court reporter for the jury's use during deliberations. This procedure eliminates the problem caused by variations between oral and written versions, while at the same time enhancing the ability of jurors to understand and recall the instructions.

Instructions should be presented in a logical sequence; simple, non-technical words should be used to the extent possible. Propositions of law should be explained in the context of the parties and issues of the particular case or by illustrative examples with which the jurors are familiar. On some matters the court may wish to refer to the opposing contentions of the parties or to items of evidence. Rarely should the judge express personal opinions on disputed facts or the credibility of witnesses; if such comments are to be made, the admonitions of Quercia v. United States[51] must be kept in mind.

The judge has discretion in determining what materials should be sent to the jury for use during deliberations. Normally, all exhibits received as evidence are automatically sent to the jury room with the exception of items such as currency, narcotics, weapons,

51. 289 U.S. 466 (1933).

and explosive devices. However, the court may conclude that some items received for impeachment purposes or some other limited purpose should be withheld until requested by the jury, at which time the precautionary instructions may be repeated if appropriate. In deciding whether to send materials that were not received in evidence but might be helpful to the jury in understanding and recalling the evidence and the issues—such as tape-players, projectors, magnifying glasses, calculators, transcripts of the evidence, diagrams constructed during examination of witnesses, charts used by counsel during the arguments to outline their contentions, indexes of the exhibits, and pleadings—the court should weigh the potential utility to the jury of having the item available against any risk that, even with precautionary instructions, its presence would be unfairly prejudicial or subject to misuse.

22.434 Supplemental Instructions.

Supplemental instructions during the course of deliberations should be handled in much the same manner as the final instructions. The judge should, after discussion with counsel, determine what response should be made to the requests from the jury. If the court decides to give additional instructions, it should present them orally in open court, with counsel then being permitted to make objections outside the presence and hearing of the jury before deliberations resume. The judge should emphasize that the supplemental comments are to be considered in conjunction with the prior instructions, which remain binding upon the jury, and may repeat some portions of the earlier instructions, such as the burden of proof.

In the preliminary and final instructions the judge should consider advising the jurors that during deliberations they are expected to rely upon the exhibits and their recollections of the testimony rather than ask the court to summarize the evidence on some subject or from some witness. The jurors may also be cautioned that, in the rare event they need a portion of the testimony read by the court reporter, they should be

as specific as possible in their request.[52] When such instructions are given, jurors rarely ask for help regarding the evidence and, if they do, their inquiries usually are sufficiently limited that the court is able, with the assistance of counsel, to fashion a satisfactory response. The judge should confer with the attorneys and seek accord on an acceptable way to respond to the jury's inquiry, either by identifying the portions of the testimony that should be read or by preparing an agreed response.[53] If agreement cannot be obtained, counsel should be permitted to state on the record their objections to the court's action on the request, which in some cases may be to call on the jurors to rely on their recollections of the evidence.

22.44 Avoidance of Mistrial.

The potential for and consequences of mistrial, serious in all litigation, can be aggravated in complex trials. These risks are reduced by the various techniques and procedures that shield the jury from inadmissible matters and aid in the orderly, understandable presentation of evidence and issues. In addition, the court should anticipate the possibility that jurors may become disqualified, incapacitated, or unable to arrive at a unanimous verdict.

* **sequestration.** The greater need for sequestration of jurors in lengthy, highly publicized trials must be weighed against the increased costs, inconvenience, and emotional stress that prolonged sequestration may have on the jurors. Even if not warranted during trial, sequestration during deliberations may be desirable.

* **precautionary instructions.** As discussed in § 22.431, appropriate admonitions should be given the jurors regarding conduct that might affect the propriety of their service. Particularly if sequestration is not ordered, these instructions should be repeated periodically during the trial.

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52. If daily or expedited copy is not being prepared, the court may also explain that a typed transcript is not available and that the testimony must be read from the court reporter's notes.

53. The agreed answer may be one that merely indicates a conflict in the evidence and describes the parties' positions on the matter.

* **stipulations.** In advance of trial, during trial, and even during deliberations, the court should encourage the parties to consider stipulating under Fed. R. Civ. P. 48 to accept a verdict from less than the full complement of jurors[54] or a majority verdict, or to stipulating under Rule 39(a)(1) to a non-jury decision on the same evidence if a verdict cannot be obtained. See §§ 21.62, 22.41.

* **alternate jurors.** Absent appropriate stipulations, a sufficient number of alternate jurors should be impanelled to give reasonable assurance that the trial will not be aborted due to disqualification or release of principal jurors. The procedures and standards for replacement of jurors prior to deliberations are the same for complex litigation as for routine trials. See Fed. R. Civ. P. 47(b); Fed. R. Crim. P. 24(c).

* **replacement/reduction during deliberations.** Fed. R. Crim. P. 23(b) provides that, if a juror in a criminal case must be excused after the jury has retired to consider its verdict, the court has discretion whether to declare a mistrial or permit deliberations to continue with eleven jurors. No comparable provision exists under Fed. R. Civ. P. 39 or 47. Therefore, in a complex civil trial the court should seek an appropriate stipulation from the parties that will avoid the time and expense of retrial should a juror become disqualified or incapacitated during deliberations.[55] If the stipulation cannot be obtained, the court should consider whether, if the problem does arise, it will (1) declare a mistrial, or (2) permit the remaining jurors to return a verdict, relying by analogy upon Fed. R. Crim. P. 23(b), or (3) substitute an alternate juror, relying by analogy upon certain criminal cases that predated the 1983 amendment to Rule 23(b).[56] If the third option is contemplated, (a) the alternate juror should be separately sequestered during the deliberations; (b) the remaining original jurors and the alternate juror should be separately questioned before the substitution is made to assure that each is able and willing to begin the deliberative process anew, making no reference to or inquiry into prior deliberations and, indeed, destroying any notes made during the prior deliberations; (c) the reconstituted jury should be re-instructed fully, even if the replacement juror heard the initial instructions, and be told to start

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54. As discussed in § 22.41, the parties may be more willing to enter such a stipulation if the size of the jury is larger than six. For this reason, many courts routinely impanel a jury of seven or more persons in civil cases, coupled with a stipulation under Fed. R. Civ. P. 48.

55. See §§ 21.62, 22.41. Another possible stipulation is to permit an alternate juror to be present during deliberations, but not participate unless one of the regular jurors is excused.

56. See United States v. Hillard, 701 F.2d 1052 (2d Cir.), cert. denied, 461 U.S. 958 (1983); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). These cases do not sanction substitution as a routine practice; their rationale, however, does support this procedure in complex civil cases if thorough precautions are taken to assure that the parties are not prejudiced.

its deliberations from the beginning, including selection of a foreman; and (d) at the time of receiving the verdict, the court should confirm that the verdict is based solely on deliberations occurring after the substitution.

* **partial verdicts.** If, after sufficient time and appropriate encouragement from the court, the jury cannot reach a verdict on all of the matters presented to it, the court should inquire whether a verdict can be reached as to any of the issues or parties. A partial verdict may reduce substantially the scope or extent of another trial or, indeed, foster settlement.[57]

22.45 Verdicts.

Even when the court has denied pretrial motions under Fed. R. Civ. P. 56 after thorough consideration, it may conclude, following presentation of evidence, that a directed verdict would be appropriate under Rule 50. Nevertheless, particularly in lengthy trials, if little or no additional evidence remains to be presented, most courts adopt a pragmatic approach—denying the motion, going forward with the remainder of the trial, and reserving the issue for reconsideration under Fed. R. Civ. P. 50(b) after receiving the verdict. On the other hand, courts are more inclined to grant the motion if substantial time will be required should the motion be denied. Motions for a "partial" directed verdict, seeking to eliminate tenuous, unsubstantiated alternate theories of action or defense, may often be granted with little risk of reversible error, while significantly simplifying the task of the jury or reducing the scope of additional evidence. If a directed verdict is granted on major issues, the judge should consider—although it is not necessary—entering an opinion explaining the basis of the ruling, much as would be called for in non-jury cases on a dismissal under Fed. R. Civ. P. 41(b).

The court should be alert to the possibility of inconsistent jury verdicts, not only when special verdicts (or general verdicts with interrogatories) under Fed. R. Civ. P. 49 are used, but also in multi-party cases with standard verdicts. The risks can and should be minimized by careful structuring of the verdict form and by clear

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57. A verdict on some counts in criminal cases will, moreover, often lead to a disposition of the remaining counts, either by dismissal or a plea.

instructions. See § 21.633. Even so, at the time the verdict is received—and before it is recorded and the jury discharged—the judge should consult with counsel if necessary and ascertain whether the verdict is impermissibly inconsistent; if so, clarifying instructions should be given and the jury directed to resume deliberations.[58]

In some complex cases, the jury, after deciding certain issues, may be called upon to consider other issues. Additional arguments and instructions may be given if all the evidence was previously presented, or the court may entertain additional evidence, whether immediately after the first verdict or after some recess. See §§ 21.632, 21.634, 22.34. If the trial plan calls for a recess in the proceedings, the judge should (1) caution the jurors before they leave against activity that might jeopardize their competency to continue to serve on the case and (2) before the proceedings resume inquire into any intervening grounds for possible disqualification.

When a special verdict or general verdict with interrogatories has been returned by the jury, the judge should promptly, after such consultation with counsel as is needed, approve a form of judgment for entry by the Clerk under Fed. R. Civ. P. 58. If the jury has rendered a special verdict, the judge may also wish to make non-jury findings of fact under Rule 49(a). If the judgment does not resolve all aspects of the litigation, consideration should be given to whether it should be made final and appealable under Rule 54(b). See § 25.14.

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58. See, e.g., Landry v. Offshore Logistics, Inc., 544 F.2d 757, 761 (5th Cir. 1977); Alston v. West, 340 F.2d 856 (7th Cir. 1965). See also Fed. R. Civ. P. 49(b).

22.5 NON-JURY TRIALS.[59]

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22.51 Adopted Narratives and Reports.

Much time may be saved in non-jury trials if testimony is presented through written statements prepared in advance of trial. Under this procedure, a witness, after being asked preliminary questions, is permitted by the court under Fed. R. Evid. 611 to adopt the prepared statement as if it were testimony given on direct examination. The witness then is subject to cross-examination, and perhaps to additional questions by the judge. This procedure is particularly useful when complicated, technical information is to be presented by expert witnesses, provided the statements are required to be submitted well before trial. Through advance study of the report, the judge is better able to understand and evaluate the expert's opinions and opposing counsel can plan their cross-examination more intelligently. Although adoption of narrative statements is also an efficient method for presenting testimony from lay witnesses,[60] the court should be cautious in directing or authorizing this technique with respect to witnesses whose recollection or credibility is in issue.

22.52 Proposed Findings and Conclusions.

Whether counsel should be directed to submit proposed findings of fact and conclusions of law—and, if so, when—will depend upon the nature of the case and the extent to which these matters are adequately covered in the pretrial briefs and in the statements of agreed and disputed facts. Even if suggestions are solicited from the

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59. Reference: MCL 4.60.

60. Adoption of a prepared statement may be especially useful with a witness needing an interpreter.

parties, the judge must decide what facts have been established, and the court's findings under Fed. R. Civ. P. 52 should reflect the judicial thought process.[61] Of course, most of the findings will be consistent with the suggestions made by one or more of the parties. Nevertheless, by parsing, rephrasing, and reorganizing the matters proposed by the parties, the court can demonstrate that the findings and conclusions are its own.

Under Fed. R. Civ. P. 52, the court's findings and conclusions may be entered either by filing an opinion or memorandum of decision or by oral dictation into the record at the close of the evidence. The nature of the case, as well as the style and characteristics of the particular judge, will dictate the court's approach. The court may defer any decision on which procedure to use until the close of the case; however, if the judge anticipates rendering a decision without waiting for post-trial briefs, counsel should be so advised. The two methods can be used in combination; the court may dictate its opinion at the close of the case on some issues, while reserving its decision on other issues until later, perhaps after additional briefing by the parties.

22.53 Procedures When Combined With Jury Trial.

As discussed in § 21.631, when jury and non-jury issues in a single case in large part depend upon the same evidence or when separate jury and non-jury cases involve overlapping evidence, concurrent trial of jury and non-jury matters may be advisable. At the close of each day and again at the conclusion of the jury trial, the parties may be given the opportunity to present additional evidence admissible on the non-jury, but not on the jury, issues. The court must consider the proper sequencing of the jury and non-jury decisions, both to avoid undesired collateral estoppel consequences and to comply with the dictates of Beacon Theatres, Inc. v. Westover.[62]

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61. See, e.g., United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 n. 4 (1964); Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F.2d 960 (5th Cir. 1975).

62. 359 U.S. 500 (1959).

23. SETTLEMENT.

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23.1 ROLE OF COURT.

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23.11 Participation/Encouragement by Trial Judge.[1]

Many more cases are concluded by settlement than by trial. This reflects the fact that most lawyers and litigants prefer a negotiated solution to the costs, time, and uncertainty inherent in trial. Because both the expense and risk of loss are magnified in complex cases, such actions are even more amenable to compromise than routine cases.

The parties must negotiate the settlement, but the judge may serve as a catalyst for settlement discussions, set an atmosphere conducive to compromise, and make suggestions helpful to the litigants. Beginning with the first conference, and from time

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1. Reference: MCL 1.21, 4.70.

to time throughout the litigation, the court should encourage the settlement process. The judge's first effort should usually be light-handed—perhaps merely an inquiry whether the parties have discussed settlement. As the case progresses and both the judge and counsel learn more about it, the court should urge the parties to consider—and reconsider--the possibility of settlement in the light of what has occurred and, perhaps more important, what may be ahead if the litigation is pursued.

The judge's initiative in suggesting settlement often facilitates negotiations by obviating the apprehension of attorneys that willingness to discuss compromise will be viewed by their adversaries as a sign of weakness. Moreover, the court's comments may be useful to counsel when attempting to mitigate any intransigency or militancy of their clients regarding the litigation. The judge can assist the parties in assessing the risk and potential consequences of losing at trial and in estimating the total cost of litigation even if successful—not only in attorneys' fees and other direct expenses but also in indirect costs, including the time that will be devoted to the litigation and diverted from more productive activities.

Neither the bench nor the bar agrees on the role a trial judge should play in bringing about a settlement. The temperament, style, and philosophy of the individual judge are important factors, as is the nature of the case. Some judges do little more than suggest the general desirability of settlement and see that the case moves steadily towards trial. Others take an active part in leading settlement discussions, pointing out strengths and weaknesses of the respective positions of the parties, presenting additional considerations and alternative forms for compromise, meeting separately with the parties if all consent, and even recommending specific terms of settlement. Some ask or require that a representative of each party with settlement authority attend the discussions; others prefer to conduct settlement conferences with only counsel present. Many judges limit their settlement activities to jury cases; others believe that they can, without jeopardizing their impartiality in fact or appearance, take an active role

in non-jury cases as well. Some are active from the outset of the litigation, while others prefer to wait until later in the proceedings or until the time of trial.[2] The effectiveness of the judge in facilitating settlement depends, of course, also on the attitude of the parties. Although counsel ordinarily welcome efforts by the court to assist in the settlement process, measures viewed by them as coercive will be resented and are rarely productive.

Judicial involvement in settlement discussions, however extensive, must not be permitted to affect the perception of the parties that the judge will be fair and objective, both at trial if negotiations fail and in passing on the merits of the settlement if, as in class actions, it must be submitted to the court for approval. Although the court may aid settlement discussions by indicating its current views on some issue, it should never distort those views for strategic effect and should give the same information to all parties.

Offers of settlement may have cost-shifting consequences.[3] The rejection by plaintiffs of an offer of judgment under Fed. R. Civ. P. 68 will render them liable for certain costs not only if they lose at trial, but also if they recover less than what was offered.[4] In an extreme situation, counsel who advise their clients to reject a settlement offer and thereby multiply the proceedings "unreasonably and vexatiously" might incur personal responsibility under 28 U.S.C. § 1927 for subsequent costs, expenses, and attorneys' fees incurred by the other party, and be subject to a malpractice claim

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2. Even if the judge does not immediately take an active role, settlement discussions by the parties should ordinarily begin at an early stage. Avoidance of litigation expenses is often an important factor in the settlement of complex cases, and a delay in settlement discussions reduces the opportunity for potential savings in such expenses.

3. Settlement offers may also affect a party's entitlement to prejudgment interest under some state laws. See, e.g., Jarvis v. Johnson, 668 F.2d 740 (3d Cir. 1982).

4. Under statutes treating such fees as costs, post-offer attorneys' fees may likewise be affected by Rule 68. See Marek v. Chesny, 105 S. Ct. 3012 (1985).

as well. Moreover, the failure of a party or attorney to participate in good faith in discussion of settlement has cost-shifting implications under Fed. R. Civ. P. 16(c) and (f).

23.12 Special Assistance and Techniques.

Fed. R. Civ. P. 16(c)(7) enumerates "the possibility of settlement or the use of extra judicial procedures to resolve the dispute" as matters for consideration and action at pretrial conferences. Various innovative procedures have been used with success in achieving settlements, often after traditional negotiations have reached an impasse; creativity in this aspect of the litigation process has few risks and should be encouraged.[5] Among the techniques that have been productive are the following:

* **Other judicial officers as mediators.** The trial judge may enlist the services of another judge of the court (or appoint a magistrate) to coordinate and mediate settlement negotiations. Often the "settlement" judge or magistrate is appointed early in the litigation, with the understanding that the status or content of negotiations will not be discussed with the trial judge prior to arriving at a settlement. The mediator is free to meet separately with the different parties in order to elicit candor in discussing the strengths and weaknesses of their own position and those of the other parties. As one experienced in the litigation process and familiar with the trial judge, the "settlement" judge or magistrate may assure that the parties are realistic in assessing the costs and risks of pursuing the litigation and that alternative modes of settlement are explored. This procedure is frequently used when the trial judge prefers not to engage directly in settlement discussions.

* **Other judicial officers as evaluators.** One or more judges may be enlisted to participate in settlement discussions along with the trial judge. As outsiders, the new judges may express opinions on some matters that the trial judge would not discuss. The trial judge may be willing to comment on other points that might influence the course of negotiations.

* **Masters and experts.** Persons outside the judicial system with expertise either in the subject matter of the litigation or in techniques of mediation may be called upon for assistance in the settlement process, either on an informal basis or as special masters under Fed. R. Civ. P. 53. The court should select someone who is respected and trusted by the parties, and the parties should agree

5. For current information on mechanisms for alternative dispute resolution, write the Center for Public Resources, 680 Fifth Avenue, 9th Floor, New York, NY 10019, and the National Institute for Dispute Resolution, Suite 600, 1901 L Street, N.W., Washington, DC 20036.

on payment of compensation and reimbursement. Appointment by the court of an expert under Fed. R. Evid. 706 may also have a salutary effect in bringing about settlement, either at the time of appointment or after a report is rendered.

* **Participation by parties.** Courts frequently request that representatives of the parties with settlement authority be present while discussions are conducted. Negotiations are more direct and efficient; the presence of clients tends to increase the seriousness of discussions; each party hears a presentation of the strengths of its adversaries' positions and of the weaknesses of its own position and is better able to understand the costs and risks of pursuing the litigation. Sometimes it is appropriate and productive for the parties to discuss settlement directly with one another, without the intervention or presence of the attorneys or the judge.

* **Special counsel.** Although more familiar with the details of the case, the attorneys taking the lead in pretrial proceedings or at trial are not necessarily the ones best suited to conduct settlement discussions. They rarely are selected to handle the case because of their skills in negotiation, and, as the litigation proceeds, personal antagonisms may develop between the principal advocates that are not conducive to discussions of compromise. Accordingly, when the circumstances warrant, the judge may suggest that one or more of the parties engage special counsel for the purpose of conducting settlement negotiations. In cases in which the court has designated certain counsel to act on behalf of others (see § 20.22), it may alter responsibilities for purposes of settlement discussions.

* **"Summary jury trial."**[6] As a means for fostering settlement, some courts have sponsored a "summary jury trial" in which the parties make an abbreviated presentation of their case to a jury. Counsel may use live witnesses to testify or make an oral presentation, much like a closing argument, but severe time constraints are imposed, such as an hour to the side. After brief instructions, the jurors deliberate for a short period of time and return a verdict, whether unanimous or not. Their "verdict" may be helpful in leading the parties to settlement. If no settlement can be reached, the case will be tried as originally scheduled, before different jurors.

* **"Mini-trial."**[7] The parties may select a neutral third party to act as presiding judge in an abbreviated trial. Sitting with this expert is a representative from each party with settlement authority. For one or two days counsel present their case, either with live testimony or by summaries. At the end of the mini-trial, the expert acts as a mediator to assist the representatives in an attempt to settle the case. If a settlement is not reached, the expert's "decision" is

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6. See generally Jacoubovitch and Moore, Summary Jury Trials in the Northern District of Ohio (FJC 1982).

7. See generally Green, Growth of the Mini-Trial, 9 Litigation 12 (1982).

submitted to the parties for their consideration in further negotiations.

- **Bellwether trial.** An actual trial of some special issue or of one or more representative cases, even if not dispositive or preclusive,[8] often will facilitate further settlement discussions.

- **Arbitration.**[9] Non-binding arbitration is similar to the "mini-trial." The entire controversy or selected issues are presented to one or more arbitrators for a suggestion of an appropriate resolution. The parties are thereby provided with an objective assessment of the merits of their positions, and may be moved toward an acceptable compromise.

23.13 Relationship to Discovery and Trial.[10]

Settlement discussions may be productive early in the case, when the uncertainties of litigation are the greatest and the bulk of expense by all parties may be avoided. However, the movement of the case toward trial or summary disposition is generally the principal force in inducing settlement, for the parties learn through discovery the weaknesses of their positions, experience the costs of the process, and see the day of reckoning approaching. To provide momentum toward settlement and to keep trial preparations on schedule should settlement prove unattainable, the court should ordinarily deny requests for a general stay or suspension in discovery, issue formulation, and other pretrial proceedings or a postponement of the trial date based on the pendency of settlement discussions. If the parties are close to an accord and some particular activity or deadline would likely affect their positions and attitudes,[11] the judge may conclude

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8. For a discussion of some of the problems in attempting to use test cases for collateral estoppel, see Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), cert. denied, 419 U.S. 885 (1974).

9. See generally Levin, Court-Annexed Arbitration, 16 U. Mich. J. L. Reform 537 (1983).

10. Reference: MCL 1.21, 4.70.

11. Avoiding the expense of imminent discovery is often a substantial inducement for settlement. Terms of a settlement precluding or limiting further discovery must, however, be carefully tailored to avoid interfering with discovery that may be needed later by other parties. See § 23.22.

that a short extension would be warranted; such extensions, however, should be rare and closely monitored by the court. Suspension of discovery and other pretrial proceedings in class actions may complicate the problems of defining and notifying the class and of evaluating the adequacy and fairness of settlement.

As the litigation proceeds toward trial, the parties should reassess their positions regarding settlement, taking into account the results of discovery and rulings by the court. By the final pretrial conference, if not earlier, the parties should have sufficient information to determine the settlement value of the case. Earlier, unsuccessful negotiations may, however, be an obstacle to settlement at this point, particularly if the intervening circumstances suggest settlement on less favorable terms than those which the party earlier rejected. The judge may play a vital role in getting the parties to put the prior discussions behind them and to approach settlement on the basis of the current status of the litigation.

Ideally, settlements should be made sufficiently in advance of the scheduled trial to avoid unnecessary expense and inconvenience to witnesses, jurors, the court, and the parties themselves. Unfortunately there are cases in which the litigants are unable to arrive at a settlement until the eve of trial or, indeed, during the trial itself. Many courts by local rule provide that, in such circumstances, the parties will or may be assessed with the expense of the jury. For a discussion of the problems presented by partial settlements on the eve of trial, see § 23.21.

23.14 Judicial Review.[12]

Some types of cases cannot be settled without judicial review and approval. Most notable are class and derivative actions, which Fed. R. Civ. P. 23(e) and 23.1 direct "shall not be dismissed or compromised without the approval of the court."[13]

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12. Reference: MCL 1.45, 1.46.

13. For a detailed discussion of the procedures to be followed in settlement of these actions, see § 30.4.

Other categories of cases requiring court approval of settlement include antitrust actions instituted by the United States[14] and actions involving minors, incompetents, and trusts, in which approval may be required by common law or statutes.

Although the standards and procedures applicable to these reviews are not identical, the court is required in each instance to scrutinize the proposed settlement to assure that it is fair to the party whose interests the court is to protect and, to the extent their rights and interests will or may be affected, to persons who are not named parties to the litigation or who for other reasons are unable to protect themselves. If the proposed settlement is intended to preclude further litigation by absent or disabled persons, due process requires that their interests be adequately represented and perhaps that appropriate notice be given. Details vary regarding notice, appointment of special counsel or guardians, and the type of hearing to be held; but some fundamental principles apply to all such reviews.

First, the court must be provided with adequate information. All terms of the settlement must be disclosed to enable the court both to understand its effect on those who are not parties and to assure that there is no collusion or favoritism. The proponents also should explain why, from the standpoint of those who are not parties, the proposed settlement is preferable to continuation of the litigation and why any objections that may be tendered should be discounted or rejected. When settlements are proposed early in the litigation before the court has become knowledgeable about the case, more information regarding the fairness of the settlement must be provided.

Second, the judge must guard against the temptation to become an advocate—either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not parties to the settlement. In reviewing the settlement the judge is called upon to be

14. See 15 U.S.C. § 16.

impartial and neutral, favoring neither the proponents of the settlement nor those who are opposed or absent. The court should welcome, if not solicit, the views of those who may be affected by the settlement, whether or not they have legal standing to be heard. Notice to absent parties may be advisable even if not required by governing law, and in some cases the court may decide to appoint either an expert under Fed. R. Evid. 706 or special counsel to represent the interests of class members or persons under a disability. Although, like appellate courts,[15] the trial court has no authority to rewrite a settlement agreement, as a practical matter the proponents of the settlement often are willing to make revisions in their agreement to overcome objections of the judge to particular terms.[16]

23.2 SPECIAL PROBLEMS.

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23.21 Partial Settlements.

Settlement discussions are ordinarily aimed at the resolution of the entire controversy between all parties. Indeed, one of the major inducements for compromise is to avoid the expense of further litigation. On occasion, however, partial settlements directed to particular claims, defenses, issues, or parties should be considered. Such settlements may provide funds needed to pursue the litigation, limit the extent of

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15. See In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1133 (7th Cir.), cert. denied, 444 U.S. 870 (1979); Patterson v. Stovall, 528 F.2d 108, 111 (7th Cir. 1976).

16. See, e.g., Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977). Major changes in a proposed settlement, however, may necessitate another hearing after new notice to the class.

exposure, reduce the scope of discovery or trial,[17] aid the parties in obtaining evidence, and facilitate later settlements on other issues and with other parties. On the other hand, the court should caution the parties against partial settlements that, because of their timing or terms, may frustrate the ultimate resolution of the litigation.

Late partial settlements may present major problems in class actions. The court should usually set a deadline for the presentation of proposed settlements with a class that will not resolve all issues scheduled for trial. In setting the deadline, the court should take account of the time needed to give notice, to conduct the fairness hearing, and to rule on the settlement, while leaving enough time for the litigants to revise their plans for the trial based on which parties and issues remain in the litigation. Unless this procedure is followed, the court may either have to postpone trial pending a ruling on the settlement or repeat all or a part of the trial if the settlement is disapproved.

Late partial settlements in multi-party cases that are not class actions may present similar problems. Co-counsel in such cases may have divided responsibilities with respect to the presentation of evidence or arguments and to production of witnesses or exhibits. Partial settlement made with one adverse party which weakens other opponents is, of course, a common and permissible litigation strategy; however, such a settlement made on the eve of trial may frustrate the orderly, efficient, and just resolution of the case. Whether the court has the power to impose cost-shifting sanctions for such conduct is not clear; however, the judge can discourage such belated, potentially prejudicial settlements by offering a continuance of trial to those not parties to the settlement. Moreover, counsel who have accepted responsibilities on behalf of

17. For example, the parties may be willing to compromise on the amount of damages, while leaving for trial the issues relating to liability. In other cases, such as aircraft disasters, the parties have sometimes agreed on liability while leaving for trial only questions of damages.

other parties and attorneys, such as lead counsel and members of a trial team, should bear in mind that their fiduciary obligations may survive the dismissal of their own clients.

Careful consideration should be given to the impact of partial settlements on the issues and parties not covered by the settlement. Depending upon the applicable law and the wording of the settlement agreement, a partial settlement may release other parties and claims. The court must determine the extent, if any, to which claims not extinguished are to be reduced because of payments made under the settlement,[18] as well as how the settlement will be treated at trial. Mindful of Fed. R. Evid. 408, courts generally prefer to handle partial settlements by making appropriate reduction in any judgment recovered against non-settling parties, avoiding the introduction of evidence of the settlement during the trial.[19] However, in some cases juries have been asked to determine the extent of damages remaining after consideration of partial settlements,[20] and Fed. R. Evid. 408 is not an absolute bar to evidence of settlement agreements. For example, settlements may be admissible to show bias of a witness.

23.22 Agreements Affecting Discovery.

Because one of the major reasons for settlement is to avoid further litigation expense, settlement agreements frequently contain provisions purporting to relieve a

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18. See Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529 (3d Cir.), cert. denied, 429 U.S. 825 (1976); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976). The parties frequently attempt to apportion the settlement among different claims, sometimes for tax purposes and sometimes to enhance their position against non-settling parties. When partial settlements are submitted for judicial approval, the court should be wary of apportionment clauses that may complicate further proceedings or, indeed, be unfair to other parties; in such cases, the court should insist that it be empowered under the agreement to make appropriate modifications if justified by later developments in the case.

19. See, e.g., Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) modified on other grounds, 757 F.2d 614 (1985) (en banc); McHann v. Firestone Tire & Rubber Co., 713 F.2d 161 (5th Cir. 1983) (error to admit evidence of partial settlement).

20. Appropriate instructions should be given, cautioning that the settlement is to be considered only in determining the unpaid damages and not in deciding whether the non-settling parties are liable.

settling party from further discovery or to limit the form or extent of such discovery. These provisions sometimes, however, create problems, particularly in multi-party cases. Other parties may need discovery from a settling defendant that will be more time-consuming or expensive if that defendant has been dismissed as a party. In class actions, additional discovery may be needed from a settling defendant in order to administer and distribute a settlement fund. The court, therefore, should carefully scrutinize agreements relieving a party from further discovery, and may refuse to certify a partial settlement as final under Fed. R. Civ. P. 54(b) until it has ascertained that additional discovery will not be needed or will be voluntarily provided.

Sometimes a settling party will seek to have discovery materials returned, destroyed, or protected from distribution to others. The effect, if not the purpose, of such an agreement may be to forestall or frustrate other litigation, pending or anticipated. Because of the potential effect on other litigants and courts, as well as First Amendment implications, the judge should be wary of approving such agreements.[21] If such a provision is adequately justified, for example to protect trade secrets, the court should consider requiring that the returned documents be preserved for a reasonable period of time rather than destroyed.

23.23 Secret Agreements; Conditional Settlements.

Litigants sometimes enter into "side" agreements that supplement their formal settlement agreements but are not intended to be disclosed to others. These agreements may not of themselves be unlawful or unethical, and on rare occasions there may be legitimate reasons for not disclosing them to other parties. However, in presenting settlement agreements for judicial approval, the parties are obligated to make full disclosure to the court of all terms and understandings, including any "side" agreements.

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21. See Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984); Tavoulareas v. Washington Post Co., 737 F.2d 1170 (D.C. Cir. 1984); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866 (E.D. Pa. 1981).

Moreover, if the settling parties seek to avoid disclosure of any terms to other parties, their justification should be presented to the court.

Agreements defining in advance the rights and obligations of parties with respect to litigation are, of course, commonplace. Contracts of insurance and indemnification are prime examples. Not infrequently, however, there are special agreements among some of the parties—often intended to be kept secret—that may cause serious problems in the litigation.

"Mary Carter" agreements. The plaintiff may secretly agree to place a limit upon the maximum liability of a particular defendant, with the further provision that such liability will be reduced or extinguished in relation to the plaintiff's recovery against other defendants. First dealt with by the courts in Booth v. Mary Carter Paint Co.,[22] this type of agreement has the effect of placing the real interests of the "settling" defendant, who remains in the litigation, into alignment with those of the plaintiff; unknown to its co-defendants, this defendant has a direct financial interest in plaintiff's prevailing and obtaining as large a judgment as possible. Many varieties of such agreements have developed, including loan-receipt agreements and agreements to dismiss during the case or not to execute on a judgment if the defendant does not take an aggressive posture against the plaintiff's claims.[23]

Non-disclosure of these agreements may necessitate a new trial.[24] Since secrecy is the principal problem and these agreements are clearly discoverable, the court should early in the litigation declare that counsel are under a continuing duty, without need for specific interrogatories, to disclose immediately all such agreements and understandings.

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22. 204 So.2d 8 (Fla. 1967).

23. See Annot., 65 A.L.R.3d 602 (1975).

24. See, e.g., Daniel v. Penrod Drilling Co., 393 F. Supp. 1056 (E.D. La. 1975).

Damage Sharing Agreements. Defendants sometimes agree to divide any liability ultimately imposed upon them in the litigation. These agreements serve the legitimate purposes of controlling their exposure in the litigation and preventing plaintiffs from forcing an unfair settlement through threats to show favoritism in the collection of any judgment that may be recovered. However, they have the effect—and often the purpose—of preventing any partial settlement, and may discourage the introduction of evidence indicating liability on the part of co-defendants. Damage-sharing agreements are subject to discovery and may be admissible in evidence in appropriate circumstances, such as to show bias of a witness. Moreover, once the terms of the agreement are made known, negotiations for partial settlement sometimes can be structured in a manner that overcomes the problem of potential contribution, as by eliminating items of damage or by providing a percentage reduction in any judgment recovered against other defendants.

Most-favored-nation clause.[25] One form of the "most-favored-nation" clause obligates the plaintiffs to give settling defendants an appropriate refund if the plaintiffs later settle with other defendants on more favorable terms. Another form requires a defendant to make an additional payment to settling plaintiffs if the defendant later settles with other plaintiffs on more favorable terms.

Each of these clauses presents obstacles to later settlements; moreover, a change in settlement terms may be fully warranted because of materials obtained in the course of discovery or because of changes in the circumstances of the parties or in governing law. In class actions, inclusion of a clause by which the class agrees to a refund if it later makes a settlement more favorable to other defendants is particularly inappropriate

25. Reference: MCL 1.46.

because the adequacy of the proposed settlement cannot be fairly appraised when its amount is uncertain.[26]

The complications and inequities that these clauses generate make their use generally undesirable. In the unusual situation in which such a clause is found warranted, its operative effect should terminate after a specified length of time and the court should be vested with broad discretion to void or limit the clause if its continuation would be unfair and inequitable.[27]

23.24 Ethical Considerations.

Serious ethical questions are raised by "Mary Carter" and other secret settlement agreements. However, some forms of settlement discussions may present ethical problems even if conducted openly.

Negotiations Not Involving the Attorneys. Attorneys are precluded ethically from negotiating directly with a party represented by counsel. Most courts have concluded that attorneys for a defendant are therefore prohibited from negotiating settlement directly with plaintiff class members, both before a class certification ruling and after a class has been certified.[28] Whether, after a ruling on class certification, a defendant may make direct offers of settlement to persons who are not members of any class allowed by the court is less clear. Although ethical precepts do not prevent the parties

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26. Nor does the promise by a defendant to increase a settlement with a class if a higher settlement is later made with individual plaintiffs diminish the court's responsibility to evaluate on its own the adequacy of the settlement amount offered to the class.

27. Merely to provide that the clause may be voided upon a change in circumstances may not solve the problems these clauses present. See In re Corrugated Container Antitrust Litigation, 752 F.2d 137 (5th Cir. 1985) (evidentiary hearing needed to resolve disputes regarding effect of most-favored-nation cause). See also In re Chicken Antitrust Litigation, 560 F. Supp. 943 (N.D. Ga. 1979).

28. But cf. Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), in which the defendant was permitted, after institution of a class action, to continue to submit directly to members of the putative class offers of settlement that had been earlier negotiated with the EEOC.

themselves from engaging in settlement discussions without their attorneys, counsel should avoid rendering assistance to their clients with regard to such activities that might have the effect of evading the lawyer's ethical constraints.

Agreements Foreclosing Other Representation. As a condition of settlement, defendants have sometimes sought an agreement that plaintiff's counsel will not represent other persons with similar claims in cases already pending or in new litigation. These covenants have been justly condemned. In an effort to accomplish the same objective, while attempting to avoid ethical problems, ingenious attorneys have employed several devices, such as agreements to keep the terms of the settlement secret (coupled with a stipulation for liquidated damages), and agreements to return or destroy materials gathered during discovery. See § 23.22. The propriety of an agreement not to disclose information obtained independent of the litigation process is doubtful, and the ethical implications of these understandings should be carefully considered.

Negotiations Regarding Attorneys' Fees.[29] Settlements that involve attorneys' fees present particularly troublesome questions of professional ethics. Defendants typically, and understandably, want to know the total cost of a settlement; and, in routine non-class litigation in which each party is responsible for its own attorney's fees, settling defendants customarily agree to make a single payment to the plaintiff and plaintiff's counsel, leaving to them the resolution of any questions regarding fees. Special problems, however, may arise when settlements are negotiated in class actions and in cases in which the losing party is liable for the adversary's attorneys' fees.[30]

In cases in which by statute or case law a party may be liable for attorneys' fees in addition to any substantive liability to an adversary, counsel are ordinarily permitted to negotiate the amount of attorneys' fees if such negotiations are conducted entirely

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29. Reference: MCL 1.46.

30. See, e.g., Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985); Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984), cert. granted, 105 S. Ct. 2319 (1985).

apart from and after completion of negotiations settling the substantive claims. When, however, a defendant proposes to pay a single sum to settle both the damage claim and the fees demand, a conflict of interest may be created for the plaintiff's attorney, who may be asked expressly or impliedly to accept an unreasonably small fee in order to assure recovery for the client or who may be tempted to negotiate an unreasonably high fee at the expense of the client's recovery.[31] Some bar associations have, therefore, ruled that it is unethical for opposing counsel to make an offer creating such a conflict of interest.

In class actions whose primary objective is the recovery of money damages, settlements may be negotiated on the basis of a lump-sum that includes both class claims and claims for attorneys' fees. The class will be notified that, if the settlement is approved, the court will determine on the basis of applicable law the amount to be awarded from the fund for attorneys' fees, subject to a stated maximum amount or percentage.[32] This procedure avoids the conflict of interest inherent in any attempt to negotiate simultaneously on specific amounts to be paid to the class and for attorneys'

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31. As to whether there is a distinction between class counsel's agreement not to seek fees beyond a specified amount (a "ceiling") and the defendant's agreement not to oppose fees below a specified amount (a "free sailing" clause), see Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985).

32. Unless some upper limit is set, class members will not be adequately advised what they are assured from the proposed settlement. Courts sometimes also require that fee applications be submitted before notice of the proposed settlement is sent to the class, so that the notice may contain full information about the fee requests.

fees.[33]

This approach, however, presents problems if significant non-monetary relief is sought and statute or case law provides potential liability for attorneys' fees. An offer by the defendant in such litigation to provide non-monetary relief but little or no compensation for the attorney may create a conflict of interest for the plaintiffs' counsel. The problem is acute when the plaintiffs, whether individuals or a class, are represented by a legal aid clinic or other non-profit group which has agreed with the clients to seek fees only from the opposing parties. In such cases, the parties should negotiate on a settlement that resolves in a mutually satisfactory manner the relief to be provided to the class or the individual plaintiffs, coupled with a provision that the defendant's liability for attorneys' fees will be determined by the court.[34] This approach has its problems; it is difficult to enforce and indeed may inhibit favorable settlements.[35] Nevertheless, it may be the only way by which such a case can be settled in jurisdictions which consider unethical a settlement offer by a defendant conditioned upon a waiver of attorneys' fees or upon acceptance of fees disproportionate to the amount that would be due if fees were fixed by the court.

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33. Counsel may try to avoid the conflict-of-interest problem by negotiating first to settle the class claims independently of any claims for attorneys' fees and then, after that agreement is reached, negotiating on the fee amount. This procedure does not eliminate the risk of conflict, and, if negotiations are to be conducted in stages, counsel must scrupulously avoid making concessions in one phase for advantages in the other. If for any reason an agreement is reached setting the amount of a settlement fund and separately providing an amount for attorneys' fees and expenses, both amounts should be disclosed to the class. Moreover, the sum of the two amounts ordinarily should be treated as a single settlement fund for the benefit of the class, with the agreed-upon fee amount constituting an upper limit on the fee that can be awarded to counsel.

34. See Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977). But see White v. New Hampshire Department of Employment Security, 629 F.2d 697, 705 (1st Cir. 1980), rev'd on other grounds, 455 U.S. 445, 454 n. 15 (1982). Provision for judicial determination of the fee will not prevent the parties from attempting to settle any dispute about attorneys' fees once the relief for the class or parties has been approved.

35. See Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. of Pa. L.Rev. 793 (1983).

Failure to Submit Offers to Client. The attorney's obligation promptly to submit serious offers of settlement to the client for acceptance or rejection is generally understood. Breach of this duty is egregious if counsel will be compensated in whole or in part on the basis of the number of hours expended in the litigation, which almost always will be the situation when a fee award will be made or approved by the court.

The responsibilities of counsel representing a class may extend beyond communicating an offer to the class representatives, for the representatives—the direct clients—do not have the ultimate power to accept or reject offers of settlement made to the class.[36] Although class counsel should discuss with the class representatives the terms of any settlement offered to the class, rejection of the offer by the representatives does not end the attorneys' obligations. Counsel must act as they believe to be in the best interests of the class as a whole.[37] If counsel for the class have genuine doubt about the desirability of a settlement offer and little reason to believe a better offer will soon be made, they should communicate the proposal to the court for a determination whether it should be submitted to the class under Fed. R. Civ. P. 23(e). Similarly, class counsel should bring to the court's attention any settlement offer that the class representatives approve even though, as attorneys for the entire class, they believe it should not be submitted to the class. Circumstances may also exist in which, if class counsel refuse to do so, a defendant might properly advise the court of its offer to settle the class claims.[38] For further discussion of the problems involved in settlement of class actions, see § 30.4.

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36. See, e.g., Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); cf. Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972).

37. See, e.g., Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981).

38. Such a disclosure might, for example, be appropriate if there is reason to believe that class counsel's refusal to accept or even communicate an offer of settlement is motivated by a desire to increase potential fees through unnecessary additional discovery.

24. ATTORNEYS' FEES.

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24.1 COURT'S ROLE IN AWARDING FEES.

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24.11 Types of Cases.

The amount of attorneys' fees is ordinarily determined by agreement between the attorney and the client. However, in a number of situations the court is required to determine the amount that should be paid to attorneys for compensation and expenses. Among these are the following:

- **statutory fees.** Provision is made in a variety of statutes, ranging from antitrust and civil rights cases to less well-known actions,[1] for the court to vary from the "American Rule" and award attorneys' fees to a prevailing party. Whether the award is mandatory or permissive depends upon the wording of the particular statute and applicable case law, and the standards may differ for plaintiffs and defendants.[2]

- **common fund.** If attorneys' efforts preserve or create a fund or benefit for others in addition to their own clients, the court is empowered to award fees from the fund or, in some circumstances,

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1. E.g., 15 U.S.C. § 2102 (hobby protection); 15 U.S.C. § 2619 (toxic substances).

2. See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

make an award that is indirectly paid by those benefited.[3] This power provides a basis for awards from recoveries obtained by settlement or trial in class actions when fees are not provided for by statute.

- **lead counsel.** The court can award fees to lead counsel, liaison counsel, and other attorneys performing tasks on behalf of a group of litigants.[4]

- **special parties.** Under the common law and many state statutes, the court is required to review fees charged by counsel for minors, incompetents, and trusts.

- **sanctions.** The court has inherent power to award fees against a litigant who in bad faith or vexatiously institutes or pursues litigation, either as plaintiff or defendant.[5] A statutory counterpart, 28 U.S.C. § 1927, provides for awards against an offending attorney. The court is directed by various provisions of the Fed. R. Civ. P. to award fees for time spent because of a failure of parties or counsel to fulfill responsibilities with respect to discovery and other pretrial proceedings. For a detailed discussion of sanctions, see § 42.

24.12 Standards.[6]

An award of attorneys' fees should fairly compensate the attorney for the reasonable value of the services beneficially rendered, based on the circumstances of the particular case.[7] The starting point in determining this fee is to multiply the number of hours reasonably expended by a reasonable hourly rate.[8] Both elements must

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3. See, e.g., Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

4. In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977) (relying on "common fund" principles and inherent management powers of court in complex litigation).

5. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Ellingson v. Burlington Northern, Inc., 653 F.2d 1327 (9th Cir. 1981)

6. Reference: MCL 1.47.

7. See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I); 7A C. Wright & A. Miller, Federal Practice & Procedure § 1803.

8. Blum v. Stenson, 104 S. Ct. 1541, 1548 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). A number of the additional factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), will usually be subsumed in the determination of the reasonableness of the time spent and the hourly rate.

be shown by supporting evidence. Counsel seeking a fee award should maintain time records in a manner that will identify the various tasks and work being performed; failure to keep contemporaneous time records justifies an appropriate reduction in the award, if not denial of all fees.[9] Excessive, redundant, or otherwise unnecessary hours should not be compensated; and, when a party prevails only on certain issues, reduction may be required for hours spent unsuccessfully on other unrelated issues.[10] Nor may a plaintiff who recovers less at trial than the amount of a rejected offer under Fed. R. Civ.P. 68 recover fees for post-offer legal services if the statute treats such fees as costs.[11]

Although this calculation—reasonable hours multiplied by a reasonable rate—usually provides an appropriate estimate of the value of a lawyer's services,[12] the fee may be adjusted upward or downward based on additional considerations.[13]

A fee applicant has the burden of proving entitlement to an enhanced award. The court may consider an upward adjustment to the fee award if the "applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'"[14] An upward adjustment may also be appropriate to compensate a litigant

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9. Hensley, 461 U.S. at 433. Some circuits require contemporaneous time records as a condition to an award of fees. See New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983); National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982); 5th Cir. R. 47.8.1 1983) (absent contemporaneous records, fee based on minimum time necessary).

10. Hensley, 461 U.S. at 434-35. For an illuminating account of what may occur in the interest of generating fees, see In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), aff'd in part and rev'd in part, 751 F.2d 562 (3d Cir. 1984).

11. Marek v. Chesny, 105 S. Ct. 3012 (1985).

12. Stenson, 104 S. Ct. at 1548.

13. See Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985).

14. Stenson, 104 S. Ct. at 1549.

for "the risk of not prevailing, and therefore the risk of not recovering any attorney's fees,"[15] as well as for delay in receipt of payment.[16]

A downward adjustment of the lodestar figure may be required when the party being awarded fees achieved only "limited success."[17] The court should not award more than the amount that is "reasonable in relation to the results obtained."[18]

Concentration on the hours spent by counsel does not, in short, preclude inquiry into the reasonableness of those efforts given the issues at stake and into the degree of success obtained in the litigation. To the extent permitted by applicable law, the court should weigh the level of success against the time spent in achieving it, and then award fees that appropriately reward efficient handling of litigation while acting as a disincentive to unnecessary proliferation of hours as a fee-generating device.[19]

Fee applications should not result in substantial additional litigation. When fees are to be awarded against opposing parties, settlement by the parties of the fee amount

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15. Id. at 1550-51 (Brennan, J., concurring); Hall v. Borough of Roselle, 747 F.2d 838, 842-43 (3d Cir. 1984); but cf. McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984); Laffey v. Northwest Airlines, 746 F.2d 4 (D.C. Cir. 1984).

16. See, e.g., Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985); In re Fine Paper Antitrust Litigation, 751 F.2d 562 (3d Cir. 1984); Cf. Murray v. Weinberger, 741 F.2d 1423 (D.C.Cir. 1984).

17. Hensley, 461 U.S. at 436. See also In re Fine Paper Antitrust Litigation, 751 F.2d 562 (3d Cir. 1984) ("negative" multiplier for mismanagement by lead counsel).

18. Hensley, 461 U.S. at 440.

19. For a critique of the current standards for fee awards and of the possible need for revision, see Report of Third Circuit Task Force on Court-Awarded Attorneys' Fees, "If Not Lindy, Then What?" (1985). After noting complaints that the present system tends to waste judicial resources and creates a disincentive for early settlement, the report recommends for common fund cases (and some statutory fee cases) a procedure under which a percentage fee agreement would be negotiated early in the litigation under supervision of the court. For the typical statutory fee case, it recommends retention of the lodestar approach, but with some standardization of hourly rates, stronger judicial control over hours, and elimination of the "quality" multiplier.

is encouraged.[20] If the court must decide the amount of the fee, it should "provide a concise but clear explanation of its reasons for the fee award."[21] However, since the amount of the fee depends largely on factual matters and involves the exercise of discretion by the trial judge, appellate review should rarely be appropriate.

Many questions bearing on fee awards remain the subjects of judicial controversy. Are the standards identical in both statutory fee cases and common fund cases? Should the hourly rate be measured as of the time the services were rendered (the "historic" rate) or as of the time of the award (the "current" rate), and, if the former, should an adjustment of some sort be made for delay in payment? Should the rates be compared to those customarily charged in the local forum or those where the attorney's principal offices are maintained? What is the effect on court-awarded fees of contractual agreements with the client regarding fees? At what rate should travel time be compensated? Should a "contingency" factor be considered after partial settlements?[22] May a fee be awarded to a pro se litigant? May fees for expert witnesses be treated as a reimbursable expense of counsel? Should the cost of paralegals, secretaries, and

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20. Stenson, 104 S. Ct. at 1550 n.19; Hensley, 461 U.S. at 437. Some courts have expressed concern about the simultaneous negotiation of fee issues and settlement of the merits, e.g., Cheng v. GAF Corp., 713 F. 2d 886, 889-90 (2d Cir. 1983); Mendoza v. United States, 623 F.2d 1338, 1352-53 & n.19 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981); Prandini v. National Tea Co., 557 F. 2d 1015, 1017 (3d Cir. 1977); but ethical counsel should be able to resolve such potential conflicts. See White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 453-54 n.15 (1982). See also § 23.24.

21. Hensley, 461 U.S. 437.

22. See In re Fine Paper Antitrust Litigation, 751 F.2d 562 (3d Cir. 1984). Courts disagree on whether amounts recovered through early partial settlements should be subjected to fee claims only for work performed prior to the settlements, with the result that time later spent by counsel is still being performed on a "contingent fee" basis, or whether such amounts should be subjected to fee claims for all work in the litigation, in effect funding further litigation activities. If an early settlement will be used to finance a class action, the notice given to class members of the proposed settlement should so state, and fee awards for time later spent should not be enhanced by a "contingency" factor.

copying be allowed as expense items or included within the hourly rate?[23] May activities in related judicial or administrative proceedings—or, indeed, in lobbying efforts—be considered? As a touchstone for answering many of these and other similar questions,[24] judges should look to the bill for services rendered that would properly be submitted to a fee-paying client.

24.13 Procedures.[25]

Timing. In the absence of a local rule,[26] the court should prescribe a date by which fee applications should be filed, as well as any special requirements regarding the form and content of the applications. When awards are sought in connection with proposed class action settlements, counsel should file their applications in advance of the hearing under Fed. R. Civ. P. 23(e); class members may then make a more informed decision regarding the proposed settlement and, if they wish, contest the amount of fees to be paid from the settlement fund. Sometimes an interim award of fees and expenses will be appropriate; in such cases, the court may wish to award less than full compensation for the services to date and to provide that the interim award is conditional, subject to reevaluation at the conclusion of the litigation.

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23. The interrelationship between taxable costs and expenses chargeable as part of attorneys' fees is discussed in Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553 (1984).

24. For a thorough yet concise compilation of cases, see Bartell, Federal Court Awards of Attorneys' Fees, 2 Civil Practice and Litigation in Federal and State Courts (ALI-ABA 1984). See generally E. R. Larson, Federal Court Awards of Attorney's Fees (1981).

25. Reference: MCL 1.47.

26. Responding to White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), many courts have adopted local rules fixing a deadline for filing fee applications. For a brief discussion of the effect of motions for attorneys' fees on appealability, see § 25.3.

Applications; Documentation. To the extent not previously filed,[27] time and expense records should be summarized in the fee applications. The time records should reflect for each attorney the time spent for which compensation is sought, identifying the particular task or activity involved and the date on which such services were performed. Descriptions such as "telephone call" or "conference" are ordinarily inadequate; counsel should indicate the reason for the call or conference, the persons involved, and, to the extent possible without waiving any privilege, some general description of the subjects discussed. Any individual contracts or understandings with the clients regarding the fees to be charged should be submitted to the court; and some courts have required that counsel support their indicated hourly rates by evidence of fees charged other clients during the same periods of time.

When several attorneys are seeking fees, either in the same or separate applications, they may be required to provide the court with a compilation arranged by each particular task or function, listing the hours and expenses (including travel) claimed by each participating lawyer. This tabulation will enable the court to determine whether excessive or duplicative hours are being claimed with respect to the same conference, deposition, brief, or other activity.[28]

In some cases various firms representing common interests have joined in presenting a single application for fees. The suggested hourly rates for each attorney are shown separately, as they would when different lawyers from the same firm have participated in a case. For purposes of the fee application, however, the various firms in effect ask to be treated as a single firm, requesting a fee that appropriately compensates the

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27. See § 24.21, recommending that time records be filed periodically during the litigation.

28. See In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), aff'd in part and rev'd in part, 751 F.2d 562 (3d Cir. 1984). As a control against exaggeration in the number of hours claimed, some courts have required that, for each day in which hours are claimed to have been spent in the litigation, counsel also submit statements reflecting hours billed by them to other clients.

group for the results obtained in the light of the total hours spent by all. Whatever total fee is found reasonable by the court will then be divided by the group in a manner that reflects their own evaluation of the respective contribution each made to the case, which may not necessarily be in proportion to their hours-times-rate figures. This approach has obvious advantages to the court and counsel in avoiding the internecine conflicts that sometimes erupt among counsel at the conclusion of litigation. However, in such situations the judge should take special care to assure that the lack of competing applications does not diminish the integrity of the fee award process.

Discovery. If the documentation presented in support of fee applications is sufficiently detailed and inclusive, formal discovery by or from the applicants will rarely be necessary. Sometimes, however, discovery may be warranted, as when there is reason to suspect that the number of hours claimed has been exaggerated or that unnecessary or cost-inefficient activities may have been permitted under "patronage" agreements made in an effort to gain designation as lead counsel. Additionally, if a party contests the fees being sought against it, many courts have permitted discovery into the hours, if not the rates, charged in the litigation by its own counsel.[29]

Hearings. The nature and scope of the hearing to be held by the court will vary with the circumstances of the case. The determination of a fee award should not itself become major litigation. In many cases, the award can be made on the basis of the documentary materials furnished by the parties, together with the judge's personal knowledge of the litigation. The parties, however, should be provided the opportunity

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29. Cf. In re Fine Paper Antitrust Litigation, 751 F.2d 562, 587 (3d Cir. 1984) (not an abuse of discretion to deny such discovery). Before awarding fees from a settlement fund, courts sometimes request counsel for the settling parties to submit for in camera inspection a statement regarding their own fees. This information can alert the court to discrepancies in the hours claimed by attorneys seeking compensation from the fund that require justification or explanation.

for an evidentiary hearing whenever there are contested issues of fact.[30] Recognizing the inherent difficulties in ruling on a fee application when the safeguards of the adversarial process are not present, some judges in unusual cases have appointed special counsel to represent at the fee hearing the interests of class members or parties under a disability.

Special Referrals. If fee requests are extensive or vigorously contested, the court should consider appointing an expert under Fed. R. Evid. 706 or referring the applications to one or more special masters appointed under Fed. R. Civ. P. 53. The use of a fee committee, which may consist of lawyers and non-lawyers having no interest in the case, may aid the court in evaluating voluminous applications. Courts differ on whether such a fee committee should include any counsel who were involved in the litigation.

Settlements. To the extent possible,[31] the parties should attempt to settle disputes regarding claims by a prevailing party for statutory attorneys' fees.[32] Although claims in class actions for fees from a common fund cannot be resolved by settlement, counsel may be urged to be modest in their requests for fees and to consider modifications to satisfy anticipated objections from class members.

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30. To reduce the length of fee hearings, the court may employ techniques used to expedite other non-jury trials. The Federal Rules of Evidence apply to such hearings. In re Fine Paper Antitrust Litigation, 751 F.2d 562 (3d Cir. 1984). However, with the consent of the litigants, affidavits may be used in lieu of testimony in person or by deposition.

31. See, however, §§ 23.24 and 24.12, cautioning that conflicts of interest, in fact or in appearance, may arise if negotiations to settle claims for attorneys' fees are conducted simultaneously with negotiations to settle the dispute between the parties.

32. Stenson, 104 S. Ct. at 1550 n.19 (1984); Hensley, 103 S. Ct. at 1941. However, the settlement is not binding upon the court, which for good reason—including the public perception of the appropriateness of the fees and the range of awards in similar cases—may reduce agreed fees to an acceptable level. Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881 (2d Cir. 1983), cert. denied, 104 S. Ct. 1929 (1984).

24.2 CONTROL OF FEES.

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At the outset of any litigation in which it may be called upon to review or award attorneys fees, the court should institute procedures that will not only be useful in later determining those awards but also deter wasteful expenditures of time and money by counsel. Some controls may be appropriate in other cases as well; under Fed. R. Civ. P. 26 discovery is to be conducted in ways that minimize expense, including the fees of counsel for all parties.

24.21 Periodic Filings.

In cases in which successful counsel will be seeking fees from opposing parties or a common fund, contemporaneous time and expense records should be maintained, and summaries of these records should be filed at periodic intervals, such as every 60 days. Except for good cause, the court should deny compensation or reimbursement for items not reflected on these summaries. Prior to the conclusion of the litigation these reports generally are kept under seal,[33] although from time to time they should be reviewed in camera by the judge (or a specially designated magistrate or master) to ascertain whether counsel are spending excessive time and money in the litigation.[34]

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33. In statutory fee cases, however, it may be appropriate to disclose the total number of hours reported—although not the particular activities involved—to opposing parties who need to know their potential exposure for attorneys' fees before making or accepting an offer of settlement.

34. Like applications at the end of the case, the interim reports should show for the various activities during the period—for example, "preparing/reviewing brief on venue," or "deposition of J. Johnson"—the names of the attorneys involved, the hours claimed, suggested hourly rates, travel time, and expenses.

24.22 Guidelines.

Particularly in cases with many attorneys, the court may wish to indicate, either orally or in writing, its expectations with respect to participation by counsel at conferences, depositions, and the like. Although any restriction on the number of attorneys should be based on the circumstances of the particular litigation, some of the more common guidelines adopted to eliminate unnecessary fees are the following:

- **court appearances.** Only rarely—for example, at the initial pretrial conference and perhaps at the final pretrial conference—should all counsel attend conferences and other pretrial court hearings. The court may not only relieve counsel from any obligation to be present when not needed, but also caution that fees will not be awarded for excessive attendance at such conferences.[35] In some cases the court may wish to indicate the maximum number of counsel who will be compensated for participating in a given conference, absent unusual circumstances. Similar limitations regarding the number of attorneys who will participate in the trial may also be appropriate.

- **depositions.** Like pretrial conferences, depositions are often over-attended. Rarely should more than three attorneys with a common interest and position be present at a deposition; frequently one attorney for each side will suffice. In selecting which attorneys should conduct a particular deposition, care should be taken to minimize travel time and expense.

- **drafting and reviewing documents.** Special caution must be taken in cases with many counsel to avoid excessive and duplicative time spent in drafting and reviewing discovery requests, briefs, statements of proposed facts, and other documents. Unless counsel exercise restraint, the number of hours spent in multi-party cases on such matters can be absurd. No standard of general application can fairly establish how many attorneys are needed to draft or review a given document; but counsel should understand that the court will not approve payment for an unreasonable number of hours spent in such activities.

- **rates by function.** Senior partners should spend time only on matters that deserve their attention—and merit their hourly rate. When doing work that reasonably could be performed by an associate or paralegal in approximately the same time, the senior attorney should be compensated only at the rate of such an associate or paralegal.[36] The courts are not in accord as to the proper billing rate for travel time; in any event, unnecessary travel should not be compensated or reimbursed.

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35. See In re Fine Paper Antitrust Litigation, 751 F.2d 562, 595 (3d Cir. 1984).

36. Id. at 593.

24.23 Responsibilities of Designated Counsel.

Lead and liaison counsel are responsible for seeing that work is performed in an efficient and economical manner. Only those persons reasonably necessary to do a given task should be assigned to it. In selecting the persons to perform some function, consideration must be given not only to the skills required but also to the cost, considering hourly rates and travel.[37] Lead counsel should advise other attorneys when their participation in conferences and hearings will be needed; attorneys should understand that, if not asked to be present, their attendance at such meetings and at depositions will not ordinarily be treated by the court as compensable.

As discussed in § 20.222, sound judgment and discretion must be exercised by lead and liaison counsel in communicating with other attorneys in the group. Periodic, concise notices and reports of major activities in the litigation are useful in keeping other counsel informed, particularly if they may be called upon to perform assigned tasks from time to time, such as conducting a deposition. However, furnishing all counsel with copies of all briefs, motions, orders, correspondence, and the like will be inefficient and uneconomical—one of the principal reasons for designating counsel to act on behalf of others is to save the time that would be wasted if many attorneys had to read identical documents. Lead and liaison counsel should, therefore, be selective in distributing materials. In some cases, counsel may save time and money by circulating only the first page of most documents; the balance of such documents, of course, would be available on request. If counsel understand that the court will not approve fees for time spent in reviewing the work of others—essentially to keep informed—they will appreciate not receiving unnecessary "informational" materials.

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37. The first obligation is to see that the work is done properly. At times the services of attorneys with high hourly rates will be justified. If, however, the same work can be performed just as effectively and efficiently by other attorneys, counsel are expected to be cost-conscious, as they should be when being paid by their own clients.

25. JUDGMENTS AND APPEALS.

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25.1 INTERLOCUTORY APPEALS.[1]

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As stated in 28 U.S.C. § 1291, appeals may generally be taken only from "final decisions." The statute is designed to conserve judicial energy at all levels and to eliminate the delay, harassment, and cost that would result from a succession of separate interlocutory appeals from various rulings made during the course of litigation.[2] Indiscriminate attempts to seek interlocutory appellate review may frustrate this policy, especially in complex cases in which the court may make numerous rulings during pretrial

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1. Reference: MCL 1.43.

2. Catlin v. United States, 324 U.S. 229 (1945); Cobbledick v. United States, 309 U.S. 323 (1940).

proceedings and in which one or more of the litigants may have great resources and little interest in expeditiously resolving the litigation.

On the other hand, appropriate invocation of the exceptions to the final judgment rule may be of great value in reducing the time and expense—which may be enormous in some complex litigation—that otherwise would be spent if all claims and issues had to be determined before any appellate review.

When appealability depends upon the entry of a discretionary order at the trial level—such as an order under Fed. R. Civ. P. 54(b), 28 U.S.C. 1292(b), or a state certification procedure[3]—the district judge should not only consider carefully the applicable legal criteria for the order, but should also weigh the value of an early appellate ruling, whether affirming or reversing, against the problems of review on an incomplete record, the possibility of mootness resulting from subsequent events, and the potential for delay and disruption in pretrial proceedings during the appellate process. Appellate courts should be receptive to appeals certified under 28 U.S.C. § 1292(b) in major complex litigation and, recognizing the substantial impact their ruling may have on the scope and extent of further proceedings, should attempt to expedite their consideration and decision in such cases.[4]

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3. Several states authorize their appellate courts to decide questions of controlling state law certified by federal district courts. See, e.g., Ala. R. App. P. 18, Idaho App. R. 12.1, Md. Code § 12-601 (1974); cf. Del. Const., Art. IV, § 11(9) (Delaware Supreme Court may accept certification from United States District Court for the District of Delaware, but not from other federal courts). In states permitting certification only by an appellate court, the district court may wish to consider certifying the issue to the court of appeals under 28 U.S.C. § 1291(b), coupled with a suggestion for certification to the appropriate state court.

4. Courts of appeals are to take all necessary and proper steps to avoid delays in the disposition of appeals in complex cases. See Resolution, Judicial Conference of the United States, Reports of the Judicial Conference 1971, p. 73-74. The trial judge is responsible for certifying to the appellate court that the case has been given special supervision under the terms of the Resolution.

§ 25.11 Collateral Order Doctrine.

Under Cohen v. Beneficial Indus. Loan Corp., orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" are treated as final and thus appealable under 28 U.S.C. § 1291.[5] The Supreme Court has, however, emphasized that appellate review under this doctrine is reserved for exceptional circumstances and that, at a minimum, the order of the trial court must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from final judgment."[6]

In view of the limitations on the Cohen doctrine, the district court should, if it desires immediate appellate review, consider whether its order may be certified for appeal under 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(b). See §§ 25.13, 25.14. For like reason, counsel attempting to obtain appellate review of a collateral order should

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5. 337 U.S. 541, 546 (1949). See also Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (order directing defendants to bear part of costs of Fed. R. Civ. P. 23 notice held appealable), and Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983) (order staying federal suit for arbitration pending state court proceedings held appealable). Whether the right to appeal from a Cohen-type order is lost if the appeal is not taken immediately is not clear.

6. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (order denying class certification held not appealable). Mindful of the constraints placed by Coopers & Lybrand, appellate courts have declined to review interlocutory orders restricting communications with class members, Lewis v. Bloomsburg Mills, Inc., 608 F.2d 971 (4th Cir. 1979); awarding interim attorneys' fees, Hillery v. Rushen, 702 F.2d 848 (9th Cir. 1983); directing class counsel to create a list of class members at their own expense, Judd v. First Fed. Sav. & Loan Ass'n, 599 F.2d 820 (7th Cir. 1979); and transferring the action to another district court because of a forum selection clause, Nascone v. Spudnuts, 735 F.2d 763 (3d Cir. 1984). But cf. Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 104 S. Ct. 349 (1983) (order permitting maintenance of suit despite forum selection clause requiring action be brought in foreign country held appealable). For a brief discussion of the appealability of orders on motions to disqualify counsel, see § 20.23.

consider seeking review by special writ in the alternative.[7] See § 25.15. Although these exceptions to the rules of appealability are not interchangeable, one can rarely be certain whether the Cohen doctrine applies in particular cases.

Absent a stay from the court of appeals, review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case. In deciding whether to suspend or alter the pretrial and trial proceedings pending an appellate ruling, the district court should consider both the likelihood and consequences of a reversal.

25.12 Appeals under 28 U.S.C. § 1292(a).

Special statutory authorization is given for interlocutory appeal from various orders with respect to receiverships, admiralty decrees, and orders granting or denying preliminary injunctions.[8] 28 U.S.C. § 1292(a). Although such appeals are a matter of right—neither the district court nor the court of appeals is vested with any discretion to forbid or refuse to hear the appeal—the opportunity for review is not lost by failure to take the interlocutory appeal,[9] and the standard for review may be more limited than if the same basic issue were presented after final adjudication. Accordingly, the parties should ordinarily forgo their option to take an interlocutory appeal under § 1292(a) unless the issue may become moot, the immediate consequences of the ruling are severe, or early appellate review may affect significantly further proceedings in the case.

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7. Some appellate courts will treat appeals outside the scope of the collateral order doctrine as petitions for special writs. See, e.g., Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 736 (3d Cir. 1983) (discretionary with court of appeals).

8. See also 28 U.S.C. § 1292(c)(2), for appeals to the Court of Appeals for the Federal Circuit in civil actions for patent infringement prior to an accounting for damages. The present status of interlocutory appeals in bankruptcy matters is uncertain. See, e.g., 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3926.

9. See cases cited and discussion in 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3921.

If an early decision from the court of appeals on some issue would be valuable in charting future proceedings but other interlocutory appeals would not be authorized, counsel may be able—for example, by amending a complaint to seek preliminary injunctive relief—to use § 1292(a) as a device to insure immediate appealability. Orders controlling the conduct of litigation on matters of procedure, however, even if stated as directions to the parties or counsel, are not treated as injunctions subject to § 1292(a)(1).[10]

25.13 Appeals under 28 U.S.C. § 1292(b).

Under 28 U.S.C. § 1292(b), an appeal may be taken, if permitted by both the district court and the court of appeals, from an interlocutory order that "involves a controlling question of law as to which there is substantial ground for difference of opinion . . . [if] an immediate appeal from the order may materially advance the ultimate termination of the litigation." Adopted with complex litigation in mind,[11] this section provides a useful mechanism for obtaining early appellate review on a critical legal issue that may simplify or shorten discovery or trial.

In deciding whether to make the certification under § 1292(b), the trial judge should consider the consequences upon the litigation that the various potential rulings by the appellate court may produce. Certification may, for example, be desirable if a reversal of the challenged order would substantially reduce the scope or extent of further discovery or trial. Even in such circumstances, however, the district court may conclude that reversal is sufficiently unlikely that interlocutory review would probably be a waste of time. The declination to make the certification under § 1292(b) is within the discretion of the trial judge.[12]

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10. See id. § 3922.

11. See id. § 3929.

12. See id. § 3929. But see Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982).

If the district court believes that immediate review is desirable, then it should assure that the petition to appeal can be filed within the 10-day period allowed by Fed. R. App. P. 5.[13] The court can effectively give the parties additional time by indicating in the order that it is prepared to make the appropriate findings under § 1292(b) when requested by one of the parties. The court of appeals is under no obligation to accept the appeal;[14] therefore, the district court's certificate should contain (in addition to the statutory findings) a concise statement of the controlling question of law and a meaningful explanation why early review will materially advance the termination of the litigation.[15] An alternative certificate under Fed. R. Civ. P. 54(b) may also be proper and desirable.[16]

25.14 Appeals under Fed. R. Civ. P. 54(b).

The provisions of Fed. R. Civ. P. 54(b) enable the district court to certify as immediately appealable—to be appealed then or never[17]—decisions that, although not disposing of the entire litigation, fully resolve one or more claims or the rights or liabilities of one or more parties. The opportunity for such appeals often arises in multi-party, multi-claim litigation when the court grants a motion under Fed. R. Civ. P. 12 or 56 or completes a separate trial of a claim under Rule 42(b). The court should, however, carefully consider whether to enter the "express determination that there is no just reason for delay" and the "express direction for the entry of judgment" that

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13. The time limit for the petition is jurisdictional. E.g., Atkins v. Scott, 597 F.2d 872 (4th Cir. 1979).

14. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (appeal may be declined for any reason, including docket congestion).

15. The local rules of some courts of appeals require a precise statement by the trial judge of this controlling question. See, e.g., 3d Cir. R. 23.

16. See CAB v. Tour Travel Enter., Inc., 605 F.2d 998 (7th Cir. 1979); cf. Morrison-Knudsen Co. v. Archer, 655 F.2d 962 (9th Cir. 1981).

17. See, e.g., Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co., 642 F.2d 1065, 1071 n.7 (7th Cir. 1981).

are required under Rule 54(b). A number of factors may be relevant; ultimately the matter is entrusted to the discretion of the trial court, to be exercised in an equitable manner that promotes sound judicial administration at both the trial and appellate levels.[18]

Special attention should be given to the situation that arises in class actions and other multi-party cases when a finding of liability is made in favor of the class or group, whether upon motion or after trial. Appellate review of this decision before proceeding to trial (or discovery) regarding damages may be highly desirable. In such circumstances, however, a determination of damages for at least one member of the class or group will generally be needed before an appeal may be taken under Rule 54(b).[19] If both sides desire immediate appeal, they may be able to stipulate the damages for one class member or party; otherwise, it may be necessary to defer the appeal until damages are determined for someone by summary judgment or trial.

25.15 Special Writs.

Interlocutory review may occasionally be obtained through applications for writs of mandamus, prohibition, and other "extraordinary" writs.[20] These procedures are not to be used as a substitute for appeal or merely to correct asserted errors in the management of litigation in the trial court, for this would thwart the policy against

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18. See Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956).

19. See Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (finding of liability without resolving any of claims for relief held not appealable under Rule 54(b)). However, orders for transfer of title to property may, without awaiting damage determinations, be appealable under Forgay v. Conrad, 47 U.S. 201 (1848), or perhaps under 28 U.S.C. § 1291(a).

20. See Fed. R. App. P. 21; 28 U.S.C. § 1651; cf. Fed. R. Civ. P. 81(b).

piecemeal reviews.[21] Appellate courts rarely grant these writs,[22] limiting them to situations in which the trial court has clearly committed legal error and relief cannot as a practical matter be obtained through other means.[23]

Nevertheless, the need sometimes arises for interlocutory review of an order having serious and irremediable consequences, and these special writs may provide the only effective means for obtaining appellate review. Appellate courts have, for example, granted writs to require that a demand for trial by jury be honored,[24] to vacate orders restricting communications with class members,[25] and to uphold claims of sovereign immunity.[26] The writ of mandamus may also be used to exercise supervisory control over the trial court and to correct a "clear abuse of discretion"[27] concerning such matters as claims of privilege[28] or work product immunity.[29] If the availability of other methods for obtaining interlocutory review is unclear, counsel should consider

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21. Will v. United States, 389 U.S. 90 (1967).

22. As the Supreme Court said in Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980), "In short, our cases have answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, hardly ever!'"

23. Kerr v. United States District Court, 426 U.S. 394 (1976).

24. E.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

25. E.g., Coles v. Marsh, 560 F.2d 186 (3d Cir.), cert. denied, 434 U.S. 985 (1977).

26. E.g., Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974).

27. E.g., La Buy v. Howes Leather Co., 352 U.S. 249 (1957) (improper referral to special master).

28. E.g., Jenkins v. Weinshienk, 670 F.2d 915 (10th Cir. 1982); Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd per curiam, 400 U.S. 348 (1971).

29. E.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984).

adding to their appeal an alternative application for a special writ.[30]

25.16 Proceedings While Appeal Pending.

Interlocutory appeal, whether by right or by permission, does not ordinarily deprive the trial court of jurisdiction except with respect to the matters that are the subject of the appeal.[31] Notwithstanding the pendency of an interlocutory appeal, the case should usually proceed as scheduled through discovery and other pretrial steps toward trial. Depending, however, upon the nature of the issue before the appellate court, suspending some portion of the proceedings or altering the sequence in which further activities in the litigation are conducted may be appropriate. Even if the trial court has in effect sponsored an appeal by making a certification under 28 U.S.C. § 1292(b), some matters may be handled efficiently and economically while the appeal is pursued.

25.2 COORDINATION IN APPELLATE PRACTICE.

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25.21 Designation of Single Panel.

Appellate review is sometimes sought several times during the course of complex litigation. The court of appeals should designate a single panel to consider, to the extent possible, all appeals and reviews arising in the case. This procedure avoids the need for several different judges to study the issues and the factual context of the

30. See, e.g., In re Cement Antitrust Litigation, 673 F.2d 1020 (9th Cir. 1982) (judge's recusal reviewable by mandamus, but not by § 1292(b)), aff'd under 28 U.S.C. § 1297 sub nom. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983).

31. See 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 203.11, at 3-54; Taylor v. Sterrett, 640 F.2d 663 (5th Cir. 1981).

litigation.[32] The panel can become familiar with the case and more readily appreciate the interrelationship of the various matters presented to it.

When initiating the first appellate review in a complex case, therefore, counsel should alert the court of appeals to the possibility of later appeals, whether in the same case or in related cases. Information pertinent to the possible disqualification of judges should be provided at the outset with respect to all cases that are part of the litigation, not just those involved in the first appeal; otherwise a later appeal may have to go to another panel. Special problems with regard to disqualification arise in class actions;[33] if the first appeal is taken before class certification has been considered, some description should be given to the appellate court of the types of persons or companies that would likely be in the class if one were certified.

25.22 Pre-argument Conferences.

Under Fed. R. App. P. 33, an appellate court may (either on motion or sua sponte) convene a pre-argument conference to consider such matters as simplification of the issues, coordination of briefs, and briefing schedules. Particularly in complex litigation with multiple appeals or related petitions for review of agency actions concerning overlapping issues, counsel may wish to move for such a conference in conjunction with, or soon after, filing their notice of appeal. An early conference will enable the court and counsel the opportunity to take full advantage of this procedure in managing the appellate process.

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32. An interesting variation in this procedure occurred in the Corrugated Container Antitrust Litigation. The Chief Judge of the Fifth Circuit designated the first panel that considered an appeal in the case to hear all subsequent appeals. Following the division of the Fifth Circuit into the Fifth and Eleventh Circuits, all subsequent appeals were directed to a panel of "new" Fifth Circuit judges that considered the first matter to arise in the case after the circuit division. Between 1979 and 1982, these two panels heard a total of ten appeals.

33. Cf. In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir. 1982), aff'd under 28 U.S.C. § 1297 sub nom. Arizona v. United States District Court, 459 U.S. 1191 (1983).

Although rarely used in most circuits, pre-argument conferences can serve several valuable purposes. The court may decide to establish unified and coordinated briefing schedules in cases involving multiple appeals and petitions. Peripheral or weak issues may be exposed and eliminated; the law on other questions may be so clear that exposition in the briefs is unnecessary. The court may, moreover, be willing to indicate the topics that preliminarily appear to be most significant to it and on which counsel should focus their primary attention in the briefs. Jurisdictional questions, including problems of mootness or lack of finality of the underlying orders, can be addressed and perhaps resolved before proceeding with briefs on the merits.

25.23 Role of Lead Counsel.

Counsel with leadership roles in the trial court generally should also take the lead in coordinating appellate efforts on behalf of parties with common or similar interests. However, appellate responsibilities should sometimes be placed on attorneys other than those primarily involved in conducting the litigation. Counsel should make every effort to resolve their disagreements without involving the court. If disagreements regarding appellate representation or strategy must be resolved by the court, the trial judge should consider referring the matter to another judge of the court.

25.3 ENTRY OF FINAL JUDGMENT.

Under Fed. R. Civ. P. 58 the final judgment must be set forth on a separate document[34] and is effective only when entered by the Clerk in accordance with Rule 79.[35] The time for appeal does not begin to run until both of these conditions have

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34. If the terms of the final judgment will run several pages in length, as will frequently be true in class actions and cases involving equitable relief, a good practice is to prepare for signature a single cover sheet that refers to and adopts the additional provisions which are set forth in appendices.

35. The requirement can be waived by the parties. Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978).

been met.[36] Even after the judgment has been signed and filed, it ceases to be final until the court rules on timely-filed motions for judgment notwithstanding the verdict, to amend or make additional findings of fact, for a new trial, or to amend judgment.[37] These post-judgment motions, therefore, should be acted on specifically and without undue delay. Post-judgment motions may affect appealability of other cases consolidated for trial.[38]

The final judgment in class actions must describe the class with sufficient specificity to identify those bound by the decision. Fed. R. Civ. P. 23(c)(3). In actions maintained under Rule 23(b)(3) a list should be compiled, and referred to in the judgment, that identifies the persons who were sent individual notice and did not timely elect to be excluded from the class.

25.4 DISPOSITION OF MATERIALS.

Materials filed with the court in complex litigation during discovery or trial may be voluminous. Most courts by local rule or order provide that, after the time for appeal has expired, the parties are permitted—if not directed—to remove many of the documents and other exhibits.

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36. United States v. Indrelunas, 411 U.S. 216 (1973).

37. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). The law is unsettled whether the pendency of a motion for attorneys' fees suspends the finality of the judgment on which it is premised. Compare West v. Keve, 721 F.2d 91 (3d Cir. 1983), and Cox v. Flood, 683 F.2d 330 (10th Cir. 1982) (holding that judgments finally disposing of the merits are final and appealable even though questions relating to fees are unresolved), with Holmes v. J. Ray McDermott & Co., 682 F.2d 1143 (5th Cir. 1982), cert. denied, 459 U.S. 1107 (1983) (impact of pending motion for fees depends on nature and basis of fee request). Unless the law in their circuit is clear, counsel desiring to appeal should probably file a notice of appeal after entry of the underlying judgment and a second notice after the request is ruled upon; otherwise, the appeal might be dismissed as untimely. See Ironworkers' Local 75 v. Madison Industries, Inc., 733 F.2d 656 (9th Cir. 1984).

38. Harcon Barge Co. v. D & G. Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984) (timely post-judgment motion in one case nullified prior notice of appeal in other consolidated cases; absent new notices after entry of amended judgment, appellate court lacked jurisdiction), reh'g granted, 760 F.2d 86 (5th Cir. 1985).

Exhibits gathered or compiled at great expense in the case may, however, be needed by parties in other litigation, whether presently pending or not. In complex litigation the court should therefore be hesitant to authorize immediate destruction of documents and other exhibits. Items permitted to be withdrawn from the court should usually be retained by the parties for a reasonable period of time so that, if shown to be needed in other litigation, they could be produced without undue expense or delay.

30. CLASS ACTIONS.[1]

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Although not every class action is complex, each case in which claims are made by or against a class presents special problems of management. Once class allegations are made, consideration must be given to the rights of the putative class members, by definition too numerous to be joined as parties. Various decisions—such as whether to dismiss or compromise, whether to appeal, and whether to abandon the class claims—are

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1. Although defendant classes are sometimes certified and occasionally a request for class certification is made by an adversary rather than by the person seeking to be a class representative, the typical class action is one in which the plaintiffs are seeking to be recognized as representatives of a plaintiff class. For convenience, § 30 of MCL 2d is written in this modal context, but the principles are generally applicable in the other variants, including cases brought as derivative actions under Fed. R. Civ. P. 23.1.

no longer wholly within the control of the litigants. The attorneys and parties seeking to represent the class assume fiduciary responsibilities to the class; and to a degree the court also is called upon to protect the interests of the class.

Although class actions continue to provoke controversy within the profession, it is the responsibility of the court to assure that Fed. R. Civ. P. 23 serves its intended salutary purposes and becomes neither a mere tactical device nor an impossible burden on overcrowded dockets.[2]

30.1 CERTIFICATION.

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Deciding whether to certify a class and defining its membership are rulings that often prove as important as those on the substantive issues. They typically affect the scope and timing of discovery, the duration and expense of litigation, the sums at stake, and sometimes even the methods of proof on the merits. The decision on whether or not to certify a class should be made carefully, on the basis of sufficient information, and at an early stage in the case.

30.11 Timing.[3]

Fed. R. Civ. P. 23(c)(1) directs the court to determine "as soon as practicable" whether an action is to be maintained on behalf of or against a class. Early class

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2. The focus of this chapter is on the techniques and procedures that are useful in managing class actions. H. Newberg, Newberg on Class Actions (2d Ed.), is a helpful resource for locating cases on particular problems.

3. Reference: MCL 1.40, 1.401, 2.10, 2.11.

determination enables the parties and the court to know what is really at stake, eliminates unproductive squabbles over the scope of discovery, saves the time and expense that might be wasted on matters not properly involved in the litigation, starts statutes of limitation running again if a class is not certified, and exposes potential conflicts that might result in disqualification of the judge or the attorneys.

How soon it is "practicable" to rule on class certification depends on the circumstances of the case. If the plaintiff has an idiosyncratic personal claim or is obviously not a member of the alleged class, quick denial of class status may be appropriate. Conversely, a suit challenging the legality of a uniformly applied law, regulation, or governmental policy may so clearly satisfy Rule 23 that extensive discovery or other pre-certification proceedings are unnecessary. However, most cases with class allegations fall between these extremes; and in some of the large antitrust, employment discrimination, and securities class actions, substantial discovery may be needed to refine the issues and to furnish the factual predicates before an informed determination can be made regarding certification of a class.

Parties sometimes ask for an obviously premature class certification, arguing that it may be vacated if later developments show a class should not have been formed. This approach is generally unwise, particularly if members of the class will learn of certification by formal notice or otherwise. Although Fed. R. Civ. P. 23(c)(1) permits amendment of class orders prior to the final decision on the merits, that power does not lessen the court's obligation to observe the requirements of Rule 23(a) and (b). Undesirable consequences result when an expansive class, formed on insufficient information, must later be decertified or redefined. Substantial time and expense may be wasted on discovery with respect to matters affecting persons who later are excluded from the case. Those eliminated from the litigation as a result of decertification or

reduction in the size of a class may be confused, unsure what they should do next.[4] If relief is obtained for a reduced class, those who were initially in the larger class may attempt to reverse the decision that excluded them from the class; such a reversal may be particularly troublesome if the relief was obtained by settlement. Although Rule 23(c)(1) permits alteration of a class decision that proves to have been made in error, it should not be used to justify ill-advised, premature consideration of the important question of class certification.

To be able to make a class determination as soon as practicable and, in turn, to facilitate the rapid accumulation of facts bearing on class issues, the court should become involved early in the litigation in developing a schedule for resolving Rule 23 issues. Through pretrial conferences, discovery and scheduling orders, and other management techniques, the court may fairly force the parties to develop the class issues with dispatch.[5]

The court need not—and in some situations should not—wait for the parties to make class allegations in the pleadings or by motion.[6] Litigants have occasionally threatened to add class allegations to extort excessive settlements of individual claims.[7] If class allegations have not been made although class action treatment appears warranted,

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4. For those excluded from the class, the statute of limitations, which was tolled by the filing of the class complaint, begins to run again. See Chardon v. Soto, 462 U.S. 650 (1983); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).

5. Some district courts have local rules that provide a short period—typically 30 to 90 days—within which the plaintiff must file a class certification motion. These rules commendably force all parties to focus early on class action issues. However, in some cases these time limits will be too short. Counsel should make known any requests for additional time at the initial conference or as soon thereafter as the need is known.

6. See Citizens Envtl. Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan. 1973), aff'd, 484 F.2d 870 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974); Huff v. N. D. Cass Co., 485 F.2d 710, 712 (5th Cir. 1973) (en banc). But see Wilson v. Zarhadnick, 534 F.2d 55 (5th Cir. 1976).

7. Cf. Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978) (pre-certification settlement of individual claims, dismissing class claims without prejudice).

the court may call upon the parties to show cause why the case should not be certified, directing that no settlement be made prior to this determination. However, the court should be cautious about entrusting to a reluctant party or attorney the responsibility of presenting claims on behalf of a class, and in some cases other members of the putative class should be given the opportunity to intervene to seek to become class representatives.

Frequently a defendant, before certification, will move to dismiss the plaintiffs' claims under Fed. R. Civ. P. 12 or for summary judgment on those claims under Fed. R. Civ. P. 56. Issues regarding certification of a class should, if ripe for decision, be decided before any ruling under Rule 12 or 56 is made. Often, however, the court not only may, but should, rule on motions under Rule 12 or 56 without awaiting class certification. For example, the court should rarely postpone a ruling that it lacks jurisdiction over the subject matter or the parties. Similarly, defects in venue or service of process should ordinarily be corrected before the case is permitted to proceed, even if it involves class claims. Rulings that dismiss particular parties or claims or that call for more definite statements will help to clarify the claims of the named parties and thus focus consideration on the requirements of Fed. R. Civ. P. 23(a) and (b).

A more difficult problem is presented if, prior to consideration of class certification, the court is asked to rule on motions under Rules 12 and 56 that, if granted, would either terminate the litigation or constitute a final determination regarding the merits of the claims or defenses. If such motions are granted before a class is certified, the ruling binds just the individual parties, with only precedential effect on class members, and the issue of class certification has in essence been made contingent on the merits of the representative's own case.[8] Granting such a motion after a class has been certified forecloses future litigation by other members of the class. If the

8. See Consor v. Occidental Life Ins. Co., 469 F. Supp. 1110 (N.D. Tex. 1979). These concerns are based on observations in cases like Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), and Long v. Sapp, 502 F.2d 34 (5th Cir. 1974).

ruling depends in any respect upon the decision on class certification—if, for example, additional discovery is needed before summary judgment may fairly be considered with respect to class claims—then the court ordinarily should defer its ruling until after the certification hearing is held.

In some situations, however, dispositive motions may appropriately be decided before class certification is considered. For example, the defendants may be clearly entitled to dismissal of a class complaint under Rule 12 or 56, and investigation into the matters bearing on Rule 23 would be costly and time-consuming. Not surprisingly in view of the difficulties a contrary conclusion would produce, pre-certification consideration of the merits of the case has been upheld as within the court's power.[9] The basic rationale is that members of the putative class are not harmed in a "losing" case by pretermission of the issue of certification and that, by filing the motion before a ruling on the class issues, the defendant has waived the additional protection that would have been afforded by a judgment against the class.[10] The court, however, should approach such pre-certification motions with caution and ensure that an adequate opportunity for discovery on the critical issues has been allowed before considering motions for summary judgments.

30.12 Discovery.[11]

The discovery program in cases brought as class actions should be structured to facilitate an early decision regarding certification and enable discovery on the merits

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9. See, e.g., Roberts v. American Airlines, Inc., 526 F.2d 757 (7th Cir. 1975), cert. denied, 425 U.S. 951 (1976); Jackson v. Lynn, 506 F.2d 233 (D.C. Cir. 1974); cf. Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801 (W.D. Pa. 1974), rev'd on other grounds, 526 F.2d 1083 (3d Cir. 1975).

10. Courts occasionally have granted summary judgment in favor of a class representative before considering the question of class certification. This practice should usually be avoided. Post-judgment certification in favor of the class may not be possible. Moreover, the potential use of collateral estoppel may have inequitable consequences similar to those of one-way intervention, a practice that Fed. R. Civ. P. 23(c)(3) was intended to prevent.

11. Reference: MCL 1.40.

of the controversy to be conducted efficiently and economically. Sometimes the initial discovery should be limited to the requirements of Fed. R. Civ. P. 23(a) and (b) that are in dispute; a prompt ruling may then be made on whether the case should proceed as a class action and a plan developed for conducting further discovery.

Often, however, bifurcating discovery in this manner will be counterproductive. Discovery relating to "class issues" is not always distinguishable from other discovery. Moreover, the key question in class certification is often the similarity or dissimilarity of the claims of the representative parties to those of the class members—an inquiry that may require some discovery on the "merits" and development of the basic issues.[12] Nor will discovery into matters affecting other members of the putative class necessarily be wasted if a class is not certified, for in many cases this information will be valuable as circumstantial evidence. Therefore, in deciding whether to give priority to discovery on class issues, the court should consider the nature of the particular case. See § 21.41. Any stay of merits discovery should be lifted promptly after completion of class discovery.

Inquiry into the claims of one or more of the representative parties and into the status of some of the members of the putative class will be needed in many cases before an informed decision can be made under Rule 23(a) and (b). However, parties opposing class certification sometimes have attempted to use discovery from class members and representatives as a device to harass and embarrass. The court should impose appropriate limitations on the number and scope of depositions that may be taken during Rule 23 discovery from class representatives and putative class members. See also § 30.233. For example, pre-certification[13] inquiries into the financial arrangements between the class representatives and their counsel respecting the expenses of the litigation are

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12. See Chateau de Ville Prod., Inc. v. Tams-Witmark Music Library, 586 F.2d 962 (2d Cir. 1978).

13. These arrangements may, however, later become relevant in awarding fees. See § 24.12.

rarely appropriate,[14] particularly in view of the provisions of the 1983 A.B.A. Model Rules of Professional Conduct permitting attorneys to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."[15]

30.13 Hearings.[16]

The nature of the dispute over class certification determines the type and format of the hearing to be held under Fed. R. Civ. P. 23(c). Some or all of the material facts may be established by the pleadings, by stipulation of the parties, or by uncontradicted affidavits. The absence of genuine controversy may be ascertained by calling on the parties to develop a statement of contested and uncontested facts relevant to Rule 23 issues, using the procedure described in § 21.47. Some type of hearing will generally be desirable, either to consider oral arguments or to receive evidence; indeed, "while evidentiary hearings are not mandated in every rule 23 case, a denial of class action certification should not ordinarily be made without giving the plaintiffs an evidentiary opportunity, if requested."[17] To make the hearing more efficient, the court may limit the number of witnesses, require depositions to be summarized, call for direct evidence of witnesses to be presented by adopting prepared statements, and use other techniques described in § 22 for non-jury trials.

Evidentiary hearings on class certification should not be "mini-trials" whose purpose is to determine the merits of the class or individual claims.[18] However, the

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14. See, e.g., Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), cert. denied, 421 U.S. 914 (1975); Kamens v. Horizon Corp., 81 F.R.D. 444 (S.D.N.Y. 1979).

15. A.B.A. Model Rules of Professional Conduct (1983), Rule 1.8(e)(1). Although the new Code is not automatically effective in each state, courts have frequently applied A.B.A. standards if the corresponding local or state rules are imprecise or incomplete. See Paul E. Iacono Structural Eng., Inc. v. Humphrey, 722 F.2d 435 (9th Cir.), cert. denied, 464 U.S. 851 (1983).

16. Reference: MCL 1.40.

17. Marcera v. Chinlund, 565 F.2d 253, 255 (2d Cir. 1977).

18. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

court will often need a detailed explanation by the parties regarding these claims and how they will be presented and defended at a trial on the merits—not to assess the merits of the claims, but to project the type of trial that likely will take place if the case proceeds as a class action.[19]

The judge should enter findings and conclusions after the hearing, addressing each of the applicable requirements of Rule 23(a) and (b).[20] The court's findings are particularly important if the decision is affected by credibility choices.

30.14 Class Definition.[21]

The representatives must be members of the class, having the same interests and suffering the same injury as other class members even in cases based on claims of class discrimination.[22] The court should, however, avoid class definitions that depend on the merits of the claim (for example, persons racially discriminated against by the defendant) or the seeking of relief (for example, persons claiming injury or seeking damages from some stated practice). These definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and constitute an improper opt-in procedure.

Rather, the class should be defined to the extent possible in objective terms that are capable of present ascertainment.[23] This definition may be qualified by adding

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19. See General Tel. Co. v. Falcon, 457 U.S. 147, 157-60 (1982).

20. See Interpace Corp. v. City of Philadelphia, 438 F.2d 401 (3d Cir. 1971) (articulation desirable, but not mandatory).

21. Reference: MCL 1.42.

22. General Tel. Co. v. Falcon, 457 U.S. 147 (1982).

23. Similarly, objective terms should be used in defining any persons who should be excluded from the class, such as affiliates of the defendants, residents of particular states in diversity cases, or persons who have filed their own actions or are members of another class.

appropriate language describing the claims made on behalf of the class in the litigation.[24] For example, the class may be defined as consisting of those persons and companies (other than the defendants) that purchased specified products from the defendants and other specified sellers during a specified time period; but the order and any notice may provide that this class is formed for the limited purpose of resolving the entitlement, if any, of such class members to relief for alleged violation by the defendants of the federal antitrust laws in connection with such sales.

Many class actions satisfy the criteria of Rule 23(b)(3) as well as those of Rule 23(b)(1) or 23(b)(2). In such situations, the classification of the case plays an important role in defining the class, for putative class members have the right on timely request to exclude themselves from (b)(3) classes but not from (b)(1) or (b)(2) classes. This classification also determines whether notice is mandated by the Rule. Although the law is not settled, the better view is that, if the conditions of (b)(1) or (b)(2) are met as well as those of (b)(3), the court is not required to give notice or to permit members to opt out;[25] in its discretion, however, the court may require notice under (d)(2) and perhaps allow exclusion on timely request.[26]

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24. A description of the claims made on behalf of or against the class will be valuable if res judicata questions are presented in later litigation. See Dore v. Kleppe, 522 F.2d 1369 (5th Cir. 1975); cf. Cooper v. Federal Res. Bank of Richmond, 464 U.S. 808 (1984) (judgment against class bars only "class claims" and individual claims actually tried).

25. See, e.g., Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978).

26. A court is not precluded from defining a class under (b)(1) or (b)(2) as including only those putative class members who do not opt out of the litigation. Such a definition may be appropriate in some (b)(2) cases or in a (b)(1)(B) case in which the class was formed merely because separate actions by class members might impede their ability to protect their interests. See, e.g., Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981).

30.15 Selection of Representatives, Counsel, and Cases.[27]

Occasionally there are several cases with similar class allegations, each of which might be appropriately certified under Rule 23. Rarely should more than one be certified.[28] In deciding which of several cases to certify as a class action—assuming that each meets the requirements of Rule 23—the court has broad discretion. If the cases were initially filed in different districts, consideration should be given to choice-of-law consequences.[29] Certifying one of the earliest cases may avoid problems with the statute of limitations.[30] Special reasons may exist why particular cases should not be selected as vehicles for presentation of class claims, such as some impediment personal to the class representative, a failure to join or serve all defendants, or the limited scope of the allegations in the complaint.

The relative competence, experience, dedication, and resources of the attorneys who appear on behalf of the different persons seeking to become class representatives are important factors. The court is, however, not limited in making appointments of class counsel to those who were hired by the class representatives and, if necessary to assure adequacy of representation, it may appoint another attorney as class counsel or may condition class certification on the employment of additional counsel. See § 20.22.

Replacement of the class representative sometimes becomes necessary or desirable.

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27. Reference: MCL 1.44, 5.40.

28. The designation of several persons as representatives of the class is, however, often beneficial. If not already parties, they may sometimes be added to the class action by joinder, by intervention, or by filing a unified consolidated complaint. Rarely should more than ten persons or firms be named as class representatives.

29. Van Dusen v. Barrack, 376 U.S. 612 (1964), holds that, if a case is transferred under 28 U.S.C. § 1404(a) on motion of the defendant, the law of the transferor court should be applied in the transferee court.

30. Sometimes persons may be class members under the allegations of one complaint but not under those of another. Amendment of the second complaint may not solve problems with the statute of limitations. In such circumstances, certification of more than one class action may be necessary if class members are to have the benefit of tolling based on the class allegations.

The individual claim may have been mooted or otherwise significantly affected by intervening events. Or the representative may have engaged in conduct prejudicial to the interests of the class, or may no longer be interested in pursuing the litigation. If replacement is needed, the court may permit intervention by a new representative.[31] If no appropriate substitute is immediately available, notice may be given to the class under Fed. R. Civ. P. 23(d)(2), soliciting intervention.[32]

30.16 Multiple Classes; Subclasses.[33]

During certification proceedings—or even after a class has been certified—the court may discover differences in the positions of the class members that may cause conflicts in pretrial, trial, or settlement. Although all members of the class may challenge the same conduct of the defendants, their specific interests and legal theories may be different;[34] often the relief sought by some will be inconsistent with or competing with the relief sought by others, even though they have a common view on liability.

On occasion these differences may be so substantial as to justify either denial of class certification or decertification. In other cases the court may certify more than one class or divide a class into subclasses to avoid or manage intra-class conflicts.[35] Each class or subclass must independently satisfy the conditions of Rule 23(a) and (b). Fed. R. Civ. P. 23(c)(4)(B). The requirements of common questions, typical claims, and

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31. Formal intervention by class members is usually unnecessary and inadvisable. Class members in (b)(3) actions may, however, appear by their own attorneys, subject to the court's power to adopt appropriate controls regarding the organization of counsel.

32. The notice may provide that, unless a new party seeks by a specified date to intervene to represent the class, the class will be decertified.

33. Reference: MCL 1.42, 1.44.

34. Different state laws may, for example, govern the claims of class members residing in different states. See Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985).

35. See, e.g., Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1975); Wellman v. Dickinson, 79 F.R.D. 341, 345 (S.D.N.Y. 1978); Tober v. Charnita, Inc., 58 F.R.D. 74 (M.D. Pa. 1973); Seigel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967).

adequate representation rarely prove troublesome, for the subclasses usually comprise claimants who meet those standards. However, if too many subclasses are sought, some may not contain enough members to satisfy Rule 23(a)(1).[36]

All too often, counsel have requested certification of multiple classes and subclasses merely as a predicate for appointment to positions of leadership in conducting the litigation—and, indeed, to conceal the fact that the number of attorneys so designated was excessive. Unnecessary classes and subclasses have caused confusion, resulted in conflicts that might have been resolved amicably, and led to excessive attorneys' fees. The court should authorize multiple classes and subclasses only to the extent that the need is clearly demonstrated.

30.17 Classes for Special Issues.[37]

"[A]n action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4)(A). Sometimes a class may be certified for certain claims, but not for others.[38] Selectively used, this provision enables a court to achieve the economies of class action treatment for portions of a case, without being overwhelmed by the numerous problems presented if it were necessary to handle all aspects of the case for the entire class. The court, moreover, may certify a (b)(3) class for certain claims, allowing class members to opt out, while creating a (b)(1) or (b)(2) class for other claims from which opt-outs are not permitted.

The provision authorizing a class for specific "issues" does not require that an

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36. In some cases, defense counsel may advocate subclasses for just that purpose. Cf. Green v. Santa Fe Industries, 88 F.R.D. 575 (S.D.N.Y. 1980). Denial of class status in such circumstances will not, however, necessarily be wrong. If conflicts and differences among class members are so sharp that a number of small subclasses results, perhaps no class was justified in the first place.

37. Reference: MCL 1.42, 1.43, 1.51.

38. See, e.g., Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974) (class for injunctive relief); Nix v. Grand Lodge of Int'l Ass'n of Machinists, 479 F.2d 382 (5th Cir.), cert. denied, 414 U.S. 1024 (1973) (class to determine validity of disciplinary procedures); Chicken Delight, Inc. v. Harris, 412 F.2d 830 (9th Cir. 1969) (class to challenge portions of standard franchise agreement).

entire claim by or against a class be certified. Several courts have assumed that class action treatment might be afforded one or more issues relating to liability, while denying (or deferring consideration of) class certification of other issues affecting liability or questions of damages.[39] In considering such an approach, the court should ensure that the issues certified for class action treatment (1) are sufficiently separate from other issues that a severed trial will not violate constitutional rights to trial by jury[40] and (2) will, when judgment is entered, support appellate review.[41] The court should be wary of certifying special issues under Rule 23(c)(4)(A) unless both of these conditions are met, and should keep in mind that in actions under Rule 23(b)(3) common questions must continue to predominate over individual questions.

30.18 Reconsideration.

The fact that certification orders are conditional until entry of final judgment does not lessen the court's obligation to make its initial determination carefully and on the basis of sufficient information. The parties should be entitled to prepare for trial and to engage in settlement discussions on the assumption that this decision will not be altered except for good cause.

Sometimes, however, either because of evidence obtained during later discovery or because of changes in substantive or procedural law, the initial decision should be altered. Perhaps a class should be formed although class certification was originally denied, or a certified class should be redefined—either enlarged or reduced—or dissolved.

Motions for reconsideration under Rule 23(c)(1) may be made by any party, or

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39. See, e.g., Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979) (dictum), rev'd on other grounds, 451 U.S. 1 (1981). This appears to have been the intention of the drafters of the clause. See Notes of Advisory Committee to Subdivision (c)(4).

40. See § 21.632. Cf. Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978).

41. See Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976), holding that a finding of liability that does not resolve any claims for relief is not appealable even under Rule 54(b).

the court sua sponte may call for reexamination through a show cause order. The basic procedures to be followed are similar to those for the original hearing under Rule 23(c)(1), although, if the matter is being presented during the later stages of the litigation, an evidentiary hearing may not be needed. In deciding whether to modify its original decision, the court should consider not only the requirements of Rule 23(a) and (b) in the light of the facts and issues of the case, but also whether the parties or the class would be unfairly prejudiced by a change in the proceedings at that point.

30.2 COMMUNICATION WITH CLASS.[42]

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Communication with the class is one of the major concerns in management of class actions—when and how information may or should be given to class members; how to handle inquiries from class members; when and how information may or should be obtained from class members; and how to avoid communications that may interfere with the conduct of the litigation. Answers to these and similar questions are not always clear; the rules are still being formulated by the courts.

42. Reference: MCL 1.45.

30.21 Notices from the Court.[43]

.211 Certification Notice 220
.212 Settlement Notice 225
.213 Other Court Notices 227

Notice to class members is mandated in two circumstances: when a class is certified under Fed. R. Civ. P. 23(b)(3), and when the parties propose to dismiss or compromise a class suit. Fed. R. Civ. P. 23(c)(2), 23(e). Because the rule provides that the court "direct" these notices, they are generally given in the name of the court and viewed as court notices, although typically prepared and distributed by one of the parties. In addition, the rule provides the court with a reservoir of authority to require notice whenever needed for the protection of class members or for the fair conduct of the litigation. Fed. R. Civ. P. 23(d).

30.211 Certification Notice.

Notice that the case has been certified as a class action, mandatory for (b)(3) actions,[44] is often advisable for (b)(1) and (b)(2) classes as well. These notices may help identify diverse interests or antagonistic positions within the class of which the court was not aware at the time of the certification hearing; class members will be advised of their opportunity to question the fairness and adequacy of representation; and, after notice, any final judgment will more likely be given res judicata effect with respect to class members.[45]

Counsel usually submit a draft of the proposed notice to the court for its review, revision, and approval. The notice should be accurate, balanced in tone, and

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43. Reference: MCL 1.45

44. As discussed in § 30.14, many cases meet the standards of Rule 23(b)(3) as well as those of (b)(1) or (b)(2). No generalization can be made as to whether the provisions of Rule 23(c)(2) (individual notice and right of exclusion) will be applicable in such circumstances.

45. See 7A C. Wright & A. Miller, Federal Practice and Procedure, §§ 1789, 1793.

understandable by the typical member of the class. Sometimes it should be printed in more than one language.[46] In recent years, as more attorneys and judges have gained experience in preparing class notices, disagreement regarding the form and content of notices has diminished; now the judge is often presented a notice on which the litigants have agreed.

In (b)(3) actions, the notice must advise class members of their right to exclude themselves from the case and the consequences if they fail to do so. Although only these items are mandated by Rule 23(c)(2), sufficient information about the case should be provided to enable class members to make an informed decision about their participation. Thus, the notice should describe as simply as possible the substance of the suit, which may include a brief statement regarding the positions of the parties. Class representatives and counsel should be identified, as should the opposing parties. While emphasizing that the court has not ruled on the merits of any claims or defenses, the notice should indicate the relief being sought as well as any special risks of class membership in addition to being bound by an unfavorable judgment. Finally, the procedures and deadlines for opting out should be described clearly and explicitly. A simple form for exercising this right of exclusion should be attached to the notice. See Sample Notice and Form, § 41.41.

The manner by which certification notices are distributed varies. When the names and addresses of most class members are known, notice by mail should generally be employed and, indeed, may be essential. Publication in a newspaper or journal may be used as a supplement; and, if class members are not easily identifiable after reasonable effort, notice by publication may be the principal means for informing them of their Rule 23 rights. When providing notice by publication, both publications with general circulation and with specialized circulation should be considered, giving attention to

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46. See, e.g., Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

the probable interests and characteristics of members of the class. Rarely will there be a class most of whose members may be expected to read the financial or legal sections of newspapers.

The proposed distribution of class notices may become a battleground between class and defense counsel. Citing due process concerns, defendants may claim that detailed, individual identification of all class members and proof of actual receipt by them are essential. Plaintiffs typically respond that reasonable efforts to identify and reach class members pass muster both under the Constitution and Rule 23 and that any additional notice should be the responsibility of the defendants. On a tactical level, these disputes stem from class counsel's desire to reduce litigation costs and defense counsel's hope that the magnitude and expense of the effort may end the case altogether.[47]

These disagreements can be intense, particularly in securities and consumer class actions. In securities cases, the stock of many class members may be held by brokers or financial institutions in their "street names," and, depending on the circumstances, merely to give notice to these nominees may not suffice as notice to the class members.[48] The class representatives will usually be able to make satisfactory financial arrangements with the nominees to forward the notices or at least provide a list of the names and addresses of the beneficial owners. If the nominees are not willing to enter such arrangements and are not parties to the litigation, consideration can be given to issuance of a subpoena duces tecum directing the nominees to produce the records from which the class representatives can compile a mailing list. Of course, if the litigation is

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47. Ordinarily the time and expense of identifying and notifying class members must be borne, at least initially, by the class representatives. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (noting, however, that in some circumstances the court might properly order the defendants to assist in identifying class members or even to give notice to the class).

48. Compare In re Franklin Nat'l Bank Sec. Litigation, 574 F.2d 662 (2d Cir. 1978), modified, 599 F.2d 1109 (1979), with In re National Student Mktg. Litigation v. Barnes Plaintiffs, 530 F.2d 1012 (D.C. Cir. 1976).

terminated favorably to the class, the representatives may be entitled to reimbursement for these expenses from the entire fund recovered for the class, from that part of the fund recovered on behalf of security holders whose stock was held in street names, or perhaps from the defendants.[49] The problems of notice may be even more critical with classes composed of individual purchasers of other goods or services, for sales records are often incomplete and addresses questionable, if indeed available.

Problems such as these require the exercise of good judgment and common sense. The individual notice mandated for (b)(3) actions must be given to class members "who can be identified through reasonable effort;" otherwise, Rule 23(c)(2) calls for "the best notice practicable under the circumstances." Receipt of actual notice by all class members is required neither by Rule 23 nor the Constitution;[50] instead, as indicated, notice should be mailed to the last known addresses of those who can be identified and publication used to notify others. What efforts to identify and notify are reasonable under the circumstances of the case rests initially in the sound discretion of the judge before whom the class action is pending, and is ultimately decided by the court in which a claim of res judicata is raised based on the earlier class action. Sometimes the inability to identify or notify many class members may justify denying or revoking (b)(3) certification, but the fact that notice to some class members must be given by publication is not necessarily fatal. In all cases the court should strike an appropriate balance between protecting class members and making Rule 23 workable.

Disputes sometimes arise when class counsel—hoping to reduce costs of notice or shift them to the defendant—propose distribution to identifiable class members by other than separate first-class mail. Frequently these suggestions involve including a notice

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49. See In re Penn Central Sec. Litigation, 560 F.2d 1138 (3d Cir. 1977).

50. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-19 (1950); Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975).

with a defendant company's mailings to shareholders or credit card holders, or in its employees' pay envelopes. Defendants usually object to such steps because of the administrative burden they pose and the supposed incongruity of a defendant publicizing a suit against itself. Before such steps are approved, class counsel should be required to show either a substantial cost difference[51] or another significant advantage provided by the alternative method over first-class mail. Certification notice need not always be given by first-class[52] mail or publication; creativity is often needed in devising an effective means of reaching class members.[53]

The parties seeking class certification must initially bear the cost of preparing and distributing the certification notice required by Rule 23(c)(2)[54] and the expense of identifying the class members.[55] The court should require class counsel to keep accurate, complete records of the steps taken in giving notice, providing documentation not only if costs are ultimately taxed against the defendants, but also if post-judgment attacks are made on the adequacy of notice.

Class representatives may also be required to pay the initial cost of preparing and distributing certification notices when ordered to be given in (b)(1) and (b)(2) actions. However, payment of such expenses by the class representatives is not required by Rule 23; and, particularly when such notices are given at the request of the defendants to obtain greater assurance that the judgment will be binding on members of the class, courts sometimes have required that these costs be borne by the defendants.

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51. Any increased administrative costs to the defendant caused by the alternative means of notice should be taken into account.

52. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 355 n.22 (1978), speaks favorably of the use of second-class mail.

53. See, e.g., Arizona Dairy Products Litigation, 75-2 Trade Cas. ¶ 60,555 (D. Ariz. 1975).

54. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (interpreting Rule 23).

55. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

Rule 23 gives no guidance on when, in relation to the certification decision, notice should be given to class members under (c)(2). Ordinarily, notice should be given promptly after certification. Sometimes, however—as when the parties are nearing accord on a settlement or developments indicate that it may be necessary to revise the certification—common sense dictates that the notice should be delayed temporarily. The court should not permit a delay in giving notice if problems may arise from the statute of limitations.[56]

30.212 Settlement Notice.

Rule 23(e) states that class actions "shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Distribution of settlement notices is subject to many of the same considerations outlined for certification notices. However, the cost of such notices is often imposed by the agreement upon the defendants and the parties are usually able to agree on a proposed form of notice.

The notice should announce the proposed settlement and state that, if approved, it will bind class members. The notice should disclose the essential terms of the proposed settlement,[57] any special benefits provided to the class representatives, information regarding attorneys' fees (§ 24.1), the time and place of the hearing to consider approval of the settlement, and the method for objecting to (or, if permitted, for opting out of) the settlement. It should describe the procedures for allocating and

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56. If the court certifies a class more narrow than that set forth in the complaint, the statute of limitations starts to run again with respect to those excluded from the class by the ruling. Delay in communicating the class definition to those excluded may be prejudicial.

57. The text of the proposed settlement may or may not be included in the notice, depending upon its length and clarity. If the agreement itself is not distributed, the notice must contain a clear, accurate description of the key terms and tell class members where they can examine or secure a copy, such as from the Clerk's office, from class counsel, or from a defendant's employment office.

distributing settlement funds,[58] and, if the settlement provides different kinds of relief for different categories of class members, those variations should be clearly described. The address and phone number of class counsel should be prominently displayed, as should any instructions regarding questions. See Sample Notice, § 41.42.

If a settlement is tentatively approved before notice of class certification has been given, certification and settlement notices should be combined, reducing the expense of notice and avoiding the confusion that separate notification of certification and settlement would produce.[59] See Sample Notice, § 41.43. If the class has been certified only conditionally for settlement purposes, that fact should be disclosed. Even though a settlement is proposed, the original claims, relief sought, and defenses should be outlined; only with such information can class members make an informed decision regarding their role in the litigation. Special care should be taken to describe clearly the options open to the class members and the deadlines for taking action.

Interpreting the terms "class action" and "dismissal" for purposes of Rule 23(e) is sometimes difficult. Courts tend to answer these questions based more on concepts of practicality and common sense than on logical consistency. For example, the courts have generally held that, prior to the time of a decision under Rule 23(c)(1) on whether to allow a case with class allegations to be maintained on behalf of the class, Rule 23(e) precludes any settlement, dismissal, or deletion of class claims without approval of the court.[60] On the other hand, courts have occasionally permitted parties to abandon class claims, without any notice to the class under Rule 23(e), upon finding

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58. If the details of a claims procedure have been determined, claims forms sometimes may be included with the settlement notice. Often, however, the details of allocation and distribution are not established until after the settlement is approved.

59. See, e.g., In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977).

60. The right of the parties to dismiss under Fed. R. Civ. P. 41(a)(1) is expressly made subject to the provisions of Rule 23(e). This provision does not, however, resolve whether Rule 23(e) applies prior to certification.

no collusion between the parties to gain any improper advantages for the plaintiff and no apparent prejudice to the rights of any putative class member.[61] Pre-certification amendments of the pleadings to delete certain parties or claims, made to refine the issues and not as a result of any settlement, apparently do not require notice to the putative class, nor do involuntary dismissals by court action over the active opposition of the class representatives. How to apply these principles to situations involving a proposed dismissal for want of prosecution or a failure to oppose summary judgment is a more difficult task, addressed to the sound discretion of the court.[62]

30.213 Other Court Notices.

The court may determine that notice should be given to the class at other times. Rule 23(d)(2) authorizes:

> "notice . . . of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action."

The court may, for example, require notice to certain class members to correct misinformation or misrepresentations, notice to "excluded" class members after a class is redefined or decertified, or notice to the class in the event of some significant change in class counsel or representatives, coupled with a suggestion that intervention by other members may be necessary if the class is to remain certified. The key consideration is whether notice is needed for the protection of the class or for the fair conduct of the litigation.

The type and contents of the notice and who should bear the cost depend on the circumstances that give rise to the need for notice—what prompted it, who should be notified, whose duties it discharges, and when it is given. Thus, the cost of a notice

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61. See, e.g., Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978).

62. See, e.g., Papilsky v. Berndt, 466 F.2d 251 (2d Cir.), cert. denied, 409 U.S. 1077 (1972); Certain-Teed Products Corp. v. Topping, 171 F.2d 241 (2d Cir. 1948); Partridge v. St. Louis Joint Stock Land Bank, 130 F.2d 281 (8th Cir. 1942).

to correct misstatements made by defense counsel should be borne by defendants. Named plaintiffs should usually be required to pay for a notice to announce a change in class representation. In some situations, costs should be divided.

30.22 Requests by Class Members for Advice.

From time to time, class members may ask the court questions about the case and its conduct. Ordinarily the court should decline politely to answer these inquiries, particularly if they relate to matters of trial strategy, the likelihood of success, the advisability of a proposed settlement, or how class members should exercise their options under Rule 23. After certification, questions by class members should usually be referred to class counsel. Questions posed prior to certification (or by someone who opted out of the litigation) may be more appropriately referred to a committee consisting of counsel for both sides.

The court may, however, appropriately respond to some inquiries. If a class member asks for additional forms or for information on how to opt out, oppose a settlement, or present a claim, a response by court personnel is not improper. Nevertheless, most courts prefer that even these matters be handled by counsel.

Repeated questions or complaints from the class—including assertions that counsel have refused to respond to their inquiries—may indicate that class counsel are not representing the class properly. If investigation appears warranted, the court should summon counsel, and perhaps the class representatives, for further information; if egregious conduct is discovered, replacement of counsel or decertification of the class may be necessary.

30.23 Gathering Information from Class.

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30.231 Opting Out.

In (b)(3) actions class members must be given the option to exclude themselves from the litigation, and they may be afforded this opportunity in other class actions.[63] The procedure for making the election should be simple, and the class members should be afforded a reasonable time to make their decision. Courts usually establish a period of 30 to 60 days following mailing of the notice for filing the election and include with the notice a form to be used. Typically the court directs that the notices be filed with the Clerk, although in large class actions the court may arrange for a special mailing address and designate a committee of counsel to be responsible for receiving and tabulating the responses.

In the exercise of equitable discretion, the court may treat as effective a tardy election to opt out. Relief from deadlines, however, should ordinarily be permitted only if the delinquency is not substantial or if there is good cause for the delay; the parties should be entitled to prepare for trial and to discuss settlement on the basis of the class as it exists after the time for exclusion has expired. However, a general extension of time for making the election may be appropriate if, due to problems with addresses, a second mailing or publication is needed.

A careful record should be made of those who opt out and when, both to comply with Fed. R. Civ. P. 23(c)(3) and for use in allocating and distributing funds obtained in the litigation for the class.

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63. See § 30.14.

30.232 Presentation of Claims.[64]

Class members are sometimes called upon to provide the court with information regarding their individual claims. If required as an adjunct to distribution or determination of individual relief, this is appropriate.[65] However, class members should not be asked for information unless it is actually needed in the litigation and cannot be obtained at less expense from other sources. The court should not permit the parties to make unnecessarily burdensome demands on class members in order to deter claims—either to reduce the liability of a defendant or to increase the shares of other class members in a settlement fund. See § 30.47.

30.233 Discovery from Class Members.

To determine whether the requirements of Rule 23(a) and (b) are satisfied, some discovery prior to the certification hearing may be needed not only from the named parties but also from putative class members. Discovery from class members may also be warranted—either before or after a decision on certification—with regard to the merits of the controversy, for the class members may be the sole or most convenient source of important evidence.

The party seeking discovery from the class should, however, be required to demonstrate the need for such discovery.[66] Moreover, as discussed in § 30.12, the court should place appropriate limits on the form and extent of the discovery from the class to assure that it serves its legitimate purpose and is not used as a device to harass either the class representatives or the class members.

Courts have generally agreed that the discovery procedures which may be directed

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64. Reference: MCL 1.46.

65. On the other hand, the court should not make submission of a proof of claim a condition to membership in the class, which would be equivalent to establishing an "opt in" procedure.

66. See Clark v. Universal Builders, Inc., 501 F.2d 324, 340-41 (7th Cir.), cert. denied, 419 U.S. 1070 (1974) (indicating that a greater showing of need is required for depositions than for interrogatories).

only to parties—that is, interrogatories, requests for production and examination, and requests for admission—may not be used to obtain information from putative class members prior to certification of a class. Whether these forms of discovery may be addressed to class members after certification and expiration of the period for opting out is less clear.[67] Most courts have concluded that class members may be subjected to all discovery methods after certification, but have restricted the number of class members to whom the requests may be directed and the extent of the information that may be sought. Even for this discovery, however, courts usually require a showing of need.

Potential problems with class discovery should be addressed early in the litigation. At the initial conference in a case brought with class allegations, and as a part of planning the schedule for a certification ruling, the judge should inquire whether any discovery from the class is contemplated, either on Rule 23 issues or on the merits of the case. If discovery is sought and justified, appropriate limits should be placed on its scope and form. Depositions upon written questions (permitting a limited number of questions, jointly developed) under Fed. R. Civ. P. 31 may be preferable to interrogatories under Rule 33 because the answers may be used not only against class members but also by them.

30.24 Other Communications.[68]

Improper communications with class members may cause serious problems. Early in the proceedings the judge should emphasize the need for accuracy when providing class members with information about the litigation and their role in it. Class representatives and their counsel should understand that misrepresentations or other misconduct in dealing with the class would impair the fairness and adequacy of

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67. See, e.g., Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); Clark v. Universal Builders, Inc., 501 F.2d 324, 340-41 (7th Cir.), cert. denied, 419 U.S. 1070 (1974); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972).

68. Reference: MCL 1.41.

representation under Fed. R. Civ. P. 23(a)(4).

However, the court should not enter any order[69] restricting communications between the litigants or their counsel and the potential or actual class members except when justified by actual or threatened misconduct of a serious nature.[70] Before entry of such an order, there must be "a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties;" and this weighing "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[71] Nevertheless, a limited restriction--such as precluding a defendant from soliciting class members to opt out of the litigation--will sometimes be justified.[72]

Whether or not limitations on future communications are warranted, the court may need to take appropriate remedial measures if improper communications occur. If class members have received communications containing misinformation or misrepresentations, a curative notice from the court—at the expense of those at fault—giving the correct information should be considered. Extensions of deadlines for opting out, intervening, or responding to a proposed settlement may also be needed. Other sanctions, including fines or the replacement of counsel or of class representatives, may be justified in an egregious situation.[73]

Apart from restraints designed to prevent or remedy communications that subvert the purposes of Rule 23, other considerations may affect communications with class members. Under accepted ethical principles, an attorney may ordinarily communicate

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69. Local rules or standing orders automatically prohibiting or limiting such communications are highly suspect and are not recommended.

70. Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981).

71. Id. at 101-02.

72. See Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985).

73. Id.

with a represented party only through that party's counsel; once a class is certified, all class members who do not exclude themselves from the litigation are generally regarded as clients of the class counsel for this purpose.[74] Communications to class members in the ordinary course of business, unrelated to the litigation, do not violate generally accepted ethical principles even after class certification. Moreover, by court order, defendants' counsel may be relieved from these constraints and be permitted to answer inquiries from class members about a proposed class settlement.

Prohibitions against communication between class members and opposing counsel may create special problems in some cases. For example, in employment discrimination class actions, which typically provide no opportunity for opting out, some of the key individuals upon whom the employer must rely both for evidence and for guiding its attorneys may be members of the class. The employer's attorneys will be seriously handicapped if they may not communicate with such persons except through the plaintiffs' attorney. In such circumstances, the court may consider certification under Rule 23(b)(3) (enabling class members to opt out), certification of a subclass, or entering an order under Rule 23(d) that permits individuals, although remaining as class members, to renounce representation by class counsel and thereby become directly accessible to the employer's attorney.

30.3 RELATIONSHIP OF CLASS ACTION TO OTHER CASES.[75]

Claims identical or similar to those made in class actions are often also made in other cases, either in the same or in other courts. Individual suits may be filed either before or after the certification decision by persons who do not wish to be members of the class, or who fear that a class may not be formed or may be dissolved. Other class actions may be filed, or even certified, with proposed classes that are

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74. Id. at 1207 n.28; Resnick v. American Dental Ass'n, 95 F.R.D. 372 (N.D. Ill. 1982); see also Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 n.21 (1981).

75. Reference: MCL 5.40.

discrete, overlapping, or even identical. These various possibilities are, under Fed. R. Civ. P. 23(b)(3)(B), to be considered in deciding whether to certify a (b)(3) action,[76] and may have a significant impact upon the planning process.

Class actions should be coordinated with related individual cases pending in the same court, including adversary proceedings in bankruptcy.[77] With (b)(3) classes, the court often should plan for the possibility that persons may opt out to file their own cases, and accordingly it may enter an order making existing discovery available and usable in the later cases. Those who opt out of a class in order to bring their own actions do not necessarily have a right to separate trials; indeed, consolidation for trial of class and individual actions frequently is appropriate, both to avoid the possibility of duplicative trials and to prevent inequitable one-way collateral estoppel.[78] The problem of coordination is obviously more complicated if the cases are not all in the same court, although much may usually be accomplished on an informal basis, using the techniques described in §§ 20.123 and 31.

Class members in (b)(1) and (b)(2) actions sometimes pursue their own separate actions while the class action progresses.[79] The maintenance of a certified class action does not automatically preclude the pursuit of such individual suits. The danger of inconsistent judgments is slight, for the first judgment will ordinarily be given preclusive

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76. Such actions may also be of significance in deciding on the scope of a (b)(2) class or whether to use subclasses. See Califano v. Yamasaki, 442 U.S. 682 (1979) (in forming a national class, care should be taken that nationwide relief would be appropriate and that such a class would not improperly interfere with similar litigation in other courts).

77. See, e.g., In re Flight Trans. Corp. Securities Litigation, 730 F.2d 1128 (8th Cir. 1984), cert. denied, 105 S. Ct. 1169 (1985).

78. The law is not settled as to whether an opt-out party may assert collateral estoppel based on a trial favorable to the class. Compare Sarasota Oil Co. v. Greyhound Leasing & Fin. Corp., 483 F.2d 450 (10th Cir. 1973), with In re Transocean Tender Offer Securities Litigation, 455 F. Supp. 999 (N.D. Ill. 1978).

79. This sometimes happens in (b)(3) actions, when a class member is too late in opting out.

effect in the case still pending.[80] If the cases are pending in the same court, the judge should ensure that the actions, if not consolidated, are handled in the most efficient order. Prejudgment attempts to enjoin state court actions on the grounds of interference with federal class actions have been held impermissible under 28 U.S.C. § 2283.[81]

30.4 SETTLEMENTS.[82]

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Since the late 1970's, class action settlements have received as much judicial consideration as any other class action issue.[83] This attention is understandable: most class actions do settle and, if not properly scrutinized, these settlements may be unfair. Insuring that a settlement satisfies Rule 23(e) can be a demanding task, in which all of the major participants in the litigation have important responsibilities. The comments

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80. A judgment in the class action adverse to the class will, however, bar only "class claims" or individual claims actually addressed and resolved in the class action. See Cooper v. Federal Res. Bank of Richmond, 464 U.S. 808 (1984).

81. See, e.g., In re Glenn W. Turner Enter. Litigation, 521 F.2d 775 (3d Cir. 1975); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982), cert. denied, 459 U.S. 988 (1982); cf. In re Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982) (approving injunction when, after judgments approving partial settlements, state proceedings would be barred by res judicata); In re Baldwin-United Corp., ___ F.2d ___ (2d Cir. 1985) (upholding power of court to enjoin states from instituting new representative actions that would frustrate potential settlement of class actions).

82. Reference: MCL 1.21, 1.46.

83. See, e.g., In re Chicken Antitrust Litigation American Poultry, 669 F.2d 228 (5th Cir. 1982); Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982); In re Fine Paper Antitrust Litigation, 632 F.2d 1081 (3d Cir. 1980); In re Equity Funding Corp., 603 F.2d 1353 (9th Cir. 1979); In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), cert. denied, 444 U.S. 870 (1979).

contained this section should be read in conjunction with the discussion in § 23 regarding settlements of complex litigation in general.

30.41 Role of the Court.[84]

Rule 23(e) states that a "class action shall not be dismissed or compromised without the approval of the court."[85] Rule 23.1 contains a similar restriction for stockholder derivative actions. Court review must not be perfunctory; it is not a ministerial function. As a practical matter, the dynamics of class action settlement may lead the negotiating parties—even those with the best of intentions—to regard the interests of class members too lightly. Under Rule 23(e), the court must assure that any eagerness by the litigants and attorneys to conclude the case without the rigor and cost of trial does not disadvantage class members.

The fairness of settlements cannot be measured by any simple mathematical yardstick. Certain questions may, however, be asked about any proposed settlement. For example, are the named plaintiffs the only class members who will receive monetary relief? Is the relief proposed for class representatives significantly greater than that proposed for other class members?[86] Is the total relief far less than that sought in the complaint or indicated by the preliminary discovery? Have major causes of action or types of relief sought in the complaint been omitted in the settlement? Are particular segments of the class treated differently from others? Has the settlement been reached after little or no discovery? Do the parties appear to have negotiated simultaneously on attorneys' fees and class relief?[87] Do most class members dissent from the settlement,

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84. Reference: MCL 1.21, 1.46.

85. It also requires that notice of a proposed dismissal or compromise be given to class members. See § 30.212.

86. Not all differentials are improper. Modest compensation may sometimes be merited for extra time spent by the class representatives in meeting with class members, gathering discovery materials on behalf of the class, and similar efforts.

87. See, e.g., Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985).

or do some raise apparently cogent objections? If the answer to any of these questions is "yes," a detailed explanation should be required from the parties. The settlement may nevertheless be proper, but affirmative responses raise some concern that the case may have been settled with too little regard by the representatives for the interests of the class as a whole.

The court's role in settlement has its limits. The court may only approve or disapprove a settlement; it is not empowered to rewrite the agreement between the parties.[88] The judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation, and a presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.[89] This standard is a useful guide; if the conditions for the presumption are met and the settlement is a sensible one that seems fair to class members, the settlement should usually be approved.

30.42 Role of Counsel.[90]

Counsel for the parties are the main source of information concerning the settlement. They must fully disclose to the court all agreements and understandings and be prepared to explain how the settlement was reached and why it is fair and reasonable. They must also disclose any facet of the settlement that may adversely affect any member of the class or does not treat all members of the class in the same manner.

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88. A court's explanation of its reasons for disapproval often leads to revisions that satisfy the judge's objections. See § 23.14. If the court makes suggestions at the time the settlement agreement is submitted for tentative approval, the parties may be willing to make changes prior to the time the agreements are submitted to the class members for their consideration. If substantial changes that adversely affect some members of the class are made at the time of the settlement hearing, a new hearing and additional notice may be necessary.

89. See, e.g., Wellman v. Dickinson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980), aff'd, 647 F.2d 163 (2d Cir. 1981); Galdi Sec. Corp. v. Propp, 87 F.R.D. 6 (S.D.N.Y. 1979).

90. Reference: MCL 1.46.

If the judge has been actively involved in the case, the request for preliminary approval may involve merely the presentation to the court of the settlement documents, accompanied by a draft order that sets a hearing date and prescribes the notice to be given to class members and the procedure for presenting objections. In most cases, however, counsel should also file a brief covering such matters as the status of discovery, the identity of those involved in the settlement discussions, and an explanation why the settlement is believed to be in the best interests of the class. Any benefits to be received only by the class representatives should also be disclosed and explained. Counsel should advise the court with respect to attorneys' fees for class counsel—the proposed procedure for determining these fees, as well as the terms of any understandings (formal or informal) with respect to fees and reimbursement.

At the hearing to consider final approval of the proposed settlement, counsel for the settling parties typically are called upon to make an appropriate showing on the record why the settlement should be approved. How detailed these explanations should be depends on the circumstances of the case, particularly the extent of disaffection in the class with respect to the settlement.

The justification given by counsel for the proposed settlement, although important, has practical limits. Attorneys who have been engaged in strenuous advocacy cannot be expected instantaneously to lay bare the strengths and weaknesses of their respective cases. Moreover, the settlement may be based in part on matters which, if disclosed, might be damaging if the settlement is disapproved or if claims remain against non-settling parties. To press counsel too hard for detailed explanations of their settlement calculus may, therefore, be unwise. The court's evaluation of the settlement should take into account the presentations of counsel, but may also be based on other sources—including comments from class representatives and class members, the judge's own knowledge of the case obtained during pretrial proceedings, and information provided by persons who in unusual cases may be appointed by the court as special masters under Fed. R. Civ. P. 53 or as experts under Fed. R. Evid. 706 to assess the settlement.

A detailed explanation of the settlement will be needed if a class settlement is proposed before certification[91] or substantial discovery.[92] The court will likely know little about the case and, indeed, class counsel may have a limited factual basis for assessing its merits. In some cases, the court may require further discovery to justify the settlement; however, such activities will likely increase attorney's fees for the class members,[93] may result in fees and expenses to the opposing party the avoidance of which was a major inducement for settlement, and may produce evidence whose trustworthiness is suspect. Accordingly, any post-settlement discovery should be monitored carefully by the court and limited to what is truly needed.

Class counsel should make themselves available to answer questions from class members in the interval between notice of the settlement and the settlement hearing. The notice often advises that questions be directed to class counsel and gives their address and telephone number. In cases in which most of the class members reside in the same locale—for example, many employment discrimination cases—a meeting may be scheduled at which the class attorneys and class representatives meet with the members of the class and personally explain the terms and consequences of the proposed settlement.

30.43 Role of Class Representatives.[94]

The class representatives should be consulted by class counsel during negotiations; their views may be important in shaping the agreement. In most cases they approve the proposed settlement and sometimes they are called as witnesses at the fairness

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91. See § 30.45 for a discussion of the use of settlement classes.

92. Informal discovery, not apparent from the court file, may have taken place. If so, such discovery should be described.

93. In class settlements in which attorneys' fees will be awarded from a settlement fund, the court should ascertain when the settlement was, for all practical purposes, reached. Some discovery may have been undertaken after that time, not in an effort to assess the fairness of the settlement, but rather in order to generate additional attorneys' fees.

94. Reference: MCL 1.46.

hearing.

Problems arise when some or all class representatives oppose a proposed settlement. Of course, the disagreement of a class representative may convince class counsel not to settle or even present the matter to the court.[95] However—unlike a party in an individual lawsuit—a class representative cannot veto a settlement that is found by the court to be in the best interests of the class as a whole.[96] Exercising its equitable powers, the court should not permit representatives, in violation of their fiduciary responsibilities, to become overly concerned with their individual interests and unfairly impede a desirable settlement on behalf of the class. Therefore, while the objections of class representatives must be considered by the court, they do not preclude a settlement that resolves not only the claims of the class but also the representatives' own claims.

The views of the class representatives are, however, often entitled to special weight because they have a better understanding of the case than most members of the class. Moreover, their objections to a settlement may be symptomatic of strained attorney-client relations that may have affected settlement negotiations. Accordingly, opposition by class representatives to a proposed settlement merits special attention by the court, and the notice of the settlement hearing should usually indicate any terms about which class counsel and class representatives differ.

Class representatives sometimes favor acceptance of a settlement offer that class counsel believe is inadequate. In such circumstances, class counsel should ordinarily ask the court to determine whether preliminary approval should be given and a fairness hearing scheduled. Although the court should rarely approve a settlement that counsel do not recommend, class counsel—like class representatives—have no veto powers over

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95. For a brief discussion of the ethical problems when class counsel or class representatives do not favor a bona fide offer of settlement, see § 23.24.

96. See, e.g., Laskey v. International Union (UAW), 638 F.2d 954 (6th Cir. 1981); Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981).

settlements of class actions.

30.44 Procedures for Review and Approval.[97]

A two-step process is followed when considering class settlements. First, the court makes a preliminary evaluation of the fairness of the settlement. In some cases this initial assessment may be made on the basis of matters already known by the court, supplemented by information about the settlement presented through briefs, motions, or informal presentation from the settling parties. In other cases a hearing may be needed to inform the judge about the circumstances surrounding the negotiations and to permit presentation not only from the attorneys who participated in the negotiations but also from any who were excluded from the discussions.[98] At the hearing the court may express any reservations regarding the settlement, and the parties may decide on the basis of these comments to revise their agreement.

If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement. See § 30.212.

Fairness hearings vary considerably. Sometimes no objection to the settlement will have been filed, and no one wishes to be heard in opposition;[99] although the burden

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97. Reference: MCL 1.46, 1.47, 3.40.

98. The judge may also, at this preliminary stage or at the formal hearing, hear the views of the parties' experts or seek the advice of a court-appointed expert or special master.

99. Although the order scheduling the fairness hearing and the notice to the class typically require that any objections be filed with the Clerk by a specified date in advance of the hearing, courts customarily permit others in attendance at the hearing to express, at least briefly, any opposition to the settlement. Many judges have also permitted non-settling parties who lack formal standing to be heard as friends of the court.

is on the proponents to show that the settlement should be approved, their presentation may be very brief. In other cases, attention will be directed primarily to concerns raised by objectors. Occasionally, fairness hearings become protracted and emotionally charged, requiring firm control by the court.

The opportunity should be provided at the hearing for all distinct, substantial objections to the settlement to be presented to the court. The same objection need not be heard more than once, although the court may wish to ascertain how many of those in attendance agree or disagree with some proposition. If the subsequent goodwill of class members will be critical to the successful implementation of the proposed settlement, an extended fairness hearing, enabling individuals to express their frustrations and concerns, may be needed for reasons other than to enable the court to assess the fairness of the settlement.

In determining whether a class settlement should be approved, the court must decide whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued.[100] The settlement must be fair, reasonable, and adequate under the circumstances. In cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement. The defendant's inability to pay a greater amount may be an important factor, as may the need of the plaintiffs for immediate relief.

30.45 Settlement Classes.[101]

Sometimes the parties propose a settlement for a class before a class has been certified. The defendant may be willing to settle the case as a class action on specified terms but wants to preserve its right to contest the propriety or scope of the class

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100. See, e.g., Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975).

101. Reference: MCL 1.40, 1.46.

allegations if the settlement is not finally approved by the court or if it elects to withdraw from the settlement of a (b)(3) action because too many members opt out. The money that might otherwise be spent contesting Rule 23 certification may, at least in theory, be made available to provide additional benefits to the class. Early settlement should reduce the fees awarded to class counsel from the settlement fund. Moreover, although "common questions" may predominate and justify a class if the case is settled, the standards of Rule 23(b)(3) may not be met if the case must be tried.

For these reasons courts have permitted, though with great caution, the use of "settlement classes."[102] In such situations, the fairness of the settlement may be very difficult to assess. No one may know how many members are in the class, how large their potential claims are, what the strengths and weaknesses of the parties' positions are, or how much the class members will benefit under the settlement. Lacking this information, the court should be wary of presenting the settlement to the class. Ordinarily, a class action determination should be made not only before a settlement is reached, but indeed before settlement discussions are commenced.

Three additional caveats should be noted:

- **Opposition.** Settlement classes should be considered only in connection with settlements that are likely to have little opposition from class members.
- **Partial Settlements.** Settlement classes present special problems when used with partial settlements. Members of the settlement class will almost certainly find it difficult to understand their position in the litigation. Moreover, since they will not know whether they will be members of a class with respect to claims against non-settling defendants, they may be unable to make an informed decision regarding the adequacy of the settlement.
- **Conditional Settlements.** The court should be reluctant to give preliminary approval to a proposed pre-certification settlement that provides the settling parties a right to withdraw from the settlement if a specified

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102. See e.g., Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), cert. denied, 452 U.S. 905 (1981); cf. Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982); In re Franklin Nat'l Bank Sec. Litigation, 574 F.2d 662 (2d Cir. 1978), modified, 599 F.2d 1109 (1979). For an analysis of the factors affecting formation of a settlement class, see In re Baldwin-United Corp., 105 F.R.D. 475 (S.D.N.Y. 1984).

number of persons opt out of the class or of the settlement. If such protection must be afforded the defendant and in other respects the settlement is believed desirable, a provision under which the benefits paid to the class will be appropriately reduced in proportion to the number of opt-outs (or size of their claims) may be preferable.

Occasionally the parties propose a settlement covering a class different from that certified. Typically, the parties propose to enlarge the class—or the claims of the class—to give the settling defendants greater protection against further litigation, although sometimes they may seek to reduce the size of the class. The problem presented by these requests is not the lack of sufficient information and scrutiny, but rather the possibility that fiduciary responsibilities of class counsel or class representatives may have been compromised. The parties should be required to explain in detail what new facts, changed circumstances, or earlier errors support the conclusion that the original definition should be altered. If a (b)(3) class is enlarged, notice must be given to the new members of their right to opt out; if a class is to be reduced, notice should ordinarily be given under Rule 23(d) to those being excluded because the statute of limitations will begin to run again on their claims.

30.46 Partial Settlements.[103]

Settlements involving less than all parties present special considerations in class actions, particularly if each defendant may be liable to the class as a whole and not simply to certain members of the class.

The fairness of partial settlements may be particularly difficult to assess. Because the litigation may continue against others, the parties are likely to be reluctant to disclose fully and candidly their assessment of strengths and weaknesses that led to the settlement. Moreover, the adequacy of the settlement depends in part upon the relative exposure of other parties: an apparently generous settlement offer from a single defendant may be questionable if there are no realistic claims against non-settling defendants and, conversely, a partial settlement providing little relief may be entirely

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103. Reference: MCL 1.46.

satisfactory if the settling defendant has strong defenses or is impecunious. This assessment may be almost impossible to make if discovery is incomplete or has been conducted against only a few of the defendants, and subsequent discovery may reveal in retrospect that the settlement was not in the best interests of the class.

Despite these problems, partial settlements often play a vital role in resolving class actions, and the court should be prepared to deal with them. If several such settlements are being negotiated, the court should ordinarily defer consideration until all are submitted—saving the time and expense of successive notices and hearings and enhancing the ability of the court and class members to assess the adequacy of each one. Expert testimony may be offered to demonstrate the economic justification of the various settlements.[104] Funds received from the settlements typically are placed in income-producing trusts established by the class counsel for the benefit of the class, and held until the case is fully resolved by further settlements or trial. The court should consider establishing a deadline for partial settlements, sufficiently in advance of the trial date that fairness hearings may be completed while enough time remains for the parties to prepare for trial whether the settlements are approved or disapproved. See § 23.21.

The court should be reluctant to approve partial settlements containing provisions that might interfere with further proceedings, such as clauses attempting to limit further discovery and "most favored nation" clauses. See §§ 23.22, 23.23. Although the court may give some deference to provisions in an agreement purporting to allocate a settlement fund to particular theories, claims, or time periods, it should reserve the power to make alterations when warranted by further developments in the case. See § 23.21.

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104. See In re Corrugated Container Antitrust Litigation, 643 F.2d 195, on second appeal, 659 F.2d 1322 (5th Cir. 1981).

30.47 Administration.[105]

Class settlements are rarely self-executing; various problems may arise in their administration, many of which involve more than clerical or ministerial functions. Sometimes a settlement fund is to be divided equally among all class members who meet specified criteria (for example, employees who sought promotion during a specified period) or allocated in proportion to some measure for damage or injury (for example, the price paid for particular securities). In such cases, the class members are potentially in a competitive, adversarial role because the benefits of each will vary in inverse proportion to the benefits awarded to others. In other cases, the settlement may provide for a specified payment—either a flat sum or an amount determined under a formula—to be made to each class member meeting some prescribed standard; in this situation, the class members remain in potential conflict with the settling defendants, whose liability is reduced if class members are found to be disqualified or if their claims are reduced.

Class members are usually called upon to file claim forms providing details about their claims and other information needed to administer the settlement. See Sample Order and Notice, § 41.44. Verification under oath or affirmation pursuant to 28 U.S.C. § 1746 may be required, and in some cases it may be appropriate to require substantiation of the claims—for example, through invoices, confirmations, or brokers records. Completion and documentation of the claim forms should be no more burdensome than is actually needed to implement the settlement; requiring additional information from class members is tantamount to an impermissible opt-in procedure.[106] Nor, for purposes of administering a settlement, should the court necessarily require the same type of evidence and specificity that might be needed to establish damages at a trial; secondary

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105. Reference: MCL 3.20.

106. In some cases class members need not be required to do anything as a condition to distribution. For example, the defendants' records may provide a satisfactory, inexpensive, and accurate method for determining the division of a settlement fund.

forms of proof should ordinarily be permitted, and estimates derived from other sources should in some cases be acceptable. Additional mailings, telephone calls, and investigative searches may—depending on the size of expected distributions—be warranted if notices to class members are returned or if class members fail to submit claim forms.

A procedure should be established for recording receipt of the claims and tabulating their contents. These arrangements are usually made by class counsel and approved by the court. If the class is very large, claims are customarily sent to a separate mailing address and the essential information is recorded on computers. Form letters may be prepared to answer common types of inquiries from class members and to deal with recurring errors in completing the claim forms. These activities should be memorialized to minimize subsequent disputes.

The audit and review procedures that are needed will depend upon the nature of the case. Claims of modest amounts are frequently accepted solely on the basis of the verified claim forms. Medium-sized claims—or some of them selected by statistical sampling—may be subjected to telephone audit inquiries or cross-checks against other records. Large claims may warrant a field audit.

A Claims Committee or special master may be appointed to review all claims or to review those that are late, deficient in documentation, or questionable for other reasons. This review may be made merely by considering the materials submitted or may involve a hearing at which the claimant and other interested parties may present additional matters bearing on the claim. Provision should be made for judicial review of the findings of the Committee or Master unless the terms of the settlement provide that these findings are final under Fed. R. Civ. P. 53(e)(4). Periodic reports should be made to the court indicating the interest earned, distributions made, allowance and disallowance of claims, and other matters involving the status of administration.

The settlement should make some provision for disposition of unclaimed or

undistributable funds.[107] Whether such funds should be returned to the settling defendant, escheat to the government, be paid to other class members, or be distributed in a manner to be decided on equitable principles by the court[108] will depend on the nature of the case; the question, however, should be addressed in the settlement agreement and considered by the court at the settlement hearing.

The equitable powers of the court may be invoked to deal with a number of other problems that frequently arise during administration of settlement but may not be covered by the terms of the agreement: the impact of divorce, death, and dissolution on ownership of claims; investment of settlement funds;[109] interim distributions and partial payments of fees and expenses; and procedures for handling lost or returned checks.[110] The court and counsel should be alert to the possibility of persons soliciting class members after the settlement, offering to provide "collection services" for a percentage of the claims; such activities may fraudulently deprive class members of benefits provided by the settlement and impinge on the court's responsibility to control fees in class actions.

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107. An adequate time should be allowed for late claims before any refund or other disposition of settlement funds occurs. A reserve for late claims may also be established.

108. Although its use to determine damages in a fully-tried class action is problematic, "fluid recovery" is permissible when authorized in a settlement. See, e.g., Beecher v. Able, 575 F.2d 1010 (2d Cir. 1978); cf. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), cert. denied, 444 U.S. 870 (1979).

109. Security of settlement funds is critical. The court should permit these funds to be held only in the most secure investments.

110. Although checks should ordinarily be stamped with a legend requiring deposit or negotiation within 90 days, counsel should be authorized to grant additional time.

31. MULTIPLE LITIGATION.

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31.11 Cases in Same Court.[1]

All related civil cases pending in the same court, whether or not filed in different divisions, ordinarily should be assigned at least initially to one judge to determine whether coordinated pretrial proceedings will be advisable to reduce conflicts and duplication.[2] Formal consolidation, if appropriate, may be ordered under Fed. R. Civ. P. 42(a), which provides that "when actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may

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1. Reference: MCL 0.30, 5.00-5.21.

2. Adversary proceedings in bankruptcy, including issues as to the dischargeability of certain debts, should sometimes also be reassigned to the district judge handling related litigation. See, e.g., In re Flight Trans. Corp. Securities Litigation, 730 F.2d 1128 (8th Cir. 1984), cert. denied, 105 S. Ct. 1169 (1985).

make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." As stated by the Second Circuit,

> "We see no reason nor has any been suggested by counsel why the considerations permitting consolidation for trial are not equally apposite in connection with consolidation in the period before trial. Indeed, an orderly and expeditious disposition at trial is dependent in large part on the manner in which the pre-trial proceedings are conducted. If one of the purposes of consolidation for trial be to expedite the proceedings and avoid needless time and expense to the litigants and to the court, such objectives are as desirable and as attainable in the period utilized in preparing for the trial."[3]

The desirability of coordinated or consolidated pretrial proceedings ordinarily should be discussed at the initial conference. See § 21.24. That the cases were filed in more than one division of the court does not prevent their coordination or consolidation for pretrial purposes,[4] and frequently it will be appropriate to transfer all cases to a single division under the discretion granted by 28 U.S.C. § 1404(b).

A master file for the litigation may be established in the Clerk's office, eliminating the need for multiple filings of the same pleadings, motions, notices, orders, and discovery materials. Only documents having special application to particular cases need be filed separately in the individual case files.

31.12 Multidistrict Transfers under § 1407.[5]

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Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation is authorized to transfer multidistrict civil actions involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings upon its determination

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3. MacAlister v. Guterma, 263 F.2d 65, 68 (2d Cir. 1958).

4. Consolidation of related cases for a joint trial under Rule 42(a) on one or more common issues is discussed in § 21.631.

5. References: MCL 5.22, 5.23, 5.30.

that transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." The Panel's authority is not encumbered by venue restrictions;[6] however, it extends only to civil actions[7] and only to transfers for pretrial.[8] Counsel who seek or oppose transfers before the Panel should familiarize themselves with § 1407,[9] with the Panel's Rules of Procedure,[10] and with the Panel's decisions in similar cases.[11]

31.121 Requests for Transfer.

Proceedings for transfer of actions by the Panel may be initiated by one of the parties or by the Panel itself, although the latter procedure is ordinarily used only for "tag-along" cases.[12] The Panel evaluates each group of cases proposed for multidistrict treatment on its own facts in the light of the statutory criteria, mindful that the objective is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation costs, and save time and effort on the part of the parties, the attorneys,

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6. In re New York City Mun. Sec. Litigation, 572 F.2d 49 (2d Cir. 1978).

7. Antitrust actions brought by the United States are exempt from the Panel's power, 28 U.S.C. § 1407(g), as are injunctive actions instituted by the Securities and Exchange Commission unless the SEC consents to consolidation, 15 U.S.C. § 78u(g).

8. Although transfer by the Panel under § 1407 is ordinarily only for pretrial purposes, the transferee court may find it appropriate to transfer cases for trial under 28 U.S.C. § 1404 or § 1406. Parens patriae antitrust actions brought by states under 15 U.S.C. § 15c may be transferred by the Panel for both pretrial and trial. 28 U.S.C. § 1407(h).

9. For a discussion of Panel practices, see Cahn, A Look at the Judicial Panel on Multidistrict Litigation, 72 F.R.D. 211 (1976).

10. The Panel's Rules are found in U.S.C.A. following § 1407 and in U.S.C.S. following the Rules of Civil Procedure.

11. Opinions of the Panel are reported in Federal Supplement.

12. The Panel's power to act without need for a motion is also utilized to avoid problems in situations in which the movant is not a party in one or more of the cases that should be transferred for coordinated or consolidated proceedings. See, e.g., In re Equity Funding Corp. Sec. Litigation, 375 F.Supp. 1378, 1380 n.4 (J.P.M.D.L. 1974).

the witnesses and the judiciary.[13] As few as two cases may warrant multidistrict treatment under § 1407,[14] although when there are only a few actions, particularly if the same parties and counsel are involved, those advocating transfer have a heavy burden of persuasion.[15]

The timing of a motion to transfer may be important. In some cases—for example, large aircraft disasters—the need for multidistrict treatment under § 1407 may be apparent at the outset and counsel should initiate proceedings before the Panel shortly after the second case is filed. Sometimes, however, the justification for transfer may not arise until later in the proceedings, either because additional cases have been filed unexpectedly or because efforts to obtain voluntary cooperation have proved ineffective in reducing conflicts and duplication. Counsel should file their motion to transfer as soon as the need under § 1407 can be demonstrated; the Panel is reluctant to transfer a case after significant proceedings have occurred or if the motion appears to be motivated by a desire for delay or to change judges.

Once a transfer under § 1407 becomes effective—when the order granting the transfer is filed in the office of the clerk of the transferee court—the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction.[16] However, during the pendency of a motion (or show cause order) for transfer, the court in which the action was filed continues to have all judicial powers over the case.[17]

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13. See In re Plumbing Fixture Cases, 298 F. Supp. 484 (J.P.M.D.L. 1968).

14. See, e.g., In re Clark Oil and Ref. Corp. Antitrust Litigation, 364 F. Supp. 458 (J.P.M.D.L. 1973).

15. See, e.g., In re Scotch Whiskey, 299 F. Supp. 543 (J.P.M.D.L. 1969).

16. In re Plumbing Fixture Cases, 298 F. Supp. 484 (J.P.M.D.L. 1968). Unless altered by the transferee court, orders entered by the transferor court remain in effect.

17. Rule 16, J.P.M.D.L. Rules of Procedure; In re Four Seasons Sec. Laws Litigation, 362 F. Supp. 574 (J.P.M.D.L. 1973).

Unfortunately, some courts, upon being notified of the filing of a motion for transfer,[18] have stayed discovery, postponed rulings on pending motions, and generally suspended further proceedings in the case. Rarely are such generalized delays advisable. Although deferral of some activities in the case may be appropriate until the Panel has the opportunity to rule on transfer,[19] often other matters—for example, motions to dismiss and motions to remand raising issues unique to the case—should ordinarily be addressed before the Panel considers the motion to transfer.[20] The court should also revise any deadlines that, if not altered, would present to the Panel a misleading picture of the readiness of the case for trial.[21]

No single factor determines which district is selected as the one to which the actions will be transferred.[22] After deciding upon the proper transferee district, the Panel designates a judge or judges[23] to whom the cases are assigned for pretrial proceedings. The litigation is usually assigned to a judge in the transferee court, but occasionally the Panel has selected a judge designated to sit specially in the transferee district on an intra-circuit or inter-circuit assignment.

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18. A copy of the motion is to be filed with the court where the action is pending. See Rule 4(d), Rules of Procedure of J.P.M.D.L.

19. For example, while a conditional transfer order from the Panel is pending with respect to a newly-filed "tag-along action," there would be little reason to enter a scheduling order under Fed. R. Civ. P. 16(b) or a discovery order under Rule 26(f).

20. Sometimes the Panel has concluded that it should delay its ruling on transfer until critical motions have been decided by the court in which the case is pending.

21. Cases sometimes are described to the Panel as being ready for trial on the basis of dates for cut-off of discovery or for trial that are no longer realistic.

22. See Cahn, A Look at the Judicial Panel on Multidistrict Litigation, 72 F.R.D. 211, 214-15 (1976).

23. On rare occasions the Panel has assigned the litigation to two judges.

31.122 During Period of Transfer.

After the transfer, the transferee judge[24] has all the usual judicial powers in the transferee district[25] and, in addition, "the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings."[26] 28 U.S.C. § 1407(b). This supervisory power over depositions in other districts may be exercised by telephone.[27] The transferee judge may vacate, modify, or expand any order of a transferor court, including protective orders;[28] however, until altered, orders of the transferor court remain in effect.[29]

The transferee judge has the power to terminate actions by rulings on motions under Fed. R. Civ. P. 12, 41, and 56, and by entering dismissals or judgments pursuant to settlements. Likewise, the transferee judge may transfer a case for trial to any district, including the § 1407 transferee district, in which the venue and other criteria of 28 U.S.C. § 1404 or § 1406 are met.[30] In such situations the actions will be closed

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24. The Panel has no authority to direct transferee judges in the exercise of their powers and discretion in supervising multidistrict proceedings. In re Plumbing Fixture Cases, 298 F. Supp. 484, 489 (J.P.M.D.L. 1968).

25. The transferee judge is bound, however, by the laws that would apply in the transferor court, even if the case is later transferred to the transferee court under 28 U.S.C. § 1404. See § 33.23, n.36.

26. Under the statute, these powers also may be exercised by members of the Panel and by other district and circuit judges designated by the Panel.

27. See In re Corrugated Container Antitrust Litigation, 662 F.2d 875 (D.C. Cir. 1981); In re Corrugated Container Antitrust Litigation, 644 F.2d 70 (2d Cir. 1981); In re Corrugated Container Anti-trust Litigation, 620 F.2d 1086 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981).

28. See, e.g., In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation, 664 F.2d 114 (6th Cir. 1981).

29. See In Re Master Key Antitrust Litigation, 320 F. Supp. 1404 (J.P.M.D.L. 1971).

30. Even if all cases cannot be transferred to a single district for trial, transfer to a limited number of districts may be useful in facilitating coordination of further proceedings.

by appropriate orders entered in the transferee court, without further involvement by the Panel or the original transferor court.[31]

The transferee court's management plan for the litigation should include provisions for handling "tag-along actions"--cases transferred by the Panel after the initial transfers. Ordinarily it is advisable to provide that (1) tag-along actions shall be automatically made part of the centralized proceedings upon transfer to the transferee court; (2) rulings already made on common issues—for example, on the statute of limitations—shall be "deemed" to have been made in the tag-along action without the need for separate motions and orders; and (3) discovery already taken shall be available and usable in the tag-along cases.[32] Consideration should also be given to videotaping key depositions or testimony given in bellwether trials for more effective use at subsequent trials in the transferor courts after remand.

31.123 Remand.

Actions not terminated in, filed in, or transferred under § 1404 or § 1406 to the transferee court or another court are to be remanded under § 1407 by the Panel after appropriate pretrial proceedings to the respective transferor courts for further proceedings and trial. When this should be done will depend on the circumstances of the litigation. In some cases, remands have been ordered relatively early, while substantial discovery remained to be done; in others, virtually all discovery has been completed and the cases are ready for trial at the time they are remanded to the transferor districts. Some of the constituent cases may be remanded, while others are retained for further centralized pretrial proceedings.

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31. Whether under § 1404 a case may be transferred only for the determination of certain issues and whether a retransfer or second transfer may be ordered is not clear. Compare In re Air Crash Disaster Near Hanover, N.H., 342 F. Supp. 907 (D.N.H. 1971), and Starnes v. McGuire, 512 F.2d 918 (D.C. Cir. 1974) with Technitrol, Inc. v. McManus, 405 F.2d 84 (8th Cir. 1968), cert. denied, 394 U.S. 997 (1969).

32. For a discussion of the use of supplemental depositions, see § 21.453. Also see Sample Order at § 41.38-¶13.

The Panel looks to the transferee court to suggest when remand should be ordered, although under its rules it may also consider remand on its own initiative or on the motion of a party.[33] Rule 11(c), J.P.M.D.L. Rules of Procedure. Although authorized to "separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded," 28 U.S.C. § 1407(a), the Panel has rejected most requests to exclude portions of a case from transfer under § 1407,[34] believing that such matters may be given individualized treatment by the transferee court if warranted, and has concluded that it has no power to transfer (or sever-and-remand) particular "issues", as distinguished from particular "claims."[35]

After remand, the transferor court has exclusive jurisdiction and additional proceedings in the transferee court with respect to a remanded case are not authorized absent a new transfer by the Panel.[36] Further pretrial proceedings, as needed, are conducted in the transferor court, using the principles and techniques of effective management discussed in Part II of MCL 2d, §§ 20-25, as appropriate.[37] Rulings made by the transferee court can be altered by the transferor court to the extent advisable, subject only to the same considerations regarding the "law of the case" that would

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33. Great deference is given to the views of the transferee judge. See, e.g., In re IBM Peripheral EDP Devices Antitrust Litigation, 407 F. Supp. 254, 256 (J.P.M.D.L. 1976). Efforts by parties to use the Panel as a substitute for appellate review, by seeking premature remand, have been uniformly rejected by the Panel.

34. But see In re Hotel Tel. Charge Antitrust Litigation, 341 F. Supp. 771 (J.P.M.D.L. 1972); cf. In re Midwest Milk Monopolization Litigation, 388 F. Supp. 1401 (J.P.M.D.L. 1975).

35. In re Plumbing Fixture Cases, 298 F. Supp. 484, 489-90 (J.P.M.D.L. 1968).

36. See, e.g., In re The Upjohn Company Antibiotic Cleocin Products Liability Litigation, 508 F. Supp. 1020 (E.D. Mich. 1981). In unusual circumstances, the Panel has by a new order again transferred a remanded case to the transferee district or transferred it to a new district as part of another multidistrict proceeding.

37. For example, all cases remanded to the same court for additional proceedings and trial should be assigned at least initially to one judge for further coordination or consolidation in the transferor court.

apply had those rulings been made in the transferor court; however, the transferor judge should be reluctant to overturn rulings made in the transferee court if the result would frustrate the purposes served by centralized pretrial proceedings.

A complete pretrial record is sent to the transferor court upon remand of the case. One of the final actions of the transferee court should be entry of a pretrial order that concisely chronicles the proceedings, summarizes the primary rulings that will affect further activities, outlines the issues remaining for discovery and trial, and indicates the nature and expected duration of further pretrial proceedings. This order will greatly assist the transferor courts in planning for further proceedings and trial.[38] In a few cases the transferee judge has received intra-circuit or inter-circuit assignments under 28 U.S.C. § 292(b, d) to preside at trials of cases remanded to the transferor courts.

31.13 Coordination Between Courts.[39]

Frequently there are cases in different districts with similar issues and some common discovery, but transfer to a single district under 28 U.S.C. § 1404, 1406, or 1407 is not warranted. In such cases, the courts should nevertheless consider adopting procedures to avoid or minimize duplicative discovery and potential conflicts in pretrial and trial schedules. Among the steps that may be feasible are the following:

- **special assignment of judge.** One judge may be assigned all cases through a designation to sit temporarily in other districts under 28 U.S.C. §§ 291-296. In many circuits the district judges are appointed by the Chief Circuit Judge on an annual basis to serve in the other districts in their own state, facilitating the coordination of related litigation pending in the same state.

- **lead case.** The judges and attorneys in the various cases may agree to treat one as the "lead case." Rulings in the lead case on such matters as scheduling conflicts and discovery disputes may be accorded presumptive (but not conclusive) validity in the other courts, or pretrial proceedings in the other cases may be stayed pending a resolution of the lead case.

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38. Transferee courts are not expected to provide transferor courts with status reports during the pretrial proceedings.

39. Reference: MCL 1.22, 5.21, 5.30, 5.40.

- **joint conferences and orders.** Joint or parallel orders have sometimes been entered by the several courts in which the cases are pending. Joint hearings or conferences at which all of the judges are present in person or by telephone may also be feasible.[40]

- **joint appointments.** If special referrals are to be made to experts under Fed. R. Evid. 706 or to masters under Fed. R. Civ. P. 53, appointment of the same persons by all courts will save time and expense, as well as avoid inconsistencies. This technique is especially useful if numerous claims of privilege against disclosure will be made in a number of similar cases pending in different courts. Likewise, all courts may consider appointing the same attorneys to act as lead or liaison counsel.

- **avoiding duplicative discovery.** Techniques to coordinate discovery and avoid duplication, such as those discussed in §§ 21.422, 21.443, 21.444, and 21.465, should be considered. In particular, litigants should cooperate in conducting common discovery and establishing joint document depositories and should not be permitted to repeat interrogatories already answered or request documents already available from other sources. Notices for depositions may be filed or cross-filed in related cases to make the depositions usable in all cases. Relevant discovery already completed should ordinarily be made available to litigants in the other cases.[41]

The key elements are communication and cooperation—between the judges of the several courts, and between the attorneys in the various cases. Fed. R. Civ. P. 26(b) calls for limits on discovery "obtainable from some other source that is more convenient, less burdensome, or less expensive." Conflicts between one class action and other class actions or individual suits may sometimes be avoided by careful drafting of the class definition or by providing an election to opt out of a class. See § 31.32.

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40. Under Fed. R. Civ. P. 77(b) consent of the parties is required before trials and hearings may be conducted outside the district; their consent is not required with respect to other proceedings.

41. See Wilk v. American Medical Ass'n, 635 F.2d 1295 (7th Cir. 1980). "Where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. . . . Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order." Id. at 1299. The court usually may accommodate any legitimate interest in privacy by amending the protective order to include the new litigants within its restrictions, id. at 1301, and the party seeking the discovery may be required to bear an appropriate portion of the cost incurred in initially obtaining the information.

31.2 RELATED CRIMINAL AND CIVIL CASES.[42]

Major problems of management arise when there are concurrent criminal and civil cases involving the same persons. Witnesses may claim Fifth Amendment privileges in the civil actions, especially if examined prior to final resolution of the criminal proceedings,[43] and serious questions may arise as to the propriety of requiring an accused during the pendency of criminal charges to produce in civil proceedings either adverse (although non-privileged) evidence or exculpatory evidence to which the prosecution would not be entitled under the Fed. R. Crim. P. The criminal proceeding should ordinarily have first priority because of the short pretrial period allowed under the Speedy Trial Act[44] and because of the potential impact of conviction.[45] However, suspending all pretrial activities in civil litigation until the criminal proceeding has been concluded may be unnecessary and inadvisable, for often there are major portions of the discovery program in the civil cases that should be conducted before completi of the criminal proceedings.[46]

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42. Reference: MCL 6.10, 6.20, 6.30.

43. Termination of the criminal case will not necessarily result in testimony becoming available. See Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) (witness compelled by grant of "use immunity" to give testimony to grand jury does not waive right to claim Fifth Amendment in subsequent civil litigation).

44. The complexity of the case may be considered in determining whether to grant a continuance. 18 U.S.C. § 3161(h)(8)(B). See § 32.22

45. Even if conviction will not preclude relitigation of issues raised in the civil proceeding, it may be admissible in the civil case as substantive evidence of the essential elements of the offense under Fed. R. Evid. 803(22) or as impeachment evidence under Fed. R. Evid. 609.

46. See Landis v. North American Co., 299 U.S. 248, 254-55 (1936); Texaco, Inc. v. Borda, 383 F.2d 607 (3d Cir. 1967).

Because the court must weigh carefully the competing interests, related criminal and civil cases should ordinarily be assigned, if possible,[47] to the same judge.[48] If the cases are assigned to different judges, whether or not in the same court, coordination may be achieved through informal consultation and cooperation. If grand jury materials from another court are sought, the two-step procedure described in Douglas Oil Co. of California v. Petrol Stops Northwest[49] must be followed.

31.3 RELATED STATE AND FEDERAL CASES.

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31.31 Coordination.[50]

To the extent possible, proceedings in cases with common issues of fact that are pending simultaneously in state and federal courts should be coordinated to avoid unnecessary conflicts and expense, conserve judicial resources, and expedite the disposition of all the cases. Implementation of this coordination will depend on many circumstances—for example, the number and location of the courts,[51] the status of the proceedings in each case, the method for assigning cases in the state court,[52] and the

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47. Although the Judicial Panel on Multidistrict Litigation has no authority to transfer criminal cases, it has frequently ordered transfer of civil actions to the location of related criminal proceedings.

48. However, as noted in § 20.12, circumstances may exist that make assignment to the same judge inadvisable.

49. 441 U.S. 211 (1979).

50. Reference: MCL 1.94.

51. Although the Judicial Panel on Multidistrict Litigation has no power over cases pending in state courts, it has frequently transferred federal cases to a state where related cases were pending in the state courts in order to facilitate coordination.

52. For example, cases in many state courts are handled on a master calendar basis, without assignment to a particular judge prior to trial, and in other states the cases may be assigned to several judges, with restrictions against reassignment to a single judge.

extent to which the procedural rules in the courts are similar.

In some litigation state and federal judges have conducted joint pretrial conferences with all attorneys, developed a single management plan covering all cases, and entered parallel orders that, to the extent possible, sought to provide uniform rulings on common questions.[53] However, coordination is often achieved on a more limited basis—by designating the same attorneys to serve as lead counsel, by appointing the same special master to resolve discovery disputes or facilitate settlement discussions, by using joint document depositories and cross-noticing depositions, by providing for discovery taken in one case to be made available in other cases,[54] by agreeing that rulings of one court on procedural and scheduling disputes shall be given presumptive validity in other courts, or by allowing cases in one court to take the "lead" and informally staying proceedings in the other courts.[55] See Sample Order § 41.51.

The attorneys should be urged by the courts to confer and develop ways to avoid conflicts and duplication. However, it often is valuable, particularly at the outset of the litigation, for the judges themselves to communicate informally and determine how best to coordinate their activities and facilitate an efficient resolution of the entire litigation. The fact that the courts have different procedures is sometimes an advantage. For example, the existence of state court procedures for interlocutory appeals may provide a means for obtaining an early appellate ruling on a critical issue of state law, while the federal procedures may permit discovery to be conducted in a more expeditious and efficient manner.

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53. If permissible under state law, consideration may also be given to a joint trial, at which separate state and federal juries would sit in the same courtroom and hear common evidence.

54. Reciprocity, cost-sharing, and future cooperation may be required as conditions to obtaining discovery for use in other litigation.

55. See, e.g., Union Light, Heat & Power Co. v. U. S. District Court, 588 F.2d 543 (6th Cir. 1978), cert. dismissed, 443 U.S. 913 (1979).

31.32 Jurisdictional Conflicts.[56]

Frustrated by competing schedules and the failure to obtain voluntary cooperation, counsel sometimes seek orders to restrain their adversaries from pursuing similar or identical actions in other courts. Federal law, however, generally permits multiple actions between the same parties to be pursued simultaneously, whether in other federal courts or in state courts, until a judgment is obtained that will be given effect in other cases under the doctrines of issue preclusion or claim preclusion. Moreover, pre-judgment efforts to enjoin competing state actions are ordinarily barred by 28 U.S.C. § 2283, a constraint that applies even in class actions.[57] Indeed, class definitions should be carefully worded to avoid unintended conflicts with existing or potential litigation in other courts.[58]

Special care should be taken when deciding whether to exercise pendent jurisdiction over related state claims otherwise outside the court's jurisdiction. The question may arise because the defendant in a case filed in federal court seeks to force the plaintiff to pursue state claims in state court or, more frequently, because the plaintiff in a

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56. Reference: MCL 5.40.

57. See, e.g., In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982); In re Glenn W. Turner Enter. Litigation, 521 F.2d 775 (3d Cir. 1975); cf. In re Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982) (approving injunction where, after judgments approving partial settlements, state proceedings would be barred by res judicata); In re Baldwin-United Corp., ___ F.2d ___ (2d Cir. 1985) (upholding power of district court under All-Writs Act, 28 U.S.C. § 1651 to enjoin states from instituting representative actions that would frustrate potential settlement of class actions).

58. For example, a class may be defined to exclude automatically any persons who already have instituted their own suit or are members of a pending class action. Depending on the circumstances, however, it may be preferable to provide that such persons will be members of the class or that they will be members unless they opt out under Rule 23(c)(2). See In re Federal Skywalk Cases, 95 F.R.D. 483 (W.D. Mo. 1982), (certifying a Rule 23(b)(3) class with respect to claims arising from hotel disaster after court of appeals had vacated a class certification under Rule 23(b)(1)).

removed case seeks to sever and remand state claims under 28 U.S.C. § 1441(c).[59] In exercising its discretion, the court should consider, in addition to the principles of comity and federalism, the practical consequences to the litigants and witnesses if the claims are pursued in separate courts, as well as the possibility for the courts to coordinate the cases by using techniques discussed in this Manual. The court should ordinarily give early attention to motions to remand or dismiss an entire case, particularly if the Judicial Panel on Multidistrict Litigation is considering transfer under 28 U.S.C. § 1407. However, a delay in ruling on motions to remand portions of a case is sometimes advantageous to all parties by enabling discovery and other pretrial proceedings to be coordinated in one court.

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59. This situation arises with some frequency in antitrust cases because plaintiffs often seek the benefit of state laws authorizing damages based on indirect purchases and providing special measures of damages. An additional complication stems from the fact that the federal court's removal jurisdiction is derived from and dependent upon the initial jurisdiction of the state court. Compare Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972) (remanding entire antitrust case because state court had no jurisdiction over federal cause of action on which removal based), with Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981) (reaching merits of defense in antitrust action removed from state court).

32. CRIMINAL CASES.

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32.1 GENERAL PRINCIPLES.[1]

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The complicated criminal case—typically one involving numerous defendants, substantial documentary evidence, and a long trial—may present problems unlike those usually faced in complex civil litigation: insufficient discovery, little time to prepare for trial, and sometimes too few attorneys. However, the principles of effective management—active judicial involvement, professionalism of counsel, and development of a plan for pretrial and trial—are the same, and many of the techniques discussed in the Manual regarding civil cases may also be usefully adapted to criminal cases.[2]

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1. Reference: MCL 6.10, 6.20.

2. A helpful resource is the "Judges' Manual for the Management of Complex Criminal Jury Cases," distributed in November 1982 to federal district judges by the Administrative Office of the United States Courts.

32.11 Early Judicial Supervision.

Promptly after return of the indictment, the Clerk's Office or the United States Attorney should notify the judge to whom the case is assigned of the filing of a potentially complex criminal case.[3] After reviewing the indictment and perhaps briefly discussing the dimensions of the case with counsel, the judge should determine whether to alter the routine procedures by which criminal cases are handled. For example, the judge may wish to conduct or attend the arraignment or pretrial conference in courts where these are ordinarily handled by a magistrate. Many courts have a standing order or policy by which significant dates—arraignment, deadline for motions, schedule for discovery, pretrial conference, and trial date—are set automatically by the Clerk or magistrate by reference to the date of indictment; the judge should consider whether, given the nature and complexities of the case, any of these dates should be revised. Some modification of the procedures under which counsel are expected to exchange discovery materials pursuant to Fed. R. Crim. P. 16 without judicial involvement may be warranted. If trial of the case will likely take more than a month, arrangements may be needed to relieve the judge from further criminal assignments for a period of time; otherwise, the judge may be assigned cases that cannot be brought to trial within the time prescribed by the Speedy Trial Act, 18 U.S.C. §§ 3161-74.

As mentioned above, in many courts magistrates conduct most pretrial proceedings in routine criminal cases, including arraignments, review of motions for ruling or recommendation, and pretrial conferences. In a complex case, referral of some pretrial matters to the magistrate may be of great value to the judge, particularly if numerous discovery and other nondispositive pretrial motions are expected. However, in such

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3. In courts in which criminal cases are not assigned to a judge until after arraignment, an individual assignment should nevertheless be specially made upon the filing of an indictment in a complex case. A special assignment may also be needed if the judge to whom the criminal case would otherwise be assigned is involved in a lengthy civil trial.

cases it may be advisable for the judge to take a more active role in supervising pretrial proceedings by conducting personally the pretrial conference and by hearing motions on which a magistrate's ruling would probably be challenged. Moreover, by hearing important suppression motions, the judge will gain valuable insight into the strategies and personalities of the attorneys and the defendants.

The entire case should usually be treated as a single action during pretrial proceedings even if severance for trial under Fed. R. Crim. P. 14 will be required. Moreover, pretrial proceedings in related criminal cases should often be coordinated, whether or not they should be consolidated for a joint trial under Fed. R. Crim. P. 13. Common motions in separate but related cases may be scheduled for joint hearings even if the cases are not otherwise consolidated for pretrial or trial.[4] Coordination is facilitated if all such cases in the same court are assigned to one judge, at least for pretrial purposes.

32.12 Counsel.

The court should encourage defense counsel in multi-party cases to organize themselves for trial.[5] Often one attorney may be designated to present the principal arguments, conduct the initial cross-examination, and make objections on behalf of all, with attorneys for the other defendants being permitted to present additional, non-cumulative questions or argument. If counsel are unable to agree on a sequence in which to conduct examination, the court should fix an order for them—frequently the sequence in which the defendants are listed in the indictment or a periodic rotation of this order. Objections and requests made by one attorney should ordinarily be deemed

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4. Joint pretrial hearings of related criminal and civil cases may also be useful.

5. In civil cases the court clearly has the authority, and at times the responsibility, to review proposals by the parties for the designation of lead or liaison counsel and, indeed, to make such appointments itself. See § 20.22. However, the wisdom or propriety of the court taking such action in a criminal case over the objection of a defendant is questionable.

to be made on behalf of all defendants who do not specifically disclaim the objection or request.

Conflicts of interest may arise when an attorney attempts to represent more than one defendant, creating serious post-conviction problems. The court, therefore, must be wary of efforts by attorneys to act as counsel on behalf of several defendants. Under Fed. R. Crim. P. 44(c), the judge should personally examine the defendants and perhaps also defense counsel and the prosecutor.[6] The court should also ascertain whether any attorney has a potential conflict because of prior representation or other cases. When needed, whether because of some conflict or because of questions about the competency or dedication of counsel, new counsel should be employed or appointed as early as possible in order to avoid motions for continuances and post-conviction attacks.

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32.21 Conferences.[7]

The arraignment provides an opportunity for the judge or magistrate to discuss with the defendants and their attorneys schedules and procedures for further proceedings and trial. In addition, under Fed. R. Crim. P. 17.1 the court is authorized on motion or its own initiative to order "one or more conferences to consider such matters as will

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6. **Unfortunately, if a conflict does arise, the original attorney will often be disqualified from continuing to represent any of the former clients.**

7. **Reference:** MCL 6.10, 6.20, 6.30.

promote a fair and expeditious trial."[8] The actual powers of the court with respect to such conferences are far more limited than in civil litigation.[9] Nevertheless, resourceful judges have used these conferences to great advantage in refining the issues, resolving procedural problems, facilitating the disclosure of information prior to trial, eliminating undue delays at trial, and developing techniques to expedite and simplify the presentation of evidence, particularly voluminous documentary evidence. Counsel may also wish to explore at a conference the possibility of waiving a jury trial or of entering a conditional plea under Fed. R. Crim. P. 11(a)(2) if a key motion to suppress evidence is denied.

The court should seek to create an atmosphere conducive to voluntary agreements. Most lawyers are willing to make concessions that expedite the trial of complex criminal cases if their client's cause will not be prejudiced. Compromises are often possible; for example, the prosecution may be willing to produce Jencks Act material (18 U.S.C. § 3500) before trial or at least a reasonable time before the witness testifies, or even to make its "summary witness" available for pretrial deposition or interview in exchange for stipulations on authenticity and on the foundation for introduction of business records.

The defendants are usually not present at the pretrial conferences.[10] Of course, if they are not in custody[11] and wish to attend, they should be permitted to do so. A

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8. Although by its terms the Rule applies only if the defendant is represented by counsel, many courts schedule pretrial conferences in cases with defendants representing themselves. No sanctions, however, should be imposed for non-attendance, nor any attempt made to obtain stipulations.

9. Rule 17.1 calls for the court to "file a memorandum of the matters agreed upon" and provides that defense admissions during the conference may be used only if "reduced to writing and signed by the defendant and his attorney." The Rule emphasizes voluntary agreement, not the possibility of court sanctions.

10. The defendant is not required to be present "at a conference or argument upon a question of law." Fed. R. Crim. P. 43(c)(3).

11. Some courts make provision for incarcerated defendants to be brought to the courthouse for pretrial conferences.

court reporter should be present, or recording equipment available, to record understandings and directions. However, as in civil litigation, discussions are often more productive when off-the-record, and, even if recorded, concessions made during the conference are not usable against the defendants unless in writing and signed. Fed. R. Crim. P. 17.1.

If any attorney has limited experience in federal criminal cases, the judge or magistrate should briefly discuss at the early pretrial conferences the basic procedures that will be followed, particularly those that differ from civil litigation or from practice in state court. For example, the court may wish to alert counsel to the limitations on formal discovery and to the requirement for giving notice of a defense based on an alibi or a mental condition. Appointed counsel should also be informed of the procedures for payment of interim fees and expenses and the need to obtain advance approval for investigative and expert services.[12]

32.22 Schedules.[13]

The time allowed by the Speedy Trial Act for taking the case through the pretrial steps to trial must not be exceeded. Counsel should be reminded at the arraignment that these time limits may not be waived by the defendants. The court should make clear to the attorneys at the outset, particularly in a multi-party case, that they and their clients must be prepared to proceed on the scheduled trial date and that continuances will not be granted because of personal or professional conflicts.

Under 18 U.S.C. § 3161(h)(8)(B)(ii, iv), the judge may consider "whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within

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12. See 18 U.S.C. § 3006A(e).

13. Reference: MCL 6.30.

the [specified] time limits" or "whether the failure to grant such a continuance . . . would deny counsel for the defendant . . . the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." However, these are but factors for the court to consider in deciding under § 3161(h)(8)(A) whether "the ends of justice served by [continuance] outweigh the best interests of the public and the defendant in a speedy trial." Thus, the complexity of the case, although an important consideration in establishing a fair schedule for pretrial and trial, is not a license for delaying tactics.

32.23 Pretrial Hearings.

By deferring evidentiary hearings on motions to suppress until the time of trial, as permitted by Fed. R. Crim. P. 12(e), the court may avoid the cost and inconvenience of bringing the defendants and witnesses to the courthouse an extra time. Moreover, the hearing may ultimately be rendered unnecessary by guilty pleas. In complex cases, however, the court should ordinarily schedule, in advance of trial, evidentiary hearings on motions to suppress that may take substantial time to hear or that, if granted, will significantly affect the scope or course of trial. An early hearing has several advantages: If the motion is decided in favor of the defendants, the prosecution will have the opportunity to appeal. If the motion is decided in favor of the prosecution, the defendants may wish to enter conditional guilty pleas under Fed. R. Crim. P. 11(a)(2), while preserving their right to appeal the ruling. If the trial is held, the proceedings will not be interrupted while evidence on the suppression motion is presented.

By motions in limine, the parties may seek rulings under Fed. R. Evid. 104 in advance of trial on various evidentiary issues, such as the use of convictions under Rule 609, evidence of other acts under Rule 404(b), and admissibility of statements of co-conspirators under Rule 801(d)(2)(E). By addressing these questions before trial, the judge and the attorneys may be able to give them more deliberate and careful consideration than if the issues were raised for the first time during trial, and pretrial

rulings on critical evidentiary questions permit the trial to be conducted more efficiently and effectively. Often, however, the court cannot rule definitively, if at all, on such matters except at trial, after taking into account the other evidence and the posture of the parties at the time.[14] If pretrial rulings are made, the court should indicate whether they are final (intended to preclude renewal at trial of the offer of evidence or the objection) or are conditional (intended for guidance, but requiring a formal renewal at trial as a condition to any claim of error).

32.24 Discovery.[15]

Pretrial discovery in criminal cases, compared to that available in civil litigation, is limited. Fed. R. Crim. P. 16 provides a procedure for obtaining production of certain documentary matters, generally only those documents that the party expects to offer as evidence in chief.[16] A motion for a bill of particulars under Rule 7(f) is similar to contention interrogatories in civil cases, but far more restricted. The parties have no right to take depositions for discovery purposes; however, under Fed. R. Crim. P. 15, "in exceptional circumstances" the court may permit a party to take the deposition of one of its own witnesses in order to preserve the testimony for trial.[17] The parties have no right to obtain in advance of trial the names of their adversaries' witnesses, except to the extent provided in Rule 12.1 when an alibi defense is raised. Under the Jencks Act, 18 U.S.C. § 3500, the defendants are entitled to production of statements made by prosecution witnesses, but only after completion of the direct examination of

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14. For example, the balancing of probative value and prejudicial effect of a prior conviction under Fed. R. Evid. 609(a) involves a consideration of the defendant's testimony at trial. Accordingly, a pretrial ruling that a conviction may be admissible for impeachment purposes is not reviewable on appeal if the defendant decides not to testify. See Luce v. United States, 105 S. Ct. 460 (1984).

15. Reference: MCL 6.20.

16. Under Rule 16(a)(1)(A,B) the prosecution is also required, if requested, to produce the defendant's prior statements and criminal record.

17. Also see 18 U.S.C. § 3503.

such witnesses; under Rule 26.2, the prosecution has similar access to statements of defense witnesses. In view of these restrictions, the court should assure that full advantage is taken of the limited opportunities for pretrial discovery available in criminal cases.

In complex cases the court should establish a schedule for early disclosure of all materials discoverable under Fed. R. Crim. P. 16 or under applicable case law.[18] The judge or magistrate should emphasize the value of pretrial disclosure of all documentary evidence and encourage the defense to make the appropriate request for such items under Rule 16(a)(1)(C,D), with its reciprocal obligation for disclosure under Rule 16(b). In multi-party cases defense counsel should understand that, by inspecting documents, examinations, and tests produced by the prosecution in response to the request of a co-defendant, they will be treated as having made a similar request and accordingly will have a similar duty of disclosure.

Pretrial production of documents and objects in the possession of third parties may be obtained under Fed. R. Crim. P. 17(c). This provision does not authorize "fishing expeditions;" it is limited to relevant evidence not otherwise reasonably obtainable that is needed to prepare properly for trial.[19] The court should, however, encourage the parties to use this procedure to marshal and organize voluminous documents in the possession of third parties.

Although involuntary discovery in criminal cases is limited, broad disclosure is possible if the parties consent. For example, the Jencks Act does not prevent the prosecution from voluntarily making statements of its witnesses available before trial; pretrial disclosure will avoid the interruption in the flow of evidence that occurs if at the conclusion of direct examination the defense needs time to review and study such

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18. E.g., Brady v. Maryland, 373 U.S. 83 (1963).

19. See United States v. Iozia, 13 F.R.D. 335 (S.D.N.Y. 1952), cited with approval in United States v. Nixon, 418 U.S. 683 (1974).

statements. As an inducement to broadened pretrial discovery, the defense will often agree not to raise objections regarding authenticity or similar matters. In many districts, the court schedules an "omnibus hearing" at which some issues are resolved without formal motions and the parties are encouraged to exchange information that will facilitate the trial of the case without prejudice to the rights of any of the parties. Indeed, in many districts the prosecution has found that its interests are best served by adopting an "open file" policy in most criminal cases. Other courts by local rule require counsel to meet and exchange discoverable information before filing pretrial motions.

Discovery in criminal cases should be coordinated with that in related civil litigation. As discussed in § 31.2, a stay of some discovery in the civil litigation will sometimes be needed. However, the broader discovery available in civil cases may occasionally be used to obtain information that will allow the related criminal proceedings to be conducted more effectively and efficiently.

32.25 Publicity.

Complex criminal trials often involve personalities or events that command widespread public interest and attract extensive attention from the news media. In such cases, the court has a special responsibility to assure that jurors unbiased by pretrial publicity are offered to the parties for selection and that the jurors chosen are appropriately shielded from publicity during the trial that might impair their fairness and objectivity.

Some courts have adopted the Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue.[20] Judges in courts that have not adopted the Report should study its recommendations and may wish to implement its suggestions by special order in cases of unusual notoriety. Also see § 32.32.

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20. The Revised Report, approved by the Judicial Conference of the United States on September 25, 1980, is published at 87 F.R.D. 519.

32.26 Severance and Joinder.

Under Fed. R. Crim. P. 14 the court may sever either defendants or counts for separate trial. Most frequently used to avoid problems under Bruton v. United States,[21] this procedure may also be used to simplify and expedite trial. Often the severance of certain counts will reduce substantially the complexity of the instructions and the scope of the evidence, with little chance that a trial on those severed counts will later be necessary.[22]

Separate criminal cases may be joined for trial under Fed. R. Crim. P. 13 "if the offenses, and the defendants if there is more than one, could have been joined in a single indictment." In combination with the power to sever, this procedure enables the court to structure an efficient trial of related indictments.

Courts sometimes have scheduled for common trial, but with separately impanelled juries, cases in which Bruton calls for severance of the defendants. Most of the evidence is heard at the same time by both juries, sitting separately in the same courtroom. The jury considering the charges against a defendant implicated by the confession of a co-defendant is excused from the courtroom when evidence of that confession is presented. Use of multiple juries has obvious advantages in lengthy trials of cases with a Bruton issue; however, careful planning—and a large courtroom—are essential.[23]

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21. 391 U.S. 123 (1968)

22. After the first trial, the remaining counts are frequently dismissed by the prosecution or resolved by plea bargains.

23. See State v. Corsi, 430 A. 2d 210 (N.J. 1981), upholding the use of a two-jury procedure in a joint criminal trial. See also Note, Criminal Law Multiple Jury Joint Trials: On the Joint Trial of Two Defendants, the Empanelling of Two Juries Simultaneously is Permissible, 2 Fordham Urban L.J. 407 (1974).

32.3 TRIAL.

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32.31 Physical Arrangements.

Plans must be made well in advance of trial if modifications will be needed in the courtroom or its furnishings because of the number or personalities of the defendants or because of news coverage. The defendants should be seated in a manner to enhance security and minimize disruptions. In a case with numerous defendants and counsel, name signs may be placed on the tables except when in-court identifications will be made. A portion of the public section of the courtroom may be reserved for the media; artists making sketches should be located so they do not distract the jury. A convenient, secure, private room will be needed where a defendant can confer with counsel; this may pose problems if several defendants are in custody.

The judge should consult with the Marshal regarding security measures needed under the circumstances of the case. If security is a major concern, the court should be cautious about bench conferences or conferences in chambers or robing rooms. Matters that must be considered outside the hearing of the jury should ordinarily be taken up in the courtroom, after excusing the jurors. The court should also discuss with the Marshal appropriate courtroom procedures for defendants and witnesses who are in custody.[24]

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24. The usual practice is for incarcerated defendants to be escorted to their seats before the jury is brought into the courtroom and be removed after the jury has been excused. In some cases a defendant's incarceration is known by the jury, and custodial arrangements need not be concealed.

32.32 Management of Jury.

As with civil trials, the procedures used in the voir dire and selection process in criminal cases vary from court to court and from judge to judge. Defense counsel frequently request that prospective jurors in complex criminal cases complete detailed questionnaires prior to jury selection. Such questionnaires save substantial time in voir dire and enable both the prosecution and the defense to make more informed use of their peremptory challenges. If sent to prospective jurors in advance of the trial, answers may disclose persons who may be excused from attendance because of disqualification or hardship. However, as in civil cases, pretrial distribution of questionnaires tends to produce an excessive number of unexcused absences and requests for excuse and to encourage inappropriate inquiries by jurors into the case. See § 22.41. Accordingly, many courts prefer to have jurors complete such questionnaires at the courthouse after they have reported for service and have received preliminary instructions from the judge about the case.

In cases with extensive pretrial publicity, the court should elicit information during voir dire about potential jurors' exposure and reaction to such publicity in a manner that encourages candor but does not, in the process, infect other jurors with prejudicial material. Many courts proceed as follows: (1) the court gives a general orientation and introduction to the case to all jurors; (2) the court then questions the jurors, who have been divided into smaller groups of 10 to 14, about their qualifications and experience (excluding however any inquiry into their exposure to publicity about the case), after which the attorneys present any challenges for cause; (3) the court then calls the jurors for individual questioning about the pretrial publicity, with the attorneys being allowed to supplement the judge's questioning and challenge jurors for cause; and (4) the attorneys then exercise their peremptory challenges against those not excused or removed for cause. Other courts use their normal voir dire and selection

procedures, but question individually those jurors who indicate any prior knowledge about the case.

As in civil cases, the court should warn jurors not to read, watch, or listen to any report about the case. In some cases the jurors must be sequestered to shield them from exposure to inadmissible, highly prejudicial information—such as a Bruton confession or a confession that has been suppressed—or to protect them from physical harm, intimidation, or bribery. The court should communicate to the Marshal as soon as possible its decision to sequester: lodging, meals, transportation, and security must be arranged, and particularly in long trials attention should also be given to such matters as recreation, family emergencies, medical care, and personality conflicts.[25]

Particularly in long trials, defendants may be willing to stipulate to a jury of less than 12 under Fed. R. Crim. P. 23(b). Under an amendment to Rule 23, "even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."[26] Only a unanimous verdict may be received in a criminal case.[27]

32.33 Transcripts.

Expedited transcripts may be valuable to counsel in planning their examination of later witnesses, to the jurors in refreshing their memory about the testimony, and to the court in avoiding delays if there are post-trial motions or appeals. However, daily

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25. For further guidance regarding sequestration, see the materials in the Judge's Manual for the Management of Complex Criminal Cases, distributed by the Administrative Office of the United States Courts in November 1982.

26. Prior to the amendment, replacement with an alternate juror during deliberations had been upheld by appellate courts in protracted criminal cases. See United States v. Hillard, 701 F.2d 1052 (2d Cir.), cert. denied, 461 U.S. 958 (1983); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

27. See, e.g., United States v. Pachay, 711 F.2d 488 (2d Cir. 1983); United States v. Morris, 612 F.2d 483 (10th Cir. 1979).

or expedited copy may place a strain on the reporters, be distracting to jurors, and result in unjustified extra expense.

Although accelerated reporting services should not be routinely provided,[28] the court may order payment for daily copy under the Criminal Justice Act (18 U.S.C. § 3006A) if such transcripts are needed by defense counsel. If expedited copy is ordered by someone other than counsel appointed under the CJA, the CJA counsel are entitled to copies at the copy rate.

32.34 Expediting Trial.

The court should announce on the record in the presence of the jury that, unless disavowed, objections and offers of proof made by one defendant will be treated as made by all. Other attorneys may state additional grounds or make additional offers, which, unless disclaimed, will also be deemed to be made by all. The court should not permit counsel to repeat objections made by other attorneys or to ask repetitive questions of the witnesses. Lead defense counsel and all defendants should be in the courtroom during all sessions of the trial; with consent of their clients, other counsel may be permitted to leave the courtroom periodically.

Much time may be saved in cases with numerous documents by requiring that counsel affix identification labels to exhibits before they are presented and have extra copies available for opposing counsel and the court.[29] Advance notification of the documents to be offered will also expedite the presentation of such evidence.

Recognizing the great value of informal discussions as the trial proceeds, many courts set aside a short time each day—typically at the end of the day—to consider matters that will facilitate the presentation of evidence. The prosecution will often be willing to identify those witnesses it expects to testify the next day and to provide

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28. See resolution of the Judicial Conference of the United States, Reports of the Judicial Conference 1980, p. 19.

29. As discussed in § 22.32, extra copies should ordinarily be provided for jurors also.

Jencks Act statements for many of them. The defense will frequently stipulate at this time, even if unwilling to do so before trial, to the admissibility of various documents without foundation or authentication evidence. The parties may alert the judge to potential problems and present or renew motions in limine.[30]

Courts differ on whether the defendants should be present at these conferences and whether the discussions should be transcribed by a reporter. See Fed. R. Crim. P. 43. The discussions will generally be more productive if held in chambers, "off the record," with only the judge and the attorneys present. However, if requested, the court should permit defendants to attend and have the proceedings transcribed; and many judges, as a precaution, hold informal conferences in chambers only if the defendants have waived on the record their right to be present.

32.35 Disruptive Conduct.

The judge should be prepared to deal with improper behavior by the defendants and the attorneys in a timely and appropriate manner, appreciating however the stresses that trial places on all participants and guarding against any tendency to over-react to offensive conduct. For relatively minor improprieties, particularly those due to ignorance or misunderstanding, a mild admonition and explanation of the required standards of conduct[31]—perhaps given outside the hearing of the jury—will often be sufficient. For repeated or deliberate misconduct, the court should consider more severe measures, such as citing the individual for civil contempt or even for criminal contempt under Fed. R. Crim. P. 45(b). In the event of courtroom disturbances that must be

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30. In some cases the judge has found it necessary, in order to reduce the time being wasted on insignificant and repetitious motions, to require that all motions be in writing and be filed and argued at a specified time each day—for instance, the thirty-minute period at the beginning of the day.

31. Indeed, in cases with the potential for disruptive conduct, the judge should provide guidance in advance on matters of proper courtroom decorum—not only to the parties and counsel, but also to the spectators. The court should also assure that its rulings and directives with respect to the presentation of evidence are understood by the attorneys.

dealt with immediately to preserve order and prevent disruption of the proceedings, the judge may summarily impose punishment for contempt under Rule 45(a).[32] Obstreperous spectators may be removed from the courtroom, and, if necessary, defendants who persist in disruptive conduct may also be removed until they are willing to conduct themselves in an orderly manner.[33]

32. The maximum punishment for summary contempt is six months' imprisonment. See Codispoti v. Pennsylvania, 418 U.S. 506 (1974). If the misconduct involves contemptuous remarks directed toward the trial judge personally but does not merit immediate punishment, the contempt proceedings should be conducted before another judge under Fed. R. Crim. P. 42(b). See United States v. Meyer, 462 F.2d 827 (D.C. Cir. 1972).

33. See Illinois v. Allen, 397 U.S. 337 (1970). If such problems are anticipated or if the defendant's absence may be prolonged, arrangements may be made for a remote loudspeaker (or even closed-circuit television) in order to keep the defendant informed about the proceedings.

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33.1 ANTITRUST CASES.

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The principles of judicial management and many of the procedures discussed in the Manual were developed in major antitrust cases, which continue to be the paradigms of complex litigation.[1] Antitrust cases often involve complex legal issues, voluminous documentary evidence, numerous depositions, complicated economic questions and factual disputes, substantial sums of money, and many parties and attorneys. Frequently brought as class actions, they may be filed in several federal and state courts concurrently with or following criminal or administrative proceedings. Lengthy trials are not unusual, nor are controversies over settlements and attorneys' fees. The earlier sections of the Manual should, therefore, be consulted in complex antitrust cases to the extent applicable.[2]

33.11 Managing the Issues.

Efficient management of antitrust litigation requires that key factual and legal issues be identified, clarified, and narrowed as soon as practicable. Unless the judge and the attorneys give early attention to the issues, substantial time may be wasted on claims that are subject to summary dismissal, on class action disputes that are not critical to the ruling on class certification, and on discovery that is not relevant to the later-refined issues regarding liability or damages. By carefully defining the issues

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1. See also W. Schwarzer, Managing Antitrust and Other Complex Litigation (1982); ABA Antitrust Section, Monograph No. 3, Expediting Pretrials and Trials of Antitrust Cases (1979); Report, Nat'l Comm'n for the Review of Antitrust Laws and Procedures (1979). Of course, not all antitrust claims present management problems. Many are raised in counterclaims primarily for tactical purposes and will not be seriously pursued.

2. Many of the procedures used to manage mass disaster cases, as discussed in § 33.2, may also be of value in multi-party antitrust litigation. See, e.g., § 33.23 (master file; "deemed" pleadings) and § 33.25 (joint discovery requests).

at an early stage, the court may be able to structure discovery and trial in a manner that reduces the scope of discovery and the length of the trial, and enhances the ability of the fact-finder to understand the evidence.

The procedures for defining and resolving issues in antitrust cases before trial are the same as those used in other complex litigation. See, e.g., §§ 21.33, 21.34. Similarly, the principles affecting the structuring of trial under Rule 42 apply in general to antitrust cases, although the court must be especially careful when attempting to sever issues regarding damages from other elements of the claim.[3] See § 21.632.

Among the potential issues in antitrust cases that may merit special consideration are the following:

* **jurisdictional questions.** The court should give early attention to assertions that the requisite effect upon commerce is lacking.[4] Often these issues, as well as contentions that for other reasons the claim is beyond the reach of the antitrust laws,[5] may be resolved summarily under Fed. R. Civ. P. 56 or by a short trial under Rule 42.

* **standing.** Whether the claimant has the necessary standing to maintain a

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3. Compare Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978) (impermissible to present statutory violation and damages to separate juries), with In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981) (permissible for first jury to determine statutory violation, including injury and measure of damages, leaving issues relating to individual damages under that measure for a second trial), cert. dismissed, 462 U.S. 1125 (1983). Bifurcation of liability and damages issues "must be approached with trepidation." Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1324 (5th Cir. 1976); accord Windham v. American Brands, Inc., 565 F.2d 59, 71 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978). See also Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528 (3d Cir. 1979) (state civil conspiracy).

4. See, e.g., McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980).

5. See, e.g., Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977) (pretrial dismissal on basis of act of state doctrine). But cf. International Ass'n of Machinists & Aerospace Workers v. Organization of the Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir.), cert. denied, 454 U.S. 1163 (1981) (act of state doctrine applied after trial).

claim for damages[6] may frequently be resolved under Rule 12 or 56; if not, a separate trial under Rule 42 should be considered.

* **exemptions and regulated industries.** The court should consider early any claims of exemption from antitrust laws that may be raised if the case involves insurance,[7] organized labor,[8] restraints imposed or authorized by state action,[9] or group solicitation of governmental action.[10] Similarly, early attention should be given to any issues of primary or exclusive agency jurisdiction, as may be present in cases involving the transportation, communications, fuel and energy, banking, and securities industries.

* **statute of limitations.** Because of its effect on the scope of discovery, if not on the viability of the entire claim, the court should rule as soon as practicable on any dispute about the applicable period of limitations. Whether summary judgment may be used to resolve assertions that the statute has been tolled because of fraudulent concealment will, of course, depend upon the facts of the case.[11]

* **market definition.** In many antitrust cases a definition of the relevant geographic and product market is an essential element of the case, upon which the significance of other evidence in the case directly depends. The court, therefore, should give early attention to the possibility of obtaining agreement on the market definition and, if this cannot be achieved, it should consider methods to resolve the conflict before a trial of issues dependent on that definition. If the relevant market cannot be determined under Rule 56 because of factual disputes, the court may set the issue for separate trial under Rule 42. Recognizing that definition of the market often involves technical, tedious evidence with a distinct "legal" content, counsel will frequently be willing to waive their jury demands on this issue. Disputes regarding the relevant market may be referred to a special master (see §§ 21.52, 21.53) or studied by a court-appointed expert (see § 21.51).

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6. See, e.g., Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) (standing requires analysis of relationship between defendants' conduct and plaintiff's injury); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (no federal antitrust damages for "indirect" purchases); Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (requirement for "antitrust injury"); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (requirement for "direct injury").

7. 15 U.S.C. §§ 1011-15.

8. United States v. Hutchinson, 312 U.S. 219 (1941); 29 U.S.C. §§ 101-10, 113-15.

9. Southern Motor Carriers Rate Conference v. United States, 105 S. Ct. 1721 (1985); Parker v. Brown, 317 U.S. 341 (1943).

10. Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

11. Compare Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975), with Norton-Children's Hosp. v. James E. Smith & Sons, 658 F.2d 440 (6th Cir. 1981).

* **theory of damages.** The attention given to liability issues in antitrust cases has sometimes resulted in an unfortunate neglect of questions regarding injury and damages. Early consideration of the theory of damages—as, for example, by calling for a preliminary offer of proof of damages claimed on behalf of named parties and potential class members—may be important for many reasons. The damages claimed may, in whole or in part, not be allowable under the antitrust laws; if so, claims may be subject to dismissal, the scope of discovery reduced, or the method for proving damages otherwise altered. Moreover, the extent to which injury and damages will require individualized proof is often critical in determining whether a class of antitrust claimants should be certified and whether a consolidated trial of separate claims is feasible. Early scrutiny of the claimed damages will often facilitate settlement, either because the potential exposure is so great or, on the other hand, because the provable damages are relatively small in relation to the cost of pursuing the litigation. Indeed, in some cases the court may conclude that the initial discovery should be focused on the fact and amount of damages, perhaps leading to a separate trial on such issues before extensive discovery and trial on the issue of the existence of a conspiracy.[12] In any event, the court should require that exhibits and opinions regarding injury and damages be exchanged in their final form prior to trial, whether such trial is held separately under Rule 42 or in conjunction with a trial on the other issues.

The advisability of a separate motion schedule preceding discovery on the merits depends not only on the relationship of the motion to the merits, but also on the court's ability to consider and resolve such motions promptly. A stay of merits discovery may be appropriate only if the court will be able to determine the preliminary motions expeditiously. The court should ordinarily avoid hearing preliminary motions seriatim, which might result in a prolonged stay of merits discovery while motions are filed and decided.

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12. If, for example, the time needed for discovery and trial of the issues as to the impact and damages resulting from a particular practice would be relatively short, substantial savings may be effected by postponing until after a trial on injury and damages any significant discovery on whether the defendants conspired to institute or maintain the practice, particularly if the asserted damages may be nonexistent or minimal. If the practice in question is well defined in scope and time, such a "reverse" bifurcation should be permissible notwithstanding the admonitions in such cases as Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) cert. denied, 435 U.S. 968 (1978), and Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976). Cf. In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981), cert. dismissed, 462 U.S. 1125 (1983).

33.12 Economic Data and Opinions.

Antitrust cases often involve the collection, assimilation, and evaluation of evidence regarding thousands of transactions and enormous quantities of other economic data, a substantial part of which may merit protection as trade secrets or confidential commercial information. Effective management of such cases depends upon the adoption of pretrial procedures to facilitate the acquisition and exchange of this evidence and its efficient presentation at trial. Among the measures that may be useful are the following:

- **limiting scope of discovery.** The court may confine initial discovery to a limited historical period. However, unduly restrictive limitations may be counterproductive if broader discovery must later be conducted at the same sites or from the same people. See § 21.41.

- **confidentiality orders.** Protective orders of the type discussed in § 21.431 will facilitate the expeditious discovery of confidential commercial information. Especially if the parties are competitors, provisions are often included that preclude or restrict disclosure by the attorneys to their clients. Particularly sensitive information, such as customer names and pricing instructions, may often be masked by excision, codes, or summaries without impairing the utility of the information in the litigation.

- **summaries; computerized data.** Early in the litigation the court may require the parties to identify any potentially relevant information existing in summary form or as computerized data; and they may be directed to produce computerized data in hard copies (print-outs) or in machine-readable form. See § 21.446. Early production of this information will often obviate the need for discovery of source documents and may result in agreement on a single data base upon which all experts rely in forming their opinions. In any event, the court should encourage the use of summaries and tabulations to present voluminous data and should require the exchange of such exhibits well in advance of trial, insisting upon verification procedures to eliminate to the extent practicable any disputes about accuracy See § 21.483.

- **other sources.** Relevant economic data may be obtainable from governmental or industry sources far more quickly and cheaply than through discovery from the litigants. Accordingly, the court may wish to make an early determination regarding the admissibility of such evidence under Fed. R. Evid. 803(8), 803(17), and 803(18).

- **expert opinions.** Economists may be employed to study such topics as the relevant market, concentration of economic power, pricing structures, elasticity of demand, barriers to entry, marginal costs, and the effect of the challenged practices upon competition and the claimants. Early in the litigation the court should call for an identification of the subjects on which expert testimony will likely be offered and establish an appropriate

schedule for disclosure of the experts' opinions, recognizing that some studies may require considerable time both to prepare and to review. See § 21.481. Agreement on a common data base to be used by all experts is highly desirable; and the court may require the parties to seek accord on methodology and form before surveys or polls are conducted. See § 21.484. Major questions regarding the admissibility of experts' opinions may be addressed in advance of trial by a hearing under Fed. R. Evid. 104;[13] and, if conflicts between the parties' experts on matters of theory become apparent, the court may wish to appoint an expert under Rule 706. See § 21.51.

33.13 Conflicts of Interest.

Attention should be given early in the litigation to possible conflicts of interest that may lead to disqualification of attorneys[14] or the judge. These problems may be acute in antitrust actions brought on behalf of a large class of purchasers because (unless special steps are taken) the identification of class members—which can result in disqualification of the judge under 28 U.S.C. § 455—may not occur until after substantial proceedings have taken place.[15] In such cases, the court may call upon the parties to provide a list of likely class members or may provide the parties with a list of companies in which the judge may have some disqualifying interest.

33.14 Related Proceedings.

Antitrust litigation sometimes involves a number of individual and class actions for damages filed in several federal and state courts, and may involve criminal or administrative proceedings as well. The effect of such parallel or related proceedings must be carefully considered when developing and implementing a management plan for the litigation.

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13. Cf. In re Japanese Elec. Prods. Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983) (reversing exclusion of expert opinion, but approving procedure of considering objections to such evidence before trial), cert. granted, 105 S. Ct. 1863 (1985).

14. See, e.g., Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978).

15. See In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir. 1982), aff'd under 28 U.S.C. § 1297 sub nom., Arizona v. United States District Court, 459 U.S. 1191 (1983).

Recognizing the desirability of centralized management, the Judicial Panel on Multidistrict Litigation has regularly transferred antitrust cases for pretrial purposes under 28 U.S.C. § 1407, often selecting as the transferee court the district in which criminal proceedings have been brought or in which a civil action by the United States is pending.[16] Cases instituted in a state court may sometimes be removed to federal court and then included in the multidistrict proceedings.[17] If centralized management of the entire litigation is impossible or impractical, the affected courts should nevertheless attempt to coordinate proceedings through procedures such as those described in §§ 20.123 and 31.13.[18]

Special problems are presented when conduct that is the basis for civil antitrust claims is also the subject of criminal or administrative proceedings.[19] The criminal charges should ordinarily be tried first, not only because of the requirements of the Speedy Trial Act but also because of disruptions in the normal discovery processes

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16. The Panel is not authorized to transfer criminal cases or civil antitrust actions brought by the United States. 28 U.S.C. § 1407(g).

17. Antitrust claims are being brought with increasing frequency under special state laws that allow damages based on indirect purchases or provide a measure of damages that in some cases is more favorable than treble damages under the Clayton Act. Sometimes these claims are made in state court with an express disavowal of any claim under federal laws, often in an effort to avoid removal and subsequent joinder in multidistrict proceedings. Whether such cases are subject to removal is not clear. Compare Federated Dep't Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981) (reaching merits of defense in antitrust action removed from state court), with In re Sugar Antitrust Litigation, 588 F.2d 1270 (9th Cir. 1978) (remanding indirect purchaser claims), cert. denied, 441 U.S. 932 (1979).

18. Injunctions against the maintenance of parallel actions are rarely permissible as a means for avoiding conflicts. See § 31.32.

19. Indeed, disclosure of a criminal or administrative investigation frequently triggers the filing of civil actions.

caused by Fifth Amendment claims.[20] See § 31.2. However, a general stay of all activities in the civil litigation pending completion of the criminal case will rarely be appropriate.[21] Similarly, although a decision by the Federal Trade Commission or some other agency may narrow the issues or reduce the scope of discovery,[22] the court should carefully weigh the rights and interests of all parties before deciding to defer any of the proceedings in the civil actions.

33.2 MASS DISASTERS AND OTHER COMPLEX TORT CASES.[23]

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For several decades courts have used techniques described in the Manual to resolve multiple claims resulting from a mass disaster such as a fire or aircraft crash. More recently, judges and attorneys have found that special procedures may be needed to cope with other complex tort cases, particularly those involving numerous claims for

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20. Of course, completion of the criminal case will not necessarily result in access to relevant evidence. See Pillsbury Co. v. Conboy, 459 U.S. 248 (1983). As to whether an inference may be drawn from the claim of the privilege in civil proceedings, see Brink's, Inc. v. New York, 717 F.2d 700, 707 (2d Cir. 1983).

21. See Landis v. North American Co., 299 U.S. 248, 254-55 (1936); Texaco, Inc. v. Borda, 383 F.2d 607 (3d Cir. 1967).

22. For example, enforcement proceedings may result in collateral estoppel. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Moreover, the findings of an agency may be admissible under Fed. R. Evid. 803(8)(C), perhaps eliminating the need for discovery on such facts. See, e.g., In re Japanese Elec. Prods. Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1985); In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981), cert. dismissed, 462 U.S. 1125 (1983).

23. Reference: MCL 1.51, 1.52.

compensatory or punitive damages arising from discrete, though similar, uses of (or exposures to) one or more widely distributed products, perhaps over a period of time.[24]

Management of such litigation may be complicated by many factors. Numerous cases, often with multiple plaintiffs[25] and defendants, may be filed in several courts, both federal and state. The cases may be governed by different state laws regarding such issues as liability, the measure of compensatory damages, the standards for award of punitive damages,[26] the statute of limitations, and rights of contribution or indemnification. Conflicts among the defendants are sometimes even more pronounced than their disagreements with the plaintiffs, and third-party complaints may be successively filed to join additional parties. Highly technical expert testimony may be needed, and (unless required by the court) these experts will rarely be willing to express their opinions in "final" form prior to trial. Consolidation of separate cases for joint trial in their entirety may not be feasible because of individualized disputes on causation and damages. If the available funds are insufficient to cover all claims, the plaintiffs may compete with one another to obtain an early trial or settlement.

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24. The comments and suggestions contained in this section also apply in general to complex environmental cases that may be brought for injunctive relief, penalties, or damages under federal or state law.

25. Complaints with hundreds, or even thousands, of named plaintiffs are sometimes filed, due in part to the reluctance of courts to certify classes in these cases.

26. Compare, e.g., Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036 (5th Cir. 1984) (under Texas law, punitive damages may be successively awarded to each plaintiff in multiple products liability litigation), cert. denied, 105 S. Ct. 1749-50 (1985), with Jackson v. Johns-Manville Sales Corp., 757 F.2d 614 (5th Cir. 1985) (certifying to Mississippi Supreme Court question as to whether under state law punitive damages permissible in multiple tort litigation).

33.21 Centralized Management.

All related litigation pending in the same court, including actions regarding insurance coverage, suits for indemnification, and adversary proceedings in bankruptcy,[27] should ordinarily be assigned at least initially to the same judge.[28] Similarly, if several cases are remanded to a transferor court for trial after a period of multidistrict supervision under 28 U.S.C. § 1407, they should all be referred to one judge to coordinate such further discovery as may be needed and to determine the most appropriate structure for trial.

The duration of unitary judicial supervision will depend on the circumstances of the litigation. After a period of centralized management, the court may conclude that the trial of some issues—for example, disputes over insurance coverage—may be conducted just as efficiently by another judge. The judge may determine that separate trials of each of the constituent actions will be needed and that, because of the number of such cases, they should be reassigned among the several judges of the court after common discovery has been completed.

Multiple tort litigation frequently involves cases in several courts, federal and state. Even if multidistrict treatment of the federal cases under 28 U.S.C. § 1407 is possible,[29] cases may be filed in state courts that cannot be removed and transferred

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27. References to Bankruptcy Judges of proceedings to determine the dischargeability of tort claims may also be withdrawn by the district court and assigned to the judge supervising the underlying claims. The court may also decide to defer transfer of multiple claims for personal injury or wrongful death under 28 U.S.C. § 157(c)(5) until after a period of centralized pretrial management.

28. Supervision of all cases by one judge not only provides centralized management of the cases pending in that court, but also facilitates coordination with other courts.

29. The Judicial Panel on Multidistrict Litigation has frequently transferred tort cases for centralized pretrial management. See, e.g., In re Swine Flu Immunization Prod. Liability Litigation, 464 F. Supp. 949 (J.P.M.D.L. 1979); In re A. H. Robins Co. "Dalkon Shield" IUD Prod. Liability Litigation, 406 F. Supp. 540 (J.P.M.D.L. 1975). On other occasions, however, the Panel has concluded that multidistrict centralization was not warranted. See, e.g., In re Asbestos & Asbestos Insulation Material Prod. Liability Litigation, 431 F. Supp. 906 (J.P.M.D.L. 1977).

or cases may be filed in or removed to federal court so late that transfer is not merited. The judges involved should, nevertheless, attempt to avoid unnecessary conflicts and coordinate the proceedings to the extent possible. Appointment of the same attorneys in all courts to act as lead counsel or of the same person to act as special master will sometimes be feasible, as may the convening of joint pretrial conferences by two or more of the courts. For a discussion of various techniques that may be considered, see §§ 31.13 and 31.31.

33.22 Organization of Counsel.

Several factors may affect efforts to coordinate the attorneys' activities through appointment of lead counsel and committees. Lawyers representing the plaintiffs in such cases may be unaccustomed to working as part of a litigation team; often they have highly individualistic styles and very different approaches towards the conduct of discovery and trial.[30] Conflicts in the legal and strategic positions of the defendants, which may not necessarily be manifested through formal cross-claims and third-party complaints, may make appointment of lead counsel for them impractical.

While complicating the arrangements, these considerations also increase the need for such coordination among attorneys as is feasible under the circumstances and for judicial involvement in organizing counsel for efficient conduct of the litigation. The court may designate one or more attorneys for the plaintiffs to present motions and arguments during centralized pretrial proceedings and to conduct common discovery from

30. Cooperation among plaintiffs' counsel through formation of associations to share discovery materials, technical studies, and legal research is, however, increasingly common in major mass tort litigation. Through such efforts, the time and expense of discovery in individual cases can be substantially reduced. Protective orders covering confidential information obtained during discovery in one case may be drafted to enable disclosure to attorneys for use in the other related cases, subject to appropriate restrictions precluding use or disclosure for non-litigation purposes.

the defendants and third parties.[31] Disagreements among defendants may not prevent designation of an attorney to act as their liaison counsel in distributing documents from the plaintiffs and from the court, and such defendants may also be required to develop joint discovery requests. See §§ 20.22, 21.422.

33.23 Parties and Issues.

New Parties. Management of many complex tort cases is complicated by the possibility that new parties may be added over an extended period of time. As discovery progresses, additional defendants may be joined by amendments to plaintiffs' complaints or by a succession of third-party complaints. Moreover, new actions may be commenced over a period of many years, particularly in products liability litigation and in cases with lengthy statutes of limitations or in which such statutes are tolled.

Pursuant to Fed. R. Civ. P. 16(b)(1), the court should establish at the initial pretrial conference a schedule for joinder of additional parties and amendment of pleadings. The parties should be afforded a reasonable period of time, ordinarily including an opportunity for discovery, before the deadline for adding parties or amending their pleadings, and the schedule may be modified "upon a showing of good cause." Fed. R. Civ. P. 16(b). The order may establish tentatively the period for later-added parties to join further parties—for example, sixty days after they are served—subject to their right to seek additional time.

Discovery should not ordinarily be postponed until all parties have been joined; indeed, some discovery often will be needed before all potential parties can be identified.

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31. The cost of these services may be apportioned among all plaintiffs. See In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977). Once made aware of the court's powers, counsel have usually been able to agree on an equitable method for making such payments, either by establishing a fund through advance assessments or by periodic billings. Contributions may be required from parties subsequently settling and from those in later-filed cases. See § 20.223; In re Swine Flu Immunization Prod. Liability Litigation, 89 F.R.D. 695 (D.D.C. 1981); cf. Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977) (improper to assess persons settling before appointment of lead counsel or without filing suit).

interrogatories may be served on the existing parties; their answers will be available to, and usable by, any parties later added to the litigation. Similarly, new parties may use documents produced in response to requests by others and be afforded access to document depositories that may have been established. To facilitate the use of depositions against those who may subsequently be made parties, the court may institute special procedures such as those described in § 21.453.

Master File; "Deemed" Pleadings. Particularly if the litigation will involve a number of actions filed, removed, or transferred over a period of time, the court should consider establishing a master file with standard pleadings, motions, and orders. See Sample Order § 41.52. Answers, third-party complaints, and motions contained in the master file may be "deemed" automatically filed in each new case to the extent applicable. See § 21.32. Similarly, rulings already made by the court on motions under Fed. R. Civ. P. 12 and 56 may also be deemed applicable in the new cases, as may a pretrial order establishing a standard plan and schedule for discovery. These procedures will expedite proceedings in the later-filed cases, while preserving the parties' rights to claim error from adverse rulings. The parties should not, however, be precluded from presenting special issues or requests in individual cases by supplemental pleadings, motions, and arguments.

Managing the Issues. Identification of the issues—and, indeed, of the law, statutory or decisional, that governs such issues—is of major importance in developing a plan for the efficient resolution of complex tort litigation. Multiple tort cases frequently involve claims and defenses asserted under various federal and state laws. Differences in the substantive law governing liability and damages may substantially affect discovery, trial, and settlement.

Many of the legal issues may be resolved, including appellate review, relatively early in the litigation. Appellate courts have, for example, accepted interlocutory appeals under 28 U.S.C. § 1292(b) of such questions as whether claims were cognizable

under federal common law,[32] were barred by the statute of limitations,[33] or were governed by collateral estoppel.[34] Major disputes over insurance coverage, which can frustrate management of the underlying claims, may also merit early attention and appellate review.[35] Particularly in actions brought as a result of some mass disaster, the court may find upon analysis of the applicable choice-of-law rules[36] that the same law governs all cases, thereby facilitating trial or settlement.[37] Interlocutory certifications of questions to state courts may also be feasible. See § 25.1.

Cases may frequently be consolidated for pretrial proceedings, and even for trial, notwithstanding some differences in the applicable substantive law. The evidence on liability that will be sought during discovery and presented at trial is often the same, for example, whether claims are premised on negligence, breach of warranty, or strict liability. Jurors in a single trial may be asked to resolve by special verdict such questions as whether a product was negligently designed or manufactured, whether it was reasonably suited for its intended use, whether it presented an unreasonable danger

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32. See In re "Agent Orange" Prod. Liability Litigation, 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981).

33. See Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983).

34. See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982); Ezagui v. Dow Chemical Corp, 598 F.2d 727 (2d Cir. 1979).

35. See, e.g., Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981) (appeal under 28 U.S.C. § 1292(b)), cert. denied, 455 U.S. 1007 (1982).

36. In diversity cases, the federal court must apply state choice-of-law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). In a case transferred on the motion of the defendant, the transferee court applies the choice-of-law rules of the state in which the transferor court sits. Van Dusen v. Barrack, 376 U.S. 612 (1964). The rule of Van Dusen has been held also applicable after a transfer on the plaintiff's motion if the transferor court had jurisdiction over the defendants. See, e.g., Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, 689 F.2d 982 (11th Cir. 1982); Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980).

37. See, e.g., In re Air Crash Disaster near Chicago, Ill., 644 F.2d 594 (7th Cir. 1981) (punitive damages), cert. denied, 454 U.S. 878 (1981); In re Air Crash Disaster near Chicago, Ill., 644 F.2d 633 (7th Cir. 1981) (pre-judgment interest).

to consumers, and whether adequate warnings were given about its use. Differences in the defenses and the measure of damages should create no major problems during discovery; these issues may frequently be tried to separate juries under Fed. R. Civ. P. 42(b) after a joint trial on those liability issues that are based on common evidence.[38]

Nevertheless, the court may conclude for a variety of reasons that consolidated trial of tort cases, even on issues relating to the defendants' liability, is not desirable. In such cases, the judge may decide that some disputes regarding the applicable law should be deferred until trial, particularly if the cases are to be remanded or transferred to other courts.

33.24 Class Actions.[39]

Heeding the caveat of the Advisory Commitee,[40] courts historically have been reluctant to authorize class action treatment of personal injury claims arising from a mass disaster or from discrete uses of, or exposure to, a product at different locations and times. Nevertheless, use of Rule 23 is not necessarily impermissible in all mass tort litigation. Courts have only recently begun to consider the propriety of forming a class under Rule 23(b)(1) and (b)(2) in the mass tort context on the theory that a single award of punitive damages is appropriate or that the claims greatly exceed the funds available. The law is evolving as to whether and when mandatory class certification

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38. State laws that preclude bifurcation of liability and damages are considered essentially procedural and not binding on federal courts in diversity actions. Rosales v. Honda Motor Co., 726 F.2d 259 (5th Cir. 1984). However, punitive damage claims must ordinarily be tried to the same jury that determines the culpability of the defendants. See § 21.632.

39. Reference: MCL 1.51.

40. "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages, but also of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Notes of Advisory Committee, 39 F.R.D. 69, 103 (1966).

is appropriate in multiple tort litigation.[41] Formation of a (b)(3) class may also be appropriate,[42] particularly if major questions regarding the defendants' culpability may be tried on behalf of the class under Rule 42(b).[43] Accordingly, careful consideration should be given to the propriety of class certification in mass tort litigation.

33.25 Discovery.[44]

Discovery in complex tort cases frequently has two distinct dimensions: that involving the conduct of the defendants and that relating to the individual plaintiffs' activities and injuries. Sometimes—particularly in multidistrict litigation—the court directs that discovery first be conducted regarding those matters that bear on the defendants' liability to all plaintiffs,[45] deferring discovery into the details of each

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41. Compare In re Bendectin Prods. Liability Litigation, 749 F.2d 300 (6th Cir. 1984); In re Northern Dist. of Cal., Dalkon Shield IUD Prod. Liability Litigation, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U. S. 988 (1982), with In re Agent Orange Prod. Liability Litigation, 100 F.R.D. 715 (E.D.N.Y. 1983), petition for mandamus denied sub nom. In re Diamond Shamrock Chem. Co., 725 F.2d 858 (2d Cir.), cert. denied sub nom. In re Diamond Shamrock Chem. Co. v. Ryan, 104 S. Ct. 1417 (1984).

42. In the Bendectin Prods. Liability Litigation the Sixth Circuit stated that a class action could be authorized under Rule 23(b)(1)(B) upon proper proof of the insufficiency of funds to satisfy potential judgments, 749 F.2d at 305; in the Dalkon Shield decision, the Ninth Circuit indicated that a more limited class under Rule 23(b)(3) than that certified by the district court might be appropriate, 693 F.2d at 856; in the Federal Skywalk Cases the district court certified a Rule 23(b)(3) class after its reversal on the (b)(1) class, 95 F.R.D. 483 (W.D. Mo. 1982); and in Agent Orange the district court certified an opt-out class for compensatory damages at the same time that a mandatory class was certified for punitive damages.

43. See, e.g., Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982); Pruitt v. Allied Chem. Corp., 85 F.R.D. 100 (E.D. Va. 1980); cf. Payton v. Abbott Laboratories, 83 F.R.D. 382 (D. Mass. 1979), vacated, 100 F.R.D. 336 (D. Mass. 1983). The court may wish to consider authorizing the class under Rule 23(c)(4)(A) only for particular issues. However, the propriety of class certification for only certain issues of liability is unclear. See Alabama v. Blue Bird Body Co., 573 F.2d 309, 329 (5th Cir. 1978).

44. Reference: MCL 1.51, 1.52.

45. Videotaping of depositions is particularly useful in multidistrict litigation as a means of recording the testimony of key witnesses for effective presentation at trials in the transferor courts after remand of the proceedings.

plaintiff's unique claims. In other cases, however, recognizing the need to obtain such information for settlement purposes, the court may conclude that discovery from the plaintiffs regarding their claims should be conducted concurrently with, or even preceding, discovery from the defendants.[46]

The court should not permit duplicative discovery requests. A party's answers to interrogatories will be usable by all other litigants; therefore, once having answered an interrogatory, a party should be asked by others only supplemental questions. Indeed, many judges require that the plaintiffs jointly develop a single set of interrogatories to be propounded to each defendant and that the defendants similarly develop a standard set of interrogatories and document requests to be served on each plaintiff.[47] The court may order that these standard discovery requests be considered to have been automatically filed as new parties are joined or new actions filed. The court should also consider the desirability of establishing document depositories, instituting procedures to facilitate the use of depositions against parties later added to the litigation, and providing counsel in related cases in other courts with access to relevant confidential materials covered by terms of any protective orders. See §§ 21.453, 33.23. Depositions on written questions under Fed. R. Civ. P. 31 may in some circumstances be preferable to interrogatories because the deponents' answers can be used by and against all parties.

At the initial conference the court should ascertain from the parties what information may be available as a result of governmental investigations. Reports from the National Transportation Safety Board or the Federal Aviation Administration may serve as "first wave" discovery to identify witnesses and documents; and findings of an

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46. Interrogatories inquiring into the extent of the plaintiffs' damages may be useful early in the litigation even if depositions of the plaintiffs are to be delayed. Answers to such interrogatories may be prepared without disrupting the schedule for discovery from the defendants, and may be a valuable starting point for settlement discussions.

47. Alternative forms of interrogatories may be drafted by the defendants if the measure of damages is different for various plaintiffs.

agency, if admissible under Fed. R. Evid. 803(8)(C), may substantially reduce the need for discovery on some of the substantive issues in the case. See § 21.482. Before approving the discovery plan, the judge should also ascertain the extent to which discovery materials—interrogatories, documents, and depositions—may be available as a result of litigation in other courts. See § 21.422.

Expert opinions play a vital role in many complex tort cases, both during the discovery process and at trial. The court should ordinarily establish early in the litigation a schedule for disclosure of these opinions in the form of a written report and for deposing the experts. See § 21.481. A deadline for the experts' "final" opinions may be needed to avoid the confusion that often results if opinions are altered as trial approaches. After reviewing the reports from the parties' experts, the court may conclude that an independent expert should be appointed under Fed. R. Evid. 706.

33.26 Trial.

A single trial of all issues is rarely feasible in multiple tort litigation. However, issues relating to the culpability of the defendants often may be constitutionally severed under Fed. R. Civ. P. 42(b) from issues relating to causation or damages[48] and then consolidated under Rule 42(a) for a joint trial. See § 33.23. For a discussion of some of the techniques that may be useful in such a trial, see § 22.22. Another approach is the "bellwether" trial, in which a typical case is tried in its entirety: a few such trials, with the juries responding by special verdicts or interrogatories under Rule 49, may establish a basis for settling the other cases or narrowing the remaining liability issues on principles of collateral estoppel.[49]

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48. State laws precluding bifurcation may not be binding upon the federal courts. See Rosales v. Honda Motor Co., 726 F.2d 259 (5th Cir. 1984).

49. Compare Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979) (defendant precluded in second trial from contesting inadequacy of warning), with Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982) (defendant not collaterally estopped under circumstances of case).

33.27 Settlement.

Attempts to settle mass tort cases are frequently complicated by conflicts among the defendants and by difficulties in evaluating the claims of the various plaintiffs, particularly when they are governed by different substantive laws.[50] Nevertheless, by using a variety of innovative techniques counsel have, with the assistance of the courts, resolved many multiple tort cases by settlement. See § 23.12.

The parties should attempt to achieve, to the extent feasible, a "global" settlement, resolving not only the defendants' potential liability to the plaintiffs, but also their liability to one another on theories of indemnification or contribution.[51] To supplement direct negotiations between the attorneys, the court may enlist the services of other judges or appoint one or more special masters to assist defendants' counsel in evaluating their potential liabilities and to aid plaintiffs' counsel in assessing the merits and settlement values of their respective claims.[52] By carefully reviewing the evidence of damages sustained by each plaintiff, plaintiffs' counsel will often be able to agree among themselves on a confidential basis on an appropriate settlement value for each such claim. In the aggregate, these values may be used as a basis for settlement negotiations with the defendants, and, by agreement, may also be used to allocate funds that are accepted in any global settlements.

If resolution of the entire litigation through a single settlement cannot be obtained, partial settlements—by some defendants with all plaintiffs, by all defendants with some plaintiffs, or by some defendants with some plaintiffs—should be explored. These settlements may reduce the scope of discovery or trial and will often lead to

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50. In some cases, moreover, the potential exposure of one or more of the defendants may greatly exceed their resources.

51. Another alternative is for the defendants to agree to contribute specified amounts to a settlement fund, while reserving the right to litigate their respective obligations to one another.

52. See In re MGM Grand Fire Hotel Litigation, 570 F. Supp. 913 (D. Nev. 1983).

further settlements. If all other efforts fail, the parties may be able to resolve major portions of the litigation through a series of case-by-case, party-by-party, settlements.[53] The court may also explore, particularly in cases in which only compensatory damages are allowable, the possibility of the defendants' conceding liability, leaving for trial only questions regarding the damages sustained by individual plaintiffs.

A method widely used in settlement of individual tort cases—the "structured settlement"—has on occasion been successful in resolving multiple tort cases. Under this approach, a portion of the settlement funds is set aside, often through purchase of an annuity or the funding of a trust, to pay future benefits to the plaintiffs, depending on such factors as medical expenses and lost earnings after the date of the settlement.[54] Similarly, if the defendants are concerned about the possibility of actions instituted after the settlement—for example, by minors with respect to whom the statutes of limitations may be tolled--some of the settlement funds may be reserved on a contingent basis for such claims.[55]

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53. The court should consider requiring that some specified amount or percentage be set aside from such settlements to compensate plaintiffs' lead counsel and steering committees for their services on behalf of all plaintiffs. See In re Swine Flu Immunization Prod. Liability Litigation, 89 F.R.D. 695 (D.D.C. 1980); cf. Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977).

54. Cf. Friends for All Children, Inc. v. Lockheed Aircraft Corp., 87 F.R.D. 560 (D.D.C. 1980) (preliminary injunction requiring defendant that had conceded liability to provide funds for certain diagnostic, treatment, and educational services for plaintiffs pending trial).

55. See In re MGM Grand Fire Hotel Litigation, 570 F. Supp. 913 (D. Nev. 1983).

33.3 SECURITIES LITIGATION.

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Cases claiming securities fraud under federal and state laws present many of the same problems that arise in mass disasters and other forms of complex tort litigation. The comments contained in § 33.2 should, therefore, be consulted in conjunction with the suggestions made in this section.

33.31 Coordination.

At the initial conference, the court should ascertain the extent and status of all related litigation and inquire into the possibility that new cases may be filed. In addition to privately-instituted individual and class actions, suits may be filed by the Securities and Exchange Commission or state administrative agencies. Frequently one or more of the parties will be a debtor in bankruptcy, which may result in automatic stays, removal of cases, related adversary proceedings, and objections to the discharge of debts. Separate actions regarding fidelity bonds and other insurance coverage are common. Suits may also be brought to prevent foreclosure of security interests.

All related litigation pending in the same court, including pertinent aspects of bankruptcy proceedings,[56] should ordinarily be assigned or transferred to one judge for initial supervision and preliminary planning. The extent to which the cases should be formally consolidated for further pretrial proceedings and trial will depend on the circumstances; and, after a period of centralized management, some cases may be appropriately reassigned to other judges of the court for further proceedings and trial.

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56. See, e.g., In re Flight Trans. Corp. Sec. Litigation, 730 F.2d 1128 (8th Cir. 1984), cert. denied, 105 S. Ct. 1169 (1985).

Because the conduct challenged in securities fraud litigation often affects persons in many states, similar—and occasionally competing or conflicting—cases may be filed in a number of courts. Centralized pretrial management of the federal litigation has frequently been effected through transfers by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407.[57] If cases remain in different courts, the judges should attempt to coordinate, formally or informally, the proceedings and to avoid unnecessary conflicts. If one court authorizes an action to proceed derivatively under Fed. R. Civ. P. 23.1 or on behalf of a class under Rule 23, especially one certified under Rule 23(b)(1) or (b)(2), other courts may conclude that a deferral of proceedings involving similar issues is justified. Similarly, the judges may, after consultation with counsel, determine that one of the cases may appropriately serve as the "lead case" for purposes of discovery or trial.[58] For other techniques of coordination, see §§ 31.13, 31.31.

Conflicts between the defendants, which are often (though not always) manifested by cross-claims and third-party complaints, may complicate efforts to coordinate the activities of counsel. The legal positions of different groups of plaintiffs may also conflict. See § 33.33. Nevertheless, in litigation with many parties and attorneys, the court should usually designate liaison counsel and may conclude that the appointment of lead counsel or committees is also feasible, subject to the right of parties to act independently on matters in which their interests are not compatible. See § 20.22.

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57. E.g., In re Washington Public Power Supply Sys. Sec. Litigation, 568 F. Supp. 1250 (J.P.M.D.L. 1983); In re National Student Mktg. Litigation, 368 F. Supp. 1311 (J.P.M.D.L. 1973); In re Glenn W. Turner Enter. Litigation, 355 F. Supp. 1402 (J.P.M.D.L. 1973).

58. The first case, even if resolved by a non-jury trial, may result in collateral estoppel. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (defendant precluded by adverse decision in proceeding brought by SEC from relitigating the question of whether proxy statement was misleading).

33.32 Issues.

Pleadings. Complaints in securities fraud cases typically assert numerous claims under federal statutes,[59] state statutes, and common law against a variety of defendants, including the company whose securities are involved, its officers and directors, independent accountants and attorneys, and brokerage firms. Given the requirement for particularity of pleading under Fed. R. Civ. P. 9(b),[60] these complaints may be lengthy.[61] Defendants frequently need substantial time to respond to the complaint and to decide whether to file counterclaims, cross-claims, and third-party complaints. Moreover, after a short period of discovery, the plaintiffs may be willing to dismiss many of the claims and defendants.[62]

For these reasons, the judge should consider entering an order immediately after assignment of the litigation that suspends the time for all defendants to respond to the complaint. At the initial conference, the court should, after consulting with counsel, establish a schedule for filing such motions and pleadings. The judge may decide to suspend the time for filing some motions and pleadings until after the plaintiffs, following

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59. In addition to claims under the 1933 and 1934 Acts, plaintiffs with increasing frequency are including charges under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1965 (1976). See, e.g., Wilcox Development Co. v. First Interstate Bank, 97 F.R.D. 440 (D. Or. 1983) (denying class claims for RICO violation); Friedlander v. Nims, 571 F. Supp. 1188 (N.D. Ga. 1983) (certifying class claims for RICO violation).

60. See Christidis v. First Pennsylvania Mtg. Trust, 717 F.2d 96 (3d Cir. 1983); Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972).

61. But see Gordon v. Green, 602 F.2d 743 (5th Cir. 1979) (fraud complaint of more than 4,000 pages violative of Rule 8 and dismissed with leave to file proper complaint).

62. Although often criticized, the breadth of pleading in securities cases may, at least in part, be explained not only by the requirements of Rule 9 but also by uncertainty as to culpability of the possible defendants and relatively short statutes of limitations. Nevertheless, serious questions concerning compliance with Rule 11 may be raised with regard to some complaints, and, particularly if claims are pursued after discovery establishes their lack of merit, sanctions under that rule or 28 U.S.C. § 1927 may be warranted. See also Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972) (rules of pleading not intended to permit filing of complaint to discover whether cause of action exists).

a period of discovery, have filed an amended complaint.[63] A single consolidated complaint may be appropriate if several cases have been filed.[64] Ordinarily the court should also set a deadline after which new claims, defenses, and parties may be added only upon a showing of good cause. In deciding upon an appropriate schedule for filing and refining the pleadings, the court should weigh the desirability of early identification of the issues against the possibility that pleadings filed too soon may be imprecise and overly broad or may need to be amended later as a result of information obtained during discovery.

Defining and Narrowing the Issues. As soon as they may fairly be asked to do so, however, the judge should call on the parties to define and clarify the issues, using techniques such as those described in § 21.33. Among the many issues that may be susceptible to early resolution under Fed. R. Civ. P. 12 or 56 are the following: whether an interest constitutes a security or is exempt from registration;[65] whether a claim is barred by the statute of limitations;[66] whether an omission from a proxy statement is material;[67] whether a demand must be made on the directors;[68] whether a suit may be dismissed or compromised by the directors under the "business judgment" rule;[69] whether

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63. Of course, the order should not preclude pleadings that must be filed because of problems with statutes of limitations.

64. See, e.g., In re LTV Sec. Litigation, 88 F.R.D. 134 (N.D. Tex. 1980).

65. See, e.g., SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635 (9th Cir. 1969).

66. See, e.g., Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976).

67. See, e.g., SEC v. Research Automation Corp., 585 F.2d 31 (2d Cir. 1978).

68. See, e.g., Daily Income Fund, Inc. v. Fox, 104 S. Ct. 831 (1984).

69. See, e.g., Joy v. North, 692 F.2d 880 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983); Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49 (5th Cir. 1980), cert. denied, 450 U.S. 1029 (1981); Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979), cert. denied, 444 U.S. 1017 (1980), Zapata Corp. v. Maldanado, 430 A.2d 779 (Del. 1981).

a "controlling person" is liable;[70] and when a "purchase" occurred.[71] In addition, many controversies—for example, whether the plaintiffs may proceed on the theory of a "fraud on the market"[72]—will be important in deciding whether individual cases may be efficiently consolidated for joint trial or whether a case should proceed as a class action.[73]

33.33 Class and Derivative Actions.

At the initial conference the court should set a schedule for determining whether one or more of the cases should proceed as a class action under Fed. R. Civ. P. 23 or a derivative action under Rule 23.1. Although the comments contained in § 30—including the desirability of an early determination of these questions—are generally applicable and should be consulted, in securities litigation some clarification of the issues and discovery on the merits of the case will often be needed before these decisions should be made. Discovery from the representative parties (and even from some members of the putative class) may also be warranted, although the court should assure that such discovery is appropriately limited and not used to harass. See §§ 30.12, 30.233.

Class Definition. The initial complaint will occasionally include some claims—for example, reliance upon oral misrepresentations or the breach of a "suitability" standard--that rarely would be susceptible to class action treatment, while including other claims—such as an omission of a material fact from a proxy statement—that may well be presented on behalf of a class. The dates when the plaintiffs bought or sold

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70. See, e.g., Carpenter v. Harris, Upham & Co., 594 F.2d 388 (4th Cir.), cert. denied, 444 U.S. 868 (1979); Zweig v. Hearst Corp., 521 F.2d 1129 (9th Cir.), cert. denied, 423 U.S. 1025 (1975).

71. See, e.g., Freeman v. Decio, 584 F.2d 186 (7th Cir. 1978).

72. See, e.g., Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (en banc), cert. denied, 459 U.S. 1102 (1983); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975).

73. See, e.g., In re LTV Sec. Litigation, 88 F.R.D. 134 (N.D. Tex. 1980). See also § 33.33.

the securities, and what information they had on those dates, may not be clear from the complaint, yet be critical to a decision regarding the class of persons they might properly represent.[74] Whether the plaintiffs are able to proceed on the theory of a "fraud on the market" may depend both on matters developed during discovery and on what claims will be pursued in the case. See § 33.32. The court may sometimes need to decide whether a particular claim is made derivatively or individually[75] and whether the same plaintiff may assert both a derivative claim and a class claim.[76]

In deciding whether a class should be certified, what class the plaintiffs may represent, and whether multiple classes or subclasses should be formed, the court may be called upon to consider potential conflicts between holders of different classes of securities,[77] between those who took some action and those who did not,[78] between those who sold before an alleged disclosure and those who sold after the disclosure (or did not sell at all),[79] between those who had inside information and those who did

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74. Cf. General Tel. Co. v. Falcon, 457 U.S. 147 (1982) (in employment discrimination case, as in other litigation, class representative must be part of class, possessing the same interest and suffering the same injury as other members of the class).

75. See, e.g., Daily Income Fund, Inc. v. Fox, 104 S. Ct. 831 (1984); King v. Kansas City Southern Ind., Inc., 519 F.2d 20 (7th Cir. 1975).

76. Compare Ruggiero v. American Bioculture, Inc., 56 F.R.D. 93 (S.D.N.Y. 1972) with Bertozzi v. King Louie Int'l, Inc., 420 F. Supp. 1166 (D.R.I. 1976). The determination whether derivative and class claims conflict may sometimes be deferred pending further developments in the case.

77. See, e.g., Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480 (E.D. Pa. 1977) (stock versus debentures).

78. See, e.g., Cole v. Schenley Industries, Inc., 60 F.R.D. 81 (S.D.N.Y. 1973) (those who sold versus those who did not); Pomierski v. W. R. Grace & Co., 282 F. Supp. 395 (N.D. Ill. 1967) (warrant holders who exercised option versus those who did not).

79. See, e.g., In re LTV Sec. Litigation, 88 F.R.D. 134 (N.D. Tex. 1980).

not,[80] between those who purchased at different times based on different information,[81] and between those who seek different relief.[82]

Such differences in the situations of various groups of plaintiffs and putative class members are often emphasized by defendants in opposing class action treatment, and are sometimes sufficiently significant to justify the court's refusal to certify any class. Frequently, however, these conflicts, if real, may be resolved by appropriately limiting the scope of the class or classes which the plaintiffs may represent and perhaps by creating additional classes or subclasses. For example, the court may define a class to exclude (or treat as a subclass) those who, as often occurs in complex securities litigation, are also defendants in the class action or in related litigation. If a subclass should be formed and no representative of that subclass is a party, the court may direct notice to the unrepresented class members, giving them time to have a representative intervene.[83] Although, as discussed in § 30.16, unnecessary classes should generally be avoided, in some securities cases multiple classes or subclasses may be needed to assure that the interests of all class members are fairly and adequately protected, particularly during settlement negotiations. For some claims a mandatory class under Fed. R. Civ. P. 23(b)(1) or (b)(2) may be formed, while for other claims a class under Rule 23(b)(3), with the right to opt out, may be more appropriate.[84]

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80. See, e.g., Curtiss-Wright Corp. v. Helfand, 687 F.2d 171 (7th Cir. 1982).

81. See, e.g., Weisberg v. APL Corp., 76 F.R.D. 233 (E.D.N.Y. 1977) (plaintiff cannot represent earlier purchasers); Issen v. GSC Enterprises, 508 F. Supp. 1298 (N.D. Ill. 1981) (plaintiffs cannot represent later purchasers).

82. See, e.g., Tober v. Charnita, Inc., 58 F.R.D. 74 (M.D. Pa. 1973) (recision versus damages).

83. See, e.g., Kamens v. Horizon Corp., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,776 (S.D.N.Y. 1979).

84. The right of a class member to opt out of a (b)(3) class may cure some arguable conflicts, such as whether recision or damages should be sought.

Notices. Absent special circumstances, the class representatives must bear not only the cost of providing notice to the class under Rule 23(c)(2), but also the expense of obtaining the names and addresses of the class members, which frequently are in the possession of the defendants or a transfer agent.[85] When securities are registered in street names with brokerage houses, the assistance of the brokerage houses will be needed.[86] In some cases—for example, a class action on behalf of holders of bearer bonds—the identity of class members may not be ascertainable, and notice by publication in appropriate media will be required.[87] When notice by publication is given, either in lieu of or in addition to individual notice, publications should be used that are likely to be seen by the class members.[88]

33.34 Discovery.

The principles and procedures discussed in § 21.42 for controlling discovery are generally applicable to securities litigation. Ordinarily, plaintiffs' counsel should begin by ascertaining the types and locations of relevant documents and the identities of potential witnesses, and should defer depositions until after these documents have been produced and reviewed. Interrogatories may be useful not only in identifying sources of information but also, if limited in scope, in determining certain transactional and background facts that will narrow the focus of inquiry at the depositions. Discovery from the plaintiffs is often conducted at the same time, particularly if information from both sides will be needed to decide whether the litigation should proceed as a derivative or class action or to assist the parties in discussing settlement.

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85. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

86. See, e.g., In re Penn Central Sec. Litigation, 560 F.2d 1138 (3d Cir. 1977); Lamb v. United Sec. Life Co., 59 F.R.D. 25 (S.D. Iowa 1972). See also § 30.211.

87. See, e.g., Spector v. City of New York, 71 F.R.D. 550 (S.D.N.Y. 1976).

88. See In re U. S. Financial Sec. Litigation, 69 F.R.D. 24 (S.D. Cal. 1975) (notice in overseas publications and foreign language periodicals).

Steps should be taken, especially in multiple litigation, to avoid duplicative discovery, as by requiring that plaintiffs in different cases prepare a single set of interrogatories to be propounded to a particular defendant; and the discovery plans for cases pending in different courts should be coordinated, as by establishing a common document depository and cross-noticing depositions of common witnesses for use in all cases. See generally §§ 31.13, 31.31. The court should ascertain at the initial conference whether claims of the attorney-client privilege are likely to arise during the course of discovery and, if so, whether such claims may be raised and resolved before they have any adverse impact on the discovery schedule.[89] The court should establish early in the litigation a schedule for disclosing expert testimony, § 21.481, and should also adopt procedures to facilitate discovery and use at trial of summaries and computerized data. See §§ 21.446, 21.483. As in other cases, counsel should be expected to stipulate facts not genuinely in controversy and may be required to develop a joint statement of agreed (or uncontroverted) facts such as described in § 21.47.

33.35 Court-Appointed Masters and Experts.

Securities cases frequently present complex factual disputes over matters of accounting, corporate finance, and market analyses. Such disputes sometimes may be appropriately referred to a special master appointed under Fed. R. Civ. P. 53 or to an expert appointed under Fed. R. Evid. 706. Although the possibility of such an appointment may be explored early in the litigation, the court should usually defer its decision until the critical facts have been developed during discovery and the issues have been refined; at that time, and after study of the reports of the parties' experts, the judge is better

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89. Often the attorney-client privilege will not apply because of the relationship of the parties, e.g., Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), because of a defense based on advice of counsel or because of allegations of fraud against the attorney. See In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038-42 (2d Cir. 1984). Nevertheless, the privilege may protect many items sought during discovery, and the parties should understand the requirement for describing these items with the requisite specificity. See § 21.432.

able to decide what issues, if any, should be so referred and to whom. See generally §§ 21.51 and 21.52. The court may also consider using experts or masters to facilitate the discussion, or implementation, of settlement.

33.36 Trial and Settlement.

Procedures for trial and settlement of securities litigation are similar to those described in §§ 33.26, 33.27. Related cases—both class actions and individual suits—may often be consolidated for a joint trial on specified issues, such as the defendants' respective liabilities for alleged misrepresentations and omissions, while leaving for subsequent separate trials other issues, such as the damages and special defenses. In class action trials, the court should ascertain the identity and expected testimony of any class members who may be called as witnesses, either by the plaintiffs or the defendants, and may impose appropriate limits on such testimony under Fed. R. Evid. 403 and 611. See § 21.643. Although the principles and procedures that govern settlements of class actions, as discussed in § 30.4, apply in general to settlements of derivative actions, non-monetary benefits—such as a change in corporate management or policies—may play a more significant role in derivative actions.[90]

33.4 TAKEOVER LITIGATION.

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"Takeover litigation"—actions brought in connection with the attempted acquisition or transfer of control of a corporation by obtaining stock, assets, or stockholder support—presents special problems for the court, counsel, and the parties. Within a few days, several suits and countersuits may be filed in different courts to enjoin or remedy alleged violations of federal antitrust and securities laws and various state statutes.

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90. See Maher v. Zapata Corp., 714 F.2d 436, 461-62 (5th Cir. 1983).

Major decisions must often be made in a few days about complex factual, legal, and economic issues that involve large amounts of money and would ordinarily take many months or even years to resolve. Fortunately, such litigation typically involves only a few parties, and the attorneys employed in such cases frequently are accustomed to working under severe time constraints and other pressures. The court should be aware that the litigants' positions in the judicial proceedings are often influenced by the effect such actions may have outside the courtroom—on shareholders, other potential purchasers, financial institutions, and the news media—and, indeed, that even the timing of hearings and rulings may have strategic importance to the parties.

33.41 Immediate Control and Planning.

As soon as possible after the commencement of takeover litigation—preferably within a day or two after the complaint is filed—the judge should conduct a preliminary conference with counsel.[91] This conference, as well as others during the proceedings, may be held by telephone to accommodate attorneys who are not immediately available for a conference in chambers. The complaint, which typically includes an application for a preliminary injunction, is often also accompanied by a request for a temporary restraining order. In view of the opportunity for a telephone conference, almost never should a TRO—or, indeed, any order in takeover litigation—be granted ex parte.

Among the agenda items that may be appropriate for consideration at this initial conference, whether held in person or by telephone, are the following:

* **preliminary issues.** If serious questions will be raised about standing, personal jurisdiction, venue, or other threshold matters that, if resolved promptly, might eliminate the need for discovery, the court should establish

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91. Plaintiff's counsel will usually know or be able to ascertain the identity of counsel for the defendants. Attorneys for other companies with an interest in the litigation, either as potential intervenors or as parties in related cases, may be requested to participate in the conference. In appropriate circumstances, the court may also invite counsel for governmental enforcement agencies, such as the Securities and Exchange Commission or the Antitrust Division of the Department of Justice.

a schedule for expedited resolution of these issues. The status of other related cases, including times set for hearings, should be ascertained, and plans made to coordinate the proceedings to the extent possible. If jurisdiction and venue will not be contested, the judge should consider requiring the parties to include any related claims that may subsequently arise and enjoining them from instituting new litigation in other courts.[92]

- **date and form of hearing.** Before deciding when to hear the application for a preliminary injunction,[93] the judge should determine whether there is a critical date by which a ruling on the application must be rendered[94] and ascertain from counsel all relevant dates that may affect the litigation, including the time when any statutory waiting periods expire and the dates when significant events (such as a stockholders' meeting or the date on which a competing offeror begins buying shares) are scheduled to occur. The court should obtain counsels' views about the minimum time needed to conduct any essential discovery and the hearing itself. The court may also make a tentative determination as to the form of the hearing—for example, whether the motion will be determined solely on affidavits, depositions (or abstracts or summaries of depositions), and documents, or whether witnesses will be heard in person and, if so, whether their direct testimony will be presented by adoption of prepared statements and reports. See § 22.51.

- **timetables.** Schedules should ordinarily be established for filing responsive pleadings and motions, for conducting essential discovery, for narrowing the issues, and for the next conference. These timetables, which depend upon the date set for the hearing, will usually be substantially truncated from the periods typical in other litigation. For example, the court may require the answer to be incorporated with any motions and filed well before the 20-day period prescribed by Fed. R. Civ. P. 12, and the parties may be directed to serve papers in person rather than by mail.

- **emergency matters.** Pending requests for temporary restraining orders should generally be resolved at this initial conference, and the court should establish a procedure—such as telephonic conference calls or by setting aside a period before or after normal office hours for a conference in

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92. Because of time constraints, multidistrict transfer under 28 U.S.C. § 1407 is rarely feasible. Often, however, transfer of cases to a single district under 28 U.S.C. § 1404 or 1406 may be appropriate; if so, such transfers should be ordered as expeditiously as possible. If the cases remain in separate courts, the judges should confer and attempt to avoid unnecessary conflicts in schedules and rulings.

93. The most significant trial in takeover litigation is usually the hearing on the preliminary injunction. This ruling may moot or resolve further issues. Depending on the date of the hearing, the court may under Fed. R. Civ. P. 65(a)(2) order the trial on the merits to be advanced and consolidated. In some cases the plaintiff may not seek a preliminary injunction if a hearing on a permanent injunction can be held expeditiously.

94. If the deadline for a ruling cannot be met because of requirements of other litigation, such as constraints under the Speedy Trial Act, the court should consider reassignment of the case to another judge.

> person—for attending to other matters that may arise and require an immediate ruling, such as critical discovery disputes that the parties are unable to resolve. The judge should, however, caution the parties that unnecessary "emergency" motions, whose primary purpose is to influence activities in the market, will subject offending counsel or their clients to appropriate sanctions.

The court should consider deferring entry of its order until the market has closed and may enjoin counsel from immediately disseminating the results of the conference if it is concluded earlier in the day.[95] The judge should also be amenable to a revision of the timetables based on suggestions of counsel after they have had the opportunity to discuss the details of the schedule.[96]

Because of the limited time within which discovery and trial must be completed, the judge should, to the extent possible, be personally involved in the management and supervision of takeover litigation. Referral to a magistrate, which may result in critical delays while rulings are appealed, should be avoided.

33.42 Discovery.

The first discovery issue for the court in takeover litigation is whether expedited discovery is necessary. If it is, the judge—guided by the suggestions of counsel—should determine the extent of such discovery. In view of the limited time available for discovery and the intensive involvement of key individuals in other aspects of a contested takeover, the discovery plan generally involves a drastic reduction both in the scope

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95. All orders in takeover litigation involving parties with publicly-traded securities should, to the extent feasible, be announced after the market closes. These rulings may have a substantial impact on the market for the stock of both plaintiffs and defendants, and are sometimes monitored by securities' professionals in an attempt to take immediate action in response to the court proceedings, often to the disadvantage of less sophisticated, but equally affected, shareholders. In unusual situations involving important confidential information, the court may also consider holding certain proceedings in camera or receiving some evidence under seal.

96. The attorneys should ordinarily meet in advance of each conference, seeking through discussion and compromise to narrow, if not eliminate, disagreements on the matters to be considered by the court. If time permits, such a preliminary meeting of counsel should be held before the initial conference; otherwise, the court may, after some discussion, decide to adjourn the conference for a day or two to permit counsel to develop more detailed proposals for management of the case.

of discovery and in the time periods normally applicable for discovery requests and responses.[97] Often counsel will, under the urging of the judge, be able to develop a mutually satisfactory plan for conducting discovery consistent with the general schedule adopted by the court.

The discovery program should usually begin with the production of documents. To facilitate this production a general protective order such as that described in § 21.431 may be entered at the initial conference, limiting disclosure of confidential documents produced by the litigants or obtained from non-parties either informally or under Fed. R. Civ. P. 45.[98] Interrogatories and requests for admissions should be allowed only with leave of the court. Depositions ordinarily are the most appropriate form of discovery in a takeover litigation.[99] Discovery available from related litigation pending in other courts should not be duplicated.

Special problems may arise with respect to expert testimony. If practical, reports from experts should be exchanged sufficiently in advance of the hearing to permit further discovery by deposition. However, the time constraints in takeover litigation may be so severe that the experts will be unable to complete their studies and form

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97. See, e.g., Fed. R. Civ. P. 30(a) (depositions by plaintiff within 30 days of service only with leave of court), Rule 30(e) (30 days for deponent to review deposition), and Rules 33(a) and 34(b) (30 days for plaintiff to respond to interrogatories and document requests; 45 days after service of complaint for defendant to respond).

98. As further protection, these documents may be filed under seal or, pursuant an order under Fed. R. Civ. P. 5(d), exempted from filing. If related litigation is pending in other courts, the judge should reserve the power to make information obtained during discovery in the present case available for the other cases, subject to appropriate safeguards.

99. Though depositions are an important discovery device in takeover litigation, they are also vulnerable to abuse. The court should monitor the deposition process to assure that depositions are not being sought or prolonged for the purpose of harassing key individuals by distracting them from more pressing obligations during the contested takeover. The court should also be wary of requests for unnecessary multiple "track" depositions. In deciding whether to permit several depositions to be conducted at once, the court should consider the time available before the hearing, the parties' need for numerous depositions, and the possibility that simultaneous depositions might prejudice one or more parties with limited litigation resources.

their opinions until shortly before the hearing. Guided by the suggestions of counsel, the court should establish a procedure for discovery of these opinions most appropriate under the circumstances.

Counsel should attempt to resolve, to the extent possible, all discovery disputes without the need for intervention by the court. Efforts to subvert or frustrate the discovery process—such as directing deponents not to answer questions calling for unprivileged information or suggesting answers to deponents in the guise of an objection—merit substantial sanctions by the court. See § 21.456. Overly technical and restrictive interpretations of interrogatories and requests for production should not be countenanced, and objections based on burdensomeness or unavailability should not be made if comparable information in another form can be produced. See § 21.465. Claims of privilege should be accompanied by information sufficiently detailed to enable the court to rule promptly on the dispute. See § 21.432. Cooperation and professionalism on the part of counsel are essential in takeover litigation; the court should be ready to impose sanctions sufficiently onerous to make discovery abuse unprofitable.

33.43 Additional Conferences; Preparation for Trial.

One or two additional conferences will usually be needed before the hearing, each being preceded by a meeting of counsel. The primary purposes of these conferences are to assure that schedules are being met, to narrow or revise the issues based on intervening circumstances (such as an offer being made by another company for the "target" company's stock, with or without its encouragement, or other defensive measures adopted or proposed to be adopted by the "target" company), and to make final preparations for the hearing.

Complaints in takeover litigation frequently include a number of claims that, after further exploration, the plaintiffs will be willing to eliminate, at least for purposes of the preliminary injunction. Similarly, many of the defenses and counterclaims made by the defendants will be abandoned as the hearing date approaches. The court should

encourage the parties to narrow the scope of the case to the most important issues and, indeed, should set a date by which they are to specify those allegations they will press at the hearing.

To enable the court to resolve some issues by summary judgment in advance of the hearing and to reduce the length of the hearing itself, the parties may be required to develop a joint statement of agreed (or uncontested) facts and disputed facts. See § 21.641. Matters that, although not "agreed," will not be controverted, at least on the motion for preliminary injunction, should be taken as established for purposes of the hearing without the need for evidence.

Before the hearing the parties should exchange, simultaneously or sequentially, a list of the witnesses and documents they propose to present in support of their respective versions of the disputed facts. The form by which testimony will be presented—by affidavit;[100] by deposition;[101] by adoption of prepared statements as direct testimony, subject to oral cross-examination;[102] or by the traditional question-and-answer method—should be determined in advance by the court based on the circumstances of the case, including the projected length of the hearing. When witnesses are to be examined orally, a summary of their expected testimony should ordinarily be provided before the hearing. Objections to the admissibility of documents should be deemed waived unless raised within a day or two after receiving the adversary's exhibit

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100. Absent agreement of counsel waiving hearsay objections, affidavits should not generally be used if, under Fed. R. Civ. P. 65(a)(2), the trial on the merits is advanced for consolidation with the hearing on the preliminary injunction or the matters presented at the hearing will used as evidence on a later trial on the merits.

101. Pertinent abstracts (or agreed summaries) of depositions should be used whenever practical. See § 22.332.

102. See § 22.51.

list; and, indeed, the parties should ordinarily not insist on authentication, production of originals, or foundation evidence for business records.[103]

Briefs on the legal issues should be filed before the hearing is completed, preferably several days before it begins. Inclusion in the briefs of suggested findings of fact and conclusions of law, as well as a proposed order, may be especially useful in view of the need for an immediate decision. To the extent practical, the court should announce its ruling from the bench following the presentation of evidence and arguments and, because an immediate appeal may be taken, should dictate into the record the essential findings and conclusions on which this decision is based. More detailed findings and conclusions, if needed, may be entered within the next few days.

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103. If necessary, a telephonic deposition of the author or custodian of a document may be taken during the hearing to solve unanticipated problems regarding admissibility. See § 21.452.

33.5 EMPLOYMENT DISCRIMINATION LITIGATION.

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Cases charging employment discrimination may merit special supervision by the court because of class action allegations, the scope of potential discovery, the technical nature of expert testimony, the need for careful attention to the structuring of trial, and the problems that may arise in—or as a result of—settlements. On the other hand, many individual actions alleging discrimination in employment do not involve any such complications and may proceed according to the normal practices of the court applicable to routine litigation.[104] All related actions against the same employer, including "pattern and practice" suits brought by a government agency, should ordinarily be assigned to the same judge for centralized pretrial proceedings and perhaps for consolidated trial.

33.51 Issues and Parties.

As soon as practicable, often before discovery commences, the court should ascertain the particular acts of discrimination each plaintiff (or intervenor) claims to have suffered and the extent to which these claims have been preserved by filing appropriate administrative charges or are otherwise within the applicable statute of limitations.[105] Early identification of the individual claims that may be pursued in the

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104. Actions under Title VII of the Civil Rights Act of 1964 are, however, to be heard "at the earliest practicable date and . . . in every way expedited." 42 U.S.C. § 2000e-5(f)(5). If the case is not scheduled for trial within 120 days after joinder of issues, a special master may be appointed under Fed. R. Civ. P. 53. Id.

105. Claims under 42 U.S.C. § 1981 (racial discrimination) and 42 U.S.C. § 1983 (discrimination by governmental employers) do not require administrative charges, but are controlled by state statutes of limitations.

litigation is needed as a foundation for ruling on requests for class certification[106] and is also valuable in developing an appropriate plan for discovery and trial.[107] This initial narrowing of issues may usually be accomplished without substantial discovery, and, if any of the critical facts are disputed—such as when a plaintiff received a "right to sue" letter—an expedited trial on those issues under Fed. R. Civ. P. 42(b) may be useful.

Often the plaintiffs will be seeking relief that might adversely affect other employees of the defendant company. In such circumstances, even if only the company was named in the administrative charges or is alleged to have been guilty of discrimination, joinder of the union as an additional defendant may be needed in order to bind it by the decree if the plaintiffs are successful. Similarly, in some cases joinder of (or intervention by) other employees who would be adversely affected by the plaintiffs' relief may also be warranted to assure that all competing interests are adequately represented and to protect against subsequent claims of "reverse" discrimination.

33.52 Class Actions.

Employment discrimination cases are frequently brought as class actions under Fed. R. Civ. P. 23(b)(2) on the basis that the defendant "has acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." To ascertain the extent to which this requirement and the prerequisites of Rule 23(a) are satisfied, some discovery will often be needed. For example, the particular practice about which the plaintiffs complain may be one that applies throughout the company, affecting hundreds or thousands, or it may pertain only to a specific facility, department, or individual supervisor. Discovery from the company and union—perhaps also from the plaintiffs and even some putative class

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106. See General Tel. Co. v. Falcon, 457 U.S. 147 (1982).

107. As discussed in § 33.53, however, other discriminatory acts and practices of the defendants, whether or not directly at issue in the case, may constitute admissible circumstantial evidence at trial and hence be discoverable.

members—may be essential to a sound determination whether a class should be formed and, if so, what class.[108] Accordingly, the discovery process should ordinarily not be delayed pending a hearing on class certification,[109] and in many employment discrimination cases any attempt to give priority to "class discovery" over "merits discovery" will be counterproductive. The information relevant to class certification will, moreover, often be useful as circumstantial evidence at trial even if a class is not certified.

The plaintiffs may only represent class members consistent with the requirements of Rule 23. In particular, the court should assure itself that the claimed injuries of the representatives are so interrelated with those of the putative class that the prerequisites of commonality and typicality are satisfied.[110] This principle does not mean that the court should determine the merits of the individual claims before considering class certification or that the class should be decertified if the representatives do not prevail at the hearing on the merits. However, the court should probe behind the pleadings to ascertain the particular practice or procedure about which

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108. See, e.g., General Tel. Co. v. Falcon, 457 U.S. 147 (1982), emphasizing the need for careful attention to the requirements of Rule 23 in the light of the legal and factual issues comprising plaintiff's cause of action and rejecting the approach that one who claims injury from an employer's alleged ethnic discrimination is automatically qualified to represent all others adversely affected by any manifestation of that discrimination. Of course, some claims—for example, an attack on an employment test with admitted adverse impact on a protected class of applicants—may frequently be certified for class action treatment without any substantial discovery. If so, the court should give immediate consideration to class certification, bearing in mind the admonition that this determination be made "as soon as practicable after the commencement" of the action. Fed. R. Civ. P. 23(c)(1).

109. As discussed in § 33.51, however, the viable individual claims of the plaintiffs should ordinarily be identified before proceeding with discovery.

110. General Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982). The Court noted that the class members need not be identically situated and that a class action of both applicants and incumbents might be justified if a general policy of discrimination were shown to manifest itself in both hiring and promotional practices in the same general fashion. Id., at 159, n.15. See, e.g., McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982). For a decision indicating the difficulties in applying the Falcon standards, see Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984).

the plaintiffs are complaining and the extent to which the evidence that will be presented to support or contest the plaintiffs' claims will at the same time establish or disprove discrimination against other employees or applicants.

The class (and any subclasses) should be described as precisely as possible, both to facilitate planning for discovery, trial, and settlement and to define the persons (and claims) that will be affected by a final judgment in the case.[111] This definition should be expressed in objective terms to the extent feasible—for example, all female applicants during a specified time who, like the plaintiffs, failed to meet the employer's height and weight requirements. If not clear from the description of the class itself, the nature of the claimed class discrimination should be indicated—for example, all black persons employed by the defendant during a specified period with respect to any claim that they were not promoted during that period to the position of line foreman because of their race.

Class members are ordinarily not permitted to opt out of a class formed under Rule 23(b)(2). However, the court may permit class members to exclude themselves from the class, and an opt-out privilege may be appropriate in some cases to avoid conflicts within a class or to enable class members to pursue individually back pay claims or claims of discrimination regarding other employment practices.[112] To avoid

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111. The court is authorized by Fed. R. Civ. P. 23(c)(1) to modify a class order prior to final judgment. The opportunity to alter a certification ruling when warranted by further developments in the case does not, however, lessen the obligation to consider carefully the requirements of Rule 23(a) and (b) at the time of the initial decision on class certification. See § 30.11. A precise delineation of the issues to be tried is particularly essential for purposes of res adjudicata. See Cooper v. Federal Res. Bank of Richmond, 464 U.S. 932 (1984) (related "individual" claims of discrimination not precluded by a finding of no "class" discrimination).

112. See Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981).

potential conflicts within a broad class, the court may also define the class to exclude certain persons from the class or create one or more subclasses.[113]

Although not required by Rule 23 for a class under Rule 23(b)(2), notice of class certification should ordinarily be given to the class members. Whether this notice is provided by individual mailing or in another form--such as posting on bulletin boards or inclusion in pay envelopes--will depend on the circumstances of the particular case. Because these notices are provided under Rule 23(d)(2) rather than Rule 23(c)(2) and are often requested by the defendants to assure that the judgment will have res judicata consequences, courts have frequently required that the company bear some or all of the expense of notice.[114]

33.53 Discovery.

The discovery process in employment litigation has four typical characteristics. First, many aspects of the company's employment practices and its work force are potentially relevant as circumstantial evidence. Second, most of the information is generally within the control of the employer, sometimes in computerized form. Third, except for actions instituted by the federal government, the plaintiffs frequently have limited resources. Fourth, although the underlying data may come from the company's records, both the plaintiffs and the defendants may present expert testimony and complex statistical evidence at trial. The discovery plan should take these factors into account, as well as the fact that the trial of class actions is customarily conducted in phases or stages.

Identification of source materials. Before the plaintiffs proceed with requests for production or broad interrogatories regarding the employment practices of the

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113. As discussed in § 30.24, special provisions may be needed if some members of the putative class are closely aligned with the company.

114. Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (plaintiff must bear cost of notice required for class actions under Rule 23(b)(3)).

company, the defendant should usually be called upon to provide, either in response to interrogatories or on an informal basis, an identification and general explanation—perhaps with samples—of the various types of records that contain data possibly relevant to the issues in the case. After obtaining this information, the plaintiffs may need to depose or interview informally the personnel director or other person responsible for maintenance of these records in order to clarify the nature of the information contained in these records, how the information is coded or compiled, and how data may be extracted from the various sources.[115] The parties can then determine the most efficient and economical method for the company to produce, and the plaintiff to obtain, the most relevant information. Because many aspects of the company's employment practices may have some potential relevance as circumstantial evidence and various records may contain information about these practices, judgment is necessary in deciding what information is most probative and how that information may most efficiently be produced.[116]

Computerized records. The time and expense of discovery may usually be substantially reduced if pertinent information can be retrieved from existing computerized records. Moreover, production in machine-readable form of relevant files and fields (or even of an entire data base) will reduce disputes over the accuracy of compilations made from such data and enable experts for both sides to conduct studies using a common set of data. The parties' computer experts should informally discuss, in person

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115. Employers frequently maintain the same or similar information in different forms. For example, earnings information may be kept in a personnel file, in tax records, and in payroll records. Job histories of employees may be determined from periodic transfer and promotion records, from individual work record cards, or from personnel files. The company may also have compiled relevant data regarding its work force and employment practices for reporting to governmental agencies or for use in other litigation.

116. Under Fed. R. Civ. P. 26(g) counsel are required to weigh the potential value of particular discovery against the time and expense of production, and under Rule 26(b)(1) the judge is authorized to limit discovery consistent with this principle.

or by telephone, procedures to facilitate retrieval and production of computerized information; the attorneys can then confirm these arrangements in writing. For further guidance, see § 21.446.

Confidential information. The employer's concern for the privacy interests of its employees may sometimes be ameliorated by selecting records for discovery that do not contain matters irrelevant to the litigation[117] or by masking the names of individuals in particular compilations. If the company fears exposure to privacy claims were it to disclose personal information voluntarily, the parties may draft an order for entry by the court, directing the employer to provide the information. A protective order may also be useful in facilitating the production of relevant information about employees while protecting against unnecessary disclosure of sensitive items.[118] See § 21.431.

Preservation of records. Regulations of the EEOC require that, when a charge of discrimination or a civil action has been filed, the "employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or action." 29 C.F.R. § 1602.14. The parties may disagree on which records are covered by this mandate, particularly with respect to computerized data that may be periodically erased as new information is electronically stored. A separate order of the court may be needed both to clarify what records must be preserved and to provide relief from unduly burdensome requirements. See § 21.442.

Statistical evidence and expert testimony. Discrimination litigation frequently involves the collection and presentation of voluminous data regarding characteristics of the company's work force and its employment practices. As discussed in § 21.483, this

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117. For example, rarely are employees' medical histories of significance in a discrimination case.

118. The persons to whom plaintiffs' counsel will be permitted to disclose confidential materials will depend upon the circumstances. For example, counsel might be allowed to disclose some sensitive information to the plaintiffs or even to class members, but permitted to disclose information about tests only to an expert.

information should, whenever possible, be presented at trial through summaries, charts, and other tabulations,[119] and pretrial procedures should be adopted to facilitate this presentation and reduce disputes over the accuracy of the underlying data and the compilations derived from such data.[120] Indeed, to the extent practicable, disputes at trial regarding statistical evidence should focus on its weight and significance, not its accuracy. Experts who will present statistical studies or express opinions based on such studies should ordinarily be required to prepare and disclose a written report of their proposed testimony and be available for deposition.[121] After reviewing these reports and considering the comments of counsel, the court may conclude that it should appoint an independent statistical expert under Fed. R. Evid. 706.[122]

Discovery from class members. The extent to which discovery from class members should be permitted, as well as the timing and form of any such discovery, will depend on the particular circumstances of the case. As noted in § 33.52, depositions of a limited number of putative class members are sometimes needed prior to a ruling on class certification. In some cases, discovery from class members may be appropriate

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119. In discrimination cases, the parties sometimes attempt to introduce in bulk numerous personnel files, work history cards, and other similar documents. The court may insist upon compilations and is not required to "[wade] through a sea of uninterpreted raw evidence." See, e.g., Crawford v. Western Elec. Co., 614 F.2d 1300, 1319 (5th Cir. 1980).

120. In addition to using data already computerized by the company, the parties often prepare new data bases, electronically storing information manually extracted from other records. To eliminate disagreements about the accuracy of these new data bases and to reduce the time and expense otherwise involved in preparing and verifying separate data bases, the parties may—with the court's encouragement—be able to agree on joint development of a common data base on which their respective experts will conduct their studies. If agreement on a common data base cannot be obtained, pretrial verification procedures should be used to eliminate (or quantify) errors in the different data bases. See §§ 21.446, 21.484.

121. For further discussion of discovery of experts, including the establishing of schedules, see § 21.481.

122. The court should, however, be wary of making an appointment under Rule 706 if the plaintiffs will be able to pay their share of any assessed fees only if they prevail. See § 21.51.

after certification and before a "stage I" trial on class liability.[123] Indeed, each party should ordinarily be permitted to depose a class member whom the other party plans to present as a witness, and discovery may also be appropriate of a class member whose employment history will be used as evidence showing the existence (or non-existence) of the alleged discrimination.[124] Similarly, class members on whose behalf claims for individual relief are presented after a finding of class-wide liability may be treated as subject to discovery. On the other hand, court approval should usually be required before any discovery from class members is undertaken, and the judge should limit such discovery to that which is truly needed and assure that it is not used as a device to harass either the class representatives or the class members. See § 30.233.

33.54 Trial.

Absent unusual circumstances, the trial of an employment discrimination class action should be conducted in separate stages under Fed. R. Civ. P. 42(b).[125] At "stage I," the court determines whether the defendants have discriminated against the class.[126] If class-wide discrimination is found,[127] the court next considers the appropriateness

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123. See, e.g., Western Elec. Co. v. Stern, 544 F.2d 1196 (3d Cir. 1976).

124. Whether anecdotal experiences of individual class members are relevant at a stage I trial will depend on the circumstances of the particular case. See § 33.54. If such evidence will become relevant at subsequent proceedings only if liability to the class is established at the stage I trial, then discovery from those class members should be deferred until after the first trial.

125. See United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974). In some cases the class issues may themselves be severed, with the stage I trials of different class issues conducted in separate hearings.

126. At the stage I trial the court frequently considers also the merits of the individual claims of the class representatives, including any special defenses and damage issues.

127. To the extent discrimination against the class is not established at the stage I trial, the court should consider whether to enter judgment against the class on those claims or to decertify, redefine, or subdivide the class. The decision as to which of these rulings is most appropriate will depend upon the facts of the particular case as developed during the stage I trial.

of class-wide injunctive relief[128] and then, perhaps after a period for additional discovery, resolves claims for back pay and other individual relief by the various class members.[129] In this second stage, the claimants—who, by proof of their membership in the class, are presumed to have been subjected to the discrimination practiced against the class—are permitted to present their individual claims of injury,[130] subject to the right of the employer to raise defenses to those claims that were not resolved during the stage I proceedings.[131] The court sometimes refers the individual claims to a magistrate or other special master under Fed. R. Civ. P. 53 for hearings and a report.[132]

Because the stage I trial is designed to determine the existence or non-existence

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128. An immediate appeal from the ruling on injunctive relief is permissible under 28 U.S.C. § 1292(a). Because resolution of claims for individual relief can be an expensive and time-consuming process, such an appeal may be desirable as a means for obtaining early appellate review of a finding of liability. If an appeal under § 1292(a) is unavailable, the court should consider certifying its ruling on class liability under 28 U.S.C. § 1292(b).

129. The award of attorneys' fees may be deferred until completion of proceedings for individual relief; an interim award, however, is frequently made after a grant of injunctive relief.

130. Courts often require class members to complete information forms disclosing the critical facts—such as the job bids which they assert were discriminatorily rejected by the company—on which their claim of individual injury is based. Class members are sometimes permitted at this point to opt out of further proceedings in the case to pursue back pay claims in separate actions; this practice, however, may lead to a proliferation of individual cases and frustrate later efforts to settle the litigation.

131. Further severance may be useful at the individual remedy stage. For example, the court may identify those entitled to relief before the parties proceed with discovery and possible trial regarding the amount of damages. As to whether the amount of damages each class member has sustained must be individually determined or whether damages may be assessed on a class-wide basis, compare Mitchell v. Mid-Continent Spring Co., 583 F.2d 275, 283 n.11 (6th Cir. 1978), cert. denied, 441 U.S. 922 (1979) (individual damages must be proved), with Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259-63 (5th Cir. 1974) (class-wide formula permissible).

132. After the conclusion of evidentiary hearings on individual claims, the master should submit findings and conclusions on each claim. The master's findings should be accepted unless "clearly erroneous," and only for exceptional cause should the judge permit additional evidence to be presented on review.

of discriminatory practices against a class,[133] the central focus of the trial is frequently on statistical evidence and expert testimony. Pretrial planning should, however, also be given to the proper presentation of "anecdotal" evidence regarding the individual experiences of various employees, union stewards, supervisors, and managers. Such evidence may be offered by the plaintiffs or defendants to provide illustrative support for their respective positions and for the studies conducted by their experts and, indeed, may be critical to a decision on the merits of the claim of class discrimination. Some limits, however, may be needed on the number of such persons the parties may call as witnesses, and pretrial disclosure should be made of their names and the general subject matter of their expected testimony. The parties must be selective in deciding which witnesses to present, bearing in mind that a class action trial should not be conducted as a series of individual lawsuits by the class members.[134]

33.55 Settlement.

Timing. Pre-certification settlements of discrimination cases brought as class actions are not uncommon and in some circumstances may be warranted. Class settlements prior to judicial consideration of class certification, however, present special problems

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133. The court should define as precisely as possible the particular issues to be resolved at the stage I trial, as well as those to be decided in subsequent proceedings if class-wide discrimination is found at stage I. Although this delineation will not eliminate all duplicative evidence—for example, anecdotal testimony may be admissible as circumstantial evidence at the first trial and, if liability is established, be offered as direct evidence on individual claims in later proceedings—it will enable counsel to prepare more effectively for both stages of the case. Issues are generally separated according to the extent they depend upon the particular circumstances of individual employees; thus, for example, defenses such as "business necessity" and "bona fide occupational qualification" are usually resolved at stage I, while the issue of whether employees may be excused from making applications for a position is generally reserved for decision in later proceedings.

134. The failure of a class member to testify at a stage I trial should not, for example, affect that person's right to make a claim if liability to the class is established, nor should the failure of the defendant to rebut an individual's testimony at a stage I trial preclude it from contesting that person's claim for individual relief on grounds not resolved in the initial trial. If the stage I trial of a class action requires the testimony of virtually all class members, the case probably does not satisfy the requirements of Fed. R. Civ. P. 23.

and should be approached with great caution. See generally § 30.45. If the parties propose that the court deny class certification and permit settlement of the individual claims of only the named plaintiffs, the court should require the parties to demonstrate that the facts as determined during discovery clearly show that the requirements of Fed. R. Civ. P. 23 are not met and that no special benefits are being obtained for the plaintiffs or their counsel for abandoning the class claims.[135] As discussed in § 30.45, settlement negotiations in class actions should ordinarily be deferred until the court has ruled on class certification; in employment discrimination litigation, the parties should explore settlement possibilities as the case proceeds toward trial after the certification ruling, and, if those initial efforts are unsuccessful, they should renew their discussions after the stage I trial.[136] Indeed, the parties have settled many employment discrimination cases while awaiting a decision from the trial or appellate court.

Terms. Settlements in discrimination cases frequently involve both general changes in the company's employment practices that will prospectively affect all employees and special provisions benefiting only members of the class, such as immediate reinstatements, preferential treatment in future vacancies, remedial seniority, and back pay. The parties should, however, be cautious when negotiating class settlements that may provide persons not shown to have been victims of discrimination with special benefits which may adversely affect other employees who never benefited from any discriminatory practices; inclusion of such provisions in the settlement may result in "reverse discrimination"

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135. The court may conclude, particularly if members of the putative class may be aware of the litigation, that the class should be notified of the proposed settlement and given an opportunity to intervene to pursue the class claims.

136. As discussed in § 23.11, any involvement by the trial judge in settlement discussions must not be allowed to affect the judge's impartiality in considering the fairness to the class of a proposed settlement or, if no settlement is reached, in deciding the merits of the case at trial.

litigation.[137] Special problems also arise if the parties attempt to settle claims for attorneys' fees before a settlement of the class claims has been effected or, indeed, if the defendants offer to settle class claims on condition that attorneys' fees be waived. See § 23.24. Although the parties should be encouraged to settle claims regarding attorneys' fees, § 24.13, these negotiations should ordinarily not be commenced until the class claims have been resolved by trial or settlement.

Settlement hearing. Unlike the typical settlement hearing in other class actions, the hearing to consider approval of a class settlement in an employment discrimination case is frequently well attended and marked by vigorous dissent.[138] Because such opposition often stems from misunderstandings about the terms of the proposed settlement, the parties should take special care when drafting the notice of the settlement. Class counsel may also schedule in advance of the hearing a meeting with the class at which they and the class representatives can explain in person the terms of the agreement and answer questions. At the outset of the hearing, before the court proceeds to hear objections from class members or others,[139] counsel should again describe the key features of the settlement, clarify any widespread misunderstandings, and indicate why they believe it to be advantageous to the class. See generally § 30.44. The judge may also explain portions of the proposed settlement that may have been confusing to members of the class.

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137. See Firefighters Local Union No. 1784 v. Stotts, 464 U.S. 808 (1984).

138. Opposition to the settlement does not, however, mean that it should necessarily be rejected by the court. See, e.g., Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977). Also see §§ 30.41-30.44.

139. In its notice to the class of the proposed settlement, the court should usually require that any objections or requests to be heard orally be filed in writing by a specified date. However, judges often permit persons who have not filed timely objections to express their views at the hearing, including representatives of employees not members of the class who claim they will be adversely affected by the settlement.

Implementation. Settlements of employment discrimination cases sometimes specify the persons to whom back pay awards will be made and the amount each is to be paid. More frequently, however, they have provided only the basic principles for determining these awards, contemplating further proceedings to ascertain the factual matters on which these awards depend. The settlement may, for example, establish one or more funds to be shared by persons satisfying prescribed criteria; in this situation the court may require class counsel after the settlement to preliminarily identify those class members eligible to participate in distribution and provide those found ineligible an opportunity to present their claims to the court at a later date. If the settlement provides for a specified payment--whether a flat sum or an amount determined under a formula--to be made to each class member meeting some specified standard, the defendants may have a financial interest in challenging the claims of class members, and the court may refer such matters to a magistrate or other special master under Fed. R. Civ. P. 53 for individual hearings as necessary. See § 30.47. The court may also decide to appoint a master under Rule 53 to monitor future implementation of injunctive features of the settlement. See § 21.52.

33.6 PATENT LITIGATION.

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Special judicial management may be merited in patent cases for a variety of reasons: the difficulty in delineating the real issues; the technical nature of the dispute over validity and infringement of the patent; the extent of potential discovery; the use of expert witnesses; and the importance of structuring both discovery and trial. As an additional complication, stipulations and concessions may be difficult to obtain because of the personal involvement of trial counsel as a result of pre-litigation advice given by them to their clients.

33.61 Technology.

The judge will often need some general explanation of the terminology and technology involved in the subject matter of the patent before attempting to identify the major issues in the case or develop a plan for discovery and trial. Therefore, at an early stage—typically at or before the initial conference—the court may wish to call upon counsel for a concise overview, orally or in writing, of this technology, including a definition of key terms and concepts. To encourage candor, the court may provide that these statements will not bind the parties and may not be used against them later in the proceedings.

More detailed information regarding technical aspects of the patent will probably be needed as the case proceeds toward trial. Reports from the parties' experts may be helpful, as may published articles on the subject or the industry. The court may also require the parties jointly to develop a glossary of the terms and concepts, using

a procedure similar to that described in § 21.47 for developing a joint statement of uncontested and contested facts.

33.62 Defining the Issues.

The typical patent case involves a number of separate, but related, claims and defenses. In addition to seeking injunctive relief and damages for the alleged infringement, plaintiffs often assert claims of unfair competition, wrongful business interference, and other similar torts. Defendants may plead specially several of the statutory bars under 35 U.S.C. §§ 102 and 103 or other sections of title 35, as well as assert misuse of the patent or other equitable defenses and counterclaim for violations of antitrust laws. Although a sufficient basis for these contentions may exist for purposes of Fed. R. Civ. P. 11, many of them usually prove to be without merit and are abandoned by the time of trial.

Under the prodding of the court, counsel may be willing to drop the less serious of these contentions at the time of the initial conference, or at least agree that discovery on such issues should be deferred while attention is given to the more significant issues. Sanctions may be appropriate if counsel refuse, after a reasonable opportunity for discovery, to abandon unsubstantiated claims or defenses. Some of these issues may, of course, also be subject to early resolution under Fed. R. Civ. P. 56.

The court should consider requiring the plaintiff to specify precisely which claims of the patent have been infringed (and which infringed wantonly or willfully) and requiring the defendant to identify which of these claims are believed to be invalid or not infringed. A party asserting invalidity or non-infringement is required under 35 U.S.C. § 282 to identify "at least thirty days before the trial" other patents, publications, inventors, or users to be relied upon to show anticipation or the state of the art; the court may, however, conclude that an earlier deadline for this disclosure should be established.

Assertions that the patentee is guilty of unclean hands or fraud on the Patent and Trademark Office—typically based on an alleged misrepresentation or failure to disclose pertinent prior art or test results—merit special attention by the court.[140] If the allegations have substance, discovery into matters otherwise protected by the attorney-client privilege may be warranted; on the other hand, pending some substantiation of these charges, the privilege should be respected and, therefore, the court may need to control carefully the scope of discovery from counsel or clients.[141] When fraud is alleged, the court may conclude that a new application should be made under 35 U.S.C. § 302.

Separation of issues for severed trials under Rule 42(b) is regularly used in patent cases to reduce the time for discovery and trial. Trifurcation into the statutory issues, equitable defenses, and damages may be advisable; moreover, some defenses—for example, an "on sale" bar—may be suitable for early trial before proceeding with discovery and trial on other liability issues. Discovery and trial with respect to claims of unfair competition and antitrust counterclaims frequently are deferred until resolution of the patent issues, at which time these claims are often resolved by voluntary dismissal or settlement.

33.63 Related Litigation.

Patent litigation frequently involves a series of cases brought in different districts. Although these cases are sometimes transferred to a single court under 28 U.S.C. § 1407 for centralized pretrial proceedings, the Judicial Panel on Multidistrict Litigation frequently declines to order such transfers on the basis that coordination can be achieved

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140. Fraud may be asserted not only as a defense to the infringement claim, but also as part of the foundation for an antitrust counterclaim. See Walker Process Equip. Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965).

141. Particularly in non-jury cases, the trial judge may prefer for another judge or magistrate to conduct any in camera inspections that are needed to determine whether sufficient evidence of fraud exists for the privilege to be abrogated.

through the cooperative efforts of the affected courts and counsel.[142] In such circumstances, techniques such as those described in § 31.13 may be used to avoid or minimize duplicative discovery and potential conflicts in pretrial and trial schedules.

Decisions by other courts involving the same patent require careful study. A final decision holding the patent invalid will preclude further efforts to enforce the patent against others—provided the patentee "had a full and fair chance to litigate" its validity.[143] In such circumstances, however, the patentee must be given the opportunity to demonstrate under the factors outlined in Blonder-Tongue that "in justice and equity" it should not be collaterally estopped by the adverse decision. Although a decision upholding the validity of the patent will not bar a new defendant from attacking the patent and, indeed, is not necessarily binding even on the same court under the doctrine of stare decisis, the decision is nevertheless entitled to appropriate weight in a subsequent case--this weight depending primarily on the degree of similarity of the prior art and other evidence introduced in the two cases.[144]

33.64 Discovery.

Discovery frequently is conducted according to a prescribed sequence of issues, particularly if severed trials under Fed. R. Civ. P. 42(b) are contemplated. This approach, however, may cause extra expense and delay if discovery regarding the priority issues will involve examination of many of the same witnesses and exhibits as discovery on the subsequent issues. Moreover, deferral of discovery regarding damages may complicate efforts to evaluate settlement of the litigation.

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142. Often the real parties in interest and the attorneys are the same in all cases.

143. Blonder-Tongue Lab., Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). This principle applies not only when the first decision holds the patent invalid, but also when, after rulings upholding its validity, a decision is subsequently made that it is invalid. See Stevenson v. Sears, Roebuck & Co., 713 F.2d 705 (Fed. Cir. 1983).

144. Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 711 n.5 (Fed. Cir. 1983)

Protective orders of the type described in § 21.431 will usually be appropriate in patent cases. Disclosure of particularly sensitive information—such as production processes and customer information—may be restricted to counsel and their experts, but counsel should exercise restraint in designating materials as confidential.[145] For further protection, filing of sensitive documents may either be waived under Fed. R. Civ. P. 5(d) or be made under seal.

At the initial conference the court should ascertain the extent to which discovery will be sought of matters that may be protected by the attorney-client privilege or work product doctrine and, if so, whether disclosure will be resisted. Use of a special master may be warranted if such disputes will be extensive and cannot be resolved by considering a few specimen documents. As discussed in § 33.62, the court may also need to consider whether evidence of fraud warrants abrogation of the attorney-client privilege.

Early inquiry should also be made as to the possible use of out-of-court tests or in-court demonstrations. The court should set a deadline for pretrial disclosure of any such tests or proposed demonstrations and may wish to consider before trial objections to the admissibility of such evidence.

The parties should not undertake formal discovery outside the country without prior approval from the court, and any requests for documentary evidence in such countries should be precisely and narrowly drafted. See § 21.485. If the parties are unable to agree on a translation or translator for documents in foreign languages, the court may appoint an expert under Fed. R. Evid. 706.

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145. In some cases the parties prefer that inspection of such facilities and exhibits be done by a court-appointed expert or master, rather than by someone associated with their adversary.

33.65 Expert Opinions.

The parties frequently employ two types of experts in patent cases: technical experts and patent law experts. Technical experts are persons whose special training or experience in the applicable technology enables them to express opinions bearing on the validity or invalidity of the patent--such as the scope and content of the prior art, the level of skill in the art, and the obviousness or non-obviousness of the claimed invention in view of the prior art[146]—and on the alleged infringement. Patent law experts, on the other hand, typically are experienced patent attorneys, patent law professors, or former officials of the Patent and Trademark Office who are asked to express opinions on such legal issues as alleged estoppel arising from the prosecution of the application for the patent in question, the duty of disclosure to the Patent and Trademark Office, and whether or not that duty has been violated by particular acts or omissions during such prosecution.

Early in the litigation the court should set a deadline for the parties to identify their experts and provide complete information regarding their opinions, typically in the form of a written report suitable for adoption by them as their direct testimony. After review of these reports, the court may conclude--particularly if the differences in the opinions are not attributable to factual disputes that the court can readily resolve at trial—that an independent expert should be appointed under Fed. R. Evid. 706. See § 21.51. Such an expert may also be valuable if examination of the facilities or processes of the parties is needed but they are reluctant to provide access to their adversaries' experts.

Consideration may also be given to reexamination of the patent by the Patent and Trademark Office under 35 U.S.C. § 302, with citations of prior art being furnished

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146. See Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966).

under 35 U.S.C. § 301. In unusual cases, reference to a special master under Fed. R. Civ. P. 53 may be warranted.

33.66 Trial.

To reduce the length of trial and focus attention on the key issues in the case, the court should usually require the parties to develop a joint statement of the agreed and disputed facts, including a glossary of key terms and concepts. See § 21.641. Extracts or summaries of depositions may be valuable, as may (at least in non-jury cases) the procedure of having witnesses adopt a prepared report or narrative as their direct testimony, subject to cross-examination.

As trial approaches, the parties should reevaluate any requests for jury trial. Sometimes they will agree to a withdrawal of the jury demand for some or all portions of the case, and frequently they will be willing to enter stipulations to eliminate the need for alternate jurors, to accept a verdict from a reduced jury or a non-unanimous jury, or to waive a jury and receive a non-jury decision if the jury is unable to return a verdict. If the case is to be tried to a jury, copies of key exhibits should be made for each juror (and for the judge) or appropriate enlargements made. Provision may also be made for jurors to take notes, study exhibits, and submit questions to the witnesses.

Courts frequently require pretrial submission of proposed findings of fact and conclusions of law in non-jury cases and of proposed instructions and special verdicts or interrogatories in jury cases.

33.67 Appeals.

Since October 1, 1982, the Court of Appeals for the Federal Circuit has had exclusive jurisdiction for appeals of patent infringement cases from all district courts.[147] See 28 U.S.C. §§ 1292(c)(2), 1294(a)(1), 1338(a). Decisions by this Court should, therefore,

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147. Although 28 U.S.C. § 1295(a)(1) provides that this jurisdiction is exclusive if the jurisdiction of the district court "was based, in whole or in part, on [28 U.S.C. § 1338(a)]," some question exists as to the proper appellate route for related non-patent claims tried separately from issues of validity and infringement.

be given special attention,[148] and the precedential value of earlier opinions by other courts should be scrutinized. Appellate review may, and often should, be obtained prior to resolution of all issues by invoking the provisions of 28 U.S.C. § 1292(c)(1) (interlocutory appeal from orders granting or denying preliminary injunctions), 28 U.S.C. § 1292(c)(2) (judgments in patent infringement cases appealable if "final except for an accounting"), and Fed. R. Civ. P. 54(b). Review is not available, however, under 28 U.S.C. § 1292(b).

148. See, e.g., Weinar v. Rollform, Inc., 744 F.2d 797 (Fed. Cir. 1984) (guidelines for instructions and interrogatories), cert. denied, 105 S. Ct. 1844 (1985).

40. CHECKLISTS.[1]

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40.1 AGENDA ITEMS FOR INITIAL CONFERENCE.

1. Format for Conference. [§ 21.22]

____ Establish/confirm agenda. [§§ 21.24; 41.2-¶2]

____ Special instructions. E.g., Counsel to identify themselves for court and reporter when speaking. [§ 21.22]

2. Counsel. [§ 20.2]

____ Appearances at conference. [§§ 21.23; 41.2-¶1]
- ____ By counsel and parties.
- ____ Counsel from other cases.
- ____ Other observers.

____ Admission pro hac vice. [§§ 21.13; 41.2-¶4(a)]

____ Present/potential problems of disqualification. [§ 20.23]

____ Organization of Counsel.
- ____ Selection and duties. [§§ 20.22; 41.3-¶2; 41.31]
  - ____ Lead Counsel.
  - ____ Liaison Counsel/Coordinating Secretary.
  - ____ Committees.
- ____ Compensation. [§§ 20.223; 41.3-¶2(c)]
- ____ Role of other counsel. [§§ 20.222; 41.31]

____ Maintenance and filing of time and expense records. [§§ 24.21; 41.32]

____ General policies:
- ____ Avoidance of excessive attendance, unnecessary time. [§ 24.22]
- ____ Obligations under FRCivP 7, 11, 16, 26. [§ 20.21]
- ____ Cooperation and courtesy; resolving disputes without resort to court. [§ 20.21]
- ____ Use of MCL 2d. [§§ 21.12; 41.2-¶3(a)]

____ Responsibility for preparation/maintenance of service list. [§ 41.31-¶2,4]

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1. Explanatory text and sample orders are indicated in brackets. Additional discussion may be located by using the index.

3. Court. [§ 20.1]

____ Present/potential problems of disqualification of judge. [§ 20.121]

____ Assumption of active supervision over litigation. [§ 20.13]

____ Policies and preferences of judge regarding such matters as communications with court, decorum, etc.

____ Suspension of local rules. [§ 21.13]

____ Procedures for attending to emergency matters; telephonic conferences. [§§ 21.423; 41.38-¶14]

____ Use of sanctions. [§ 42.1]

____ Use of magistrates and other judges. [§§ 20.122; 20.14; 41.37]

4. Other Litigation.

____ Cases pending in same court.
- ____ Reassignment of cases. [§ 20.123]
- ____ Inter-divisional transfers. [§ 31.11]
- ____ Consolidation for pretrial (or trial). [§§ 31.11; 41.3-¶1]
- ____ Coordination of cases not consolidated. [§ 41.3-¶1(d)]

____ Other proceedings.
- ____ Civil cases pending in other courts. [§ 31.13]
  - ____ Potential multidistrict transfers under 28 U.S.C. § 1407. [§ 31.12]
  - ____ Potential transfers under 28 U.S.C. § 1404 or 1406. [§ 20.123]
  - ____ Potential removal of state cases. [§ 31.32]
- ____ Criminal investigations/proceedings. [§ 31.2]
- ____ Administrative proceedings.
- ____ Coordination. [§§ 31.13; 31.31; 41.51]
  - ____ Joint Hearings.
  - ____ Joint Special Master.
  - ____ Joint appointment of Lead Counsel.
  - ____ Designation of lead case.
  - ____ Deference to first ruling.

5. Filing and Service.

____ Reducing filing.
- ____ Creation of master file. [§§ 21.13; 41.3-¶1]
  - ____ Filing in master file. [§ 41.3-¶1(a)]
  - ____ When also to be filed in individual cases. [§ 41.3-¶1(b)]
- ____ Non-filing of discovery under FRCivP 5(d). [§§ 21.431; 41.3-¶1(c)]

____ Reducing service under FRCivP 5(c). [§§ 21.13; 41.3-¶3]
- ____ Use of Liaison Counsel to receive/distribute orders.
- ____ Use of Liaison Counsel to receive/distribute documents from parties.
- ____ Parties who are to be separately served.

5. Filing and Service. (cont'd)

____ Maintenance of Service List. [§ 41.31-¶2,4]

6. Preliminary Identification of Issues. [§ 21.33]

____ Brief outline by parties of positions and expected principal issues, supplementing any earlier written reports. [§ 21.12]

____ Jurisdictional/venue problems—whether to consider early or defer. [§§ 21.61; 31.121; 31.32; 41.3-¶4(a)]

____ Issues for early determination.
- ____ Class action allegations. (see ¶ 8 this section)
- ____ Whether initial discovery should be limited to certain time periods, parties, claims, or defenses. [§§ 21.31; 21.41; 41.33-¶2(b)]
- ____ Identification of issues for early summary judgment determination. [§§ 21.34; 41.3-¶4(c)]
  - ____ Discovery needed; time to accomplish.
  - ____ Schedule for motions, briefing, and submission.

____ Preliminary determination of issues on which discovery should be focused. [§ 21.41]

7. Pleadings and Motions.

____ Suspension of time for filing certain pleadings and motions. [§§ 21.32; 41.3-¶4(b)]

____ Refiling of consolidated complaint(s) after discovery.

____ Deadlines. [§§ 21.32; 41.3-¶4(b); 41.33-¶2(e)]
- ____ Adding/changing claims or defenses.
- ____ Joining additional parties.
- ____ Counterclaims, cross-claims, third-party complaints.
- ____ Relief from deadlines if justified by discovery.

____ Standard and "deemed" pleadings, motions, and orders. [§§ 21.32; 41.3-¶1(a), 4(a); 41.52]
- ____ Provision for later filed cases.
- ____ Supplementing/revising standard pleadings under FRCivP 11. [§ 41.52-¶2]

____ Refinement of issues. [§ 21.33]
- ____ Abandonment of frivolous issues.
- ____ Listing essential elements of cause of action/defense.
- ____ Statements of contentions/proof on specific claims/defenses.
- ____ Total or partial summary judgment; also FRCivP 56(d). [§§ 21.34; 41.3-¶4(c)]
  - ____ Discovery period.
  - ____ Time for motions, briefs, and submission.
- ____ Early trial of special issues under FRCivP 42(b).

____ Early appellate review under FRCivP 54(b), 28 U.S.C. § 1292(b), etc. [§ 25.1]

8. Class Allegations.

____ Probing behind allegations; potential for certification even if not alleged. [§§ 30.11; 30.12]

____ Possible conflicts. [§ 30.16]
- ____ Within class.
- ____ With classes sought/certified in other courts.

____ Discovery for class certification purposes.
- ____ Schedule; completion date. [§ 30.11]
- ____ Discovery from class representatives. [§ 30.12]
- ____ To what extent discovery permitted from class members. [§ 30.233]

____ Time/procedures for presenting certification question. [§§ 30.11; 41.3-¶4(d)]
- ____ Whether formal motion required; if so, when. [§ 30.11]
- ____ Need to define class in objective terms and identify particular claims of class. [§ 30.14]
- ____ Briefing; Statement of Uncontested/contested facts. [§§ 30.13; 41.3-¶4(d)]
  - ____ Schedule.
  - ____ Identify factual disputes on which evidentiary hearing needed.
  - ____ Proposed method and form of notice. [§ 30.211]
- ____ Hearing. [§ 30.13]
  - ____ Date.
  - ____ Extent to which evidence presented by affidavit, by witnesses, etc.

9. Preliminary Plan for Discovery. [For a more comprehensive Discovery Checklist, see § 40.2]

____ Obligations under FRCivP 26(b)(1), 26(g). [§§ 20.21; 41.3-¶5(b)]

____ Adoption of Plan under FRCivP 26(f). [§§ 21.41; 41.33]
- ____ Based on preliminary delineation of issues.
- ____ Monitor and review as litigation progresses.
- ____ Revise when justified.

____ Limitations. [§ 41.33]
- ____ Time limits and schedules. [§ 21.421]
  - ____ Completion of all discovery (or set trial date).
  - ____ Schedule for particular segments of discovery.
- ____ Sequencing of discovery. [§ 21.421]
  - ____ Identify sources of information (documents/witnesses).
  - ____ Time frames for other discovery.
- ____ Limits on quantity. [§ 21.421]
- ____ General limitations. [§ 41.3-¶5(b)]
  - ____ Class members/representatives. [§ 30.233]
  - ____ Discovery in other countries. [§ 21.485]

9. Preliminary Plan for Discovery. (cont'd)

____ Procedures for resolving disputes. [§ 21.423]
  ____ Efforts by counsel to resolve voluntarily.
  ____ Procedures for obtaining court ruling.
    ____ Form of motion—written/oral.
    ____ When briefs required/permitted.
    ____ Telephonic conferences.
    ____ Use of magistrates.
  ____ Need for special master. [§§ 20.14; 41.37]

____ Special topics.
  ____ Confidential Information; Protective Orders. [§§ 21.43; 41.36]
  ____ Documents.
    ____ Adoption of identification system. [§§ 21.441; 41.3-¶5(d)(2)]
    ____ Preservation. [§§ 21.442; 41.34]
    ____ Depositories. [§§ 21.444; 41.35]
  ____ Depositions.
    ____ Cross-noticing. [§§ 21.455; 41.51-¶3(c)]
    ____ Guidelines. [§§ 21.456; 41.38]
    ____ Deferred/supplemental depositions. [§§ 21.453; 41.38-¶13]
  ____ Interrogatories. [§§ 21.46; 41.3-¶5(e)]
    ____ For what purposes.
    ____ Timing; scope.
    ____ Special limits on number.
  ____ Requests for Admissions; Stipulations. [§§ 21.47; 41.6]
  ____ Expert testimony. [§§ 21.481; 41.33-¶1]
  ____ Governmental Investigations; Reports. [§ 21.482]
  ____ Computerized data; other summaries. [§§ 21.446; 21.483; 41.33-¶1]
  ____ Polls; surveys; other sampling techniques. [§ 21.484]
  ____ Continuing duty to disclose settlements/special agreements. [§§ 21.24; 23.23; 41.3-¶5(g)]

10. Special Appointments and Referrals. [§§ 20.14; 21.5; 41.37]

____ Court-appointed expert (FRE 706) or magistrate/master (FRCivP 53).
  ____ Need; identification of subject matter.
  ____ Timing.
  ____ Procedure for selection.
    ____ Nominations by parties.
    ____ Suggestions by other groups; peremptory challenges.
    ____ Use of magistrate as special master.
  ____ Compensation. [§ 41.37-¶4]
  ____ Communications.
    ____ Extent to which expert/master may communicate ex parte with parties, parties' experts, or court.
    ____ Report from expert/magistrate/master.
    ____ Discovery from court-appointed expert.

____ Agreements as to effect of findings by court's expert/master.

____ Arbitration. [§ 21.24]

11. Settlement.

____ Status of discussions. [§ 21.24]

____ Desirability of settlement conference. [§ 23.12]

____ Judge's role in facilitating negotiations. [§ 23.11]

____ Use of other resources/techniques. [§ 23.12]
- ____ Other judges/magistrates.
- ____ Special master(s).
- ____ Special counsel.
- ____ Summary jury trial; mini-trial.
- ____ Non-binding arbitration.

____ Special problems.
- ____ Class actions. [§§ 30.42; 30.45]
  - ____ Premature settlement discussions.
  - ____ Settlement classes. [§ 30.45]
- ____ Secret agreements. [§§ 23.23; 41.3-¶5(g)]
- ____ Most-favored-nation clauses. [§ 23.23]
- ____ Agreements which limit discovery. [§ 23.22]
- ____ Problems with late partial settlements. [§ 23.21]
- ____ Ethical considerations. [§ 23.24]

____ Discovery schedules not extended for settlement discussions. [§§ 21.24; 23.13]

12. Trial.

____ Trial date—tentative or firm. [§§ 21.24; 41.3-¶6]

____ Statement of agreed/disputed facts; statement of contentions and proof; listing of witnesses/exhibits. [§§ 21.47; 21.641; 41.3-¶6]
- ____ Preliminary schedule.
- ____ Preclusive effects.

____ Identification of issues for severance and early trial. [§ 21.631]

____ Interrelationship between jury and non-jury issues. [§ 21.632]

____ Potential res judicata/collateral estoppel from other litigation. [§ 33.63]

13. Further Conference(s). [§ 21.21]

____ Date of next conference—tentative or firm. [§ 41.3-¶7]

____ Interim status reports.

13. Further Conference(s). (cont'd)

____ Additional conferences.
____ Pre-scheduled.
____ On request, as need arises.
____ As particular phases of proceedings completed.
____ To handle emergency matters.

14. Preparation of Order.

____ Drafts by counsel. [§ 21.22]

____ Use of exhibits as attachments to order. [§ 41.1-n.4]

____ Transcription by reporter of proceedings. [§ 21.22]

40.2 DISCOVERY CHECKLIST.

1. Obligations under FRCivP 26(b)(1); 26(g). [§§ 20.21; 41.3-¶5(b)]

____ Possible inclusion of language from rule in certificate. [§ 21.46]

____ Sanctions under FRCivP 16, 26, 37. [§ 42]

2. Filing and Service requirements.

____ Non-filing of discovery materials under FRCivP 5(d).
____ All discovery requests/responses. [§ 41.3-¶1(c)]
____ Confidential materials. [§§ 21.431; 41.36-¶7]
____ Defer transcribing/filing depositions. [§ 21.452]
____ Filing when needed in connections with motions. [§ 41.3-¶1(c)]
____ Reports regarding discovery.
____ Periodic reports. [§ 20.13]
____ Filing abbreviated notices of discovery requests/responses. [§ 41.3-n.2]
____ Reducing service requirements under FRCivP 5(c). [§§ 20.221; 21.13; 41.3-¶3]
____ Use of liaison counsel/coordinating secretaries.
____ Special service on need-to-know basis.

3. Preclusion. Failure to disclose proposed facts/proof/evidence may result in preclusion from use at trial. [§§ 21.33; 41.3-¶6; 41.7-¶5]

4. Identification of Issues for Discovery Purposes.

____ Issues for early discovery. [§§ 21.33; 21.41]
____ Sources of information (documents/witnesses/other litigation). [§§ 21.421; 21.422]
____ Existence of compiled/computerized data. [§ 21.421]

4. Identification of Issues for Discovery Purposes. (cont'd)

____ Issues for early discovery. (cont'd)
____ Class action discovery. [§§ 30.12; 30.233]
____ Special issues for early resolution. [§ 21.41]

____ Limiting scope of discovery. [§ 21.42]
____ Time periods. [§§ 21.421; 41.33-¶2(b)]
____ Priority to particular claims/defenses. [§ 21.421]
____ Damage issues—whether to defer. [§ 21.41]

____ Interrelationship between discovery and issues.
____ Revision of discovery plan in light of intervening discovery and refinement/modification of issues. [§ 21.31]
____ Attempt to structure discovery so that any additional discovery will be supplemental, not duplicative. [§ 21.41]

5. Control of Discovery.

____ Limitations.
____ Time limits. [§§ 21.421; 41.33]
____ Completion of all discovery (or set trial date).
____ Schedule for completing particular phases/forms.
____ Limits based on issues. [§ 21.421]
____ Priority to specified issues.
____ Deferring discovery on specified issues.
____ Limits on quantity. [§ 21.421]
____ Number/length of depositions. [§§ 21.451; 41.33-¶2(d)]
____ Number of interrogatories. [§§ 21.46; 41.33-¶2(c)]
____ Requiring joint interrogatories/document requests. [§§ 21.422; 21.443; 21.465; 41.3-¶5(d,e)]
____ Precluding discovery already obtained by co-parties. [§§ 21.422; 41.3-¶5(d,e)]
____ Special situations.
____ Class members/representatives.
____ Limitations on scope of discovery from class representatives and counsel. [§ 30.12]
____ Approval from court before discovery from class members. [§§ 30.233; 41.3-¶5(b)]
____ Limits on quantity/scope/form of discovery from class members. [§ 30.233]
____ Discovery outside country. [§§ 21.485; 41.3-¶5(b)]
____ Advance approval from court required.
____ Need shown.
____ Specific information/documents sought.

____ Sequencing of discovery.
____ Identify sources of information. [§§ 21.421; 41.33]
____ Location/form of documents.
____ Identification/location of witnesses.
____ Computerized data; summaries. [§ 21.446]
____ Governmental studies/reports. [§ 21.482]
____ Other litigation. [§ 21.422]

5. Control of Discovery. (cont'd)

____ Sequencing of discovery. (cont'd)
____ Priority of discovery on specific issues, time periods, geographic areas, etc. [§ 21.421]
____ Common discovery before individual discovery.
____ Sequencing common discovery, with concurrent individual discovery.
____ Priority/preference according to party. [§§ 21.421; 41.33]
____ From one side before other side.
____ By one side before other side.
____ Alternatively by weeks/months.
____ According to form of discovery. [§§ 21.421; 41.33]
____ Document production.
____ Depositions.
____ Interrogatories.
____ Requests for Admission.

____ Reducing cost/time of discovery. [§ 21.42]
____ Cooperation among counsel.
____ Stipulations.
____ Informal discovery.
____ Document inspection.
____ Interviews of possible witnesses.
____ Consultation before formal discovery requests prepared.
____ Non-technical reading of discovery requests.
____ Disclosing/providing similar information already available.
____ Combining forms of discovery (requests for admission, document requests, interrogatories, identification of potential deponents) into single discovery request.
____ Conference-type depositions.
____ Limiting number of counsel.

____ Resolving discovery disputes. [§§ 21.423; 41.38-¶14(a)]
____ Good faith effort by counsel to resolve voluntarily.
____ Procedures for obtaining court ruling.
____ Form of motion/request—written or oral.
____ When briefs required/permitted.
____ Telephonic conferences.
____ Reference to magistrates.
____ Appointment of special master.
____ Use of other judges on special matters (e.g., privileges).
____ Depositions in other districts. [§§ 21.456; 41.38-¶14(b)]

____ Monitoring progress of discovery. [§§ 20.13; 21.21; 41.3-n.2]
____ Periodic written reports.
____ Reports at conferences.
____ Sanctions for failure to meet schedules. [§ 42.1; 42.5]

6. Privileges and Confidential Information.

____ Identify potential problem areas. [§ 21.43]
____ Discovery from parties.
____ Discovery from third parties.

6. Privileges and Confidential Information. (cont'd)

____ Identify potential problem areas. (cont'd)
____ Access sought by others.
____ Related litigation.
____ News media; public interest groups.
____ Governmental investigations.
____ Confidentiality Orders. [§§ 21.431; 41.36]
____ To whom disclosure authorized without prior court approval.
____ Extent of disclosure to clients.
____ Disclosure to experts.
____ Disclosure for trial-support services.
____ Execution of agreements precluding further disclosure.
____ Counsel in related litigation.
____ Procedures for additional disclosures.
____ Advance notification of proposed disclosure.
____ Disputes whether documents should be considered confidential; declassification.
____ Power of court to modify terms of order.
____ Special terms regarding depositions. [§§ 41.36-¶4; 41.38-¶6(b)]
____ Availability of protection to third parties.
____ Subpoenas from other courts/agencies.
____ Copying.

____ Claims of privilege, including work-product protection. [§§ 21.432; 41.37]
____ Possible avoidance by delaying certain discovery.
____ Need to identify items for which privilege claimed.
____ Use of another judge/magistrate for in camera inspections.

____ Need for appointment of special master. [§§ 20.14; 21.431; 41.37]

____ Consideration of non-waiver agreements. [§ 21.432]

7. Documents.

____ Identification system. [§§ 21.441; 41.3-¶5(d)(2)]
____ Same number throughout litigation.
____ When copies separately identified.
____ Log of documents produced.

____ Preservation orders. [§§ 21.442; 41.34]
____ Modification of interim order against destruction.
____ Exemption to avoid unnecessary hardship.
____ Limiting scope as issues narrowed.
____ Procedure for giving advance notice of proposed destruction.
____ Special problems with computerized data; preservation of hard copies or other documents.
____ Expiration. [§ 25.4]
____ Return of documents after litigation concluded.
____ Retention for specified period of time.

7. Documents. (cont'd)

____ Document depositories. [§§ 21.444; 41.35]
- ____ Location(s).
- ____ Cost.
- ____ Responsibility for maintenance/indexing.
- ____ Joint depositories. [§§ 31.13; 41.51-¶2(a)]
- ____ Access. [§ 41.35-¶3]
  - ____ Other litigants.
  - ____ Confidential documents.
  - ____ Copying; removal.
  - ____ Logs.
- ____ Notification of additional filings.

____ Computerized data. [§§ 21.446; 41.33-¶1]
- ____ Identification of existing data/print-outs.
  - ____ Description of files/fields/records/etc.
  - ____ Direct communications between parties' experts.
- ____ Identification of data prepared/compiled for trial.
  - ____ Time for disclosure.
  - ____ Format.
  - ____ Preservation of source documents.
- ____ Verification.
  - ____ Production of source documents.
  - ____ Inquiry regarding input, storage, retrieval.
  - ____ Opportunity for testing.
  - ____ Feasibility of requiring admission regarding accuracy.
- ____ Production.
  - ____ In machine-readable form.
  - ____ Protection of confidential information, including programming.
  - ____ Requests for special programming/formats.
- ____ Cost.
- ____ Feasibility of jointly-developed trial-support systems.

____ Coordinating requests for documents. [§§ 21.443; 41.3-¶5(d)(4)]
- ____ Joint request for production.
- ____ Limiting request to documents not previously produced.
- ____ Standard/deemed requests in multiple litigation. [§ 41.52-¶4]

____ Discovery from third parties. [§ 21.447]
- ____ Sufficient advance notice.
- ____ Applicability of confidentiality orders. [§ 41.36-¶1,4]
- ____ Cost-sharing.
- ____ Outside district.
  - ____ Exercise of powers outside district.
  - ____ Use of special master to supervise.

8. Depositions.

____ Limitations. [§ 21.451]
- ____ Number/length of depositions. [§ 41.33-¶2(d)]
- ____ Requiring court approval. [§ 41.3-¶5(b)]
  - ____ Depositions of class members.
  - ____ Depositions outside country. [§ 21.485]

8. Depositions. (cont'd)

____ Cost-saving measures. [§§ 21.452; 41.38]
- ____ Informal interviews.
- ____ Tape-recorded interviews.
- ____ Tape-recorded depositions.
  - ____ Encouragement by court.
  - ____ Stipulations as to submission/filing.
  - ____ Provision for transcription(s).
  - ____ Tape-recording as supplement to regular reporting.
- ____ Telephonic depositions.
  - ____ Stipulations as to oath.
  - ____ Restrictions on attendance/coaching.
  - ____ Providing documents to deponent.
- ____ Written questions under FRCivP 31.
- ____ Conference-type depositions.
- ____ Affidavit from proposed deponent claiming no knowledge.
- ____ Limited attendance by counsel.
  - ____ Authorizing supplemental examination after review of transcript.
  - ____ Participation by telephone.
  - ____ Providing written questions under FRCivP 30(c) or FRCivP 31.
- ____ Deferring transcription/filing until need arises.
- ____ Adoption of previously-given deposition/report/affidavit.

____ Video-taped depositions; teleconferencing. [§ 41.38-¶10]

____ Scheduling. [§§ 21.454; 41.33; 41.38-¶3]
- ____ Time periods.
  - ____ Exclusive periods for particular parties.
  - ____ Preferential rights during specified periods.
  - ____ According to subject matters.
  - ____ Special time periods for deposing experts.
- ____ Arranging depositions in logical or geographical sequence.
- ____ Conducting depositions in central locations.
- ____ Multiple, concurrent depositions.
- ____ Ordinarily no postponement for attorney scheduling conflicts.

____ Other litigation. [§§ 21.455; 41.51-¶2]
- ____ Cross-noticing.
- ____ Adoption of previously given testimony.
- ____ Coordination of scheduling.
- ____ Order to show cause why not usable in other cases.

____ Disputes. [§§ 21.456; 41.38-¶14]
- ____ Telephonic presentations.
- ____ Acting as deposition judge outside district.
- ____ Use of master/magistrate/judge to supervise deposition.

____ Guidelines. [§§ 21.456; 41.38]
- ____ Improper objections; suggesting answers.
- ____ Instructions not to answer.
  - ____ Privileges.
  - ____ Bad faith/oppressive examination.
- ____ Who may be present.

8. Depositions. (cont'd)

____ Guidelines. (cont'd)
- ____ Advance approval for telephonic and non-stenographic depositions.
- ____ Confidential information—examination/production.
- ____ Providing copies of documents to deponent/other counsel.
- ____ Procedures for supplemental examination.
- ____ Procedures for obtaining court ruling.

9. Interrogatories.

____ Uses. [§ 21.46]
- ____ Identify witnesses/documents.
- ____ Identification/description of computerized data.
- ____ Specific information known in part by different persons.
- ____ Initial discovery of expert opinions.
- ____ Explain denials of requests for admission.
- ____ Contention interrogatories.
  - ____ Timing.
  - ____ Scope.

____ Limitations. [§§ 21.46; 41.3-¶5(e)]
- ____ Number.
- ____ Restricting overinclusive definitions.
- ____ Scope/purpose; timing.
- ____ Not repeat interrogatories previously answered.

____ Improving utility. [§§ 21.465; 41.3-¶5(e); 41.52-¶4,5]
- ____ Consolidated interrogatories in multiple-party litigation.
- ____ Standard/master interrogatories in multiple litigation.
- ____ Use of answers from other litigation.
- ____ Non-technical reading.
- ____ Respond with available information similar to that requested.
- ____ Successive responses as information obtained.
- ____ Resolving disputes promptly—voluntarily if possible.
- ____ Continuing obligation to supplement. [§ 21.461]

10. Stipulations; Admissions; Uncontested/Contested Facts.

____ Timing; adequate opportunity for discovery. [§ 21.47]

____ Acknowledging facts that will not be disputed or contested. [§§ 21.47; 41.6-¶2(b)]

____ FRCivP 36 procedures. [§ 21.47]
- ____ Timing.
- ____ Duty to make reasonable inquiry.
- ____ Obligation to clarify denial, admit other parts.
- ____ Interrogatories to further clarify.

____ Negotiated stipulations. [§ 21.47]
- ____ Timing.
- ____ Use of special master to facilitate. [§ 20.14]

10. Stipulations; Admissions; Uncontested/Contested Facts. (cont'd)

____ Development of uncontested/contested facts; statements of contentions and proof. [§§ 21.47; 21.641; 41.6]
- ____ Sequential preparation.
- ____ Timetable.
- ____ Scope.
  - ____ All facts.
  - ____ Principal facts.
  - ____ Facts that may be admitted and, if admitted, will reduce scope of trial.
  - ____ Facts on particular issues (e.g., summary judgment).
  - ____ Use for special hearings (e.g., class certification, preliminary injunctions).
- ____ Interlineation/deletion to clarify position.
- ____ Annotations by reference to witnesses/documents.
  - ____ Permissive.
  - ____ Mandatory, with preclusive effect.
- ____ Objections.
  - ____ Not basis for refusing to admit.
  - ____ Requiring certain objections (e.g., authentication).
  - ____ Requiring all objections.
- ____ Effect.
  - ____ Admitted for purpose of trial; when independent evidence permitted.
  - ____ Precluding proof of unlisted facts.
  - ____ Sanctions under FRCivP 36 for unwarranted denial.
  - ____ Withdrawal from admission under FRCivP 36 standards.

11. Special Problems.

____ Expert opinions. [§§ 21.481; 21.51; 41.33-¶1]
- ____ At initial conference—
  - ____ Identify subjects on which expert opinions may be offered.
  - ____ Set timetables for—
    - ____ Identifying experts to be called.
    - ____ Disclosure of reports/information under FRCivP 26(b)(4)(A)(i).
    - ____ Deposing experts.
    - ____ Any revision to opinions/reasons.
- ____ Materials on which opinions based.
  - ____ General requirement for preservation/production.
  - ____ Consider whether aborted/discarded preliminary studies should be preserved/produced.
  - ____ Potential problem when using information protected by attorney-client privilege or work product doctrine.
  - ____ Disclosure of publications/treatises.
- ____ Critiques of opinions by other experts—time for disclosure.
- ____ Costs of depositions.
  - ____ Paid by deposing party under FRCivP 26(b)(4)(C).
  - ____ Each party by agreement pays costs of own expert.
- ____ Limiting length of deposition.
- ____ Pretrial consideration of objections to expert's qualifications or opinions.
- ____ Discovery from court-appointed expert(s).

11. Special Problems. (cont'd)

____ Governmental investigations/reports. [§ 21.482]
- ____ Early identification of relevant investigations/reports.
- ____ Production.
  - ____ From parties.
  - ____ From public records.
  - ____ Subpoena.
  - ____ Requests under Freedom of Information Act.
  - ____ Grand jury materials.
- ____ Admissibility.
  - ____ Discovery regarding trustworthiness.
  - ____ Pretrial consideration of objections.

____ Summaries; compilations. (See also ¶ 7 this section) [§§ 21.446; 21.483; 41.33-¶1]
- ____ Timetable for disclosure.
- ____ Production of underlying data.
- ____ Verification procedures.
  - ____ Detect/correct errors if feasible.
  - ____ Stipulation as to estimated range of errors.

____ Polls; surveys; other sampling techniques. [§§ 21.484; 41.33-¶1]
- ____ Timetable for disclosure of potential use.
- ____ Consultation between experts prior to conducting survey.
- ____ Disclosure of results/underlying data.
- ____ Admissibility.
  - ____ Discovery.
  - ____ Pretrial consideration of objections.

____ Settlements.
- ____ Continuing duty to disclose settlements/special agreements. [§§ 21.24; 23.23; 41.3-¶5(g)]
- ____ Discovery regarding fairness/adequacy of proposed class settlements. [§ 30.42]
- ____ Discovery not postponed for settlement discussions. [§§ 21.24; 23.13]
- ____ Potential problems with settlements limiting discovery. [§ 23.22]

____ Attorneys' fees. [§ 24.13]
- ____ Scope of discovery.
- ____ Inquiry into hours/rates of opposing counsel.

40.3 FINAL PREPARATION FOR TRIAL.

1. Review of Proceedings.

____ Schedule. [§ 21.6]
- ____ Reports on completion of discovery.
- ____ Items remaining to be completed.
- ____ Requests for relief from deadlines/preclusion orders.

____ Review statements of uncontested/contested facts, statements of contention and proof, witness/document lists. [§§ 21.641; 21.643; 21.65]

1. Review of Proceedings. (cont'd)

____ Outstanding motions. Rule on all outstanding motions. [§ 41.7-¶1]
- ____ Challenges to jurisdiction or venue. [§ 21.61]
- ____ Transfer under 28 U.S.C. § 1404 or 1406. [§ 21.61]
- ____ Summary judgment, including motions under FRCivP 56(d). [§ 21.65]
- ____ Motions seeking to limit period/scope of proof.
- ____ Issues regarding right to jury trial. [§ 21.62]

____ Possible rulings on objections to evidence. [§ 21.642]
- ____ Immediate rulings.
- ____ Schedule hearing under FRE 104.

____ Consider whether to recommend remand under 28 U.S.C. § 1407. [§§ 21.61; 31.123]

2. Trial.

____ Set/modify/confirm date and place of trial. [§§ 21.61; 41.7-¶2]
- ____ Continuance only in extreme circumstances. [§§ 21.61; 41.7-¶2(f)]
- ____ Deadline for partial settlements in class actions. [§§ 23.21; 30.46; 41.7-¶2(f)]
- ____ Trial schedule. [§§ 22.11; 41.7-¶2(d)]
  - ____ Normal hours.
  - ____ Days when no trial or trial day reduced.
  - ____ Holidays; recesses.

____ Consolidation under FRCivP 42(a). [§§ 21.631; 41.7-¶2(a)]
- ____ Class actions and individual actions.
- ____ Jury and non-jury cases.
- ____ Transfer as appropriate under 28 U.S.C. § 1404 or 1406.

____ Severance under FRCivP 42(b). [§§ 21.632; 41.7-¶2(b)]
- ____ Define/confirm issues for trial and those severed for later trial.
- ____ If both jury and non-jury issues to be tried—
  - ____ Receive additional non-jury evidence at completion of trial.
  - ____ Receive additional non-jury evidence at close of each day.
- ____ Schedule for subsequent trials of severed issues.
  - ____ Immediately after initial trial.
  - ____ Later, perhaps after additional discovery.

____ Order of proof/issues/evidence. [§§ 22.23; 22.34; 41.7-¶2(c)]
- ____ Standard order of presentation.
- ____ Issues presented in specified sequence.
  - ____ Plaintiffs' evidence presented in specified sequence, followed by defendants' evidence in same sequence.
  - ____ Parties present all evidence on first issue before proceeding with evidence on next issue(s).
    - ____ Arguments presented as evidence on issue completed.
    - ____ Verdict/findings on first issue before proceeding with evidence on next issue.

2. Trial. (cont'd)

____ Jury selection. [§§ 22.41; 41.7-¶2(e)]
____ Principal jurors.
____ Number to be selected.
____ Number of peremptory challenges.
____ Selection of alternate jurors.
____ Number.
____ When disclosure made as to identity of alternates.
____ Stipulations.
____ Agreement to receive verdict from remaining jurors, avoiding need to select alternates.
____ Agreement to accept less than unanimous verdict.
____ Agreement on excusing juror after deliberations begin.
____ Agreement to accept non-jury decision if jury not unanimous.
____ Number of jurors to be called/impanelled.
____ Submission of suggested voir dire questions.
____ Written questionnaires.
____ Before jury reports.
____ After jurors given initial instructions.
____ Special procedures to handle problems of publicity.
____ Review of practices used in court for exercising challenges.

3. Witness and Exhibit Lists.

____ Deadline for submitting. [§§ 21.641; 41.7-¶3,4]
____ Sequentially.
____ Concurrently by all parties.

____ Contents. [§§ 21.641; 41.7-¶3,4]
____ All potential witnesses and exhibits.
____ Exception for impeachment evidence.
____ Indicate whether probable or improbable.
____ Key witnesses and exhibits.
____ Expected length of direct examination of witnesses.
____ Nature of expected testimony.
____ Subject matter.
____ Outline of expected testimony.
____ Depositions.
____ Indicate which witnesses to be presented by deposition.
____ Designation of portions to be offered.
____ Preparation of agreed summaries of depositions.
____ Identify evidence to be offered against less than all parties.
____ Provide copies of exhibits not previously produced.

____ Responses. [§§ 21.641; 41.7-¶3,4]
____ Cross-examination.
____ Expected length.
____ Additional substantive topics.
____ Designation of additional portions of depositions.
____ Objections to evidence. [§§ 21.642; 41.7-¶3-5]
____ Certain objections waived if not raised. (E.g., authenticity, best evidence, requirement for foundation.)
____ All objections waived if not raised.

3. Witness and Exhibit Lists. (cont'd)

____ Effect. [§§ 21.66; 41.7-¶3-5]
____ Precluding evidence not listed--
____ Except solely for impeachment purposes.
____ Authenticating/laying foundation for exhibits.
____ Precluding all or certain objections not raised.

4. Limits on Evidence; Facilitating Presentation of Evidence.

____ Precluding proof of facts not disclosed on statement of contentions or statement of contested facts. [§§ 21.47; 21.641; 41.6-¶4(b)]

____ Precluding/limiting proof of facts not in dispute. [§§ 41.6-¶4(a); 41.7-¶5]

____ Precluding witnesses/exhibits not listed. [§ 41.7-¶3-5]

____ Precluding expert testimony unless report filed. [§ 21.481]

____ Limits on quantity of evidence. [§ 21.643]
____ Preliminary steps.
____ Review lists of witnesses/exhibits in light of disputed facts.
____ Consider views of counsel.
____ Limit number of expert witnesses.
____ Limit number of lay witnesses/exhibits on particular subjects.
____ Limit time for presentation by parties.
____ Limits on time for direct examination of own witnesses and on cross-examination of other witnesses.
____ Limits on gross time for each party's case-in-chief.

____ Depositions. [§§ 22.33; 41.38-¶10(k); 41.7-¶3]
____ Summaries.
____ Selected extracts, purged of unnecessary materials.

____ Adoption of prepared reports as direct testimony, subject to cross-examination. [§ 22.51]

____ Permitting all/specified witnesses to remain in courtroom by not invoking FRE 615. [§ 22.34]

____ Limiting cross-examination on additional subjects under FRE 611(b).

____ Pretrial rulings on objections. [§ 21.642]

____ Use of summaries or samples in lieu of voluminous source documents. [§ 22.32]

5. Briefs.

____ Timetable. [§§ 21.65; 41.7-¶6]
____ Sequential.
____ Concurrent.
____ Supplemental briefs as trial progresses.

5. Briefs. (cont'd)

____ Contents. [§§ 21.65; 41.7-¶6]
____ Specific issues or all probable issues.
____ Jury voir dire. [§§ 22.41; 41.7-¶2(e)]
____ Suggested questions for oral examination.
____ Suggested written questionnaire.
____ Suggested instructions. [§§ 22.433; 41.7-¶6(a)]
____ Initial instructions.
____ Limiting instructions on particular evidence.
____ Final instructions.
____ Glossary/index of key terms, events, persons. [§ 22.31]
____ Suggested special verdict/interrogatories. [§§ 21.633; 21.65; 41.7-¶6(b)]
____ Proposed findings/conclusions in non-jury cases. [§ 22.52]

6. Organization of Counsel.

____ Designation of lead/trial counsel in multi-party cases. [§§ 22.22; 41.7-¶7]
____ Excessive number of participating counsel—limiting fees. [§ 22.22]
____ Excusing counsel from continuous attendance. [§ 22.11]

____ Opening statements. [§ 22.21]
____ Order.
____ Time limits.
____ Non-repetitive additional statements by other counsel. [§ 41.7-¶7]
____ Use of exhibits. [§ 22.21]

____ Presentation of evidence; examination of witnesses. [§§ 22.22; 41.7-¶7]
____ Order.
____ Fixed order throughout trial.
____ Rotation.
____ Shifting order, based on principal proponent/adversary.
____ Designation of attorney to conduct principal examination (direct and cross) of each witness; another attorney on stand-by. [§ 22.22]
____ Supplemental examination by other counsel. [§ 22.22]

____ Objections; offers; motions. [§§ 22.22; 41.7-¶7]
____ Unless specifically disavowed, deemed made on behalf of all.
____ Supplementation where special grounds/circumstances.
____ Renewal of objections/offers. [§ 22.13]

7. Administrative Details.

____ Arrangements for facilities/equipment. [§§ 22.12; 41.7-¶8(a)]
____ Representatives from parties.
____ Courtroom arrangement, tables, name plates.
____ Witness/exhibit/conference rooms.
____ Copying/computer equipment.
____ Security arrangements in criminal cases.

7. Administrative Details. (cont'd)

____ Exhibits. [§§ 22.13; 22.31; 22.32; 41.7-¶8(d)]
- ____ Premarked and listed on Clerk's exhibit sheets.
- ____ Absent objection, deemed as offered and received when identified.
- ____ Notify counsel before using (to avoid interruptions while they review/locate copies).
- ____ Glossaries; indexes; demonstrative aids.
- ____ Provide copies for court/jurors.
  - ____ Exhibit books.
  - ____ Enlargements/slides.
- ____ Representatives assist clerk in maintaining/indexing list of exhibits received.

____ Schedule of evidence. [§§ 22.13; 22.15; 22.23; 41.7-¶8(b)]
- ____ Advance notification of expected order of presenting witnesses and documents.
- ____ Notify of changes in schedule as soon as known.
- ____ Notify of changes in deposition designations.
- ____ Notify if portion of document to be offered.

____ Guidelines/discussion of courtroom protocol/decorum.
- ____ Examination of witnesses.
- ____ Manner of making objections.
- ____ Submission of exhibits to witnesses.
- ____ Publication of exhibits to jurors.
- ____ Side-bar/chambers conferences.
- ____ How/when offers of proof made.

____ Transcript of proceedings. [§ 22.14]
- ____ Expedited/daily/hourly transcript.
- ____ Representatives review daily.
- ____ Suggested corrections submitted promptly to court.
- ____ Whether to permit independent tape recording of proceedings.

____ Interpreters; translation of documents.

____ Special arrangements if jury to be sequestered. [§§ 22.44; 32.32]
- ____ Hotel/meals.
- ____ Transportation.
- ____ Family visitation.
- ____ Recreation.
- ____ Security.

____ Schedule for interim conferences during trial. [§§ 22.15; 41.7-¶8(c)]

____ Jurors.
- ____ Note-taking. [§ 22.42]
- ____ Exhibit books. [§ 22.32]
- ____ Questions by jurors. [§ 22.42]

41. FORMS AND SAMPLES.

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The sample orders contained in this section are intended only as illustrations. They should be selected, modified, and adapted as appropriate to the circumstances of the case.

41.1 TYPICAL FORMAT—ORDERS IN MULTIPLE LITIGATION.

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:) Master File No. _____ 2/
)
_____ 1/ LITIGATION) THIS DOCUMENT RELATES TO:
) [ALL CASES]

ORDER NO. ___ 3/

[Preamble]

[Body of Order]

Dated: _____

_____
United States District Judge

Attachments:
_____ 4/

Notes:

1/ Courts frequently assign multiple litigation a descriptive name, both to serve as an abbreviated caption in orders, pleadings, and other documents, and to minimize confusion if parties are changed or cases dismissed. In multidistrict proceedings under 28 U.S.C. § 1407, the name given by the Judicial Panel on Multidistrict Litigation is used.

2/ In its order establishing a master case file—a decision that is frequently deferred until the initial conference—the court should include provisions such as those contained in § 41.3, ¶ 1, and specify a master file number. The MDL number is used if the litigation includes cases transferred under 28 U.S.C. § 1407. Documents that apply generally to all constituent cases are so identified; those that apply only to particular cases should specify in their captions or by a separate list the style or case number of such cases.

3/ If many orders may be entered during the litigation, the court should number its major orders sequentially for convenient reference. An explanatory description of the nature of the order is often added. Transcripts of conferences at which rulings are made should be included in the numerical sequence if no separate order incorporating these rulings will be prepared.

4/ Drafting, as well as ease of reference, is facilitated by appending lists and lengthy directives (such as a protective order for confidential documents) as attachments rather than including them within the body of an order. Sample orders and other materials from MCL 2d may be incorporated by reference.

41.2 SAMPLE ORDER SETTING INITIAL CONFERENCE.

[CAPTION]

ORDER NO. 1
(Setting Initial Conference)

It appearing that [the above styled case(s)] [the cases listed on Attachment __] may merit special attention as complex litigation, the court ORDERS:

1. **Initial Conference.** All parties shall appear for a conference with the undersigned on the ____ day of _____, 19__, at _____ __m. in [Court]room _____, United States Courthouse, _____.

(a) **Attendance.** Each party represented by counsel shall appear through its attorney who will have primary responsibility for its interests in this litigation.1/ Parties not represented by counsel are expected to appear in person or through a responsible officer. Attendance at the conference will not waive objections to jurisdiction, venue, or service.

(b) **Service List.** A list of the names and addresses of the persons to whom this order is being mailed is appended as Attachment __. Counsel are requested to advise the Clerk of any additions or corrections to this list and to forward a copy of this order to any other attorneys or parties who should be notified, including those in any additional related cases that may be filed in, removed to, or transferred to this court before the conference.

(c) **Other Participants.** Persons who are not named as parties in this litigation but may later be joined as parties or are parties in related litigation pending in other federal and state courts are invited to attend in person or by counsel.

2. **Purposes; Agenda.** The conference will be held for the purposes specified in Fed. R. Civ. P. 16(a), 16(b), 16(c), and 26(f) and subject to the sanctions prescribed in Rule 16(f). A tentative agenda is appended as Attachment __.2/ Counsel are encouraged to advise the court as soon as possible of any items that should be added to the agenda.

3. **Preparations for Conference.**

(a) **Procedures for Complex Litigation.** Counsel will familiarize themselves with the Manual for Complex Litigation, Second, and be prepared

at the conference to suggest procedures that will facilitate the expeditious, economical, and just resolution of this litigation.

(b) **Initial Organization of Counsel.** Before the conference, counsel shall confer and seek consensus to the extent possible with respect to the items on the agenda, including a proposed discovery plan under Rule 26(f) and a suggested schedule under Rule 16(b) for joinder of parties, amendment of pleadings, consideration of any class action allegations, and trial. [The court designates _____ and _____ to arrange the initial meetings of plaintiffs' and defendants' counsel, respectively.][3]

(c) **Preliminary Reports.** Counsel will submit to the court by _____, 19___, a brief written statement indicating their preliminary understanding of the facts involved in the litigation and what they expect to be the critical factual and legal issues. These statements will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings.

(d) **List of Affiliated Companies and Counsel.** To assist the court in identifying any problems of recusal or disqualification, counsel will submit to the court by _____, 19___, a list of all companies affiliated with the parties and all counsel associated in the litigation.

4. **Interim Measures.** Until otherwise ordered by the court:

(a) **Admission of Counsel.** Attorneys admitted to practice and in good standing in any United States District Court are admitted pro hac vice in this litigation. Association of local co-counsel is not required.

(b) **Pleadings.** Each defendant is granted an extension of time for responding by motion or answer to the complaint(s) until a date to be set at the conference.

(c) **Discovery.** Pending the conference, all outstanding discovery proceedings are stayed and no further discovery shall be initiated. This directive does not preclude informal discovery regarding the identification and location of relevant documents and witnesses. Relief from this stay may be granted for good cause shown, such as the ill health of a proposed deponent.

(d) **Preservation of Records.** Each party shall preserve all documents and other records containing information potentially relevant to the subject matter of this litigation. Subject to further order of the court, parties may continue routine erasures of computerized data pursuant to existing programs, but they shall (1) immediately notify opposing counsel about such programs and (2) preserve any printouts of such data. Requests for relief from this order will receive prompt attention from the court.

5. **Later Filed Cases.** This order shall also apply to related cases later filed in, removed to, or transferred to this court.

6. **Other Provisions.** [Include any special instructions, such as procedures for presenting emergency matters prior to conference.]

Dated: _____

_____
United States District Judge

Attachments: [Omitted.]

Notes:

1/ In some cases the court may decide that the parties themselves should attend the conference with their counsel. See § 21.23.

2/ As an alternative, the clause might read, "The items listed in MCL 2d § 40.1 shall, to the extent applicable, constitute a tentative agenda."

3/ Appointment of attorneys to organize these initial meetings may be useful both to fix responsibility and to reduce early factionalism among those interested in becoming lead or liaison counsel. The attorneys designated by the court need not be persons who would be considered for appointment as lead or liaison counsel.

41.3 SAMPLE CASE MANAGEMENT ORDER AFTER INITIAL CONFERENCE.

[CAPTION]

ORDER NO. ___
(Case Management Order)

Having considered the comments and proposals of the parties presented at the initial conference held _____, 19___, the court ORDERS:

1. **Pretrial Consolidation.** The cases listed on Attachment __ are, until further order, consolidated for pretrial purposes. This order does not constitute a determination that these actions should be consolidated for trial, nor does it have the effect of making any entity a party to an action in which it has not been joined and served in accordance with the Federal Rules of Civil Procedure.

(a) **Master Docket and File.** The Clerk will maintain a master docket and case file under the style "In re _____ LITIGATION", master file number _____. All orders, pleadings, motions, and other documents will, when filed and docketed in the master case file, be deemed filed and docketed in each individual case to the extent applicable.

(b) **Captions; Separate Filing.** Orders, pleadings, motions and other documents will bear a caption similar to that of this Order[1]. If generally applicable to all consolidated actions, they shall include in their caption the notation that they relate to "ALL CASES" and be filed and docketed only in the master file. Documents intended to apply only to particular cases will indicate in their caption the case number of the case(s) to which they apply, and extra copies shall be provided to the Clerk to facilitate filing and docketing both in the master case file and the specified individual case files.

(c) **Discovery Requests and Responses.** Pursuant to Fed. R. Civ. P. 5(d), discovery requests and responses will not be filed with the court except to the extent offered in connection with a motion under Rule 11, 12, or 56 or a motion seeking a ruling by the court on a discovery dispute.[2]

[(d) **Coordinated Actions.** The actions listed on Attachment __ are not consolidated for pretrial purposes at the present time, but discovery in such cases shall be coordinated with that in the consolidated actions to prevent duplication and conflicts.][3]

2. **Organization of Counsel.**[4]

(a) **Plaintiffs.** To act on behalf of plaintiffs with the responsibilities prescribed in [Attachment __] [MCL 2d § 41.31], the court designates—

(1) as Liaison Counsel:

(name, address, telephone number)

(2) as Lead Counsel:

(name, address, telephone number)

(3) as additional members of Plantiffs' Steering Committee:

(names, addresses, telephone numbers)

(b) **Defendants.** To act as Liaison Counsel on behalf of all defendants [except defendant(s) _____] with the responsibilities prescribed in [Attachment __] [MCL 2d § 41.31, ¶ 4], the court designates (name, address, telephone number).

(c) **Reimbursement.** If agreement cannot be reached on a method for periodically reimbursing attorneys for expenses incurred and paying them for services rendered as lead or liaison counsel, the matter will be presented to the court for resolution.

(d) **Time Records.** Counsel who anticipate seeking an award of attorneys' fees from the court shall comply with the directives contained in [Attachment __] [MCL 2d § 41.32] regarding the maintenance and filing of contemporaneous records reflecting the services performed and and expenses incurred.

3. **Service of Documents.**

(a) **Orders.** A copy of each order will be provided to Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel for redistribution as appropriate to other counsel and parties. [A copy shall also be provided to counsel for defendant(s) _____.]

(b) **Pleadings, Motions, and Other Documents.** Plaintiffs' Liaison Counsel will be provided with ___ copies of each pleading, motion, or other document filed by a party; Defendants' Liaison Counsel will be provided with ___ copies of each such document. [Pursuant to Fed. R. Civ. P. 5, service on Liaison Counsel constitutes service on other attorneys and parties for whom Liaison Counsel is acting, such service being deemed effective seven days after service on Liaison Counsel.[5/]]

4. **Refinement of Issues.**

(a) **Rule 12 Motions.** [Make rulings on pending Rule 12 motions if appropriate, or establish dates for filing, briefs, and arguments. For example, "The motions of defendants A.B. and C.D. to dismiss the complaint of plaintiff E.F. for failure to state a claim on which relief may be granted are, upon consideration, DENIED. A similar motion is hereby deemed filed by each other defendant, and the same order deemed made on each such motion."]

(b) **Pleadings.** Each defendant shall have until _____, 19___, to file its answer to the complaint, including any cross-claims or counterclaims. Answers to any cross-claims or counterclaims will be filed by _____, 19___. Except for good cause shown, no additional parties may be joined as plaintiff, defendant, or third-party defendant after _____, 19___.

(c) **Summary Judgment.** The following issues may be considered for early resolution on motions under Fed. R. Civ. P. 56: _____ _____. Subject to further order of the court, motions seeking summary judgment on these issues will be presented, with supporting affidavits and briefs, by _____, 19___. Opposing

affidavits and briefs will be filed by _____, 19___, and any reply briefs by _____, 19___.

(d) **Class Action.** Plaintiffs will file by _____, 19___, their motion seeking class certification, identifying the class(es) for which certification is sought, detailing the facts on which satisfaction of the requirements of Fed. R. Civ. P. 23 is asserted, and describing what and how notice will be given to class members. Defendants will file by _____, 19___, any objections to class certification, specifying with particularity the factual and legal basis of their objection and identifying any facts on which an evidentiary dispute exists. A hearing will be conducted by the court under Rule 23(c) on _____, 19___, at which time the parties may present extracts of depositions, interrogatories, and documentary evidence relevant to any factual disputes. Only on a showing of good cause will a party be permitted to call a witness to testify in person at the hearing.

5. **Discovery.**

(a) **Schedule.** Discovery shall be conducted according to the schedule attached as Attachment __ [MCL 2d § 41.33]. All discovery [other than on the issue(s) of _____] shall be completed by _____, 19___.

(b) **General Limitations.** All discovery requests and responses are subject to the requirements of Fed. R. Civ. P. 26(b)(1) and (g). Discovery shall not, without prior approval of the court, be taken of putative class members or of persons in countries outside the United States; and any request for such discovery shall indicate why the discovery is needed and the specific information or documents sought.

(c) **Confidentiality Order.** See Attachment __ [MCL 2d § 41.36].

(d) **Documents.**

(1) **Preservation.** See Attachment __ [MCL 2d § 41.34].

(2) **Numbering System.** Counsel shall develop and use a system for identifying by a unique number or symbol each document produced or referred to during the course of this litigation. All copies of the same document should ordinarily be assigned the same identification number.

(3) **Document Depositories.** See Attachment __ [MCL 2d § 41.35].

(4) **Avoidance of Multiple Requests.** Counsel shall, to the extent possible, coordinate and consolidate their requests for production and examination of documents to eliminate duplicative requests from the same party. No party shall request documents available to it at a document depository or from its own Liaison Counsel.

(e) **Interrogatories.** Counsel shall, to the extent possible, combine their interrogatories to any party into a single set of questions. No question shall be asked that has already been answered in response to interrogatories filed by another party unless there is reason to believe that a different answer will be given. [Without leave of court, interrogatories shall not include more than ____ separate questions, including subparts.]

(f) **Depositions.** See Attachment __ [MCL 2d § 41.38].

(g) **Special Agreements.** All parties shall be under a continuing duty to make prompt disclosure to the court (and, unless excused by the court for good cause shown, to other parties) of the existence and terms of all agreements and understandings, formal or informal, absolute or conditional, settling or limiting their rights or liabilities in this litigation. This obligation includes not only settlements, but also such matters as "loan receipt" and "Mary Carter" arrangements, and insurance, indemnification, contribution, and damage-sharing agreements.

6. **Trial.** Subject to further order of the court, the parties are directed to be ready for trial on all issues [except _____] by _____, 19___. Counsel are cautioned that the court may require a listing in advance of trial of the factual contentions each party expects to prove at the trial, identifying the witnesses and documents to be presented in support of each such contention, and may preclude the presentation of any contention, witness, or document not so identified.

7. **Next Conference.** The next pretrial conference is [tentatively] scheduled for _____, 19___.

8. **Later Filed Cases.** The terms of this order, including pretrial consolidation, shall apply automatically to actions later instituted in, removed to, or transferred to this court (including cases transferred for pretrial purposes under 28 U.S.C. § 1407) that involve claims of _____ _____. Objections to such consolidation or other terms of this order shall promptly be filed, with a copy served on liaison counsel for plaintiffs and defendants.

Dated: _____

_____
United States District Judge

Attachments: [Omitted.]

Notes:

1/ See § 41.1.

2/ As a means of keeping advised of the progress of discovery without unnecessarily burdening the Clerk's office, the court may wish to add this provision: "At the time

of requesting or responding to discovery, the parties shall file with the Clerk a one-page notice indicating the nature of the discovery request or response."

3/ Coordination of discovery, including use of joint notices for common depositions, is often appropriate even if consolidation is not warranted.

4/ This order provides for appointment of only Liaison Counsel for defendants, while providing for appointment of Liaison Counsel, Lead Counsel, and a Steering Committee for plaintiffs. In many cases, of course, the same organizational structure for both plaintiffs and defendants will be appropriate.

5/ To assure that each liaison counsel has a complete file, copies of all documents should be served on both liaison counsel even if individual service is also to be made on other attorneys and parties. If the court directs under Fed. R. Civ. P. 5 that service on all opposing counsel may be made by serving liaison counsel, some additional time should be provided for liaison counsel to make distribution among those counsel and parties interested in a particular document.

41.31 Sample Order Prescribing Responsibilities of Designated Counsel.1/

Responsibilities of Designated Counsel

It is ORDERED:

1. **Plaintiffs' Lead Counsel.** Plaintiffs' Lead Counsel shall be generally responsible for coordinating the activities of plaintiffs during pretrial proceedings and shall—

(a) determine (after such consultation with other members of Plaintiffs' Steering Committee and other co-counsel as may be appropriate) and in briefs, oral argument or such other fashion as may be appropriate present (personally or by a designee) to the court and opposing parties the position of the plaintiffs on all matters arising during the pretrial proceedings;

(b) coordinate the initiation and conduct of discovery on behalf of plaintiffs consistent with the requirements of Fed. R. Civ. P. 26(g), including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in depositions;

(c) conduct settlement negotiations on behalf of plaintiffs, but without authority to enter binding agreements except to the extent expressly authorized;

(d) delegate responsibilities for specific tasks to other counsel in a manner to assure that pretrial preparation for the plaintiffs is conducted effectively, efficiently, and economically;

(e) monitor the activities of co-counsel to assure that schedules are met and and unnecessary expenditures of time and expenses are avoided; and

(f) perform such other duties as may be incidental to proper coordination of plaintiffs' pretrial activities or authorized by further order of the court.

Counsel for plaintiffs who disagree with lead counsel (or those acting on behalf of lead counsel) or who have individual or divergent positions may present written and oral arguments, conduct examinations of deponents, and otherwise act separately on behalf of their client(s) as appropriate, provided that in doing so they do not repeat arguments, questions, or actions of lead counsel.

2. **Plaintiffs' Liaison Counsel.** Plaintiffs' Liaison Counsel shall—

(a) maintain and distribute to co-counsel and to Defendants' Liaison Counsel an up-to-date service list;

(b) receive and, as appropriate, distribute to co-counsel orders from the court [and documents from opposing parties and counsel];

(c) maintain and make available to co-counsel at reasonable hours a complete file of all documents served by or upon each party [except such documents as may be available at a document depository]; and

(d) establish and maintain a document depository.

3. **Plaintiffs' Steering Committee.** The other members of Plaintiffs' Steering Committee shall from time to time consult with Plaintiffs' Lead and Liaison Counsel in coordinating the plaintiffs' pretrial activities and in planning for trial.

4. **Defendants' Liaison Counsel.** Defendants' Liaison Counsel shall—

(a) maintain and distribute to co-counsel and to Plaintiffs' Liaison Counsel an up-to-date service list;

(b) receive and, as appropriate, distribute to co-counsel orders from the court [and documents from opposing parties and counsel];

(c) maintain and make available to co-counsel at reasonable hours a complete file of all documents served by or upon each party [except such documents as may be available at a document depository];

(d) establish and maintain a document depository; and

(e) call meetings of co-counsel for the purpose of coordinating discovery, presentations at pretrial conferences, and other pretrial activities.

Dated: _____

_____
United States District Judge

Notes:

1/ The sample orders in § 41 illustrate the designation of Lead Counsel, Liaison Counsel, and a Steering Committee for plaintiffs and a Liaison Counsel for defendants. In many cases the same organizational structure will be appropriate both for plaintiffs and for defendants.

41.32 Sample Order—Attorneys' Time and Expense Records.

Attorneys' Time and Expense Records

It is ORDERED:

1. **Maintenance of Contemporaneous Records.** All counsel shall keep a daily record of their time spent and expenses incurred in connection with this litigation, indicating with specificity the hours, location, and particular activity (such as "conduct of deposition of A.B."). The failure to maintain such records will be grounds for denying court-awarded attorneys' fees, as will an insufficient description of the activity (such as "research" or "review of correspondence").

2. **Filing.**1/ By the 15th day of each month, each firm which may seek an award (or approval) of a fee by the court shall file [under seal with the Clerk] [with Lead Counsel] a report summarizing according to each separate activity the time and expenses spent by its members or associates during the preceding month (and the ordinary billing rates of such attorneys in effect during such month) and the accumulated total of the firm's time, hourly rates, and expenses to date. [Lead Counsel shall file under seal with the Clerk by the last day of the month a report summarizing for all participating counsel such time and expenses reports, arranged according to the particular activities.]

Dated: _____

_____
United States District Judge

Notes:

1/ Time and expense records should ordinarily be submitted through lead counsel, if one has been appointed, in order to facilitate such attorney's monitoring of the activities of co-counsel and preparation of a single, consolidated report for filing with the court.

41.33 Sample Scheduling Order.

Scheduling Order

It is ORDERED:

1. Discovery shall be conducted according to the following schedule:

Discovery	Time[1/]
Interrogatories by all parties to ascertain identity and location of witnesses and documents, incl. computerized records	_____
Document production by all parties	_____
Lay-witness depositions	
—noticed by plaintiffs	_____
--noticed by defendants	_____
Expert(s):	
—plaintiffs:	
—identification; reports	_____
—depositions	_____
—defendants:	
--identification; reports	_____
—depositions	_____
Production of proposed computerized summaries and samples:	
—by plaintiffs	_____
—by defendants	_____
Requests for Admission and Interrogatories by all parties	_____

2. Except for good cause shown,—

(a) relief from the above schedule shall not be granted and all discovery shall be completed by _____, 19___;[2/]

(b) discovery shall be limited to matters occurring after _____, 19___, [and before _____, 19___];

(c) no more than _____ interrogatories (including subparts) may be propounded to any party (exclusive of interrogatories seeking the identity and location of witnesses and documents);

[(d) no more than ____ depositions may be taken by either plaintiffs or defendants, and no single deposition (other than of _____ _____) may take more than ____ days;] and

(e) no amendment of pleadings may be made after _____, 19___, and no additional parties may be joined as plaintiff, defendant, or third-party defendant after _____, 19___.

3. The parties are expected to be prepared for trial on all issues [except _____] by _____, 19___.

Dated: _____

_____
United States District Judge

Notes:

1/ The time for undertaking or completing some aspect of discovery may be stated either by using specific dates or by reference to completion of discovery that should precede it. The listing in this sample order of certain forms of discovery is not intended to suggest that they should be undertaken in this sequence or that each item should be completed before other discovery is undertaken. For example, in many cases depositions should be conducted by both sides during the same period of time, during which the parties may also be involved in preparing answers to interrogatories and responses to requests for admission.

2/ The extent to which a schedule may be established at the initial conference for all discovery will depend on the circumstances of the litigation. In some complex cases it may be feasible to establish a timetable only for certain portions of the discovery, leaving for subsequent conferences the task of setting a schedule for other discovery and a final cut-off date for all discovery. In other cases, a comprehensive discovery schedule—which may even include dates for preparation and submission of a joint statement of contested and uncontested facts and for identification of trial witnesses and documents—can be fairly established at the initial conference.

41.34 Sample Order—Preservation of Records.

Order for Preservation of Records

It is ORDERED:

1. **Preservation.** During the pendency of this litigation, and for _____ days after final order closing all cases, each of the parties herein and their respective officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from altering, interlining, destroying, permitting the destruction of, or in any other fashion changing any "document" in the actual or constructive care, custody, or control of such person, wherever such document is physically located. Such persons are also enjoined from changing the location of any such documents except to facilitate compilation, review, or production (as by filing in a document depository).

2. **Scope.**

(a) "Document" shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained, including (but not limited to) notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, computer storage tapes, computer storage cards or discs, books, journals, ledgers, statements, reports, invoices, bills, vouchers, worksheets, jottings, notes, letters, abstracts, audits, charts, checks, diagrams, drafts, recordings, instructions, lists, logs, orders, recitals, telegram messages, telephone bills and logs, resumes, summaries, compilations, computations, and other formal and informal writings or tangible preservations of information.

(b) This order pertains only to documents containing information that may be relevant to, or may lead to the discovery of information relevant to, _____ (describe general subject matter of litigation) _____ [which have been written or generated after _____, 19__, and before _____, 19__]. Any document described or referred to in any discovery request made during this litigation shall, from the time of the request, be treated for purposes of this order as containing such information unless and until the court rules such information to be irrelevant.

(c) Counsel are directed to confer to resolve questions as to what documents are outside the scope of this order or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the court for clarification or relief from this order upon reasonable

notice. A party which, within 60 days after receiving written notice from another party that specified documents will be destroyed, lost, or otherwise altered pursuant to routine policies and programs, fails to indicate in writing its objection shall be deemed to have agreed to such destruction.

3. **Implementation.** Each party will, within 10 days after receiving this order, designate an individual who shall be responsible for ensuring that the party carries out the requirements of this order.

Dated: _____

_____
United States District Judge

41.35 Sample Order—Document Depositories.

Order for Establishment of Document Depositories

It is ORDERED:

1. **Establishment of Depositories.** Document depositories shall be established in [specify city] at such locations as the parties may agree upon. In the absence of agreement, the court upon motion shall designate such locations. Documents produced by plaintiffs pursuant to formal or informal request shall be placed in a plaintiffs' depository maintained at the expense of plaintiffs; those produced by defendants pursuant to formal or informal request shall be placed in a defendants' depository maintained at the expense of defendants. Each depository will contain a copying machine with an appropriate mechanism for separately counting the copies that are made by each party.

2. **Filing System.** The filing party shall place the documents in the depository in sequential order according to the document numbers, and the documents shall be organized in groups in accordance with the document identification prefixes. Documents without identification numbers shall be organized in an orderly and logical fashion. Existing English translations of all foreign-language documents shall be filed with the documents.

3. **Access; Copying; Log.** Counsel appearing for any party in this litigation and the staffs of their respective law firms working on these cases shall have

reasonable access during business hours to each document in any such depository and may copy or obtain copies at the inspecting parties' expense. Such inspection shall not be subject to monitoring by any party. A log will be kept of all persons who enter and leave the depository, and only duplicate copies of documents may be removed from the depository except by leave of court. [Access to, and copying of, confidential documents is subject to the limitations and requirements of the order protecting against unauthorized disclosure of such documents.]

4. **Subsequent Filings.** After the initial deposit of documents in the depository, notice shall be given to both Liaison Counsel of all subsequent deposits.

Dated: _____

_____
United States District Judge

41.36 Sample Confidentiality Order.

Confidentiality Order

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and insure that protection is afforded only to material so entitled, it is, pursuant to the court's authority under Fed. R. Civ. P. 26(c) and with the consent of the parties, ORDERED:

1. **Non-disclosure of Stamped Confidential Documents.** Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this order, no stamped confidential document may be disclosed to any person.

[A "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER IN CIVIL ACTION NO. _____, UNITED STATES DISTRICT COURT, _____ DISTRICT OF _____" to signify that it contains information believed to be subject to protection under Fed. R. Civ. P. 26(c)(7). For purposes of this order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced

pursuant to Rule 34, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.]

2. **Permissible Disclosures.** Notwithstanding paragraph 1, stamped confidential documents may be disclosed to counsel for the parties in this action[1/] who are actively engaged in the conduct of this litigation; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in the litigation; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to court officials involved in this litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the court). Subject to the provisions of subparagraph (c), such documents may also be disclosed—

(a) to any person designated by the court in the interest of justice, upon such terms as the court may deem proper; and

(b) to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify; to outside consultants or experts retained for the purpose of assisting counsel in the litigation; to employees of parties involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions; provided, however, that in all such cases the individual to whom disclosure is to be made has signed and filed with the court a form containing—

(1) a recital that the signatory has read and understands this order;

(2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents constitute contempt of court; and

(3) a statement that the signatory consents to the exercise of personal jurisdiction by this court.

(c) Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing

to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the court has denied such motion. The court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted.

3. **Declassification.** A party (or aggrieved entity permitted by the court to intervene for such purpose) may apply to the court for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

4. **Confidential Information in Depositions.**

(a) A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 2(c) are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 2(b). A deponent who is not a party or a representative of a party shall be furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within 15 days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential—Subject to protection pursuant to Court Order." Until expiration of the 15 day period, the entire deposition will be treated as subject to protection against disclosure under this order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

5. **Confidential Information at Trial.** Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the

court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The court will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information at the trial.

6. **Subpoena by Other Courts or Agencies.** If another court or an administrative agency subpoenas or orders production of stamped confidential documents which a party has obtained under the terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

7. **Filing.** Stamped confidential documents need not be filed with the Clerk except when required in connection with motions under Fed. R. Civ. P. 12 or 56 or other matters pending before the court. If filed, they shall be filed under seal and shall remain sealed while in the office of the Clerk so long as they retain their status as stamped confidential documents.

8. **Client Consultation.** Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 2(b) and (c).

9. **Prohibited Copying.** If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the court, with notice to counsel so designating the document.

10. **Use.** Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and trial of this litigation (including appeals and retrials), and shall not use such information for any other purpose, including business, governmental, commercial, or administrative or judicial proceedings. [For purposes of this paragraph, the term "this litigation" includes other related litigation in which the producing person or company is a party.]

11. **Non-Termination.** The provisions of this order shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, stamped confidential documents and all copies of same (other than exhibits of record) shall be returned to the party or person which produced such documents or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

12. **Modification Permitted.** Nothing in this order shall prevent any party or other person from seeking modification of this order or from objecting to discovery that it believes to be otherwise improper.

13. **Responsibility of Attorneys.** The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing in court under seal.

Dated: _____

_____
United States District Judge

Notes:

1/ The order should indicate whether or not disclosure may be made to house counsel actively involved in conduct of the litigation and to attorneys involved in related litigation in other courts.

41.37 Sample Order Referring Privilege Claims to Master.

Referral of Privilege Claims to Master

It appearing that submission of claims of privilege to a special master appointed under Fed. R. Civ. P. 53 is warranted by the expected volume of such claims and by the likelihood that in camera inspection may be needed to rule on these claims and should be accomplished, to the extent possible, by someone other than the judge to whom this litigation has been assigned, the court hereby, with the consent of the parties, ORDERS:

1. **Appointment.** _____ is appointed under Rule 53 as special master for the purpose of considering all claims of privilege (including assertion of protection against disclosure based on the "work product" doctrine) that may be asserted during the course of discovery in this litigation and for such other matters as may be referred to such master by the court, such as resolution of disputes under the Confidentiality Order.

2. **Procedures.** The master shall have the rights, powers, and duties as provided in Rule 53 and may adopt such procedures as are not inconsistent with that rule or with this or other orders of the court. Until directed otherwise by

the master or the court, any person asserting a privilege shall specifically identify the document or other communication sought to be protected from disclosure, including the date, the person making the statement, the persons to whom or in whose presence the statement was made, other persons to whom the contents were or have been revealed, the general subject matter of the communication (unless itself claimed to be privileged), the particular privilege(s) or doctrine(s) upon which protection against disclosure is based, and any other circumstances affecting the existence, extent, or waiver of the privilege. When appropriate, the master may require that this documentation of claims of privilege be verified.

3. **Reports.** The master shall make findings of fact and conclusions of law with respect to the matters presented by the parties and report expeditiously to the court pursuant to Rule 53(e) as applicable in non-jury actions. Unless directed by the court or believed advisable by the master, the report shall not be accompanied by a transcript of the proceedings, the evidence, or the exhibits. Such parts of the report, if any, as may be confidential shall be filed under seal pending further order of the court.

4. **Fees and Expenses.** Compensation at rates mutually agreeable to the master and the parties shall be paid to the master on a periodic basis by the parties, together with reimbursement for reasonable expenses incurred by the master. The master may employ other persons to provide clerical and secretarial assistance; such persons shall be under the supervision and control of the master, who shall take appropriate action to insure that such persons preserve the confidentiality of matters submitted to the master for review. Final allocation of these amounts shall be subject to taxation as costs at the conclusion of the case at the discretion of the court.

5. **Distribution.** A copy of this order shall be mailed by the Clerk to the special master and to Liaison Counsel for the parties.

Dated: _____

_____
United States District Judge

41.38 Sample Deposition Guidelines.

Deposition Guidelines

It is ORDERED that depositions be conducted in accordance with the following rules:

1. **Cooperation.** Counsel are expected to cooperate with, and be courteous to, each other and deponents.

2. **Stipulations.** Unless contrary to an order of the court, the parties (and, when appropriate, a non-party witness) may stipulate in any suitable writing to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for the extension of discovery cut-offs set by the court are not, however, valid until approved by the court.

3. **Scheduling.** Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at mutually convenient times and places. [That some counsel may be unavailable shall not, however, in view of the number of attorneys involved in this litigation, be grounds for postponing a deposition if another attorney from the same firm or who represents a party with similar interests is able to attend.]

4. **Attendance.**

(a) **Who may be present.** Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purpose of the deposition, the parties or the representative of a party, counsel for the deponent, and potential witnesses. While a deponent is being examined about any stamped confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Confidentiality Order shall be excluded.

(b) **Unnecessary attendance.** Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the court. Counsel who have only marginal interest in a proposed deposition or who expect their interests to be adequately represented by other counsel may elect not to attend and to conduct pursuant to paragraph 13(b) of this order supplemental interrogation of the deponent should a review of the deposition reveal the need for such examination.

5. **Conduct.**

(a) **Examination.** Each side should ordinarily designate one attorney to conduct the principal examination of the deponent, and examination by other attorneys should be limited to matters not previously covered.

(b) **Objections.** The only objections that should be raised at the deposition are those involving a privilege against disclosure or some matter that may be remedied if presented at the time, such as to the form of the question or the responsiveness of the answer. Objections on other grounds are unnecessary and should generally be avoided. All objections should be concise and must not suggest answers to (or otherwise coach) the deponent. Argumentative interruptions will not be permitted.

(c) **Directions not to answer.** Directions to the deponent not to answer are improper except on the ground of privilege or to enable a party or deponent to present a motion to the court for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the party or the deponent. When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

(d) **Private consultation.** Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may however be held during normal recesses and adjournments.

6. **Documents.**

(a) **Production of documents.** Witnesses subpoenaed to produce numerous documents should ordinarily be served at least 30 days before the scheduled deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the interrogation commences.

(b) **Confidentiality order.** A copy of the Confidentiality Order shall be provided to the deponent before the deposition commences if the deponent is to produce or may be asked about documents which may contain confidential information. [Counsel shall comply with the provisions of paragraphs 2(b), 2(c), and 4 of the Confidentiality Order when examining a deponent about confidential information.]

(c) **Copies.** Extra copies of documents about which counsel expect to examine the deponent should ordinarily be provided to opposing counsel and the deponent. Deponents should be shown a document before being examined about it except when counsel seek to impeach or test the deponent's recollection.

7. **Depositions of Witnesses Who Have No Knowledge of the Facts.** An officer, director, or managing agent of a corporation or a governmental official

served with a notice of a deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party a reasonable time before the date noticed an affidavit so stating and identifying a person within the corporation or government entity believed to have such knowledge. Notwithstanding such affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order.

8. **Expert witnesses.** Leave is granted to depose expert witnesses in addition to or in lieu of discovery through interrogatories. Objection to such depositions may be made by motion.

9. **Tape recorded depositions.** By indicating in its notice of a deposition that it wishes to record the deposition by tape recording in lieu of stenographic recording (and identifying the person before whom the deposition will be taken), a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(4). Unless an objection is filed and served within ___ days after such notice is received, the court shall be deemed to have granted the motion pursuant to the following terms and conditions:

(a) **Transcript; filing.** Subject to the provisions of paragraph 12, the party noticing the deposition shall be responsible for preparing a transcript of the tape recording and for filing within applicable time limits this transcript together with the original tape.

(b) **Rights of other parties.** Other parties may at their own expense arrange for stenographic recording of the deposition, may obtain a copy of the tape and transcript upon payment of a pro-rata share of the noticing party's actual costs, and may prepare and file their own version of the transcript of the tape recording.

10. **Videotaped depositions.** By indicating in its notice of a deposition that it wishes to record the deposition by videotape (and identifying the proposed videotape operator), a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(4). Unless an objection is filed and served within ___ days after such notice is received, the court shall be deemed to have granted the motion pursuant to the following terms and conditions:

(a) **Stenographic recording.** The videotaped deposition shall be simultaneously recorded stenographically by a qualified court reporter. The court reporter shall on camera administer the oath or affirmation to the deponents. The written transcript by the court reporter shall constitute the official record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to witness) and 30(f) (filing; exhibits).

(b) **Cost.** The noticing party shall bear the expense of both the videotaping and the stenographic recording. Any party may at its own expense obtain a copy of the videotape and the stenographic transcript.

Requests for taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

(c) **Video Operator.** The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

(d) **Attendance.** Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped.

(e) **Standards.** The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition will not be permitted.

(f) **Interruptions.** [The videotape shall run continuously throughout the active conduct of the deposition.] [Videotape recording will be suspended during all "off the record" discussions.][1/]

(g) **Examination; exhibits; re-reading.** The provisions of paragraphs 5 and 6 of this order apply to videotaped depositions. Re-reading of questions or answers, when needed, will be done on camera by the stenographic court reporter.

(h) **Index.** The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which any interruption of continuous tape-recording occurs, whether for recesses, "off the record" discussions, mechanical failure, or otherwise.

(i) **Filing.** [The operator shall preserve custody of the original videotape in its original condition until further order of the court.] [Subject to the provisions of paragraph 12 of this order, the original of the tape-recording, together with the operator's log index and a certificate of the operator

attesting to the accuracy of the tape, shall be filed with the Clerk.] No part of a videotaped deposition shall be released or made available to any member of the public unless authorized by the court.

(j) **Objections.** Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If the objection involves matters peculiar to the videotaping, a copy of the videotape and equipment for viewing the tape shall also be provided to the court.

(k) **Use at trial; purged tapes.** A party desiring to offer a videotape deposition at trial shall be responsible for having available appropriate playback equipment and a trained operator. After the designation by all parties of the portions of a videotape to be used at trial, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), [may] [shall] be prepared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other parties at least ___ days before it is used, and the unedited original of the tape shall also be available at the trial.

11. **Telephonic depositions.** By indicating in its notice of a deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(7). Unless an objection is filed and served within ___ days after such notice is received, the court shall be deemed to have granted the motion. Other parties may examine the deponent telephonically or in person. However, all persons present with the deponent shall be identified in the deposition and shall not by word, sign, or otherwise coach or suggest answers to the deponent.

12. **Waiver of transcription and filing.** The parties and deponents are authorized and encouraged to waive transcription and filing of depositions that prove to be of little or no usefulness in the litigation or to agree to defer transcription and filing until the need for using the deposition arises.

[13. **Use; supplemental depositions.**

(a) **Use.** Depositions may, under the conditions prescribed in Fed. R. Civ. P. 32(a)(1)-(4) or as otherwise permitted by the Federal Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this court as part of this litigation)—

(1) who was present or represented at the deposition,

(2) who had reasonable notice thereof, or

(3) who, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this court in any action

which is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.

(b) **Supplemental depositions.** Each party not present or represented at a deposition (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this court) may, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this court in any action which is a part of this litigation), request permission to conduct a supplemental deposition of the deponent, including the right to take such deposition telephonically and by non-stenographic means. If permitted, the deposition shall be treated as the resumption of the deposition originally noticed; and each deponent shall, at the conclusion of the initial deposition be advised of the opportunity of non-attending parties to request a resumption of such deposition, subject to the right of the deponent to seek a protective order. Such examination shall not be repetitive of the prior interrogation.]

14. **Rulings.**

(a) **Immediate presentation.** Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition may be presented by telephone to the court. [If the judge will not be available during the period while the deposition is being conducted, the dispute may be addressed to Magistrate _____.] The presentation of the issue and the court's ruling will be recorded as part of the deposition.

[(b) **Extraterritorial jurisdiction.** The undersigned will exercise by telephone the authority granted under 28 U.S.C. § 1407(b) to act as district judge in the district in which the deposition is taken.][2/]

Dated: _____

_____
United States District Judge

Notes:

1/ If, as in this sample order, a simultaneous stenographic transcript is being made, many courts prefer that "off the record" discussions be eliminated from the videotape.

2/ The power to exercise authority over non-party deponents outside the district is available only in multidistrict litigation unless the judge has been given an intra-circuit or inter-circuit assignment.

41.4 SAMPLE CLASS ACTION ORDERS.

41.41 Order Certifying Class.

[CAPTION]

ORDER NO. ___
(Certifying Class)

In accordance with the findings and conclusions contained in the Opinion filed concurrently herewith [omitted], it is, subject to alteration or amendment under Fed. R. Civ. P. 23(c), conditionally ORDERED:

1. **Class Certification.** Civil Action No. _____, styled _____ _____, shall be maintained as a class action on behalf of the following class of plaintiffs:

> [Describe class in objective terms to the extent possible. For example, "All persons and entities throughout the United States and its territories (other than widget manufacturers and entities owned or controlled by them) that, since _____, 19__, have purchased widgets directly from any of the defendants or from any other widget manufacturer."]

with respect to the following cause(s) of action:

> [Describe class claims as precisely as possible. For example, "Any claims for damages or injunctive relief under federal antitrust laws premised upon an alleged conspiracy among the defendants and other widget manufacturers to restrict competition in the manufacture, distribution, and sale of widgets by setting the minimum prices charged for widgets after _____, 19__."]

2. **Class representative; class counsel.** Subject to further order of the court, [A. B. Co.] is designated as class representative and [X.Y.] is designated as counsel for the class.

3. **Notice.**

(a) Class counsel shall by _____, 19__, cause to be mailed in the name of the Clerk by first class mail, postage prepaid, to all class members who can be identified through reasonable efforts a notice in substantially the same form as Attachment A. In addition to class members identified through an examination of defendants' records, this notice will also be mailed to persons who are members of [National Widget Dealers Trade Association.]

(b) Class counsel shall cause to be published in the _____ _____ by _____, 19___, a notice in substantially the same form as Attachment B.

4. **Exclusion.** Class members may exclude themselves from the class by filing with the "Committee of Counsel" by _____, 19___, the form attached to Exhibit A or some other appropriate written indication that they request exclusion from the class. Class counsel and _____ _____ are designated as a Committee of Counsel to arrange for a post office box and to receive and tabulate requests for exclusion.

5. **List of Class Members.** Class counsel will file with the Clerk by _____, 19___, an affidavit identifying the persons to whom notice has been mailed and who have not timely requested exclusion.

Dated: _____, 19___

_____
United States District Judge

Attachments:
A—Notice
B—Published Notice

(Attachment A)

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

NOTICE OF CLASS ACTION

This notice may affect your rights.
Please read carefully.

Si usted desea obtener una copia de este documento legal en Español, favor de actuar inmediatamente y escribir a "Committee of Counsel, P.O. Box ___, _____."

TO: Purchasers of [Widgets]

Your rights may be affected by a lawsuit pending in this court, Civil Action No. _____.

A. B. Co. (the company bringing the lawsuit) charges that since _____ ____,19___, C. D. Inc., E. F. Inc., and G. H. Inc. have unlawfully agreed among themselves and with other [widget] manufacturers to restrict price competition in the sale of [widgets] and that, as a result, buyers of [widgets] have paid higher prices than they otherwise would have paid. It asserts that under the federal antitrust laws these companies are legally responsible to the purchasers for three times the amount of the claimed overcharges, as well as for attorneys' fees and costs. A. B. Co. (the plaintiff) also asks that the three companies (the defendants) be prohibited from continuing the alleged conspiracy. The defendants deny these claims and charges.

The court has not ruled on the merits of the plaintiff's charges or on the denials and other defenses made by the defendants. However, some matters have arisen during the preparation of this case for trial that affect purchasers of [widgets] who were not previously parties to the lawsuit. The purpose of this notice is to advise you (who have been identified as possibly such a purchaser) of these events and their potential effect on your rights.

Class Action Ruling

The court has conditionally ruled that this lawsuit may be maintained as a claim for triple damages, injunctive relief, attorneys' fees, and costs not only by A. B. Co., but also on behalf of a class consisting of certain other buyers of

[widgets]. The court has named A. B. Co. as representative of the class, and its attorney, X.Y., as counsel for the class. The class consists of those persons and entities throughout the United States and its territories (other than [widget] manufacturers and companies owned or controlled by them) that since _____, 19__, have purchased [widgets] directly from the defendants or other [widget] manufacturers.

Establishment by the court of this class does not mean that any money or injunctive relief will be obtained for purchasers of [widgets], for these are contested issues which have not been decided. Rather, the ruling means that the ultimate outcome of this lawsuit—whether favorable to the plaintiffs or to the defendants—will apply in like manner to the class members; that is, to all [widget] buyers described above who do not timely elect to be excluded from the class.

The class is limited to those persons and companies that have made at least one purchase of [widgets] since _____, 19__, directly from the defendants or some other company which manufactures [widgets]. If you have bought [widgets] during the period only from other sources (for example, from dealers or retailers), you are not a member of the class on whose behalf this suit will be maintained and any claims you desire to make against the defendants must be presented independently by you.

Election By Class Members

If you fit the above description of a class member, you have a choice whether or not to remain a member of the class on whose behalf this suit is being maintained. Either choice will have its consequences, which you should understand before making your decision.

- If you want to be excluded from the class, you must complete the enclosed form ("Exclusion Request") and return it to the "Committee of Counsel, Widget Antitrust Litigation, P.O. Box __, _____ _____," by mail postmarked no later than _____, 19__. By making this election to be excluded, (1) you will not share in any recovery that might be paid to [widget] purchasers as a result of trial or settlement of this lawsuit; (2) you will not be bound by any decision in this lawsuit favorable to the defendants; and (3) you may present any claims you have against the defendants by filing your own lawsuit or you may seek to intervene in this lawsuit.

- If you want to remain a member of the class, you should NOT file the "Exclusion Request" and are not required to do anything at this time. By remaining a class member, any claims against the defendants for damages under the federal antitrust laws arising from the defendants' conduct as alleged by the class representative will be determined in this case and cannot be presented in any other lawsuit.

Rights and Obligations of Class Members

If you remain a member of the class:

- A. B. Co. and its attorney, X. Y., will act as your representative and counsel for the presentation of the charges against the defendants. If you desire, you may appear by your own attorney. You may also seek to intervene individually and may advise the court if at any time you consider that you are not being fairly and adequately represented by A. B. Co. and its attorney.

- Your participation in any recovery which may be obtained from the defendants through trial or settlement will depend upon the results of this lawsuit. If no recovery is obtained for the class, you will be bound by that result also.

- You may be required as a condition to participating in any recovery through settlement or trial to present evidence respecting your purchases of [widgets]. (You should, therefore, preserve invoices and other records reflecting these purchases.)

- You will be entitled to notice of any ruling reducing the size of the class and also to notice of, and an opportunity to be heard respecting, any proposed settlement or dismissal of the class claims. (For this reason, as well as to participate in any recovery, you are requested to notify the "Committee of Counsel" of any corrections or changes in your name or address.)

Further Proceedings

[As noted, the essential allegations of the charges against the defendants are denied by them. Because of the substantial discovery and other pretrial proceedings that remain to be done, trial of the case is not likely to occur before _____, 19__. You may communicate with Class Counsel if you have evidence you believe would be helpful to establishment of the class claims and you may be asked by the parties to provide information relevant to the case.]

Additional Information

Any questions you have concerning the matters contained in this notice (and any corrections or changes of name or address) should not be made to the court but should be directed in writing to:

Committee of Counsel
[Widget Antitrust Litigation]
P. O. Box ____
_____, __, _____

If you decide to remain a member of the class and wish to communicate with Class Counsel as your attorney in this litigation, you may do so by writing or calling:

X. Y., Esq.
Attorney at Law
_____
_____, __, _____
Telephone: (__) _____

You may, of course, seek the advice and guidance of your own attorney if you desire. The pleadings and other records in this litigation may be examined and copied at any time during regular office hours at the office of the Clerk, Federal Courthouse, _____, _____, _____.

Reminder as to Time Limit

If you wish to be excluded from the class on whose behalf this action is being maintained, return the completed "Exclusion Request" to the Committee of Counsel by mail postmarked on or before _____, 19__.

Dated: _____

U. V., Clerk
United States District Court
Federal Courthouse
_____, ____

Enclosure:
Exclusion Request

REQUEST FOR EXCLUSION

Read the Enclosed Legal Notice
Carefully Before Filling Out This Form

The undersigned does NOT wish to remain a member of the plaintiff class certified in the case of A. B. Co. v. C. D. Inc. et al., CA _____, in the United States District Court for the _____ District of _____.

Date: _____

_____

_____

_____
(Print name and address of company)

_____
(Signature)

_____
(Print name of person signing)

_____
(Print title of person signing)

If you want to exclude yourself from the class, you must fill in and return this form by mailing before _____, 19___, to:

Committee of Counsel
Widget Antitrust Litigation]
P. O. Box ___
_____

A separate request for exclusion should be completed and timely mailed for each entity electing to be excluded from the class.

(Attachment B)

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

PUBLISHED NOTICE OF CLASS ACTION

This notice may affect your rights.
Please read carefully.

TO: Purchasers of [Widgets]

Your rights may be affected by a lawsuit pending in this court, Civil Action No. _____.

The plaintiff, A. B. Co., charges that since _____,19__, the defendants, C. D. Inc., E. F. Inc., and G. H. Inc., have unlawfully agreed among themselves and with other [widget] manufacturers to restrict price competition in the sale of [widgets] and that, as a result, buyers of [widgets] have paid higher prices than they otherwise would have paid. The plaintiff asserts that under the federal antitrust laws these defendants are legally responsible to the purchasers for three times the amount of the claimed overcharges, as well as for attorneys' fees and costs, and the plaintiff also asks that they be prohibited from continuing the alleged conspiracy. The defendants deny these charges. The court has not ruled on the merits of the charges or of the defendants' denials and other defenses.

The court has, however, conditionally ruled that this lawsuit may be maintained as a claim on behalf of a class consisting of all persons and entities throughout the United States and its territories (other than [widget] manufacturers and companies owned or controlled by them) that since _____, 19__, have purchased [widgets] directly from the defendants or other [widget] manufacturers.

Persons and entities that have been identified as possible members of this class are being advised by mail of their rights with respect to the lawsuit (including the right to exclude themselves from the class if they desire). This notice is being published because some class members may not receive the mailed notice. If you are (or may be) a member of the class but do not receive individual notice of your rights by _____, 19__, you are requested to notify the "Committee of Counsel, Widget Antitrust Litigation, P. O. Box ___, _____ _____," giving your correct name and current address. You will then be mailed a more detailed explanation of your rights in this litigation and be placed on the mailing list for any future notifications regarding the suit.

U. V., Clerk

41.42 Sample Order and Notice of Class Settlement.

[CAPTION]

ORDER NO. ___
(Order for Hearing on Proposed Class Settlement)

It is ORDERED:

1. **Proposed Settlement.** The proposed settlement between the plaintiff class and the defendants appears, upon preliminary review, to be within the range of reasonableness and accordingly shall be submitted to the class members for their consideration and for a hearing under Fed. R. Civ. P. 23(e).

2. **Hearing.** A hearing shall be held in Courtroom ___, United States District Courthouse, _____, _____, at _____.m., on _____, _____, 19___, to consider whether the settlement should be given final approval.

(a) Objections by class members to the proposed settlement will be considered if filed in writing with the Clerk on or before _____, 19___.[1/]

(b) At the hearing, class members may be heard orally in support of or in opposition to the settlement, provided such persons file with the Clerk by _____, 19___, a written notification of the desire to appear personally, indicating (if in opposition to the settlement) briefly the nature of the objection.

(c) Counsel for the class and for the defendants should be prepared at the hearing to respond to objections filed by class members and to provide other information, as appropriate, bearing on whether or not the settlement should be approved.

3. **Notice.** The parties to the proposed settlement shall by _____, 19___, cause to be mailed in the name of the clerk by first class mail, postage prepaid, to members of the class [who did not timely elect to be excluded from litigation] a notice in substantially the same form as Attachment A. [Notice of the proposed settlement (and of the rights of class members to object to the settlement) shall also be given by publication in the following manner: _____.

Dated: _____

_____
United States District Judge

Attachment: A--Notice

Notes:

1/ In some cases the court has required that a copy of objections also be mailed to a post office box to facilitate inspection by counsel.

(Attachment A)

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

NOTICE OF PROPOSED CLASS SETTLEMENT

TO: Purchasers of [Widgets] who are members of the plaintiff class in CA _____

A lawsuit pending in this court (CA _____) involves a claim by A. B. Co. (the plaintiff) that C. D. Inc., E. F. Inc., and G. H. Inc. (the defendants) violated federal antitrust laws by conspiring among themselves and with the other [widget] manufacturers to the damage of those buying [widgets] after _____, 19___. The court ruled that this case was to be maintained on behalf of a class consisting of all persons and entities throughout the United States and its territories (other than [widget] manufacturers and companies owned or controlled by them) which after _____, 19___, bought [widgets] directly from a [widget] manufacturer. If you are such a purchaser, you should have received a notice dated _____, 19___, advising you of the certification of this class and of your rights as a member of the class.

The purpose of this notice is to advise you of the status of the lawsuit, including a statement of your rights with respect to a proposed settlement of the case.

Terms of Proposed Settlement

Subject to court approval, the plaintiff and defendants have agreed on a settlement under which C. D. Inc., E. F. Inc., and G. H. Inc. will pay the amounts of $_____, $ _____, and $ _____, respectively. These payments will be in final settlement of all claims by class members against the defendants for violations of federal antitrust laws in the sale of [widgets] from _____, 19___, to _____, 19___. The defendants do not admit any wrongdoing or liability on their part; the proposed settlement with them

is a compromise of disputed claims and does not mean that they or any other [widget] manufacturers are guilty of the charges made by the plaintiff.

This settlement fund, totalling $_____, will, after reduction for such fees and expenses of the Class Counsel as may be allowed by the court, be distributed to class members (who have not elected to be excluded from the class) in a method to be determined by the court. The court has not fixed the amount of fees and expenses to be allowed or determined the precise method of allocating and distributing the net settlement fund to class members. However, Class Counsel has indicated that the total fees and expenses to be requested (including amounts in connection with distribution of the settlement fund) will not exceed $ _____, and that the method to be proposed for allocating the net settlement funds will be based on the total amount paid to [widget] manufacturers for [widgets] by class members during the period from _____, 19__, to _____, 19__. [Although the amount to be distributed to individual class members cannot be accurately determined until fees and expenses have been fixed, the method for allocation determined, and more complete information obtained regarding widget purchases by all class members, Class Counsel estimates that the net recovery by class members should be in the approximate range of __ to __ % of the gross amounts paid by them to widget manufacturers for widgets during the applicable period.]

Settlement Hearing

The court will hold a hearing in Courtroom ___, United States District Courthouse, _____, at _____ __.m on _____, _____, 19___, to determine whether, as recommended by both class counsel and the class representative, it should approve the proposed settlement.

Objections to the proposed settlement by class members (who have not previously elected to exclude themselves from the class) will be considered by the court, but only if such objections are filed in writing with the Clerk by mail postmarked before _____, 19___. Attendance at the hearing is not necessary; however, class members wishing to be heard orally in opposition to the proposed settlement should indicate in their written objection their intention to appear at the hearing.

Class members who support the proposed settlement do not need to appear at the hearing or take any other action to indicate their approval.

Further Proceedings

If the settlement is approved by the court, procedures will be established to ascertain the amounts of [widget] purchases made by class members and any other information needed to apportion and distribute the settlement fund. Class Counsel believes that, unless delayed by appeals or unforeseen events, this distribution may

be made by _____, 19___. You should preserve records relating to your purchases of [widgets] during the period covered by the settlement.

If the settlement is not approved, the case will continue to be prepared for trial or other judicial resolution of the claims and defenses. [Trial (of certain issues in the case) is presently scheduled for _____, 19___; depending upon the results of that trial, further proceedings may be necessary before the case is finally resolved.]

Additional Information

Any questions you have about the matters in this notice should not be directed to the court but may be directed by telephone or letter to:

X. Y., Esq.
Class Counsel, Widget Antitrust Litigation
_____
_____
Telephone: (___) _____

or

S. T., Esq.
Defendant's Lead Counsel, Widget Antitrust Litigation
_____
_____
Telephone: (___) _____

You may, of course, seek the advice and guidance of your own attorney if you desire. The pleadings and other records in this litigation, including a complete copy of the proposed settlement agreement, may be examined and copied at any time during regular office hours at the office of the Clerk, Federal Courthouse, _____, _____.

Reminder as to Time Limits

If you wish to object to the proposed settlement, file your written objection with the Clerk of the court by mail postmarked before _____, 19___. Include any request to be heard orally at the hearing.

Dated: _____

U. V., Clerk
United States District Court
Federal Courthouse
_____

(Alternate Attachment A)

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

NOTICE OF PROPOSED CLASS SETTLEMENT (PARTIAL)

TO: Purchasers of [Widgets] who are members of the plaintiff class in CA _____

A lawsuit pending in this court (CA _____) involves a claim by A. B. Co. (the plaintiff) that C. D. Inc., E. F. Inc., and G. H. Inc. (the defendants) violated federal antitrust laws by conspiring among themselves and with the other [widget] manufacturers to the damage of those buying [widgets] after _____, 19___. The court ruled that this case was to be maintained on behalf of a class consisting of all persons and entities throughout the United States and its territories (other than [widget] manufacturers and companies owned or controlled by them) which after _____, 19___, bought [widgets] directly from a [widget] manufacturer. If you are such a purchaser, you should have received a notice dated _____, 19___, advising you of the certification of this class and of your rights as a member of the class.

The purpose of this notice is to advise you of the status of the lawsuit, including a statement of your rights with respect to a proposed settlement in the case.

Terms of Proposed Settlement

Subject to court approval, the plaintiff and C. D. Inc. have agreed on a settlement under which C. D. Inc. will pay the amount of $_____. This payment will be in final settlement of all claims by class members against C. D. Inc. for violations of federal antitrust laws in the sale of [widgets] from _____, 19___, to _____, 19___. C. D. Inc. does not admit any wrongdoing or liability on its part; the proposed settlement with it is a compromise of disputed claims and does not mean that it or any other [widget] manufacturers are guilty of the charges made by the plaintiff.

The settlement funds will be held for the exclusive benefit of the class members (who have not elected to be excluded from the class), including the payment of class counsel for services rendered on behalf of the class. Distribution to class members will not be made at this time and probably will not be made until resolution of the class claims against the remaining defendants, E. F. Inc.

and G. H. Inc. [A portion of the funds may, if permitted by the court, be used to defray the cost of conducting this litigation on behalf of the class members against such remaining defendants.] The fairness and reasonableness of the amount of this settlement, as well as of utilization or distribution of the fund, are subject to the approval of the court; and the manner and method of distribution to the class will be determined at a future time, after providing class members appropriate notice and an opportunity to be heard.

Settlement Hearing

The court will hold a hearing in Courtroom ___, United States District Courthouse, _____, at _____ __.m on _____, _____, 19___, to determine whether, as recommended by both class counsel and the class representative, it should approve the proposed settlement.

Objections to the proposed settlement by class members (who have not previously elected to exclude themselves from the class) will be considered by the court, but only if such objections are filed in writing with the Clerk by mail postmarked before _____, 19___. Attendance at the hearing is not necessary; however, class members wishing to be heard orally in opposition to the proposed settlement should indicate in their written objection their intention to appear at the hearing.

Class members who support the proposed settlement do not need to appear at the hearing or take any other action to indicate their approval.

Further Proceedings

The claims of the class against E. F. Inc. and G. H. Inc. will continue to be prepared for trial or other judicial resolution whether or not the settlement is approved. If the settlement is not approved, C. D. Inc. will remain as an additional defendant against whom these claims are made. If the settlement is approved, C. D. Inc. will no longer be a defendant, and the amount paid by C. D. Inc. will be credited against any recovery obtained in the proceedings from the two remaining defendants. (It should be noted that the claims made on behalf of the class are based not only on purchases made from the three defendants, but also on purchases made from other widget manufacturers; this will continue to be true whether or not the settlement with C. D. Inc. is approved.)

Discovery is expected to be completed by _____, 19___. Trial [of certain issues in the case] is presently scheduled for _____, 19___; depending upon the results of that trial, further proceedings may be necessary before the case is finally resolved. Each of the defendants (including C. D. Inc.) denies the essential allegations made against it; and the court has not determined the merits of these claims or the defenses.

Additional Information

Any questions you have about the matters in this notice should NOT be directed to the court but may be directed by telephone or letter to:

X. Y., Esq.
Class Counsel, Widget Antitrust Litigation
_____
_____
Telephone: (___) _____

or

S. T., Esq.
Defendant's Lead Counsel, Widget Antitrust Litigation
_____
_____
Telephone: (___) _____

You may, of course, seek the advice and guidance of your own attorney if you desire. The pleadings and other records in this litigation, including a complete copy of the proposed settlement agreement, may be examined and copied at any time during regular office hours at the office of the Clerk, Federal Courthouse, _____, _____.

Reminder as to Time Limits

If you wish to object to the proposed settlement, file your written objection with the Clerk of the court by mail postmarked before _____, 19___. Include any request to be heard orally at the hearing.

Dated: _____

U. V., Clerk
United States District Court
Federal Courthouse
_____

41.43 Sample Order—Combined Certification and Proposed Settlement.

[CAPTION]

ORDER NO. ___
(Certifying Class and Setting Hearing on Proposed Settlement)

In accordance with the findings and conclusions contained in the Opinion filed concurrently herewith [omitted], it is ORDERED:

1. **Class Certification.** Civil Action No. _____, styled _____ _____, shall be maintained as a class action on behalf of the following class of plaintiffs:

> [Describe class in objective terms to the extent possible. For example, "All persons and entities throughout the United States and its territories (other than widget manufacturers and entities owned or controlled by them) that, between _____, 19___, and _____, 19___, have purchased widgets directly from any of the defendants or any other widget manufacturer."]

with respect to the following cause(s) of action:

> [Describe class claims as precisely as possible. For example, "Any claims for damages or injunctive relief under federal antitrust laws premised upon an alleged conspiracy among widget manufacturers to restrict competition in the manufacture, distribution, and sale of widgets by setting the minimum prices charged for widgets between _____, 19___, and _____, 19___."]

2. **Class representative; class counsel.** [A. B. Co.] is designated as class representative and [X.Y.] is designated as counsel for the class.

3. **Exclusion.** Class members may exclude themselves from the class by filing with the "Committee of Counsel" by _____, 19___, the form appended to Attachment A or some other appropriate written indication that they request exclusion from the class. Class counsel and _____ _____ are designated as a Committee of Counsel to arrange for a post office box and to receive and tabulate requests for exclusion.

4. **Proposed Settlement.** The proposed settlement between the plaintiff class and the defendants appears, upon preliminary review, to be within the range of reasonableness and accordingly shall be submitted to the class members for their consideration and for a hearing under Fed. R. Civ. P. 23(e).

5. **Hearing.** A hearing shall be held in Courtroom ___, United States District Courthouse, _____, _____, at _____ __.m., on _____, _____, 19___, to consider whether the settlement should be given final approval.

(a) Objections by class members (who do not timely elect to exclude themselves from the class) to the proposed settlement should considered if filed in writing with the Clerk on or before _____, 19___.

(b) At the hearing, class members (who do not timely elect to exclude themselves from the class) may be heard orally in support of or in opposition to the settlement, provided such persons file with the Clerk by _____ ____, 19___, a written notification of the desire to appear personally, indicating (if in opposition to the settlement) briefly the nature of the objection.

(c) Counsel for the class and for the defendants should be prepared at the hearing to respond to objections filed by such class members and to provide other information, as appropriate, bearing on whether or not the settlement should be approved.

6. **Notice.**

(a) Class Counsel shall by _____, 19___, cause to be mailed in the name of the Clerk by first class mail, postage prepaid, to all class members who can be identified through reasonable efforts a notice in substantially the same form as Attachment A. In addition to class members identified through an examination of defendants' records, this notice will also be mailed to persons who are members of [National Widget Dealers Trade Association.]

(b) Class Counsel shall cause to be published a notice in substantially the same form as Attachment B in the following manner _____ _____

7. **List of Class Members.** Class counsel will file with the Clerk by _____, 19___, an affidavit identifying the persons to whom notice has been mailed and who have not timely requested exclusion.

Dated: _____, 19___

_____
United States District Judge

Attachments:
A—Notice
B—[omitted]

(Attachment A)

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT

This notice may affect your rights.
Please read carefully.

Si usted desea obtener una copia de este documento legal en Español, favor de actuar inmediatamente y escribir a "Committee of Counsel, P.O. Box ___, _____."

TO: Purchasers of [Widgets]

Your rights may be affected by a lawsuit pending in this court, Civil Action No. _____.

A. B. Co. (the company bringing the lawsuit) charges that since _____ ____,19___, C. D. Inc., E. F. Inc., and G. H. Inc. have unlawfully agreed among themselves and with other [widget] manufacturers to restrict price competition in the sale of [widgets] and that, as a result, buyers of [widgets] have paid higher prices than they otherwise would have paid. It asserts that under the federal antitrust laws these companies are legally responsible to the purchasers for three times the amount of the claimed overcharges, as well as for attorneys' fees and costs. A. B. Co. (the plaintiff) also asks that the three companies (the defendants) be prohibited from continuing the alleged conspiracy. The defendants deny these claims and charges.

The court has not ruled on the merits of the plaintiff's charges or on the denials and other defenses made by the defendants. However, some matters have arisen during the preparation of this case for trial that affect purchasers of [widgets] who were not previously parties to the lawsuit. The purpose of this notice is to advise you (who have been identified as possibly such a purchaser) of these events, including a proposed settlement of the case, and their potential effect on your rights.

Class Action Ruling

The court has conditionally ruled that this lawsuit may be maintained as a claim for triple damages, injunctive relief, attorneys' fees, and costs not only by A. B. Co., but also on behalf of a class consisting of certain other buyers of

[widgets]. The court has named A. B. Co. as representative of the class, and its attorney, X.Y., as counsel for the class. The class consists of those persons and entities throughout the United States and its territories (other than [widget] manufacturers and companies owned or controlled by them) that between _____, 19__, and _____, 19__, have purchased [widgets] directly from [widget] manufacturers.

Establishment by the court of this class does not mean that money or injunctive relief will be obtained for purchasers of [widgets], for these are contested issues which have not been decided. Rather, the ruling means that the ultimate outcome of this lawsuit—whether favorable to the plaintiffs or to the defendants—will apply in like manner to the class members; that is, to all [widget] buyers described above who do not timely elect to be excluded from the class.

The class is limited to those persons and companies that have made at least one purchase of [widgets] between _____, 19__, and _____, 19__, directly from [widget] manufacturers. If you have bought [widgets] during the period only from other sources (for example, from dealers or retailers), you are not a member of the class on whose behalf this suit will be maintained and any claims you wish to make against the defendants must be presented independently by you.

Election By Class Members

If you fit the above description of a class member, you have a choice whether or not to remain a member of the class on whose behalf this suit is being maintained. Either choice will have its consequences, which you should understand before making your decision.

- If you want to be excluded from the class, you must complete the enclosed form ("Exclusion Request") and return it to the "Committee of Counsel, Widget Antitrust Litigation, P.O. Box ___, _____, _____," by mail postmarked no later than _____, 19__. By making this election to be excluded, (1) you will not share in any recovery that might be paid to [widget] purchasers as a result of trial or settlement of this lawsuit; (2) you will not be bound by any decision in this lawsuit favorable to the defendants; and (3) you may present any claims you have against the defendants by filing your own lawsuit or you may seek to intervene in this lawsuit.

- If you want to remain a member of the class, you should NOT file the "Exclusion Request" and are not required to do anything at this time. By remaining a class member, any claims against the defendants for damages under the federal antitrust laws arising from the defendants' conduct as alleged by the class representative will be determined in this case and cannot be presented in any other lawsuit.

Rights and Obligations of Class Members

If you remain a member of the class:

* A. B. Co. and its attorney, X. Y., will act as your representative and counsel for the presentation of the charges against the defendants. If you desire, you may appear by your own attorney. You may also seek to intervene individually and may advise the court if at any time you consider that you are not being fairly and adequately represented by A. B. Co. and its attorney.

* Your participation in any recovery which may be obtained from the defendants through trial or settlement will depend upon the results of this lawsuit. If no recovery is obtained for the class, you will be bound by that result also.

* You may be required as a condition to participating in any recovery through settlement or trial to present evidence respecting your purchases of [widgets]. (You should, therefore, preserve invoices and other records reflecting these purchases.)

* You will be entitled to notice of any ruling reducing the size of the class and also to notice of, and an opportunity to be heard, respecting any proposed settlement or dismissal of the class claims. (For this reason, as well as to participate in any recovery, you are requested to notify the "Committee of Counsel" of any corrections or changes in your name or address.)

Terms of Proposed Settlement

Subject to court approval, the plaintiff and defendants have agreed on a settlement of this case under which C. D. Inc., E. F. Inc., and G. H. Inc. will pay to the class members (who do not timely elect to exclude themselves from the class) ___% of the net sales price (after all discounts and allowances) paid to them by such class members for [widgets] between _____, 19___, and _____, 19___. Under the proposed settlement, the defendants have also agreed to discontinue the practice of _____ and to pay the fees and expenses of class counsel, X. Y., in such amount as the court may determine. Details of the distribution, including any requirements for verification of these purchases, will be determined by the court.

The defendants do not admit any wrongdoing or liability on their part; the proposed settlement with them is a compromise of disputed claims and does not mean that they are guilty of the charges made by the plaintiff. If approved, the settlement will discharge the defendants from any further liability to the class members for the conduct alleged by the plaintiff.

Settlement Hearing

The court will hold a hearing in Courtroom ___, United States District Courthouse, _____, at ___.m on _____,

_____, 19__, to determine whether, as recommended by both class counsel and the class representative, it should approve the proposed settlement.

Objections to the proposed settlement by class members (who do not timely elect to exclude themselves from the class) will be considered by the court, but only if such objections are filed in writing with the Clerk by mail postmarked before _____, 19__. Attendance at the hearing is not necessary; however, class members wishing to be heard orally in opposition to the proposed settlement should indicate in their written objection their intention to appear at the hearing.

Class members who support the proposed settlement do not need to appear at the hearing or take any other action to indicate their approval.

Further Proceedings

If the settlement is approved by the court, procedures will be established to ascertain the amounts of widget purchases made by class members and any other information needed to make distribution of the settlement. Class Counsel believes that, unless delayed by appeals or unforeseen events, this distribution may be made by _____, 19__. You should preserve records relating to your purchases of widgets during the period covered by the settlement.

If the settlement is not approved, the case will continue to be prepared for trial or other judicial resolution of the claims and defenses. The case is not expected to be ready for trial before _____, 19__, as substantial discovery remains to be conducted. Depending upon the results of the trial, further proceedings may be necessary before the case is finally resolved.

Additional Information

Any questions you have about the matters contained in this notice (and any corrections or changes of name or address) should NOT be made to the court but should be directed in writing to:

Committee of Counsel
[Widget Antitrust Litigation]
P. O. Box ____
_____, __, _____

If you decide to remain a member of the class and wish to communicate with Class Counsel as your attorney in this litigation, you may do so by writing or calling:

X. Y., Esq.
Attorney at Law
_____
_____, __, _____
Telephone: (__) _____

You may, of course, seek the advice and guidance of your own attorney if you desire. The pleadings and other records in this litigation, including a complete copy of the proposed settlement agreement, may be examined and copied at any time during regular office hours at the office of the Clerk, Federal Courthouse, _____.

Reminder as to Time Limit

If you wish to be excluded from the class on whose behalf this action is being maintained, return the completed "Exclusion Request" to the Committee of Counsel by mail postmarked before _____, 19___.

If you wish to remain a member of the class but want to object to the proposed settlement, file your written objection with the Clerk of the court by mail postmarked before _____, 19___. Include any request to be heard orally at the hearing.

Dated: _____

U. V., Clerk
United States District Court
Federal Courthouse

_____, ____

Enclosure:
Exclusion Request [Omitted; see § 41.41]

41.44 Sample Order—Approving Settlement; Claims Procedure.

[CAPTION]

ORDER NO. ___
(Approving Settlement; Claims Procedure)

In accordance with the findings and conclusions contained in the Opinion filed concurrently herewith [omitted], it is ORDERED:

1. **Approval of Settlement.** The settlement is, after hearing, determined to be fair, reasonable, and in the best interests of the class. It is, therefore, approved. By separate order [omitted], this action will be dismissed with prejudice, each side to bear its own costs.

2. **Award of Fees and Expenses.** In accordance with the findings and conclusions contained in the Opinion [omitted], X. Y. is awarded $_____ as compensation and $_____ as reimbursement for expenses, to be paid [from the settlement fund] [by the defendants]. [Application for an award from the settlement fund of additional fees and expenses in connection with further proceedings, including administration and distribution of the settlement fund, may be made to the court.]

3. **Administration and Distribution of Settlement Fund.**

(a) **Investment.** [After payment of counsel fees and expenses as awarded by the court,] the settlement fund shall, pending distribution to class members, be held in interest-bearing investments to be approved by the court from time to time.

(b) **Allocation.** The [net] settlement fund shall be allocated among the class members in proportion to their "qualified purchases," which means the net sales price (after discounts and allowances) paid by them to [widget] manufacturers for [widgets] from _____, 19___, to _____, 19___.

(c) **Claims; proof of purchases.**[1] Unless extended by the court (or the special master) class members shall have until _____, 19___, to submit claims detailing, with appropriate supporting proof, their "qualified purchases."

(d) **Special master.**[2] _____ is appointed as special master under Fed. R. Civ. P. 53 to review, tabulate, and (as appropriate) audit claims made by class members. The special master shall establish procedures to consider disputes regarding eligibility of persons to be

members of the class and regarding the amount of "qualified purchases" by such persons. The findings and conclusions of the special master identifying the class members, their respective "qualified purchases," and their allocable shares of the settlement fund shall be reported to the court under Fed. R. Civ. P. 53(e)(2) as soon as is practicable. Compensation and expenses of the special master will be paid from the settlement fund in such amount as the court may determine to be fair and reasonable.

(e) **Distribution.** The net settlement fund, with interest, shall be distributed to class members as soon as practicable after the amounts to which each is entitled has been determined.

4. **Notice.** Class counsel shall by _____, 19___, cause to be mailed in the name of the Clerk by first class mail, postage prepaid, to members of the class [who did not timely elect to be excluded from litigation] a notice in substantially the same form as Attachment A. [Notice in substantially the same form as Attachment B shall also be given by publication in the following manner _____ _____.]

5. **Reserved powers of court.** The court retains jurisdiction over the settlement of this case and reserves the power to enter additional orders to effectuate the fair and orderly administration of the settlement as may from time to time be appropriate, including the determination of persons to whom payment should be made in the event of death or dissolution and the right to set aside a portion of the net settlement fund not exceeding [$_____] [___ % of the net fund] as a reserve for late claims and other contingencies and to determine the appropriate disposition of any portion of the reserve not distributed to the class members.

Dated: _____

_____
United States District Judge

Attachments:
A—Notice
B—Published Notice

Notes:

1/ If the facts on which the allocation is to be made may, in whole or in part, be ascertained from the defendants' records or other sources more conveniently than from the class members, the information from those records may be used as a basis for the allocation, with provision being made for class members to supplement such information or challenge its accuracy.

2/ These sample forms contain provisions generally suitable if a special master is appointed to administer the settlement. In other cases, use of a Claims Committee or Magistrate may be appropriate.

(Attachment A)

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

NOTICE OF METHOD OF DISTRIBUTION AND CLAIMS PROCEDURE

TO: Purchasers of [Widgets] who are members of the plaintiff class in CA _____.

Status of Proceedings

On _____, 19___, all persons believed to be members of the plaintiff class for whom addresses were available and who had not timely elected to exclude themselves from the class were notified of the proposed settlement of this litigation. Following a hearing on _____, 19___, this settlement was approved.

The amount received for the class from the defendants, after reduction for attorneys' fees and expenses, is $_____. Distribution of these funds, which are being held at interest, will be made to class members as soon as feasible after the necessary information has been obtained from the class members and appropriate orders are issued by the court. Barring unforeseen difficulties, this distribution should occur during [Summer], 19___.

The purpose of this notice is to advise class members of the procedure by which the settlement funds will be distributed and to ascertain data necessary to make this distribution.

Eligibility to Share in the Proceeds

Distribution will be made to a class of persons and entities throughout the United States and its territories (other than [widget] manufacturers and companies owned or controlled by them) which did not timely elect to be excluded from the class and which between _____, 19___, and _____, 19___, purchased one or more [widgets] directly from a [widget] manufacturer.

You are NOT eligible to file claims in this litigation or to share in the proceeds of the settlement if: (1) you are or have been a [widget] manufacturer or

a company owned or controlled by such a manufacturer, or (2) you timely elected to exclude yourself from the class in this case, or (3) you did not during the indicated period purchase [widgets] directly from a [widget] manufacturer. (If, for example, you purchased [widgets] during this period only from a wholesaler or retailer that was not a [widget] manufacturer, you are not eligible to participate in the settlement.)

Plan of Distribution

The net settlement fund will be distributed as follows:

(1) The "qualified purchases" of each eligible class member will be determined. A "qualified purchase" means the net sales price (exclusive of transportation charges and after any discounts or allowances) paid by a class member to a [widget] manufacturer for [widgets] from _____, 19__, to _____, 19__. The procedure by which the "qualified purchases" of the class members will be determined is explained below.

(2) The "qualified purchases" by all eligible class members will be totalled.

(3) Each eligible class member's share of the net settlement fund to be distributed after payment of fees and expenses will be its fractional share of the fund where the numerator of the fraction will be its "qualified purchases" and the denominator will be the total of the "qualified purchases" by all eligible class members.

Claims; Documentation

To participate in the allocation and distribution of the settlement fund, eligible class members must complete and sign, under penalties of perjury, the claim form attached hereto and mail it, first class mail, postage prepaid, before _____, 19__, to:

Special Master, Widget Antitrust Litigation
P. O. Box ____

_____

You may be required during audit of the claims to provide appropriate supporting evidence (such as invoices and purchase orders), and should therefore preserve such records.

If any question is raised about your eligibility to participate in the settlement or the amount of your "qualified purchases," you will be provided an opportunity to be heard in an appropriate manner before the Special Master appointed by the court to review, tabulate, and audit the claims.

Additional Information

Any questions you have about the matters contained in this notice (and any corrections or changes of name or address) should NOT be directed to the court but should be addressed in writing to:

Special Master, Widget Antitrust Case
P. O. Box ___

_____
telephone: (___) _____

You may also write or telephone:

X. Y., Esq.
Class Counsel, Widget Antitrust Case

_____

_____
telephone: (___) _____

You may, of course, also seek the advice and guidance of your own attorney if you desire. Employment of private counsel is not, however, required as a condition to participation in the settlement and will be at your own expense.

Court's Powers

The court has retained jurisdiction over the settlement of this case, reserving the power to enter appropriate orders to effectuate the fair and orderly administration of the settlement. These reserved powers include the right to set aside a portion of the settlement fund as a reserve for late claims and other contingencies.

Reminder as to Time Limit

You are not entitled to participate in the settlement unless you file your completed claim form with the Special Master by mail postmarked before _____, 19___.

Dated: _____

U. V., Clerk
United States District Court
Federal Courthouse

_____

Enclosure:
Claim Form

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

Claim Form
(Complete both sides of form)
(See instructions on back)

Section I. Identification

1. Business Name of Claimant _____

2. Address _____

3. City, State, ZIP _____

4. Telephone (___) _____

5. Other names and addresses used by claimant (including any predecessors) from _____, 19__, to _____, 19__. (If you received more than one copy of the settlement notice, indicate the names and addresses to which they were sent):

_____

_____

_____
(Use additional sheets if necessary)

6. Name, title, address, and telephone number of the individual (if different from the person signing this form) who is most knowledgeable about claimant's purchases of [widgets] from _____, 19__, to _____, 19__:

_____

7. Has claimant ever been owned or controlled by a [widget] manufacturer? _____
(If "yes", describe the circumstances below)

(Complete both sides)

Section II. Widget Purchases

Manufacturer from which purchased	Date of purchase	Number of widgets	Net price	Type/number of document reflecting purchase
_____	_____	_____	$_____	_____
_____	_____	_____	$_____	_____
_____	_____	_____	$_____	_____
_____	_____	_____	$_____	_____
_____	_____	_____	$_____	_____

(Use additional sheets, if necessary)

I certify under penalty of perjury that to the best of my knowledge, information, and belief the information on the front and back of this claim (and any additional sheets) is true and correct and that this is the only claim being made with respect to these purchases.

Dated: _____, 19___

_____
Business Name of Claimant

By: _____
(Signature of authorized officer)

_____
(Printed name of officer)

_____
(Title and telephone number)

Instructions

* Complete all items. Type or print all information (except for signature).
* Attach additional sheets if space is inadequate.
* Retain supporting documentation (invoices, purchase orders, etc.)
* Mail first class, postage prepaid, before _____, 19___, to
  Special Master, Widget Antitrust Litigation
  P. O. Box _____
  _____

(Attachment B)

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

In re:)
) Master File No. _____
[WIDGET ANTITRUST] LITIGATION)

PUBLISHED NOTICE OF SETTLEMENT DISTRIBUTION

TO: Purchasers of [Widgets]

The class action charging C. D. Inc., E. F. Inc., and G. H. Inc. with violation of the federal antitrust laws in the sale of [widgets] has been settled. Settlements with the defendants in the total amount of $_____ have been approved by the court.

If you purchased [widgets] directly from a [widget] manufacturer between _____, 19___, and _____, 19___, you may be entitled to a share of the proceeds of the settlements. You are not, however, entitled to participate in the settlement if you are or have been a [widget] manufacturer (or a company owned or controlled by such a manufacturer) or if you timely elected to exclude yourself from the class.

Notice of the method by which the funds will be distributed, eligibility requirements, and the action that must be taken by eligible persons to obtain a share of the proceeds was mailed on _____, 19___, to all persons and entities previously identified as members of the class.

If you are or may be a member of the class but do not receive the mailed notice by _____, 19___, you should immediately notify the "Special Master, Widget Antitrust Litigation, P. O. Box ____, _____ _____," requesting a copy of the notice and a claim form. Delay in filing the claim form described in the notice may result in loss of benefits to which you might otherwise be entitled.

Dated: _____, 19___

U. V., Clerk
United States District Court
Federal Courthouse

_____

41.5 SAMPLE ORDERS COORDINATING MULTIPLE LITIGATION.

41.51 Coordinating Proceedings in Separate Courts.

[CAPTION]

ORDER NO. ___
(Coordination with Proceedings in Other Courts)

It appearing that [the above-styled cases] [the cases listed on Attachment ___] share common issues with, and will involve common discovery with, certain cases pending in _____ [list other court(s)] _____ (the "related actions") and that pretrial proceedings in all these cases should be coordinated to avoid unnecessary conflicts and expense, conserve judicial resources, and expedite the disposition of all the cases, this court, after having consulted with counsel [and being advised that similar orders will be entered in such other court(s)[1/]], ORDERS:

1. **Designated Counsel.**[2/]

(a) **Plaintiffs' Lead and Liaison Counsel.** _____ and _____, are designated as Plaintiff's Lead Counsel and Plaintiffs' Liaison Counsel, respectively, in this court, with the responsibilities prescribed in [Attachment ___] [MCL 2d § 41.31, ¶¶ 1 and 2]. They may serve in similar capacities in the related cases if so authorized or permitted by the courts in which such cases are pending and, in any event, shall endeavor to coordinate activities in these cases with those in the related cases.

(b) **Defendants' Liaison Counsel.** _____ is designated to serve as Defendants' Liaison Counsel with the responsibilities prescribed in [Attachment ___] [MCL 2d § 41.31, ¶ 4]. Defendants' Liaison Counsel may serve in a similar capacity in the related cases if so authorized or permitted by such courts and, in any event, shall endeavor to coordinate activities in these cases with those in the related cases.

(c) **Compensation.** Attorneys designated as Lead or Liaison Counsel by this court and the other courts shall be entitled to reasonable compensation and reimbursement of expenses for services performed in such capacities, equitably apportioned among the parties in these and the related cases benefiting from such services. This court will cooperate with the other courts in making appropriate orders for such compensation if agreement cannot be reached between such counsel and the parties for whom they are acting.

2. **Discovery.**[3/]

(a) **Joint Document Depositories.** The document depositories prescribed in [Exhibit __] [MCL 2d § 41.35] shall be established for the joint use of parties in these and the related cases. [Subject to agreement regarding the sharing of expenses,] counsel in the related cases shall have access to the documents in such depositories to the same extent as counsel in the cases in this court. Parties will not make new requests for production of documents in these proceedings if such documents have already been produced and are available to them in the related cases.

(b) **Confidential Documents.** Counsel in the related cases shall have access to confidential documents produced under the Confidentiality Order entered in this court [see, e.g., MCL 2d § 41.36] on the same terms and conditions as counsel in the cases in this court. Counsel in the cases in this court obtaining access to documents marked confidential under similar orders entered in other courts shall be subject to the terms and conditions of such orders.

(c) **Depositions.** Depositions of persons whose testimony will likely be relevant both in these cases and in the related cases should ordinarily be cross-noticed for use in all such cases. [The parties in the cases before this court are directed to show cause within 60 days why the depositions previously taken in the related cases should not be usable in this court, subject to the right to conduct supplemental examination on a showing of need.]

3. **Consistency of Rulings.** To avoid unnecessary conflicts and inconsistencies in the rulings of this and the other courts on matters such as discovery disputes and scheduling conflicts,

[Alternate 1—Deferral to Prior Rulings]

this court will adopt a ruling already made on such matter by another court in a related case unless a different ruling is shown to be mandated by the laws and rules governing this court or justified by particular circumstances of the cases before this court.

[Alternate 2—Lead Case]

such disputes will initially be presented in case no. _____, pending in _____ (name of court) _____, and the ruling made in that case will be given effect in all [other] cases in this court unless a different ruling is shown to be [mandated by the laws and rules governing this court or] justified by particular circumstances of such cases.

[Alternate 3—Joint Special Master]

_____ is appointed under Fed. R. Civ. P. 53(d) to serve as Special Master in these cases (and, under similar appointments by the other courts, in the related cases) (1) to assist the respective courts in preparing and monitoring schedules and plans for coordinated conduct of discovery and other pretrial proceedings; (2) to recommend to the respective courts appropriate resolution of discovery disputes, including controversies regarding limitations on the scope or form of discovery and questions regarding claims of privilege and confidentiality; and (3) to facilitate proper cooperation and coordination among counsel.

[Alternate 4—Joint Hearings]

the judges of the several courts will be prepared to conduct consolidated hearings and pretrial conferences at which they jointly shall preside and would expect to enter joint rulings (except to the extent differences may be mandated by different laws or rules governing the courts or justified by special circumstances in the various cases).

4. **Other Litigation.** Upon application, these provisions may be ordered applicable regarding coordination with cases involving the same common issues and discovery subsequently filed in other courts.

Dated: _____, 19___

_____
United States District Judge

Attachments [omitted]

Notes:

1/ The terms of coordination between the affected courts should ordinarily be arranged—either by direct consultation between the judges of the courts or indirectly through counsel—before this type of order is entered, and, if feasible, parallel orders should be entered by the various courts.

2/ This form provides for appointment of Lead Counsel and Liaison Counsel for plaintiffs, but only Liaison Counsel for defendants. In many cases, the same organizational structure will be appropriate both for plaintiffs and for defendants.

3/ Depending on the circumstances, it may be appropriate to condition access to discovery materials either on a reciprocal obligation or on payment of fair compensation for a share of the services involved in gathering the information.

41.52 Standardizing Proceedings in Multiple Tort Cases.

[CAPTION]

ORDER NO. ___
(Standard Procedures)

It appearing that the [above-styled cases] [cases listed in Attachment ___] involve claims of death, personal injury, and other damage allegedly arising as a result of _____ and that other similar actions may be filed over a period of several months, the court ORDERS:

1. **Filing of Order.** A copy of this order shall be filed in each such case. In cases subsequently filed, a copy will be provided by the Clerk to the plaintiff at the time of filing the complaint and will be served with the complaint on any defendant not previously a party in these cases. (In cases subsequently removed or transferred to this court, a copy will be provided by the Clerk to each new party upon removal or transfer.)

2. **Standard Answers and Other Pleadings.** Appended to this order as Attachments ___ to ___ are standard answers (including, as applicable, motions under Fed. R. Civ. P. 12, cross-claims, and third-party complaints) which the parties previously named as defendants or third-party defendants have, at the court's direction, prepared to represent their typical responses in these cases.

(a) These answers shall be deemed filed as their responses in each case presently pending (or subsequently filed, removed, or transferred) in which they are named as defendants or third-party defendants; provided, however, that within _____ days after this order (or, if later, after filing, removal, or transfer) they may, to the extent consistent with the requirements of Fed. R. Civ. P. 11, add additional defenses or claims and shall withdraw any defenses or claims not warranted under such Rule.

(b) Defendants in subsequently filed actions that have not previously been parties in these cases shall have _____ days after service of the complaint to file their initial response (which shall be an answer, incorporating any matters under Rule 12); defendants in subsequently removed or transferred cases that have not previously been parties in these cases and have not filed responses prior to removal or transfer shall have ____ days after removal or transfer to file their response (which shall be an answer, incorporating any matters under Rule 12).

3. **Deemed Motions and Rulings.** In each pending case and in the subsequently filed, removed, or transferred cases, the following motions (which the court has already considered in one or more of the pending cases) shall be

deemed filed on behalf of each party with interests similar to the movant, and the following rulings shall be deemed made by the court:

> [Describe the typical motions that raise recurring issues (such as measure of damages, collateral estoppel, and applicable limitations period) and indicate the court's ruling.]

This provision does not preclude a renewal or re-argument of such motions based on particular circumstances of an individual case.

4. **Discovery Concerning Defendants' Conduct and Issues of General Causation.**[1] Discovery relating to the alleged culpability of the defendants and issues of general causation shall be conducted under the following procedures and schedule:

(a) **Existing Discovery.** Unless restricted upon motion for good cause shown, all existing discovery materials—including answers to interrogatories, documents produced, and depositions—shall be made available to all parties, including those in subsequently filed, removed, or transferred cases. Depositions taken in one case shall be usable in other cases to the same extent as if taken on proper notice in such other cases unless within ____ days after this order (or, if later, after the filing, removal, or transfer of such case) a party shows good cause why such use would be unfair.

(b) **Expert testimony.** The plaintiff shall within ___ days, and the defendants shall within ___ days, identify all persons who are expected to be called as expert witnesses with respect to the culpability of the defendants and issues of general causation. The information specified in Fed. R. Civ. P. 26(b)(4)(A)(i) shall be provided at the time of identification, and opposing parties are granted leave under Rule 26(b)(4)(C) to depose such persons with respect to opinions about which they have not previously been deposed. In pending cases, these times shall be measured from the date of this order; in subsequently filed, removed, or transferred cases, these times shall be measured from the date of filing, removal, or transfer.

(c) **Completion.** The parties in any case may undertake additional discovery regarding the culpability of the defendants or issues of general causation provided (1) such discovery does not duplicate that already available to, and usable by, the parties under subparagraph (a), and (2) such discovery is completed within _____ days after this order (or, if later, after filing, removal, or transfer).

5. **Discovery Concerning Injuries and Conduct of Plaintiffs.** Discovery with regard to causation and extent of any injuries or other damages claimed by plaintiffs [and with regard to any defenses based on the conduct of the plaintiffs, such as comparative or contributory negligence or assumption of the risk] shall be conducted according to the following schedule and procedures:

(a) **Discovery from Plaintiffs.** To the extent not earlier accomplished, plaintiffs shall—

(1) within ___ days answer the standard interrogatories appended as Attachment ___ [including the identification of persons with knowledge about the plaintiffs' conduct] and provide the documents described in the standard request appended as Attachment ___ (including all medical reports regarding the history, diagnosis, and treatment of any person with respect to whom a claim for personal injury or death is made in the litigation);

(2) within ___ days make themselves available for deposition if physically able;

(3) within ___ days make available for a medical examination by a physician designated by defendants any person with respect to whom a claim for personal injury is made in the litigation; and

(4) within ___ days identify all persons who are expected to be called as expert witnesses with respect to the specific causation and extent of the injuries and damages claimed by them. The information specified in Fed. R. Civ. P. 26(b)(4)(A)(i) shall be provided at the time of identification, and the defendants are granted leave under Rule 26(b)(4)(C) to depose such persons.

In pending cases, the above times shall be measured from the date of this order; in subsequently filed, removed, or transferred cases, these times shall be measured from the date of filing, removal, or transfer.

(b) **Discovery from defendants.** To the extent not earlier accomplished, defendants shall--

(1) within ___ days answer the standard interrogatories appended as Attachment ___ [including the identification of persons with knowledge about the plaintiffs' conduct] and provide the documents described in the standard request appended as Attachment __; and

(2) within ___ days identify all persons who are expected to be called as expert witnesses with respect to the specific causation and extent of the injuries and damages claimed by plaintiffs. The information specified in Fed. R. Civ. P. 26(b)(4)(A)(i) shall be provided at the time of identification, and the plaintiffs are granted leave under Rule 26(b)(4)(C) to depose such persons.

In pending cases, the above times shall be measured from the date of this order; in subsequently filed, removed, or transferred cases, these times shall be measured from the date of filing, removal, or transfer.

(c) **Discovery from third parties.** Discovery from third party witnesses regarding the injury and conduct of plaintiffs shall be completed within ___ days after the date of this order or, if later, after the date of filing, removal, or transfer of the action.

6. **Settlement.**

[Insert any special provisions to facilitate settlement, such as a timetable for scheduling settlement conferences with the court (or with a special master appointed for that purpose), non-binding arbitration, mini-trials, or summary jury trial. Also include any provisions for contributions by later-settling parties to compensate designated counsel for beneficial services previously rendered.]

7. **Trial.** The parties in all pending cases are expected to be ready for trial on all issues within ____ days from the date of this order. Parties in subsequently filed, removed, or transferred cases are expected to be ready for trial on all issues within _____ days from the date of filing, removal, or transfer.

Dated: _____, 19___

_____
United States District Judge

Attachments [omitted]

Notes

1/ Separate provisions relating to discovery into that directed to the defendant's conduct and to the plaintiffs' injury and conduct is not intended to imply that discovery into these aspects of the case should be conducted sequentially. In many cases, both aspects of discovery should be conducted concurrently.

41.6 SAMPLE ORDER TO ESTABLISH UNCONTESTED AND CONTESTED FACTS.[1]

[CAPTION]

ORDER NO. ___
(Statement of Uncontested and Contested Facts)

It is ORDERED:

1. **Development of Joint Statement of Uncontested and Contested Facts.**

(a) **Plaintiffs' Proposed Facts.** By _____, 19___, plaintiffs shall serve on opposing parties a narrative statement listing all facts proposed to be proved by them at trial in support of their claim(s) as to liability and damages [except on the issue(s) of _____].

(b) **Defendants' Response and Proposed Facts.** By _____, 19___, defendants shall serve on opposing parties a statement—

(1) indicating the extent to which they contest and do not contest the plaintiffs' proposed facts;

(2) listing all additional facts proposed to be proved by them at trial in opposition to, or in special defense of, the plaintiffs' claim(s) as to liability and damages; and

(3) listing all facts proposed to be proved by them at trial in support of their counterclaim(s), cross-claims(s), and third-party claim(s).

(c) **Replies.**

(1) By _____, 19___, plaintiffs shall serve on opposing parties a statement indicating the extent to which they contest and do not contest the defendants' proposed facts (including defendants' modifications to the facts initially proposed by plaintiffs) and listing all additional facts proposed to be proved by them at trial in opposition to, or in special defense of, the defendants' counterclaims; and

(2) by _____, 19___, defendants to cross-claims and third-party claims shall serve on opposing parties a statement indicating the extent to which they contest and do not contest the proposed facts of the cross-claimant or third-party claimant and listing all additional facts proposed to be proved by them at trial in opposition to, or in special defense, of such cross-claims or third-party claims.

(d) **Final Response.** By _____, 19___, defendants making counterclaims, cross-claims, or third-party claims shall serve on opposing

parties a statement indicating the extent to which they contest and do not contest their adversary's proposed facts (including modifications to the facts initially proposed by them).

(e) **Joint Statement of Uncontested and Contested Facts.** By _____, 19___, the parties shall file with the court a joint statement listing the facts that are not contested and those that are contested, indicating as to the latter the precise nature of their disagreement. These facts, both uncontested and contested, will to the extent practicable be organized and collected under headings descriptive of the claim or defense to which they may be relevant (and, where appropriate, subdivided into factual categories descriptive of particular parties and time periods).

2. **Directions.**

(a) **Narration of Proposed Facts.** In stating facts proposed to be proved, counsel shall do so in simple, declarative, self-contained, consecutively numbered sentences, avoiding all "color words," labels, argumentative language, and legal conclusions. If a fact is to be offered against fewer than all parties, counsel shall indicate the parties against which the fact will (or will not) be offered. [The facts to be set forth include not only ultimate facts, but also all subsidiary and supporting facts except those offered solely for impeachment purposes.]

(b) **Agreement and Disagreement.** Counsel shall indicate that they do not contest a proposed fact if at trial they will not controvert or dispute that fact. In indicating disagreement with a proposed fact, counsel shall do so by deletion or interlineation of particular words or phrases so that the nature of their disagreement (and the extent of any agreement) will be clear.

(c) **Objections.** Objections to the admissibility of a proposed fact (either as irrelevant or on other grounds) may not be used be used to avoid indicating whether or not the party contests the truth of that fact. [Counsel shall, however, indicate any objections, both to the facts which they contest and those which they do not contest.]

(d) **Individual Positions.** To the extent feasible, counsel with similar interests are expected to coordinate their efforts and express a joint position with respect to the facts they propose to prove and to the facts other parties propose to prove. Subject to the time limits set forth in paragraph 1, each party may, however, list additional proposed facts to cover positions unique to it.

3. **Annotations.** Facts, not evidence, are to be listed by the parties. However, a party may identify in parentheses at the end of a proposed fact the witness(es), deponent(s), document(s), or other evidence supporting the truth of the fact. No party, however, will be required to admit or deny the accuracy of such references.

[Alternate—Annotation Required.][2/] For each proposed fact, the parties shall, at the time of proposing to prove the fact, list the witnesses (including expert witnesses), documents, and (with line-by-line references) any depositions and answers to interrogatories or requests for admission that they will offer to prove that fact. In their response, parties shall, if they object to any such proposed fact or proposed proof, state precisely the grounds of their objection and, if they will contest the accuracy of the proposed fact, similarly list the witnesses, documents, depositions, interrogatories, or admissions that they will offer to controvert that fact. In the joint statement submitted to the court, any objections to each uncontested fact will be shown, and any objections and the listing of evidence will be shown for each contested fact. Except for good cause shown, a party will be precluded at trial from offering any evidence on any fact not so disclosed and from making any objection not so disclosed.

4. **Effect.**

(a) **Elimination of proof.** The uncontested facts shall be taken at the trial as established under Fed. R. Civ. P. 36 without the need for independent proof. To the extent relevant to a resolution of the contested facts and otherwise admissible, these facts may be read to the jury. Independent proof of the uncontested facts will be allowed only if incidental to the presentation of evidence on the contested facts or if such proof will better enable the jury to resolve the contested facts.

(b) **Preclusion of other facts.** Except for good cause shown, the parties shall be precluded at trial from offering proof of any fact not disclosed in their listing of proposed facts (except purely for impeachment purposes).

5. **Sanctions.** Unjustified refusal to admit a proposed fact or to limit the extent of disagreement with a proposed fact shall be subject to sanctions under Fed. R. Civ. P. 37(c). Excessive listing of proposed facts [or of the evidence to be submitted in support of or denial of such facts] which imposes onerous burdens on opposing parties shall be subject to sanctions under Rule 16(f).

Dated: _____, 19___

_____
United States District Judge

Notes:

1/ These statements are sometimes also known as statements of contentions (and proof) or as final pretrial statements ("FPS").

2/ Because of its burdensomeness, such annotation with preclusive effects should be ordered only in unusually complex cases. For the same reason, the parties are sometimes required to list only the principal facts supporting their claims or defenses or the facts to which the other parties may possibly agree.

41.7 SAMPLE FINAL PRETRIAL ORDER.

[CAPTION]

ORDER NO. ___
(Final Pretrial Order)

It is ORDERED:

1. **Rulings on outstanding motions.** [Rule on all outstanding motions seeking summary judgment, challenging jurisdiction or venue, requesting transfer, seeking to limit the period of proof, regarding jury demands, and similar matters.]

2. **Trial.** Trial is [tentatively] scheduled to commence at _____ a.m., _____, 19___, at the Federal Courthouse, _____, _____.

(a) **Consolidation.** Under Fed. R. Civ. P. 42(a), the following cases are consolidated for purposes of this trial:

[Define by inclusion or exclusion the cases consolidated for trial. To the extent appropriate, order transfer of cases under 28 U.S.C. § 1404 or 1406.]

(b) **Severance.** Under Fed. R. Civ. P. 42(b), the following issues are scheduled for trial at this time:

[Define the issues to be tried, indicating whether jury or non-jury.]

After this trial has been concluded, the court will establish a schedule for trial of the remaining issue(s) as may be necessary.

(c) **Order of proof.** [Insert any special provisions as to the order in which the issues, evidence, or arguments will be presented.]

(d) **Hours of trial.** Subject to further order, court sessions will be held from _____ a.m. to _____ p.m. each weekday except for—

[Indicate any anticipated changes, such as federal holidays, days on which trial will not be held or on which the trial hours will be reduced, any religious holidays to be observed, and any planned recesses.]

(e) **Jury.** A jury of ___ persons and ___ alternates shall be selected. The parties shall by _____, 19___, file any special voir dire questions they request the panel be asked; additional questions may be suggested after

the initial examination of the panel. Each side shall be permitted ___ peremptory challenges to the principal jurors and ___ peremptory challenges to the alternate jurors. [By stipulation of the parties under Fed. R. Civ. P. 48, a verdict may be accepted if returned by a unanimous jury of at least ___ jurors.]

(f) **Continuances; Deadline for Partial Settlements.** Postponement of trial will be granted only for compelling reasons. Illness or unavailability of counsel will not justify a continuance if other members of their firms or attorneys representing parties with a similar interest are available to proceed with the trial. [Any proposed partial settlements with the class will be considered only if presented sufficiently in advance of the trial date to enable a hearing to be conducted (after proper notice) at least ___ days before the trial date.]

3. **Witness Lists.**[1/] Plaintiffs shall file and serve by _____, 19___, and defendants shall file and serve by _____, 19___, a list identifying all persons (including expert and rebuttal witnesses) whose testimony they may offer at trial in person or by deposition. Counsel will separately list their "major" witnesses (whose testimony they expect to offer) and their "minor" witnesses (whose testimony will probably not be needed, but who have been listed merely to preserve the right to offer such testimony should it be needed in the light of developments during trial).

(a) **Witnesses to testify in person.** For witnesses to be examined in person, the list will contain an estimate of the time expected to be needed for direct examination and [include a brief summary of their expected direct testimony] [indicate the subjects on which they are expected to testify]. For any witness who is to express any opinion under Fed. R. Evid. 702, the list shall include, if not previously provided, the information prescribed under Fed. R. Civ. P. 26(b)(4)(A)(i).

(b) **Depositions.** Each party will attach to the list the pages of any deposition to be used at trial, with the portions to be offered by the proponent indicated by blue marking in the margin.

(c) **Response.** Within ____ days after receiving these lists, each party shall, with respect to witnesses not previously listed by it but listed by another party, file and serve a notice—

(1) indicating for each witness who is to testify in person the estimated time expected to be needed for cross-examination and [a brief summary of the expected cross-examination] [any additional subjects on which the witness will likely be examined on cross-examination] (other than for impeachment), and

(2) attaching for each witness whose testimony will be presented by deposition, the portions of the deposition, marked in yellow, that

are objected to (specifying the grounds for the objection) and, marked in red, that in fairness should be considered with the portions already designated or that will be offered as cross-examination. Unless indicated to the contrary in the notice, the party shall be deemed to have agreed that the conditions of Fed. R. Civ. P. 32(a) are satisfied with respect to each person identified in another party's witness list as someone whose testimony will be presented by deposition.

(d) **Effect.** Except for good cause shown, the parties will be precluded from offering substantive evidence through any person not so listed. The listing of a witness does not commit the listing party to have such person available at trial or to offer the testimony of such person. Any party may offer the testimony of a witness listed by another party.

4. **Exhibit Lists.**[1] Plaintiffs shall file and serve by _____, 19__, and defendants shall file and serve by _____, 19__, a list identifying all writings, recordings, documents, bills, graphs, charts, models, summaries, compilations, reports, records, photographs, and other exhibits (collectively called "exhibits") which they expect to offer at trial, to use as demonstrative exhibits, or to be used or referred to by any of their witnesses, including expert witnesses.

(a) **Identification.** The list shall describe each exhibit and give its identification number, if any. Although some exhibits may be adequately identified through a group description (for example, "invoices from C. D. Inc., to A. B., dated from _____, 19__, to _____, 19__, bearing identification # _____ through # _____"), general references (for example, "documents identified in the deposition of _____") will be regarded as insufficient.

(b) **Exhibition.** Unless beyond the party's control (for example, exhibits from an independent third party being obtained through subpoena), the party shall at the time of serving the list make all exhibits not previously produced available to other parties for their inspection and copying at (city in which trial will be held, or some other convenient location) _____.

(c) **Objections.**[2] Except to the extent a party in its listing of exhibits or within ____ days after receiving another party's exhibit list gives notice to the contrary, it shall be deemed to have agreed (for purposes of this trial only) that—

(1) the originals of the listed exhibits are authentic within Fed. R. Evid. 901 or 902;

(2) duplicates, as defined in Fed. R. Evid. 1001, of the listed exhibits are admissible to the same extent as the originals;

(3) any listed exhibits purporting to be correspondence were sent by the purported sender and received by the purported recipient(s) on approximately the dates shown or in accordance with customary delivery schedules;

(4) any disputes regarding the accuracy of any of the listed exhibits that purport to be summaries under Fed. R. Evid. 1006 affect only the weight, not the admissibility, of such exhibits;

(5) any listed exhibits purporting to be records described in Fed. R. Evid. 803(6) meet the requirements of that Rule without extrinsic evidence; and

(6) any listed exhibits purporting to be public records or reports described in Fed. R. Evid. 803(8) meet the requirements of that Rule.

(d) **Effect.** Except for good cause shown, the parties will be precluded from offering in evidence, using as demonstrative evidence, or examining any of their witnesses concerning, any exhibit not so identified (except solely for impeachment purposes). The listing of an exhibit does not commit the listing party to use it. Subject to any objections that have not been waived under subparagraph (c), any party may use any exhibit that has been listed by another party.

(e) **Rulings.** Requests for a ruling under Fed. R. Evid. 104 in advance of trial with respect to any objections made under subparagraph (c) or with respect to any other expected objection to admissibility of evidence must be made by motion filed not later than _____, 19___.

5. **Limits on Evidence.** [Except for good cause shown, counsel will not be permitted to offer proof of facts not disclosed in the joint statement of uncontested and contested facts previously submitted, nor will they be permitted to offer independent evidence of the agreed facts except to the extent incidental to the presentation of evidence on the disputed facts.] Counsel are expected to be selective in deciding on (and listing) the witnesses and documents to be presented at trial and in deciding as trial progresses which of the listed witnesses and documents will be offered. If warranted after review of the lists of witnesses or documents, the court will consider (after hearing from the parties) whether to impose any limits on the length of trial, number of witnesses, or number of exhibits.

6. **Briefs.** By _____, 19___, plaintiffs (and any defendants asserting counterclaims, cross-claims, or third-party claims) shall file and serve comprehensive trial briefs covering all significant legal issues expected to arise at trial with respect to their claims and the defenses made to such claims. By _____, 19___, defendants (and any plaintiffs against whom counterclaims are asserted) shall file and serve comprehensive trial briefs responding to

the legal contentions of their adversaries and covering any additional significant legal issues expected to arise at trial with respect to the claims against them and their defenses. Any reply briefs shall be filed by _____, 19___.

(a) **Suggested preliminary and interim instructions.** In a separate section of their briefs, the parties shall include their suggestions as to the contents of preliminary instructions to be given the jury at the beginning of the trial and of any interim instructions regarding evidence that will likely be received only for a limited purpose. (The time for filing requests for final jury instructions will be set by the court during trial.)

(b) **Proposals for special verdicts or interrogatories.** In a separate section of their briefs, the parties shall outline the special verdicts or interrogatories that, depending upon the evidence, may be appropriate for submission to the jury. (The time for filing revisions to these proposed special verdicts or interrogatories will be set by the court during trial.)

7. **Organization of Counsel.** Multiple parties with similar positions in the litigation shall designate an attorney with principal responsibility for the conduct of each phase of trial, including the designation of attorneys to take the major role in presenting opening statements, in examining particular witnesses, in making and responding to motions and objections, and in presenting arguments to the court. Other counsel shall be permitted to supplement opening statements highlighting any special, non-cumulative points relevant to the claim or defense of that party and to conduct additional non-cumulative examination of witnesses relevant to the claim or defense of that party. An objection, motion, or offer of proof by one party shall be deemed made on behalf of all similarly situated parties who do not disclaim it; such parties may, however, make known any additional grounds or circumstances pertinent to the admissibility of the evidence with respect to them.

8. **Administrative Details.**

(a) **Facilities.** Each side shall by _____, 19___, designate a representative to confer with the Clerk of the court and the GSA Building Manager and make any special arrangements with respect to the courtroom, witness and conference rooms, facilities for storage of documents, installation of copying machines or computer equipment, and similar matters.

(b) **Schedule of witnesses and documents.** Counsel shall, absent unusual circumstances, give notice to opposing parties at least ___ hours before calling a witness or offering (or otherwise using) any exhibit during direct examination. This shall be accomplished during trial by daily providing a schedule, updated as trial progresses, reflecting the order in which witnesses are expected to be presented during the next ___ trial days and the exhibits that are expected to be offered or used during the examination of such witnesses.

(1) If less than a complete exhibit (or less than all of the portions of a deposition previously designated by the parties) is to be introduced, the schedule shall so indicate.

(2) Revisions to this projected sequence of witnesses and documents (or to the portions of the deposition to be read) shall be disclosed as soon as known.

(c) **Interim conferences.** A short conference will usually be held at the end of each trial day and ___ minutes before the start of each trial day to consider problems that may be expected to arise, including last-minute revisions in the sequence or scope of evidence to be presented and objections that have not previously been ruled on or that should be reconsidered.

(d) **Presentation of exhibits.** Exhibits shall be premarked by the proponent. Unless impractical, the proponent shall provide extra copies for the court and for each juror at the time of offering or first referring to an exhibit. Use of an exhibit shall, unless specifically disclaimed or limited, be deemed an offer of the exhibit in evidence; and, unless excluded on objection promptly made, the exhibit shall be deemed received in evidence. If notice of the proposed use has been given under subparagraph (b) or (c), the presentation of evidence shall not be interrupted for opposing counsel to examine the exhibit. Each side shall designate a representative to aid the courtroom deputy in maintaining current lists and indexes of the exhibits that have been received.

9. **Additional conferences.** The court will be available to confer with the parties as trial approaches to consider any details of trial not resolved in this order or any part of this order that should be changed.

Dated: _____, 19___

_____
United States District Judge

Notes

1/ Witness and exhibit lists are sometimes required to be submitted before the final pretrial conference, such as in conjunction with the preparation of the uncontested and contested facts.

2/ Some courts require that all objections be made and ruled on before trial.

42. SANCTIONS.[1]

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42.1 ROLE OF SANCTIONS.[2]

Although the governing principles are the same as in routine litigation, sanctions[3] tend to play a more significant role in complex cases because of the larger number of persons involved, the greater demands made on them, and the more serious consequences of any derelictions. Sanctions may be needed not only to punish a party, attorney, or witness for misconduct or neglect, but also to remedy the difficulties or compensate others in the litigation for the damage caused. Perhaps even more important, the knowledge that the court will impose sanctions when warranted provides an incentive

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1. See generally W. Schwarzer, Managing Antitrust and Other Complex Litigation., Chapter 8.

2. The discussion of sanctions has been included as a separate chapter in Part IV rather than in the basic text of MCL 2d to emphasize that sanctions should be viewed as supplemental to, or as a means for assuring compliance with, the procedures adopted to guide the conduct of complex litigation, rather than as a substitute for the planning process.

3. In a broad sense, the term "sanctions" includes all forms of penalties that may be imposed because a party, attorney, or witness does not conform to or comply with the requirements or expectations of statutes, rules, orders, or standards of conduct governing the litigation process. The acts or omissions upon which sanctions are based may be wilful and intentional, even criminal, or may be the result of carelessness, inattention, or poor judgment. Indeed, the shifting of responsibility for subsequent costs under Fed. R. Civ. P. 68 may be viewed as a sanction for the failure of the plaintiff to accept an offer that was as favorable as the judgment obtained by trial.

for all participants to act in a timely and responsible manner throughout the pretrial proceedings and at trial.

Sanctions may, however, have disruptive effects upon the proceedings.[4] Imposition of sanctions after problems have arisen is not a substitute for careful planning at the outset or for continuing review and supervision as the case progresses. Indeed, one of the objectives of the management plan in complex litigation should be to minimize the need for and severity of sanctions. To accomplish this goal, clear timetables should be established in an appropriate order disseminated to all affected attorneys, which provide adequate time for the necessary actions to be taken if counsel proceed diligently and even make allowance for unanticipated problems; such schedules should be monitored by lead or liaison counsel before deadlines occur. The court should also review periodically with counsel the progress of discovery and other pretrial proceedings and, if merited, make appropriate revisions in the schedules.

The availability of sanctions provides no justification for a lack of cooperation and professional courtesy by counsel. Most discovery disputes can and should be resolved voluntarily without resort to the court. For example, attorneys should ordinarily ask opposing counsel whether they have reasons for delay before filing a motion to compel delinquent answers to interrogatories and should attempt to resolve such questions as the date and place of depositions without seeking a protective order. Counsel should also exercise restraint in filing motions for sanctions, and should understand that such motions are themselves subject to the requirements of Fed. R. Civ. P. 11.

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4. The litigants' attention may be diverted from the merits of the case while the court considers the need for and type of sanction. Moreover, a motion for sanctions, if not the penalty imposed, may result in personal antagonism that can destroy the spirit of cooperation and mutual respect that is needed in the case and may lead to a series of similar motions for sanctions as the case proceeds.

42.2 GENERAL PRINCIPLES.

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When considering the imposition of sanctions, the judge should usually analyze (1) the nature and consequences of the dereliction or misconduct, (2) the identity of the person(s) responsible, (3) what discretion the court has in deciding whether (and what) sanctions may be imposed, and (4) the purpose(s) to be served by the sanction. The court should ordinarily select the least severe penalty that will, given the nature and consequences of the misconduct, achieve the purposes of the sanction. As a preliminary matter, the court must also decide whether to consider such questions at the time the offending conduct is first brought to its attention or at some later date, such as the conclusion of the litigation.

42.21 Nature and Consequences of Conduct.

Was the conduct a deliberate and wilful act, done with the knowledge of its impropriety and with the intent to delay or harass others in the litigation, or was it the result of inadvertence, carelessness, inattention, or ignorance? Was it in direct violation of an order or rule[5] of the court, or was it a failure to comply with an obligation arising under the rules from a party's request? What consequences does it have on other persons—attorneys, parties, witnesses, or jurors—and on further proceedings in the case? Is it an isolated event, or only the last in a series of similar derelictions

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5. For a discussion of the use of local rules as a basis for imposing sanctions, see Miranda v. Southern Pacific Trans. Co., 710 F.2d 515 (9th Cir. 1983). See also United States v. Warren, 601 F.2d 471 (9th Cir. 1979) (upholding dismissal of indictment under local rule deeming failure to file brief as consent to motion); cf. McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (local rule requiring preparation of extensive pretrial order held invalid).

and misconduct? Are there extenuating circumstances? These questions must be considered in deciding the seriousness of the conduct and the severity of any penalties to be imposed.

42.22 Identity of Person Responsible.

As a predicate for the award of many sanctions, such as those under Fed. R. Civ. P. 37(a), the court must first decide the merits of some motion pending before it. On other occasions, the judge may be faced with a heated dispute as to whether failure to comply with a rule or directive is properly chargeable to the plaintiffs, the defendants, or perhaps both.[6] Although such questions must usually be resolved before an appropriate sanction can be determined, the imposition of most sanctions is not dependent upon a finding of wilful misconduct or neglect and may be based upon the mere fact of noncompliance.[7]

In many situations it is unclear whether the lawyer, the litigant, or both should be sanctioned. Sanctions that affect the client—even default judgment or dismissal—may, if otherwise warranted, be imposed although the attorney is solely responsible.[8] Monetary sanctions, however, ordinarily should be directed only against those responsible for the noncompliance, whether the lawyer, the party, or both. For example, an award of expenses to other counsel for the failure of an attorney to appear at a deposition should usually be assessed directly against the offending attorney, accompanied by a

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6. See, e.g., Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890 (7th Cir. 1981), cert. denied., 455 U.S. 1017 (1982).

7. See 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2283, commenting on the 1970 amendments to the Rules and on the holding in Societe Internationale v. Rogers, 357 U.S. 197 (1958).

8. See, e.g., Link v. Wabash Railroad Co., 370 U.S. 626 (1962) (upholding court's sua sponte dismissal under its inherent powers for plaintiff's failure to prosecute, based on counsel's failure to attend pretrial conference; "Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent"). Cf. Silas v. Sears, Roebuck & Co., 586 F.2d 382 (5th Cir. 1978) (lesser sanctions than dismissal generally favored where the offending conduct is clearly attributable only to the attorney).

by a directive not to include this penalty in any charges to the client and an order that opposing counsel not waive payment. If allocating responsibility between the client and the attorney is difficult and would involve an inquiry into privileged communications, the court may prefer to impose an immediate sanction against both, but defer until completion of the case consideration of which should bear ultimate responsibility for the penalty.[9]

42.23 Discretion.

The imposition of sanctions is ordinarily addressed to the sound discretion of the trial judge and reviewed under the abuse-of-discretion standard.[10] The Federal Rules of Civil Procedure limit to some degree this discretion in particular circumstances—as by mandating that some form of sanction be imposed,[11] by prescribing a particular form of sanction,[12] or by indicating what sanctions may be imposed.[13] The severe sanctions of default judgment or dismissal should be imposed only when the failure of the party or attorney to comply with directives of the court involves wilfulness, bad faith, or

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9. At the conclusion of the litigation, disputes between the client and the attorney regarding responsibility for payment of such awards may be viewed as analogous to a malpractice claim or a fee dispute in which the attorney-client privilege would not apply.

10. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) (court of appeals erred in reversing dismissal based on failure to comply with order directing answers to interrogatories).

11. See, e.g., Rule 11. Of course, the court has wide discretion in determining what is "an appropriate sanction" as required by this and other similar rules.

12. See, e.g., Rule 37(c).

13. Compare the sanction available under Rule 37(a)(4) for incomplete or evasive responses to discovery requests with those available under Rule 37(b)(2) for disregard of an order compelling discovery or a failure to make any response to a discovery request. Rule 37 governs the imposition of sanctions in the situations it addresses. Societe Internationale v. Rogers, 357 U.S. 197 (1958).

some degree of fault;[14] absent a clear record of delay or contumacious conduct, less drastic sanctions should be used.[15]

42.24 Purpose.

A major consideration is the purpose to be served by the sanction.

Remedial sanctions. The principal purpose of many sanctions is to correct or prevent harm to another litigant from the improper conduct. Examples include the award of expenses unnecessarily caused by the conduct, such as the fees incurred in filing and presenting a motion under Fed. R. Civ. P. 37 or the additional expenses incurred in obtaining information from a more costly source; the grant of an extension of time to complete discovery improperly delayed by an adversary's action or inaction; precluding a party from offering evidence not disclosed in advance of trial; and holding an unwilling deponent in civil contempt until the required testimony is given. If the sole purpose of a sanction is to coerce, the court may direct that the sanction be conditional, relieving the recalcitrant party or witness from all or a portion of the penalty if the necessary corrective action is taken by a prescribed time.

Punitive sanctions. Sanctions may also be imposed to deter the offending party or attorney from similar conduct in the future or to serve as a warning to others against similar derelictions or misconduct. In egregious circumstances, penalties may be assessed as retribution (punishing the offender for criminal or contumacious acts that threaten the integrity of the judicial process) or to incapacitate (preventing any repetition, as by entering against a party a default judgment or a dismissal, or by removing, suspending, or disbarring an attorney).

42.25 Timing.

The court should ordinarily impose sanctions promptly after the improper conduct occurs. Delay tends to magnify the problems that may need corrective action, encourage repetition or retaliatory conduct, and complicate disputes over who is really at fault. Moreover, imposition of the more severe penalties may be held to be an abuse of discretion unless lesser sanctions, previously imposed, have been ineffective in obtaining compliance with the court's directives.

Some sanctions—for instance, an award under Fed. R. Civ. P. 37(c) of expenses incurred in proving a matter that the adversary refuses to admit—depend upon further

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14. Societe Internationale v. Rogers, 357 U.S. 197 (1958).

15. See, e.g., Silas v. Sears, Roebuck & Co., 586 F.2d 382 (5th Cir. 1978).

proceedings and therefore cannot be imposed immediately. In addition, there may be reasons for the court to defer consideration of certain other motions for sanctions. For example, the court may prefer to have the merits of a pleading or motion resolved before considering whether it was signed in violation of Fed. R. Civ. P. 11. Similarly, if the decision whether sanctions should be imposed or the identity of the person who should be sanctioned may require inquiry into communications protected by the attorney-client privilege, the court may conclude that the issue should be deferred until the conclusion of the litigation.

42.3 TYPES OF SANCTIONS.

Depending on the nature of the sanctionable conduct, its consequences on others, and the purposes to be served by a sanction, one or more of the following may be considered:

* **oral reprimand/warning.** This is ordinarily imposed for the first infraction, if minor and no real damage has resulted.

* **written reprimand/warning.**[16] If an attorney is so sanctioned, the court may conclude that a copy of the order should be sent to the client and perhaps to the bar association.

* **cost-shifting awards.** Depending on the conduct involved and the source of authority for imposition of the sanction, the court may award against the offending party or attorney the expenses (including attorney's fees) incurred by other parties
  —in seeking an order to compel compliance;[17]
  —because of the improper conduct or to correct the effects of such conduct;[18]
  —after a certain point in the case;[19] or

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16. See, e.g., Brookhaven Landscape & Grading Co. v. J. F. Barton Contr'g Co., 681 F.2d 734 (11th Cir. 1982).

17. See, e.g., Fed. R. Civ. P. 37(a)(4).

18. See, e.g., Fed. R. Civ. P. 37(b)(2).

19. See, e.g., Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983) (award for fees incurred by defendant after it was clear that suit had no merit). See also Fed. R. Civ. P. 68 (imposing subsequent costs on plaintiff whose recovery at trial is no more favorable than rejected offer of judgment).

—during the entire proceedings.[20]
The expense of a special master to supervise discovery may be imposed on the party whose dilatory and abusive tactics created discovery problems.[21] The expenses of calling a jury are taxed by many courts as a sanction for late settlements.[22] Courts of Appeals sometimes award double costs and attorneys' fees under 28 U.S.C. § 1912 and Fed. R. App. P. 38 as a sanction for frivolous appeals.[23]

- **denial of fees or expenses.** The court may preclude attorneys from charging their client, opposing parties, or a settlement fund for the time spent or the expenses incurred while engaged in improper conduct, in hearings regarding such conduct, or even for the entire case.[24]

- **remedial action.** Counsel and parties may be ordered to take appropriate remedial action at their expense for their neglect or misconduct, as by undertaking the reconstruction of destroyed data compilations or by providing corrective notices to class members misled by their false or misleading communications about a class action.[25]

- **denial of untimely objections.** The failure of a party to respond timely to interrogatories or a request for production is usually treated as waiving all objections to such discovery requests. Courts frequently order that some or all objections to the admissibility of evidence at trial will be waived if not raised by a certain date.

- **precluding evidence.** Parties are often precluded from presenting evidence in support of or opposition to particular issues because of a failure to comply with an order directing production of such evidence during discovery or to disclose such evidence in advance of trial as required by a preclusionary order.[26]

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20. See, e.g., Farrell v. Rouan, 578 F. Supp. 380 (E.D. Mich. 1984). The award of attorneys' fees to a prevailing defendant in certain civil rights cases under Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), involves an inquiry not unlike that involved in imposing sanctions.

21. See, e.g., Chesea Int'l Ltd. v. Fashion Assoc., 425 F. Supp. 234 (S.D.N.Y.), aff'd without opinion, 573 F.2d 1288 (2d Cir. 1977).

22. See, e.g., Martinez v. Thrifty Drug & Discount Co., 593 F.2d 992 (10th Cir. 1979)

23. See, e.g., Gattuso v. Pecorella, 733 F.2d 709 (9th Cir. 1984).

24. See, e.g., Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), cert. denied, 104 S. Ct. 984 (1984). To prevent such charges being made against the client, as well as prevent any attempt to recover penalties assessed personally against the attorney, the court may direct that a copy of its order be sent to the client.

25. In egregious circumstances, an order restricting communications with the class may be justified. See § 30.24.

26. See, e.g., Smith v. Missouri Pacific Railroad Co., 716 F.2d 1208 (8th Cir. 1983).

- **treating certain facts as admitted.** Courts frequently order that certain facts be deemed admitted when a party refuses to comply with a discovery order directing production of evidence relating to such facts.[27]

- **striking claims or defenses.**

- **refusing to permit amendments to pleadings or joinder of parties.**

- **modification of schedules.** For example, other parties may be granted an extension of time to complete items of discovery improperly delayed by an adversary, and the time allowed for the offending party to complete subsequent discovery may be reduced.

- **staying the proceedings until the order is obeyed.**[28]

- **refusing to grant extensions of time.** Requests for discovery after the deadline has passed may be denied, even if the result is summary judgment.[29] Courts frequently have required that a deposition or trial commence or continue notwithstanding the absence or lack of preparation of an attorney or party.[30]

- **dismissal or default judgment.** This sanction, the most severe penalty from the standpoint of its effect on the litigation itself, is occasionally warranted—ordinarily only after lesser sanctions have proved ineffective or after the court has entered a conditional order warning that such action will be taken if appropriate remedial steps are not taken by a specified time. See § 42.24. In some cases it may be appropriate to impose this sanction with respect to some, but not all, claims in the case.

- **enjoining further litigation.**[31]

- **removal of party as class representative.** As an alternative, the court may prefer to order notice under Fed. R. Civ. P. 23(d)(2), affording class members the opportunity to intervene.

- **removal, suspension, or disbarment of counsel.** Depending on the seriousness of the neglect or misconduct, an attorney may be removed

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27. See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Beauxites de Guinea, 456 U.S. 694 (1982) (finding of personal jurisdiction based on sanction for refusal to obey order compelling discovery).

28. See, e.g., Gibbs v. Maxwell House, 738 F.2d 1153 (11th Cir. 1984) (staying pretrial conference until plaintiff pays airfare of defendant's counsel).

29. See, e.g., Otero v. Buslee, 695 F.2d 1244 (10th Cir. 1982).

30. See, e.g., In re Fine Paper Antitrust Litigation, 685 F.2d 810 (3d Cir. 1982) cert. denied, 103 S. Ct. 801 (1983).

31. See, e.g., Stegeman v. Detroit Mortg. & Realty Co., 541 F. Supp. 1318 (E.D. Mich. 1982).

from a position as lead, liaison, or class counsel or from all further participation in the litigation. Proceedings may be initiated to suspend attorneys from further practice in the court for a period of time or even to disbar them.[32]

- **fine.** Although the court has the inherent power to assess a fine in the absence of a finding of contempt, the person against whom the fine may be imposed should be given notice and an opportunity to be heard.[33]

- **contempt.** The court has inherent power,[34] as well as statutory authorization,[35] to punish for contempt—for misbehavior committed in its presence or for disobedience of its orders. Before exercising these powers, the court should announce whether the proceedings are civil or criminal.[36] Civil contempt is remedial, intended to coerce compliance with an order of the court and compensate a party for the effects of the contemnor's conduct.[37] Criminal contempt sanctions are unconditional, punitive in nature, imposed to vindicate the authority of the court, and ordinarily used only if the civil contempt remedy would be inappropriate.[38]

- **criminal prosecution.** Referral to the United States Attorney for possible prosecution under criminal statutes such as 18 U.S.C. §§ 1501 et seq. may sometimes be warranted.

- **civil actions.** After dismissal of frivolous cases, actions may be brought for malicious prosecution. Independent suits are sometimes also brought

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32. See, e.g., In re Beard, 742 F.2d 1465 (11th Cir. 1984); In re Grimes, 364 F.2d 654 (10th Cir. 1966), cert. denied, 385 U.S. 1035 (1967); cf. In re Robert J. Snyder, 105 S. Ct. ___ (1985). Also see Fed. R. App. P. 46.

33. See, e.g., Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985) (en banc); Miranda v. Southern Pacific Trans. Co., 710 F.2d 516 (9th Cir. 1983); Woodham v. American Cystoscope Co., 335 F.2d 551 (5th Cir. 1964).

34. E.g., Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

35. See, e.g., 18 U.S.C. §§ 401, 402, 3691. See also Fed. R. Crim. P. 42, Fed. R. Civ. P. 37(b)(2)(D), 45(f).

36. United States v. Westinghouse Elec. Corp., 648 F.2d 642 (9th Cir. 1981).

37. United States v. United Mine Workers, 330 U.S. 258 (1947). Often the sanction imposed is a conditional jail term or continuing fine until the contemnor complies with the order. See, e.g., International Business Mach. Corp. v. United States, 493 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974) ($150,000 per day fine until party complies with production order). A remedial fine payable to injured parties may also be appropriate. See, e.g., United States v. United Mine Workers, supra at 304; cf. Hutto v. Finney, 437 U.S. 678 (1978) (award of attorneys' fees for bad faith failure to cure constitutional violations upheld as analagous to civil contempt).

38. See Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966).

for damages resulting from civil contempt or from failure to comply with terms of an order.[39] Malpractice actions may be brought by a client for damages caused by the misconduct or derelictions of its former attorney.

42.4 PROCEDURES.

The question of sanctions most frequently arises because of a motion filed in the case that either seeks an order on the basis of which some sanction is prescribed by the Fed. R. Civ. P.—for example, a motion for an order compelling discovery under Rule 37(a)—or specifically requests some sanction for an adversary's failure to comply with the orders of the court. The court itself may, however, initiate such an inquiry, typically by an order directing the party or attorney to show cause why appropriate sanctions should not be imposed for some misconduct or neglect described in the order.[40] Although not always required,[41] the attorney or party against whom a sanction may be imposed should ordinarily be given some notice that a sanction will be considered, describing the offending conduct, and should also be given some opportunity to be heard regarding those charges or the appropriate sanction to be imposed.[42]

The hearing should usually be held promptly after the misconduct has occurred, although a deferral of the matter may be appropriate if attorney-client communications

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39. See, e.g., Allied Materials Corp. v. Superior Prod. Co., 620 F.2d 224 (10th Cir. 1980); Cook v. Ochsner Found. Hosp., 559 F.2d 270 (5th Cir. 1977).

40. Many of the rules specifically authorize the court to act on its own initiative—e.g., Rule 16(f)—and there is little doubt that the court has this inherent power even when not explicitly provided in the rules. See Landis v. North American Co., 299 U.S. 248 (1936).

41. See Link v. Wabash Railroad Co., 370 U.S. 626 (1962) (dismissal upheld although neither notice nor hearing); but cf. Miranda v. Southern Pacific Trans. Co., 710 F.2d 516 (9th Cir. 1983) (reasonable notice and opportunity for hearing required before monetary sanctions may be imposed).

42. Some of the rules—for example, Rule 37(a)—mandate that the opportunity for a hearing be afforded before imposing the sanction. Even when not explicitly required, a hearing may be needed to consider such matters as whether non-compliance was "substantially justified" or whether a sanction would be "unjust."

may be involved. See § 42.25. As stated by the Advisory Committee in its Notes to the 1983 amendments to Fed. R. Civ. P. 11,

> The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary. . . . [T]he court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of court, and then only in extraordinary circumstances.

The amount of notice before the hearing will likewise depend on the circumstances; for example, a few minutes notice may be adequate when the facts are clear and the person sanctioned is an attorney.[43]

For more serious sanctions, the court should file a formal order. It should be accompanied by a written opinion (or by an opinion dictated into the record) noting the authority under which the sanction is imposed, reciting the relevant facts (including any past derelictions or misconduct that bear on the sanction imposed), and explaining why less severe penalties are inappropriate.

Criminal contempt proceedings are governed by special rules and statutes. To preserve order and prevent disruption of a trial, the judge may summarily impose appropriate punishment under Fed. R. Crim. P. 42(a).[44] In other circumstances, the procedures of Rule 42(b) should be followed and, if the misconduct involves disrespect to or criticism of the judge, another judge should be assigned to hear the contempt proceedings.[45] See also 18 U.S.C. §§ 401, 402, 3691.

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43. See, e.g., In re Allis, 531 F.2d 1391 (9th Cir.), cert. denied, 429 U.S. 900 (1976).

44. If misconduct during trial does not warrant immediate punishment under Rule 42(a), the contempt proceedings after the trial should be conducted in accordance with the procedures of Rule 42(b). See United States v. Lumumba, 741 F.2d 12 (2d Cir. 1984), concluding that Sacher v. United States, 343 U.S. 1 (1952), has effectively been overruled by Taylor v. Hayes, 418 U.S. 488 (1974).

45. See, e.g., United States v. Meyer, 462 F.2d 827 (D.C. Cir. 1972).

42.5 SOURCE LIST—STATUTES AND RULES.[46]

Conduct	Authority; Specified Sanctions
General Provisions	
Failure of plaintiff (or defendant with counterclaim, cross-claim, or third-party claim): (1) to prosecute, or (2) to comply with order or Rules.	Rule 41(b): Dismissal of action (or claim). Implicitly includes less severe sanctions.
Failure of party to plead or otherwise defend against claim.	Rule 55: Default Judgment. Implicitly includes less severe sanctions.
Attorney unreasonably multiplying proceedings.	28 U.S.C. § 1927: Fees/expenses caused by conduct.
Disobedience of orders; misbehavior.	18 U.S.C. § 401: Criminal contempt--fine or imprisonment. Also see 18 U.S.C. §§ 402, 3691; Fed. R. Crim. P. 42.
Frivolous/malicious action in forma pauperis.	28 U.S.C. § 1915: Dismissal.
Unsuccessful prosecution/defense of case.	[Various statutes awarding fees/expenses to prevailing party.]
Failure to comply with judgment directing conveyance or other specific act.	Rule 70: Cost of having act done by another; writ of attachment or execution; contempt.
Fraud or misconduct in obtaining judgment.	Rule 60(b)(3): Relief from judgment "upon such terms as are just."
Service	
Failure to acknowledge receipt of summons/complaint by mail.	Rule 4(c)(2)(D): Payment of costs of personal service.
Failure to serve summons/complaint within 120 days.	Rule 4(j): Dismissal without prejudice.
Pleadings and Motions	
Unsigned pleading/motion.	Rule 11: Document stricken.

46. Unless otherwise specified, references are to the Federal Rules of Civil Procedure.

Signed in violation of Rule 11: --not read by signer, or --without reasonable inquiry, or --not well grounded in fact, or --not warranted in law, or --interposed for improper purpose, such as to harass, cause delay, or increase litigation costs.	Rule 11: "An appropriate sanction," including fees/expenses caused by violation.
Pleading insufficient defense or redundant, immaterial, impertinent, or scandalous matter.	Rule 12(f): Matter stricken from pleading.
Vague or ambiguous pleading to which responsive pleading required.	Rule 12(e): Order directing more definite statement; if not corrected within time directed, pleading stricken or "such order as [court] deems just."
Non-attendance, unpreparedness, or failure to participate in good faith at pre-trial conference; failure to obey pretrial order.	Rule 16(f): "Such orders . . . as are just," including fees/expenses caused by conduct, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.
Affidavits on summary judgment presented in bad faith or to delay.	Rule 56(g): Fees/expenses caused by conduct; contempt.

Discovery--in General

Failure to negotiate in good faith in framing voluntary discovery plan.	Rule 37(g): Fees/expenses caused by failure.
Non-attendance, unpreparedness, or failure participate in good faith at pretrial conference.	Rule 16(f): "Such orders . . . as are just," including fees/expenses caused by conduct, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.
Making a discovery request, response, or objection: --unsigned, or	Rule 26(g): Document stricken.
--signed in violation of Rule 26(g): not read by signer, or without reasonable inquiry, or inconsistent with rules, or not warranted by law, or for improper purpose (such as to harass, cause delay, or increase litigation cost), or unduly burdensome or expensive.	Rule 26(g): "An appropriate sanction," including fees/expenses caused by the violation.

Discovery that is unreasonably cumulative, obtainable from another source at less expense or burden, or for which adequate opportunity already afforded.	Rule 26(b)(1): Limitations on extent or frequency of discovery.
Filing a discovery motion or response that is unsigned or signed in violation of Rule 11.	Rule 11: Strike unsigned document; for documents signed in violation of Rule 11, "an appropriate sanction," including fees/expenses caused by the violation.
Lack of substantial justification in presenting/opposing motion to compel or for protective order.	Rule 37(a)(4): Fees/expenses of prevailing party (or deponent) incurred on motion.
Failure to obey scheduling order.	Rule 16(f): "Such orders . . . as are just," including fees/expenses caused by failure, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.
Failure to obey other discovery orders, such as preservation of documents and confidentiality orders; failure to obey order establishing discovery plan under Rule 26(g).	Rule 37(b)(2): "Such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.
Failure to provide movant's prior statement.	Rule 26(b)(3): Fees/expense incurred on motion.

Depositions[47]

Non-attendance:	
(1) by noticing party.	Rule 30(g)(1): Fees and attendance expenses of parties/counsel.
(2) By non-party deponent:	
(a) not subpoenaed.	Rule 30(g)(2): Fees and attendance expenses of parties/counsel awarded against noticing party.
(b) subpoenaed.	Rule 45(f): Contempt.

47. Sanctions may ordinarily be imposed either by the court in which the case is pending or by the court where the deposition is taken. See Fed. R. Civ. P. 26(c), 30(c), 37(a)(1). However, if sanctions are sought against a non-party deponent, application should be made to the court in which the deposition is being taken. See Fed. R. Civ. P. 37(a)(1), 37(b)(1), 45.

(3) by party-deponent, including party's Rule 30(b)(6) witness.	Rule 37(d): Unless protective order has been sought, "such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment.
Failure of deponent to designate witness under Rule 30(b)(6).	Rule 37(a)(2,4): Fees/expenses of prevailing party incurred on motion to compel designation.
Failure of deponent to answer question(s); evasive or incomplete answer(s); refusal to be sworn.	Rule 37(a)(2-4): Fees/expenses of prevailing party (or deponent) incurred on motion to compel. If persists after order compelling discovery, Rule 37(b)(2): "Such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.
Conduct of deposition in bad faith or unreasonably to annoy, embarrass, or oppress.	Rule 30(d): Fees/expenses of prevailing party (or deponent) incurred on action to terminate or limit deposition.
Motion for protective order; e.g., disputes as to time, place, scope, attendance, etc.	Rule 26(c): Fees/expenses of prevailing party (or deponent) incurred on motion for protective order.
Unreasonable, oppressive subpoena duces tecum.	Rule 45(d)(1): Quash/modify subpoena; condition on payment of expenses.
Motion to suppress under Rule 32(d)(4).	Rule 37(a)(4): Fees/expenses of prevailing party incurred on motion.
Interrogatories	
Failure to serve any answers.	Rule 37(d): Unless protective order has been sought, "such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment.
Evasive, incomplete answer(s); objections; motions for protective order.	Rule 37(a)(2-4): Fees/expenses of prevailing party incurred on motion to compel. If persists after order compelling discovery, Rule 37(b)(2): "such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.

Requests for Production

Failure to serve any response or objections.	Rule 37(d): Unless protective order has been sought, "such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment.
Refusal to permit inspection; objections; evasive, incomplete production; motions for protective order.	Rule 37(a)(2-4): Fees/expenses of prevailing party incurred on motion. If persists after order compelling discovery, Rule 37(b)(2): "Such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.

Physical or Mental Examinations

Motion for examination.	[Movant subject to Rule 11; unclear whether Rule 37(a)(4) authorizes award of fees/expenses incurred by prevailing party.]
Failure to comply with order under Rule 35(a) compelling production of person for physical/mental examination.	Rule 37(b)(2)(E): Fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment.
Failure to submit report of examining physician.	Rule 35(b)(1): Exclusion of physician's testimony at trial.

Requests for Admission

Failure to answer or object.	Rule 36(a): Deemed admitted.
Objections; evasive answers; motions to determine sufficiency or for protective order.	Rule 36(a), 37(a)(2-4): Fees/expenses of prevailing party incurred on motion. If persists after order compelling discovery, Rule 37(b)(2): "such orders . . . as are just," including fees/expenses caused by failure, establish facts, preclude evidence, strike claims/defenses, stay proceedings, dismissal, default judgment, contempt.
Unjustified denial of matter later proved to be true.	Rule 37(c): Fees/expenses incurred in proving matter.

Referral to Master

Failure of subpoenaed witness to appear/give evidence before Master.	Rule 53(d): Contempt under Rule 45; penalties under Rule 37.

Failure to pay Master's compensation.	Rule 53(a): Writ of execution.
Trial	
Unreasonable, oppressive subpoena duces tecum.	Rule 45(b): Quash/modify subpoena; condition on payment of expenses.
Refusal to comply with order compelling testimony or production of documents.	28 U.S.C. § 1826: Civil contempt—confinement. Also, under Fed. R. Evid. 804(a), witness deemed unavailable for some hearsay exceptions.
Refusal to produce documents used to refresh memory.	Fed. R. Evid. 612: "Any order justice requires." (Special rule if prosecution witness.)
Appeal	
Appeal not in good faith.	28 U.S.C. § 1915(a); Fed. R. App. P. 24(a): Denial of appeal in forma pauperis.
Frivolous appeal.	Fed. R. App. P. 38: "Just damages and single or double costs." Similar penalty under 28 U.S.C. § 1912.
Attorney not complying with rules; conduct unbecoming member of bar.	Fed. R. App. P. 46(b, c): Suspension; disbarment; "any appropriate disciplinary action."
Criminal Proceedings	
Failure to present defenses/requests, objections within time set by court.	Fed. R. Crim. P. 12(f): Waiver.
Failure to raise insanity defense within time set by court.	Fed. R. Crim. P. 12.2(a): Preclude defense.
Failure to comply with discovery request under Fed. R. Crim. P. 16.	Fed. R. Crim. P. 16(d)(2): Order compelling discovery; continuance; preclude undisclosed evidence; "such other order as [court] deems just."
Failure to list witness(es) to support/rebut alibi.	Fed. R. Crim. P. 12.1(d): Preclude witness(es).
Failure to disclose expert witness(es) regarding defendant's mental condition; failure to submit to examination ordered by court.	Fed. R. Crim. P. 12.2(d): Preclude testimony.
Failure to obey subpoena.	Fed. R. Crim. P. 17(g): Contempt.
Failure to produce statement of witness.	Fed. R. Crim. P. 26.2(e): Testimony stricken; mistrial. See also 18 U.S.C. § 3500(d).

43. MCL REFERENCE TABLE.

MCL (5th Ed.)		MCL 2d
Dedication, Foreword		10
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0.30	Assignment to Single Judge	21.12, 31.11
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1.11	Notice of Entry of Preclusion Order	21.2
1.20	Counsels' View of Issues	21.2, 21.31-21.34, 21.45
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