

CIVIL LITIGATION MANAGEMENT MANUAL

The Judicial Conference of the United States

**Committee on
Court Administration and Case Management**

2001

This manual is for the guidance of judges. It is not intended to be relied upon as authority, and it creates no rights or duties.

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of the
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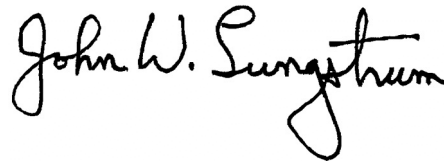
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The *Civil Litigation Management Manual*, which was approved by the Judicial Conference of the United States at its March 2001 session, was prepared under the direction of the Judicial Conference Committee on Court Administration and Case Management during the chairmanship of Judge D. Brock Hornby, with substantial contributions by the Administrative Office of the U.S. Courts and the Federal Judicial Center. The manual was written for United States judges to help them secure “the just, speedy, and inexpensive determination of every action.”

This manual has its origin in the Civil Justice Reform Act of 1990, which directs the Judicial Conference, with the assistance of the Administrative Office and the Federal Judicial Center, to “prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction.” It is one more response to a need frequently expressed by judges—that is, to learn about the case management practices of other judges. Thus, the manual reflects, in its text and in the forms included in Appendix A, the varied experiences of district and magistrate judges. We are grateful to the many judges and courts who provided models on which we could draw.

This manual is available in print as well as electronically on the judiciary’s Web site. We hope that access to the electronic copy will make the manual even more useful, particularly for judges who wish to adapt or use a portion of a form or order. Although the manual contains many forms and orders, the documents included reflect only a small portion of those available. We urge judges who are interested in seeing the forms and orders used by their colleagues, or who wish to make their own forms and orders available, to use the Web sites developed by the individual courts. We found many of these sites to be rich sources of information and relied heavily on them for the materials in Appendix A.

With every good wish that the manual will be helpful to our colleagues on the bench, and with grateful thanks to the Administrative Office and the Federal Judicial Center for supporting the committee in this project, the Court Administration and Case Management Committee offers this manual for your consideration and use.



John W. Lungstrum
Chair, Court Administration and
Case Management Committee

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The first version of this manual, the *Manual for Litigation Management and Cost and Delay Reduction*, was published by the Federal Judicial Center in 1992. Its text was the starting point for the present manual and remains the core around which it is built. In writing the manual, staff turned to a number of other sources as well. Among these were materials prepared for judicial education programs sponsored by the Center. The committee acknowledges with thanks the judges whose lectures or course outlines provided case management techniques that have been incorporated into the manual: Judges Marvin E. Aspen, D. Brock Hornby, David W. McKeague, Loretta A. Preska, Fern M. Smith, and Ann C. Williams. The committee is also indebted to the judges and courts that have posted their forms, orders, and local rules on their Web sites; ready access to these materials made the task of assembling Appendix A considerably easier. Appreciation is given as well to court staff who assisted, when necessary, in retrieving court forms and orders.

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The committee also gratefully acknowledges any others who helped in creating this manual but may have been inadvertently excluded above.

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INTRODUCTION

Is a federal judge an adjudicator or a case manager? The interplay between these two judicial roles has sometimes left confusion in its wake. Increasing caseloads, changing perspectives on the function of courts in our society, public demands for accountability in both resource use and performance in all branches of government, and the continuing reality of budget deficits have forced reappraisal of this question. In fact both functions—adjudication and case management—are critical judicial roles, the second used in service of the first. As was noted in the Judicial Conference’s *The Civil Justice Reform Act of 1990: Final Report*, “The federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation, and thus ensure the ‘just, speedy, and inexpensive’ determination of civil actions called for in the Federal Rules of Civil Procedure.”¹ Managed cases will settle earlier and more efficiently, and will provide a greater sense of justice to all participants. Even in the absence of settlement, the result will be a more focused trial, increased jury comprehension, and a more efficient and efficacious use of our scarcest institutional resource, judge time.

Beyond the rationale to act as case managers lies the question of the authority to do so: Do the national rules support this judicial role? Do the local rules and legal culture provide a basis for managerial interventions in the litigation process? Do judges have the authority to tell lawyers and litigants to do it *my* way, when zealous advocates want to do it *their* way? The answer is clearly yes. Look to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. They contain all the authority to do what has to be done.

Federal Rules of Civil Procedure

- Rule 1: Rules shall be construed to secure the just, speedy, and inexpensive determination of every action.
- Rule 16: Judges are authorized to hold pretrial conferences and to enter scheduling orders.
- Rule 61: Courts at every stage of the proceeding must disregard errors or defects that do not affect the substantial rights of the parties.
- Rule 83: In all cases not provided for by rule, district judges may regulate their practice in any manner consistent with federal law and local rules of the district in which they act.

Federal Rules of Evidence

- Rule 102: Rules shall be construed to secure elimination of unjustifiable expense and delay.
- Rule 403: Relevant evidence may be excluded for consideration of undue delay, wasted time, and needless presentation of evidence.

1. Judicial Conference of the U.S., *The Civil Justice Reform Act of 1990: Final Report* 10 (1997) [hereinafter JCUS CJRA Report].

- Rule 611(a): District courts shall exercise reasonable control over presentation of evidence so as to avoid needless consumption of time.

So, ample authority exists in the rules—and as derived from judges’ inherent authority—for the judge to take charge of the case. In fact, the rules give the judge the responsibility to make sure cases are resolved expeditiously. In addition, the Judicial Conference specifically endorses a number of complementary case management tools, such as early and firm trial dates, differential treatment of cases, and early neutral evaluation.

The Judicial Conference has encouraged these practices in part from long experience but also in light of research conducted under the Civil Justice Reform Act (CJRA), which concluded that three specific case management principles, when used together, can reduce litigation costs and time: early judicial control of the case, reduction of the time permitted for discovery, and early setting of a trial date. Based on these findings, a RAND study² suggested a general approach to early management of civil cases:

- For cases in which issues have not yet been joined, monitor them to ensure that deadlines for service and answer are met, and begin judicial action to dispose of them if those deadlines are missed.
- For cases in which issues are joined, wait a short time after the joinder date (perhaps a month) to see if these cases will terminate; if they do not, resume active judicial case management.
- Include the setting of a firm trial date as part of the early case management approach and adhere to that date as much as possible.
- Include the early setting of a reasonably short discovery cutoff time tailored to the individual case. For nearly all general civil cases, this policy should foster judicial case management within six months or less after filing.³

Each of the above principles should be reflected in initial scheduling activities. The question for the trial judge is how best to approach these tasks, within the context of his or her own chambers, court, and local legal culture. Fortunately, over time judges and courts have developed numerous tested and successful prac-

2. James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaina, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, Executive Summary 26-28 (RAND Institute for Civil Justice 1996) [hereinafter *RAND CJRA Report*].

3. The Judicial Conference, in the JCUS CJRA Report, noted the importance of setting a schedule, as authorized by Rule 16, and endorsed the RAND study’s finding that early judicial case management significantly reduced time to disposition (*see supra* note 1, at 31). The Conference is opposed, however, to establishing as policy a uniform time frame, such as eighteen months, within which all trials must begin. The Conference stated that “[a] standard time frame may be counterproductive and slow down cases that could be disposed of much more quickly. Prescribing a national rule with specific trial deadlines could also lead to the same difficulties in [civil] case management that are caused [in criminal cases] by the Speedy Trial Act.” *Id.*

tices and procedures, many of which we present in this manual. Those described here are derived from many sources, including judges' published writings, court orders, lectures, CJRA plans, and materials provided at Federal Judicial Center education programs for judges. In addition, we have borrowed heavily from an earlier FJC publication, *Manual for Litigation Management and Cost and Delay Reduction*.⁴ Finally, and most gratefully, we have drawn upon the many years of experience of the judges who have generously donated their time and expertise to this project.

The discussion in the manual's first six sections generally follows the chronology of a civil case. Thus, we begin with techniques for monitoring service of process and conclude with management of trials. Sections seven through nine turn to more specialized matters, such as the management of special types of cases, personnel resources, and institutional issues in litigation management.

Management of criminal cases is not covered in this manual. The *Manual on Recurring Problems in Criminal Trials* (Federal Judicial Center 5th ed., 2001) contains a wealth of material judges will find helpful in the management of criminal litigation.

4. *Manual for Litigation Management and Cost and Delay Reduction* (Federal Judicial Center 1992).

I. EARLY AND ONGOING CONTROL OF THE PRETRIAL PROCESS

A. Establishing Early Case Management Control

1. In general
2. Specific techniques
 - a. Initial scheduling orders and case management information packages
 - b. Early case screening

B. Prompting Counsel to Give Early Attention to the Case

1. In general
2. The parties' "meet and confer" conference and mandatory initial disclosures
3. Supplementing the "meet and confer" agenda

A. Establishing Early Case Management Control

Establishing early control over the pretrial process is pivotal in controlling litigation cost and delay.⁵ Early control includes effective use of rules, procedures, and discretionary authority that cumulatively establish your role in the progress and conclusion of the case before you. It is very important to view this as a continuing process that includes an ongoing interplay between prefilings instructions, counsel actions, counsel meetings, and case management plans, extending from filing to disposition in every case. It would be hard to overestimate the importance of your investments of time and thought into how you will use the case management tools central to the exercise of your authority. Your discretionary tailoring of these tools to each case and your maintenance of consistency in applying them will help ensure your success as a judge.

1. In general

How early is "early," and how much control is necessary? The control issue was ably addressed by Judge Alvin Rubin:

[T]he judicial role is not a passive one . . . it is the duty of the judge alone . . . to step in at any stage of the litigation where intervention is necessary in the interests of justice. Learned Hand wrote, "a judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."⁶

This intervention cannot occur too soon; the process of federal case management, and the role accorded the assigned judge in its administration, argue for the *earliest* exercise of control and oversight to ensure that case resolution comes at the soonest, most efficacious, and least costly moment in every case. Control over

5. See RAND CJRA Report, *supra* note 2, at 1, 11–16.

6. Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 136 (1978).

your cases will also help ensure that justice is not delayed and that you can give cases the kind of attention they need for a just resolution of the dispute.

2. Specific techniques

While individual districts may differ, cases are usually assigned to district judges, and in some districts to magistrate judges (see *infra* section VIII.B.5), immediately after filing. It is here, at this early juncture, that your first opportunity for judicial oversight and management control arises.

a. Initial scheduling orders and case management information packages

An important early opportunity to assert judicial control and shape attorney expectations regarding every aspect of litigation practice and management arises at filing and assignment. In some districts, upon filing or shortly thereafter, an initial scheduling order is issued, setting out important early dates, such as deadlines for filing proof of service, for holding the Federal Rule of Civil Procedure 26(f) “meet and confer” conference, and for making disclosures. Such an order can also inform attorneys of the date for the initial Rule 16 case management conference. For examples of orders, see Appendix A, Forms 1–3.

Filing also provides an opportunity to give parties a case management information package tailored to the district and the chambers of the assigned judge. Such a package can outline the specific expectations for counsel and parties, including the judge’s administrative, case management, and courtroom procedures.⁷ Alternatively (or additionally), this information can be posted on the court’s Web site. In addition to general pretrial practice tips, hard-copy or Web-site materials may include specific information regarding the form in which attorneys should submit the reports or joint statements required by Rule 16 or 26. Forms 4–9 in Appendix A provide several examples of the information provided by individual judges and courts to attorneys early in the case.

Consider creating a case management information package containing

- a statement or booklet outlining general rules of practice and procedure (including motions, continuances, decorum, and specialized standing orders or rules) for your court;
- an order setting out procedures to be followed, deadlines to be met, and topics to be covered in the parties’ first “meet and confer” conference under Rule 26(f);
- an outline (or exemplar/form/format), set of procedures, and topic list for submission of joint case management and discovery plans;
- an order detailing mandatory information and document exchanges or accelerated discovery under Rule 26;

7. See *Changes in Compliance with the Civil Justice Reform Act*, in U.S. District Courtroom Deputies at Work 11–12 (Federal Judicial Center 1992).

- an order governing pretrial conferences; and
- a form for consent to proceed before a magistrate judge.

In the following chapters we discuss many of the procedures listed above, such as the attorneys' Rule 26 "meet and confer" conference, their joint case management statement, and the judge's scheduling and final pretrial orders. In each instance, citation is made to examples of forms in Appendix A.

Using such tools as an initial scheduling order or a case management information package, you can provide specific and early notice to the parties of all preparations you want them to make prior to your first status or scheduling conference. In addition, by structuring their initial planning meetings under Rule 26(f), you can ensure that all parties will subsequently make effective use of your limited, formal conference time.

b. Early case screening

Further early judicial control can be established through creative screening of the information contained in the initial pleadings and the civil cover sheet (JS-44). Some districts require additional information to facilitate early case screening.⁸ Your regular, structured screening of new case assignments (or the delegation of this task with specific guidelines to a magistrate judge, law clerk, or courtroom deputy) can provide an early warning of potential case management problems. You can then address these problems through an early status conference, conference call, order, or other intervention before they deepen. You can look for potential service problems, potential proof problems, complex legal or factual issues, and early dispositive motions and address each according to your guidelines.

Consider

- if the plaintiff's case includes out-of-state defendants or factual and expert witnesses, issuing an order expediting a status or scheduling conference once key defendants have been served;
- in the event of inexperienced counsel handling novel cases or matters that present complex proof problems, making an early referral to early neutral evaluation (ENE) (see *infra* section V.B.3);
- in the event of an early dispositive motion, making a conference call to determine its ripeness for a ruling; and
- in the event of repeated discovery squabbles or claims of excessive discovery motions practice, making a conference call to establish parameters.

8. See, e.g., U.S. District Court for the District of Oregon, Civil Justice Expense and Delay Reduction Plan 5–7 (1991); see also U.S. District Court for the District of Massachusetts, Expense and Delay Reduction Plan, Early Assessment of Cases 9–10, 15–16 (1991) [hereinafter D. Mass. CJRA Plan].

Early screening can be the “trip wire” of your case management: It allows you to head off problems as they develop, reinforce your authority, and adjust your case management posture as necessary to keep cases moving and on schedule.

B. Prompting Counsel to Give Early Attention to the Case

1. In general

While the responsibilities of a civil case are shared by and weigh on all participants, the primary responsibility lies with counsel, not the court. Federal rules and procedures have increasingly recognized the value of placing these responsibilities on the plaintiff and the defendant and the need to conserve the system’s most limited resource, judicial time. However, one of the more common observations of the civil justice reform movement has been that opposing counsel are often unacquainted at the time of the first Rule 16 conference. Subsection (f) of Rule 26 seeks to fill that gap by forcing counsel to meet and jointly prepare for the Rule 16 conference; informally exchange core case information; and adopt, to the extent possible, a joint plan for case management. The rule provides tools through which you can delegate significant discovery and case management responsibilities directly to the parties. Early preparation by counsel will minimize the need for your unscheduled case interventions and maximize the value of those interventions when they do occur. These results become especially important during your later Rule 16 and final pretrial conferences.

2. The parties’ “meet and confer” conference and mandatory initial disclosures

Rule 26(f) requires that the parties in most types of cases meet and confer at least twenty-one days before the initial Rule 16 conference is held or the scheduling order is due. The purpose of this meeting is to discuss the nature and basis of their claims and defenses, develop a proposed discovery plan, discuss the possibility of settlement, prepare a joint case management report to the court, and exchange certain information or arrange for its exchange within fourteen days of the “meet and confer” conference (Rule 26(a)(1)).⁹

The parties’ Rule 26(f) conference presents an early opportunity for counsel to analyze their case and plan its subsequent development. Equally important are the relationships that can be developed between counsel and between counsel and the judge, which depend in part on how you convey your expectations regarding this meeting. The tenor of these relationships will color subsequent interactions between counsel, as well as between you and them.

9. Rule 26 does not apply to those limited actions specified under subdivision 26(a)(1)(E). The rule requires each party to disclose the names, addresses, and telephone numbers of persons likely to have discoverable information to support its claims or defenses; to identify documents, data, and things that support its claims or defenses; to provide a computation of damages claimed, along with the documents and other materials on which the computation is based; and to provide for inspection and copying any insurance agreement that may satisfy all or part of the judgment.

Laying an appropriate foundation for this meeting can begin with the initial scheduling orders and information packages discussed earlier (see *supra* section I.A.2.a). By either of these means, you can set a date for the Rule 16 conference and key the Rule 26(f) meeting to it, or you can instruct counsel to ask chambers directly about appropriate dates and timing. An initial order or information package can also communicate your expectations for the “meet and confer” conference, the preparations and work products you expect to emerge from it, and the end results you want to achieve. The Rule 26 work products, such as the disclosures made and the joint discovery plan, are outlined in Rule 26 and its suggested format for the joint report, which is reproduced in Appendix A, Form 10.

It is helpful to make clear that the discovery plan and joint case management report prepared by the parties will play a central role in determining the subject matter of the subsequent Rule 16 conference. Some judges issue an order of general instructions, whereas others issue an order that will, with the judge’s signature at the Rule 16 conference, become the scheduling order for the case. See Appendix A, Forms 2, 11–15 for examples of orders concerning the Rule 26(f) meeting and the joint case management report and discovery plan.

3. Supplementing the “meet and confer” agenda

Although Rule 26(f) serves as a point of departure in establishing requirements for the “meet and confer” conference, you may wish to add other requirements particularly suited to your own case management practices, including agenda items for subsequent Rule 16 conference planning.

Consider

- requiring that the plaintiff submit to the defendants, no later than ten days before the Rule 16 conference, written settlement proposals to be exchanged (or discussed) at that conference;¹⁰
- requiring that the parties submit their views on the utility of any available ADR devices in enhancing early settlement prospects;
- requiring a proposed schedule for the filing of motions;
- establishing a timetable for filing and service of dispositive motions under Federal Rule of Civil Procedure 12 or 56;¹¹
- identifying an anticipated date of trial (based on the discovery plan) and expected number of trial days;
- establishing a proposed agenda for the Rule 16 conference; and
- requiring that the joint case management plan (with dissenting addenda, as necessary) be filed with the court no later than two weeks before the Rule 16 conference.

10. See, e.g., D. Mass. CJRA Plan, *supra* note 8, at 21.

11. See, e.g., U.S. District Court for the Eastern District of Pennsylvania, Civil Justice Reform Act Plan, Development of a Joint Plan (5), ch. VII, § 701 (1991).

II. SETTING AND MONITORING A CASE MANAGEMENT PLAN

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The foundation of civil case management is the case schedule, which sets deadlines for *both* attorney and judicial actions leading to case disposition. Every civil case should be placed on a schedule, whether the case is an administrative matter, such as a Social Security review, or a complex, multiparty action. Scheduling is critical to effective litigation management for two reasons: (1) deadlines help ensure that attorneys will complete the work required to bring the case to timely resolution; and (2) unless a case is scheduled for an event (for example, a conference or filing of a motion), it may drop from sight.

Federal Rule of Civil Procedure 16(b) directs that a scheduling order be issued following the initial conference in every case (except those exempted by local rule) and that the scheduling order shall control the course of the action unless modified by a subsequent order (Rule 16(c)).¹² Even in cases exempted by local rule from Rule 16(c), a minimal but firm schedule should be set. At the other end of

12. See generally Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525 (1992).

the scale are cases, such as some class action and mass tort cases, that require extensive management, numerous rulings, and periodic adjustments to the schedule as the case unfolds; for guidance in handling the special needs of these cases, see the *Manual for Complex Litigation, Third*.¹³

Your goal should be to set a schedule that is as tight as possible but also realistic in light of what you know about the case, the attorneys, the settlement posture of the parties, and the need to develop information necessary for a reasoned and principled resolution of disputed issues. Scheduling is an art form; although it benefits from the structure provided by rules, it does require you to exercise your best judgment in every case.

A. Consulting with Lawyers and Unrepresented Parties

There are several approaches to setting a case schedule, including automatic issuance of a standard schedule for all cases of a certain type, review and approval of a schedule submitted by the lawyers, and preparation of a schedule in consultation with the lawyers at a Rule 16 conference. One question you may have is whether it is necessary or useful to consult with the lawyers to set the schedule.

Rule 16(b) provides that the judge shall enter a scheduling order after consulting with attorneys and unrepresented parties. Note that the rule specifically includes consultation with unrepresented parties. Consultation is important for two reasons: (1) consideration of the subjects listed in Rule 16(c) may be necessary or helpful in arriving at an appropriate scheduling order; and (2) the rule provides that the schedule shall not be modified except by leave of the court upon a showing of good cause. Orders therefore need to be realistic, taking into account the needs of the case, your calendar, and the lawyers' other commitments (see *infra* section II.D for discussion of the scheduling order). The District of Massachusetts has embodied these goals in its local CJRA delay reduction plan:

The most effectively managed cases often are those in which a relatively early scheduling conference is convened by the judge, and . . . a case-specific order is worked out with substantial input from the parties. Experience demonstrates that scheduling orders cannot be expected to work well if one or both litigants do not seriously believe that the order will be enforced. If a routine form order is issued, without . . . participation by the parties, it is quite likely that it will have to be modified later to suit the . . . [needs] of the case

. . . .¹⁴

B. Scheduling a Rule 16 Conference

When deciding whether to hold a scheduling conference, it is well to keep in mind the purposes Rule 16 seeks to achieve (Rule 16(a)):

13. Manual for Complex Litigation, Third (Federal Judicial Center 1995) [hereinafter MCL, Third]. Note: The fourth edition is in process.

14. D. Mass. CJRA Plan, *supra* note 8, at 24.

- expedite the disposition of the action;
- establish early and continuing control so that the case will not be protracted because of lack of management;
- discourage wasteful pretrial activities;
- improve the quality of the trial through more thorough preparation; and
- facilitate settlement of the case.

Whether to hold a scheduling conference depends on what you want to achieve at the outset of the case. Do you simply want to set dates for the major events in the case? Such dates are likely to be more realistic—and the case better managed—if you consult with the attorneys. Once your goals move beyond scheduling to such matters as narrowing issues, controlling the scope of discovery, or exploring settlement, you will undoubtedly want to hold an initial scheduling conference with the attorneys or any unrepresented parties.

In deciding whether to hold a conference, you should look at the various characteristics of the case. For example, if the case involves many parties or potentially voluminous discovery, if you identify claims that are likely to be dismissed on a Federal Rule of Civil Procedure 12(b) motion, if you know the attorneys to be short on cooperation, or if the case might easily be settled with your intervention, you will probably want to hold a conference.

Many judges think a conference should be held in every case, either in person or by telephone. They see it as an opportunity to accomplish many things: narrow issues, assert control over discovery, attempt settlement, meet the litigants, find out who the attorneys are and what their relationship is, acquaint attorneys with specific procedures of your chambers, put a “face” on the judicial system for unsophisticated litigants, and show the attorneys who is in control of the case. Advocates of conferences also argue that an investment of time early in the case saves time later by eliminating the potential for disputes over discovery and other issues. Other judges have less faith in scheduling conferences; especially in routine cases, they believe early conferences are a waste of their and litigants’ resources. Certainly, conferences that are merely perfunctory are a waste of everyone’s time. You should hold a conference if you have specific purposes you want to accomplish and can organize your approach to ensure that they are accomplished.

In some courts, specified categories of cases are exempted from the conference requirement. These cases will still benefit from early judicial management of some kind, however.¹⁵ For example, many courts exempt Social Security, government

15. The Judicial Conference, in its final report on the CJRA, endorsed the use of tracking systems for these types of administrative and quasi-administrative cases: “The DCM concept may provide its greatest benefits by offering standardized case management procedures to those plaintiffs whose claims are the least amenable to more formal adversarial procedures and whose litigation dollars are the most limited.” JCUS CJRA Report, *supra* note 1, at 28. The Conference also warned, however, that tracking systems in some cases “can be bureaucratic, unwieldy, and difficult to implement.” *Id.*

collection, habeas corpus, and section 1983 prisoner cases and have adopted discrete management approaches or “tracks” appropriate for such cases in their courts. The tracks establish preset time frames and standardized, presumptive deadlines for significant case events. This prearranged format for managing these limited categories of cases allows a judge to keep such cases on a preset, or “autopilot,” management system, yet reserves the judge’s right to intervene at any time to change it. See *infra* section IX.B for a discussion of differentiated case tracking generally.

You have broad discretion as a judge, guided by the stated purposes of Rule 16, to tailor case management approaches and conferences to the needs and circumstances of the case. That discretion offers opportunities for innovation and creativity but also tends to introduce into the case a large element of unpredictability from the perspective of the lawyers and litigants. Lawyers can play their part in litigation management more effectively if they know what you expect. Consider, therefore, issuing written guidelines or instructions covering the pretrial process, including discovery and motions practice, as well as trial procedures. For illustrative guidelines about procedures generally, see Appendix A, Forms 4–9; for examples of forms and orders regarding preparation for the joint case management statement and case management conference, see Appendix A, Forms 3, 10–15. See also *supra* sections I.A.2.a and I.B.2.

C. Setting a Case Management Plan Through the Rule 16 Conference

If you have decided that a scheduling conference is necessary, you still have many decisions to make about when, where, how, and by whom the conference will be conducted.

1. Who should conduct the conference?

To advance the purposes of the Rule 16 conference and to use it as more than a perfunctory exercise, a judge, not a law clerk, should conduct it. The Rule 16 conference is generally the first point of significant contact for establishing case management control. You have an unparalleled opportunity to set the pace and scope of all case activities that follow, to look the lawyers and litigants in the eye, and to set the tone of the case. You will also be in a better position to assess the personalities involved and the likelihood of early settlement.

If you are a district judge who assigns civil pretrial case management duties to a magistrate judge, consider conducting the initial scheduling conference jointly or at least attending part of the conference. Your presence will send a strong message to the attorneys and litigants that you are in control of the case. The magistrate judge and attorneys will also be able to coordinate their calendars more efficiently with yours. If rulings are needed on motions, particularly dispositive motions, you will be able to make them immediately, rather than waiting for a report and recommendation from the magistrate judge. Because of such consid-

erations, as well as a preference for remaining familiar with a case at all times, some judges do not assign the initial scheduling conference to magistrate judges.

2. When should the conference be held?

The Rule 16(b) scheduling conference should precede issuance of the scheduling order so that the order can be informed by the discussion at the conference. Rule 16(b) requires that a scheduling order issue as soon as practicable but in no event more than 120 days after service of the complaint. Generally, the date of the scheduling conference can be generated or otherwise automatically established when the case is filed. The 120-day period provided by Rule 16(b) is usually long enough for all defendants to be served and for lawyers to complete any necessary preconference disclosure. Some judges hold the conference earlier to get a “feel” for the action, as well as the posture of the parties, as soon as possible. Under some circumstances—for example, when all parties have filed an appearance—an early conference may expedite the case; however, holding two conferences, the first one early in the case and the second after the defendant has been served, will increase the plaintiff’s costs, as well as your time on the case.

3. Where should the conference be held?

Judges’ arrangements for holding Rule 16(b) conferences vary, but the basic choice is between the courtroom and the judge’s chambers. Several factors should be weighed when making that decision.

Consider

- how many persons will attend;
- whether the case will attract public and media interest;
- the purposes of the conference and the items on the agenda (e.g., whether you will make rulings or orders);
- the character, experience, and attitude of the participants; and
- the nature of the issues.¹⁶

Holding a conference in the informal setting of your chambers can be more conducive to achieving the cooperation needed for narrowing issues, making stipulations, and discussing possible settlement. The formality of the courtroom setting, on the other hand, promotes orderly and controlled proceedings, leading to a better record if substantive rulings will be made. In cases of public interest, members of the public and media representatives may want to attend the conference; their presence is more easily accommodated in the courtroom.

4. Is teleconferencing appropriate?

Whether teleconferencing is appropriate for the Rule 16(b) conference depends in part on what you wish to accomplish. Although a face-to-face conference is often

16. See generally MCL, Third, *supra* note 13, §§ 21.1, 21.2.

the preferred approach,¹⁷ there are cases in which such a conference is not necessary or feasible.

If the conference may be held by telephone or in person, *consider that*

- telephone conferences, especially with out-of-town counsel, save time and money, permit a conference on short notice, and can adequately address routine management matters, such as scheduling or discovery issues;
- face-to-face conferences facilitate the detailed discussion needed to clarify and narrow issues, analyze damage claims, explore settlement possibilities, and address contentious matters; such discussion may be sacrificed or minimized in a telephone conference; and
- a face-to-face conference in the courtroom may be advisable in a case with a nonincarcerated pro se litigant, to address concerns of the pro se litigant, to avoid misunderstandings that can so easily arise with such a litigant, and to enable you to emphasize the seriousness of the litigation.

5. Should the proceedings be recorded?

The parties are entitled to have all conference proceedings recorded on request, but absent such a request, you may exercise your discretion in deciding whether to record the scheduling conference.

Consider that

- counsel may speak more freely off the record, but in certain cases the attorneys or parties may be so contentious that it is advisable to record the proceedings to avoid disputes later about what was said;
- if the case involves a pro se litigant, it is wise to record the conference, whether held in person or on the telephone, to avoid misunderstandings and to have a record if disputes arise later;
- you should state at the outset of the conference whether you are having it recorded; and
- if you decide the conference should be held off the record, stipulations or rulings can be dictated to the reporter at the end of the conference.

6. Who should attend?

a. Lawyers

The utility of the scheduling conference depends on the participating lawyers' understanding of their case, their authority to enter into binding scheduling arrangements and stipulations (see Rule 16(c)), and their familiarity with subjects the court will consider. Your expectations for the lawyers' participation depend on

17. The Judicial Conference, in its final report on the CJRA, noted that "[c]onducting scheduling and discovery conferences by telephone, when appropriate, also saves time for the attorneys and the court as well as expense for the litigants." JCUS CJRA Report, *supra* note 1, at 22.

your agenda for the conference, which you can communicate to the lawyers through your initial scheduling order, case management information package, or guidelines about the lawyers' Rule 26(f) "meet and confer" session (see *supra* sections I.A.2.a and I.B.2; see also examples of forms and orders in Appendix A, Forms 3–10 and 13–15). The lead trial lawyer as well as the lawyer in charge of preparing the case during the pretrial phases should attend the conference, since both are important for decisions made about the case and for coordinating calendars.

Consider that

- if you plan to work with the lawyers to narrow issues, reduce the amount of discovery, or discuss settlement, a lawyer with full authority over the case may be needed; and
- in cases in which the United States is a party, you must recognize the inherent limitations of settlement authority granted to individual U.S. attorneys.

b. Litigants

Some judges require litigants to attend the initial scheduling conference, but many do not consider it useful in routine cases. Some research suggests that having litigants at, or available for, settlement conferences is related to reduced time to disposition.¹⁸ Litigant attendance had no significant effect, however, on cost as measured by lawyer work hours spent, leading to a conclusion that "[t]his policy appears worth implementing more widely because it has benefits without any offsetting disadvantages."¹⁹ Sometimes it is helpful to have particular types of litigants present at the conference, such as insurance carriers who bear the major risk and exercise control in the litigation or litigants pressing civil rights or personal injury claims. In cases in which strong emotions may be a factor, an opportunity to "vent" to an impartial listener may help litigants become more open to early settlement. Moreover, attorneys do not always know the litigants' goals in these cases. If you intend to make settlement a central part of the initial scheduling conference, you will want the litigants there. In deciding whether litigants or their representatives should attend the scheduling conference, you should consider that litigant attendance may

- give litigants a better understanding of the case problems;
- give litigants an appreciation of the cost and time involved in litigating the case;
- facilitate making stipulations;
- bring to the surface potential disagreements between litigants and counsel; and

18. See RAND CJRA Report, *supra* note 2, at 78.

19. *Id.* at 80.

- assist litigants in reaching a settlement.

Of course, litigants attendance may also

- cause attorneys to posture and to maintain positions on which they might otherwise yield;
- make litigants intransigent; and
- be costly for the litigants, especially if there is little movement as a result.

If litigants attend the conference, you can avoid problems by excusing them from time to time as needed. Whether the court has inherent power to compel attendance of represented parties or others with an interest may depend on the law of your circuit.

7. What can lawyers prepare?

As with so many other matters, what lawyers can prepare for the conference depends on what you want to accomplish at the conference. The more you want to do, the more information you may need from the attorneys. The greatest benefit in asking them to prepare materials for the conference is that it will force them to give attention to the case and talk to each other. Such a conversation is, in any event, required of counsel by Rule 26(f), which instructs them to meet and confer at least twenty-one days before the scheduling conference is held or the scheduling order is issued to discuss the case and the nature and timing of discovery in particular. Within fourteen days of this meeting, counsel must submit to each other the disclosures required by Rule 26(a). See *supra* section I.B.2 for a discussion of Rule 26 requirements.

The desirability of having counsel talk, not write, to each other about the case at the earliest moment cannot be overstated. Too often lawyers will not have discussed the case with opposing counsel and will have little understanding of the controverted issues, resulting in much wasted time and effort. To ensure that meaningful discussions will have occurred, and to provide a solid foundation for discussion during the conference, it is advisable to notify counsel of the agenda for the conference. You can send a statement describing the purpose of the conference and an attached order directing counsel to prepare formal submissions (either individually or jointly) on each of the conference topics (hereinafter referred to as the conference statement/order).

a. The conference statement/order

To save time at the initial conference and maximize its utility, many judges prepare one or more standard forms of the Rule 16 conference statement/order and send the appropriate form to counsel in advance of the conference. The order accompanying the statement tells counsel what the judge expects and enables counsel to use the conference time better.

Consider issuing an order directing lawyers to

- meet and confer on all subjects that are to be covered at the scheduling conference and that are required by Rule 26(f) and to reach agreement to the extent possible;
- attempt to define and narrow issues;
- prepare, exchange, and submit Rule 16 conference statements (brief, non-argumentative statements, joint to the extent feasible, that summarize the background of the action and the principal factual and legal issues);
- make all disclosures required by Rule 26(a) and file them with the court by a specified date;
- outline a discovery plan or program; and
- address other appropriate subjects for the conference.

You should instruct counsel to file a written response to your statement/order ten days before the conference date. For illustrative forms and orders for the attorneys' joint report, see Appendix A, Forms 2, 3, and 10–15; for helpful checklists for the management of cases, see the *Manual for Complex Litigation, Third*.²⁰ See also the discussion at *supra* section I.B.2.

b. Short-form conference statement/order

While the longer, more formal Rule 16 conference documents referenced above may be necessary and helpful, their costs in attorney time, and thus fees, should be recognized. An alternative to a more formal conference statement/order that may be appropriate in less complex cases is a short-form version. Under this alternative, you may require the parties to submit a one- or two-page statement in reply to your order. Recognize, however, that the parties' responses may be of little benefit to you because of their brevity.

Consider issuing an order requesting submission of a statement containing

- one sentence on subject matter jurisdiction;
- one or two sentences on what the case is about (e.g., “an antitrust case for price-fixing”);
- one or two sentences on motions that are likely to be filed or that need your consideration;
- one or two sentences on kinds of discovery required and how long discovery will take; and
- one or two sentences on settlement prospects for the case.

20. MCL, Third, *supra* note 13, § 40.0.

c. Uniform orders

Many judges have chosen to adopt a form order that is uniformly used throughout the district. Because a uniform order makes it easier for the attorneys to comply with the court's wishes, it is likely to make your job easier also.

A uniform order tells the lawyers which subjects will be discussed at the Rule 16 conference and the exact format of any conference statement or joint statement that counsel are required to submit before the conference. Such orders, while standardized in general format, usually provide spaces (blanks or lines for free-form entries) that permit the judge to tailor the requirements imposed on the particular case. Such an order will ensure that the information you want is there, in the same place, for both sides. Uniform orders serve other important purposes: To the extent they represent the consensus of the bench, they can influence the local legal culture and educate its practitioners and litigants about the court's expectations of those who come before it. For examples of a uniform approach, see Appendix A, Forms 8, 9, and 16.

8. What subjects are covered at the Rule 16 conference?

Rule 16(c) lists subjects for discussion at the Rule 16 conference, but that list is not exhaustive. As Rule 16 conferences may be held not only at the beginning of a case, when they serve as the scheduling conference, but also later in the litigation, appropriate subjects will depend on the stage of the case. As a supplement to your own ideas, you can ask counsel to suggest subjects and then determine which to cover at the conference. This kind of controlled discussion of the conference agenda can be most helpful in determining what is appropriate and useful to you and the attorneys. Moreover, through discussion, and accommodation when possible, of the attorneys' preferences, you can hold the attorneys to the commitments they make.

Consider the following topics and areas for discussion at the Rule 16 conference:

- proposals for identification, narrowing, and reduction of issues;
- preparation of a joint pretrial schedule or case management plan that includes a separate discovery plan covering all phases of case discovery;
- a schedule for filing all anticipated motions;
- certification by counsel and representatives of each of the parties that they have conferred with a view toward establishing a budget plan to cover the probable costs their litigation will entail;
- specific time limitations for the joinder of parties and amendment of pleadings;
- for district judges, referral to a magistrate judge for supervision of pretrial proceedings or, with party consent, for all aspects of the case;

- prospects for settlement and an assessment of the parties' present settlement posture;
- adoption of special procedures (e.g., for complex or patent cases, or class actions);
- control of, limitations on, or potential problems with discovery, including the possibility of phased discovery;
- setting the discovery cutoff date;
- motions management, including deadlines for filing dispositive motions;
- suitability and appropriateness of the case for ADR; ADR choices available (e.g., arbitration, mediation, ENE, judicial settlement conference); parties' preferred ADR option; parties' justification if no ADR option is chosen; and
- attorneys' estimates of the number of days a trial will take.

9. What can you do to monitor the scope of the claims?

a. *Identifying and narrowing the issues*

One of the most important tasks in the initial case management conference is early identification of the issues in controversy (in both claims and defenses) and of possible areas for stipulations as provided by Rule 16(c)(1)(3).²¹ Issue narrowing is aimed at refining the controversy and pruning away extraneous issues. This effort will provide you and the parties with an assessment of the resources that this case warrants, the likelihood of successful dispositive motions, and the issues to focus on at trial or in settlement.

Consider that issue narrowing

- forces the lawyers and their clients to analyze their claims and defenses, focus on the economics of the case, and define both the scope of the litigation and the amount of time and money they are willing to expend;
- is an educational process that enables you to learn the important facts and understand the legal principles; and
- is an educational process for the lawyers, who often know little about each other's case (and sometimes not much about their own) and who may discover that the dispute is narrower than they supposed, thus leading to stipulations or early settlement.

Do not blindly accept counsel's objections that they lack appropriate information for early issue identification. Federal Rule of Civil Procedure 11 requires inquiry prior to the filing of an action, and counsel should be held to their responsibilities. Moreover, the identification of even formative information is helpful. You can make it clear that information should be as specific as currently possible but that any information developed in this process is subject to later clarification.

21. See also MCL, Third, *supra* note 13, § 21.3.

Thus, you will want to ask direct and leading questions, such as, “What **do** you expect to prove and how? How do you expect to defeat this claim? What are the damages?” If this process discloses issues apparently ripe for dismissal, counsel should be given adequate notice and an opportunity to be heard before action is taken on the merits.

Consider the following additional approaches:

- urging attorneys to reach agreement on the issues or to clearly identify areas of disagreement and narrow those issues remaining;
- addressing and resolving early any questions concerning subject matter jurisdiction, a fatal and nonwaivable defect (for an example of a jurisdictional checklist, see Appendix A, Form 17; for an illustrative order to show cause regarding removal jurisdiction, see Appendix A, Form 18);
- determining which issues are material and genuinely in dispute by pressing both sides on this matter in an attempt to avoid wasteful litigation activity (such as unnecessary discovery and motions) and facilitating settlement (for an order to facilitate issue definition in Racketeer Influenced and Corrupt Organizations Act (RICO) cases, see Appendix A, Form 19);
- determining how issues may be resolved, whether by motion (for example, motion for partial summary judgment or Rule 12(b) motion) or by special procedures (for example, a bifurcated trial or consolidation with other cases);
- determining what discovery is required for resolution of particular issues and putting that limited activity on an expedited track;
- identifying with specificity the amount and computation of damages claimed and other relief sought, the supporting evidence, and the basis for establishing causation; and
- determining whether there are indispensable parties to be added.

Remember that while counsel may feel that they lack the information needed for meaningful issue identification early in the case, such an objection should not be permitted to stall the process. Issue identification should proceed, always subject to later clarification or modification. Establishing what is at stake in the litigation (i.e., plaintiff’s likely gains and defendant’s likely exposure) facilitates settlement and gives both the parties and the court a sense of the resources the case warrants. It also serves to make parties and counsel much more realistic about the outcome of the case.

b. Limiting joinder of parties and amendment of pleadings

Changes in parties (by addition, substitution, or dismissal) and amendments to claims or defenses can affect the issues in the case and cause unnecessary or duplicative discovery and motion activity. Such changes and amendments can be avoided by setting a reasonably early cutoff date for amendments of any kind (see

Federal Rule of Civil Procedure 15; local rules may also apply). Rule 16(b) contemplates that such a date not be modified other than on a showing of good cause.

Consider the following:

- Leave to join parties and amend pleadings should be liberally granted but need not be open-ended.
- If the parties admit in conference that they may make amendments later, you should set a reasonable time limit for such amendments, usually not to exceed sixty days.

D. The Scheduling Order and Calendar Management

1. Issuing the scheduling order

Based on your discussion with counsel and their submissions, you can determine what should be included in your scheduling order. A firm and unambiguous order is critical to effective case management. Word processing makes it feasible to maintain several formats for different case management approaches, or “case management tracks,” which can be readily adapted to meet the needs of the particular case after consultation with counsel. Counsel can also be asked to submit proposed forms of the order in advance of the conference, as shown in some of the examples in Appendix A. For illustrative scheduling orders for general civil cases, see Appendix A, Forms 11 and 20–26; for orders for Social Security cases, see Forms 27 and 28.

Consider including the following items in your scheduling order:

- a deadline for joining parties and amending pleadings (Rule 16(b)(1));
- a date for completion of all discovery or particular phases or parts of discovery (Rule 16(b)(3)) by specifying cutoff dates for noticing depositions, for serving interrogatories and document requests, and for filing discovery motions;
- a deadline for filing dispositive motions (Rule 16(b)(2));
- a deadline for identifying trial experts and exchanging experts’ materials (Rule 26(a)(2));
- a date for further conferences as needed (Rule 16(b)(5));
- a date for a final pretrial conference (Rule 16(b)(5));
- a date for a settlement conference (Rule 16(c)(9));
- a date for an ADR process (Rule 16(c)(9));
- a trial date (Rule 16(b)(5));
- a reasonable length of time for the trial;
- ground rules for continuances; and
- a procedure for reconciling calendar conflicts with proceedings in state or other federal courts.

When possible, you should accommodate any needs for expedited resolution. Delay can be very costly in some cases, such as bankruptcy appeals.

Counsel should understand your position with respect to requests for continuances; false expectations can interfere with the progress of the case. Generally, requests for continuances should be discouraged.

Consider

- requiring that stipulated continuances be ruled on by the court; and
- requiring submission of an account of all prior requests for continuances with reasons given.

One of the techniques included in the Civil Justice Reform Act for this purpose was the “requirement that all requests for extensions of deadlines, for completion of discovery, or for postponement of the trial be signed by the attorney and the party making the request.”²² The Judicial Conference, however, did not endorse this technique, noting its “almost universal rejection . . . by the bar and the courts.”²³

2. Calendar management considerations

The ultimate effectiveness and utility of scheduling orders depends to a large degree on the state of your calendar. Your time is limited, and good case management depends on good time management. If you are a magistrate judge issuing the scheduling order on behalf of a district judge, make sure you confer with that judge to ensure that the order conforms to his or her schedule.

Consider the following:

- Overscheduling will be counterproductive; keep in mind your own (and staff's) limitations and convenience.
- Multiple settings are often necessary to avoid loss of productive time but should be scheduled in ways that will minimize the resulting burdens on the parties and attorneys.
- Attorneys should learn to expect that deadlines will be firmly adhered to; you must set the example.
- Familiarity with the case and good communications with attorneys will enable you to arrive at reasonably accurate time estimates for hearings and trials.

22. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103(a)–(b), 104 Stat. 5089, 5090–96 (amended 1991, 1994, 1996, 1997, 2000). Although other sections of the CJRA relevant to cost and delay reduction plans (previously codified at 28 U.S.C. §§ 471–475, 477–478 (1994)) have sunset, the statutory requirement for semiannual reporting remains in effect (see 28 U.S.C. § 476 (1994)).

23. JCUS CJRA Report, *supra* note 1, at 41.

- Matters such as hearings, conferences, or trials should be limited in time; the participants should understand that the business at hand should be done with dispatch.
- Time management is advanced by the judge's trying whenever possible not to handle a particular matter more than once; referral of dispositive motions to a magistrate judge, for example, should be carefully weighed (see *infra* section VIII.B.2).
- Parties must not be allowed to stipulate around deadlines or gain easy continuances.

A number of automated systems are available to assist you in managing your cases and your calendar. You should be familiar, first, with the systems your court uses to report on such matters as the number of cases pending, the number of motions pending, and the age of cases on the calendar (see *infra* sections IX.D and E). This information is usually available for each individual judge. For case management to be effective, you must maintain the credibility of the calendar by holding parties to agreed-on deadlines absent very good cause, as well as by ruling promptly on motions and maintaining trial dates. You should set your own goals (e.g., to rule on nondispositive motions in thirty days) and use automated calendaring aids to flag your deadlines (see *infra* sections IX.D and E).

III. DISCOVERY MANAGEMENT

- A. In General
- B. Specific Techniques for Managing Discovery
- C. Anticipating and Forestalling Discovery Problems
- D. Limiting Discovery
 - 1. In general
 - 2. Document requests
 - 3. Depositions (who, how many, etc.)
- E. Handling Discovery Disputes
 - 1. Methods for reducing the number of disputes
 - 2. Discovery motions
- F. Computer-Based Discovery
 - 1. Positive aspects of computer-based discovery
 - 2. Unique aspects of computer-based discovery
 - a. Preservation of data
 - b. Location and volume of data
 - c. E-mail as a unique phenomenon
 - d. Deleted documents
 - e. Backup tapes
 - f. Archives and legacy data
 - g. On-site inspection
 - h. Form of production
 - i. Need for expert assistance
 - 3. Management tools for computer-based discovery
 - a. Early exchange of computer system information
 - b. Rule 16(c) pretrial conference agenda
 - c. Rule 26(a)(1) initial disclosures
 - d. Proportionality
 - e. Cost allocation
 - f. Rule 53 special master or Rule 706 court-appointed expert

Rule 26(b)(2) provides as follows:

The frequency or extent of use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery

in resolving the issues. *The court may act upon its own initiative* after reasonable notice or pursuant to a motion . . . (emphasis added)

Discovery influences both the length and cost of litigation.²⁴ Limiting discovery to that appropriate for the case at hand promotes efficiency and economy, enables you to avoid disputes by anticipating problems, and expedites the resolution of unavoidable disputes. A number of techniques can be implemented, both at the Rule 16 conference and subsequently, to advance discovery management. Effective, early management will reduce discovery problems. For illustrative procedures, see the *Manual for Complex Litigation, Third*;²⁵ examples of forms and orders are cited throughout this chapter.

A. In General

Discovery management should be guided by an awareness that you know less about the case than the lawyers. This should not deter you, however, from management, based on your experience and after consultation with counsel.

Consider the following general approaches as a discovery management “platform” to be created before or upon your first discussion with counsel:

- directing counsel to make the initial disclosures required by Rule 26(a)(1);
- advising counsel of your expectations regarding the Rule 26(f) “meet and confer” conference and the discovery plan they must submit (see *supra* section I.B.2);
- arriving at an early (at least tentative) definition of the scope of discovery (subject matter, time period, geographical range, etc.) based on early identification of issues at the Rule 16 conference;
- setting a discovery cutoff date as soon as the needs for discovery can be assessed, preferably at the Rule 16 conference;
- evaluating the appropriateness of proposed discovery in light of the damages identified and the availability of less expensive and more efficient alternatives to conventional discovery (e.g., telephone depositions or interviews) (see Rule 26(b)(1));
- clarifying the extent of parties’ obligations to supplement and update prior and subsequent disclosures and responses (see Rule 26(e)); and
- establishing procedures for resolving discovery disputes (see *infra* section III.E).

For illustrative orders and forms for management of discovery, see Appendix A, Forms 8, 11, 13–16, 26, and 29–30.

24. See RAND CJRA Report, *supra* note 2, at 67.

25. See MCL, Third, *supra* note 13, § 21.4.

B. Specific Techniques for Managing Discovery

Various techniques for management and control are available to you and the attorneys. Many districts have adopted local rules based on their CJRA expense and delay reduction plans that impose detailed restrictions and requirements on discovery. In addition, control of discovery always involves issues of timing, such as whether particular discovery actions are likely to be productive earlier or later and in what sequence. Particular kinds of discovery may help in the early evaluation of the case (for example, early disclosure of the details of the damage claim will indicate the economic stakes of the lawsuit). Specific early discovery may also help you determine whether other discovery is needed; for example, an issue may drop out of the case or needed information may become available. Your careful sequencing of discovery may help you avoid unnecessary activity. Your success will depend on your ability to take the time to key your decisions to specific, subsequent case actions, or “next action” dates.

Consider

- encouraging use of contention interrogatories and requests for admission to help define controverted issues and hence the limits of needed discovery;
- calling on attorneys early to prepare and present a proposed discovery plan (including the scope of written discovery and list of depositions), agreed upon by both sides to the extent feasible;
- using phased discovery to target particular witnesses and documents for the purpose of obtaining information needed for settlement negotiations or to lay a foundation for a dispositive motion, thereby deferring and possibly obviating other discovery;
- requiring, pursuant to Rule 26(a)(2), exchange of signed reports or statements of proposed testimony of experts in advance of their depositions;
- imposing, pursuant to Rules 26(b)(2), 30, 31, and 33, limits on the number of interrogatories, the scope of document requests, and the number and length of depositions (local court rules may contain or recommend such limits);
- restricting the use of form interrogatories;
- arranging depositions so as to avoid unnecessary travel; and
- in complex cases, having attorneys report via letter at crucial case junctures on the status of documents, depositions, and settlement prospects.

Requiring updates by letter has a number of advantages: It obviates the necessity of a conference; helps you maintain open, manageable channels of communication; keeps the case moving to subsequent decision-making points; is a simple, cheap, but critical case oversight and accountability mechanism; and keeps you informed. Because of the work it imposes on counsel, however, such an updating requirement should generally be used only in complex and protracted cases.

C. Anticipating and Forestalling Discovery Problems

Discovery disputes sometimes develop into satellite litigation that takes on a life of its own. Case management should anticipate problems that may grow into disputes and deal with disputes so as to contain them rather than letting them expand.²⁶ Discovery problems can be reduced if attorneys know what you expect of them, what you regard as the limits of acceptable conduct, and how you deal with objections and other discovery disputes. It is therefore imperative for you to establish a clear practice, with which the bar can become familiar, and to indicate firmly and clearly your expectations of counsel. For examples of orders and guidelines, see Appendix A, Forms 4, 8, 16, and 29.

Some district judges routinely refer discovery disputes to magistrate judges, which permits the district judge to concentrate on matters that only an Article III judge may handle. Other district judges prefer to oversee pretrial matters themselves, in part to remain familiar with the case and in part because they feel they can exercise firmer control than a magistrate judge can.

Consider

- establishing ground rules for depositions: where they are taken; who may attend; how they are to be taken; who pays for which expenses; how to comply with Rule 30(b)(6) notices; and how to handle documents, objections, claims of privilege, and instructions not to answer;²⁷
- allocating costs of compliance with costly discovery demands: issuing a protective order under Rule 26(c), specifying who bears the cost of certain expensive discovery, or conditioning certain discovery on the payment of expenses by the opponent (such as paying for computer runs or copying costs);²⁸
- establishing informal procedures for protecting privileged and other confidential information against inadvertent disclosure or other unintended waiver;
- establishing procedures for claiming privilege, for issuing protective orders under Rule 26(c), and for the release of protected information, while

26. A study of discovery practice in federal courts found that, of attorneys who reported some discovery in their case, 48% reported that they had experienced problems with discovery and about 40% reported unnecessary discovery expenses that were due to discovery problems. Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 532 (1997); also available as Thomas E. Willging, John Shapard, Donna Stienstra & Dean Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases* (Federal Judicial Center, 1997) [hereinafter FJC Discovery Study].

27. See MCL, Third, *supra* note 13, §§ 21.44, 21.45.

28. *Id.* §§ 21.43, 41.37.

keeping in mind that use of a protective order can be abused by the parties;²⁹

- if you are a district judge and it is the practice in your district to assign pretrial matters to a magistrate judge, designating a magistrate judge to supervise discovery, particularly in litigious or complex cases; or in complex litigation, when the overall litigation costs justify it, appointing a special master (see *infra* sections VIII.B and C for a discussion of magistrate judges and special masters);
- requiring a premotion conference between counsel and a certification of good faith efforts to resolve the disputes (see 28 U.S.C. § 473(a)(5));
- requiring that counsel present the dispute to you by telephone conference before filing a written motion;
- setting page limits on motions papers and time limits for filing; and
- awarding costs to the party prevailing on a motion.

D. Limiting Discovery

1. In general

Establishing control early and setting appropriate (even if only preliminary) limits on the timing, scope, and methods of discovery can help you to prevent excessive discovery activity, forestall disputes, and increase both fairness and the perception of fairness by not letting the “big guy” paper the “little guy” into submission.³⁰ In particular, setting an early and firm discovery cutoff date to fit the needs of the case encourages the efficient prosecution and defense of the case, reduces the need for judicial involvement, and is a way to shorten overall case disposition time.³¹ In addition, setting limitations on the number of interrogatories has been found to measurably shorten overall lawyer work hours and overall time to case disposition.³²

29. *Id.* §§ 21.431, 21.432, 41.36.

30. A recent study of discovery practice in federal courts found that high levels of discovery problems and expenses were more likely to occur in cases that were complex, contentious, had high stakes, or had high volumes of discovery. Problems in these cases were not limited to a particular type of discovery, but occurred in all or most aspects of discovery. Attorneys in tort and civil rights cases were more likely to report problems than attorneys in other types of cases. FJC Discovery Study, *supra* note 26, at 554–55.

31. See RAND CJRA Report, *supra* note 2, at 16, 26.

32. See James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data 55–58 (RAND Institute for Civil Justice 1998) [hereinafter RAND Discovery Report].

Consider

- asking counsel to make a case for the discovery they expect to conduct;
- requesting a formal submission outlining the nature, scope, duration, and costs of the proposed discovery plan; and
- phasing discovery, aiming successive stages toward central, potentially dispositive issues, and asking counsel to report back on discovery progress, thus permitting you to assess trial and settlement prospects based upon the interim discovery findings that result.

In weighing proposed discovery plans or programs, you should apply the principle of proportionality underlying Rule 26(b)—that is, there should be a reasonable relationship between the costs and burdens of discovery and what is at stake in the litigation. Fairness in the application of discovery limitations connotes an individualized approach to each case. You should tailor discovery deadlines to the case; uniformity is usually not appropriate. Some cases need only three months; few need more than twelve. You can assert control by various means.

Consider

- setting overall time limits and incorporating them into the scheduling order;
- limiting the “frequency or extent of use of the discovery methods” under Rule 26(b)(2);
- stating a clear definition of the substantive scope of permitted discovery based on issue identification;
- if the parties propose early dispositive motions, phasing discovery and shaping it to serve these motions, staying other discovery until motions-related discovery is complete;
- requesting, if appropriate, the submission of a formal discovery plan; and
- in the most complex cases, phasing discovery by time period or issue and requesting accompanying status reports with the completion of each phase.

Remember that because most cases settle or are otherwise disposed of before trial, many attorneys make their fees on discovery. Only you can prevent abuse of the discovery process. For illustrative forms and orders setting limits on discovery, see Appendix A, Forms 2, 11, 20–22, and 29. The *Manual for Complex Litigation, Third* also provides useful advice.³³

2. Document requests

Unnecessarily broad or burdensome document requests are among the most dreaded, expensive, and time-consuming tools employed in the discovery proc-

33. MCL, Third, *supra* note 13, §§ 21.422, 21.423.

ess.³⁴ Often, however, by asking direct questions and making suggestions regarding the proposed exchange of documents, you can better focus the request and minimize its impact.

Consider the following approach:

- Ask the plaintiff, for example, at the Rule 16 conference, “What can we get without traditional discovery? What do you want from the defendant? List it.” With this approach you can usually get the defendant to give up what the plaintiff has requested without further discussion.
- After the plaintiff has responded, ask the defendant, “What do you want from the plaintiff?”
- The case manager (or other recorder present) can jot the agreements down quickly and subsequently place them in the final case management order: “Plaintiff has agreed to produce _____. Defendant has agreed to produce _____.”

You can persuade parties to turn over voluntarily much that would have been pursued through traditional discovery methods, and you can head off many discovery disputes. This approach, as illustrated in Rule 16(c)(3), (4), and (7), can also help determine the number and types of depositions requested and approved.

3. Depositions (who, how many, etc.)

Although depositions are not the most frequent form of discovery, they account for by far the greatest proportion of discovery expenses.³⁵ You should be assertive in suggesting a course of action that will phase depositions to reach important decision-making junctures in a case (Rule 16(c)(4)) while avoiding unnecessary intermediate conferences or disputes. This planning should be an important part of your continuing efforts to refine the case into a triable or settlement-ready matter. Naturally, such suggestions must be tailored to the individual case. The following judicial guidance to plaintiff’s counsel may be suitable, for example, in a discrimination case (depending on counsel’s requests and the scope of the claims).

Consider the following instruction:

You may depose the defendant, the defendant’s supervisor, the defendant’s co-worker, and the following witnesses: _____. Then stop. When you have completed these depositions and if you believe you need additional ones, write a letter of no more than two pages, with a copy to the defendant, to inform me of your progress, where you feel you are in this case, and the settlement prospects at this juncture.

Alternatively, consider asking the plaintiff’s counsel to arrange a conference call with you and opposing counsel after completing the initial depositions.

34. A recent study found that document production is not only the most frequent form of discovery but also the one that generates the highest rate of reported discovery problems. FJC Discovery Study, *supra* note 26, at 530, 532.

35. *See id.* at 540.

E. Handling Discovery Disputes

1. Methods for reducing the number of disputes

Discovery disputes, if not controlled early and firmly, will constitute the most time-consuming, inefficient, and costly investment of judicial pretrial case management time. You should consider adopting a formal procedure for discovery motions that clearly states that, in general, discovery motions may not be submitted without a prior telephone conference requesting your permission to file them.

In implementing such a policy, *consider* the following:

- requiring counsel to notify the court, by telephone, immediately after their “meet and confer” conference if they have a dispute they cannot resolve;
- if you have referred discovery disputes to a magistrate judge, taking the first discovery dispute telephone call in any case in which you expect ongoing discovery problems; your initial reaction to the offending counsel that “You can’t be serious . . .” will often prompt counsel to work out the dispute themselves;
- if you cannot take the first telephone call when it comes in, having a backup district or magistrate judge who can take the call immediately (see *infra* section IX.A.4 for a discussion of discovery “hot lines”);
- if the dispute raises complex issues, requiring the attorneys to submit a letter, no more than two pages in length, describing their positions; and
- permitting the filing of a motion only upon court order.

It is important to remember that the 1993 amendments to several federal rules require attorneys to confer and to certify in good faith that they attempted to resolve their discovery disputes; these changes include those to Federal Rules of Civil Procedure 26(c), 37(a)(2)(A) and (B), and 37(d). Furthermore, the CJRA advocated “conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.” The Judicial Conference has endorsed this principle and has noted that the principle has been incorporated into the above-mentioned rules.³⁶

By sending the message to counsel (1) that you will hear their disputes over the telephone, even during a deposition, (2) that you expect professional conduct, (3) that as a general rule only work product and attorney–client privilege are valid bases for objections, and (4) that discovery abuse will lead to sanctions, you will substantially reduce disputes. For an example of an order issued in response to discovery disputes, see Appendix A, Form 30.

36. See JCUS CJRA Report, *supra* note 1, at 35 (citing to the 1993 amendments to Fed. R. Civ. P. 26(c), 26(f), and 37(a)(2)(A) and (B)).

2. Discovery motions

Many discovery motions are unnecessary and do not warrant the investment of client time and money required to support them. Sometimes, however, a fully briefed motion is the only way to resolve important discovery issues (for example, disputes over privilege).

When a fully briefed discovery motion is necessary, *consider* the following approach:

- Ask counsel to use a letter format of no more than three double-spaced pages with no more than five case cites. This format should suffice for the majority of discovery motions submitted, as long as they are docketed properly by the court.
- If you are concerned about the styling and docketing of a letter format, permit only three-page briefs with limited citations.

F. Computer-Based Discovery

Discovery is changing in response to the pervasive use of computers. In more and more cases discovery now involves e-mail, word-processed documents, spreadsheets, and records of Internet activity. In most of these cases, computer-based discovery is routine and uneventful: Instead of exchanging paper documents, the parties exchange electronic files in an agreed upon portable format (e.g., disks). In some cases, however, computer-based discovery raises a number of case management issues and generates disputes that require judicial intervention.

You will seldom need to know how computer technology works to resolve the questions before you, but you will need to be confident that the attorneys understand the relevant computer technology. In many of the reported cases on electronic discovery, failure of the attorneys to understand their clients' computer systems, routines, capabilities, and limitations were at the heart of the problem. Therefore, early identification of potential computer-based discovery issues and focusing the attorneys' attention on early resolution of these matters are the keys to smooth case management. Discovery of computerized information can in some cases be costly, and some of the procedures described below for reducing problems in such discovery can also be costly. One of your roles will be to help counsel find the balance between the usefulness of these procedures and the time and expense involved.

1. Positive aspects of computer-based discovery

Computer-based discovery is not necessarily more costly or contentious than conventional paper-based discovery. In many cases, the exchange of electronic data, as opposed to paper, will greatly reduce cost and delay. The costs of photocopying and transport can be reduced dramatically or eliminated altogether. Software is now available, even to small firms and solo practitioners, to speed up review and analysis of documents through word searching and other operations. The cost of

using a litigation support system is reduced dramatically if the documents are in electronic form from the start and do not need to be scanned. Finally, electronic discovery leads logically to electronic evidence, and many of the set-up costs associated with electronic courtroom presentations can be reduced or eliminated.

Signaling to the attorneys and parties that computer-based discovery will be encouraged, and that the court is ready to deal with the challenges and maximize the benefits, will reduce many of the problems. As one computer forensics expert noted, the increased sophistication of judges in this field has “raised the bar” for attorneys appearing in computer-based discovery cases.³⁷ When the attorneys realize they cannot muddle, bluff, or stonewall their way through discovery, they begin to educate themselves and their clients and are forced to be more forthcoming and cooperative with their opponents.

2. Unique aspects of computer-based discovery

Though beneficial in many ways, computer-based discovery raises issues that do not normally occur in conventional, paper-based discovery. Among the most common problems are the following.

a. Preservation of data

Information stored on computers can be easily changed, overwritten, or obliterated, whether it is stored on a single desktop PC (personal computer) or an enterprise-wide network.

Consider

- asking the parties as soon as possible after litigation has commenced to take steps to preserve and segregate relevant data;
- requiring the attorneys to agree on the steps they will take to avoid later accusations of spoliation; and
- issuing a preservation, or “freeze,” order if the attorneys cannot agree on steps to preserve data.

b. Location and volume of data

In the old days of paper-based discovery, most organizations had centrally located files or a limited number of file locations. In the new PC-based world, every employee of an organization may have a desktop computer, plus disks or other removable data-storage devices, a laptop computer, a home computer, and a handheld personal organizer, all containing potentially relevant data. In addition, larger organizations have network servers that connect and store data for many PCs, plus backup and archival data storage. Off-site data-storage facilities, Internet service providers, and other third parties may also have data subject to discovery.

37. John Jessen, CEO, Electronic Evidence Discovery, Inc., Remarks at the Glasser Legal Works 3d Annual Conference on Electronic Discovery (Mar. 24, 2000).

The cost and complication of conducting discovery in a modern, distributed-business computing environment can be enormous.

In record-keeping systems that are based on paper, outdated records, papers with no business significance, and superfluous copies are routinely destroyed. Records managers maintain paper files in “business-record order.” In today’s business computing environment, there is seldom an equivalent electronic records management system. Copies of documents are made routinely, distributed widely, and seldom purged when outdated. Potentially discoverable records are stored according to computer logic, as opposed to “business record” logic, and can be difficult to locate and untangle from irrelevant and privileged records.

Consider

- requiring an early agreement between the attorneys on the scope of discovery or a plan for phased discovery; and
- asking the parties to give serious consideration to an agreement under which neither party waives privilege for inadvertent production of privileged material, if this would reduce the difficulty of screening computer-based material for privilege before production.

c. E-mail as a unique phenomenon

Electronic mail does not have a counterpart in the conventional paper-based world. Several characteristics make e-mail unique and particularly problematic. One is the volume, which can be staggering even for a small company or individual. Another is the usual lack of a coherent filing system, as e-mail systems are seldom designed for file management and retrieval. Perhaps the most important characteristic is the nature of e-mail, which is usually informal and riddled with slang, jargon, and jokes, even in the strictest business environments. These characteristics of e-mail combine to make retrieval of e-mail messages by topic difficult, even with computer-based word-searching. They also make e-mail a most attractive target for discovery.

Consider

- requiring the attorneys to develop a clear understanding of their own clients’ e-mail systems, the extent of data that may be subject to discovery, and the technological tools that may be available to assist in locating discoverable material; and
- then encouraging the attorneys to agree on a common search protocol to avoid future disputes over the adequacy of production.

d. Deleted documents

In the conventional paper-based world, once a document is shredded, incinerated, or buried in a landfill, it is no longer subject to discovery as a practical matter. The routine “deletion” of a computer-based document does not, however, actually destroy the data. Hitting the “delete” key merely renames the file in the computer,

marking it as available for overwriting if that particular space on the computer's hard disk is needed in the future. The data itself may remain on the hard disk or on removable storage media for months or years or may be overwritten only incrementally. It is a relatively simple task for a computer forensics expert to restore routinely deleted data, but it is expensive and the results are speculative.

At the earliest possible stage in the litigation, *consider*

- asking the attorneys whether they expect deleted data to be subject to discovery; and
- determining whether there is a need for an early data-preservation order or agreement.

e. Backup tapes

Most businesses, as well as many individuals, periodically back up their computer data onto tapes or disks for disaster recovery purposes. Often these tapes or disks are kept for months or even years. Data and documents that have been edited, deleted, or written over in the normal course of business may be recovered from these tapes or disks. The problem is that backup media are not organized for retrieval of individual documents or files. Special programs may be needed to retrieve specific information, and the process may be costly and time-consuming.

Early in the litigation, *consider* requiring that the attorneys discuss

- what backup data may be available;
- whether these data will be subject to discovery; and
- what the scope of such discovery should be.

f. Archives and legacy data

As businesses, institutions, and government agencies adopt new computer systems, the data from older systems may be archived in an organized, retrievable fashion, but most likely the data will be backed up on storage devices and filed in a vault. Years later, the data on these outdated tapes or disks will be unreadable without expensive conversion to modern media and formats.

Early in the litigation, *consider*

- requiring the attorneys to survey their clients' stored data holdings and retrieval capabilities; and
- requiring the attorneys to come to an understanding on whether discovery will be extended into archived material, how it will be conducted, and who will bear the costs.

g. On-site inspection

Computer-based discovery makes on-site inspections under Rule 34(b) problematic. On the one hand, it may be necessary to actually view the computer system in operation to make sure the discovery protocols are being performed properly, to

check the adequacy of security and chain of custody, or to ascertain the provenance of computer records. On the other hand, the nature of computer record storage and organization makes it virtually impossible to protect privileged or trade secret information in the context of an on-site inspection. In addition, any attempted manipulation of the computer data by the opposing party, counsel, or expert may compromise the entire process.

Consider

- directing the attorneys to guidelines that have been developed for conducting on-site inspections;³⁸ and
- requiring the attorneys to come to an agreement on whether on-site inspection is justified or necessary and, if so, what the protocol will be.

b. Form of production

In 1970, when Rule 34 was amended to include discovery of “data compilations,” the typical computer-based discovery response was a printout of the computer data. In those days, few, if any, law offices had computers, and the software necessary to translate data was not mass marketed. Today, producing printouts of computer data is so unnecessary that it might be considered an abusive tactic because it forces the recipient to reenter the data or spend long hours performing manual analysis. Many computer-based documents, such as relational databases and spreadsheets, are meaningless in printed form and must be viewed and manipulated on a computer using the appropriate software. Electronic exchange of electronic data is the preferred mode, but within that mode, there is plenty of room for dispute over the exact format.

Consider

- requiring the attorneys to agree on an appropriate form for the production of computer-based discovery before discovery gets under way, to avoid costly conversions and repeat productions later.

i. Need for expert assistance

If computer-based discovery will involve any of the technical issues outlined above, the parties very likely will need the assistance of computer experts. This is costly, but in the long run may save costs and time. Once the experts have had an opportunity to assess their respective parties’ computer systems and capabilities, they will be in a much better position than the attorneys to negotiate the technical

38. For guidelines on conducting on-site inspections, see Andy Johnson-Laird, *Discovery of Computer Software in Patent Litigation*, 1998 Fed. Cts. L. Rev. 1; Joseph Kashi, *How to Conduct On-Premises Discovery of Computer Records*, L. Prac. Mgmt., March 1998, at 26; Computer Crime and Intellectual Property Section, Criminal Division, U.S. Dep’t of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (January 2001), available at <http://www.usdoj.gov/criminal/cybercrime/searchmanual.htm>.

aspects of conducting discovery, including search protocols, privilege and relevance screening, and production.

3. Management tools for computer-based discovery

As a judge, it is not your role to dictate solutions to these thorny technical problems. Your role should be to make sure the attorneys on both sides face these issues squarely, negotiate solutions, and follow through. You have several tools available to help you manage computer-based discovery, limit cost and delay, and, when necessary, resolve discovery disputes.

a. Early exchange of computer system information

At the outset of litigation, before any document or computer-based discovery is initiated, the attorneys should be encouraged to exchange information about their clients' respective computer systems. The information each side needs to know includes which computer systems are in place at the moment, which computer systems were in place during the period of time relevant to anticipated discovery, the extent of the computerized information (including backups and archives) that will need to be searched in the course of discovery, the capabilities of each party to perform searches and produce material in a usable format, and the measures being taken to secure and preserve potential computer evidence.

Consider

- requiring the attorneys to arrange an informal meeting between the parties' most knowledgeable computer staff, with attorneys present, to help lay the groundwork for a workable discovery plan; or
- granting leave for each side to depose the other party's most knowledgeable computer staff under Rule 30(b)(6) prior to the start of formal discovery under Rule 26(d).

b. Rule 16(c) pretrial conference agenda

Perhaps the most important judicial management tool in computer-based discovery cases is the Rule 16 pretrial conference. Rule 16(c) lists several issues that may be addressed during the pretrial conference, but you may supplement that list with additional points on computer-based discovery and issue a memo to the attorneys well in advance of the conference, preferably at the outset of the litigation. See Appendix A, Form 31 for a list of topics that might be included in such a memo. The risk with such a procedure is that you may alert counsel to issues they had not considered, inadvertently expanding the scope of discovery, but given that computer-based discovery and its associated issues will become the norm in the future, this risk may be small.

c. Rule 26(a)(1) initial disclosures

Following the 2000 revisions to the Federal Rules of Civil Procedure, initial disclosure will most likely be the rule throughout the federal court system, except for

cases so small and routine that they involve little or no discovery of any type. The expected agenda for the Rule 16 pretrial conference sets the tone for the initial disclosures, the Rule 26(f) “meet and confer” conference of the parties, and the parties’ Rule 16 conference statement.

Consider issuing a memorandum to counsel stating your expectation that both sides will

- disclose the relevant aspects of their parties’ computer systems; and
- come to an agreement on computer-based discovery prior to the Rule 16 pretrial conference.

d. Proportionality

Under Rule 26(b)(2), you have the power to limit discovery “if the burden or expense of the proposed discovery outweighs its likely benefit.” If extraordinary efforts, such as the recovery of deleted data, are not justified by some showing that the efforts are likely to result in the discovery of relevant and material information, it is within your discretion to limit such discovery or shift the costs to the proponent.

e. Cost allocation

The normal rule in document discovery is that each side bears its own costs. Computer-based discovery may involve extraordinary costs, however, such as legacy data restoration or backup tape analysis. The court has the power to allocate costs equitably, balancing the needs of justice with the resources of the parties. In some cases, you may find it appropriate to condition extraordinary discovery on payment of part or all of the costs by the proponent.

f. Rule 53 special master or Rule 706 court-appointed expert

Under the Federal Rules of Civil Procedure and the Federal Rules of Evidence, you have the power to appoint a neutral expert to act as a special master (Fed. R. Civ. P. 53) or as an expert in computer-based discovery (Fed. R. Evid. 706).

If the parties cannot provide their own experts, or if the situation is contentious, *consider* appointing a neutral third party to

- break an impasse;
- supervise the technical aspects of discovery; or
- act as a secure custodian for sensitive or disputed data.

Even the suggestion of bringing in a neutral expert may help bring the attorneys to an agreement. See *infra* section VII.B.4 for a discussion of court-appointed experts and *infra* section VIII.C for a discussion of special masters.

IV. PRETRIAL MOTIONS MANAGEMENT

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Motions practice is also a common and continuing source of avoidable cost, delay, and burden for the court and parties. Civil Justice Reform Act (CJRA) research confirms practical experience regarding civil motions practice in the federal courts: Motions practice increases in intensity as monetary stakes and the number of attorneys go up.³⁹ It is therefore important that you seize the initiative regarding motions practice in your court, especially in complex or large cases.

A. In General

The Rule 16 conference provides an opportunity to set the tone and the limits of what is acceptable in both substantive and discovery-related motions in accordance with national and local rules, CJRA plans, and your individual preferences. Local custom and practice in the district also have a bearing; the bar's expectations and the benefits of consistency of practice within your district should be considered to the extent that they can be accommodated to the needs of effective case management. This means that the forms and procedures created to meet your

39. See RAND Discovery Report, *supra* note 32, at 28–38.

specific needs should be designed to supplement the national rules and be consistent with local district rules and practice to achieve their maximum effect.

As in all other aspects of dispute resolution, your initiative in establishing the initial focus and tenor of your interactions with counsel is extremely important in maintaining control and direction over the motions process. Some routine matters do not require your intervention, nor do they benefit from a formal motions process (e.g., an attack on a technical pleading defect; joint requests for extensions that do not affect the overall case management plan or schedule; requests to proceed by videotape depositions). Submission of such motions should be discouraged, and counsel should be advised to work out such matters or respond to the court with joint stipulations or letters when possible. Requiring counsel to advise the opponent by a brief letter of any intended motion can be helpful. For substantive motions, the issue to be decided should be defined with precision, before filing if possible, to avoid obviously inappropriate motions and to focus the motion papers on that issue.⁴⁰

Consider, as a general approach,

- requiring counsel to meet and confer before filing a motion to discuss the issues to be addressed, whether they can be resolved without judicial involvement, and, when appropriate, whether to consult with the judge in advance of filing;
- imposing page limits on briefs, memoranda, and other submissions, and allowing departures only for good cause;
- refusing submission of sur-reply briefs; and
- modifying the order of the filing of supporting and opposing papers to reflect the reality of the burden of persuasion for the particular motion.

In some cases, the basis for the motion will be so obvious that no opening memorandum by the moving party will be needed and the resolution will turn on the opposition and reply. In some situations, concurrent memoranda may be preferable to the usual motion–opposition–reply format.

Consider

- tailoring supporting documentation to the needs of the case; omitting affidavits on undisputed propositions; or limiting briefing to core issues;
- when oral argument is necessary, advising counsel of the particular issues on which you want argument; and

40. See, e.g., William W Schwarzer, Alan Hirsch & David Barrans, *The Analysis and Decision of Summary Judgment Motions* (Federal Judicial Center 1991); reprinted at 139 F.R.D. 441 (1992) [hereinafter *Analysis of Summary Judgment*]. For an update of case law on summary judgment, see William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 154 F.R.D. 311 (1994).

- barring live testimony except when clearly necessary to resolve issues of credibility.

Federal Rule of Civil Procedure 43(e) permits the court to hear a motion partially on oral testimony; that is, the court may call for or permit limited oral testimony to supplement written material and clarify complex facts. In lieu of oral testimony, however, the court may permit declarants to be deposed and relevant excerpts from their depositions to be submitted.

Consider the following approaches:

- Issue a tentative ruling (proposed or draft order) before the scheduled hearing. This practice, used in many state courts, expedites the motions calendar and may obviate the need for a hearing if the parties accept the ruling. If they do not, it can help focus oral argument and disclose potential errors in the tentative ruling, which, in turn, leads to more accurate minute orders at the hearing, a more accurate final ruling, and a savings of time to you and your clerks in the preparation of the final ruling and order.
- When possible, rule on motions from the bench at the close of a hearing, and, when this is not possible, minimize the time motions are under submission.

Many judges believe they should write no more than necessary. Your ruling and supporting reasons can often be stated orally on the record following the hearing; however, bear in mind that a clear and complete statement is necessary for the appellate record. Delays in issuing rulings are a major cause of public dissatisfaction with the courts, and most litigants would prefer a timely decision to a perfectly written one. Additionally, matters taken under submission rather than immediately ruled on can slip through the cracks; it may be difficult in the press of business to get around to making a ruling and time-consuming to become reacquainted with the matter. Moreover, your workload can become oppressive when submitted matters accumulate. For illustrative management procedures and orders, see Appendix A, Forms 4, 5, 22, 25, and 26.

B. Specific Techniques

1. Pretrial motions conference

Judicial time is often the least available element of the litigation process; many procedures have therefore been designed to use it efficiently. Toward this end, the recommended approach to controlling the timing, organization, and presentation of motions is to center initial motions planning on the Rule 16 conference (see *supra* section II.C.8). In complex or paper-intensive cases, or when an unexpected crush of paper threatens your pretrial schedule, a tailored investment of minimal time in a pretrial motions conference can get you back on track and reinforce both your authority and the certainty of your trial date.

Consider setting a pretrial motions conference to

- let each side know the other's general positions;
- narrow issues;
- prevent unfounded motions;
- discuss issues that preclude summary judgment; and
- regain control over motions activity in the case.

The amount of motions traffic and the kind of motions you are facing should determine whether you use this method. You might want to use the following cost-benefit analysis: Will your investment of time resolve issues, narrow issues, and prevent nonmeritorious motions?

2. Motions screening

Ideally, motions can provide the impetus that moves the case beyond its initial pleadings toward more tailored judicial actions and speedier disposition. Unfortunately, the timing and purpose of motions (despite your initial efforts to plan motions practice at the initial Rule 16 conference) may not always coincide with this ideal. You must therefore be able to separate worthy, timely motions from those that are merely tactical, dilatory, or inopportune. Screening motions as they are filed is a technique that can help identify those motions you can decide without a hearing or by oral ruling. You can then promptly dispose of them so that they will not clutter your calendar, impose unnecessary costs, or delay the progress of the case.

Screening also provides an opportunity to make the initial decision to delay a filed (or prospective) motion to the point in the case when it will serve a more useful purpose. Although you may not be able to prohibit motions, you can refuse to entertain them until you feel the case management process is sufficiently advanced to address the question raised. As always, your decision to postpone consideration of a motion will be stronger and more easily understood if it is logical and keyed to particular case-activity stages.

You may wish to do this screening yourself, or you can establish screening guidelines for use by your law clerks. These guidelines can incorporate some or all of the considerations listed below.

Consider

- delaying (refusing to accept or entertain) a motion until discovery on relevant key questions or issues is complete (i.e., after critical discovery is completed);
- deferring summary judgment motions until the end of the discovery period;
- deferring sanctions motions until the end of the case; and

- establishing the general restrictions that Rule 11 and Rule 37 motions cannot be filed without leave of court.

3. Motions timing

Rule 16(b)(2) specifically directs the judge to limit the time within which motions may be filed. You can do this in discussion with counsel at the initial Rule 16 scheduling conference; the dates can then be incorporated into the scheduling order. The conference can also enable you and counsel to identify issues appropriate for resolution by motion, prevent the filing of pointless or premature motions, manage motions that are time sensitive, and establish an appropriate and efficient procedure for filing and hearing motions in the case. Local rules and general orders usually provide additional means for regulating motions practice at the Rule 16 scheduling conference.

Consider

- discussing contemplated motions with attorneys before they are filed;
- exploring the possibility of resolution of the issue without resort to motions;
- expediting the filing of motions ripe for early disposition, such as those directed at personal and subject matter jurisdiction;
- for motions that may remove a case from normal scheduling routines (e.g., motions to stay or to compel arbitration), adding a statement to the granting order that counsel shall inform the court every sixty days by letter of the status of the case;
- planning requisite discovery for summary judgment motions; and
- scheduling dispositive motions as early as feasible but not before a sufficient record for decision has been made.

With summary judgment motions in particular, sometimes the parties plan cross motions that one or both parties fully intend to be dispositive. In those instances, agreed-upon dates for motions submission should be carefully set. In the event a setting is premature from the standpoint of case progress, the parties can be required to meet and confer to arrive at dates and the order of presentation for your subsequent approval. Summary judgment motions should not await the completion of all discovery, however, if they are to serve to forestall needless expense and trial preparation time.

4. Limiting oral arguments on motions

Oral arguments can serve a variety of purposes for both judges and litigators; most are salutary, but not all serve the ends of effective and efficient justice. The need for oral argument is always your determination to make and should therefore be based on your needs in the particular case.

Consider whether oral argument will

- help you understand the law or facts;
- help you narrow the issues;
- open opportunities for settlement discussions; or
- help you rule.

In complicated cases, it might be useful to test your tentative conclusions during oral argument. The focus should remain on what information you will get out of oral argument. A rule of thumb is that if you cannot think of three things you wish to ask attorneys in oral argument, deny the request for it.

C. Treatment of Specific Types of Motions

1. Motions for summary judgment

a. In general

Motions for summary judgment should not be filed unless they raise an issue that may reasonably be decided by summary resolution. Summary judgment motions should be filed at the optimum time. Motions filed prematurely can be a waste of time and effort, yet motions deferred until shortly before trial can result in much avoidable litigation effort. Summary judgment motions are best filed as soon as the requisite discovery supporting them has been completed and the issue is ripe.⁴¹ They should also be set far enough in advance of the existing trial date to maximize the motion's case management and disposition potential. Beware of overbroad motions for summary judgment that are designed to make the opponent rehearse the case before trial.

Consider

- requiring a prefiling conference;
- incorporating any special procedures for summary judgment (or any other) motions into your district's Web site, prefiling information packet, or local rules;
- scheduling the filing of summary judgment motions for the appropriate time in the litigation;
- limiting the length and volume of supporting and opposing papers; and
- determining whether cross motions are appropriate.

Cross motions can convert a summary judgment motion into a bench trial on submitted papers, but only if the parties consent to it; in that event, the papers could be supplemented with live testimony as needed (e.g., when credibility becomes an issue).⁴²

41. Fed. R. Civ. P. 56; *see also* Analysis of Summary Judgment, *supra* note 40, at 441; MCL, Third, *supra* note 13, § 21.34.

42. *See* Analysis of Summary Judgment, *supra* note 40, at 500.

b. Specific techniques

It is wise to set out for counsel the actual procedural framework you prefer for summary judgment motions. The process should provide you with all information, in the most efficacious form, necessary to support your decision-making routines. Notice to counsel of the process you prefer can be accomplished through a handout, a posting on the court's Web site, or inclusion in a more comprehensive handbook of chambers-specific rules and procedures.

Consider the following in setting out your summary judgment process:

- page limits on submissions by counsel;
- an instruction to state disputed issues of fact up front;
- an instruction to state whether there is a governing case;
- an instruction that all summary judgment motions be accompanied by a computer disk, in a chambers-compatible format that includes full pinpoint citations and complete deposition and affidavit excerpts to aid in opinion preparation;
- an instruction that all exhibits submitted in support of a motion, brief, or memorandum be tabbed at the right margin;
- an instruction that citations to deposition or affidavit testimony must include the appropriate page or paragraph numbers and that citations to other documents or materials with three or more pages must include pinpoint citations;
- an instruction that all such motions be accompanied by a form order with a brief statement of law to help in writing the decision;
- notification that you will issue a tentative ruling on the submitted pleadings, to which counsel will respond in oral argument;
- in lieu of a tentative ruling, a notice that if requests for argument are granted, a preargument order will be issued to let parties know what points you want addressed and what time limits will govern; and
- after oral argument, your dictation (from a memo prepared from the briefs) of a concise opinion or report and recommendation from the bench.

A concise bench opinion, based on a memo prepared from submitted briefs by your law clerk, can save both court and litigant time and costs. It is also generally sufficient for appellate review, but you should educate yourself about your circuit's preferences in this regard. If necessary, it can be supplemented by a written opinion at a later date.

2. Motions for injunctive relief

Motions for injunctive relief require special attention because they demand prompt decisions on a limited record and have an immediate impact on the parties (see Federal Rule of Civil Procedure 65). The motions hearing presents op-

portunities to achieve a number of important objectives, including deciding whether a temporary restraining order should be issued; setting dates for associated motions, depositions, and requested actions; and examining and resolving any matters relating to the issuance of surety bonds.

Consider the following in approaching these and other matters:

- Insist that a party seeking a restraining order notify the opposing counsel or party in advance, unless doing so would cause prejudice (Rule 65(b)).⁴³
- Instead of issuing a conventional order to show cause, call an early conference with counsel to identify issues (for example, whether irreparable harm can be shown), address bond-posting requirements, schedule written submissions and a hearing date (see Rule 65(b) regarding time limits for show cause orders), and consider other procedural issues.
- If an injunction proceeding is required, avoid live testimony unless necessary. Most matters can be adequately presented in writing, so long as the declarant can be deposed on his or her declaration in advance of the hearing.
- Require counsel to submit proposed findings of fact, conclusions of law, and forms of order on computer disk in a chambers-compatible format (Rule 65(d)).
- Combine preliminary and permanent injunction proceedings when possible (see Rule 65(a)(2)). Separate hearings and proceedings can result in duplication and wasted time, whereas an expedited trial can resolve all issues in a single proceeding.

The wording of an injunction order can be critical to its enforcement and to its fate on appeal. You should ensure that counsel agree as far as possible on its form and state any objections clearly on the record. You should be cognizant of the valuable opportunity such a motion provides for settlement; in addition, many defendants will gladly agree to maintenance of the *status quo ante* to avoid the potential risks of the hearing itself.

3. Motions for remand

a. In general

A motion for remand is appropriate when the case that was the subject of the original removal action to federal court (1) fails to state a cause arising under the Constitution or federal law (28 U.S.C. § 1331); (2) is not an appropriate federal cause of action as a diversity case (28 U.S.C. § 1332); (3) is the subject of an abstention by the court under the inherent powers doctrine with regard to claims of equitable relief, discretionary relief, or other prudential actions; (4) is barred by

43. See also Benchbook for U.S. District Court Judges § 3.08-1 (Federal Judicial Center, 4th ed. 1996) [hereinafter Benchbook].

statute; or (5) is an otherwise appropriate removal case whose original removal action was marred by procedural defects. The more common remand actions, for lack of federal jurisdiction or procedural defects, fall under 28 U.S.C. § 1447(c). Although you (or any party) may raise the jurisdictional issue sua sponte or entertain motions for remand on this basis at any time, motions based upon procedural defects related to the removal action itself (e.g., failure to join all necessary defendants or defective notice of removal) must be made within thirty days of removal (28 U.S.C. § 1447(c)).

b. Specific techniques

The two most common motions for remand are motions alleging lack of federal question jurisdiction (asserting the absence of a substantial federal issue arising under the Constitution or federal law) and motions alleging the absence of diversity of citizenship between the parties accompanied by a monetary claim in excess of \$75,000.00. These elements must appear on the face of the “well-pleaded complaint” to withstand challenge. Frequent arguments advanced in such remand motions involve attacks on the basis for federal court diversity jurisdiction (including claims of the fraudulent joinder of parties to create diversity) or on damage or monetary claims inflated to reach the monetary threshold for federal jurisdiction. You should also be mindful that although these questions should be addressed to the pleadings as they stood at the time of removal, legitimate interim changes may have arisen in the facts or parties of the case which may destroy or create diversity (e.g., the death of a party).

In addressing motions for remand, *consider that*

- little or no discovery effort should be required to address these issues;
- procedural defects are waivable or curable at the discretion of the court;
- you should be cognizant of state statute-of-limitations questions in the event of a remand so as not to foreclose relief;
- the pleadings themselves must speak directly to all jurisdictional issues (the “well-pleaded complaint” rule) as presented through briefs at a motions hearing; and
- the court has great power and discretion to retain, remand, or dismiss in part.

Partial retentions, remands, or dismissals should be avoided whenever possible owing to the potential burdens imposed on the parties to proceed in two separate forums. Dismissals, of course, may have terminal effects on parties’ claims in the state forum, whereas partial retentions risk inconsistent state and federal rulings. You should always address all motions for remand as soon as possible to avoid potentially duplicative, costly, and unnecessary federal proceedings.

4. Motions to dismiss

a. In general

The Rule 12 motion is a common “suit killer,” and therefore you must safeguard the rights of the plaintiff, whose options for relief on any legitimate portion of the claim as filed will rest on your decision or recommendation. While a range of possibilities exist under Rule 12(b) for a motion to dismiss, the most common is that of subsection (6), failure to state a claim for which relief can be granted. Other common grounds are lack of subject matter jurisdiction (12(b)(1)) or personal jurisdiction (12(b)(2)). Venue questions may commonly be coupled with the primary motion under either Rule 12(b)(3) or 28 U.S.C. § 1404. If jurisdiction is lacking or venue is questionable, the parties must go elsewhere or reform their pleadings. Each of these latter two grounds have less potential impact on plaintiff rights but will generally appear earlier in the life of the case, as they constitute threshold questions for further court action in the case. Again, the most common ground is failure to state a cognizable claim for relief (Rule 12(b)(6)).

b. Specific techniques

Bear in mind that a motion to dismiss is often used by one party as a tactical delay weapon, as the defect it alleges is normally and most easily cured by amending the original pleadings. At your earliest opportunity, it pays to ask whether such motions will be filed, on what grounds, and whether such grounds are curable.

In addition, *consider* the following:

- A motion to dismiss is directed at the pleadings; you must assume the truth of the factual allegations in the complaint. You may not look at materials outside the complaint, unless attached or referred to in the complaint.
- You may, on notice to parties, convert the motion to dismiss to a summary judgment motion. Conversion may be appropriate (with proper notice) if you deem the motion to be substantively determinative and, in the interests of justice, think the claim would benefit from the wider pleading latitude summary judgment affords under Rule 56.
- You should bear in mind the statute of limitations and the 120-day rule as you contemplate a dismissal without prejudice. If they have run, your action may frustrate your intent and result in a bar to any further kind of relief.

A final caution: Because Rule 12(b) motions come early in the case, often before the answer is filed or the Rule 16 conference has been held, it may not be as easy to control them as it is to control later motions for which time frames have been established by your scheduling order. Resolution of Rule 12(b) motions as soon as possible will keep the litigation on track.

5. Motions raising qualified immunity

The affirmative defense of qualified immunity will most often be raised in a motion to dismiss or a motion for summary judgment, but it may also be presented as its own motion. Because qualified immunity should be pled in the answer, you should be aware of it as a potential issue in the case from the outset. If the issue has not already been addressed by the time you conduct the Rule 16 conference, you may want to discuss with counsel a schedule for briefing the issue. Cases involving allegations of qualified immunity often present factually complicated situations that require a lot of your time in the form of either reviewing deposition evidence or conducting a hearing. Outlining a schedule for handling these complexities may lessen the impact of these cases on your overall workload.

It is also important to note that if a motion based upon the defense of qualified immunity is denied, that denial is the appropriate subject of an interlocutory appeal. In this situation, only the qualified immunity issue will go to the court of appeals, leaving the remaining issues in the case on your docket. You or a member of your staff should pay close attention to the progress of the qualified immunity issue on appeal so that you will be aware of the ruling of the court of appeals as soon as possible. Early knowledge of the ruling on this issue will allow you to get the remaining issues in the case back on the appropriate litigation track and thereby achieve a faster resolution.

6. Motions that remove a case from the schedule set for it

When you grant a motion that removes a case from its schedule—for example, a motion to stay or a motion to compel arbitration—you run the risk that the case will quickly age if you do not require the lawyers to keep you informed about its status.

Consider, in orders granting motions that remove a case from its schedule, adding a statement that counsel must inform the court by letter every sixty days of the status of the case.

7. Motions for sanctions

a. In general

Sanctions motions and the satellite litigation they may spawn can represent a large and nagging portion of the motions practice before your court. By establishing early control over the case and setting clear limits on acceptable behavior, you can limit the number of such motions you see and avoid their use as tactical tools for limited advantage in highly charged cases. Federal Rules of Civil Procedure 11, 16, 26, 37, and 41, as well as 28 U.S.C. § 1927, authorize the imposition of sanctions in connection with pretrial proceedings. Sanctions are not a basis for effective case management or a substitute for it; on the contrary, the need for sanctions often arises when case management has received insufficient attention, has been ineffective, or has broken down. It is equally true, however, that good case man-

agement cannot anticipate all problematic conduct of attorneys or parties, or always control it when it occurs. Sanctions may therefore be necessary, but you should maintain close control over the process to prevent the spawning of satellite litigation and the degradation of professional standards in the conduct of the litigation.

Sanctions can serve several purposes: to protect a party, to remedy prejudice caused, to deter future misconduct, to punish the offender, and to protect the efficiency of the court's docket. You should select the least severe sanction adequate to accomplish the intended purpose. Moreover, you should be aware that sanctions can have collateral effects, including the creation of a permanent shadow on the sanctioned attorney's record as maintained by state regulatory and bar authorities. Generally, the authority you use to sanction should be limited to the most precise sanctioning tool applicable.

Consider, for example, the following authorities and sanctionable conduct:

- Rule 11: pleadings unreasonably lacking support in rule, law, evidence, precedent, fact, or theory; or filed with frivolous or improper purposes;
- Rule 16: noncompliance with a pretrial order;
- Rules 26 and 37: violations, abuses, or impropriety in relation to discovery orders or processes;
- 28 U.S.C. § 1927: vexatious or unreasonable multiplying of proceedings in any case; and
- the doctrine of inherent judicial powers: contempt citations for any kind of sanctionable conduct.

More generally, sanctions can be contained in rulings in response to motions. Your sanctions, when imposed, should be tailored to the offense at hand, within the broad discretion granted to the judge. What should the punishment be?

Consider the following:

- If an attorney has failed to disclose an expert and there is no way to avoid prejudice to the opposition, prohibit the expert.
- If a false affidavit has been made, impose on the offending party the costs and fees incurred in the defense against it.
- If a frivolous pleading has been filed, strike the pleading.
- If specific remedial action will cure the harm, impose the remedy.
- To suit the specifics of the individual case, use a combination of sanctions (costs, strikes, punishments, and remedial actions).

The discretion invested in the judge, as well as the many specific remedies enumerated in the rules of procedure, provide the wide latitude you need to get your point across. But do remember your purpose—to secure just, speedy, and inexpensive dispositions; to stop rules transgressions; and to deter future violators.

Consider the following approaches:

- Set the guidelines for acceptable conduct at your earliest opportunity (printed rules of conduct can help).
- Deal swiftly and firmly with the transgressors, even if imposition of sanctions is to be delayed until the end of the trial (i.e., don't avoid or postpone challenges).
- Never make empty sanctions threats.
- Avoid being used by one side in technical, tactical violations contests.

It may be necessary, at first, to act aggressively in the area of rule administration, as a warning to other potential malefactors. In complex or multiparty cases (especially with out-of-state counsel), this is a small price to pay, early on, to establish and maintain order. Once developed, a reputation for fairness, responsiveness, and certainty in rule administration and motions management can be among your most lasting professional assets.

b. Specific techniques

When, despite your careful shaping of motions practice before your court, legitimate disputes and sanctionable conduct arise, consider the relevant threshold issues and give the parties an opportunity for a fair hearing. Remember that different statutes and rules authorize sanctions for different kinds of conduct and on different predicates; they are not interchangeable. You should make a record indicating clearly the authority relied on and the factual basis for the action.

Consider the specific conduct to be sanctioned, asking

- what prejudice was caused to the opponent;
- whether the act was deliberate or inadvertent;
- whether there were extenuating circumstances;
- what the impact was on the court and the public;
- whether the offending party has had notice and an opportunity to respond;
- what purpose is to be served by the sanction—protection, remedy, deterrence, or punishment—and the least severe sanction adequate for the purpose;
- whether sanctions should be imposed promptly or delayed until the end of trial;
- on whom the sanctions should be imposed—attorney, client, or both;
- under what legal authority sanctions will be imposed;
- whether the sanction is authorized by inherent authority or the court's local rules (distinguish between civil and criminal contempt);
- what specific sanction will be imposed; and
- whether the conduct requires reporting to the court's professionalism committee or the local bar association.

In situations in which you address sanctionable conduct, especially when acting *sua sponte*, use a show cause order with its accompanying process.

Consider

- letting counsel know you are considering sanctions and under which rule or statute;
- giving counsel an opportunity to show why any or all of the possible sanctions are not warranted; and
- letting counsel demonstrate why the show cause order is a good option instead of just imposing sanctions.

In short, give attorneys an opportunity to be heard. The process itself will insulate you from the danger of a precipitous response; provide time for the transgressors to reflect; and ultimately force them to help shape the remedy you adopt, ensuring a more memorable, larger sense of justice for all concerned. For further discussion of sanctioning, see the *Manual for Complex Litigation, Third*.⁴⁴ See also the *Benchbook for U.S. District Judges*.⁴⁵

44. MCL, Third, *supra* note 13, § 20.15.

45. Benchbook, *supra* note 43, § 2.08-1.

V. JUDICIAL SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

- A. Judicial Settlement
 - 1. The judge's role
 - 2. The timing of settlement discussions
 - 3. Successful settlement techniques
 - 4. Recording the settlement
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- B. Alternative Dispute Resolution Procedures
 - 1. Some terms to keep in mind
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 - a. Mediation
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 - 4. Selecting and compensating an ADR neutral
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 - 6. Managing cases referred to ADR

Only a small percentage of federal civil cases are resolved by trial.⁴⁶ Many of the remaining cases settle. Many of these settle without judicial or other third-party intervention, but some do not. Furthermore, many of these cases settle later than they should, unnecessarily absorbing both client and judicial resources. Early settlement is therefore one objective of effective litigation management.⁴⁷ It can also contribute substantially to the perception by litigants that the court has fulfilled its responsibility and has treated them fairly and respectfully.

Judges need to keep in mind, however, that settlement is not invariably the preferred disposition for every case. For a variety of reasons—for example, the need for a definitive ruling on a matter of law or for a decision on an issue of public interest—some cases should be resolved through adjudication.

46. Although the trial rate varies from district to district, on average across the federal district courts only about 2%–3% of civil cases are tried. *See, e.g.*, Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2000 Annual Report of the Director 162 tbl.C-4A.

47. Federal Rule of Civil Procedure 16(c)(9) identifies “settlement and the use of special procedures to assist in resolving the dispute” as appropriate topics for discussion at pretrial conferences. Commentary to the rules identifies various ADR processes as acceptable special procedures.

How and when to assist the parties in reaching an early settlement depends on the circumstances of each case and the personalities involved. Likewise, who can best assist the parties and by what settlement techniques will depend on the nature of the case. You can provide settlement assistance yourself or turn to a variety of other neutrals (e.g., mediators, arbitrators, or early neutral evaluators) to assist you with this task. This chapter provides guidance on judicial settlement techniques and on the use of alternative dispute resolution (ADR) for resolution of civil cases.

A. Judicial Settlement

Judge-hosted settlement conferences are a long-standing method for helping litigants resolve their cases. Nearly all judges play this role at least occasionally, and some judges play it frequently, if not routinely. Judges may serve as settlement facilitators in their own cases, or they may do so on behalf of other judges. In some districts, magistrate judges serve as the court's primary settlement neutrals. The extent to which you become involved in settlement discussions will depend on several factors, including whether you have time, whether other alternatives are available, whether you feel your involvement helps the parties, and, if you are a magistrate judge, whether the court or individual judges refer such matters to you.⁴⁸

1. The judge's role

Opinions of expert commentators differ on whether, and when, it is appropriate for judges to participate in settlement negotiations in their assigned cases. Because doing so may jeopardize the appearance of impartiality and create a risk of recusal, many judges will not do so unless the parties specifically request it and waive recusal. Other judges believe their familiarity with the case makes them the most effective neutrals and best able to focus on the issues and evaluate the parties' positions. Some draw a distinction between bench and jury trials, feeling freer to participate in settlement negotiations when the facts in the case will be determined by a jury. Local custom and practice may provide guidance, but generally you should be cautious about participating in settlement discussions if you are the finder of fact unless the parties have asked you to and have waived recusal.⁴⁹ You

48. See Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges 1–2* (American Bar Association 1985). In this study of litigating attorneys in four districts, Brazil found that 85% agreed that involvement of a federal judge in settlement discussions was likely to improve prospects for settlement and that a majority thought judges should involve themselves in settlement even when the attorneys did not ask for help. However, a substantial majority also preferred that the settlement judge not be the judge who will try the case, especially if the case is a bench trial.

49. See Comm. on Codes of Conduct, Judicial Conf. of the U.S., *Code of Conduct for United States Judges*, Canon 3A(4) as revised September 1992 (stating that a judge may, with both parties' consent, confer separately with parties and counsel to assist settlement but must disqualify

might also consider establishing a relationship with another judge for exchange of cases that would benefit from settlement assistance but in which you prefer not to be too close to the negotiations. Or you might refer the case to your court's ADR program (see *infra* section V.B).

In any event, you can always serve as a catalyst, by opening the door to negotiations and helping the parties evaluate the case. Because many attorneys and their clients are reluctant to make the first settlement move, fearing their overture may signal a weak case, you can be especially important in breaking down barriers to negotiation. You will be most effective if you develop credibility and a reputation for candor and fairness, giving counsel and litigants confidence that they will be fairly treated in the negotiation process.

2. The timing of settlement discussions

You should raise the possibility of settlement discussions early and often. Whether your first contact with the parties is a Rule 16(b) conference or issuance of a scheduling order, you should ask them to begin settlement discussions and offer, as appropriate, your assistance, the assistance of other judges, or the assistance of the court's ADR program.

Although conventional wisdom has held that productive settlement discussions cannot be held until substantial discovery has been completed, many cases defy this truism. Before counsel embark on extensive briefing schedules or extended rounds of discovery (i.e., before their clients have sunk large sums in the case and become hardened in their positions), you should open the door to settlement discussions. Try not to put yourself and the parties in the position of preparing for trial, with all the resources that requires, and then having the case settle.

You should raise the settlement question not only early but regularly, first at the initial conference with the parties, at subsequent conferences, after dispositive motions (which tend to change how parties view their case), and before attorneys start the task of preparing the final pretrial order. Just before trial is the worst time to raise settlement for the first time, but if you have not raised it before, by all means do so then. Moreover, some cases settle during trial. Raising the issue at that time may help the parties gracefully cut their losses. Generally you should not permit the attorneys to ask for delays of the trial date to settle the case. If you have encouraged and assisted settlement discussions all along, you should rarely, if ever, find yourself in this position.

himself or herself if his or her impartiality might be questioned). *See also* Administrative Office of the U.S. Courts, 2 Guide to Judiciary Policies & Procedures, Published Advisory Opinions, Advisory Opinion No. 95 at ch. 4 (January 14, 1999) ("Judges must be mindful of the effect settlement discussions can have not only on their own objectivity and impartiality but also on the appearance of their objectivity and impartiality.").

To help parties enter into serious settlement discussions, you might do a number of things in connection with the first or any appropriate Rule 16 conference.

Consider

- asking counsel for an oral or written report on whether settlement negotiations are in progress or contemplated, what the prospects are, and how settlement may be facilitated (for an example of a case management form requiring settlement certification, see Appendix A, Form 26);
- having counsel identify, and then complete, targeted discovery necessary to evaluate the case for settlement;
- assisting counsel, without participating in merits discussions, in developing a format or procedure for negotiations, including arranging for exchange of demands and offers through a neutral third party (preferably someone other than yourself if you are the fact finder);
- requiring counsel to discuss with their clients the anticipated costs of litigation;
- in fee-shifting cases, requiring counsel to disclose to you and opposing counsel any anticipated fees and costs;
- referring the case to a mediator, special master, settlement judge, magistrate judge, or, if all counsel request it, to yourself to conduct negotiations; and
- referring the case to ADR procedures provided by local rules or general orders or agreed to by the parties, such as arbitration, mediation, or early neutral evaluation (see *infra* section V.B).

As important as settlement is, you should not consider it necessary to delay the progress of the case for the sake of settlement. For example, you should not feel compelled generally to stay discovery or other pretrial proceedings, or to postpone the trial, because of settlement discussions. The momentum of the pretrial process can in itself be an important impetus to settlement. For an example of an order of referral to settlement conference, see Appendix A, Form 32.

3. Successful settlement techniques

If the parties agree that they want you to serve as the settlement neutral, or if you are serving as such on a case for another judge, you will need to decide how to conduct the discussions and how to lower barriers to settlement. Your choice of settlement techniques will be influenced by the setting of the negotiations, the character of the participants, and the nature of the case. There is no single way to conduct a settlement conference, but whatever techniques you use, two things are fundamental: be prepared and listen carefully. Much relevant information is communicated by the participants in subtle ways. Understanding the parties' thinking and feelings is as important as analyzing the issues; the parties' real ob-

jectives in the litigation may not always be what they seem to be on the face of the pleadings. The parties may also take a long time to reach settlement as they reluctantly come to grips with their case and their feelings. You can help them start this process by asking the plaintiff to state simply what he or she wants from the defendant.

Assisting in settlement can require great patience. Negotiating a settlement, however, may lead to a far better outcome for the parties and may take less time than trying the case.

You can facilitate settlement negotiations by your actions and decisions in setting up the process and by the steps you take during the settlement session itself.

In setting up the settlement process, *consider*

- asking the parties at the first opportunity what information they need to evaluate the case and to reach supportable damage estimates (e.g., personnel files in discrimination cases or the medical file in personal injury cases), ordering them to produce the necessary items, and asking them to write you about the results of subsequent settlement talks;
- directing attorneys participating in any settlement conference to be prepared regarding the factual and legal issues and their clients' positions;
- ensuring that the attorneys and other party representatives have adequate authority to settle the case or at least have immediate access to the final authority, including access to insurers, senior government officials, and top management when necessary;
- requiring the attendance of parties in any case in which you suspect the attorneys, rather than the parties, are standing in the way of settlement;⁵⁰
- requiring the attendance of parties in any case in which you think the case cannot be resolved without giving the parties an opportunity to "tell their story" to the judge, such as discrimination and personal injury cases;
- suggesting, if counsel in the case are antagonistic or unskilled in negotiation, that one or more parties employ special counsel for the purpose of conducting settlement discussions;
- setting a firm and credible trial date to keep pressure on the parties; and
- having counsel submit confidential memoranda, outlining the pivotal issues, the critical evidence, and their settlement positions.

Over the years, judges have developed and refined a number of ways of helping parties settle their cases.

50. Federal Rule of Civil Procedure 16(c) authorizes the court to require a party or its representative to be present or available by telephone at pretrial conferences "to consider possible settlement of the dispute."

To assist negotiations during the settlement conference itself, *consider* the following approaches:

- Discuss with the participants the issues and the probable risks each party faces, without taking a position on the merits.
- Ask the attorneys, in front of their clients, how much it will cost to litigate the case through trial and then suggest to their clients that they put this sum toward settlement.
- Help parties focus on their underlying interests (e.g., resuming a profitable business relationship) rather than disputed facts or legal principles.
- Meet separately with each side (parties and counsel) for candid evaluations of the parties' prospects and the costs of continuing the litigation. These meetings often become essential to the successful conclusion of settlement negotiations; however, you should have the parties' consent to them, or they may preclude you from presiding at trial.
- Suggest that the corporate principals meet without counsel to reach an agreement as businesspeople.
- Defer recommendation of potential settlement figures for the parties to consider until the outlines of a probable settlement become apparent.
- Delay having parties state their "bottom lines" so as to keep the negotiating positions flexible.
- Direct attention to damages, including possible tax consequences, instead of emphasizing liability issues. In many settlements, it is money rather than principle that ultimately matters; if it becomes clear to the parties that a settlement on financially acceptable terms is possible, there is little point in continuing to debate liability.
- Sever one or more issues for a separate trial if doing so will provide the basis for settlement of other issues.
- Look for imaginative and innovative solutions, such as structured payouts, payment in kind, future commercial relations, concessions, apologies or admissions, establishment of a training or recruiting program, or correction of a defect.
- Discuss settlement in the parties' language (e.g., with two business litigants, ask "How many widgets will the litigation costs buy? What are your daily profits against the costs of this case?").
- Provide a structure, when the parties are dug in, to help them exchange offers (e.g., ask the plaintiff to "come up with the next offer," ask the defendant to make a counteroffer, and ask them to continue exchanging offers until settlement or impasse is reached). This forces movement but takes the burden off the parties to make the first move.
- Inject realities, such as the difficulties of collecting a judgment from a financially strapped defendant and the risk of bankruptcy.

- Recommend or encourage the parties to exclude punitive damages as an element of the claim for settlement purposes.
- Encourage the defendant to make a Federal Rule of Civil Procedure 68 offer, carefully drafted to avoid later disputes. An offer of judgment can be helpful in cases in which attorneys' fees can be awarded by the court, since such an offer can cover all liability. The offer must be unambiguous to permit a determination whether the final judgment is more favorable.
- Settle only some issues in the case or the claims of some but not all parties.⁵¹
- Keep the negotiations going despite lack of agreement.

Some judges find they are most effective if they try to move the parties within range of settlement (i.e., if they establish a “ballpark”). To do that, you may need to remain noncommittal on the merits for some time. If you do not make a recommendation too soon, you may also find that your credibility and effectiveness are enhanced, and you may avoid having to backtrack later if discussions take an unanticipated direction. On the other hand, a study done some years ago found that many attorneys preferred a judge who was actively involved in settlement discussions, who knew the facts and law in the particular case, who offered explicit assessments of party positions, and who made specific suggestions for resolution—provided the judge was not going to be the fact finder in the case.⁵² These preferences varied by location, which suggests that you should try to understand your local culture in deciding what approach you will take in settlement discussions.

4. Recording the settlement

In the end, it is not the judge who settles the case, but the parties, and their decision does not ordinarily require your review or approval. To forestall future disputes over the settlement, it is generally wise nonetheless to record the settlement in writing. You should consider dictating the complete terms of the settlement into the record in the presence of counsel as soon as agreement is reached. If the agreement requires ratification or approval by a board of directors, the Attorney General, or some other higher authority, set a date certain by which counsel must file a written agreement with the court. If the agreement is to be filed later, it is wise to get at least an outline of the settlement terms on paper on the spot, particularly if individuals rather than corporations are involved. Ask both counsel and all parties to affirm, by signature or on the record, the terms of the agreement.

Even if the agreement is on the record, disputes may arise later about the form of the agreement. Therefore, have counsel state on the record that if there are arguments later about the form of their agreement, the form, not the underlying

51. *But see* MCL, Third, *supra* note 13, § 23.21 for a discussion of the risks of partial settlements.

52. Brazil, *supra* note 48, at 1–2, 5–6.

settlement, may be discussed. Make it clear, in the record, that if the parties cannot agree on the form, the court will decide it.

If you have given counsel leeway to file the agreement by a specified later date, you will undoubtedly find that some parties are tardy in meeting that date. When you set a date certain and put it on the record, make certain counsel know you expect them to keep that date. When they do, you can dismiss the case (see Appendix A, Form 33, for an example of an order dismissing a settled case). If they do not, you can move to dismiss the case or, if you prefer, ask the parties to show cause why you should not dismiss the case (see Appendix A, Form 34, for an example of an order dismissing a case).

In some cases, such as class actions and some antitrust cases, you are required to review and approve the settlement. You can find a helpful discussion of this responsibility in the *Manual for Complex Litigation, Third*.⁵³

5. Settlement in cases involving pro se litigants

Cases involving a pro se litigant seem to be obvious candidates for disposition by settlement, but there is one serious risk for the judge: Pro se litigants will very likely turn to you for advice, and you may be tempted by their sometimes extreme neediness to help them. Within bounds, it is your responsibility to ensure that justice is done for these litigants, just as it is for those who can hire the finest counsel, but you must also protect your impartiality on behalf of all litigants in the case. Because this is a difficult line to walk, some judges do not assist in settlement negotiations in cases on their docket with pro se litigants. This is unfortunate, as early settlement would benefit many of these litigants. These cases present a very good opportunity to turn to one of your colleagues for assistance.

Consider

- referring cases with pro se litigants to another district or magistrate judge for settlement assistance; and
- establishing a regular exchange relationship with another district or magistrate judge to provide settlement assistance in pro se cases.

6. Ethical and other considerations in settlements

Whatever your approach to settlement discussions, you should ensure at all times that your impartiality and the court's credibility are not compromised. To preserve the integrity of the process, you may also have to monitor the conduct of counsel and their clients. Party efforts to seal documents as part of the settlement agreement, for example, will require your close attention, especially in cases that involve public safety. Counsel may also try to avoid additional discovery costs by seeking agreements that relieve their clients of further discovery. Or they may attempt to enter into side agreements that are not disclosed to other parties in the case. Ne-

53. MCL, Third, *supra* note 13, § 23.14.

gotiations regarding attorneys' fees may also require your attention, especially in civil rights cases, in which the losing side is liable for the prevailing party's attorneys' fees. These and other problems are given careful attention in the *Manual for Complex Litigation, Third*.⁵⁴

B. Alternative Dispute Resolution Procedures

Using methods other than conventional adjudication to resolve cases is an important aspect of litigation management. These methods are sometimes collectively referred to as alternative dispute resolution (ADR), but no single label adequately describes the full range of alternatives. During the 1990s, many federal district courts established court-annexed ADR programs, through which they provide one or more procedures, such as mediation, arbitration, early neutral evaluation (ENE), or summary jury trial.⁵⁵ The first step you should take in considering whether and how to use ADR is to become familiar with your court's local rules on the subject.⁵⁶ These rules may, for example, define the types of cases eligible for ADR, establish procedures by which cases are referred, and state how the neutral is to be appointed; they may even require that certain types of cases routinely go to ADR.

1. Some terms to keep in mind

Although ADR has been used by the courts for some time, confusion persists regarding some of the key terms in ADR. Below is a short glossary.

- *Mandatory versus voluntary.* These terms describe how proceedings enter the court ADR process; they do not describe what happens during the process or the nature of the outcome. If ADR use is based wholly on the consent of the parties, the referral is voluntary. If participation in ADR is required by the court, whether by an individual judge's order or by a court rule that certain types of proceedings will go to ADR, the referral is presumptively mandatory. In courts with programs that automatically refer some types of cases to ADR, such as the mandatory arbitration programs,

54. MCL, Third, *supra* note 13, §§ 23.22–23.24.

55. The first federal district court ADR program dates to the 1970s, when the Judicial Conference established three pilot arbitration sites. This program was expanded, by statute, to twenty courts in 1988. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. 9, § 901, Nov. 19, 1988, 102 Stat. 4663 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)). The greatest development of district court ADR was prompted by the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (1990; amended 1991, 1994, 1996, 1997, 2000). *See* Elizabeth Plapinger & Donna Stienstra, ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers (Federal Judicial Center and CPR Institute for Dispute Resolution, 1996) (summarizes history of federal court ADR developments and describes each district court ADR program) [**hereinafter ADR and Settlement Sourcebook**].

56. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (1998), discussed in *infra* section V.B.2, requires that each district court provide an ADR program and do so by local rule (§ 651(b)).

the court provides procedures for parties to seek exemption from the process.

- *Binding versus nonbinding.* These terms refer to the outcome of the ADR process. All federal court ADR programs are nonbinding, meaning the parties are not bound by any resolution unless they agree to it. For example, a mandatory arbitration program produces a nonbinding decision, which the parties can reject in favor of a trial de novo. A mediation, whether voluntary or mandatory, results in either a resolution agreed to by the parties or no agreement.
- *Court-annexed.* The term *court-annexed* generally refers to an ADR program authorized and managed by the court. Originally used to distinguish arbitration in the courts from private arbitration, the term is now sometimes used for all kinds of ADR programs based in the court. The terms *court-based* and *court-related* have the same meaning. Under the ADR Act of 1998, each federal district court must authorize the use of ADR and must devise and implement its own ADR program to encourage and promote use of ADR.⁵⁷ The court may arrange for an outside entity, such as a bar association, community mediation program, or state court ADR program, to provide ADR services to cases referred by the court.
- *Third-party neutrals.* Third-party neutrals are the individuals who conduct ADR sessions. Most federal courts have established panels of neutrals who have met qualifications requirements set by the court and encourage parties to use these neutrals. Most members of federal court panels have training and experience in the law. In addition to the panels, many courts rely on their magistrate judges to conduct settlement sessions, and a few courts employ mediators on staff.
- *Adjudicatory versus consensual processes.* Some ADR processes are adjudicatory, involving a third-party decision maker who renders a decision, albeit nonbinding, based on adversarial presentations. Others are consensual processes, in which the parties are the decision makers. Arbitration is the classic adjudicatory process, whereas mediation is the principal consensual process. Adjudicatory processes are dominated by the attorneys, focus on facts and rights, and result in a winner and a loser. Consensual processes give the parties the decision-making role, focus subjectively on needs and interests, and result in an accommodative resolution.
- *Interest-based versus rights-based processes.* Interest-based dispute resolution processes expand the legal discussion to look at underlying interests, enhance communications, deal with emotions, and seek inventive solutions or joint gains. The focus of these processes—of which mediation is the primary example—is on clarifying the parties’ real motivations or under-

57. 28 U.S.C. § 651(b) (Supp. 1998).

lying interests in the dispute. Rights-based processes, such as arbitration, narrow issues, streamline legal arguments, and predict or render judicial outcomes based on assessments of fact and law. ADR processes may contain both interest-based and rights-based elements, depending on the structure of the process and the style of the third-party neutral.

2. Authority to refer cases to ADR

Twice during the past several years, the Judicial Conference has endorsed the use of ADR in civil cases. In the 1995 Long Range Plan for the Federal Courts, the Conference stated, “District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources”⁵⁸ The Conference reiterated this policy in 1997 when it reported to Congress on the courts’ experiences under the Civil Justice Reform Act of 1990: “The Conference supports continued use of appropriate forms of ADR [The Judicial Conference] recommends that local districts continue to develop suitable ADR programs”⁵⁹

With passage of the ADR Act of 1998, all district courts must provide at least one form of ADR to litigants in civil cases.⁶⁰ Furthermore, the courts must require litigants to consider using ADR⁶¹ and are permitted to order litigants to use mediation and early neutral evaluation.⁶² These and other requirements of the Act, for example, that courts adopt procedures for making neutrals available and issue

58. Judicial Conference of the U.S., Long Range Plan for the Federal Courts 70 (1995).

59. JCUS CJRA Report, *supra* note 1, at 37–38. The Conference’s recommendations were based on findings from two studies of ADR conducted pursuant to the CJRA. The first, a study by the RAND Institute for Civil Justice of six ADR programs, “provided no strong statistical evidence that the mediation or neutral evaluation programs, as implemented in the six districts studied, significantly affected time to disposition, litigation costs, or attorney views of fairness” The study found that participants were generally satisfied with the procedures, and it concluded that ADR was not a panacea nor was it detrimental. James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act xxxiv (RAND Institute for Civil Justice 1996). The second study, of three ADR demonstration districts, found a significant reduction in disposition time in one district (data were insufficient in the other two to make a determination); attorney-estimated cost savings across the three districts; and high attorney satisfaction in all three districts. Donna Stienstra, Molly Johnson & Patricia Lombard, A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990, at 16–19 (Federal Judicial Center 1997) [hereinafter FJC Demonstration Programs Report].

60. 28 U.S.C. § 652(a) (Supp. 1998).

61. *Id.* Implementation of this requirement may fall to the individual judge; see your local rules for your court’s approach to this requirement.

62. *Id.* The ADR Act expressly requires consent of the parties for a referral to arbitration, excepting ten courts authorized in 1988 to compel participation in arbitration in certain kinds of cases (28 U.S.C. § 654).

rules on disqualification of neutrals,⁶³ will affect how you use ADR. Again, you should make sure you know your court's local rules.

For an analysis of authority to refer cases to ADR, in both district and bankruptcy courts, see a manual written for federal judges, *Guide to Judicial Management of Cases in ADR*.⁶⁴ This source also examines judicial authority to compel ADR use without party consent.⁶⁵

3. Deciding whether to refer a case to ADR and selecting an ADR process

Whether and how you refer a case to ADR will depend on a number of factors, including the nature of the case, the availability of ADR procedures, the ADR rules established by your court, and your own views about ADR.⁶⁶ If the decision whether to refer a case to ADR remains with the individual judge (i.e., your court does not require ADR in certain types of cases), you will have to decide what you want to accomplish through ADR. This might be an evaluation of the strengths and weaknesses of the case, a judgment on the merits of the case, or assistance with settlement discussions. You will then need to determine when you should refer the case to ADR and what type of ADR procedure will accomplish that purpose.

The effort to match cases to ADR processes has a long history, which we will not discuss here because so much has been written elsewhere. We recommend that you consult the *Guide to Judicial Management of Cases in ADR*.⁶⁷ That manual discusses the kinds of issues a judge might consider when deciding whether to refer a case to ADR, what type of ADR to use, whether to order use of ADR, when in the litigation to make the referral to ADR, and how to appoint a neutral.

It is important to keep in mind that most district courts are not authorized to order parties to use arbitration without their consent. The ADR Act of 1998 states that “[a]ny district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.”⁶⁸ Ten districts are exempt from this provision and may retain the mandatory arbitration procedures authorized by statute in 1988.⁶⁹

63. 28 U.S.C. § 653(a) and (b), respectively (Supp. 1998).

64. Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* § I.A (Federal Judicial Center 2001) [hereinafter ADR Guide].

65. *See id.* § V.A.

66. Over the years, both the propriety and efficacy of ADR in the federal courts have been vigorously debated. For a discussion of the pros and cons of ADR in the federal district courts, see Donna Stienstra & Thomas E. Willging, *Alternatives to Litigation: Do They Have a Place in the Federal District Courts?* (Federal Judicial Center 1995).

67. *See* ADR Guide, *supra* note 64, §§ III, IV.

68. 28 U.S.C. § 652(a) (Supp. 1998).

69. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. 9, § 901, 102 Stat. 4663 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994); now codified at 28 U.S.C. §§ 651–658 (2000)). The ADR Act of 1998 provides that “[n]othing in this

Among the many case and party characteristics that might affect your referral decision and that are discussed in the *Guide to Judicial Management of Cases in ADR* are the following:

- whether justice will be served;
- whether the litigants' interests will be protected and advanced;
- whether there are legal issues that must be resolved (such as statute of limitations or jurisdiction) before the case can move forward;
- whether the parties have already attempted settlement and failed;
- whether the parties are opposed to ADR;
- whether any of the parties are proceeding pro se;⁷⁰
- whether the projected costs of proceeding with litigation are disproportionate to the amount in controversy;
- whether the case involves few or many issues;
- whether the case involves an issue of public interest;
- what effect a pending dispositive motion may have; and
- whether the case is a class action, a mass tort action, or some other type of complex case.

Your referral decision will depend not only on the case's characteristics but on the types of ADR available to you. Each of the principal types of ADR presently used in the federal courts serves a different purpose. One or more may be suitable in a given case or at a particular stage in a case. The principal procedures—and thus the ones for which you are most likely to find a trained neutral—are mediation, arbitration, early neutral evaluation, and summary jury trial.

Depending on the needs of the particular case, any one of these procedures may be useful. The most frequently used form of ADR is mediation, perhaps because it can be used at most stages of the litigation and may require less intensive, and therefore less costly, preparation than more adjudicatory types of ADR.

a. Mediation

Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party—the mediator—assists the parties with settlement negotiations.

chapter is deemed to affect any program in which arbitration is conducted pursuant to section title IX of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702), as amended by section 1 of Public Law 105-53.” 28 U.S.C. § 654(d) (Supp. 1998). The Judicial Conference has consistently opposed authorizing additional courts to make mandatory referrals to arbitration.

70. Most federal district courts do not refer to ADR cases that are usually decided on the papers, such as Social Security and government collection cases, nor do they refer pro se cases. In the latter cases, courts are concerned about the pro se litigant's need for advice and the potential to compromise the ADR neutral. Recognizing the value of assisting these parties, however, some courts have set up procedures for referring these cases to magistrate judges, and two courts (the Northern District of California and the District of the District of Columbia) are experimenting with appointment of counsel for pro se litigants for the sole purpose of settlement discussions.

The mediator, who may meet jointly or separately with the parties, serves solely as a facilitator and does not issue a decision or make findings of fact. In the federal courts, the mediator is usually an attorney approved by the court, although in some courts magistrate judges, and occasionally district judges, bankruptcy judges, and other professionals, such as psychologists and engineers, may serve as mediators.

Mediation sessions are confidential and are structured to help parties clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options. Mediation is considered appropriate for most kinds of civil cases, and in a few courts referral to mediation is routine in most civil cases. The timing of the referral is variable and generally left to the judge. Conventional wisdom suggests that mediation will not be profitable until considerable discovery has been completed, but some courts have found that parties can benefit from earlier mediation.⁷¹

As mediation has developed, distinct mediation strategies have emerged. In classic mediation, the mediator's mission is purely *facilitative*—to help the parties find solutions to the underlying problems giving rise to the litigation. In this kind of mediation, mediator expertise in the process of mediation, rather than the subject matter of the litigation, is paramount. In the *evaluative* approach, the mediator uses case evaluation (i.e., an assessment of potential legal outcomes) as a primary settlement tool. Evaluative mediation is similar to early neutral evaluation and may be most effective if the mediator is an expert in federal litigation and in the subject matter of the case.

b. Arbitration

In court-based arbitration, one or more arbitrators listen to presentations by each party to the litigation, then issue a nonbinding judgment on the merits. Witnesses may or may not be called, and exhibits are generally submitted. The arbitrator's decision addresses the disputed facts and legal issues in the case and applies applicable legal standards. Either party may reject the nonbinding ruling and request a trial de novo. As an adversarial, rights-based process, arbitration may be particularly helpful when a decision on the merits appears to be important but the dollar value of the case makes trial uneconomical. Arbitration is believed to be particularly suited to contract and tort cases involving modest amounts of money, for which litigation costs are often disproportionate to the amount at stake. Ten district courts are authorized to order parties to use arbitration; in all other districts, referral is permitted only with the consent of the parties.⁷²

71. For example, in the Western District of Missouri, mediation occurs approximately thirty days after the answer is filed (i.e., very early in the case); 11% of attorneys thought the mediation occurred too early, compared with 11% and 24% in two districts in which mediation occurred near or after completion of discovery. See FJC Demonstration Programs Report, *supra* note 59, at 238.

72. 28 U.S.C. § 654 (Supp. 1998).

c. Early neutral evaluation

Early neutral evaluation (ENE) is a nonbinding ADR process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely court outcome. The ENE session is generally held before much discovery has taken place.

In ENE, a neutral evaluator, usually a private attorney with expertise in the subject matter of the dispute, holds a confidential session with parties and counsel early in the litigation to hear both sides of the case. The evaluator then helps the parties clarify arguments and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a nonbinding assessment of the merits of the case. Depending on the goals of the program, the evaluator may also mediate settlement discussions or offer case planning assistance. Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes.

d. Summary jury trial

The summary jury trial is a nonbinding ADR process presided over by a district or magistrate judge and designed to promote settlement in trial-ready cases. The process provides litigants and their counsel with an advisory verdict after an abbreviated hearing in which evidence is presented to a jury by counsel in summary form. Witnesses are generally not called. The jury's nonbinding verdict is used as a basis for subsequent settlement negotiations. If no settlement is reached, the case returns to the trial track.

Some judges use this resource-intensive process only for protracted cases; others use it for routine civil litigation in which litigants differ significantly about the likely jury outcome. Although the format of the summary jury trial is determined by the individual judge more than in most ADR procedures, summary jury trials are typically used after discovery is complete. The advisory verdict is delivered by a jury selected from the court's regular jury pools. A variant of the summary jury trial is the summary bench trial, in which the presiding district or magistrate judge issues an advisory opinion.

In a minitrial or minihearing, a third form of summary trial, the attorneys present their cases to high-level representatives of the parties who have authority to settle the case. The informal hearing may be conducted outside the courthouse, and generally no witnesses are called. After the presentations, the representatives of the parties meet to discuss settlement. The role of the court may be limited, unless the parties wish to have a judge preside over the hearing. Minitrials are uncommon and are generally used in large cases in which all parties are business entities.

4. Selecting and compensating an ADR neutral

You may have several options for providing ADR services to civil cases you refer to ADR. Your court may, for example, have a panel of non-court neutrals who are

trained in specific ADR procedures.⁷³ Your court may also use its Article III judges in rotation as settlement judges; it may have designated its magistrate judges as the settlement experts; or your district may be one of the few that has a trained mediator on staff. Another option is to refer cases to ADR providers in the private sector.

Before deciding whether an outside neutral, as compared with an internal settlement judge, is the best choice, consult your local rules to see if they give you discretion in how the neutral is selected. If they do, you might *consider* the following issues:

- *Cost.* Unless the outside neutral serves pro bono, use of another district or magistrate judge for settlement discussions will reduce the cost to the litigants; use of an outside neutral, however, frees in-court personnel to attend to other duties.
- *Neutrality.* If you are concerned about loss of your neutrality, or even the appearance of such a loss, an individual not connected with the court may provide the neutrality you want.
- *Expertise.* Outside neutrals may be able to provide subject matter expertise not available in court. Outside neutrals also are more likely to be trained in the specific ADR techniques you or the parties wish to use for the case.⁷⁴
- *Availability.* In courts with crowded dockets, outside neutrals may be able to give more individual attention to a case, or get to it sooner, than court personnel.
- *Time.* Some ADR procedures, mediation in particular, can take several hours for a straightforward case, one or more days for a more difficult case, and many days over a long period of time for large or complex cases. Outside neutrals may have more time to give unless ADR is a routine part of the responsibilities of in-court personnel.

If at all possible, you should not personally select the ADR neutral; to do so creates a risk that you will appear biased or that you are channeling profitable work to favored providers. If your court has a roster of neutrals, it should also have procedures for party selection of the neutral. In some courts, the ADR staff selects the neutral. For a helpful discussion of the issues regarding appointment of the neutral, see the *Guide to Judicial Management of Cases in ADR*.⁷⁵

When an outside neutral is used for dispute resolution, the neutral and the parties will have a keen interest in whether the neutral will receive a fee for his or

73. Many courts have established such panels, which are usually made up of attorneys from the local bar who have met qualifications requirements set by the court. See **ADR and Settlement Sourcebook**, *supra* note 55, at 29–56 tbls.3–7. The ADR Act of 1998 requires that a court make **neutrals available** and ensure that they are qualified in the type of ADR procedures offered by the court. 28 U.S.C. § 653 (Supp. 1998).

74. See, e.g., ADR Guide, *supra* note 64, § VI.

75. *Id.* § VI.

her services. The ADR Act of 1998 leaves to the district courts the decision whether to compensate neutrals, but it requires the courts to establish the amount of compensation, if any, in conformity with Judicial Conference guidelines.⁷⁶ The Judicial Conference guidelines require all district courts to establish a local rule or policy on compensation, whether neutrals serve pro bono or for a fee.⁷⁷ You should, therefore, look to your local rules for guidance. You may also want to consult the *Guide to Judicial Management of Cases in ADR*.⁷⁸

Parties will also have an interest in the qualifications and standards of conduct expected of court ADR neutrals. The creation of a court panel of neutrals is beyond the scope of this manual but is a matter that judges should be concerned about if they or the parties need to look to such a panel for a neutral. For useful information about designing a sound court ADR program and establishing standards for neutrals, see the guidelines approved by the Court Administration and Case Management Committee of the Judicial Conference.⁷⁹

5. Issuing a referral order

After you have decided to refer a case to ADR, you should decide how to formulate your referral order. Your court may have a standing referral order.

If you need to prepare your own referral order, *consider* including the following items:

- identification of the type of ADR to be used;
- identification of the neutral or a description of the process the parties should use to select a neutral;
- a statement on whether the neutral serves pro bono or for a fee and guidelines for compensation of the neutral;
- instructions on whether the parties must submit materials, such as a statement of positions and settlement status, to the neutral;
- guidelines on who must attend the ADR session, whether settlement authority must be present, and whether good faith participation is required;
- deadlines that must be met for initiating and completing the ADR process, as well as instructions on whether other case events, such as discovery, must go forward as scheduled or are tolled;

76. 28 U.S.C. § 658(a) (Supp. 1998).

77. Administrative Office of the U.S. Courts, 1 Guide to Judiciary Policies & Procedures, ch. III (November 15, 1999).

78. See ADR Guide, *supra* note 64, § VII.

79. Court Administration and Case Management Comm., Judicial Conf. of the U.S., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997); reproduced *infra* at Appendix B [hereinafter CACM Guidelines].

- instructions regarding confidentiality of the proceedings and communications between the judge and the neutral;
- instructions about how to end the ADR process (e.g., where to submit a status report, if any);
- instructions about whom to contact if problems arise during the ADR process; and
- a statement about whether sanctions might be imposed and under what circumstances.⁸⁰

It is particularly important that all persons involved in an ADR process, including the referring judge, have a clear understanding of two matters: (1) any ADR deadlines and how the ADR process will fit into the regular litigation schedule and (2) what the limits of any confidentiality provisions are, including who may speak with you and on what matters. The first is for the most part a matter of clarity about deadlines and whether other pretrial events will go forward during the ADR process. The second is a much more complex matter, with pitfalls for the parties, the neutral, and the judge. You should check your local rules, which must, in compliance with the ADR Act of 1998, provide for confidentiality in ADR proceedings.⁸¹ See also the *Guide to Judicial Management of Cases in ADR* for an in-depth analysis of the limits of existing rules on confidentiality in court-based ADR programs.⁸²

6. Managing cases referred to ADR

After you have referred a case to ADR, you may need to make decisions about a number of issues, such as whether discovery will be stayed or go forward; what your role should be in monitoring the ADR process; whether you will engage in ex parte communications with the neutral; and how the ADR process should be concluded. You may also have to resolve issues, such as a party who refuses to attend the ADR session; a neutral who has failed to disclose a conflict of interest; a request for public access to ADR sessions; or a motion to admit at trial information disclosed during ADR. These kinds of problems arise infrequently in cases referred to ADR, but when they do they can be messy and time-consuming. For a comprehensive discussion of how to handle such problems, see the *Guide to Judicial Management of Cases in ADR*.⁸³ The guide is especially helpful in identifying techniques you can use to prevent such problems. You should also consult your

80. For a more extended discussion of the referral order and how it can help forestall problems in cases referred to ADR, see ADR Guide, *supra* note 64, § IX.

81. 28 U.S.C. § 652(d) (Supp. 1998).

82. ADR Guide, *supra* note 64, § VIII and app. E.

83. *Id.* § X.

local rules, which may, pursuant to the ADR Act of 1998, have well-established procedures for handling some of these matters.⁸⁴

84. Issues such as these are generally considered a part of ADR program design. For a summary of the rules and procedures of federal district court ADR programs, *see* **ADR and Settlement Sourcebook**, *supra* note 55. A helpful guide for designing court ADR programs is Elizabeth Plapinger & Margaret Shaw, *Court ADR: Elements of Program Design* (CPR Institute for Dispute Resolution 1992). You should also consult the Court Administration and Case Management Committee's guidelines on establishing an effective court ADR program; CACM Guidelines, *supra* note 79.

VI. FINAL PRETRIAL CONFERENCE AND TRIAL PLANNING

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The final pretrial conference provides yet another opportunity for you to manage and shape the case. This conference (also known as a “docket call” in some districts) can help you to improve the quality of the trial by

- reminding counsel of your procedures and expectations;
- stimulating counsel to prepare for trial;
- reducing the length of the trial by eliminating unnecessary proofs;
- avoiding surprise;
- ensuring the orderly and succinct presentation of the case; and
- anticipating and resolving potential trial problems.

Moreover, disclosure of trial evidence at the final pretrial conference helps promote settlement.

Some judges dispense with the final pretrial conference and order in routine cases. Some treat it as little more than a scheduling event. Others use it as a thorough rehearsal for the trial. However, because even seemingly simple cases can get out of control, resulting in avoidable cost and delay, you should consider holding a final pretrial conference unless there is clearly no need for it. More broadly, you

may view this pivotal case monitoring point as a necessary final review for ensuring that your policy and procedural guidance, designed to serve your particular management and information needs, has been followed.

A. Planning the Final Pretrial Conference

The final pretrial conference is intended to “improve the quality of the trial through more thorough preparation” (Fed. R. Civ. P. 16(a)(4)) and to “facilitate the settlement of the case” (Fed. R. Civ. P. 16(a)(5)). To those ends, Rule 16(d) provides that

- any pretrial conference shall be held as close to the time of trial as is reasonable under the circumstances;
- the participants shall formulate a plan for trial, including a program for facilitating the admission of evidence; and
- the conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties.

If the purposes of the conference are to be achieved, it is critical that trial counsel, and preferably lead trial counsel, attend and participate. The Rule 16 subjects previously discussed (see *supra* section II.C.8) provide a general frame of reference for the final pretrial conference. The conference’s scope will depend on the nature, number, and complexity of the issues; the number of witnesses and volume of documentary evidence; and the experience and competence of the attorneys—in short, on what is needed under the circumstances to ensure a fair and efficient trial.

1. Timing and arrangements

In planning the final pretrial conference, *consider*

- setting the conference date sufficiently in advance of the trial date to allow for the possibility of at least one more final conference, in the event it is needed;
- holding the conference when discovery is substantially completed and a firm trial date has been set and is near;
- requiring the parties to be present;
- holding the conference where it is likely to be most productive (either in chambers or in open court); and
- having a transcript made of the conference for future reference in guiding the course of the trial.

2. Preparation for the final pretrial conference

Adequate preparation by the judge and counsel is necessary for the final pretrial conference to be productive. Pretrial preparation requirements should be adapted

to the needs of the particular case to ensure full exchange of relevant information and to improve the quality of the trial without imposing undue burdens. You should consult local rules for applicable provisions, realizing that modifications may be desirable to meet the particular needs of the case. For examples of pretrial orders, see Appendix A, Forms 9, 25, 35–41.

Consider requiring a preconference meeting of counsel for the purpose of preparing a joint pretrial statement covering an agenda of key topic areas to assist you in conducting the conference.

Consider having counsel exchange and submit the following:

- requested jury voir dire questions;
- lists that identify all witnesses and the subject matter of the witnesses' testimony, and that separately identify those witnesses the parties will definitely call and those they may call only if needed;
- lists that identify each exhibit the parties will definitely offer and those exhibits they may offer only if needed;
- copies of all proposed exhibits;
- brief memoranda on critical legal issues, as needed;
- statements of facts believed to be undisputed;
- motions in limine and any opposition thereto;
- deposition and discovery excerpts and any opposition thereto;
- proposed jury instructions that define the issues, that is, state the elements of each claim and defense; and
- proposed verdict forms, including special verdict forms or juror interrogatories if requested (under Rule 49), and proposed findings of fact and conclusions of law in non-jury cases.

While each of the above suggestions may not be important in every case coming before you, the suggestions regarding jury instructions and verdict forms are more generally useful. Preparing jury instructions and verdict forms is a useful discipline for attorneys, requiring them to analyze their case and, more critically, the sufficiency of the available proof.

3. Subjects for the conference

a. In general

According to Rule 16(d), the participants at the final pretrial conference should “formulate a plan for trial, including a program for facilitating the admission of evidence.” Rule 16 offers a checklist of relevant subjects appropriate for consideration at the final pretrial conference; you may also want to consult the *Manual for Complex Litigation, Third*.⁸⁵ You or counsel may suggest other subjects. The final pretrial conference is a significant stage of pretrial case management and a

85. MCL, Third, *supra* note 13, § 40.3.

significant monitoring point for you to ensure that the case is trial or settlement ready. Your order imposing on the parties the burden to prepare and to appear to discuss the case at this final stage should also provide notice to the parties (through the order itself or an attached information package) as to what you wish them to prepare and the level of detail you require. The final pretrial conference is as significant as the initial Rule 16 conference; your scheduling order for this conference should reflect its importance. For illustrative procedures and orders, see Appendix A, Forms 9, 25, 35–41.

For additional matters worthy of suggestion to counsel and emphasis in your final pretrial conference order, *consider* the following approaches:

- Arrive at a final and binding statement of the factual and legal issues to be tried and encourage stipulations.
- Exclude evidence bearing on uncontested matters and evidence that is cumulative or unnecessary.
- Distribute your own rules of courtroom decorum. As legal practice has become more impersonal and professional courtroom courtesies have declined, many judges have developed their own rules of courtroom decorum or adopted those of others in their district. You may distribute such rules at the final pretrial conference or post them on your district's Web site.
- Inquire whether the parties still want a jury trial. Some jury demands are filed perfunctorily early in the case; the parties may in the meantime have changed their minds without having advised the court.

b. Preliminary considerations

A primary task that confronts you in organizing a successful pretrial conference is deciding how you will address a number of procedural considerations that will arise at the start of or during the course of the conference. As has been emphasized already, your early decisions on and notice to counsel regarding how these preliminary matters will be dealt with will save time and expense and will promote effective control of both the conference and trial proceedings.

Consider the following approaches:

- Hear already submitted motions in limine and make rulings at the conference, when possible, on the admissibility of evidence, the qualification of expert witnesses, claims of privilege, and other threshold matters (see Fed. R. Evid. 104(a)). The presubmission of motions in limine for rulings at the final pretrial conference can save time and provide another opportunity to set the stage for and pace of subsequent pretrial activities. Consider an admonition to counsel that any later motions in limine are considered waived without a strong showing that the matter was not one counsel would have known of in advance.
- Receive exhibits into the record.

- Receive and rule on matters concerning the mode or order of proof (see Fed. R. Evid. 611(a)).
- Bifurcate potentially dispositive issues.
- Review the numbers and purposes of proposed witnesses within the triable issue framework of the trial, challenging as necessary for redundancy or duplication, and imposing limits on the total number of witnesses each side may offer.
- Require agreement by counsel (to be included in your final order) that all documents are considered authentic if produced by parties, unless a specific document is objected to, to avoid unnecessary custodial witnesses or certification of authentication.
- Require narrative written statements for presenting, subject to cross-examination, the direct testimony of certain witnesses in bench trials and of expert witnesses in jury trials and avoiding the use of depositions in trial (see Rule 43 and Fed. R. Evid. 611(a)). Many judges feel that joint statements by counsel as to what a particular witness would say under oath are preferable, in terms of trial time, to depositions in trial.
- Have counsel list, by page and line for review, depositions to be used (i.e., those that are not amenable to the above procedure).
- Entertain motions for postponing the trial date only if submitted with a certification of client consent.⁸⁶ Only a few districts require client consent for continuances; however, because trial date continuances can have a severe impact on a judge's calendar, a different view may be warranted. In addition, because trial date certainty gives credibility to your calendar, you may want to use more stringent criteria in cases in which multiple continuances have been requested and cause exists to question the sincerity of counsel.
- Explore the possibility of settlement once more. The final pretrial conference presents one last opportunity to discuss settlement with the counsel and the parties, who may now realize for the first time the actual burdens of going forward. For those cases that do not settle, actual trial time may be shortened as a consequence of frank settlement discussions at this time.
- Clarify other procedural matters, such as (1) using video depositions (edited to limit playing time) and deposition summaries (in lieu of reading the transcript) at trial; (2) using advanced technologies in the presentation of evidence; (3) preinstructing the jury; and (4) approving forms and procedures for return of the verdict.

86. See, e.g., U.S. District Court for the District of Idaho, The Civil Justice Reform Act of 1990 Expense and Delay Reduction Plan, § II.E at 4 (1990); U.S. District Court for the Middle District of Louisiana, Civil Justice Reform Act Plan, art. III, Motions Practice 4 (1993); U.S. District Court for the Northern District of Texas, Expense and Delay Reduction Plan, § V at 8 (1995).

c. Expert witnesses

Management of expert witnesses presents another opportunity to avoid the often excessive reliance upon redundant or duplicative expert testimony, which not only wastes trial time but represents an extremely expensive portion of the parties' litigation budget. As the trial judge, you are uniquely placed to question expert witness justifications in an area in which the parties themselves may be technically unprepared to challenge their own counsel.

In connection with the final pretrial conference, *consider*

- ruling on the qualifications of expert witnesses, the admissibility of particular expert evidence, the use of hypothetical questions, and the requisite evidentiary foundations (see Fed. R. Evid. 104(a));
- entering a final pretrial order barring experts not previously identified and expert testimony at variance with that expert's prior deposition testimony, written report, or statement, unless preceded by proper notice and prior court approval;
- establishing procedures to enhance jury comprehension (see *infra* section VI.B.1.c.);
- determining whether to appoint a court expert (see Fed. R. Evid. 706); and
- limiting the number of experts permitted to testify (see Fed. R. Evid. 702).⁸⁷

While it may appear easier to defer to the judgments of counsel regarding experts, it is important to reemphasize that you are the guardian of economy and efficiency in the use of public trial resources. Consider whether more than one expert per side is needed and should be permitted to testify with respect to any single scientific discipline; different disciplines may require different qualifications and therefore may call for different experts. See also *infra* section VII.B for a discussion of expert witnesses generally.

d. Exhibits

Limiting the number of exhibits and shaping those ultimately presented at trial is an important part of structuring an effective trial and preserving juror (and judge) patience. Duplicative, redundant, or unclear exhibits not only waste limited trial time, but may also prejudice the case of the presenter, who is often the last to recognize this.

87. See, e.g., U.S. District Court for the Western District of Wisconsin, Civil Justice Expense and Delay Reduction Plan, § V.C. at 8 (1991).

Consider

- controlling the volume of exhibits by limiting their number and forcing counsel to justify their independent utility with regard to specific issues or proofs (see Fed. R. Evid. 611(a)(2));⁸⁸
- having counsel redact voluminous exhibits;
- asking counsel to premark exhibits and provide copies of them to the court;
- insisting that counsel rehearse their handling of visual and other aids to ensure their dexterity with such aids in the courtroom; and
- identifying special or potentially prejudicial exhibits and developing protocols for their presentation.

e. Jury issues

Jurors are too often the forgotten actors in the litigation process. While no one consciously wishes to offend or abuse them, they are often subjected to seemingly arbitrary and unexplained delays, excluded from private sidebar discussions, and presented with confusing or arcane instructions in the course of trial. You are their only consistent champion and defender. You should highlight for trial counsel the risks they face in not considering juror needs from their first contact with a trial panel at voir dire through the trial stages, when fatigue and impatience can set in.

Aside from these general admonitions, *consider*

- screening prospective jurors by having them complete questionnaires in advance in cases in which a large jury pool is necessary and voir dire could be lengthy (see, for example, Appendix A, Forms 42 and 43);
- clarifying voir dire procedures generally (see Rule 47; see, for example, Appendix A, Forms 41, 44, and 45);
- establishing procedures for jury selection, including the number of jurors to be seated and the number of peremptories per side, as well as the procedure for their exercise (see Rule 48; see, for example, Appendix A, Forms 44–46);
- clarifying that all jurors remaining at the end of the presentation of evidence will deliberate (see Rule 48);
- determining how complex evidence will be presented to enhance jury comprehension;
- scheduling the final submission of jury instructions;
- drafting brief, well-organized instructions using clear and plain language to maximize jury comprehension (for guidelines, see Appendix A, Form 47);

88. *See also id.*

- proposing a stipulation that a nonunanimous verdict may be returned by a specified number of jurors (see Rule 48); and
- preparing special verdict forms and considering whether to use seriatim verdicts (jury decides one issue at a time), general verdicts with interrogatories (see Rule 49), or special verdicts (see Rule 49).

In discussing juror-related issues, you can probe to determine if larger juror panels must be summoned for voir dire owing to the nature of the case or its complexity. Special precautions may be necessary to qualify a larger number of expected panelists. If many prospective jurors are likely to be ineligible or lengthy voir dire may be necessary, juror questionnaires can be mailed to the venire in advance with the assistance of the clerk's office. Whether the questionnaires are completed and returned in advance or completed at the courthouse, sufficient time needs to be allowed for their review and screening by counsel before voir dire.

Special verdicts and interrogatories can be useful devices to reduce the risk of having to retry the entire case. You can, with counsel, make the initial determination that complex issues raised and addressed in the proposed instructions lend themselves to special verdicts. Such verdicts also make possible alternative outcomes in cases in which the law is not settled or the law has changed but its retroactive application is in doubt (e.g., as under the Civil Rights Act of 1991). Because the preparation for special verdicts and interrogatories requires care to avoid inconsistencies or conflicts, however, you should obtain the attorneys' approval as to form.⁸⁹

f. Scheduling and limiting trial events

One of the most direct and important ways your leadership can be exercised in the course of the final pretrial conference is in discussions of scheduling of trial events and the actual trial time likely to be required by the case. Scheduling trial events and limiting trial time through consultation with counsel is an exercise of authority well within the traditional discretion of the trial judge.⁹⁰ Counsel should be forced to estimate, and you can subsequently hone and accede to, time necessary for each major trial event from opening statements through closing arguments. In addition, the scheduling and timing of many other subevents can come into play.

Consider the following for discussion:

- the overall scheduling of the trial and of each trial day;

89. See MCL, Third, *supra* note 13, § 22.45.

90. Fed. R. Civ. P. 16(c)(15) (listing discussions of time limits as a proper topic for pretrial conferences); *Gen. Signal v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1508–09 (9th Cir. 1995); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir.), *cert. denied*, 513 U.S. 1014, 115 S. Ct. 573, 130 L. Ed. 2d 490 (1994); *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1408 (7th Cir. 1991); see generally Pierre Leval, *From the Bench*, 12 Litig. 7 (1985) (discussing approaches to setting trial time limits).

- the length, scope, and content of opening statements;
- the length, scope, and content of closing arguments;
- the number of hours each side may have to conduct examination and cross-examination;
- the order of cross-examination and designation of cross-examiners in multiparty cases; and
- the order of final arguments and jury instructions (see Rule 51).⁹¹

Setting time limits requires careful consideration of the views of counsel (who know the case), of the allocation of burdens among the parties, and of how the respective cases will be presented (e.g., one side may depend on cross-examination of the opponent's witnesses to present much of its case). Naturally, this should be done in full consultation with counsel.

You may begin the process by getting consensus on the total time to be consumed, in days and hours. The starting point for that figure should be the original estimates presented by counsel on the cover sheet accompanying the original filing or at the earlier Rule 16 conference. From that total figure (further refined in the course of the discovery and pretrial process), time can be assigned to the various events of the trial process: opening statements, testimonial and exhibit presentation, direct and cross-examination, closing statements, and so forth. You may also consider specifying that any sidebar conferences (if they are allowed) will be charged against the time of the requester. It may be helpful to divide each day of counsel's time estimate into two sessions (morning and afternoon) on forms representing each trial day and have counsel plan their daily events and the divisions of total trial time between them; the results can be made part of the final pretrial order (see, for example, Appendix A, Form 44).

4. The final pretrial order

Rule 16(e) requires entry of an order reciting all actions taken at the final pretrial conference; that order "shall control the subsequent course of the action" and may be modified only "to prevent manifest injustice." The purpose of the order is to memorialize the actions and rulings at the conference; the order should be clear and comprehensive, covering all important matters (such as those discussed above). Trial counsel should understand that no deviation or modification will be permitted except "to prevent manifest injustice."⁹²

You may dictate the order on the record at the end of the conference, or you may direct counsel to prepare it on the basis of the record of the conference. For illustrative final pretrial orders, see Appendix A, Forms 9, 25, 35–41, and 44.

91. See, e.g., U.S. District Court for the Northern District of Indiana, Civil Justice Expense and Delay Reduction Plan, § 2.05(c) at 16 (1993); U.S. District Court for the Northern District of Texas, Civil Justice Expense and Delay Reduction Plan, § VII at 9 (1993).

92. Fed. R. Civ. P. 16(e). See also MCL, Third, *supra* note 13, § 41.7.

B. The Trial Phase

1. Jury trials

a. In general

Although case management tends to focus on the pretrial phase of litigation, management of the trial is equally important. Excessively lengthy and costly trials can deny parties access to civil justice, clog the court system, impose undue burdens on jurors, and diminish public respect for, and confidence in, the justice system. Judges have broad inherent discretion to manage the trial of the cases assigned to them. The following section addresses management techniques at trial. Not all of them will be appropriate for any given trial, but all are worthy of your consideration in the process of arriving at a suitable trial management plan. For illustrative trial guidelines and orders, see Appendix A, Forms 4, 44, and 48. For a discussion of high-visibility trials, see *infra* section VII.C.

b. Techniques for trial management

The lawyers, not the judge, must try the case, but there is much you can do to improve the quality of the trial and reduce its length and cost.

Consider

- streamlining voir dire procedures generally;⁹³
- establishing procedures for conducting voir dire, for exercising peremptory challenges, and for giving opening statements;
- having counsel submit proposed voir dire questions for use by the judge and preparing for the voir dire examination in advance to ensure that all important points will be covered;
- conducting short daily conferences with counsel to identify upcoming witnesses and exhibits, to anticipate problems (such as objections to evidence, witness unavailability, or other potential causes of interruption or delay of the trial), and to assess the progress of the case generally;⁹⁴
- controlling the volume of exhibits (e.g., by using summaries or redacted documents or imposing limits on the number of exhibits);⁹⁵
- limiting the reading of depositions by use of a stipulated summary or agreed-on statement of the substance of a witness's testimony;⁹⁶
- avoiding unnecessary proofs by narrowing disputes or by encouraging stipulations to such matters as the foundation for exhibits; and

93. See MCL, Third, *supra* note 13, § 22.41. For civil trial matters generally, see Benchbook, *supra* note 43, §§ 6.03–6.07.

94. See *id.* § 22.15.

95. See *id.* § 22.13.

96. See *id.* § 22.33.

- minimizing or avoiding sidebar conferences, arguments, and other proceedings that disrupt the trial day.

You should let counsel know in advance the procedures you use for conducting voir dire and exercising challenges. Because lawyers tend to attach more importance to voir dire than judges do, you should consider allowing counsel a reasonable but limited time to supplement judge-conducted voir dire.

Presenting deposition testimony by reading depositions can save litigant costs, but it can bore jurors, so readings should be limited to key testimony. This practice should also be balanced against the reasonable desire on the part of counsel to allow a key witness to “speak the case” to a jury (at least in part through deposition testimony). Requiring that counsel, in advance of trial, designate or stipulate to summaries or depositions to be offered at trial can promote the effective and efficient use of these materials at trial.

For additional suggestions for streamlining trials, see the discussion of the pretrial conference in *supra* section VI.A.3.

c. *Assisting the jury during trial*

Sound trial management will improve jurors’ performance, promote juror satisfaction with their service, and enhance the court’s public image. In conducting the trial, you should ensure that jurors are treated as important participants in the trial and assist them in carrying out their functions.⁹⁷

Consider

- instructing the jury on trial procedure and the issues to be decided;⁹⁸
- permitting jurors to take notes;
- permitting jurors to ask questions (in writing, submitted through the judge) when appropriate, under adequate safeguards;⁹⁹
- discouraging or delaying sidebars whenever possible until the next recess;
- encouraging the use of techniques to enhance jury comprehension,¹⁰⁰ such as (1) jury notebooks listing witnesses and containing critical exhibits, glossaries, and so forth; (2) overhead projectors to display an exhibit to the jury as a witness testifies about it; (3) charts with pictures of witnesses; (4) summaries of exhibits; (5) the use of plain English by lawyers and witnesses; (6) interim summations (or supplemental opening statements) by counsel; and (7) interim explanations of legal principles (with counsel comment or objection) to prepare jurors for closing instructions;¹⁰¹
- giving jurors a copy of your charge;

97. See generally William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575 (1991). See also *Called To Serve* (Federal Judicial Center 1995) (FJC video no. 2980-V/95).

98. See MCL, Third, *supra* note 13, § 2.431.

99. See *id.* § 22.42.

100. See *id.* § 22.3.

101. See *id.* § 22.433.

- determining whether to instruct jurors before or after closing arguments (see Rule 51); and
- permitting reasonable read-backs of trial testimony when requested by the jury during deliberations.

Many judges believe that the jury can make better use of closing arguments after having first heard the judge's instructions. Note also that some judges have gained valuable insights from exit questionnaires completed by jurors, enabling them to improve their trial management techniques.¹⁰²

The comfort of sitting jurors affects their performance, and there are ways you can easily enhance their comfort. You should, for example, avoid calling jurors prior to the time they are to sit, explain any delays, and observe break times and day-end times. You can also reinforce the importance of jurors' service by thanking them for their time and sacrifice at the end of trial.

You may receive requests from counsel to speak to the jurors after the verdict. While such contacts may be prohibited for cause (e.g., posttrial motions), they may also be controlled (or denied entirely) by local rule. If such contacts are neither controlled nor prohibited, your decision whether to permit them should be guided by the jurors' comfort and the circumstances of the case; you should caution jurors that they may refuse any requests.

2. Bench trials

a. *In general*

Avoiding cost and delay is no less important in bench trials than it is in jury trials, even though the absence of a jury eliminates some requirements. However, the lesser formality of bench trials should not be allowed to lead to casual proceedings and a cluttered record, which will make the case more difficult to decide and more difficult to review on appeal.

b. *Techniques for trial management*

Many of the trial management techniques applicable to jury trials are relevant to bench trials as well.

In addition, *consider* the following approaches:

- Have direct testimony of witnesses under the parties' control submitted and exchanged in advance in narrative statement form (see Rule 43; for examples of instructions regarding submission of direct testimony in writing, see Appendix A, Form 49).
- Impose limits on testimony and exhibits to avoid creating an excessively long record that will make the case more difficult to decide.
- Adopt trial procedures to ensure that you understand the evidence as it comes in rather than leaving it to be studied after the case is submitted.

102. See generally D. Brock Hornby, *How Jurors See Us*, 14 Me. B.J. 174 (1999).

Such procedures include asking questions of witnesses to enhance understanding, having opposing witnesses appear in court at the same time for back-to-back questioning, and having opposing experts confront each other to identify and explain the bases of their differences of opinion.

If substantial factual or technical material needs to be presented, and the credibility of the material is not a significant factor, consider allowing the receipt of direct testimony into the record by written statements exchanged in advance and subject to cross-examination at trial. This approach can reduce costs and expedite the trial and decision, provided you read the testimony in advance of trial. Opinions differ regarding whether this technique may be used without the parties' consent.¹⁰³

Although exclusionary rulings are of less importance in bench trials than in jury trials, receiving evidence into the record indiscriminately may result in a record that is difficult for you to manage and digest in the decision-making process. One way to control the volume of evidence is to receive no exhibit unless the trial counsel offering it represents that he or she has personally read it.

c. Deciding the case

Bench trials can be more burdensome than jury trials because judges may have trouble finding time to decide the case once it is submitted, and cases become more difficult to decide as they grow cold with the passage of time. Many judges follow the practice of taking a case under submission only if it cannot be decided from the bench and then setting a deadline on their calendar for its decision. A prompt decision saves resources, increases the parties' and public's satisfaction with the court, and eases the judge's burden.¹⁰⁴

Consider

- having counsel submit proposed findings of fact and conclusions of law before trial begins, enabling you to accept or reject findings as the trial progresses (see Fed. R. Civ. P. 52);
- having counsel argue the case immediately following the close of the evidence (as in a jury trial) instead of using posttrial briefings;
- if briefing is needed, having briefs submitted before trial rather than after;
- deciding the case, whenever possible, promptly after the closing arguments by dictating findings of fact and conclusions of law into the record; and

103. See MCL, Third, *supra* note 13, § 22.51. See also Charles R. Richey, *A Modern Management Tool for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 72 Geo. L.J. 73 (1983).

104. See generally MCL, Third, *supra* note 13, § 22.52 and Benchbook, *supra* note 43, § 6.02.

- adopting your own time standards for reaching decisions (e.g., within 120 days of the close of evidence).¹⁰⁵

Your fact-finding can be greatly aided by the use of counsel-prepared materials, such as findings of fact and conclusions of law, as well as through trial briefs. With regard to the former, you may find it helpful to require that each finding be brief, noncontentious, and limited to one fact. Some judges also require that counsel mark the opponent's proposals to indicate which ones are contested and which are not (for an example of this approach, see Appendix A, Form 9).

Whatever you decide about the adoption of time standards for reaching decisions in bench trials, you should be aware that under the Civil Justice Reform Act of 1990, the Director of the Administrative Office must prepare semiannual reports listing all bench trials undecided for six months or more.¹⁰⁶

105. *See, e.g.*, U.S. District Court for the Western District of New York, Civil Justice Expense and Delay Reduction Plan, § II.11 at 11 (1993); U.S. District Court for the Middle District of Louisiana, Civil Justice Reform Act Plan, art. V(5) at 6 (1993).

106. *See* Admin. Office of the U.S. Courts, 3 Guide to Judiciary Policies & Procedures ch. D-IV (providing detailed guidelines for preparing reports on bench trials submitted).

VII. SPECIAL CASE MATTERS

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Although most of the cases on your docket are likely to be of the routine sort that are the subject of this manual, you will undoubtedly be assigned cases whose demands on you and others will go well beyond those of the ordinary case. In this chapter we discuss some of these types of cases, including class actions, capital habeas cases, and cases that attract intense media and public attention. Our goal in these discussions is not to give a full treatment of complex or unusual litigation, but only to offer some basic case management guidance, with the expectation that you will turn to other, readily available sources for more information.

In this chapter we also discuss two kinds of cases—prisoner litigation and pro se cases—that appear much more frequently on your docket and can be managed with many of the principles and techniques discussed in the preceding chapters.

In some important ways, however, these cases are different from the ordinary case; those differences and some suggestions for managing them are discussed below.

A. Mass Tort, Class Action, and Other Complex Cases

The principles and techniques set out in the previous chapters are meant to apply to ordinary litigation. Management of complex cases often requires additional procedures and special techniques. The *Manual for Complex Litigation* has served since 1960 as the judiciary's primary source of innovative ideas about managing complex litigation.¹⁰⁷ We do not attempt to duplicate that source, and we refer the reader to that manual when appropriate.

1. Complex cases generally

One way in which the editors of the *Manual for Complex Litigation, Third* (*MCL, Third*) implicitly identified sets of complex cases was to write a separate chapter about each area of substantive law involved. Thus, antitrust, mass torts, securities, takeovers, employment discrimination, patent, CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)), and civil RICO cases gain a presumption of complexity by virtue of their treatment in the *MCL, Third*. Yet, such cases do not always call for the special management techniques that are associated with complex litigation, and some may well be managed more efficiently using the routine methods described earlier in this manual.

Given that factors other than subject matter may determine a case's complexity, how can you distinguish ordinary cases from complex cases? The editors of the *MCL, Third* approached that question from a functional perspective. If a case needs extensive management, it is complex: "The greater the need for management, the more 'complex' is the litigation."¹⁰⁸

Consider some of the signs that a case will need extensive management:

- *Number of parties.* When a complaint lists dozens of plaintiffs or defendants or your courtroom is full of lawyers at the first pretrial conference, you can be pretty sure that the case is complex and will require some of the techniques discussed in the *MCL, Third*, such as organizing counsel, adopting standard motions and responses, coordinating discovery, and establishing fair and efficient approaches to trial.¹⁰⁹
- *Number of similar or related cases.* The answers to some pivotal questions asked at a pretrial conference or listed on a form to be completed by counsel before the conference may reveal a substantial number of cases involving the same or similar transactions and legal claims in your court or in other federal or state courts. Under a system of random assignment of

107. See *MCL, Third*, *supra* note 13.

108. *Id.* at 3.

109. See *id.* §§ 20.2 (role of counsel), 21.32 (motions practice), 21.4 (managing discovery), 22.0 (managing the trial).

cases, you may not even know that your colleagues have a large number of similar cases, but clerks of court often have this information and should be encouraged to look for trends. Sometimes, as with mass tort litigation, different attorneys may represent individual plaintiffs, and those attorneys may not initially be aware of the full scope of the litigation. The same defendants, though, will be named in most related cases, and the defendants' attorneys can often give precise information about the number and location of similar cases. Some judges routinely ask counsel to identify all similar cases, even though such cases may not be technically "related to" each other as that term is used in local rules.

- *Multiple transactions.* A warning sign that multiple cases may be filed sooner or later is the filing of a claim that is based on an intrinsic characteristic of a mass-produced substance (e.g., a products liability claim). A claim that a widely marketed pharmaceutical product, for example, is associated with a particular disease should alert you to the likelihood that similar claims will be filed.
- *Competing experts.* A leading indicator of case complexity is that the parties have experts who propose to testify to opposing conclusions about a central issue in the case, such as the capacity of a chemical or pharmaceutical product to cause the injuries plaintiffs allege. (Management of cases with competing experts is discussed in *infra* section VII.B.)
- *Complex subject matter.* The subject matter of a claim can suggest complexity without other indicators being present. Patent law cases, for example, often involve disputes about highly technical and complex matters. On the other hand, complex subject matter does not necessarily mean that case management will be complex. A case with complex legal issues, for example, might be managed and resolved by a ruling on a motion for summary judgment or some other straightforward procedure.
- *"Maturity" of the litigation.* If the dangers of a product that is the subject of a liability suit are clear from prior litigation (as with asbestos), past decisional history will have diminished much of the case's complexity. If, however, a case involves liability for a product that has never been found to cause the type of injury the plaintiff alleges, you can assume that it will be complex because of the parties' disputes over the scientific basis for causation.¹¹⁰
- *Class action allegations.* Managing a putative class action imposes additional responsibilities on a judge. You may have to control the parties' and their attorneys' communications with the putative class, designate counsel, rule on class certification, rule on the fairness of any proposed settlement

110. For a discussion of applying the maturity factor to mass torts, see MCL, Third, *supra* note 13, § 33.2.

or dismissal, and provide for the administration of an approved settlement.¹¹¹

- *Volume of discovery and evidence.* Cases that revolve around standard transactions, such as the use of a form contract or a public forecast of corporate earnings, will undoubtedly involve less factual complexity and hence require less management than cases arising from a host of individualized transactions, such as claims of product liability and personal injury arising from the manufacture of, say, an automobile.

If you conclude that the case before you is complex, consult the appropriate section of the *MCL, Third* for the specific type of case. Note that the section on patent litigation was written before the U.S. Supreme Court's decision in *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996), which assigns judges the role of determining the construction of patent claims as a matter of law before trying infringement issues to a jury. For a useful discussion of post-*Markman* case management procedures, see *Patent Law: A Primer for Federal District Judges*.¹¹²

2. Mass tort cases

Mass tort claims will call for you to make a number of discretionary decisions at the outset of the litigation. These decisions, which will affect the direction of the litigation and may contribute to its complexity, center on one key question—whether to aggregate the individual claims for pretrial or trial purposes. Even the seemingly simple and straightforward act of consolidating cases within your district should be considered only after consulting the *MCL, Third* and looking for the characteristics described above. As an alternative to aggregating similar claims, you should think about whether pursuing one or more test cases—or a sample of cases—would be the most efficient way to proceed. For a more recent discussion of the questions of whether, when, and how to aggregate mass tort cases, see the article *Mass Torts Problems and Proposals*.¹¹³

3. Class action cases

Management of class actions should be governed by principles discussed in the *MCL, Third*. Prompt consultation of the *MCL, Third* will aid you in making the critical decision about when to rule on the certification issues and actions that might be considered before ruling on a motion to certify a class, such as whether to allow preliminary discovery on class issues.¹¹⁴

111. See *id.* § 30.0.

112. James M. Amend, *Patent Law: A Primer for Federal District Court Judges* (Berkeley Center for Law and Technology 1998).

113. Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 348–377 (1999). The Mass Torts Working Group was established by and reported to the Chief Justice.

114. For a discussion of settlement class actions after the U.S. Supreme Court decision in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2236 (1997), see Jay Tidmarsh, *Mass Tort Set-*

B. Management of Expert Evidence

Experts are used in civil litigation with increasing frequency to testify on a variety of subjects, including economic, scientific, technological, medical, and legal subjects. Persons with qualifications across a broad spectrum of disciplines and experience may qualify as experts. Once they are so qualified, their forensic purpose is to “assist the trier of fact to understand the evidence or to determine a fact in issue” (Fed. R. Evid. 702). In light of two recent Supreme Court decisions,¹¹⁵ management of expert evidence is an integral part of proper case management. Under those decisions, the district judge is the gatekeeper who must pass on the sufficiency of proffered evidence to meet the test under Federal Rule of Evidence 702. Your performance of the gatekeeper function will be intertwined with your implementation of Federal Rule of Civil Procedure 16.¹¹⁶

To further your own understanding of expert evidence, you can use several sources, beginning with the parties’ experts. You may also appoint your own expert, as discussed below. Or you can consult books, articles, and other items that deal with the subject matter of the case. One such resource, written specifically for federal judges, is the *Reference Manual on Scientific Evidence*; each chapter is a tutorial on a different scientific area, including DNA evidence, epidemiological evidence, medical evidence, engineering evidence, and estimations of economic loss in damages awards.¹¹⁷

1. Early pretrial evidence

Effective management of expert evidence begins at the pretrial stage. Rules 16(c)(4), (c)(5), (c)(10), and (c)(11) authorize you to require identification of witnesses and documents, avoid unnecessary or cumulative evidence, adopt special procedures for cases presenting difficulties or complexity, and take other action to aid in the disposition of the case. Resolution of issues involving scientific evidence is often a prominent aspect of cases involving expert testimony. Consequently,

tlement Class Actions 25–31 (Federal Judicial Center 1998) and Willging, *supra* note 113, at 328, 356–61. For a discussion of limited fund class actions after the Court’s decision in *Ortiz v. Fibreboard*, 119 S. Ct. 2295 (1999), see S. Elizabeth Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations (Federal Judicial Center 2000).

115. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

116. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring): [J]udges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, evidence. Among these techniques are an increased use of Rule 16’s pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.

117. *Reference Manual on Scientific Evidence* (Federal Judicial Center, 1st ed. 1994, 2d ed. 2000) [hereinafter *Reference Manual*].

motions in limine and motions for summary judgment are likely to play a role in these cases.

Consider the following approaches:

- Require identification of expert witnesses, by area of expertise if not by name, at an early Rule 16 conference to further the process of defining and narrowing issues, to focus discovery, and to facilitate settlement. In cases in which expert evidence is the predicate of the claim (e.g., medical malpractice), identification of an expert qualified to supply such evidence may be required before the case is permitted to proceed.
- Ask the parties to identify the issues that will be addressed by expert testimony and to make sure their experts address the same issues so that you can clearly see where the differences and conflicts lie.
- Attempt to identify the specific bases for the differences between opposing experts. The utility of expert evidence can be enhanced, and issues can be more easily decided, if the basis for the difference between opposing expert evidence, not merely the difference, is identified as early in the pretrial process as possible. This may be done by determining whether the experts' disagreement is over data, interpretation of data, factual or other underlying assumptions, applicable theories, risk assessments, or policy choices.¹¹⁸
- Limit the number of experts who will testify on a given issue.
- Set deadlines for opposing parties' mutual disclosure of expert reports or narrative statements of testimony, underlying data, and curricula vitae in appropriate sequence. Although Rule 26(b)(4) provides for interrogatories to obtain the experts' facts and opinions, predeposition exchanges of the proposed testimony and access to underlying data may be more efficient and can even make depositions unnecessary.
- Explore the possibility of joint expert reports.
- Establish a procedure for discovery (including ground rules for time, place, and payment of costs and fees) to avoid the cumbersome procedure under Rule 26(b)(4).¹¹⁹
- Provide for video depositions, including cross-examination, to avoid the need for expert witnesses to appear at trial.
- Use confidentiality orders to protect information produced from further dissemination.¹²⁰ Confidentiality orders can expedite and simplify discovery of sensitive matters, but they can also raise issues concerning future release of data from protection.

118. A helpful source for your own understanding of the evidence is the *Reference Manual on Scientific Evidence*, *id.*

119. See MCL, Third, *supra* note 13, § 21.48 for a discussion of discovery into expert opinions.

120. See *id.* § 41.36 for a sample confidentiality order (Form A).

2. Final pretrial evidence

When expert evidence is anticipated at the trial, the final pretrial conference should address issues and potential problems related to such evidence, particularly rulings on expert qualifications and the admissibility of expert evidence under Federal Rule of Evidence 104(a). (See also *supra* section VI.A.3.c, where we discuss use of expert evidence in the context of the final pretrial conference.)

The admissibility of expert evidence is much litigated, and a substantial body of appellate law is evolving with variations from circuit to circuit. Particularly when you face questions of drawing the line between admissibility and weight and credibility, you should consult circuit law, which is in flux.

Distinguish rulings on admissibility under Rule 104(a) from motions for summary judgment under Rule 56. Ordinarily an evidentiary ruling should not be regarded as the vehicle for adjudicating a claim or defense, unless it is clear that no admissible evidence can be offered.

Also consider

- having counsel identify specifically those parts of the opposing experts' reports and testimony with which they disagree and those parts that are not disputed;
- directing the parties, when the expense is warranted, to have the experts submit a joint statement specifying the matters on which they disagree and the basis for the disagreement;
- directing the parties, when the expense is warranted, to have their experts present at the pretrial conference to facilitate identification of the issues remaining in dispute;
- clearing all exhibits and demonstrations to be offered by the experts at trial and giving opposing parties an opportunity to review exhibits and raise objections;
- encouraging joint use of courtroom electronics, models, charts, and other displays;
- encouraging stipulations on relevant background facts and other noncontroverted issues; and
- having the experts and lawyers prepare a glossary of technical terms to be used at trial with definitions in understandable language.¹²¹

3. Trial evidence

If expert testimony is to "assist the trier of fact to understand the evidence or determine a fact in issue" (Fed. R. Evid. 702), the trial should be managed so as to enhance the trier of fact's comprehension.

121. The source for these suggestions is William W Schwarzer & Joe S. Cecil, *Management of Expert Evidence*, in Reference Manual on Scientific Evidence, 2d ed., *supra* note 117, at 57.

Consider the following approaches:

- Have a tutorial for the jury or the judge before the trial begins, conducted by a neutral expert or experts chosen by the parties to explain fundamentals of complex scientific or technical matters.
- Exclude undisclosed experts and evidence from the trial. Few things are more disruptive at trial than the appearance of undisclosed experts or the offer of expert evidence at variance with prior testimony or reports.
- Have experts testify back to back to facilitate clarification of the extent and basis for their disagreement (if the extent and basis have not been previously established, see *supra* section VII.B.2).
- Assist the jury by giving preliminary and interim instructions, permitting note taking, and permitting them to ask questions.
- Use narrative written statements or reports for presentation of experts' direct testimony.

4. Court-appointed experts

Federal Rule of Evidence 706 provides a detailed procedure for the selection, appointment, assignment of duties, discovery, report submission, and compensation of court-appointed experts. That procedure, however, does not preclude the use of other approaches, either by stipulation of the parties or by exercise of your inherent management power. Court-appointed experts may be used in various ways and for various purposes. They may, for example, serve as witnesses, consultants, examiners, fact finders, or researchers.

If you are considering appointment of an expert, make sure you consult with counsel and determine in advance of any appointment exactly what purpose the expert is to serve, how the expert is to function, and the extent to which the expert will be subject to discovery. You also need to address the potential for what may be considered *ex parte* communications. Arrangements for compensation of the expert should be made in advance and should define clearly the potential liability of the parties. Because of the time involved in identifying and appointing an expert, try to determine early in the case whether you will appoint an expert.¹²² Academic departments and professional organizations can be a source for such experts.¹²³

122. See generally MCL, Third, *supra* note 13, §§ 21.51, § 21.52; see also Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 Emory L.J. 995 (1994); *infra* section VIII.C on appointment of special masters.

123. The American Association for the Advancement of Science (AAAS) will help federal judges find scientists and engineers suitable for appointment in specific cases. Information on the AAAS program can be found in Court-Appointed Scientific Experts: A Demonstration Project of the AAAS, at <http://www.aaas.org/spp/case/case.htm> (last visited July 6, 2001). The Private Adjudication Center at Duke University is establishing a registry of independent scientific and tech-

You should appoint the expert through a formal order, after the parties have had an opportunity to comment on it.

Consider including in the order

- the authority under which it is issued;
- the name, address, and affiliation of the expert;
- the specific tasks assigned to the expert (e.g., to submit a report, to testify at trial, to advise the court, to prepare findings);
- the subject on which the expert is to express opinions;
- the amount or rate of compensation and the source of funds;
- the terms for conducting discovery of the expert;
- whether the parties may have informal access to the expert; and
- whether the expert may have informal communications with the court and whether those communications must be disclosed to the parties.¹²⁴

Whether or not the expert you appoint is new to litigation, consider giving the expert written information about what to expect procedurally and what kinds of contacts he or she may and may not have with the parties and other experts.

C. High-Profile Cases

High-profile cases occur infrequently in most districts, but if you are assigned such a case you will face a number of management problems you usually do not encounter. Anticipating and then planning carefully for the needs and problems of these cases will be critical. A very useful guide to such planning is the manual *Managing Notorious Trials*, which was our source for the discussion that follows.¹²⁵ Although we have tried to capture the central issues and a range of procedures for handling high-profile cases, we suggest you consult that manual as well.

1. Making a plan and assigning responsibilities

Your primary goal in preparing for a high-profile case will be to protect the integrity of the judicial process at every stage. To realize that goal you will need to

- protect yourself, the jurors (if any), and court staff from improper influences;
- provide security for parties, witnesses, jurors, and other trial participants;
- give the public reasonable access to the trial and any events and materials that would be available to the public in other cases;

nical experts who are willing to provide advice to courts or serve as court-appointed experts. Information on the Private Adjudication Center program can be found in The Registry of Independent Scientific and Technical Advisors, at <http://www.law.duke.edu/pac/registry/index.html> (last visited July 6, 2001).

124. The source for this checklist is **Reference Manual**, *supra* note 117, at 63–64.

125. Timothy R. Murphy, Paula L. Hannaford, Geneva K. Loveland & G. Thomas Munsterman, *Managing Notorious Trials* (National Center for State Courts 1998).

- maintain efficiency of the pretrial and trial processes;
- provide for the jurors' comfort, especially if they are sequestered; and
- minimize disruption of other court functions.

One of the greatest challenges of a high-profile case is simply the sheer number of entities, beyond the court and parties, that must be involved. You will be very dependent on court staff for management of all these entities and the activity generated by the case. Thus, you should include them early in planning for the case, keep them informed as the case progresses, and give them discretion over their areas of expertise.

To use staff effectively, you and your clerk of court (or other designated coordinator for the case) should begin by identifying each of the requirements of the case and developing a plan to address them.

Consider including the following requirements in the plan:

- security;
- media relations;
- crowd control inside and outside the courtroom;
- inquiries by the public;
- management of case documents and their availability to the media and the public;
- jury selection;
- management of the jurors; and
- attention to the needs of court staff and other judges.

In preparing the plan, *consider*

- identifying who will be responsible for each of the requirements listed above;
- preparing a description of the duties and responsibilities of each person;
- clarifying where responsibilities overlap and how the staff involved should proceed if conflict or uncertainty arises; and
- meeting with staff at the outset to go over their responsibilities and meeting as needed for updates and morale building, but otherwise leaving the management of staff to the clerk of court or other person who has been designated oversight responsibility.

Your goal in taking these steps is not only to make sure there are no gaps in managing the events that swirl around a high-profile case, but also to foster cooperation and minimize conflict and confusion. You should, if at all possible, build your list of tasks and assignment of responsibilities using the court's existing organization rather than disrupting the court's normal procedures and staff assignments. Not only is this likely to be more efficient, but your recognition of the capabilities of existing staff will also help you gain their support.

Make sure the court's planning for the case involves everyone who may have an interest in the case or whose help you may need in managing the case. For example, the court is in control of the physical space in the courthouse and up to a certain boundary outside the courthouse. The U.S. Marshals Service will be part of your planning for security in those areas. Beyond that, other authorities will have responsibility. Your planning—and your meetings—may need to include such entities as the General Services Administration (GSA), fire department, police department, ambulance service, and mayor's office. For other purposes, you may need to involve the Federal Protective Service, the telephone company, the city's public relations office, and others. Include all relevant parties early and consistently.

Perhaps your most valuable resources in planning for a high-profile case are the judges and staff who have already handled such cases. The U.S. District Court for the District of Columbia probably handles more such cases than most other federal courts. Other districts with recent experience include the Eastern District of Arkansas, the Eastern District of California, the District of Colorado, and the Southern District of New York. Consult with their clerks and judges at the earliest possible moment.

2. Planning for the presence of the media

As soon as you are assigned a high-profile case, you should make plans for managing the media. The most intense visibility and scrutiny will occur if the case goes to trial, but interest can spike at other times, too, such as when you issue important rulings and hold key hearings.

Consider the following in your planning:

- Which member of the court's staff will handle inquiries from the media? What instructions should that person, and other staff, be given for interactions with the media?
- How will the court determine who is a legitimate member of the media (e.g., through applications, background checks, passes)?
- What arrangements must be made for routine updates of schedules and case status (e.g., recorded phone message, written notice posted at designated location)?
- What arrangements must be made for providing the media with copies of case documents and exhibits (e.g., ask parties to file two sets of papers so that one can be provided to the media)?
- What will the media be permitted to know about the jury (e.g., will the media be given access to juror questionnaires and be allowed to attend the voir dire)?
- Is the courtroom large enough, or will you need an overflow room with closed-circuit television?

- Is the courtroom located in a place where the presence of the media will interfere with other court business as little as possible?
- How many of the seats in the courtroom should be allocated to the media and by what procedure should they be allocated (e.g., one pass per media organization, permanent or daily passes, forfeiture of a seat if it is not occupied within ten minutes before trial starts)?
- Where will sketch artists be seated to provide an unobstructed view? Will they be permitted to sketch victims, children?

Keep in mind that Judicial Conference policy does not permit the use of television cameras or other recording devices in the courtroom.¹²⁶

3. Interacting with the media

a. Court interactions with the media

It is essential to maintain clear and reliable channels of communication between the court and the media. At the outset of a high-visibility case, you will want to take steps to gain the media's cooperation and goodwill. Above all, you want to make sure all media members are treated fairly and have the same level of access to information.

Consider

- establishing clear rules about media conduct and procedures for access to information;
- providing all essential information the media need, including schedules for hearings and the trial;
- asking the media to designate spokespersons or liaisons for bringing media inquiries to the court so that communications are more efficient; and
- emphasizing that you are in control of the case and courtroom and that you expect the media's cooperation and observance of your ground rules.

Some of the questions the media pose will be directed to you. If you do not want to answer media questions directly, make sure the person you select as your spokesperson is someone in whom you have complete confidence so that you do not risk errors in transmission. When responding to media inquiries, you should keep the following principles firmly in mind.

- Think through each question or issue carefully. Be aware that you will be held responsible for everything that has happened, even if someone else has handled a particular matter.

126. Admin. Office of the U.S. Courts, 2 Guide to Judiciary Policies & Procedures, ch. III, pt. E at 25 (October 14, 1997) [hereinafter Judicial Conference Cameras Policy].

- Do not foster or appear to have an especially close relationship with any member of the media. You will be charged with favoritism at the least hint of special treatment.
- Avoid the appearance of withholding information or excluding the media.
- Do not make rulings from the bench unless your decision is carefully scripted and delivered.
- Do not become the focus of media attention yourself. Be careful about your words and actions on and off the bench.

b. Attorney interactions with the media

One unfortunate but real possibility in a high-profile case is that the attorneys will use the media to convince the public (and potential jurors) of their view of the case. If at all possible, you should avoid imposing gag orders on the attorneys, as such orders can heighten animosity and also are difficult and time-consuming to enforce. A much better approach is to sit down with the attorneys early in the case and tell them what your expectations are for their conduct. You can ask them for their agreement to observe limits on what is said to the media, and you should remind them of any disciplinary rules you intend to apply.

4. Protecting the jurors, facilitating their attention, and providing for their comfort

There will be great public and media interest in the persons who are selected for the jury in a high-visibility case. There will also be much written about the case that could affect the jurors. One of your key responsibilities in protecting the integrity of the trial is protecting the jurors from improper influences. If the trial is very long or the media and public are very aggressive, you will also need to give greater attention than usual to the jurors' concentration on the case and their personal comfort and sense of safety.

Consider taking the following steps:

- withholding from the public and media any information on juror questionnaires that was given in confidence;
- withholding from the public and media the addresses of jurors;
- during voir dire, asking prospective jurors whether the presence of the media makes them uncomfortable, will distract them, or will prevent them from deciding the case impartially;
- inquiring at voir dire and periodically thereafter whether any juror has been approached by the media or publishers with offers to purchase his or her story and if so, determining whether this may bias the juror or affect how the juror listens to the evidence;
- ensuring that jurors can enter and leave the courthouse safely and without interaction with the media or public;

- if jurors must walk through or eat in public spaces, cordoning off space for them and making sure they are accompanied by a member of the court staff;
- instructing the jurors daily not to watch television coverage of the trial, read press accounts, or talk with anyone about the trial, and promising to provide jurors with a scrapbook of media coverage at the end of the trial;
- keeping the jurors well informed about the daily schedule (e.g., when breaks will be taken) and about the overall trial schedule (e.g., approximately how much longer the prosecution's case will continue);
- permitting the jurors to use such aids as note taking and notebooks (prepared by the court or parties under your supervision and containing, for example, lists and pictures of witnesses and copies of key documents or evidence);
- instructing the media that they are strictly forbidden from interviewing jurors during the trial;
- advising the jurors that the decision whether to be interviewed at the end of the trial is theirs alone and asking them to be sensitive to the privacy of fellow jurors if they do choose to speak with the media;
- determining how the jurors will be dismissed when the trial ends so that they are not mobbed by the parties, public, or media and determining whether and how they will meet the media and the parties' attorneys;
- meeting informally with the jurors after the trial to thank them, answer their questions, and explore whether they have any remaining needs; and
- determining what posttrial arrangements can be made, if needed, to deal with any psychological trauma felt by the jurors.

Your planning and thoughtful consideration of the jurors should be evident from voir dire through posttrial events. The more rapport you can develop with the jurors, the more likely they will be to alert you to any problems or interference they experience. Make sure, however, that you plan for the extra time it will take to select the jurors and ensure their comfort and security in a high-profile case.

5. Planning for security

Like all other aspects of managing a highly visible case, you should make plans early in the case for meeting its security requirements. The person to whom you assign responsibility for security (your security coordinator) should develop a written security plan, which you should review and approve. Any entities likely to be involved in security, such as the U.S. marshals and local authorities, should be consulted, and each entity's responsibilities should be clearly outlined.

The first issue you and others should address is the level of security that will be needed. Some questions you can ask are the following:

- Is security needed only to control crowds, or could there be threats to the safety of participants in the case, including yourself and court staff?
- Is the case of local or national interest?
- Is security needed both inside and outside the courthouse?
- Are demonstrations or protests likely?

Answers to these questions will help your security coordinator determine how many security personnel are needed and where.

Some additional steps your security coordinator should take are to

- make sure the courtroom is large enough to accommodate additional security personnel if higher levels of security are needed for the jurors, witnesses, or yourself;
- make sure security is provided for exhibits during trial and when court is not in session;
- confer with the media to ensure that media equipment will not compromise security or safety;
- determine what kind of security, if any, is needed outside the courthouse (e.g., roadblocks, a ban on parking, outside guards or surveillance) and confer with local authorities as needed;
- determine who should be permitted access to the courthouse, when (e.g., evenings), and to what parts of the courthouse;
- if access is restricted to certain parts of the courthouse, make arrangements for barriers, signs, and so forth;
- determine how the media, the public, the parties, witnesses, jurors, and court staff will enter the courthouse and how they will be screened for entry;
- provide security (e.g., escorts) for the jurors if they must walk through public areas or must otherwise be protected; and
- determine what level of security is needed and where (in the courtroom, outside the courthouse) when the verdict is announced.

6. Managing the courtroom

A high-visibility trial will bring the media and the public to your court in numbers and moods you may not have encountered in other cases. You should make your expectations for their conduct very clear. You might want to set out your rules and expectations in a decorum order.

Consider including the following in your decorum order:

- how persons will be screened for entry into the courtroom (e.g., color-coded, photo-ID passes);
- the time seating will begin each morning and afternoon;

- seating arrangements in the courtroom for the media, the public, and those involved in the case who need reserved seating;
- entry and reentry rules while court is in session;
- the appropriate location for interviews (never in the courtroom);
- media equipment permitted in the courtroom (as noted earlier, cameras and recording devices are prohibited in district courts by Judicial Conference policy¹²⁷);
- how questions from the media and public will be handled;
- how the media and public can obtain copies of exhibits and other case documents; and
- a clear prohibition against communicating with jurors during the trial.

7. Managing the case and the rest of your docket

Because the spotlight will be on you and the court during the litigation of a high-profile case, you should use all of your most effective case management skills with even greater consistency and dedication than you usually do. As emphasized in earlier chapters, you should set a realistic schedule for the case, in consultation with the attorneys, and then hold both them and yourself to that schedule.

Whether you will need assistance with the rest of your docket will depend on the nature of the high-profile case. If it is not a complex case and the media and public interest in it is most manifest at the time of the trial, you may be able to manage your other cases as well. But if the high-visibility case is both complex and intensely followed even in its earliest stages, you may find you need some help keeping your other cases—particularly your criminal cases—on schedule. You should speak with your chief judge about your needs. At minimum, you should arrange for another judge to handle matters in your other cases during the trial itself. Hearing motions or signing orders in other cases during your lunch breaks or in the early morning will do justice to neither the high-profile case nor your other cases.

D. Pro Se Cases

Parties in the federal courts may plead and conduct their cases personally (28 U.S.C. § 1654), and they are doing so in increasing numbers. Many, but not all, pro se litigants are plaintiffs; many, but not all, are also prisoners. Cases involving a pro se litigant present special challenges for several reasons, not the least of which is your obligation to ensure equal justice for litigants who may have little understanding of legal procedure or the law. At each stage in the case, you may need to take actions not required in cases in which all parties are represented by counsel.

127. See Judicial Conference Cameras Policy, *supra* note 126.

The burden for managing pro se cases falls heavily on court staff as well as on the judge. Pro se litigants tend to have many needs and questions and are likely to press court staff for assistance. Court staff are usually acutely aware that they should be helpful but must not give legal advice to any litigant.¹²⁸ At the same time, there are many actions court staff, especially pro se law clerks, can and must do. A very helpful manual for staff, as well as for judges, is the *Resource Guide for Managing Prisoner Civil Rights Litigation*,¹²⁹ prepared in response to passage of the Prison Litigation Reform Act of 1995 (PLRA). We have relied on this guide for the discussion below, and we encourage you to consult it for prisoner pro se cases on your docket.

1. Early screening

Techniques appropriate for the management of pro se litigation vary from case to case and may be affected by special procedures in place in your district. Many courts, for example, have pro se law clerks to screen these cases; some have special rules governing the assignment of successive cases brought by a pro se litigant. In addition, the PLRA governs many aspects of cases brought by incarcerated parties.¹³⁰

Some judges direct the clerk's office staff to bring cases by pro se litigants to their attention immediately after filing so that they can review the documents. In fact, you have a special obligation under the PLRA to screen cases filed by prisoners even before they are docketed.

With regard to cases filed by prisoners, you must

- prohibit filing of an action unless available administrative remedies have been exhausted (42 U.S.C. § 1997e(a));
- prohibit filing of an action for “mental or emotional injury suffered while in custody without a prior showing of physical injury” (42 U.S.C. § 1997e(e));
- prohibit filing of an in forma pauperis (IFP) action if the prisoner has had three or more actions in federal courts that were dismissed as frivolous or malicious, if the action fails to state a claim on which relief can be granted, or if it seeks monetary relief from a defendant immune from relief, unless the prisoner is in imminent danger of physical injury (28 U.S.C. § 1915(g)); and

128. A useful article on this subject is John M. Graecen, “No Legal Advice From Court Personnel.” *What Does That Mean?* Judges’ J., Winter 1995, at 10.

129. *Resource Guide for Managing Prisoner Civil Rights Litigation* (Federal Judicial Center 1996).

130. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, April 26, 1996, 110 Stat. 1321, Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. The PLRA amends 18 U.S.C. §§ 3624, 3626; 42 U.S.C. § 1997e; 28 U.S.C. §§ 1346(b), 1915; and 11 U.S.C. § 523(a); it adds new sections 28 U.S.C. §§ 1915A and 1932.

- dismiss a case at any time if you find that an IFP petitioner’s allegations of poverty are untrue, the action fails to state a claim on which relief can be granted, or it seeks monetary relief from a defendant immune from such relief (28 U.S.C. § 1915(e)(2)).

Non-prisoner pro se cases will also benefit from your early review. You and the parties may be saved considerable time later if you take a few minutes early in the case to start it down a fruitful path.

Consider generally the following approaches:

- Provide standard forms, through the clerk’s office, for pro se filers.
- Review the pleadings as soon as they are filed; if pleadings fail to meet technical requirements, inform the parties and give them an opportunity to cure defects. Actions brought by pro se litigants must be liberally construed and generally may not be dismissed before service unless legally frivolous. However, sanctions may be imposed on vexatious litigants, including an order directing the clerk to file no further documents without prior court order.
- Check promptly for threshold issues, such as subject matter and personal jurisdiction and venue.
- Use routine show cause orders to trigger dismissals under Federal Rule of Civil Procedure 4(m) if service of the complaint is not effected within 120 days.
- Consolidate related cases, such as cases involving similar claims arising in the same institution.

2. In forma pauperis status

In forma pauperis cases filed by incarcerated parties are also governed by the PLRA. Prisoners with any monetary assets at all may no longer file a case without paying a filing fee.

Under the PLRA, the court must

- require a prisoner seeking IFP status to include in an affidavit “a statement of all assets [the] prisoner possesses” and “a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint . . .” (28 U.S.C. § 1915(a));
- require prisoners who are granted IFP status to pay the filing fee, by a partial initial payment from funds available and through monthly payments forwarded by the institution based on the balance in the prisoner’s account (28 U.S.C. § 1915(b));
- permit prisoners with no assets and no means to pay the filing fee to file at no cost (28 U.S.C. § 1915(b)(4)); and

- require prisoners against whom judgment is entered to make full payment of any costs ordered, by partial payment from funds available and through monthly payments forwarded by the institution based on the balance in the prisoner's account (28 U.S.C. § 1915(f)).

With regard to nonincarcerated pro se parties, you will have to decide how deeply to probe into their affidavit in support of IFP status.

In reviewing pro se filings, *consider*

- asking for W-2 forms, pay stubs, tax filings for the past year, and credit checks, if any; and
- alerting pro se parties to fee shifting and other possible costs if they are unsuccessful in their suits.

3. Securing counsel for pro se litigants

Pro se litigants in civil cases have no constitutional right to counsel. The decision whether to appoint counsel in these cases is in your discretion and should be made on a case-by-case basis. The exercise of your discretion should, however, be guided by both statutes and case law. Under 28 U.S.C. § 1915(e)(1), the “court may request an attorney to represent any person unable to afford counsel.” Because this language differs little from the pre-PLRA language, your decisions on when to grant and when to deny requests for counsel should be guided by preexisting case law and more recent case law.

Because no public funds are available (except under the Criminal Justice Act, 18 U.S.C. § 3006A, for representation of habeas corpus petitioners), appointment of counsel can present substantial difficulty. Many judges, however, attempt to find counsel for nonfrivolous cases because the need to protect the rights of an unrepresented party not only places additional burdens on a judge but generally will also be better met by counsel. Even if attorneys are unwilling to take full responsibility for litigating a case, they may be willing to advise the plaintiff, or they may be willing to be appointed for a specific limited role, such as to assist the pro se litigant during trial. Sometimes, consolidating related pro se cases can make the litigation of sufficient public interest to attract counsel.

You should take care, nonetheless, to appoint counsel only when a case warrants it. A high percentage of pro se cases do not have the merit to be worthy of a volunteer lawyer, and you should not call on attorneys to represent such cases, as their time is a valuable resource not to be wasted by the court. The truth of the matter is that in most of these cases you will be on your own.

When you decide that appointing counsel is warranted, you should call on resources available locally. Some courts, by local rule, require pro bono service as a condition of admission to the bar. A number of districts have civil pro bono panels of attorneys who have volunteered to represent indigents; some bar associations also provide such panels. Some volunteer programs include a screening process to identify meritorious cases.

Although there may be no ready source to cover attorneys' fees, there is generally some relief for expenses incurred. Although appointed counsel are typically responsible for initially paying reasonable expenses, such as those for transcripts and experts' fees, many districts have some arrangement for reimbursing these expenses through use of nonappropriated funds. The PLRA also provides for certain expenses, such as those for printing the record on appeal, to be paid by the Administrative Office once the prisoner has paid the partial filing fee.

In some cases filed pursuant to specific statutes—for example, 42 U.S.C. § 1983 and other civil rights statutes—there is a possibility that attorneys' fees could be awarded. Attorneys' fees might also be recovered in cases in which there is a contingency fee arrangement and the plaintiff prevails. In prisoner cases filed under 42 U.S.C. § 1988, however, the PLRA has made substantial changes to attorney fee provisions. Such fees may not be awarded unless they were directly and reasonably incurred in proving an actual violation of the plaintiff's rights that are protected by a statute pursuant to which a fee may be awarded under 42 U.S.C. § 1988 and the fees are proportionately related to court-ordered relief for the violation or were directly and reasonably incurred in enforcing relief ordered for the violation (42 U.S.C. § 1997e(d)). The PLRA also limits the hourly rate and provides that when a prisoner is awarded monetary damages, a portion of the judgment must satisfy the award of attorneys' fees.

4. Scheduling and monitoring the pro se case

Many judges do not believe that pretrial conferences are appropriate in most pro se cases involving an incarcerated pro se litigant. Thus, most courts, by local rule, exempt such cases from the requirements of Federal Rule of Civil Procedure 16. Rule 16 conferences can, however, be a useful tool in pro se cases in which the pro se litigant is not in custody, particularly for identifying and narrowing issues and for establishing your control over the case. A conference with the judge can also send a powerful message to pro se litigants that their cases are receiving the court's attention.

Consider holding an early conference in cases with nonincarcerated pro se litigants to do the following:

- Explain the procedural requirements in straightforward terms.
- Point out resources available, such as court-developed forms or instructions.
- Discuss a schedule for the case.
- Enter a procedural order to ensure that the case moves to prompt resolution and include dates for cutoff of discovery, for submission by the defendant of all relevant records and documents, and, in appropriate cases, for the filing of a motion for summary judgment and the response. Because the relevant facts usually are in the defendant's control, early disclosure will facilitate resolution of the action.

- Establish the least disruptive discovery method adequate to the task. A deposition with written questions may be preferable, for example, to a live deposition conducted by an unrepresented party.
- Tell the pro se litigant that the case will be closely monitored and identify a person to contact should problems arise.
- Explicitly require the pro se litigant to maintain a current address and telephone number on record with the court.
- Make clear to the pro se litigant the obligation to serve copies of all communications with the court on all opposing parties.

Many cases involving incarcerated pro se litigants can be decided on the papers, after the prisoner is required to respond to an order for a more definite statement or after the defendant has filed a motion for summary judgment. A few cases, however, may involve allegations that appear to warrant the time and effort of a pretrial conference. In such instances, you have several options.

Consider, for example, the following approaches:

- Confer by telephone conference.
- Use, if available in your courthouse, videoconferencing technology to conduct hearings in prisoner cases (see *infra* section IX.G.2.b for a discussion of videoconferencing).
- Conduct in-prison hearings (see 28 U.S.C. § 636(b)(1)(B): authority to hear “prisoner petitions challenging conditions of confinement”). In some districts, magistrate judges have been assigned this responsibility.

Many courts use a *Spears* hearing for cases involving an incarcerated pro se litigant.¹³¹ The purpose of the hearing, which is “in the manner of a motion for a more definite statement” and is usually conducted by a magistrate judge, is to determine whether a prisoner can allege facts that will support a colorable claim. Hearings can be held at the prison, by telephone, or by videoconference. Many cases can be resolved through a *Spears* hearing, either by dismissal or by prison officials agreeing to solve a problem.

Many courts also use a *Martinez* report,¹³² which requires prison officials to investigate the prisoner’s complaint, to report the findings of the investigation, and to supply certain standard information. A *Martinez* report can help you and the institution determine whether a case is frivolous and can be disposed of by motion or whether there are problems the institution can address informally.

131. The hearing is named after the case *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). The *Spears* approach has been recognized by the Supreme Court (see, e.g., *Neitzke v. Williams*, 490 U.S. 319 (1989)) and is used in many courts.

132. The report is named after the case *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978). See also *Gee v. Estes*, 829 F.2d 1005 (10th Cir. 1987).

5. Holding settlement discussions and conducting the trial

Many cases involving a pro se litigant are appropriate for resolution by settlement rather than judgment or trial. At the same time, anyone who assists the parties in such cases with settlement negotiations runs the risk of being pressed by the pro se party to give legal advice. This is one reason why most federal courts exempt pro se cases from their ADR programs. Likewise, you as the judge should be cautious about assisting with settlement, since your assistance will very likely be misunderstood by the pro se litigant. Many commentators worry, nonetheless, that it is unfair to the pro se litigant for courts not to provide settlement assistance. To address this problem, you might consider appointing counsel for the limited purpose of representing the pro se litigant during settlement discussions with you, another judge, or an ADR neutral (see *supra* sections V.A.5 and V.B.3).

If the case proceeds to trial, you will want to make a serious effort, if you have not already, to appoint counsel. Should you fail to find counsel, or should the pro se litigant refuse counsel, you will need to provide guidance as the pro se party attempts to handle the trial alone. Some courts have prepared booklets with useful information, which they distribute free to litigants.¹³³ You can also provide sample documents and forms (e.g., forms for witnesses and exhibits) before trial to help the pro se litigant complete the necessary preparations. However, you will undoubtedly need to personally instruct the pro se litigant as well while carefully maintaining your impartiality.

Before the trial begins and then again on the record, you may want to tell the pro se litigant, with the other party present, what the trial will entail.

Consider

- verifying that the party is not an attorney and chooses to proceed pro se;
- explaining the trial process (e.g., that you will hear the plaintiff first, then the defendant; that interruptions will not be permitted; that a record is being made);
- explaining the elements of the case (e.g., that the plaintiff is asking for ____; that this can be granted if the plaintiff shows ____);
- explaining that the party bringing the action has the burden to present evidence in support of the relief sought;
- explaining the kind of evidence that may be presented (e.g., testimony from witnesses and exhibits) and that everyone who testifies will do so under oath;
- explaining the limits on the kind of evidence that may be considered (e.g., describe hearsay evidence and explain that it may not be admitted at trial);

133. See, e.g., United States District Court for the Eastern and Western Districts of Arkansas, *Your Day in Court: The Federal Court Experience* (1992).

- asking both parties whether they understand the process and the procedure; and
- permitting a non-attorney advocate to sit at the pro se party's counsel table and explaining that this advocate may provide support but will not be permitted to argue on behalf of a party or to question witnesses.¹³⁴

If you need to question the pro se litigant during the trial (or at any other time) make sure you use questions that seek to obtain general information so as to avoid the appearance of advocacy on behalf of the pro se litigant. When the trial concludes, decide the matter promptly, if at all possible, and enter your decision.

134. These suggestions are taken from Minnesota Conference of Chief Judges, Protocol To Be Used by Judicial Officers During Hearings Involving Pro Se Litigants (Adopted 1998).

VIII. PERSONNEL RESOURCES IN LITIGATION MANAGEMENT

- A. Court and Chambers Staff
 - 1. Law clerks
 - 2. Secretary/office manager/judicial assistant
 - 3. Courtroom deputies or case managers
- B. Magistrate Judges
 - 1. Referral of nondispositive matters
 - 2. Referral of dispositive matters
 - 3. Referral of trials
 - 4. Other referrals
 - 5. Method for assigning matters to magistrate judges
- C. Special Masters
 - 1. Authority to appoint a special master
 - 2. Reasons for appointing a special master
 - 3. Selecting and appointing a special master
 - 4. The special master's report
 - 5. Compensating the special master

Chambers staff, personnel in the clerk's office, and a number of other individuals play important roles in case management. In the preceding chapters we noted the roles they play in specific stages or events in litigation. In this chapter we discuss more extensively the kinds of assistance chambers staff and others can provide.

As a general matter, district and magistrate judges should delegate everything they can, consistent with federal law, the rules of procedure, and their court's operating procedures. Judges should retain those tasks that only a judge may perform, that serve sound principles of case management, and that give them personal satisfaction. In deciding what to delegate and to whom, analyze each task, asking whether it is worth doing at all, how it can be done most effectively, and whether it can be done by someone other than you. Depending on the nature of the task and who is doing the delegating, other persons may provide valuable assistance.

A. Court and Chambers Staff

1. Law clerks

Law clerks have no statutorily defined duties, and therefore you have great discretion in what you assign to them. The most effective use of law clerks is to have them work on motions, do research and writing, and provide other forms of direct assistance to you.

Consider having your law clerks

- research or brief any issues raised by your review of the file in preparation for the Rule 16 conference;
- screen pro se and other pleadings for jurisdictional and other defects (if your court does not have a pro se law clerk¹³⁵);
- research motions and evidentiary issues and prepare proposed rulings;
- review and annotate proposed jury instructions and findings of fact and conclusions of law;
- review and annotate trial exhibits and the trial transcript; and
- maintain a watch on current court of appeals decisions on points bearing on pending matters.

It is not advisable to have law clerks perform judicial duties, such as conducting Rule 16 conferences. Without a judge, who is able to issue orders and exercise control over the case, the conference tends to become a perfunctory exercise. You should also, as a general rule, not permit your law clerks to take telephone calls from attorneys or talk to them ex parte except about routine administrative and scheduling matters. Also, try not to give your law clerks tasks that can be performed by someone with other kinds of expertise; they should not, for example, usually act as courtroom deputies or sit in on court proceedings unless you have a specific educational or case-related reason for them to do so.

Remember that most law clerks have little or no relevant case management experience. It is therefore necessary to provide them with specific instructions, to plan their work, and to oversee them sufficiently to ensure that their time will be used most productively. You need to take care that they do not become buried in marginal research projects, spending undue amounts of time and pursuing unhelpful avenues. Because a large part of most law clerks' work concerns motions, their attendance at the motions calendar will be useful.

Several resources are available to help make the law clerks effective members of your team. When selecting law clerks, you can consult *Conducting Job Interviews: A Guide for Federal Judges*, which identifies desirable law clerk skills and provides sample interview questions for assessing those skills.¹³⁶ Another helpful guide for hiring law clerks is *The Law Clerk Appointment Process*, an FJTN program that is broadcast periodically and discusses Judicial Conference policies and statutory provisions regarding law clerk appointments.¹³⁷ When you are training new law clerks, you will want to have them read the *Chambers Handbook for Judges'*

135. See *supra* § VII.D for a discussion of managing pro se cases.

136. David K. Hendrickson, *Conducting Job Interviews: A Guide for Federal Judges* (Federal Judicial Center 1999).

137. Broadcasts of this Administrative Office program are listed in the *FJTN Bulletin*, and the program is also available on videotape. Contact the Administrative Office's Human Resources Division for more information.

Law Clerks and Secretaries, which covers every aspect of the law clerk's role.¹³⁸ You should have them watch the FJTN broadcast *Orientation Seminar for Federal Judicial Law Clerks*, which focuses on ethics and legal writing.¹³⁹ You may also find it helpful, if you have two or more law clerks, to stagger their starting dates so that the experienced law clerk can train the novice, thus relieving you of this responsibility. You might also urge your district to have an annual daylong training session for law clerks, if it does not already, to orient them to clerk's office operations and other procedures that are uniform across the district.

2. Secretary/office manager/judicial assistant

Because you and your law clerks will generally be occupied with substantive legal work, it is helpful to have a staff member who is a skilled manager and who can interact effectively with other court offices and attorneys. These duties often fall to a judge's secretary (also referred to as office manager or judicial assistant), although that is not necessarily the case. Under Judicial Conference policy, district and magistrate judges may choose to hire another law clerk in lieu of a secretary.¹⁴⁰ Given the efficiencies provided by automation, many of the duties once performed by secretaries are no longer needed. At the same time, some of their traditional tasks, such as general office management, remain. How you allocate the many routine chambers tasks—whether to a secretary, law clerk, or courtroom deputy—may change as the demands of your workload and your available personnel change.

Consider whether a secretary might

- organize your calendar;
- answer routine mail;
- maintain chambers records and files;
- handle travel arrangements;
- maintain supplies, equipment, and furniture;
- maintain the chambers library;
- work with the librarian to develop an opinion retrieval file for unpublished opinions;
- help you write speeches and special letters;

138. Chambers Handbook for Judges' Law Clerks and Secretaries (Federal Judicial Center 1994).

139. Broadcasts of this Federal Judicial Center program are listed in the *FJTN Bulletin*, and the program is also available on videotape. Contact the Federal Judicial Center's Information Services Office for more information.

140. See Report of the Proceedings of the Judicial Conference of the United States, Sept. 1991, at 66 (district judges); Report of the Proceedings of the Judicial Conference of the United States, Mar. 1993, at 16 (magistrate judges); and Report of the Proceedings of the Judicial Conference of the United States, Mar. 1999, at 26 (magistrate judges).

- compile a notebook of standard orders, letters, and forms for the law clerks; and
- set up a system to handle law clerk applications.¹⁴¹

If you decide to use your secretarial position to hire another law clerk, these duties will, of course, have to be performed by someone else.

3. Courtroom deputies or case managers

Although their titles vary, in every court there are clerk's office staff who play a central role in managing cases. In some courts they are organized as teams; in other courts individual staff members are assigned to individual judges. Although their duties and how they are organized vary from court to court and judge to judge, these staff members play a vital role in case management as the judge's calendar manager, administrative assistant, and contact with the attorneys. Appropriately trained and instructed, and given the necessary authority, these staff can become key players on your case management team.

Consider the following approaches:

- Designate the courtroom deputy¹⁴² as the exclusive communication channel between the judge and the attorneys. While some judges prefer using their secretary or law clerks for this purpose, others use the deputy, who is not so close to the judge as to imply an improper *ex parte* communication. Using a single channel for communicating with the judge should also help the attorneys avoid confusion.
- Have the courtroom deputy monitor the status of all cases and ensure that you receive current information. The courtroom deputy should know the status of all cases on your docket and should be able to provide up-to-date reports about them and any matters, such as motions, needing your attention. The courtroom deputy can also prod lawyers in slow-moving cases and bring stalled cases to your attention. (See *infra* section IX.D and E for a discussion of statistical reports.)
- Have the courtroom deputy do all your case calendaring (according to your directions). You should meet regularly with the courtroom deputy to go over the status of cases and to plan your calendar. Your instructions and

141. The Federal Law Clerk Information System, managed by the Administrative Office, provides an avenue for your staff to give information to prospective law clerks via the Internet. At this site you can post information about openings in your chambers and the application process. See Federal Law Clerk Information System, at <https://lawclerks.ao.uscourts.gov> (last visited July 6, 2001).

142. For simplicity's sake, we refer to this staff member by the most common term, *courtroom deputy*. If a court organizes its courtroom deputies in teams, a judge may work with more than one courtroom deputy, but the more common practice is to assign a single courtroom deputy to a single judge.

preferences—for example, on the length of a motions hearing—will guide the courtroom deputy in setting events on the calendar.

- Have the courtroom deputy prepare or supervise preparation of notices and orders.
- Have the deputy maintain liaison with the jury administrator to ensure the orderly and efficient use of prospective jurors.
- Free the deputy from nonessential courtroom duties. Although the presence of the deputy during trial will often be useful, there may be occasions when the deputy's time could be better spent performing administrative duties. By having attorneys premark exhibits and by shifting responsibility for administering oaths and keeping minutes to others, you can free the deputy for other work.
- Encourage the courtroom deputy to stay current on the most sophisticated methods of calendar management that are available, including full use of automation. Though much automation is standardized, there is room for initiative and creativity in developing forms and procedures and in designing and maintaining statistical reports. (See *infra* section IX.D.2 for a discussion of innovative reports.)

Although the courtroom deputy works for you, this staff member is supervised by the clerk of court. An important part of the deputy's responsibilities is to make sure that case information is timely and accurately submitted for the docket and that case documents are properly filed in the clerk's office. Because of the deputy's dual responsibilities—to you and to the clerk of court—you will want to be alert to any difficulties and maintain good communication between your chambers and the clerk's office.

B. Magistrate Judges

Magistrate judges can be a great help in managing a busy docket. Referrals to magistrate judges are governed by 28 U.S.C. § 636 and Federal Rules of Civil Procedure 72 and 73. In addition to enumerating specific duties, the statute authorizes assignment of “such additional duties as are not inconsistent with the Constitution and laws of the United States.”¹⁴³ Within the parameters set by the statute and rules, magistrate judges exercise such powers as are delegated by each district court through local rule or order.¹⁴⁴ Thus, a district judge's use of magistrate judges will be guided not only by the statute, federal rules, and his or her own preferences, but also by the district's decisions about their role. In making such decisions, a court may wish to consider advice from the Judicial Conference Committee on the Administration of the Magistrate Judges System, contained in

143. 28 U.S.C. § 636(b)(3).

144. 28 U.S.C. § 636(b)(4) (stating that “[e]ach district court shall establish rules pursuant to which the [magistrate judges] shall discharge their duties.”).

the committee's *Suggestions for Utilization of Magistrate Judges*, available on the federal judiciary's intranet site.¹⁴⁵

1. Referral of nondispositive matters

Any nondispositive pretrial matter may be referred to a magistrate judge for hearing and determination.¹⁴⁶ These matters include conducting Rule 16 conferences, supervising discovery, resolving discovery disputes, and ruling on motions that do not dispose of claims or defenses (for examples of referral orders, see Appendix A, Forms 50 and 51). The magistrate judge to whom a matter is referred is to enter a written order promptly.

Within ten days of service of the order, the parties may serve and file an appeal of the magistrate judge's decision. The district judge must consider any objection filed by a party and should modify or set aside any portion of the magistrate judge's order he or she finds to be clearly erroneous or contrary to law.¹⁴⁷ If you are a district judge and you delegate such nondispositive pretrial matters, you should adhere strictly to this narrow standard of review. Routinely second-guessing the magistrate judges will reduce the time savings you might have gained and very likely will encourage future appeals. (For sample language in a judge's guidelines for counsel, see Appendix A, Form 7.)

Increasingly, magistrate judges have taken on the role of conducting settlement conferences or serving as mediators in court-based ADR programs. You might consider referring cases to magistrate judges for these purposes when the amount of time required might be extensive or your impartiality might be questioned by close involvement in the parties' negotiations. At the same time, if extremely extensive mediation is needed, as in a mass tort or institutional reform case, consider appointing a special master (see *infra* section VIII.C).

2. Referral of dispositive matters

District judges may also designate a magistrate judge to conduct hearings, including evidentiary hearings, on dispositive matters.¹⁴⁸ These matters may include motions for injunctions, for judgment on the pleadings, for summary judgment, or to certify a class, as well as petitions for habeas corpus and petitions challenging conditions of confinement. Unless the parties have consented to full jurisdiction by the magistrate judge, the magistrate judge is limited to making recommenda-

145. See Comm. on the Admin. of the Magistrate Judges Sys., Judicial Conf. of the U.S., *Suggestions for Utilization of Magistrate Judges*, at 156.119.80.10/judgescorner/magistrate/suggestion.html (Dec. 9, 1999). This document, along with other assistance on utilization issues, is also available from the Magistrate Judges Division of the Administrative Office at (202) 502-1830.

146. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

147. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

148. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

tions, including findings where appropriate, after a hearing on the record or a review of the case file and motions.¹⁴⁹

A party may file written objections within ten days of service of the recommended disposition, and the opponent may respond within ten days. If you are the district judge receiving the appeal, you must perform a de novo review, which may be based on the record below or upon additional evidence, of any portion of the magistrate judge's disposition to which objection has been made and then enter an appropriate order.¹⁵⁰ You should exercise care in deciding which dispositive motions to assign to magistrate judges because the referral of dispositive motions can lead to wasteful duplication of judicial and attorney time and effort, especially when the motions involve primarily questions of law.

3. Referral of trials

With the consent of the parties, a magistrate judge may order the entry of judgment in a civil case.¹⁵¹ If consent is for all aspects of the case, the magistrate judge conducts all proceedings, including a jury or non-jury trial if necessary. Or, parties may consent to have a magistrate judge rule on a specified case-dispositive motion. Consent should be given in writing and can be recorded in several ways, including in the attorneys' Rule 26(f) report to the court or on a specialized consent form. (See Appendix A, Forms 13 and 14 for examples in the context of the Rule 26(f) report; see Appendix A, Forms 52 and 53 for specialized consent forms.¹⁵²)

Section 636(c)(2) of Title 28 of the U.S. Code directs the clerk of court to notify the parties, on filing of the action, of the availability of a magistrate judge to try cases on consent. The district judge or magistrate judge may thereafter again advise the parties of this availability, as well as of their right to withhold consent.¹⁵³ The Rule 16 conference is an appropriate occasion to inquire of the parties whether they are willing to consent to a final disposition, including trial—jury or non-jury—before a magistrate judge.

An increasing number of districts have adopted the practice of placing the magistrate judges on the assignment wheel to receive a portion of newly filed civil cases. In these districts, the parties are informed that their case will be assigned to a magistrate judge for all proceedings if the parties consent to it. The parties are given a specified amount of time to consent to this assignment; if consent is not given, the case is reassigned to a district judge.

149. See generally MCL, Third, *supra* note 13, § 21.53.

150. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

151. Magistrate judges may dispose of civil cases on consent if their court has “specially designated” them to do so. 28 U.S.C. § 636(c)(1). All districts have designated their full-time magistrate judges to exercise this authority. (Assignments of such authority to part-time magistrate judges are subject to further statutory requirements. See 28 U.S.C. § 636(c)(1).)

152. Fed. R. Civ. P. 73(b).

153. *Id.*

4. Other referrals

Section 636(b)(3) of Title 28 of the U.S. Code grants the district judge “catchall,” nonconsensual referral authority, the extent of which is not clearly established but the limits of which are set by Article III. There is authority permitting magistrate judges to preside while a jury deliberates and receive jury verdicts, to conduct postjudgment proceedings, and to take a variety of other judicial actions. You should consult circuit law on the limits of the authority granted under section 636(b)(3).¹⁵⁴

5. Method for assigning matters to magistrate judges

In making referrals to magistrate judges, district judges need to take into account the assignment procedures their districts use, which may include one or more of the following methods:

- *Standing order or local rule.* A standing order or local rule directs that magistrate judges have responsibility for certain categories of pretrial matters or for pretrial matters generally, with the possible exception of dispositive motions. They then routinely receive all such matters from the clerk’s office, subject to adjustment from time to time.
- *Inclusion on the wheel.* The entire civil docket is divided among all the district and magistrate judges as cases come in. Magistrate judges are then responsible for their dockets just as the district judges are. If the parties in an individual case do not consent to case assignment to a magistrate judge, the case is reassigned to a district judge, although the magistrate judge may continue to handle some or all pretrial matters.
- *Referral by case.* District judges refer selected cases to magistrate judges for some or all pretrial proceedings. Unless the referral is revoked, the magistrate judge conducts all matters up to a specified point, such as the final pretrial conference.
- *Pairing.* A magistrate judge is paired with one or more district judges and automatically conducts those judges’ pretrial matters as designated. In some districts, the magistrate judges are paired with district judges on a civil trial list and are ready to try cases when the district judges cannot and the parties consent to it.
- *Issue-by-issue assignment.* District judges assign particular motions or matters to magistrate judges, such as summary judgment motions, but otherwise retain complete control over cases for all other matters.

154. See generally Inventory of United States Magistrate Judge Duties (Administrative Office of the U.S. Courts 3d ed., 1999).

C. Special Masters

Special masters can be a critical asset in some cases. Appointment of masters is generally limited to large, complex cases and is therefore infrequent.¹⁵⁵ Because the use of masters is well covered in the *Manual for Complex Litigation, Third* and the *Reference Manual on Scientific Evidence*, we discuss only some basic issues here, drawing on those two publications.¹⁵⁶ For more information, see those two manuals.

1. Authority to appoint a special master

Appointment of special masters is governed primarily by Federal Rule of Civil Procedure 53.¹⁵⁷ An appointment is permitted in jury cases only when the issues are complicated, and in other cases, except for accountings or difficult damage computations, only when “some exceptional condition” requires it (Rule 53(b)). In every instance, a reference “shall be the exception and not the rule” (Rule 53(b)). In the absence of consent by the parties, the district judge may designate a magistrate judge as special master pursuant to Rule 53 and 28 U.S.C. § 636(b)(2). When the parties consent to it, the district judge has authority to designate a magistrate judge as special master under 28 U.S.C. § 636(b)(2), bypassing the limitations of Rule 53(b). Pursuant to 42 U.S.C. § 2000e-5(f)(5), the judge may also appoint a master under Rule 53 to hear Title VII cases, without a showing of exceptional circumstances, if the case has not been set for trial within 120 days after issue is joined (subject to the parties’ right to a jury trial under the Civil Rights Act of 1991).

Although judges have authority under Rule 53 to make an appointment *sua sponte*, most judges prefer to act only with the parties’ consent.¹⁵⁸

2. Reasons for appointing a special master

Masters can be useful adjuncts for a variety of tasks in the management of complex or large-scale litigation: supervising discovery, finding facts in complicated controversies, performing accountings, organizing and coordinating mass tort litigation, mediating settlements, and monitoring compliance with complex remedial orders. The decision whether to appoint a master will involve weighing the extra expense imposed on the parties against potential benefits. Judges have at times

155. Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan & John Shapard, Special Masters’ Incidence and Activity 15–21 (Federal Judicial Center 2000) (report to the Judicial Conference Advisory Committee on Civil Rules to inform its deliberations about whether changes are needed in Fed. R. Civ. P. 53) [hereinafter Special Masters Study].

156. See MCL, Third, *supra* note 13, § 21.52; Reference Manual, 1st ed., *supra* note 117, at 575–622.

157. Inherent authority may also support appointment of special masters, and a number of statutes and rules touch on the subject. See Special Masters Study, *supra* note 155, at 31–35.

158. See *id.* at 28–30.

delegated extensive duties to masters, which, though subject to the court's de novo review, has generated controversy and raised questions about the extent of judicial referral authority. Unless the parties affirmatively seek an appointment and explicitly waive the limits of Rule 53, you should limit your appointments to exceptional cases or conditions.

Within that general guideline, *consider* appointment of a special master to

- assist in pretrial proceedings, such as to control massive discovery requests, rule on claims of privilege, and make factual determinations on the admissibility of expert evidence;
- develop a case management plan, under your supervision, when a case involves hundreds or thousands of claims;
- evaluate the extent and size of damages;
- facilitate settlement;
- administer a class settlement;
- make recommendations regarding the facts that are necessary to determine liability or damages;
- allocate damages to individual litigants; and
- frame or monitor remedial decrees.

3. Selecting and appointing a special master

In selecting a special master, you will want to ensure that the master has two important qualifications: expertise in the matters for which you are appointing him or her, and the full trust of you and the parties. There are a number of ways in which you can identify candidates to serve as special masters.

Consider

- asking the parties to nominate candidates;
- appointing a magistrate judge;¹⁵⁹
- appointing someone because of his or her service in another case; or
- asking someone else, such as another master or an outside agency, to recommend suitable candidates.

The method most frequently used by federal judges is to ask the parties to nominate candidates for appointment.¹⁶⁰ If you use this method, you may want to ask the parties to provide information about the candidates' qualifications and, if appropriate, to discuss the candidates with you or to participate in your interviews

159. Magistrate judges not serving as special masters are properly and routinely referred duties that some courts have assigned to a special master. These include managing the pretrial phase of civil cases, crafting and monitoring remedial decrees, and facilitating settlement.

160. See Special Masters Study, *supra* note 155, at 35–40.

with the candidates. To avoid later problems, you and the parties should make certain the master has no conflicts of interest.¹⁶¹

An order appointing a master should specify what the master is to do and what the master's authority is. Generally, it is advisable to be explicit about matters that involve the appointment itself, such as conflicts of interest and ex parte communications,¹⁶² and to leave the master some discretion over procedural issues, such as the discovery process and hearing procedures.

Consider including the following in a referral order:

- functions assigned to the special master and specific authority to carry them out;
- scope of the special master's investigative authority;
- procedures for the special master to obtain information from the parties;
- discovery rights to evidence supporting the special master's findings;
- disclosure of conflicts of interest;
- scope and standards for judicial review of the special master's work product;
- periodic reporting requirements;
- duration of appointment;
- standards of performance;
- compensation rate, method of payment, and allocation of costs among the parties;
- guidelines regarding ex parte communications with judge, parties, and experts;
- liability and immunity of the special master; and
- result or work product expected and the date thereof.¹⁶³

4. The special master's report

Rule 53(e) requires special masters to prepare a report and, if required by the judge, make findings of fact and conclusions of law. The master may submit a draft of the report to counsel for suggestions. In non-jury cases, a party may serve objections within ten days of service of the report; you must accept fact findings unless they are clearly erroneous, but you may accept, reject, or modify the report. Rule 53(e)(1) directs the master to file a transcript of proceedings and of the evi-

161. For guidance in avoiding conflicts and other ethical problems, see Reference Manual, 1st ed., *supra* note 117, at 603.

162. For a discussion of federal court experiences relating to ex parte communications between special masters and the parties or the judge, see Special Masters Study, *supra* note 155, at 46–52.

163. Extracted in part from Margaret G. Farrell, *Special Masters*, in Reference Manual, 1st ed., *supra* note 117, at 605. For a summary of the contents of special master referral orders, see Special Masters Study, *supra* note 155, at 44–45.

dence, as well as the original exhibits, to facilitate your review. In jury cases, the master's findings are admissible in evidence. The parties may stipulate that a master's findings of fact shall be final, in which case only questions of law remain open for your consideration.

5. Compensating the special master

Under Rule 53(a), compensation of special masters is to be set by the court. In practice, most judges rely on the parties and the master to negotiate the rate, usually the master's hourly rate; typically, the parties share the cost of the master on an equal basis.¹⁶⁴ You will want to keep a watchful eye on the compensation paid to masters, as the costs can be quite high in some cases. Your referral order can set a timetable for periodic submission of bills (at least quarterly) and can specify what information you wish to see to monitor fees and costs.

164. See Special Masters Study, *supra* note 155, at 42. If a special master is appointed in a case subject to the Prison Litigation Reform Act of 1995, compensation and costs are to be paid from funds appropriated to the judiciary. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, April 26, 1996, 110 Stat. 1321, § 802(f)(4). The PLRA amends 18 U.S.C. §§ 3624, 3626; 42 U.S.C. § 1997e; 28 U.S.C. §§ 1346(b), 1915; and 11 U.S.C. § 523(a); it adds new sections 28 U.S.C. §§ 1915A and 1932.

IX. INSTITUTIONAL ISSUES IN LITIGATION MANAGEMENT

- A. Coordination with Other Chambers and Courts
 - 1. Calendar conflicts
 - 2. Coordination of parallel litigation
 - 3. Uniform orders
 - 4. Discovery “hot lines”
- B. Differentiated Case Management (DCM)
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- H. Visiting Judges

Most of this manual has been devoted to helping individual judges manage their cases. In this final chapter, we address a number of topics drawn from the larger field of institutional management that relate to and support individual case management responsibilities. Some of these topics constitute policy initiatives (e.g., the use of uniform orders); others involve the adaptation of new tools to the case management process (e.g., video technology). What links them all, however, is

that they constitute resources and initiatives that flow from the larger institution to the individual judge, who retains the option to use and tailor them within his or her own case management regime.

A. Coordination with Other Chambers and Courts

Coordination with other chambers within your own court and in other courts—both state and federal—can provide case management assistance to you in a number of ways. These include maximizing your management efforts by drawing on the resources of your own institution, accommodating attorneys' conflicting calendar obligations to other courts, and minimizing duplicative or inconsistent case actions when parallel litigation is pending in another forum.

1. Calendar conflicts

When confronted with an attorney's calendar conflict, consider commonsense approaches to finding a reasonable accommodation. Rather than assuming that your calendar should have priority, you might consider various other relevant factors, such as which event was scheduled first, the relative urgency of the respective matters (e.g., a criminal case versus a civil case), and the relative burdens on the parties and on the courts in making accommodations. You should also consider communicating directly with the other judge, whether federal or state, to work out an accommodation. In some states, federal–state judicial councils have established protocols for intersystem calendar coordination.

2. Coordination of parallel litigation

Frequently, litigation raising the same or similar issues is brought simultaneously in different federal courts or in state and federal courts (e.g., claims for asbestos injury by many plaintiffs against the same group of defendants). On a much smaller scale, coordination may be appropriate when a federal court remands state law claims while retaining the federal claims. Coordinating such litigation to avoid duplicate effort and inconsistent outcomes should be seriously considered.

In such situations, you should consult with counsel and the presiding judge of the companion forum to consider the possibilities of

- coordinating calendaring;
- providing for common discovery;
- coordinating motions practice;
- identifying common issues that may be susceptible to resolution in a common proceeding; and
- undertaking coordinated or joint settlement and mediation efforts.

It is important to be alert to and to prevent efforts by attorneys to manipulate multiforum litigation and obstruct effective litigation management.¹⁶⁵

165. See MCL, Third, *supra* note 13, §§ 20.123, 20.225, 21.455, 31.

3. Uniform orders

The general case management and scheduling orders routinely issued by individual chambers after case filing or in preparation for a Rule 16 conference are invaluable tools. These orders often reflect a wealth of bench and bar experience in their specific provisions, as well as in their tenor and tone. Uniform orders can represent a bench-wide consensus on this experience and reflect the general demands of practice in your particular district. Such orders can send a clear, consistent message to the bar and public about the court's expectations, telling them what is appropriate and acceptable within the district regardless of the assigned judge. In doing so, uniform orders can reduce conflicts or misunderstandings between counsel and between counsel and the court. (See Appendix A, Forms 8, 9, and 16 for examples of uniform orders.)

Naturally, the achievement of consensus on the particular provisions of a general order may require modification or sacrifice of some individual preferences. However, some districts (both large and small) have adopted uniform orders with a flexible framework that allows individual judges to attach addenda to the uniform order if a case requires them. Others offer a uniform basic order with blank spaces under specific headings, allowing each judge to tailor the order for each case.

4. Discovery “hot lines”

A discovery “hot line” makes a district or magistrate judge available by telephone whenever out-of-court conflicts arise—for example, in depositions or conferences. Judges can serve in this capacity in an individual case or for designated periods for all cases. This concept is supported by national policy trends and research, which encourage the use of telephone and video technologies, as well as by policies that promote the greater use of magistrate judges in the civil litigation process.¹⁶⁶ In addition, those districts that have implemented some form of telephonic technology note the deterrence value the availability of a judge can have on practitioners' behavior in general.

At least two approaches can be used in setting up a hot line. The first is to create the position of a “duty,” or assigned, judge. The second approach is simply to encourage or mandate by local rule the use of teleconferences for all discovery disputes as a precondition to any formal paper filing, motion, or request for sanctions.

166. See JCUS CJRA Report, *supra* note 1, at 20 (stating that “magistrate judges are indispensable resources” and “therefore the Conference recommends the effective use of magistrate judges . . .”).

B. Differentiated Case Management (DCM)

1. The systematic, differential treatment of civil cases

Differentiated case management (DCM) is a system for managing cases that is based on the assignment of cases to tracks. Each track in a DCM system is defined by specified criteria, such as the complexity of cases assigned to the track, the amount of discovery they will need, the likely time that will elapse between filing and trial, and the judicial and other resources that may be required. Each track also carries with it a specific set of procedures and case-event time lines that govern the progress of cases assigned to that track. These procedures, because they are standardized, allow the system to automatically track case progress, ensuring that no assigned cases “fall through the cracks” of case management control. DCM systems usually rely on a uniform case management order that assigns the case to a track and sets out the scheduling and other requirements of the assigned track. Appendix C provides an example of track definitions for a federal district court and copies of forms used by the court.

The purpose of a tracking system is to tailor the level of case management in each case to the needs of the individual case. However, unlike case management approaches that treat each case on an entirely individual basis, DCM provides systematic recognition of differences in case types and thus tries to conserve court resources by systematically tailoring their application. DCM systems were pioneered in a number of state courts and have subsequently been adopted in various forms in many federal district courts.

2. Track designations and number of tracks

Tracking systems are usually based primarily on case complexity, and tracks are typically designated as “expedited,” “standard,” and “complex.” Track designations can also reflect particular, and familiar, case types (e.g., Social Security or asbestos cases) or case characteristics (e.g., administrative or appeals cases). While some district courts have chosen to use only complexity designations, a large minority use a combination of complexity and other designations. Most districts that have adopted DCM programs have established two to seven tracks; three- and five-track systems are the most common.

3. Assignment of cases to tracks

The success of DCM is based in large measure on whether cases are correctly evaluated and assigned to the case management tracks. Some districts rely on judges alone to make the initial assignment decision, usually at an early case management conference. Others require the parties to make a track selection, which is then reviewed by the judge. Still other districts provide for joint decisions by the judge and a clerk of court, staff attorney, or the parties.

Many districts include an automatic track assignment process for certain types of cases. Administrative or appeals cases, such as Social Security or bankruptcy

appeals, are identified by their pleadings and are automatically assigned to the administrative/appeals track. For cases of greater complexity, as well as those not easily designated by case type, greater court involvement in the track assignment process is usually required.

Regardless of how tracks are initially designed or selected, all DCM systems preserve the discretion of the assigned judge to alter the previously chosen track or any of its predefined management controls as individual case needs evolve.

C. Automation, Court Technology, and Case Management

Since 1975, when the first computer was used in the federal courts, the use of automation technology has increased rapidly. The following are among the more notable changes:

- Judges write opinions and orders almost exclusively through the use of word processing technologies.
- Many judges and law clerks conduct their legal research using on-line computer services.
- The dockets of all courts have been automated.
- Presentence reports are prepared using specially designed computer programs.
- Nationwide software applications facilitate collection of judicial statistics.
- Electronic case filing procedures are being installed in a number of federal district and bankruptcy courts.
- The courts are now interconnected by the nationwide installation of the Data Communications Network.

In addition, the Administrative Office, the Federal Judicial Center, the U.S. Sentencing Commission, and many districts provide information to the public electronically via their Internet home pages.¹⁶⁷ The Administrative Office has also established an internal (or Intranet) Web site, the J-Net, for disseminating publications, guides, memoranda, bulletins, and other documents to judges and judicial branch staff.

These national applications are supported by technical staff within each district. The clerks of court employ an automation staff, usually headed by a systems manager, who will assist you in selecting hardware and software, installing it, and providing in-house training for you and your staff.

167. The Internet home pages for the agencies of the federal judiciary are as follows: Administrative Office of the U.S. Courts: <http://www.uscourts.gov>; <http://156.119.80.100/> (J-Net Intranet); Federal Judicial Center: <http://www.fjc.gov>; United States Sentencing Commission: <http://www.ussc.gov>.

1. Computers

The capacity of computers to provide case management support is constantly increasing. Every chambers is equipped with a standard, approved package of hardware and software to support all standard chambers functions. Additional court-wide automation support capabilities and applications administered through the clerk's office can also be used by individual judges. The nature and extent of this support will vary depending on the automation available in each court. You should become aware of what your court has available, consider how automation can further case management, and prepare yourself and your staff to use it.

2. Computer training

To use available computer technology, judges need to be familiar with personal computers (PCs) and extant software. Training is available to judges from various sources, both within the judiciary and without, including on the J-Net. Ask your court's automation support personnel or training specialist what training is available for you and your staff.

3. Word processing programs

Word processing programs permit you to write and store documents, such as jury instructions and forms, for ready access and modification. Macros, simple program instructions, permit you to automate repetitive tasks and facilitate preparation of orders and standard documents, such as sentencing reports. Software programs are available that allow text search and retrievals using strategies similar to those employed by LEXIS and WESTLAW. Using such software, you can archive jury instructions, orders, and memoranda for future retrieval and use. Word processing functionality will increase substantially with the next generation of case management hardware and software, known as Case Management/Electronic Case Files (or CM/ECF). This system, discussed *infra* at section IX.F, will effectively integrate word processing, case management, and Internet information management functions.

4. Privacy and electronic availability of case files

Many case files contain personal information filed as part of the case documents. With the increased use by courts of document-imaging technologies and electronic case filing, such personal information, which was once available only at the courthouse, may now be subject to widespread access through the Internet. This new electronic access creates many complex issues. The Judicial Conference has adopted policy guidelines for use by all federal courts in addressing privacy concerns created by electronic access.¹⁶⁸

168. The guidelines, which will be incorporated into the *Guide to Judiciary Policies and Procedures*, were adopted on September 19, 2001, and can be found at www.privacy.uscourts.gov. The

D. Case Management and Statistical Programs

Computer-based case management and statistical programs now available for use by individual judges can provide a wealth of caseload information on demand in a variety of formats. The standardized and customized reports these programs can generate allow you to track individual case progress and provide noticing or tickler functions regarding significant case actions, and they can guide your daily and monthly caseload planning. While standard formats for case information presentation are readily available, you can also customize the formats so that the resulting reports reflect your preferences.

An important factor in determining the content and format of your statistical reports should be their audience, which may vary by district and chambers. Although judges are the primary case managers within any district, judicial delegation of the case management function varies considerably from judge to judge. Primary nonjudicial case management functions may be performed solely in chambers, by a judge's secretary or law clerks; by clerk's office courtroom deputies, case managers, or docket clerks; or by any of the foregoing in combination (see *supra* section VIII.A).

In reviewing computer program capabilities and in choosing data content and formats, *consider*

- the advice of your case management team (courtroom deputies, case managers, and law clerks); and
- the use you will make of these reports within your case management delegation and routines.

1. Statistical report formats and content

The automated docketing system collects a great deal of information about each filed case. From that information you can extract the items that are relevant to your case management and arrange them in report formats that suit your needs. Listed below are some examples of reports judges have found useful and features of those reports. This listing is quite comprehensive and contains more features and details than are typically offered in the standardized statistical reports provided by the Integrated Case Management System (ICMS) or Chambers Access to Electronic Records (CHASER). (See Appendix D for sample reports.)

a. *Event Calendaring Reports*

- *Answer Report* (by judge): case number; case filed date; service status; answer filed date; responsive pleading date; default entered; pretrial order; number of defendants.

Conference is developing implementation guidelines. In the meantime, courts are asked to become familiar with the policy guidelines and to follow them to the extent possible.

- *Trial Settings Report* (cases set for trial within 120 days with pending motions by judge): case number; date filed; referral to arbitration; jury demand; discovery; pretrial order due date; proposed pretrial order received; pretrial order filed; pretrial conference; docket call set; trial; referral to magistrate judge, date of referral, and magistrate judge name.
- *Tickler Report* (by judge): docket number; case name; cause; scheduled action; actions due between (dates); date filed; referred to.

b. Case-Tracking Report

- *Case Inventory/Motions Combination Report* (by judge): jury demand; Rule 16 conference; settlement or status conference; magistrate judge conference; pretrial conference; pretrial order filed; trial date; referred date and name.

c. Appeals and Quasi-Administrative Cases Report

- *Monthly Appeals Report* (by judge): case number; bankruptcy or other appeal; prebriefing conference set; expedited; all briefs filed; at issue; at issue thirty days; at issue sixty days; at issue ninety-plus days.

d. Prisoner Cases Report

- *1915 Payment Record*: name; case number; initial payment; delinquent; case dismissed.

2. Additional and innovative report formats

Some districts have supplemented their standardized reports with graphics packages and new types of reports. These innovative reports include the following information:

- case event calendaring (e.g., answer, trial settings, and tickler reports);
- individual case types (e.g., appeals or administrative cases reports);
- specialized case processes (e.g., ADR or DCM case management information);
- specialized case information (e.g., amount in controversy; bench and jury trial continuance reports);
- administrative management information (e.g., total pleadings and papers filed; total trial and court hours); and
- special case costs (e.g., court reporter costs; juror costs).

These examples demonstrate the flexibility of the existing database, as well as the creativity of individual districts in building on existing data and report formats to expand their utility.

E. Case Management Report Applications

1. CHASER

CHASER (Chambers Access to Electronic Records) is an automated case management information retrieval system for judges' chambers. It is intended to help you and your staff access docket sheets, calendars, and motions information, as well as a variety of statistical and inventory reports. It provides access to data stored in the database in the clerk's office. Some courts also have PACER (Public Access to Electronic Records), which can now be made to perform many of the functions performed by CHASER. Using these systems, the trial judge is able to determine, among other things, the status of

- all pending cases and the date of the most recent activity in each case;
- all pending motions;
- all matters under submission; and
- compliance with pretrial orders and filing deadlines.

2. CHASER variations

A new generation of CHASER reports have been developed that are designed to capitalize on the federal court system's migration to a Windows environment. This Web version of CHASER is easier to learn and use and allows users to switch back and forth quickly between the various reports or report sections; to copy information or dates from one application to another; and to customize report layouts for use at their own workstations.

While the new Web version of CHASER accesses the same case management database and offers the same query capabilities as the current version, it also offers the following enhancements:

- The new Unscheduled Cases Report flags all cases without a "next action."
- The current Referred Motions Report has been modified to include document and document part numbers for replies and responses to motions.
- The present Docket Report has been modified to extract the last update made to the case in the ICMS database.
- A new single case query is available that allows information to be viewed for a single specified case across all report formats.
- A calendaring function is available to track case-related, as well as personal, appointments.

F. Case Management/Electronic Case Files (CM/ECF)

The Case Management/Electronic Case Files (CM/ECF) system uses Web technology to give the federal judiciary a new mechanism for information handling that will completely replace the current ICMS system. A fully implemented CM/ECF system will capture a document electronically at the earliest possible

point, ideally from the person who creates the document. The system will contain and manage everything presently included in a paper case file and will also contain the court's internal case-related documents (file notes, proposed rulings and orders, draft opinions, and so forth). It will also provide multiple, controlled levels of access to case files in CM/ECF systems throughout the federal judiciary, and it will include links to relevant information in automated court financial records and other records, as well as texts of case law, statutes, and other legal authority. If implemented by the court, the system's optional electronic filing capabilities will enable attorneys to file pleadings from their offices via the Internet; judges, court staff, and attorneys to have immediate access to new and historical documents; and case data and all related documents to be integrated and more manageable.

Significant features of CM/ECF include

- electronic notices of filings to other CM/ECF participants;
- next-generation case management, including tracking of motions, answers, deadlines, and hearings;
- up-to-date reports, queries, and docket sheets for individual cases;
- electronic delivery of documents to, from, and within the courts;
- electronic retrieval of case documents and dockets by all users;
- electronic document management, storage, security, and archiving; and
- automatic creation of docket entries from attorney filings.

Owing to its initial success in a number of pilot courts, the CM/ECF system will be made available throughout the federal court system over the next few years.¹⁶⁹

G. Trial Support Technologies

1. In general

Computer technology has the potential to provide substantial support in the management of both pretrial and trial matters. Some support can be derived from equipment available within the court, primarily PCs. In addition, attorneys in large cases often employ their own advanced technologies for handling documents and presenting evidence; you may derive additional management support from the use of this equipment.

Consider the following ways your trial management can benefit from in-court technologies:

- Computer-stored documents can be accessed during trial when the courtroom is equipped with computer consoles.

169. Since the inception of this pilot program in 1998, the prototype CM/ECF system has handled over 15,000 cases and 175,000 documents and docket entries for a user community of 75 judges, 400 court staff, and 1,000 attorneys (who used it to file their documents).

- Computer-aided transcription of trial proceedings can facilitate preparation of and access to the transcript; when used in a computer-integrated courtroom, it provides all trial participants with instant access to the transcript.
- Optical scanning devices permit the copying of large numbers of documents onto computer disks for review or display.
- In cases involving voluminous papers, counsel can provide the judge with disks containing depositions and exhibits for convenient storage and access.

2. Courtroom technologies

Courtroom technologies can be used to facilitate case management, reduce trial time and litigation costs, and improve fact-finding, juror understanding, and access to court proceedings. The Judicial Conference's Committee on Automation and Technology has found that courtroom technologies significantly enhance the fact-finding mission of the federal courts. To that end, the Judicial Conference has endorsed the use of technologies in the courtroom and, subject to priorities and the availability of funds, urges that (a) courtroom technologies—including video evidence presentation systems, videoconferencing systems, and electronic methods of taking the record—be considered necessary and integral parts of courtrooms undergoing construction or major renovation; and (b) the same courtroom technologies be retrofitted into existing courtrooms or those undergoing tenant alterations as appropriate.¹⁷⁰ The Federal Judicial Center has recently published a book to provide case management and legal guidance to judges on the use of these technologies.¹⁷¹ Two of the less familiar technologies are briefly described below.

a. *Video evidence presentation*

Video evidence presentation technologies display evidence electronically and simultaneously to everyone in the courtroom through monitors placed at the judge's bench, jury box, witness stand, and counsel tables. Most judges who have used such systems find that the systems improve their ability to manage proceedings, reach decisions, question witnesses, and understand testimony and evidence. These improvements seem to be due primarily to the judges' being able to view exhibits and contested materials at the same time as everyone else. In addition, most jurors who have been queried about the technique have indicated that they were able to see evidence clearly and follow the attorneys' presentations. Most judges also have found that the technologies make it easier for attorneys to present

170. See Report of the Proceedings of the Judicial Conference of the United States, March 16, 1999, at 8. See also Report to Congress on the Optimal Utilization of Judicial Resources 7 (Administrative Office of the U.S. Courts 2000).

171. Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial (Federal Judicial Center and National Institute for Trial Advocacy, 2001).

at least some evidence; as a result, most judges believe they are able to remain more focused on testimony and evidence (although a substantial minority of judges prefer to handle the evidence in some instances).

b. Videoconferencing

Videoconferencing can be used to provide live two-way audio and video transmission between a court and a remote site. It offers opportunities to conduct some court proceedings without having all participants present in a single courtroom. Videoconferencing appears to be most useful in routine pretrial matters or in circumstances in which it represents an obvious logistical benefit to both counsel and the court. Judges and attorneys, in their responses to user surveys, have found that videoconferencing can save time and travel, thus having the potential to reduce overall litigation costs in some proceedings. Judges have also noted that by reducing the need to move prisoners for proceedings, court security is enhanced.

System users have also found that videoconferencing did not have a significant impact on several aspects of the proceedings in which it was used. It has not had a great effect on preparation time, the length of the proceedings, or the ability to examine or understand remote witnesses. The benefits cited almost universally by judges and attorneys have been the savings in travel time and costs, as well as improved flexibility in scheduling. For visiting judges, videoconferencing can also be a useful tool (used either from different locations within the same district or from different districts within the same circuit), allowing them to conduct proceedings without traveling to the court locations where the litigants are.

H. Visiting Judges

When a judge becomes especially overburdened (because of illness, for example, or a months-long trial) or when a district as a whole becomes overburdened (because of a heavy criminal caseload, for example) the court can seek assistance from outside the district through designation of a visiting judge. Such designations are governed by statute and by Judicial Conference policy. A report to the Judicial Conference recommended that information be shared among judges and courts about how to obtain visiting judges and how to use them most effectively.¹⁷² If you think you may need the help of a visiting judge, you can contact the staff of the Judicial Conference Committee on Intercircuit Assignments and consult the manual *The Use of Visiting Judges in the Federal District Courts*.¹⁷³

172. Report of the Judicial Officers Resources Working Group to the Executive Committee of the Judicial Conference of the United States (September 1999). The Working Group, which was appointed by the Chief Justice, was made up of the chairs of six Judicial Conference committees and the chair of the Judicial Panel on Multidistrict Litigation.

173. Jennifer Evans Marsh, *The Use of Visiting Judges in the Federal District Courts: A Guide for Judges & Court Personnel* (Federal Judicial Center 2001). The Administrative Office staff who support the Intercircuit Assignment Committee can be reached at (202) 502-1180.

APPENDIX A

Sample Forms

The sample forms included in this appendix were obtained from the courts or their Web sites. Forms and orders are the copy in use by the court or the judge whose name is on the form or order, as of this writing. This manual was prepared for publication shortly after the December 1, 2000, amendments to the Federal Rules of Civil Procedure came into effect. Although some forms and orders may not yet reflect the rule amendments, in some particulars, they were included because of their overall value.

These forms and orders illustrate multiple aspects of civil procedure and case management. Citation to a form to illustrate a particular point does not suggest the form is useful for only that point. A review of the forms generally may provide helpful ideas and language on a variety of matters.

Table of Forms

- Form 1: Initial Case Management Scheduling Order
- Form 2: Order for Rule 26(f) Planning Meeting and Rule 16(b) Scheduling Conference
- Form 3: Initial Scheduling Order
- Form 4: Guidelines for Discovery, Motion Practice and Trial
- Form 5: Individual Practices of Judge Miriam Goldman Cedarbaum
- Form 6: Recommended Model for Individual Judge's Practices
- Form 7: Standing Order for Matters Before Judge Martin J. Jenkins
- Form 8: Instructions Regarding Pretrial Proceedings
- Form 9: Standing Pretrial Procedure Order and Forms
- Form 10: Report of Parties' Planning Meeting (Form 35, Fed. R. Civ. P.)
- Form 11: Joint Case Management Statement and Proposed Order
- Form 12: Order Setting Case Management Conference and Requiring Joint Case Management Statement
- Form 13: Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement
- Form 14: Report of Parties' Planning Meeting Under Fed. R. Civ. P. 26(f) and L.R. 16.3(b)
- Form 15: Order Setting Requirements for Rule 26 and Other Pretrial Matters
- Form 16: Uniform Trial Practice and Procedures
- Form 17: Jurisdictional Checklist
- Form 18: Order Concerning Removal
- Form 19: Civil RICO Actions
- Form 20: Scheduling Order
- Form 21: Case Management Order
- Form 22: Rule 16(b) Scheduling Order
- Form 23: Rule 16.1(A) Initial Order
- Form 24: Pretrial Scheduling Order
- Form 25: Pretrial Order – Jury Case
- Form 26: Preliminary Report and Discovery Schedule
- Form 27: Scheduling Order for Social Security Cases
- Form 28: Order Setting Schedule for Social Security Cases
- Form 29: Provisional Discovery Plan
- Form 30: Memorandum and Order Regarding Discovery
- Form 31: Items for Possible Inclusion in the Rule 16 Case Management Conference Notice When Significant Electronic Discovery Is Anticipated
- Form 32: Order for Settlement Conference
- Form 33: Order Dismissing Case When Parties Have Not Timely Advised Court of the Outcome of Settlement Efforts

Form 34: Order Dismissing Case When Parties Have Advised the Court That the Case Has Settled

Form 35: Order Setting Pretrial Requirements Before Judge Charles R. Butler, Jr.

Form 36: Final Pre-trial Order, with Instructions

Form 37: Order for Pretrial Preparation

Form 38: Pretrial Order

Form 39: Order Setting Jury Trial, Final Pretrial Conference, and Requirements for the Proposed Final Pretrial Order

Form 40: Order for Final Pretrial Conference

Form 41: Trial Order

Form 42: Jury Questionnaire

Form 43: Jury Questionnaire—Civil

Form 44: Stipulation and Order for Tailored Jury Trial

Form 45: Judge **Paul A. Zoss's** Voir Dire

Form 46: Civil Jury Trial Checklist

Form 47: Guidelines for Preparation of Jury Instructions

Form 48: Expectations and Requirements for Trials

Form 49: Procedure for Presentation of Direct Testimony by Written Statement

Form 50: Standard Referral Order for Referring Matters to Magistrate Judges

Form 51: Order of General Reference to Magistrate Judges

Form 52: Notice, Consent, and Order of Reference: Exercise of Jurisdiction by a United States Magistrate Judge

Form 53: Consent to Proceed Before a United States Magistrate Judge and Designation

Sample Form 1

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s))	
)	
	)	C - -MJJ
-v-)	
	)	INITIAL CASE MANAGEMENT
	)	SCHEDULING ORDER
	)	Civil L.R. 16-2
Defendant(s))	
)	

IT IS HEREBY ORDERED that this action is assigned to the Honorable Martin J. Jenkins. When serving the complaint or notice of removal, the plaintiff or removing defendant shall serve on all other parties a copy of this order, the handbook entitled “Dispute Resolution Procedures in the Northern District of California” and all other documents specified in Civil Local Rule 4-3. Counsel shall comply with the case schedule listed below unless the Court otherwise orders.

IT IS FURTHER ORDERED that this action is assigned to the Alternative Dispute Resolution (ADR) Multi-Option Program governed by ADR Local Rule 3. Counsel and clients shall familiarize themselves with that rule and with the handbook entitled “Dispute Resolution Procedures in the Northern District of California.”

CASE SCHEDULE [ADR MULTI-OPTION PROGRAM]

Date	Event	Governing Rule
11/06/2000	Complaint filed	
12/21/2000	Last day to file proof(s) or waiver(s) of service	Civil L.R. 4-2
02/05/2001	Last day to meet and confer re case management	Civil L.R. 16-4
02/05/2001	Last day to file Joint ADR Certification w/ Stipulation to ADR process or Notice of Need for ADR phone conference	ADR L.R. 3-5(b)
02/14/2001	Last day to complete initial disclosures	Civil L.R. 16-5
02/26/2001	Last day to file/serve Case Management Statement	Civil L.R. 16-12 & 16-13
03/06/2001	Case Management Conference in Ctrm. 11, 19th Fl. SF at 2:00 PM	Civil L.R. 16-13

Sample Form 2

Revised as of 12/1/00

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

)	
)	
Plaintiff,)	
)	
vs.	)	Civil No.:
)	
)	
Defendant.)	

ORDER FOR RULE 26(f) PLANNING MEETING
AND
RULE 16(b) SCHEDULING CONFERENCE

IT IS ORDERED:

The court shall hold a Rule 16(b) initial pretrial scheduling/discovery conference on _____. The conference will be held in the Magistrate Judge's Chambers, Room 440, U.S. Courthouse, 655 First Avenue North, Fargo, North Dakota, if all counsel are from Fargo-Moorhead. Otherwise, the conference will be held by telephone conference call to be initiated by plaintiff's counsel.

In preparation for the conference, counsel are directed to confer on or before **(21 days before first date)** in accordance with Rule 26(f) of the Federal Rules of Civil Procedure. The court strongly encourages counsel to meet face to face, but should that prove impossible, counsel shall meet by telephone conference. Communicating by

writing, including fax or e-mail, will not be sufficient without an actual meeting. Counsel are jointly responsible for arranging and attending the meeting.

On or before **(14 days following conference)**, counsel shall submit to the magistrate judge a joint written report detailing their Rule 26(f) meeting, together with a joint proposed scheduling/discovery plan that includes at least those items listed in the form attached to this order.

During the Rule 26(f) meeting, counsel shall discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, make or arrange for the disclosures required by Rule 26(a)(1), and develop their joint proposed scheduling/discovery plan. These are only the minimum requirements for the meeting. Counsel are encouraged to have a comprehensive discussion and are required to approach the meeting cooperatively and in good faith. The discussion of claims and defenses shall be a substantive, meaningful discussion. In addressing settlement or early resolution of the case, counsel are reminded that the court strongly encourages (although it does not mandate) participation in an early alternative dispute resolution effort. Counsel are required to explore the feasibility of ADR not only between themselves but with their clients as well. The specific reason(s) for any decision not to participate in a form of early ADR shall be delineated in the Rule 26(f) report. If the parties elect not to participate in an early ADR effort, the court may nonetheless require a settlement conference shortly before trial.

In addressing the Rule 26(a)(1) disclosures, counsel shall discuss the appropriate timing, form, scope or requirement of the initial disclosures, keeping in mind that Rule 26(a)(1) contemplates the disclosures being made by the date of the Rule 16(b) initial scheduling conference and including at least the four categories of information listed in the rule. Rule 26 affords the parties flexibility in the scope, form and timing of

disclosures under both Rule 26(a)(1) (initial disclosures) and Rule 26(a)(2) (expert witness disclosures), but the parties' agreement on disclosures is subject to approval by the court. In their discussion of disclosures, counsel shall address issues of relevance in detail, with each party identifying what it needs and why. The discussion shall include as well the sequence and timing of follow-up discovery, including whether that discovery should be conducted informally or formally and whether it should be conducted in phases to prepare for filing of particular motions or for settlement discussions.

The deadlines in the scheduling/discovery plan shall be mutually agreeable, with a view to achieving resolution of the case with a minimum of expense and delay. At the Rule 16(b) conference, the court will review the plan with counsel and set a firm trial date. Counsel are informed that the court intends to try all civil cases within 18 months of filing of the complaint. Consequently, all deadlines in the schedule, including the dispositive motion deadline, must be met within 14 months of filing of the complaint in order to afford adequate time for briefing and ruling prior to the final pretrial conference and trial dates.

Each party shall be represented at the Rule 26(f) meeting and in preparation of the report and scheduling/discovery plan, as well as at the Rule 16(b) conference, by counsel authorized to bind the party on all matters to be covered.

Dated: _____.

Karen K. Klein
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
_____ DIVISION

Caption of Case)
)
) Civil No. _____
)
)

REPORT OF RULE 26(f) MEETING

In accordance with Rule 26(f), Federal Rules of Civil Procedure, counsel for the parties conferred (in person/by telephone) on (date) and submit the following report of their meeting for the court's approval:

1. Discussion of Claims, Defenses and Relevant Issues

(Summarize discussion of primary issues, threshold issues, etc., and indicate on which issues the parties will need to conduct discovery. Identify what information each party needs in discovery as well as when and why. Also indicate likely motions and their timing.)

2. Informal Disclosures

(Indicate agreement on timing, form and scope of informal disclosures. Specifically identify not only the information listed in Rule 26(a)(1), but any additional information the parties agree to disclose informally. Justify with particularized reasons any proposal that would require less disclosure informally than required by Rule 26(a)(1).)

3. Formal Discovery

(Indicate nature, sequence and timing of formal discovery, as well as any need to conduct discovery in phases to prepare for the filing of motions or for settlement discussions. Specifically delineate what discovery will be conducted formally.)

4. Expert Witness Disclosures

(Indicate agreement on timing and sequence of disclosure of the identity and anticipated testimony of expert witnesses, including whether depositions of experts will be needed.)

5. Early Settlement or Resolution

(Recite the parties' discussion about early resolution through ADR, motion or otherwise. Explain any decision not to seek early resolution.)

6. Other Matters

(Indicate discussion and any agreement on matters not addressed above.)

(Attorney Signature)

(Attorney Signature)

ORDER

The above Rule 26(f) Report is approved with the following additions/
modifications:

Dated: _____

Karen K. Klein
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

_____ DIVISION

Caption of Case

)
)
)
)
)

Civil No. _____

SCHEDULING/DISCOVERY PLAN

An initial pretrial/discovery conference is to be held in this case on _____ . Pursuant to Rule 26(f), the parties have discussed the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, and developed a proposed discovery plan. After conferring, in person or by telephone on (date), counsel for the parties agree to the following:

1. The parties have made (or shall make by _____) Rule 26(a)(1) disclosures as follows: (Include here a summary of the parties' agreement on subject matter, timing and form of Rule 26(a)(1) disclosures, but do not submit the disclosures themselves to the court)
2. The issues on which the parties need to conduct discovery are: (list discovery issues)
3. The parties shall have until _____ to complete fact discovery and to file discovery motions.
4. Plaintiff(s) shall have until _____ and defendant(s) shall have until _____ to identify the subject matter/discipline of expert witnesses to be used at trial. (Reverse parties for experts on

counterclaims.) (Identification to be served on other parties, but not filed with the court.)

5. The parties shall have until _____ to provide the names of expert witnesses and complete reports under Rule 26(a)(2). (Treating physicians need not prepare reports, only qualifications, unless they will express opinions not reflected in the medical records.) (Reports to be served on other parties, but not filed with the court.) The parties shall have until _____ to complete discovery depositions of expert witnesses.
6. The parties shall have until _____ to move to join additional parties.
7. The parties shall have until _____ to move to amend pleadings to add claims or defenses.
8. The parties shall have until _____ to file other nondispositive motions (e.g., consolidation, bifurcation)
9. The parties shall have until _____ to file threshold motions (e.g., jurisdiction, qualified immunity, statute of limitations). Discovery (shall/shall not) be stayed during the pendency of such motions.
10. The parties shall have until _____ to file other dispositive motions (summary judgment as to all or part of the case).
11. Each party shall serve no more than ____ interrogatories, including subparts. No broad contention interrogatories (i.e., “List all facts supporting your claim that . . .”) shall be used. (Show good cause for more than the 25 interrogatories allowed by Rule 33.)
12. Each side shall take no more than ____ discovery depositions. (Show good

cause for more than the 10 depositions allowed by Rule 30.)

13. Depositions taken for presentation at trial shall be completed ____ days before trial.

14. Counsel have discussed between themselves and explored with their clients early involvement in alternative dispute resolution. The following option(s) would be appropriate in this case:

_____ arbitration

_____ mediation (choose one):

_____ private mediator

_____ court-hosted early settlement conference—should the conference be held before a judge who will not be the trial judge?

_____ yes

_____ doesn't matter

_____ early neutral evaluation before (choose one):

_____ judge other than trial judge

_____ neutral technical expert

_____ neutral attorney

_____ other (specify) _____

_____ none (explain reasons) _____.

The parties shall be ready to evaluate the case for settlement purposes by _____. (If an ADR option other than a court-hosted settlement conference is chosen, counsel shall designate one of themselves to report back to the magistrate judge that the ADR effort was completed and whether or not it was successful). The court reminds the parties that early involvement in ADR is voluntary, not mandatory. Participation in ADR is

encouraged by the court but is not required except for a settlement conference shortly before trial.

15. A mid-discovery status conference (would/would not) be helpful in this case. An appropriate time for the conference would be (list month).
16. The parties (will/will not) voluntarily waive their rights to proceed before a district judge and consent to have a magistrate judge conduct any and all further proceedings in the case, including the trial, and order the entry of a final judgment.
17. Trial of this case will be (jury/nonjury).
18. The estimated length of trial is _____ days.

(Attorney Signatures)

ORDER

The above scheduling/discovery plan is approved with the following additions/modifications:

Dated: _____

Karen K. Klein
United States Magistrate Judge

Sample Form 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

Plaintiff,

vs.

Civ. No.

Defendant.

INITIAL SCHEDULING ORDER

This cause is assigned to me for scheduling, case management, discovery, and other non-dispositive motions. The Federal Rules of Civil Procedure as amended in 1993, as well as the local rules of the Court shall apply to this law suit. Civility and professionalism will be required of counsel. Counsel should read “A Lawyer’s Creed of Professionalism of the State Bar of New Mexico”.

The parties, appearing through counsel or pro se, shall “meet and confer” no later than _____ to formulate a provisional discovery plan. Fed. R. Civ. P. 26(f). The time for discovery, generally 120 to 150 days, will run from the Rule 16 initial scheduling conference. The provisional discovery plan shall be filed with the Court no later than _____.

The parties will cooperate in preparing an Initial Pre-Trial Report (IPTR) which will follow the sample IPTR form obtainable from the Court Clerk.¹ The blanks for dates should not

¹ Please contact the Clerk’s Office to obtain a copy of the new standardized Initial Pre-Trial Report form adopted by Administrative Order dated May 11, 1995, and amended by the Court in May 1997. See Attachment “A” which contains the amended language concerning pretrial motions.

be filled in. Plaintiff, or Defendant in removed cases, is responsible for submitting the IPTR to my office by _____. Good cause must be shown and Court approval obtained for any modification of the IPTR schedules.

Initial disclosures under Fed. R. Civ. P. 26(a)(1) shall be made within ten days of the meet and confer session.

A Rule 16 scheduling conference will be held in my chambers on _____ at _____.² At the Rule 16 scheduling conference Counsel shall be prepared to discuss discovery needs and scheduling, all claims and defenses, the use of scientific evidence and whether a Daubert³ hearing is needed, initial disclosures, and the timing of expert disclosure and reports under Fed. R. Civ. P. 26(a)(2). We shall also discuss settlement prospects and alternative dispute resolution possibilities. Client attendance is not required. Out-of-town counsel may appear by telephone if prior arrangements are made with opposing counsel and the Court.

Pre-trial practice in this cause shall be in accordance with the foregoing.

IT IS SO ORDERED.

UNITED STATES MAGISTRATE JUDGE

² For daily calendar updates, please call the Court Calendaring Service at 248-8112, extension 38.

³ Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993).

NOTICE TO FEDERAL PRACTITIONERS

The standard Initial Pre-trial Report Form has been revised under the paragraph entitled “Other Pretrial Motions” as follows:

Motion “packages” containing the original and one copy of all papers relating to a motion (i.e., the motion, response and reply, with any accompanying memoranda or exhibits) as required by D.N.M. LR-Civ. 7.3(5) must be filed with the Court no later than _____. Any pretrial motion “package” filed after the above date shall be considered untimely in the discretion of the Court.

The revised form is available on the Internet at the Federal District Court web site or on disk and hard copy format at the Clerk’s Office.

ATTACHMENT “A”

Sample Form 4

(Cite as: 117 F.R.D. 273)

Federal Rules Decisions
1987

GUIDELINES FOR DISCOVERY, MOTION PRACTICE AND TRIAL

William W Schwarzer
U.S. District Judge
Northern District of California

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Government Works

GUIDELINES

These guidelines are furnished for the convenience of counsel and the Court to promote the just, speedy and economical disposition of cases. They should be accepted in that spirit.

GENERAL MATTERS

Attorneys appearing in the District Court in civil litigation must observe three sets of rules:

- The Federal Rules of Civil Procedure,
- The District Court's Local Rules, and
- The rules and practices of the particular judge to whom the case is assigned.

You can become familiar with the rules and practices of the judge assigned to your case in two ways:

- (i) By obtaining from that judge's courtroom deputy copies of the standing orders used by that judge; and
- (ii) By inquiring of the deputy (not the law clerks) how that judge wants things done.

The following matters require particular attention:

1. *Removal From the State Court.* Before filing a petition to remove from state to federal court, consider the jurisdictional facts carefully in light of 28 U.S.C. § 1441 and other applicable law. Do not attempt to remove unless you are satisfied that good grounds exist.

Note that (1) the existence of a federal law defense does not normally create federal jurisdiction and (2) the presence of fictitious defendants may destroy diversity of citizenship.

2. *Related Cases* (L.R. 205-2). If you have a case that you believe may be related to another case on file in the court (whether closed or not), you must promptly file a notice of related case. The judge with the lower numbered case will decide whether to relate the cases, depending on whether assignment to a single judge will be conducive to economy or efficiency.

3. *Status Conferences* (L.R. 235-3; Fed.R.Civ.P. 16). Judges generally hold a status conference in a case within three months of filing of the complaint. The purpose of this conference is to formulate and narrow the issues; to schedule a discovery cutoff, pretrial conference and trial date and to explore the possibility of settlement. The conference should be attended by an attorney who is thoroughly familiar with the case and is authorized and prepared to speak on these matters. Use the conference to inform the judge about your case and to propose a practical litigation program for it. A brief, informative and non-argumentative statement filed at least seven days in advance is helpful to the judge. Some judges will hear status conferences by conference telephone call if requested. Consult the assigned judge's status conference order for details.

4. *Settlement*. Over ninety percent of all civil cases settle before trial. You can expect the judge to inquire about prospects for settlement at every opportunity. Always be prepared with a reasonable negotiating position and a credible and persuasive explanation for it. At the request of any party the Court will arrange a settlement conference before another judge or magistrate. Brief settlement conference statements should be submitted to the settlement judge in advance of the conference but not filed.

5. *Rule 11 Sanctions*. As amended in 1983, Rule 11 now provides that an attorney who signs a pleading or other paper filed with the Court certifies that, after having made a reasonable inquiry, the attorney believes it to be well-grounded in fact and warranted by existing law or a good faith argument for modification or extension of existing law and that it is not interposed for an improper purpose such as to harass, delay or unnecessarily increase expense. Thus, Rule 11 requires a lawyer to make a reasonable prefiling inquiry and not to misuse the litigation process by frivolous litigation or harassment of an opponent. See also 28 U.S.C. § 1927.

Lawyers can expect the pleadings, motions and other papers they file to be scrutinized by the judge in light of this rule, regardless of whether a motion to impose sanctions is filed. When a paper is filed that does not appear to conform to Rule 11, the lawyer will be called on to explain; in the absence of a satisfactory explanation, sanctions such as the resulting costs and fees incurred by the opponent may be assessed.

Rule 11 should not be permitted to generate satellite litigation. Do not file a Rule 11 motion unless you are certain it is well-founded. It is advisable to take up the matter with the Court before filing. Generally, discovery will not be permitted in Rule 11 proceedings.

DISCOVERY

1. General Principles of Discovery. Counsel should be guided by courtesy, candor and common sense, and conform to the Federal Rules of Civil Procedure, the Local Rules, and any applicable orders. In particular, counsel should have in mind the restrictions on the scope of discovery stated in Rule 26(b)(1) and the good faith obligations implicit in Rule 26(g). Direct and informal communication between counsel is encouraged to facilitate discovery and resolve disputes.

2. Timeliness. The time limits specified in the rules and applicable orders must be observed. If additional time is needed, a continuance must be sought in advance by stipulation and order.

3. Discovery Cut-Off. Discovery cut-off dates in orders are the last date for filing discovery responses, unless otherwise specified. To be timely, therefore, discovery requests must be filed sufficiently in advance of the deadline for responses to be made. The Court will normally set cut-off dates only after consultation with counsel. Once they are set, however, they will be changed only for good cause shown.

4. Supplementing Discovery Responses. Rule 26(e) requires that an earlier discovery response be supplemented if it was incorrect or is no longer true or to the extent it relates to potential expert or other witnesses. Failure to comply may result in exclusion of evidence or witnesses at trial.

5. Depositions

a. *Scheduling.* Barring extraordinary circumstances, opposing counsel should be consulted and the convenience of counsel, witnesses and parties accommodated before a deposition is noticed. Concurrent depositions are not permitted in the absence of stipulation or order. Note that it is often less expensive to bring the witness to the deposition (and for the parties to share the expense) than for the lawyers to travel.

b. *Stipulations.* When counsel enter into stipulations at the beginning of a deposition, the terms of the stipulation should be fully stated on the record of the deposition.

c. *Questioning.* Questions should be brief, clear and simple. Rarely should a question exceed ten words. Each question should deal with only a single point. Argumentative questions are out of order. The purpose of a deposition is not to harass or intimidate, but simply to make a clear and unambiguous record of what that witness's testimony would be at trial.

d. *Documents.* Normally, except in the case of impeachment, a witness should be shown a document before being questioned about it.

e. *Objections.* Under Rule 30(c), objections to the manner of taking the deposition, to the evidence or to the conduct of a party shall be noted on the record but the evidence objected to shall be taken subject to the objection. In the absence of a good faith claim of privilege, instructions not to answer are rarely justified and may lead to sanctions under Rule 37(a)(2) and (4). Speaking objections and other tactics for coaching a witness during the deposition may also be cause for sanctions. If counsel believes that a motion to terminate or limit the examination under Rule 30(d) would be warranted, counsel should promptly initiate a conference call to the Court with opposing counsel for a pre-motion conference to attempt to resolve the problem. (See ¶ 9.a. below.)

f. *Persons Attending Depositions.* In the absence of a specific order, there is no restriction on who may attend a deposition. Only one lawyer may normally conduct the particular deposition for each side.

g. *Expert Discovery.* Rule 26(b)(4) should be consulted. However, experts who are prospective witnesses are normally produced for deposition by the opposing party as a matter of course. If the expert is expected to testify at trial, a written statement of his anticipated testimony should be given to opposing counsel in advance of the deposition.

h. *Number of Depositions.* Counsel are expected to observe the limitations specified in Rule 26(b)(1), and, in particular, to avoid unnecessary depositions. Counsel should explore less expensive alternatives for obtaining the needed information.

6. Interrogatories

a. *Informal Requests.* Whenever possible, counsel should try to exchange information informally. The results of such exchanges, to the extent relevant, may then be made of record by requests for admission. (See ¶ 8, below.)

b. *Number and Scope of Interrogatories.* Although the Court has no standing limitation, it will be guided in each case by the limitations stated in Rule 26(b)(1). Counsel's signature on the interrogatories constitutes a certification of compliance with those limitations. (See Rule 26(g).) Interrogatories should be brief, simple, neutral, particularized and capable of being understood by jurors when read in conjunction with the answer. Ordinarily they should be limited to requesting objective facts, such as identification of persons or documents, dates, places, transactions and amounts. Argumentative interrogatories, attempts to cross-examine, multiple repetitive interrogatories (such as "state all facts on which an allegation or a denial is based") are objectionable. Except in certain specialized areas of practice, such as maritime personal injury cases, standard interrogatories generated by word processors should be avoided.

c. *Responses.* Rule 33(a) requires the respondent to produce whatever information is available (but only what is available), even if other information is lacking or an objection is made. When in doubt about the meaning of an interrogatory, give it a reasonable interpretation (which may be specified in the response) and answer it so as to give rather than deny information. Generally, the responding party is required to produce information only in the form in which it is maintained. If an answer is made by reference to a document, attach it or identify it and make it available for inspection. (See Rule 33(c) and ¶ 7, below.) Generalized cross-references, such as to a deposition, are not an acceptable answer.

d. *Objections.* Unless the objection is based on privilege or burdensomeness, or a motion for protective order is made, the information requested must be supplied to the extent available, even if subject to objection. Counsel's signature on the answer constitutes a certification of compliance with the requirements of Rule 26(g).

e. *Privilege.* A claim of privilege must be supported by a statement of particulars sufficient to enable the Court to assess its validity. (See L.R. 230-5.) In the case of a document, such a statement should specify the privilege relied on and include the date, title, description, subject and purpose of the document; the name and position of the author and the addresses of other recipients. In the case of a communication, the

statement should include the date, place, subject and purpose of the communication and the names and positions of all persons present.

7. Requests for Production of Inspection

a. *Informal Requests.* See ¶ 6.a. above.

b. *Number and Scope of Requests.* Requests should specify with particularity the title and description of documents or records requested. Information needed for specification can often be obtained by informal discovery, or by depositions or interrogatories if necessary. Argumentative or catch-all requests, such as “all documents which support your claim,” are objectionable. The certification requirement of Rule 26(g) applies.

c. *Responses.* Materials should be produced either with labels identifying the specific requests to which they respond or in the manner in which they are kept in the ordinary course of business. Opening a warehouse for inspection by the requesting party, burying documents, and similar procedures do not meet the good faith requirements of the rules. (See Rule 26(g).)

d. *Objections.* See ¶ 6(d) above.

e. *Privilege.* See ¶ 6(e) above.

8. Requests for Admission

a. *Use of Requests.* Requests for admission are an economical and efficient means of making a record of informal exchanges of information, stipulations, matters subject to judicial notice, and of narrowing issues.

b. *Form of Requests.* Each request should be brief, clear, simple, addressed to a single point and stated in neutral, non-argumentative words. Requests ordinarily should deal only with objective facts. They may be combined with interrogatories to ask for the factual basis of any denial.

c. *Responses.* Rule 36(a) requires that a response shall specifically deny a matter or set forth in detail the reasons why the party cannot admit or deny. A denial shall fairly meet the substance of the request and, when good faith requires, a party shall specify so much as is true and qualify or deny the remainder. The responding party has a duty to make reasonable inquiry before responding. The certification requirement of Rule 26(g) applies.

d. *Objections.* See ¶ 6(d) above.

9. Motions to Compel or for Protective Orders

a. *Pre-motion Conference.* Counsel are required to confer in good faith before bringing a discovery dispute to the Court. If they are unable to resolve it, they should arrange a telephone conference with the Court through the courtroom deputy. If the differences cannot be resolved, the Court will direct further proceedings. Motions to compel should ordinarily not be filed without a prior conference with the Court.

b. *Memoranda.* In the event memoranda are submitted, they should be brief, focus on the facts of the particular dispute, and avoid discussion of general discovery principles.

c. *Sanctions.* If sanctions are sought, include a declaration to support the amount requested.

d. *Reference to Guidelines.* The Court will be guided by these guidelines in resolving discovery disputes and imposing sanctions.

MOTION PRACTICE

1. General. Do not file a motion without first exploring with opposing counsel the possibility of resolving the dispute by stipulation. Many motions now being filed could be avoided.

2. Motion to Dismiss or for Summary Judgment. Motions to dismiss for failure to state a claim under Rule 12(b)(6) must be made solely on the pleadings. If matter outside the pleadings is referred to, the motion is treated as a motion for summary judgment. Fed.R.Civ.P. 56. Do not file a summary judgment motion unless you are satisfied that a material issue can be resolved without reference to disputable evidentiary facts. A motion devoted to arguing evidentiary facts is likely to lose. If you think your opponent has admitted the material facts, make it of record by using requests for admission.

3. Supporting Memoranda and Other Papers. Follow these guidelines:

Be helpful: State the grounds for the motion and the issues clearly at the outset, marshal the supporting facts and law and distinguish opposing authority. Check all citations, include jump citations, and verify the continuing validity of decisions relied on.

Keep it short: Rarely if ever should it be necessary to exceed the 25-page limit under L.R. 220-4. Approval for filing a brief in excess of 25 pages will only be grudgingly granted and without it the brief will not be filed. Avoid voluminous supporting documentation; the larger the motion, the less its chance for success.

Be candid: Address directly the hard issues that must be decided; do not sweep them under the rug. Cite adverse authority and explain why it does not support a ruling against you. Don't gamble on the judge not finding it. Don't mislead the Court, either as to the facts or the law; once your credibility is in question, it is difficult to restore it.

Avoid invective and vituperation: Argument advances your case far less than exposition and analysis. Adjectives and adverbs, other than those having independent legal significance, do not make a brief persuasive; avoid them.

Submit a proposed order, retaining the original.

Submit an extra copy of all papers for use by the judge's chambers.

4. Time Limits. Observe the time limits in L.R. 220-2 and 220-3. Responses must be filed not less than fourteen days before the noticed hearing date; replies not less than seven days. The judges need that time to prepare. Late filed papers may be disregarded.

5. Continuances. Motions will not be continued without a good reason once an opposition is filed. Even then a court order must be applied for not less than seven days before the hearing date. Contrary to the practice in some state courts, most judges will not take motions "off calendar." Continuances must be requested to a specified date and for good cause. (L.R. 220-9)

Reduce all stipulations extending time to writing. After the first extension, a court order is required. (L.R. 220-10)

6. Hearings. The judge may decide the motion without hearing or by holding a hearing by conference telephone call.

If a hearing is held, assume the judge is familiar with the matter. State the issue succinctly, fairly and persuasively and limit your argument to the heart of the matter. Deal with adverse authority and whatever other matters you believe may be obstacles to a

ruling in your favor. Don't overstate your case but don't give away a good point. Be prepared to answer questions.

Although the papers filed will usually determine the outcome, don't underestimate the effect of a good oral argument. It can turn a case around if it is well-prepared, brief and to the point, and presented with conviction, common sense and candor. You will not harm your case by being courteous to the Court and counsel, observing proper demeanor and making a dignified appearance.

CONDUCT OF TRIALS

1. Pretrial. Ordinarily the Court will determine at pretrial what claims and defenses will be tried, what witnesses will testify and what exhibits will be received at trial. Except for proper impeachment, trial by ambush is not acceptable. Therefore do not expect to raise new issues or offer new evidence at trial. Consult the judge's form of pretrial order for specific requirements.

2. Opening Statements. An opening statement is simply an objective summary of what counsel expects the evidence to show. No argument or discussion of the law is permissible.

3. Questioning of Witnesses

a. Conduct the examination from the lectern. Ask permission to approach the witness when necessary and return to the lectern as soon as practicable. Treat witnesses with courtesy and respect; do not become familiar.

b. Ask brief, direct and simply stated questions. Cover one point at a time. Do not ask a witness "do you recall . . ." unless the fact of his recollection is material. Use leading questions for background material. Write out the examination or have at least a complete outline.

c. Cross-examination similarly should consist of brief, simple and clearly stated questions. It is helpful to write out questions in advance but do not read them. Cross-examination should not be a restatement of the direct examination nor should it be used for discovery or to argue with the witness.

d. Only one lawyer for each party may examine any one witness.

4. Using Depositions

a. The deposition of an adverse party may be used for any purpose. It is unnecessary to ask a witness if he "recalls" it or otherwise to lay a foundation. Simply identify the deposition and page and line numbers and read the relevant portion. Opposing counsel may then immediately ask to read such additional testimony as is necessary to complete the context.

b. The deposition of a witness not a party may be used for impeachment or if the witness has been shown to be unavailable. For impeachment, allow the witness to read to himself the designated portion first, ask simply if he gave that testimony, and then read it. Opposing counsel may immediately read additional testimony necessary to complete the context.

c. A deposition may be used to refresh a witness's recollection by showing it to him, or, just as any other document, as a basis for relevant questions.

d. In bench trials, do not offer depositions wholesale. Unless all of the testimony is important, copy the relevant pages only, staple the extracts from each deposition, and offer each as an exhibit.

e. Note: It is the responsibility of counsel anticipating use of a deposition at trial to check in advance of trial that it has been made available to the witness for signature and that the original is filed with the clerk's office.

5. Objections

a. To make an objection, rise, say "objection" and briefly state the legal ground (e.g. "hearsay," "privilege," "irrelevant").

b. Do not make a speech or argument, or summarize evidence, or suggest the answer to the witness. If argument is desired, ask for an opportunity to argue the objection.

c. Where an evidentiary problem is anticipated, bring it to the Court's attention in advance to avoid interrupting the orderly process of a jury trial.

6. Exhibits

a. All exhibits must be marked before the trial starts, using the clerk's standard form of label. Normally plaintiff's will be numbered, defendant's lettered. Copies must be provided to opposing counsel and the Court before trial.

b. When offering an exhibit follow this procedure to the extent applicable (unless foundation has been stipulated):

Request permission to approach the witness;

Show the witness the document and say:

I show you (a letter) premarked Exhibit ____, dated ____, from A to B. Please identify that document.

Identification having been made, make your offer as follows:

I offer Exhibit ____.

Note: In some circumstances additional questions may be necessary to lay the foundation.

c. It is the responsibility of counsel to see that all exhibits counsel wants included in the record are formally offered and ruled on, and that they are in the hands of the clerk. Take nothing for granted.

d. Avoid voluminous exhibits. When possible offer only relevant extracts.

7. Interrogatories and Requests for Admission

Counsel wishing to place into the record an interrogatory answer or response to request for admission should prepare a copy of the particular interrogatory or request and accompanying response, mark it as an exhibit and offer it.

8. Use of Prepared Direct Testimony

In bench trials when the direct testimony of witnesses has previously been submitted in narrative written statement form, the proponent of the witness must have the witness available for cross-examination unless cross-examination has been waived.

The following procedure should be followed:

When the witness is called to the stand, ask the witness to identify the statement, which should be premarked as an exhibit, as his testimony and to state that it is true and correct. Then offer the exhibit.

9. Conduct of Trial

a. The Court expects counsel and the witnesses to be present and ready to proceed promptly at the appointed hour—normally starting at 9:30 a.m. A witness on the stand when a recess is taken should be back on the stand when the recess ends.

b. Bench conferences should be minimized. Raise anticipated problems at the start or the end of the trial day or during a recess.

c. Have a sufficient number of witnesses available to fill the time available. Running out of witnesses may be taken by the Court as resting your case.

d. Trials normally are conducted each day except on the day scheduled for the motion calendar (normally Friday). Do not assume that the Court will recess on any of those days unless prior arrangements have been made with the Court and counsel.

e. Counsel are expected to cooperate with each other in the scheduling and production of witnesses. Witnesses may be taken out of order where necessary. Every effort should be made to avoid calling a witness twice (as an adverse witness and later as a party's witness).

f. Counsel should be prepared each day to discuss with the Court the next day's schedule of witnesses and exhibits.

10. Jury Trial

a. When trial is to a jury, counsel should present the case so that the jury can follow it. Witnesses should be instructed to speak clearly and in plain language. When documents play an important part, an overhead projector and screen should be used to display the exhibit while a witness testifies about it.

b. Jury instructions must be submitted no later than the pretrial conference but may be supplemented during the trial. Only those dealing with the particular issues in the case need be presented—the Court's standard instructions may be obtained from the clerk. Instructions are to be drafted specifically to take into account the facts and issues of the particular case, and in plain language; do not submit copies from form books. Do not submit argumentative or formula instructions. Consult the Court's order for pretrial preparation for additional guidance.

c. Do not offer a stipulation in the presence of the jury unless agreement has previously been reached. Preferably stipulations should be in writing.

d. In final argument, do not express personal opinions or ask jurors to place themselves in the position of a party or to consider possible consequences of the litigation beyond the evidence presented.

e. Normally, the Court will instruct the jury before closing argument. Accordingly, there will be no need to explain the law in the closing argument.

11. General Decorum

a. A trial is a rational and civilized inquiry to seek a just result. Counsel are expected to conduct themselves with dignity and decorum at all times, which include appropriate dress and courtroom behavior. Disruptive tactics or appeals to prejudice are not acceptable.

b. Colloquy between counsel on the record is not permitted—all remarks are to be addressed to the Court.

c. Vigorous advocacy does not preclude courtesy to opposing counsel and witnesses and respect for the Court. Calling witnesses or parties by first names or the Court “Judge” on the record is not appropriate.

d. Do not engage in activity at counsel table or move about the courtroom while opposing counsel is arguing or questioning witnesses, or in other ways cause distraction. Neither counsel nor client while at counsel table should indicate approval, disapproval or other reactions to a witness’s testimony or counsel’s argument.

e. If you have a question or problem, contact the judge’s court room deputy but not the law clerks.

Sample Form 5

REVISED OCTOBER 16, 2000

INDIVIDUAL PRACTICES OF JUDGE MIRIAM GOLDMAN CEDARBAUM

Unless otherwise ordered by Judge Cedarbaum, matters before Judge Cedarbaum shall be conducted in accordance with the following practices:

1. COMMUNICATIONS WITH CHAMBERS

A. Letters. Except on emergency matters, communications with chambers shall be in writing, with a copy to opposing counsel. Letters must be delivered to opposing counsel in the same manner in which they are delivered to chambers, and must show the method of delivery (e.g., "By Hand" or "By Mail").

B. Telephone Calls. Except as provided in Paragraph 1(D) below, telephone calls to chambers are permitted only in emergency situations requiring immediate attention. In such situations only, call chambers at (212) 805-0198.

C. Faxes. Faxes to chambers are not permitted.

D. Scheduling and Calendar Matters. For scheduling and calendar matters, call Betty Vapper at (212) 805-0095 before 10:00 a.m. or after 5:00 p.m.

E. Adjournments. Absent an emergency, a request for an adjournment shall be made by letter received by chambers at least 48 hours prior to the scheduled event, and shall indicate whether any party objects to the adjournment.

2. CONFERENCES

The lawyer who is in charge of the case and who will try it is required to appear at all conferences with the court.

3. MOTIONS

A. Pre-Motion Conferences in Civil Cases. Parties who wish to make a discovery motion (Local Civil Rule 37.2) or a motion for summary judgment should arrange for a conference before preparing any papers.

B. Courtesy Copies. Courtesy copies of all motion papers, marked as such, should be submitted to chambers.

C. Timing and Filing of Motion Papers. Motions, except those of an emergency nature, are heard on any Thursday at 9:00 a.m. Motions must be received by all parties by noon at least 22 days before the return date. Parties may not select as a return date a Thursday more than 29 days after the date of service without

permission of the court. Answering papers must be received by all parties by noon on Wednesday of the week before the return date. Reply papers, if any, must be received by all parties by noon on Tuesday of the week of the return date. Copies of all papers served should be delivered directly to chambers at the time of service.

D. Oral Argument on Motions. Oral argument will be heard on all motions except pro se matters and motions to reargue.

E. Default Judgments. Applications for default judgments must be made by notice of motion.

4. ORDERS TO SHOW CAUSE

Except when cause for ex parte relief is shown, an order to show cause will not be issued unless the party requesting such an order has notified all adversaries of the time and date the request is to be made and all adversaries have had an opportunity to appear and oppose the application. Applications for orders to show cause should be accompanied by a supporting memorandum of law.

5. PRETRIAL PROCEDURES

A. Disclosure of Trial Witnesses. All trial witnesses including experts must be disclosed by no later than 15 days before the close of discovery.

B. Joint Pretrial Orders in Civil Cases. A Joint Pretrial Order (JPTO) must be submitted on or before the date set in the Case Management Plan.

The format of the JPTO in a case to be tried before a jury must be as follows:

- 1) Best estimate of the length of the trial.
- 2) Undisputed Facts.
- 3) Plaintiff's Contentions of Fact. For each contention, there must be a citation to at least one witness or document that will establish that fact.
- 4) Plaintiff's Contentions of Law. For each contention, there must be a citation to at least one case or statute.
- 5) Defendant's Contentions of Fact. For each contention, there must be a citation to at least one witness or document that will establish that fact. The defendant's contentions should

state the defendant's version of the facts, and should not simply deny the plaintiff's contentions.

6) Defendant's Contentions of Law. For each contention, there must be a citation to at least one case or statute.

7) A list by each party of all proposed witnesses. Witnesses not listed in the JPTO will be precluded from testifying at trial.

8) A list by each party of exhibits to be offered in its case in chief with any objections by the other side on the same page immediately adjacent to the contested exhibit. Exhibits not exchanged and listed in the JPTO may not be introduced at trial.

The same format must be followed in non-jury cases, except that the parties should include "Proposed Findings of Fact" in place of "Contentions of Fact," and "Proposed Conclusions of Law" in place of "Contentions of Law."

10/16/00

Sample Form 6

The Board of Judges of the Eastern District of New York has agreed that to the extent the district and magistrate judges have a set of practices which they follow in most cases, they will employ one of the versions set forth below. Each judge's choices are set out on the Schedule and Information Sheet appended to this model. [Editor's note: In the interests of space, the individual judges' choices are not included here.]

RECOMMENDED MODEL FOR INDIVIDUAL JUDGE'S PRACTICES

Unless otherwise ordered by Judge X in a specific case, matters before Judge X shall be conducted in accordance with the following practices:

1. Communications With Chambers

A. Letters. Except as provided below, communications with chambers shall be by letter, with copies simultaneously delivered to all counsel.

Version 1: Copies of correspondence between counsel shall not be sent to the Court.

Version 2: Except for discovery matters, copies of correspondence between counsel shall be sent to the Court.

B. Telephone Calls.

Version 1: Except as provided in Paragraph 1(D) below, telephone calls to chambers are permitted only in emergency situations requiring immediate attention. In such situations only, call chambers at the number listed on the attached information sheet.

Version 2: In addition to Paragraph 1(D) below, telephone calls to chambers are permitted. For non-docketing, scheduling or calendar matters, call chambers at the number listed on the attached information sheet.

C. Faxes.

Version 1: Faxes to chambers are not permitted unless prior authorization is obtained.

Version 2: Faxes to chambers are permitted only if copies are also simultaneously faxed or delivered to all counsel. No document longer than the number of pages listed on the attached information sheet may be faxed without prior authorization. Do not follow with hard copy. The fax number is listed on the attached information sheet.

D. Docketing, Scheduling, and Calendar Matters. For docketing, scheduling and calendar matters, call the contact listed on the attached information sheet during the hours specified.

E. Request for Adjournments or Extension of Time. All requests for adjournments or extensions of time must state (1) the original date, (2) the number of previous requests for adjournment or extension, (3) whether these previous requests were granted or denied, and (4) whether the adversary consents, and, if not, the reasons given by the adversary for refusing to consent. If the requested adjournment or extension affects any other scheduled dates, a proposed Revised Scheduling order must be attached. If the request is for an adjournment of a court appearance, absent an emergency it shall be made at least 48 hours prior to the scheduled appearance.

2. Motions

A. Pre-Motion Conferences in Civil Cases. For discovery motions, follow Local Civil Rules 37.3 and 6.4. For motions other than discovery motions,

Version 1: pre-motion conferences are not required.

Version 2(a): in all cases where the parties are represented by counsel a pre-motion conference with the court is required before making a motion for summary judgment.

Version 2(b): in all cases where the parties are represented by counsel and in other than habeas corpus/prisoner petitions and Social Security and Bankruptcy appeals, a pre-motion conference with the court is required before making any dispositive motion, motion for a change of venue or to amend a pleading pursuant to Rule 15 of the Fed. R. Civ. P. where leave of court is required.

For Both Versions 2(a) and 2(b): To arrange a pre-motion conference, the moving party shall submit a letter not to exceed three (3) pages in length setting forth the basis for the anticipated motion. All parties so served must serve and file a letter response, not to exceed three (3) pages within seven (7) days from service of the notification letter. Service of the letter by the moving party within the time requirements of Rule 12 of the Fed. R. Civ. P. shall constitute timely service of a motion made pursuant to Fed. R. Civ. P. 12(b).

B. Courtesy Copies.

Version 1: Courtesy copies of motion papers should not be submitted.

Version 2(a): Courtesy copies of all motion papers, marked as such, should be submitted for chambers.

Version 2(b): In addition to motion papers, courtesy copies of pleadings, marked as such, shall be submitted to chambers, as soon as practical after filing.

C. Memoranda of Law.

Version 1: Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages, and reply memoranda are limited to 10 pages. Memoranda of 10 pages or more shall contain a table of contents.

Version 2: The court expects counsel to exercise their professional judgment as to the length of briefs and may impose limits if that expectation is not met.

D. Filing of Motion Papers.

Version 1: Motion papers shall be filed promptly after service.

Version 2: No motion papers shall be filed until the motion has been fully briefed. The notice of motion and all supporting papers are to be served on the other parties along with a cover letter setting forth whom the movant represents and the papers being served. A copy of the cover letter only is to be mailed to the assigned district judge and the magistrate judge at this time.

The parties are to set up their own briefing schedule. The parties may revise the schedule on consent, informing chambers by letter.

The original moving party shall be responsible for filing all motion papers. Such party is further obligated to furnish to chambers a full set of courtesy copies of the motion papers together with a cover letter specifying each document in the package. A copy of the cover letter shall be sent to the assigned magistrate judge and to opposing counsel.

E. Oral Argument on Motions.

Version 1: Parties may request oral argument by letter at the time their moving or opposing or reply papers are filed. The court will determine whether argument will be heard and, if so, will advise counsel of the argument date.

Version 2(a): Where the parties are represented by counsel, oral argument will be held on all motions.

Version 2(b): Where the parties are represented by counsel, oral argument will be held on all motions. After the motion has been fully briefed, and after reconsultation with all parties, the moving party shall schedule oral argument on a specific [insert day of the week when the Judge normally hears oral argument on motions] at [insert time] by letter to be received by chambers and all other parties at least ten days prior to the date selected.

Version 2(c): Where the parties are represented by counsel, oral argument will be held on all motions. The notice of motion shall state that oral argument will be “on a date and at a time to be designated by the court”. The court will contact the parties to set the specific date and time for oral argument.

F. Paragraphs A and D above do NOT apply to any of the motions described in Federal Rule of Appellate Procedure 4(a)(4)(A). A pre-motion conference is not required before making such motions, which should be filed when served.¹

Paragraph D above does not apply to any of the motions described in Federal Rule of Appellate Procedure 4(a)(4)(A). Such motions should be filed when served and each party shall be responsible for filing its motion papers and furnishing chambers with courtesy copies.²

3. Pretrial Procedures

Version 1: Pretrial orders are not required unless specifically directed by the court in a particular case.

Version 2:

A. Joint Pretrial Orders in Civil Cases. Unless otherwise ordered by the Court, within 60 days from the date for the completion of discovery in a civil case, the parties shall submit to the court for its approval a joint pretrial order, which shall include the following:

- i. The full caption of the action.
- ii. The names, addresses (including firm names), and telephone and fax numbers of trial counsel.
- iii. A brief statement by plaintiff as to the basis of subject matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject matter jurisdiction. Such statements shall include citations to all statutes relied on and relevant facts as to citizenship and jurisdictional amount.
- iv. A brief summary by each party of the claims and defenses that party has asserted which remain to be tried, without recital of evidentiary matter but including citations to all statutes relied on. Such summaries shall identify all claims and defenses previously asserted which are not to be tried.

¹ Please note that paragraph F, Section 2.Motions, was added on March 16, 2001 and pertains to the practices of Chief Judge Korman and Judges Trager, Ross, Gershon, Nickerson, Dearie, Platt, Gleeson, Block and Hurley; and Magistrate Judges Gold, Levy, Mann and Boyle.

² Please note that this version of paragraph F pertains to the practices of Judge Glasser.

v. A statement by each party as to whether the case is to be tried with or without a jury, and the number of trial days needed.

vi. A statement as to whether or not all parties have consented to trial of the case by a magistrate judge (without identifying which parties have or have not so consented).

vii. Any stipulations or agreed statements of fact or law which have been agreed to by all parties.

viii. **Version 2(a):** A list by each party as to the fact and expert witnesses whose testimony is to be offered in its case in chief, indicating whether such witnesses will testify in person or by deposition. Only listed witnesses will be permitted to testify except when prompt notice has been given and good cause shown.

Version 2(b): A list of the names and addresses of all witnesses, including possible witnesses who will be called only for impeachment or rebuttal purposes and so designated, together with a brief narrative statement of the expected testimony of each witness. Only listed witnesses will be permitted to testify except when prompt notice has been given and good cause shown.

ix. A designation by each party of deposition testimony to be offered in its case in chief, with any cross-designations and objections by any other party.

x. **Version 2(c):** A list by each party of exhibits to be offered in its case in chief, with one star indicating exhibits to which no party objects on grounds of authenticity, and two stars indicating exhibits to which no party objects on any ground.

Version 2(d): 1) A statement of stipulated facts, if any;

2) A schedule listing exhibits to be offered in evidence and, if not admitted by stipulation, the party or parties that will be offering them. The schedule will also include possible impeachment documents and/or exhibits, as well as exhibits that will be offered only on rebuttal. The parties will list and briefly describe the basis for any objections that they have to the admissibility of any exhibits to be offered by any other party. Parties are expected to resolve before trial all issues of authenticity, chain of custody and related grounds. Meritless objections based on these grounds may result in the imposition of sanctions. Only exhibits listed will be received in evidence except for good cause shown; and

3) All exhibits must be premarked for the trial and exchanged with the other parties at least ten days before trial. Where exhibits are voluminous, they should be placed in binders with tabs.

B. Filings Prior to Trial in Civil Cases. Unless otherwise ordered by the Court, each party shall file, 15 days before the date of commencement of trial if such a date has been fixed, or 30 days after the filing of the final pretrial order if no trial date has been fixed:

i. On the Thursday before trial in jury cases, requests to charge and proposed voir dire questions. Requests to charge should be limited to the elements of the claims, the damages sought and defenses. General instructions will be prepared by the court. When feasible, proposed jury charges should also be submitted on a 3.5” diskette in IBM Word Perfect format;

ii. By claim, a detailed statement regarding damages and other relief sought;

iii. In non-jury cases, a statement of the elements of each claim or defense involving such party, together with a summary of the facts relied upon to establish each element;

iv. In all cases, motions addressing any evidentiary or other issues which should be resolved in limine; and

v. In any case where such party believes it would be useful, a pretrial memorandum.

Sample Form 7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STANDING ORDER

JUDGE MARTIN J. JENKINS

Courtroom 11, 19th Floor
Gwen Wozniak, Courtroom Deputy
(415) 522-2123

1. All counsel are hereby ordered to familiarize themselves with the Federal Rules of Civil Procedure and the Local Rules of the Northern District of California.
2. COURT DATES: The Court will hear the following matters on the following days and times:
 - a. Civil Law and Motion Calendar is heard on Tuesday at 9:30 a.m.
 - b. Criminal Calendar is heard on Thursday at 2:00 p.m.
 - c. Case Management/Status Conferences are held on Tuesday at 2:00 p.m.
 - d. Civil Pretrial Conferences are held on Tuesday at 3:30 p.m.
3. MOTIONS: Motions shall be filed and set for hearing in accordance with Civil Local Rule 7 and this Court's Standing Order. Motions shall not be noticed for hearing on a Tuesday following an official court holiday that falls on a Monday.
4. SUMMARY JUDGMENT/ADJUDICATION: Pursuant to Civil Local Rule 56-2, in any pending motion for summary judgment or summary adjudication, the parties are ordered to meet, confer and submit, on or before ten (10) court days prior to the date of the hearing, a joint statement of undisputed facts. Only one joint statement of undisputed facts, signed by all parties, should be filed.
5. EXPEDITED MOTIONS AND EX PARTE APPLICATIONS: All expedited motions and ex parte applications are considered on the papers and may not be set for a hearing. Counsel are advised that this Court allows ex parte applications solely for extraordinary relief and that sanctions may be imposed for misuse of ex parte applications.
6. CONTINUANCES: Counsel requesting a continuance of any conference, hearing, deadline, or other procedural changes, must submit a stipulation with a detailed declaration as to the reason for the requested continuance or extension of time. Continuances will be granted only upon a showing of good cause, particularly focusing upon evidence of diligence by the party seeking delay and of prejudice that may result if the continuance is denied.
7. DISCOVERY: All discovery matters shall be referred to a United States Magistrate Judge for the specific purpose of hearing all discovery disputes, unless otherwise ordered by the court. The words DISCOVERY MATTER shall appear in the caption of all documents relating to discovery to insure proper routing. Counsel are directed to contact the clerk for the assigned Magistrate Judge to schedule matters for hearing.

The decision of the Magistrate Judge shall be final and binding, subject to modification by the District Court only where it has been shown that the Magistrate Judge's order is clearly erroneous or contrary to law.

8. **CRIMINAL PLEAS:** Prior to a plea being entered in a criminal case, an Application for Permission to Enter Plea of Guilty must be completed. A copy of the plea agreement should be delivered to chambers by 12:00 p.m. the day prior to the entry of plea.

9. **COMMUNICATION WITH CHAMBERS:** Counsel shall not attempt to make contact by telephone or any other ex parte means with the Court or its chambers staff, but may contact the Courtroom Deputy at (415) 522-2123 with appropriate inquiries. Counsel should list their facsimile transmission numbers along with their telephone numbers on their papers to facilitate communication with the Courtroom Deputy.

10. **NOTICE OF THIS ORDER:** Counsel for plaintiff, or plaintiff, if appearing on his or her own behalf, is responsible for promptly serving notice of these requirements upon defendants' counsel. If this came to the Court via a noticed removal, this burden falls to the removing defendant.

IT IS SO ORDERED.

Dated: _____

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

INSTRUCTIONS REGARDING PRETRIAL PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

The purpose of these instructions is to summarize information contained in the Court's local rules and to direct your attention to specific local court rules pertaining to (1) the filing of responses to mandatory disclosures; (2) the filing of a joint certificate of interested persons; (3) the scheduling of an early planning conference; (4) the conduct of discovery; (5) the scheduling of the settlement conference after discovery and the reporting of the results of that conference; (6) the submission of a joint preliminary planning report and scheduling order;¹ (7) time limits for various motions; (8) the submission of a proposed consolidated (not separate) pretrial order; and (9) the submission of requests to charge. Cases assigned to the Court's 0-months discovery tract are exempted from the LR 16 requirements regarding conferences, filing of a preliminary planning report, and filing of a consolidated pretrial order.

Counsel are jointly responsible for assuring the orderly conduct of discovery and for submitting promptly the documents requested by the Court without further notice, order, or direction. Failure on the part of any party to cooperate with others in compliance with these instructions may result in the imposition of dismissal, default judgment, or other sanctions as provided by the Federal Rules of Civil Procedure and the Local Rules of this Court.

Plaintiff's counsel is responsible for assuring delivery of a set of these pretrial instructions to defense counsel in conjunction with service of the complaint. Attached to these pretrial instructions are three (3) forms: a form for defense counsel's use in responding to the mandatory disclosures, a form for counsels' use in jointly submitting the preliminary planning report and scheduling order, and a form for presentation of the proposed consolidated pretrial order.

SUMMARY OF RELEVANT DATES

Plaintiff files Responses to Mandatory Disclosures:	simultaneously with filing of complaint. LR 26.1C. ²
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¹ Pro se litigants and opposing counsel shall be permitted to file separate preliminary planning reports.

² **LR 26.1E. In Removed Cases.** In civil actions removed to this Court from state court, all parties' responses to the mandatory disclosures must be filed with the Clerk of Court within fifteen (15) days after the filing of the first answer

Certificate of Interested Persons:	within 15 days after the first pleading is filed by a defendant. LR 3.3A
Defendant files Responses to Mandatory Disclosures:	within 15 days after the defendant files an answer to the complaint. LR 26.1D (See Footnote 2.)
Early Planning Conference:	prior to submission of preliminary planning report. LR 16.1
Preliminary Planning Report and Scheduling Order:	within 30 days after the appearance of the first defendant by answer to the complaint. LR 16.2; Appendix B, Form II.
Commencement of Limited Discovery Period:	30 days after the appearance of the first defendant by answer to the complaint. LR 26.3A
Motions not Specially Limited by Rules:	within 30 days after the preliminary planning report is filed or should have been filed. LR 7.1A(2); 16.2(7); Appendix B, Form II.
Motions to Compel:	prior to close of discovery or, if longer, within 10 days after service of the timely-filed disclosure or discovery responses. LR 7.2C; 37.1B; Appendix B, Form II.
Close of Discovery:	upon expiration of the assigned discovery track, unless the Court has either shortened the time for discovery or has for cause shown extended the time for discovery. Discovery must be initiated sufficiently early in the discovery period to permit the filing of answers and responses thereto within the time limitations of the existing discovery period. LR 26.3A,B; Appendix B, Form II.
Settlement Conference after Discovery:	within 10 days after the close of discovery. LR 16.3.

to the complaint by a defendant or within fifteen (15) days after the filing of the petition for removal, whichever is longest. Each party is required to serve simultaneously a copy of that party's disclosures on all other parties to the action.

Summary Judgment Motions:	within 20 days after the close of discovery, unless otherwise permitted by Court order. LR 7.2D and 56.1A; Appendix B, Form II
Proposed Pretrial Order:	not later than 30 days after the close of discovery. LR 16.4A; Appendix B, Form III.
Requests to Charge:	no later than 9:30 a.m. on the calendar date or specially set date for trial of the case, unless otherwise ordered by the Court. LR 51.1A.

INSTRUCTIONS

I. Responses to Mandatory Disclosures

Local Rule 26.1. Parties to all civil actions, other than those civil actions assigned to the 0-months discovery track, are required to respond to court-formulated mandatory disclosures. The Court has prepared a form, *Responses to Mandatory Disclosures*, which counsel are required to use. A copy of the response form for defense counsel is attached to these instructions. Response forms for both plaintiffs and defendants may also be found in the local rules as Form I in Appendix B. In cases involving multiple defendants, each plaintiff and each defendant must respond to each disclosure separately unless the response to a disclosure is the same for all plaintiffs or all defendants.

Each plaintiff's *Responses to Mandatory Disclosures* shall be submitted to the Clerk of Court for filing at the time the complaint is filed. Each defendant's *Responses to Mandatory Disclosures* shall be submitted to the Clerk of Court for filing no later than fifteen (15) days after the date on which the defendant's answer to the complaint was filed. In civil actions removed to this Court, all parties' *Responses to Mandatory Disclosures* shall be submitted to the Clerk of Court for filing within 15 days after the filing of the first answer to the complaint by a defendant or within 15 days after the filing of the petition for removal, whichever is longer.

II. Certificate of Interested Persons

Local Rule 3.3. Counsel for all private (nongovernmental) parties shall be required to submit a joint Certificate of Interested Persons within fifteen (15) days after the first pleading is filed by any defendant or defendants. The certificate must include a listing of all persons, associations of persons, firms, partnerships or corporations having either a financial interest or some other interest which could be substantially affected by the outcome of this particular case. Subsidiaries, conglomerates, affiliates, parent corporations, and any other identifiable legal entity related to a party must be

listed. Lawyers serving in the proceeding must also be listed. A prescribed form for the certificate is set out in LR 3.3C.

III. Early Planning Conference

Local Rule 16.1. Prior to the filing of the preliminary planning report, lead counsel for all parties are required to confer in person in an effort to settle the case, discuss discovery, limit issues, and discuss other matters addressed in the preliminary planning report. Counsel are required to inform the parties promptly of all offers of settlement proposed at the conference. This local rule applies to all cases assigned to the 4- and 8-months discovery tracks.

IV. Discovery Limitations

A. Interrogatories. Local Rule 26.2A and 33.1. A party shall not, at any one time or cumulatively, serve more than 40 interrogatories upon any other party. Each subdivision of one numbered interrogatory shall be construed as a separate interrogatory. If counsel for a party believes that more than 40 interrogatories are necessary, counsel shall consult with opposing counsel promptly and attempt to reach a written stipulation as to a reasonable number of additional interrogatories. In the event a written stipulation cannot be agreed upon, the party seeking to submit additional interrogatories shall file a motion with the Court showing the necessity for relief.

B. Depositions. Local Rule 26.2B and 30.1. Unless otherwise ordered by the Court, no deposition of any party or witness shall last more than six (6) hours.

C. Extensions of Time. Local Rule 26.3. There are three discovery tracks in this Court: 0-months discovery, 4-months discovery, and 8-months discovery. Each case is assigned to a discovery track when the complaint is filed. Discovery must be initiated sufficiently early within the discovery period to permit the filing of answers and responses thereto within the time limitations of the existing discovery period. LR 26.3A. A request for an extension of time for discovery must be filed with the Court prior to the expiration of the existing discovery period. Extensions of time for discovery will be granted only in exceptional cases where the circumstances on which the request is based did not exist or the attorney or attorneys could not have anticipated that such circumstances would arise at the time the preliminary planning report was filed. LR 26.3B.

D. Motions to Compel. Local Rules 7.2C; 37.1; 16.2(7) (Appendix B, Form II). Federal Rule of Civil Procedure 37(a)(2)(A)(B) requires the movant to certify that the movant has conferred or has attempted to confer in good faith with the opposing party prior to filing the motion to compel. This certification is required to be included as a part of all motions to compel. Directions regarding the form and content of a motion

to compel are contained in LR 37.1A. Motions to compel may be filed prior to the close of discovery or, if longer, any time within ten (10) days after service of the responses upon which the objection is based.

V. Preliminary Planning Report and Scheduling Order

Local Rule 16.2. The purpose of the *Preliminary Planning Report* is to promote early analysis and planning of the case by counsel and to alert the Court to any specific case management needs. The *Preliminary Planning Report* is a joint filing by counsel, except that pro se litigants and opposing counsel are permitted to file separate statements. The completed form must be filed no later than thirty (30) days after the appearance of the first defendant by answer to the complaint. The Court has prepared a standard form which counsel are required to use. A copy of the form is attached to these instructions [Editor's Note: see Sample Form 26] and may also be found in the local rules as Form II in Appendix B. If counsel cannot agree on the answers to specific items, the contentions of each party must be shown on the form. This local rule applies to all the cases assigned to the 4- and 8-months discovery tracks.

VI. Conference Following Discovery

Local Rule 16.3. Lead counsel and a person possessing settlement authority for each plaintiff and each defendant are required to meet in person within ten (10) days following the close of discovery to discuss, in good faith, settlement of the case. The results of the conference shall be reported in Item 26 of the pretrial order. This local rule applies to all cases assigned to the 4- and 8-months discovery tracks.

VII. Motions

A. Generally. All motions filed in this Court shall be made in compliance with the Federal Rules of Civil Procedure and the Local Rules of this Court. See LR 7.1. Motions that are not specially limited in time by the local or federal rules must be filed within thirty (30) days after the preliminary planning report was filed or should have been filed. Local Rules 7.1A(2); 16.2(7) (Appendix B, Form II.)

B. Motions to Compel. Local Rules 7.2C; 37.1; 16.2(7) (Appendix B, Form II.) Unless otherwise ordered by the Court, a motion to compel discovery must be filed prior to the close of discovery or, if longer, within ten (10) days after service of the timely filed discovery response upon which the motion is based.

C. Summary Judgment. Local Rules 7.2D, 56.1; 16.2(7) (Appendix B, Form II.) Motions for summary judgment shall be filed as soon as possible, but, unless

otherwise permitted by Court order, not later than twenty (20) days after the close of discovery. The Court will provide the respondent notice of his right to file materials in opposition to the motion.

VIII. Proposed Consolidated Pretrial Order

Local Rule 16.4A. The Court has prepared a form, *Pretrial Order*, which counsel shall be required to complete and file with the Court no later than thirty (30) days after the close of discovery. Use of the form *Pretrial Order*, which is contained in Appendix B of the local rules as Form III, is mandatory. A copy of the form is also attached to these instructions. No deviations from this form shall be permitted, except upon the express prior approval of the Court. The form may be retyped, provided it is not modified in any way. Additional copies of the form *Pretrial Order* may be obtained from the Public Filing Counter in each division.

It shall be the responsibility of plaintiff's counsel to contact defense counsel to arrange a date for counsel to confer on preparation of the proposed pretrial order. If there are issues upon which counsel for the parties cannot agree, the areas of disagreement must be shown in the proposed pretrial order. In those cases in which there is a pending motion for summary judgment, the Court may, in its discretion and upon request, extend the time for filing the proposed pretrial order.

If counsel desire a pretrial conference, a request must be indicated on the proposed pretrial order immediately below the civil action number. Counsel will be notified if the judge determines that a pretrial conference is necessary. A case shall be presumed ready for trial on the first calendar after the pretrial order is filed unless another time is specifically set by the Court.

IX. Requests to Charge

Local Rule 51.1A. Requests to Charge shall be filed with the courtroom deputy no later than 9:30 a.m. on the calendar date or specially set date for trial of the case, unless otherwise ordered by the Court. The requests shall be numbered sequentially with each request containing the citations to authorities supporting the request presented on a separate sheet of paper. In addition to the original, counsel must file two (2) copies of each request with the clerk and must serve one (1) copy of the requests on opposing counsel. Additional instructions regarding requests to charge are contained in Item 22 of the form *Pretrial Order*.

BY ORDER OF THE COURT.

s/LUTHER D. THOMAS
LUTHER D. THOMAS, CLERK OF COURT

B. Defendant's Responses to Initial Disclosures.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
_____ DIVISION

vs.

Civil Action No. _____

DEFENDANT'S RESPONSES TO INITIAL DISCLOSURES

(1) If the defendant is improperly identified, state defendant's correct identification and state whether defendant will accept service of an amended summons and complaint reflecting the information furnished in this disclosure response. _____

(2) Provide the names of any parties whom defendant contends are necessary parties to this action, but who have not been named by plaintiff. If defendant contends that there is a question of misjoinder of parties, provide the reasons for defendant's contention. _____

(3) Provide a detailed factual basis for the defense or defenses and any counterclaims or crossclaims asserted by defendant in the responsive pleading. _____

(4) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which defendant contends are applicable to this action. _____

(5) Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information. (Attach witness list to Responses to Initial Disclosures as Attachment A.)

(6) Provide the name of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For all experts described in Fed.R.Civ.P. 26(a)(2)(B), provide a separate written report satisfying the provisions of that rule. (Attach expert witness list and written reports to Responses to Initial Disclosures as Attachment B.)

(7) Provide a copy of, or description by category and location of, all documents, data compilations, and tangible things in your possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings. (Attach document list and descriptions to Responses to Initial Disclosures as Attachment C.)

(8) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of, or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such documents or evidentiary material available for inspection and copying

under Fed.R.Civ.P. 34. (Attach any copies and descriptions to Responses to Initial Disclosures as Attachment D.) _____

(9) If defendant contends that some other person or legal entity is, in whole or in part, liable to the plaintiff or defendant in this matter, state the full name, address, and telephone number of such person or entity and describe in detail the basis of such liability. _____

(10) Attach for inspection and copying as under Fed.R.Civ.P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments to satisfy the judgment. (Attach copy of insurance agreement to Responses to Initial Disclosures as Attachment E.)

Sample Form 9

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

APPENDIX A

STANDING PRETRIAL PROCEDURE ORDER AND FORMS

STANDING ORDER ESTABLISHING PRETRIAL PROCEDURE

(Adopted Pursuant to General Order of 26 June 1985; Amended Pursuant to General Orders of 27 November 1991 and 9 March 1995)

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 - Final Pretrial Order
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 - Guidelines for Proposed Findings of Fact and Conclusions of Law

1. Introduction

This pretrial procedure is intended to secure a just, speedy, and inexpensive determination of the issues. If the type of procedure described below does not appear calculated to achieve these ends in this case, counsel should seek an immediate conference with the judge and opposing counsel so that alternative possibilities may be discussed. Failure of either party to comply with the substance or the spirit of this *Standing Order* may result in dismissal of the action, default or other sanctions appropriate under Fed. R. Civ. P. 16 or 37, 28 U.S.C. §1927 or any other applicable provisions.

Parties should also be aware that there may be variances in the forms and procedures used by each of the judges in implementing these procedures. Accordingly, parties should contact the minute clerk for the assigned judge for a copy of any standing order of that judge modifying these procedures.

2. Scheduling Conference

Within 60 days after the appearance of a defendant and within 90 days after the complaint has been served on a defendant in each civil case (other than categories of cases excepted by local General Rule 5.00), the court will usually set a scheduling conference (ordinarily in the form of a status hearing) as required by Fed.R.Civ.P. 16. At the conference, counsel should be *fully prepared* and have authority to discuss any questions regarding the case, including questions raised by the pleadings, jurisdiction, venue, pending motions, motions contemplated to be filed, the contemplated joinder of

additional parties, the probable length of time needed for discovery and the possibility of settlement of the case. Counsel will have the opportunity to discuss any problems confronting them, including the need for time in which to prepare for trial.

3. Procedures for Complex or Protracted Discovery

If at any time during the scheduling conference or later status hearings it appears that complex or protracted discovery will be sought, the court may

- (a) determine that the *Manual on Complex Litigation 2d* be used as a guide for procedures to be followed in the case, or
- (b) determine that discovery should proceed by phases, or
- (c) require that the parties develop a joint written discovery plan under Fed.R.Civ.P. 26 (f).

If the court elects to proceed with phased discovery, the first phase will address information necessary to evaluate the case, lay the foundation for a motion to dismiss or transfer, and explore settlement. At the end of the first phase, the court may require the parties to develop a joint written discovery plan under Fed.R.Civ.P. 26 (f) and this *Standing Order*.

If the court requires parties to develop a discovery plan, such plan shall be as specific as possible concerning dates, time, and places discovery will be sought and as to the names of persons whose depositions will be taken. It shall also specify the parties' proposed discovery closing date. Once approved by the court, the plan may be amended only for good cause. Where the parties are unable to agree on a joint discovery plan, each shall submit a plan to the court. After reviewing the separate plans, the court may take such action as it deems appropriate to develop the plan.

Where appropriate, the court may also set deadlines for filing and a time framework for the disposition of motions.

4. Discovery Closing Date

In cases subject to this *Standing Order*, the court will, at an appropriate point, set a discovery closing date. Except to the extent specified by the court on motion of either party, discovery must be *completed* before the discovery closing date. Discovery requested before the discovery closing date, but not scheduled for completion before the discovery closing date, does not comply with this order.

5. Settlement

Counsel and the parties are directed to undertake a good faith effort to settle that includes a thorough exploration of the prospects of settlement before undertaking the extensive labor of preparing the Order provided for in the next paragraph. The court may require that representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference.

If the parties wish the court to participate in a settlement conference, counsel should ask the court or the minute clerk to schedule such conference. In a case where the trial will be conducted without a jury, particularly as the case nears the date set for trial, the preferred method of having the court preside over settlement talks is for the assigned judge to arrange for another judge to preside or to refer the task to a magistrate judge. If the case has not been settled and is placed on the court's trial calendar, settlement possibilities should continue to be explored throughout the period before trial. If the case is settled, counsel shall notify the minute clerk promptly and notice up the case for final order.

6. Final Pretrial Order

The court will schedule dates for submission of a proposed final pretrial order (Order) and final pretrial conference (Conference) in accordance with Fed.R.Civ.P. 16. In the period between notice and the date for submission of the pretrial order:

(a) Counsel for all parties are directed to meet in order to (1) reach agreement on any possible stipulations narrowing the issues of law and fact, (2) deal with nonstipulated issues in the manner stated in this paragraph and (3) exchange copies of documents that will be offered in evidence at the trial. The court may direct that counsel meet in person (face-to-face). It shall be the duty of counsel for plaintiff to initiate that meeting and the duty of other counsel to respond to plaintiff's counsel and to offer their full cooperation and assistance to fulfill both the substance and spirit of this standing order. If, after reasonable effort, any party cannot obtain the cooperation of other counsel, it shall be his or her duty to advise the court of this fact by appropriate means.

(b) Counsel's meeting shall be held sufficiently in advance of the date of the scheduled Conference with the court so that counsel for each party can furnish all other counsel with a statement (Statement) of the issues the party will offer evidence to support. The Statement will (1) eliminate any issues that appear in the pleadings about which there is no controversy, and (2) include all issues of law as well as ultimate issues of fact from the standpoint of each party.

(c) It is the obligation of counsel for plaintiff to prepare from the Statement a draft Order for submission to opposing counsel. Included in plaintiff's obligation for preparation of the Order is submission of it to opposing counsel in ample time for revision and timely filing. Full cooperation and assistance of all other counsel are required for proper preparation of the Order to fulfill both the substance and spirit of this Standing Order. All counsel will jointly submit the original and one copy of the final draft of the Order to the judge's chambers (or in open court, if so directed) on the date fixed for submission.

(d) All instructions and footnotes contained within the Final Pretrial Order form promulgated with this *Standing Order* must be followed. They will be binding on the parties at trial in the same manner as though repeated in the Order. If any counsel believes that any of the instructions and/or footnotes allow for any part of

the Order to be deferred until after the Order itself is filed, that counsel shall file a motion seeking leave of court for such deferral.

(e) Any pending motions requiring determination in advance of trial (including, without limitation, motions *in limine*, disputes over specific jury instructions or the admissibility of any evidence at trial upon which the parties desire to present authorities and argument to the court) shall be specifically called to the court's attention not later than the date of submission of the Order.

(f) Counsel must consider the following matters during their conference:

- (1) Jurisdiction (if any question exists in this respect, it must be identified in the Order);
- (2) Propriety of parties; correctness of identity of legal entities; necessity for appointment of guardian, administrator, executor or other fiduciary, and validity of appointment if already made; correctness of designation of party as partnership, corporation or individual d/b/a trade name; and
- (3) Questions of misjoinder or nonjoinder of parties.

7. Final Pretrial Conference

At the Conference each party shall be represented by the attorneys who will try the case (unless before the conference the court grants permission for other counsel to attend in their place). All attending attorneys will familiarize themselves with the pretrial rules and will come to the Conference with full authority to accomplish the purposes of F.R.Civ.P. 16 (including simplifying the issues, expediting the trial and saving expense to litigants). Counsel shall be prepared to discuss settlement possibilities at the Conference without the necessity of obtaining confirmatory authorization from their clients. If a party represented by counsel desires to be present at the Conference, that party's counsel must notify the adverse parties at least one week in advance of the conference. If a party is not going to be present at the Conference, that party's counsel shall use their best efforts to provide that the client can be contacted if necessary. Where counsel represents a governmental body, the court may for good cause shown authorize that counsel to attend the Conference even if unable to enter into settlement without consultation with counsel's client.

8. Extensions of Time for Final Pretrial Order or Conference

It is essential that parties adhere to the scheduled dates for the Order and Conference, for the Conference date governs the case's priority for trial. Because of the scarcity of Conference dates, courtesy to counsel in other cases also mandates no late changes in scheduling. Accordingly, *no* extensions of the Order and Conference dates will be granted without good cause, and no request for extension should be made less than 14 days before the scheduled Conference.

9. Action Following Final Pretrial Conference

At the conclusion of the Conference the court will enter an appropriate order reflecting the action taken, and the case will be added to the civil trial calendar. Although no further pretrial conference will ordinarily be held thereafter, a final conference may be requested by any of the parties or ordered by the court prior to trial. Any case ready for trial will be subject to trial as specified by the court.

10. Documents Promulgated with the *Standing Order*

Appended to this *Standing Order* are the following:

- (a) a form of final pretrial order;
- (b) a form for use as Schedule (c), the schedule of exhibits for the final pretrial order;
- (c) a form of pretrial memorandum to be attached to the completed final pretrial order in personal injury cases;
- (d) a form of pretrial memorandum to be attached to the completed final pretrial order in employment discrimination cases; and
- (e) guidelines for preparing proposed findings of fact and conclusions of law.

Each of the forms is annotated to indicate the manner in which it is to be completed.

Form LR16.1.1. Final Pretrial Order Form

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
[indicate Eastern or Western] DIVISION**

)	
Plaintiff ¹ ,)	
)	
v.	)	Civil Action No.
)	
Defendant.	)	Judge [Insert name of assigned judge]

FINAL PRETRIAL ORDER

This matter having come before the court at a pretrial conference held pursuant to Fed. R. Civ. P. (“Rule”) 16, and [insert name, address and telephone number] having appeared as counsel for plaintiff(s) and [insert name, address and telephone number] having appeared as counsel for defendant(s), the following actions were taken:

(1) This is an action for [insert nature of action, e.g., breach of contract, personal injury] and the jurisdiction of the court is invoked under [insert citation of statute on which jurisdiction based]. Jurisdiction is (not) disputed.²

(2) The following stipulations and statements were submitted and are attached to and made a part of this Order:³

(a) a comprehensive stipulation or statement of all uncontested facts, which will become a part of the evidentiary record in the case (and which, in jury trials, may be read to the jury by the court or any party);⁴

¹ Singular forms are used throughout this document. Plural forms should be used as appropriate. Where a third-party defendant is joined pursuant to Rule 14(a), the Order may be suitably modified. In such cases, the caption and the statement of parties and counsel shall be modified to reflect the joinder.

² In diversity cases or other cases requiring a jurisdictional amount in controversy, the Order shall contain either a stipulation that the required jurisdictional amount is involved or a brief written statement citing evidence supporting the claim that such sum could reasonably be awarded.

³ If it does not appear that the case will be reached for trial in the immediate future, or if active settlement discussions are in progress, the court may defer asterisked (*) requirements until shortly before the trial date. See items (i), (j), (k), and (l). On motion of any party or on the court’s own motion, any requirements of this Order (including one or more of the asterisked requirements) may be waived entirely.

- (b) an agreed statement or statements by each party of the contested issues of fact and law and a statement or statements of contested issues of fact or law not agreed to;
- (c) except for rebuttal exhibits, schedules in the form set out in the attached Schedule (c) of—
 - (1) all exhibits (all exhibits shall be marked for identification before trial), including documents, summaries, charts and other items expected to be offered in evidence and
 - (2) any demonstrative evidence and experiments to be offered during trial;⁵
- (d) a list or lists of names and addresses of the potential witnesses to be called by each party, with a statement of any objections to calling, or to the qualifications of, any witness identified on the list;⁶
- (e) stipulations or statements setting forth the qualifications of each expert witness in such form that the statement can be read to the jury at the time the expert witness takes the stand;⁷
- (f) a list of all depositions, or portions thereof, to be read into evidence and statements of any objections thereto;⁸

⁴ Counsel for plaintiff has the responsibility to prepare the initial draft of a proposed stipulation dealing with allegations in the complaint. Counsel for any counter-, cross- or third-party complainant has the same responsibility to prepare a stipulation dealing with allegations in that party's complaints. If the admissibility of any uncontested fact is challenged, the party objecting and the grounds for objection must be stated.

⁵ Items not listed will not be admitted unless good cause is shown. Cumulative documents, particularly x-rays and photos, shall be omitted. Duplicate exhibits shall not be scheduled by different parties, but may be offered as joint exhibits. All parties shall stipulate to the authenticity of exhibits whenever possible, and this Order shall identify any exhibits whose authenticity has not been stipulated to and specific reasons for the party's failure so to stipulate. As the attached Schedule (c) form indicates, non-objected-to exhibits are received in evidence by operation of this Order, without any need for further foundation testimony. Copies of exhibits shall be made available to opposing counsel and a bench book of exhibits shall be prepared and delivered to the court at the start of the trial unless excused by the court. If the trial is a jury trial and counsel desires to display exhibits to the members of the jury, sufficient copies of such exhibits must be made available so as to provide each juror with a copy, or alternatively, enlarged photographic copies or projected copies should be used.

⁶ Each party shall indicate which witnesses *will* be called in the absence of reasonable notice to opposing counsel to the contrary, and which *may* be called as a possibility only. Any witness not listed will be precluded from testifying absent good cause shown, except that each party reserves the right to call such rebuttal witnesses (who are not presently identifiable) as may be necessary, without prior notice to the opposing party.

⁷ Only one expert witness on each subject for each party will be permitted to testify absent good cause shown. If more than one expert witness is listed, the subject matter of each expert's testimony shall be specified.

- (g) an itemized statement of special damages;
- (h) waivers of any claims or defenses that have been abandoned by any party;
- (i)* for a jury trial, each party shall provide the following:
 - (i) trial briefs except as otherwise ordered by the court;⁹
 - (ii) one set of marked proposed jury instructions, verdict forms and special interrogatories, if any;¹⁰ and
 - (iii) a list of the questions the party requests the court to ask prospective jurors in accordance with Fed.R.Civ.P. 47(a);
- (j)* for a non-jury trial, each party shall provide proposed *Findings of Fact and Conclusions of Law* in duplicate (see guidelines available from the court's

⁸ If any party objects to the admissibility of any portion, both the name of the party objecting and the grounds shall be stated. Additionally, the parties shall be prepared to present to the court, at such time as directed to do so, a copy of all relevant portions of the deposition transcript to assist the court in ruling *in limine* on the objection. All irrelevant and redundant material including all colloquy between counsel shall be eliminated when the deposition is read at trial. If a video deposition is proposed to be used, opposing counsel must be so advised sufficiently before trial to permit any objections to be made and ruled on by the court, to allow objectionable material to be edited out of the film before trial.

⁹ (Note: The use of the asterisk (*) is explained in Footnote 3.) No party's trial brief shall exceed 15 pages without prior approval of the court. Trial briefs are intended to provide full and complete disclosure of the parties' respective theories of the case. Accordingly, each trial brief shall include statements of—

- (a) the nature of the case,
- (b) the contested facts the party expects the evidence will establish,
- (c) the party's theory of liability or defense based on those facts and the uncontested facts,
- (d) the party's theory of damages or other relief in the event liability is established, and
- (e) the party's theory of any anticipated motion for directed verdict.

The brief shall also include citations of authorities in support of each theory stated in the brief. Any theory of liability or defense that is not expressed in a party's trial brief will be deemed waived.

¹⁰ *Agreed* instructions shall be presented by the parties whenever possible. Whether agreed or disagreed, each marked copy of an instruction shall indicate the proponent and supporting authority and shall be numbered. All objections to tendered instructions shall be in writing and include citations of authorities. Failure to object may constitute a waiver of any objection.

In diversity and other cases where Illinois law provides the rules of decision, use of Illinois Pattern Instructions ("IPI") as to all issues of substantive law is required. As to all other issues, and as to all issues of substantive law where Illinois law does not control, the following pattern jury instructions shall be used in the order listed, e.g., an instruction from (b) shall be used only if no such instruction exists in (a):

- (a) the Seventh Circuit pattern jury instructions (Currently the only such instructions are Federal Criminal Jury Instructions which have limited potential applicability to civil cases.); or,
- (b) any pattern jury instructions published by a federal court. (Care should be taken to make certain substantive instructions on federal questions conform to Seventh Circuit case law.)

At the time of trial, an unmarked original set of instructions and any special interrogatories (on 8 1/2 x 11" sheets) shall be submitted to the court; to be sent to the jury room after being read to the jury. Supplemental requests for instructions during the course of the trial or at the conclusion of the evidence will be granted solely as to those matters that cannot be reasonably anticipated at the time of presentation of the initial set of instructions.

minute clerk or secretary);¹¹ [Editor's Note: These guidelines for proposed *Findings of Fact and Conclusions of Law* also appear at the end of this form.]

(k) a statement summarizing the history and status of settlement negotiations, indicating whether further negotiations are ongoing and likely to be productive;

(l) a statement that each party has completed discovery, including the depositions of expert witnesses (unless the court has previously ordered otherwise). Absent good cause shown, no further discovery shall be permitted;¹² and

(m) subject to full compliance with all the procedural requirements of Rule 37(a)(2), all motions *in limine* should be filed on or before the time for the filing of this Order. Any briefs in support of and responses to such motions shall be filed pursuant to a briefing schedule set by the court.

(3) Trial of this case is expected to take [insert the number of days trial expected to take] days. It will be listed on the trial calendar, to be tried when reached.

(4) [Indicate the type of trial by placing an X in the appropriate box]
Jury ☐ Non-jury ☐

(5) The parties recommend that [indicate the number of jurors recommended]¹³ jurors be selected at the commencement of the trial.

(6) The parties [insert "agree" or "do not agree" as appropriate] that the issues of liability and damages [insert "should" or "should not" as appropriate] be bifurcated for trial. On motion of any party or on motion of the court, bifurcation may be ordered in either a jury or a non-jury trial.

(7) [Pursuant to 28 U.S.C. § 636(c), parties may consent to the reassignment of this case to a magistrate judge who may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case. Indicate below if the parties consent to such a reassignment.]

¹¹ These shall be separately stated in separately numbered paragraphs. Findings of Fact should contain a detailed listing of the relevant material facts the party intends to prove. They should not be in formal language, but should be in simple narrative form. Conclusions of Law should contain concise statements of the meaning or intent of the legal theories set forth by counsel.

¹² If this is a case in which (contrary to the normal requirements) discovery has not been completed, this Order shall state what discovery remains to be completed by each party.

¹³ Rule 48 specifies that a civil jury shall consist of not fewer than six nor more than twelve jurors.

— The parties consent to this case being reassigned to a magistrate judge for trial.

(8) This Order will control the course of the trial and may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.

(9) Possibility of settlement of this case was considered by the parties.

United States District Judge¹⁴

Date: _____

[Attorneys are to sign the form before presenting it to the court.]

Attorney for Plaintiff

Attorney for Defendant

**Schedule (c)
Exhibits¹⁵**

1. The following exhibits were offered by plaintiff, received in evidence and marked as indicated:

[State identification number and brief description of each exhibit.]

2. The following exhibits were offered by plaintiff and marked for identification. Defendant(s) objected to their receipt in evidence on the grounds stated:¹⁶

[State identification number and brief description of each exhibit. Also state briefly the ground of objection, such as competency, relevancy or materiality, and the provision of Fed.R.Evid. relied upon. Also state briefly plaintiff's response to the objection, with appropriate reference to Fed.R.Evid.]

¹⁴ Where the case has been reassigned on consent of parties to a magistrate judge for all purposes, the magistrate judge will, of course, sign the final pretrial order.

¹⁵ As in the Final Pretrial Order form, references to “plaintiff” and “defendant” are intended to cover those instances where there are more than one of either.

¹⁶ Copies of objected-to exhibits should be delivered to the court with this Order, to permit rulings *in limine* where possible.

3. The following exhibits were offered by defendant, received in evidence and marked as indicated:

[State identification number and brief description of each exhibit.]

4. The following exhibits were offered by defendant and marked for identification. Plaintiff objected to their receipt in evidence on the grounds stated:¹⁷

[State identification number and brief description of each exhibit. Also state briefly the ground of objection, such as competency, relevancy or materiality, and the provision of Fed.R.Evid. relied upon. Also state briefly defendant's response to the objection, with appropriate reference to Fed.R.Evid.]

¹⁷ See footnote 5.

LR16.1.2. Form of Pretrial Memorandum for Use in Personal Injury Cases

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

_____ **DIVISION**

	)	Civil Action No.	
)		
	)	Judge <i>[Insert name of assigned judge]</i>	
v.)		
	)	Plaintiff requests	\$ _____
)		
	)	Defendant offers	\$ _____

PRETRIAL MEMORANDUM

Plaintiff's Name: _____
Age: _____
Occupation: _____
Marital status: _____

Attorney for plaintiff *[indicate name and phone number of trial attorney]*:

Attorney for defendant *[indicate name and phone number of trial attorney]*:

Summary of injuries *[note especially any permanent pathology]*:

Date, hour, and place of occurrence:

Attending physicians:

Hospitals:

Place of employment:

Part A. Compensatory Damages *[Parts A & B are to be completed by plaintiff's counsel.]*

1. Liquidated Damages:
 - (a) Medical fees \$ _____
 - (b) Hospital bills \$ _____
 - (c) Loss of income \$ _____
 - (d) Miscellaneous expenses \$ _____
- TOTAL \$ _____
2. What is the total amount of compensatory damages claimed in this action? \$ _____

Part B. Punitive Damages

- a. Does the plaintiff claim punitive damages?
Yes ☐ No ☐ If yes, how much? \$ _____

Brief Statement of Circumstances of Occurrence:

Plaintiff's view:

Defendant's view:

[At the direction of the court the parties are to attach to this memorandum any medical reports or other materials useful for discussion at the pretrial conference.]

LR16.1.3. Form of Pretrial Memorandum for Use in Employment Discrimination Cases

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
DIVISION**

) Civil Action No.
)
) Judge *[Insert name of assigned judge]*
 v.)
)
)

PRETRIAL MEMORANDUM

Attorney for plaintiff [*Indicate name and phone number of trial attorney*]:

Plaintiff's brief summary of claim and statement of employment action:

Attorney for defendant [*Indicate name and phone number of trial attorney*]:

Defendant's brief summary of defenses and statement of employment action:

[Plaintiff's counsel will complete Part A, Plaintiff's Summary of Damages, and defendant's counsel will complete Part B, Defendant's Summary of Damages, Assuming Liability. As indicated in the title to Part B, defendant's counsel must complete the section using the assumption of liability, even though defendant disputes liability.]

Part A. Plaintiff's Summary of Damages

1. Lost Wages and Benefits: *[For each year for which damages are claimed, indicate (A) the total wages and benefits that would have been earned working for defendant but for the discrimination, (B) the total wages, benefits, and other income earned in substitute employment that plaintiff was able to obtain, (C) additional wages and benefits defendant maintains plaintiff could have earned, and (D) the difference between (A) and the total of [(B) + (C)].*

	A Amounts Lost Due to Year ¹⁸ Discrimination	B Amounts Earned in Substitute Employment	C Additional Amounts Could Have Earned	D Difference (A-(B+C))
19_____	_____	_____	_____	_____
19_____	_____	_____	_____	_____
Total Lost Wages & Benefits:				\$_____
2.	(a) Attorneys Fees (to date):			\$_____
	(b) Costs (to date):			\$_____
3.	Do you claim:			
	(a) Pain, suffering, emotional injury, etc.?			
	Yes __ No __	If yes, how much?		\$_____
	(b) Punitive or liquidated (double) damages?			
	Yes __ No __	If yes, how much?		\$_____
	(c) Pre-judgment interest? ¹⁹			
	Yes __ No __	If yes, how much?		\$_____
4.	Do you claim any other kinds of damage?			
	Yes __ No __	If yes, what kind and how much?		\$_____
5.	Total Amount Claimed:			\$_____

¹⁸ Only two years are shown. Use the appropriate number of years in completing the form.

¹⁹ The inclusion of both liquidated damages and pre-judgment interest in this form is not intended to suggest that both are or are not recoverable.

Part B. Defendant's Summary of Damages, Assuming Liability [*This portion is to be completed in good faith even though defendant disputes liability.*]

1. [*For each year for which damages are claimed, indicate (A) the total wages and benefits that would have been earned working for defendant but for the discrimination, (B) the total wages, benefits, and other income earned in substitute employment that plaintiff was able to obtain, (C) additional wages and benefits defendant maintains plaintiff could have earned, (D) other amounts received, such as disability or pension payments, and (E) the difference between (A) and the total of (B) + (C) + (D).*]

	A	B	C	D	E
	Amounts	Amounts	Additional	Other	
	Lost	Earned in	Amounts	Amounts	
	Due to	Substitute	Could Have	Received	Difference
Year ²⁰	Discrimination	Employment	Earned		(A-(B+C+D))
19____	_____	_____	_____	_____	_____
19____	_____	_____	_____	_____	_____
Total Lost Wages & Benefits:					\$_____

2. Does the defendant dispute the amount claimed for attorney's fees and costs?

Yes ☐ No ☐ If yes, explain, giving estimated amount due:

_____ \$_____

3. Does the defendant dispute the amount claimed for pain, suffering, emotional injury, etc.?

Yes ☐ No ☐ If yes, explain, giving estimated amount due:

_____ \$_____

4. Does the defendant dispute the claim for pre-judgment interest?

Yes ☐ No ☐ If yes, explain, giving estimated amount due:

_____ \$_____

5. Does the defendant dispute the claim for punitive damages?

Yes ☐ No ☐ If yes, explain, giving estimated amount due:

_____ \$_____

²⁰ Only two years are shown. Use the appropriate number of years in completing the form.

6. Does the defendant dispute any other claims for damages made by the plaintiff?

Yes ☐ No ☐ If yes, explain, giving estimated amount due:

\$ _____

7. Total amount owed, assuming liability: \$ _____

GUIDELINES FOR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Plaintiff shall first serve and file proposed findings and conclusions. Each defendant shall then serve and file answering proposals.

(b) Plaintiff's proposals shall include (a) a narrative statement of *all facts* proposed to be proved and (b) a concise statement of plaintiff's legal contentions and the authorities supporting them:

(1) Plaintiff's narrative statement of facts shall set forth in simple declarative sentences all the facts relied upon in support of plaintiff's claim for relief. It shall be complete in itself and shall contain no recitation of any witness' testimony or what any defendant stated or admitted in these or other proceedings, and no references to the pleadings or other documents or schedules as such. It may contain references in parentheses to the names of witnesses, depositions, pleadings, exhibits or other documents, but no party shall be required to admit or deny the accuracy of such references. It shall, so far as possible, contain no pejoratives, labels or legal conclusions. It shall be so constructed, in consecutively numbered paragraphs (though where appropriate a paragraph may contain more than one sentence), that each of the opposing parties will be able to admit or deny each separate sentence of the statement.

(2) Plaintiff's statement of legal contentions shall set forth all such plaintiff's contentions necessary to demonstrate the liability of each defendant to such plaintiff. Such contentions shall be separately, clearly and concisely stated in separately numbered paragraphs. Each paragraph shall be followed by citations of authorities in support thereof.

(c) Each defendant's answering proposals shall correspond to plaintiff's proposals:

(1) Each defendant's factual statement shall admit or deny each separate sentence contained in the narrative statement of fact of each plaintiff, except in instances where a portion of a sentence can be admitted and a portion denied. In those instances, each defendant shall state clearly the portion admitted and the portion denied. Each separate sentence of each defendant's response shall bear the same number as the corresponding sentence in the plaintiff's narrative statement of fact. In a separate portion of each defendant's narrative statement of facts, such defendant shall set forth all affirmative matter of a factual nature relied upon by such defendant, constructed in the same manner as the plaintiff's narrative statement of facts.

(2) Each defendant's separate statement of proposed conclusions of law shall respond directly to plaintiff's separate legal contentions and shall contain such additional contentions of the defendant as may be necessary to demonstrate the

non-liability or limited liability of the defendant. Each defendant's statement of legal contentions shall be constructed in the same manner as is provided for the similar statement of each plaintiff.

Sample Form 10

Form 35 Fed.R.Civ.P.

Report of Parties Planning Meeting

[Caption and Names of Parties]

1. Pursuant to Fed.R.Civ.P. 26(f), a meeting was held on (date) at (place) and was attended by:

(name) for plaintiff(s)
(name) for defendant(s) (party name)
(name) for defendant(s) (party name)

2. Pre-Discovery Disclosures. The parties [have exchanged] [will exchange by (date)] the information required by [Fed.R.Civ.P. 26(a)(1)] [local rule ____].

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

All discovery commenced in time to be completed by (date).
[Discovery on (issue for early discovery) to be completed by (date).]

Maximum of ____ interrogatories by each party to any other party. [Responses due ____ days after service.]

Maximum of ____ requests for admission by each party to any other party. [Responses due ____ days after service.]

Maximum of ____ depositions by plaintiff(s) and ____ by defendant(s).

Each deposition [other than of ____] limited to maximum of ____ hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:

from plaintiff(s) by (date)
from defendant(s) by (date)

Supplementations under Rule 26(e) due (time(s) or interval(s)).

4. Other Items. [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.

The parties request a pretrial conference in (month and year).

Plaintiff(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

Defendant(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

All potentially dispositive motions should be filed by (date).

Settlement [is likely] [is unlikely] [cannot be evaluated prior to (date)] [may be enhanced by use of the following alternative dispute resolution procedure: [_____]].

Final lists of witnesses and exhibits under Rule 26(a)(3) should be due:

from plaintiff(s) by (date)

from defendant(s) by (date)

Parties should have ____ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

The case should be ready for trial by (date) [and at this time is expected to take approximately (length of time)].

[Other matters]

Date: _____.

/signed by all counsel

Sample Form 11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s),	No.	(EDL)
v.		JOINT CASE MANAGEMENT STATEMENT AND PROPOSED ORDER
Defendant(s).		

The parties to the above-entitled action jointly submit this Case Management Statement and Proposed Order and request the Court to adopt it as its Case Management Order in this case.

DESCRIPTION OF THE CASE

- 1. A brief description of the events underlying the action:**
- 2. The principal factual issues which the parties dispute:**
- 3. The principal legal issues which the parties dispute:**
- 4. The other factual issues [e.g., service of process, personal jurisdiction, subject matter jurisdiction or venue] which remain unresolved for the reasons stated below and how the parties propose to resolve those issues:**
- 5. The parties which have not been served and the reasons:**
- 6. The additional parties that the below-specified parties intend to join and the intended time frame for such joinder:**

CONSENT TO MAGISTRATE JUDGE FOR TRIAL

7. Parties consent to assignment of this case to a United States Magistrate Judge for [court or jury] trial: Yes _____ No _____ *[Note: Each party who declines to consent to jurisdiction of the magistrate judge must timely file the "Request for Reassignment to a United States District Judge for Trial and Disposition," as required by General Order 44.]*

ALTERNATIVE DISPUTE RESOLUTION

8. The parties have already been assigned [or the parties have agreed] to the following court ADR process [e.g., Nonbinding Arbitration, Early Neutral Evaluation, Mediation, Early Settlement Conference with a Magistrate Judge] [State the expected or scheduled date for the ADR session]:

9. The ADR process to which the parties jointly request [or a party separately requests] referral:

DISCLOSURES

10. The parties certify that they have made the following disclosures [list disclosures of persons, documents, damage computations and insurance agreements]:

DISCOVERY & MOTIONS

11. The parties agree to the following discovery plan [Describe the plan, e.g., any limitation on the number, duration or subject matter for various kinds of discovery; discovery from experts; deadlines for completing discovery]:

Discovery Limits

Depositions:	Pltf. _____	Def. _____
Interrogs.:	Pltf. _____	Def. _____
Doc. Req.:	Pltf. _____	Def. _____
Req. Adm.:	Pltf. _____	Def. _____

(According to Federal Rules of Civil Procedure and Local Rules, subject to any provisions below)

Non-Expert Discovery Cut-off _____

Designation of Experts: Pltf. _____ Def. _____

(Parties shall conform to Fed.R.Civ.P. 26(a)(2))

Expert Discovery Cut-off _____

Dispositive Motions - Last Day for Hearing: _____

(Shall be at least 90 days before pretrial conference date)

TRIAL SCHEDULE

12. The parties request a trial date as follows:

13. The parties expect that the trial will last for the following number of days:

SIGNATURE AND CERTIFICATION BY PARTIES AND LEAD TRIAL COUNSEL

Pursuant to Civil L.R. 16-12, each of the undersigned certifies that he or she has read the brochure entitled "Dispute Resolution Procedures in the Northern District of California," discussed the available dispute resolution options provided by the court and private entities and has considered whether this case might benefit from any of the available dispute resolution options.

Dated: _____

Dated: _____

[Typed name and signature of each party and lead trial counsel]

[Typed name and signature of each party and lead trial counsel]

CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the parties are ordered to comply with this Order.

In addition the Court orders: *[The Court may wish to make additional orders, such as:*

- a. Referral of the parties to court or private ADR process;*
- b. Schedule a further Case Management Conference;*
- c. Schedule the time and content of supplemental disclosures;*
- d. Specially set motions;*
- e. Impose limitations on disclosure or discovery;*
- f. Set time for disclosure of identity, background and opinions of experts;*
- g. Set deadlines for completing fact and expert discovery;*
- h. Set time for parties to meet and confer regarding pretrial submissions;*
- i. Set deadline for hearing motions directed to the merits of the case;*
- j. Set deadline for submission of pretrial material;*
- k. Set date and time for pretrial conference;*
- l. Set a date and time for trial.]*

Plaintiff is ordered to serve a copy of this order on any party subsequently joined in this action.

Dated:

ELIZABETH D. LAPORTE
United States Magistrate Judge

Sample Form 12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s),

No. C-

PJH

v.

**ORDER SETTING CASE MANAGEMENT
CONFERENCE AND REQUIRING JOINT
CASE MANAGEMENT STATEMENT**

Defendant(s).

IT IS HEREBY ORDERED that, pursuant to Fed. R. Civ. P. 16(b) and Civil L. R. 16-14, a Case Management Conference will be held in this case before the Honorable Phyllis J. Hamilton on _____, at 2:30 p.m., in Courtroom D, 15th Floor, Federal Building, 450 Golden Gate Avenue, San Francisco, California.

Plaintiff(s) shall serve copies of this Order immediately on all parties to this action, and on any parties subsequently joined, in accordance with Fed. R. Civ. P. 4 and 5. Following service, plaintiff(s) shall file a certificate of service with the Clerk of the Court.

Counsel shall meet and confer prior to the Case Management Conference with respect to all of the agenda items listed below. **Not less than ten (10) calendar days** before the conference, counsel shall file a joint case management statement addressing each agenda item in the order in which they are listed below. Following the conference, the court will enter its own Case Management and Pretrial Order. If any party is proceeding without counsel, separate statements may be filed by each party. Statements must be filed before each and every Case Management Conference scheduled in this case.

Each party shall appear personally or by counsel prepared to address all of the matters referred to in this Order and with authority to enter stipulations and make admissions pursuant to this Order. Any request to reschedule the date of the conference shall be made in writing, and by stipulation if possible, at least ten (10) calendar days before the date of the conference and must be based upon good cause.

AGENDA ITEMS

1. Jurisdiction: Does the court have subject matter jurisdiction over all of the plaintiff's claims and defendant's counter-claims? What is the basis of that jurisdiction? Are all the parties subject to the court's jurisdiction? Do any parties remain to be served?
2. Facts: What is the factual basis of plaintiff's claims and defendant's defenses? What is the factual basis of defendant's counter-claims and plaintiff's defenses? Provide a brief description of the events underlying the action.
3. Legal Issues: What are the legal issues genuinely in dispute?
4. Narrowing of Issues: Are there dispositive or partially dispositive issues appropriate for decision by motion or by agreement?
5. Motions: What motions are anticipated?
6. Discovery: What discovery does each party intend to pursue? Can discovery be limited in any manner?
7. Relief: What relief does plaintiff seek? What is the amount of damages sought by plaintiff's claims and by defendant's counter-claims? Explain how damages are computed.
8. ADR: Which ADR process do the parties jointly request?
9. Settlement: What are the prospects for settlement? Does any party wish to have a settlement conference with a magistrate judge?
10. Magistrate Judge Trials: Will the parties consent to have a magistrate judge conduct all further proceedings including trial?
11. Trial: Will this case be tried by jury or to the court? Is it feasible or desirable to bifurcate issues for trial? What is the anticipated length of the trial? Is it possible to reduce the length of the trial by stipulation, use of summaries or statements, or other expedited means of presenting evidence?

12. Related Cases: Are there any related cases pending in this Court?
13. Class Actions: If a class action, how and when will the class be certified?
14. Scheduling: What are the earliest reasonable dates for discovery cutoff, hearing dispositive motions, pretrial conference and trial?
15. Such other matters as any party considers conducive to the just, speedy and inexpensive resolution of this matter.

IT IS SO ORDERED.

Dated: 7/7/00

PHYLLIS J. HAMILTON
United States District Judge

Copies mailed to counsel of record

Sample Form 13

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

<p>[Name of Plf], Plaintiff(s), v. [Name of Dft], Defendant(s).</p>	<p>CASE NO. [Case No.]</p> <p>ORDER REGARDING INITIAL DISCLOSURES, JOINT STATUS REPORT, AND EARLY SETTLEMENT</p>
---	--

I. INITIAL SCHEDULING DATES

Pursuant to the December 1, 2000 revisions to the Federal Rules of Civil Procedure, the Court sets the following dates for initial disclosure and submission of the Joint Status Report and Discovery Plan:

Deadline for FRCP 26(f) Conference: _____

Initial Disclosures Pursuant to FRCP 26(a): _____

Combined Joint Status Report and Discovery
Plan as Required by FRCP 26(f)
and Local Rule CR 16: _____

II. JOINT STATUS REPORT & DISCOVERY PLAN

All counsel and any pro se parties are directed to confer and provide the Court with a combined Joint Status Report and Discovery Plan (the "Report") by _____. This conference shall be by direct and personal communication, whether that be a face-to-face meeting or a telephonic conference. The Report will be used in setting a schedule for the prompt completion of the case. It must contain the following information by corresponding paragraph numbers:

1. A statement of the nature and complexity of the case.
2. A statement of which ADR method (mediation, arbitration, or other) should be used. The alternatives are described in Local Rule CR 39.1 and in the ADR Reference Guide which is available from the clerk's office. If the parties believe there should be no ADR, the reasons for that belief should be stated.
3. Unless all parties agree that there should be no ADR, a statement of when mediation or another ADR proceeding under Local Rule CR 39.1 should take place. In most cases, the ADR proceeding should be held within four months after the Report is filed. It may be resumed, if necessary, after the first session.

4. A proposed deadline for joining additional parties.
5. A proposed discovery plan that indicates:
 - A. The date on which the FRCP 26(f) conference and FRCP 26(a) initial disclosures took place;
 - B. The subjects on which discovery may be needed and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
 - C. What changes should be made in the limitations on discovery imposed under the Federal and Local Civil Rules, and what other limitations should be imposed;
 - D. A statement of how discovery will be managed so as to minimize expense (e.g., by foregoing or limiting depositions, exchanging documents informally, etc.); and
 - E. Any other orders that should be entered by the Court under FRCP 26(c) or under Local Rule CR 16(b) and (c).
6. The date by which the remainder of discovery can be completed.
7. Whether the parties agree that a full-time Magistrate Judge may conduct all proceedings, including trial and the entry of judgment, under 28 U.S.C. § 636(c) and Local Rule MJR 13. Agreement in the Report will constitute the parties' consent to referral of the case to a full-time Magistrate Judge.
8. Whether the case should be bifurcated by trying the liability issues before the damages issues, or bifurcated in any other way.
9. Whether the pretrial statements and pretrial order called for by Local Rules CR 16(e), (h), (i), and (l), and 16.1 should be dispensed with in whole or in part for the sake of economy.

10. Any other suggestions for shortening or simplifying the case.
11. The date the case will be ready for trial.
12. Whether the trial will be jury or non-jury.
13. The number of trial days required.
14. The names, addresses, and telephone numbers of all trial counsel.
15. If, on the due date of the Report, all defendant(s) or respondent(s) have not been served, counsel for the plaintiff shall advise the Court when service will be effected, why it was not made earlier, and shall provide a proposed schedule for the required FRCP 26(f) conference and FRCP 26(a) initial disclosures.
16. Whether any party wishes a scheduling conference prior to a scheduling order being entered in the case.

If the parties are unable to agree on any part of the Report, they may answer in separate paragraphs. No separate reports are to be filed.

The time for filing the Report may be extended only by court order. Any request for extension should be made by telephone to _____ at _____.

If the parties wish to have a status conference with the Court at any time during the pendency of this action, they should notify the deputy clerk, _____, by telephone at _____.

III. PLAINTIFF'S RESPONSIBILITY

This Order is issued at the outset of the case, and a copy is delivered by the clerk to counsel for plaintiff (or plaintiff, if pro se) and any defendants who have appeared. Plaintiff's counsel (or plaintiff, if pro se) is directed to serve copies of this Order on all parties who appear after this Order is filed within ten (10) days of receipt of service of

each appearance. Plaintiff's counsel (or plaintiff, if pro se) will be responsible for starting the communications needed to comply with this Order.

IV. EARLY SETTLEMENT CONSIDERATION

When civil cases are settled early -- before they become costly and time-consuming -- all parties and the court benefit. The Federal Bar Association Alternative Dispute Resolution Task Force Report for this district stated:

[T]he major ADR related problem is not the percentage of civil cases that ultimately settle, since statistics demonstrate that approximately 95% of all cases are resolved without trial. However, the timing of settlement is a major concern. Frequently, under our existing ADR system, case resolution occurs far too late, after the parties have completed discovery and incurred substantial expenditure of fees and costs.

The judges of this district have adopted a resolution “approving the Task Force’s recommendation that court-connected ADR services be provided as early, effectively, and economically as possible in every suitable case.”

The steps required by this Order are meant to help achieve that goal while preserving the rights of all parties.

If settlement is achieved, counsel shall notify _____, deputy clerk, at _____.

V. SANCTIONS

A failure by any party to comply fully with this Order may result in the imposition of sanctions.

DATED:_____.

United States District Judge

Sample Form 14

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

	)	CASE NO.
)	
Plaintiff,)	
	)	MAGISTRATE JUDGE
	)	NANCY A. VECCHIARELLI
)	
vs.	)	<u>REPORT OF PARTIES' PLANNING</u>
	)	<u>MEETING UNDER FED. R. CIV.</u>
	)	<u>P. 26(f) AND L.R. 16.3(b)</u>
)	
)	
Defendant(s).)	
)	

1. Pursuant to Fed. R. Civ. P. 26(f) and L.R. 16.3(b), a meeting was held on _____, 2000, and was attended by:

_____ counsel for plaintiff(s) _____

_____ counsel for plaintiff(s) _____

_____ counsel for defendant(s) _____

_____ counsel for defendant(s) _____

2. The parties:

_____ have exchanged the pre-discovery disclosures required by Rule 26(a)(1) and the Court's prior order;

_____ will exchange such disclosures by _____, 2000;

_____ have not been required to make initial disclosures.

3. The parties recommend the following track:

_____ Expedited _____ Standard _____ Complex
_____ Administrative _____ Mass Tort

4. This case is suitable for one or more of the following
Alternative Dispute Resolution ("ADR") mechanisms:

_____ Early Neutral Evaluation _____ Mediation _____ Arbitration
_____ Summary Jury Trial _____ Summary Bench Trial
_____ Case not suitable for ADR

5. The parties ____do/____do not consent to the jurisdiction
of the United States Magistrate Judge pursuant to 28 U.S.C. § 636

6. This case _____is/_____is not suitable for electronic
filing.

7. Recommended Discovery Plan:

(a) Describe the subjects on which discovery is to be
sought and the nature and extent of discovery.

(b) Discovery cut-off date: _____

8. Recommended dispositive motion date: _____

9. Recommended cut-off date for amending the pleadings and/or
adding additional parties: _____

10. Recommended date for a Status Hearing: _____

11. Other matters for the attention of the Court:

Attorney for Plaintiff

Plaintiff (please print)

Attorney for Plaintiff

Plaintiff (please print)

Attorney for Plaintiff

Plaintiff (please print)

Attorney for Defendant

Defendant (please print)

Attorney for Defendant

Defendant (please print)

Attorney for Defendant

Defendant (please print)

Sample Form 15

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Form 35

Plaintiff,	)	8:CV9_____
)	
vs.)	
)	
Defendant.)	

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on (date) at (place) and was attended by: (list party/parties attending for plaintiff(s) and party/parties for defendant(s) (party name)).
2. **Pre-Discovery Disclosures.** The parties [have exchanged] [will exchange by (date)] the information required by Fed. R. Civ. P. 26(a)(1).
3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]
 - a. Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed).
 - b. All discovery commenced in time to be completed by (date). [Discovery on (issue for early discovery) to be completed by (date)].
 - c. Maximum of (number) interrogatories by each party to any other party. [Responses due (number) days after service.]
 - d. Maximum of (number) requests for admission by each party to any other party. [Responses due (number) days after service.]
 - e. Maximum of (number) depositions by plaintiff(s) and (number) by defendant(s).
 - f. Each deposition [other than of (specify)] limited to maximum of (number) hours unless extended by agreement of parties.
 - g. Reports from retained experts under Rule 26(a)(2) due:
 1. from plaintiff(s) by (date)
 2. from defendant(s) by (date)
 - h. Supplementations under Rule 26(e) due (time(s) or interval(s)).
4. **Other Items.** [Use separate paragraphs or subparagraphs as necessary if parties disagree.]
 - a. The parties [request] [do not request] a conference with the court before entry of the scheduling order.
 - b. The parties request a pretrial conference in (month and year).
 - c. Plaintiff(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.
 - d. Defendant(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.
 - e. All potentially dispositive motions should be filed by (date).
 - f. Settlement [is likely] [is unlikely] [cannot be evaluated prior to (date)] [may be enhanced by use of the following alternative dispute resolution procedure: [specify]].
 - g. Final lists of witnesses and exhibits under Rule 26(a)(3) should be due:
 1. from plaintiff(s) by (date)
 2. from defendant(s) by (date)
 - h. Parties should have (number) days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).
 - i. The case should be ready for trial by (date) [and at this time is expected to take approximately (length of time)].
 - j. [Other matters (specify)].

Date: _____

TO BE SIGNED BY ALL PARTIES

Sample Form 16

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

)	
Plaintiff(s),)	
)	
vs.	)	CASE NO.
)	
	)	CJRA TRACK
)	
Defendant(s).	)	JUDGE:
)	

UNIFORM TRIAL PRACTICE AND PROCEDURES

In conformity with the Civil Justice Reform Act of 1990, and in compliance with the Civil Justice Expense and Delay Reduction Plan adopted by this Court, the following uniform procedures will apply to all civil cases filed in the Southern District of Illinois.

Scheduling Practice

Trial settings and other scheduling will vary depending on the track classification which was assigned to the case at the time of filing by the trial judge to whom the case is assigned. There are three tracks, "A," "B," and "C." "A" cases are set for trial between eight (8) and ten (10) months after the date of first appearance of a defendant or the default date; "B" cases eleven (11) to fourteen (14) months after the date of first appearance of a defendant or the default date; and "C" cases fifteen (15) to eighteen (18) months after the date of first appearance of a defendant or the default date.

Except in cases exempted under **Local Rule 16.2(a)**, the attorneys (and any unrepresented parties) must meet in accordance with **Local Rule 16.2(b)** within 21 days after the first appearance of a defendant (and at least fourteen (14) days before any scheduling conference set by the Court) to candidly discuss the issues in the case and potential discovery needs. **Fed.**

R. Civ. P. 26(f) Within seven (7) calendar days after this meeting, the participants must submit a Joint Report of the Parties and Proposed Scheduling and Discovery Order to the Magistrate Judge.

All track "B" and "C" cases will be set for a scheduling and discovery conference before a Magistrate Judge within forty (40) days after the first appearance of a defendant in cases filed, removed, or transferred to this District. The scheduling conference may be canceled at the discretion of the Court following receipt of the Joint Report of the Parties regarding their initial meeting. The Magistrate Judge may approve the parties' Joint Report of Parties and Proposed Scheduling and Discovery Order, or enter a separate scheduling order, as circumstances require.

A final pre-trial conference will be held by the trial judge at least seven (7) days prior to the first day of the presumptive trial month. The parties shall confer and jointly submit a Final Pre-Trial Order three (3) days before the date of the final pre-trial conference.

Disclosures and Discovery Practice

Except in cases exempted under **Local Rule 16.2(a)**, the parties shall comply with the initial disclosure requirements of **Local Rule 26.1(a)(1)**. The plaintiff(s) is required to serve its disclosures upon each defendant within twenty (20) days after the appearance of that defendant. Each defendant shall serve its disclosures upon every other party within twenty (20) days after defendant's appearance.

These disclosures must be supplemented by the parties, depending on the nature of the case and any limitations placed on discovery at the scheduling conference. The disclosures and supplementation are not to be filed with the Clerk of the Court.

A party may not seek discovery from another source until: (a) the party seeking discovery has made its initial disclosures as required by **Local Rule 26.1(a)(1)**; and, further, (b) the parties have met and conferred as required by **Local Rule 16.2(b)**. A party may not seek discovery from

another party before such disclosures have been made by, or are due from, such other party.

The cut-off date for all discovery, including experts and third parties, shall be not later than ninety (90) days prior to the first day of the month of the presumptive trial date. Disclosure of experts and discovery with reference to experts and other discovery dates will be set according to the Joint Report of the Parties following their initial meeting or at the scheduling and discovery conference before the Magistrate Judge.

Motion Practice

Motions for leave to amend pleadings, for extension of time, for voluntary dismissal, to compel answers to interrogatories, to compel production, and other motions customarily disposed of without briefing or argument may be submitted to the Court by mail addressed to the Clerk, accompanied by an appropriate order on a separate letter-sized sheet. The opposing party **may** file a written response within ten (10) days after service of the motion.

All other motions, specifically motions to dismiss, for judgment on the pleadings, for summary judgment, and all post-trial motions, shall be filed with the Clerk together with a supporting brief and proposed order. Briefs shall be no longer than ten (10) double-spaced typewritten pages. Any adverse party shall have ten (10) days after the service of the movant's brief in which to file and serve an answering brief and proposed order. Reply briefs, if any, shall be filed within five (5) days of the filing of an answering brief. Such briefs are not favored and should be filed only in exceptional circumstances. Under no circumstances will sur-reply briefs be accepted.

However, when all parties are represented by counsel, motions for summary judgment and for judgment on the pleadings may be filed **ONLY AFTER** the motion is fully briefed by all parties as provided in Local Rule 7.1(g). Prior to filing a motion for summary judgment or for judgment on the pleadings, the moving party shall file a "Notice of Motion" with the Clerk of Court and shall

serve (but not file) the motion, related documents, and a copy of the Notice of Motion on all record counsel. **This Notice of Motion must be filed no later than 30 days prior to the dispositive motion deadline.** Parties opposing the motion shall then timely serve (but not file) their answering brief and related documents on all record counsel. Replies, if any, shall be similarly served. The moving party shall then file a “motion packet” which shall consist of the motion, all responsive briefs and related documents, and a Motion Packet Form. The motion packet must be filed with the Clerk of the Court on or before the dispositive motion deadline set by the Court. Failure of a party opposing the motion to serve an answering brief may, in the Court’s discretion, be considered an admission of the merits of the motion as provided by Local Rule 7.1(g).

The Notice of Motion filed with the Clerk of Court shall indicate the type of motion to be filed and shall contain a certificate of service indicating the date the motion was served upon all record counsel. The Motion Packet Form shall indicate both the type of motion filed and whether the motion packet includes Responses, Replies and Exhibits. Notice of Motion and Motion Packet Forms are included in the Appendix to these Rules.

There will be no oral arguments on motions in civil cases except by specific order of the Judge to whom the motion is assigned.

FOR THE COURT

**NORBERT G. JAWORSKI
CLERK OF COURT**

ALL MOTIONS MUST BE SUBMITTED WITH A PROPOSED ORDER

Forms referenced in this document are available, free of charge, downloadable from the district court web site at www.ilsd.uscourts.gov or from the Clerk’s Office for a fee of \$3.00. Copies of the new forms are included as attachments in the January 1, 2000 revision of the Local Rules.

Sample Form 17

Jurisdictional Checklist

- 1. Jurisdiction Properly Alleged?**
- 2. Federal Question?**
 - a. “Arising under” jurisdiction (not defensive or referential use of federal law)
 - b. Private right of action
 - c. Wholly insubstantial federal claim
- 3. Diversity Jurisdiction?**
 - a. Complete diversity
 - b. Dual citizenship of corporations
 - c. Citizenship of all partners, association members, etc.
 - d. Supplemental parties joined by plaintiff disallowed
 - e. Amount in controversy (\$75,000)
 - f. Indispensable parties
- 4. Removal jurisdiction?**
 - a. Federal question; diversity or “separate and independent” to federal question claim
 - b. Non-removable claims (e.g., FELA)
 - c. Waiver by consent or agreement
 - d. Removal limited to defendants
 - e. Artful pleading/complete preemption
 - f. Special removal statutes (e.g., federal officers)
 - g. Procedural defects:
 - i. Removal within 30 days of receipt by first defendant
 - ii. Joinder by all served defendants
 - iii. Other procedural requirements (attach papers, notices, etc.)
 - iv. Resident defendant removal (diversity)
 - v. Removal more than one year after commencement (diversity)
- 5. Supplemental (Pendent) Jurisdiction**
 - a. Do state claims derive from “common nucleus of operative fact”
 - b. Is supplemental party added to action commenced before December 1, 1990 (*Finley v. U.S.*)
 - c. Does joinder of supplemental party destroy complete diversity (e.g., added by plaintiff, intervenor as plaintiff, indispensable party)
 - d. Are there reasons to decline supplemental jurisdiction (e.g., novel/complex state claims, federal claims dismissed, or other compelling reasons for dismissal/remand)
- 6. Other Limitations?**
 - a. Venue
 - b. Timely and proper service—Fed. R. Civ. P. 4(j)
 - c. Personal jurisdiction
 - d. Jurisprudential limitations (standing, abstention, mootness, ripeness, etc.)

- e. Eleventh Amendment
- f. Failure to exhaust administrative remedies (e.g., EEOC), notice requirements, etc.

Sample Form 18

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

	)	CASE NO. _____
)	
Plaintiff(s),)	
	)	JUDGE DAN AARON POLSTER
vs.)	
)	
	)	<u>ORDER CONCERNING REMOVAL</u>
)	
Defendant(s).)	

IT IS HEREBY ORDERED that all parties removing actions to this Court shall, no later than five (5) days after the date of this order, file and serve a signed statement under the case and caption that sets forth the following information (**#3 applies to the Plaintiff only**):

1. The date(s) on which defendant(s) or their representative(s) first received a copy of the summons and complaint in the state court action.
2. The date(s) on which each defendant was served with a copy of the summons and complaint, if any of those dates are different from the date(s) set forth in item number 1.
3. **The Plaintiff shall** submit a detailed monetary breakdown of how damages claimed total at least \$75,000.00.
4. In actions predicated on diversity jurisdiction, whether any defendants who have been served are citizens of the state of Ohio.
5. If removal takes place more than thirty (30) days after any defendant first received

a copy of the summons and complaint, the reasons why removal has taken place at this time and the date on which the defendant(s) first received a paper identifying the basis for such removal.

6. In actions removed on the basis on this Court's jurisdiction in which the action in state court was commenced more than one year before the date of removal, the reasons why this action should not summarily be remanded to state court.
7. Identify any defendant who had been served prior to the time of removal who did not formally join in the notice of removal and the reasons therefore.

IT IS FURTHER ORDERED that all defendants to the action who joined in the notice of removal shall file such a statement within the time period set forth herein, although the parties may file a joint statement as long as such statement is signed by counsel for each party.

IT IS FURTHER ORDERED that the removing defendant(s) shall serve a copy of this order on all parties to the action no later than the time they file and serve a copy of the statement required by this order. Any party who learns at any time that any of the information provided in the statement(s) filed pursuant to this order contains information that is not correct shall immediately notify the Court in writing thereof.

IT IS SO ORDERED.

Dan Aaron Polster
United States District Judge

Sample Form 19

The following local rule governing RICO filings is an excerpt from the *Local Rules of Practice for the United States District Court for the Southern District of California*, which became effective January 1, 2000.

Civil Rule 11.1 Civil RICO Actions Filed

- a. **Filing.** Plaintiffs shall file, within thirty (30) days of the filing (including filing upon removal or transfer) of a complaint which states a RICO cause of action, a RICO Case Statement.

This statement shall include facts upon which plaintiffs rely to initiate their RICO claims, as a result of the “reasonable inquiry” required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form using the numbers and letters set forth in the form entitled “RICO Case Statement,” available for inspection and copying in the office of the clerk, and shall state in detail and with specificity the information requested in that form. [Editor’s Note: The referenced RICO Case Statement appears immediately following this local rule excerpt.] The court shall construe the RICO Case Statement as an amendment to the pleadings.

- b. **Failure to comply.** Failure to comply subjects the RICO cause of action to dismissal.
- c. **Service.** Counsel must serve a copy of the RICO Case Statement on all parties.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

<div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"><div style="background-color: yellow; height: 20px; width: 100%;"></div><div style="text-align: center; margin-top: 5px;">vs.</div><div style="background-color: yellow; height: 20px; width: 100%;"></div></div>	Plaintiff, Defendant.	<div style="border: 1px solid black; padding: 5px;">CASE NO. <div style="background-color: yellow; display: inline-block; width: 150px; height: 20px;"></div></div>
---	------------------------------	---

RICO CASE STATEMENT

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. 1962(a), (b), (c), and/or (d).
2. List the defendants and state the alleged misconduct and basis of liability of each defendant.
3. List alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.
4. List the alleged victims and state how each victim was allegedly injured.
5. Describe in detail the pattern of racketeering activities or collection of unlawful debts alleged for each RICO claim. The description of the pattern of racketeering shall include the following information:
 - a. List the alleged predicate acts and the specific statutes that were allegedly violated;

b. Provide the date of each predicate act, the participants in each predicate act, and a description of the facts constituting each predicate act;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the “circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). Identify the time, place and substance of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of any predicate act;

e. State whether civil litigation has resulted in a judgment with regard to any predicate act;

f. Describe how the predicate act forms a “pattern of racketeering activity;” and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe the alleged relationship and common plan in detail.

6. Describe in detail the alleged “enterprise” for each RICO claim. A description of the enterprise shall include the following: (a) state the name of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise; (b) a description of the structure, purpose, function and course of conduct of the enterprise; (c) a statement of whether any defendants are employees, officers or directors of the alleged enterprise; (d) a statement of whether any defendants are associated with the alleged enterprise; (e) a statement of whether plaintiff is alleging that the defendants are individuals or entities separate from the alleged enterprise or that the defendants are the enterprise itself, or members of the enterprise; (f) if any defendants are alleged to be the enterprise itself, or members of the enterprise, an explanation of whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether plaintiff is alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual daily activities of

the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. 1962(a), provide the following: (a) state who received the income derived from the pattern of racketeering activity or through the collection of unlawful debt; and (b) describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. 1962(c), provide the following: (a) state who is employed by or associated with the alleged enterprise, and (b) state whether the same entity is both the liable “person” and the “enterprise” under 18 U.S.C. 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. 1962(d), describe in detail the facts showing the existence of the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of 18 U.S.C. 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to the court in processing your RICO claims.

DATED:

Attorney for Plaintiff(s)

Sample Form 20

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

Plaintiff,

vs.

No. CIV ____-_____/JHG

Defendant.

SCHEDULING ORDER

This matter came before Joe H. Galvan, United States Magistrate Judge for scheduling conference pursuant to **Fed.R.Civ.P. 16** on _____. The attorneys are to submit this Scheduling Order directly to Joe H. Galvan, United States Magistrate Judge, 200 E. Griggs Ave., Las Cruces, NM 88001 by _____.

IT IS HEREBY ORDERED that the parties shall adhere to the following:

DISCOVERY

The termination date for discovery is _____, and discovery shall not be reopened, except by an order of the Court upon a showing of good cause. This deadline shall be construed to require that discovery be **completed** before the above date. Service of interrogatories or requests for production shall be considered timely only if the responses are due prior to the deadline. A notice to take deposition shall be considered timely only if the deposition takes place prior to the deadline. The pendency of dispositive motions shall not stay discovery.

MOTIONS ON DISCOVERY

Motions relating to discovery (including but not limited to motions to compel and motions for protective order) shall be served no later than _____. This deadline shall not be construed to extend the twenty-day time limit imposed by **D.N.M.LR-Civ. 26.6, and 37**.

DISCOVERY LIMITATIONS

A maximum of _____ interrogatories by each _____ to any other _____ are permitted.

A maximum of _____ requests for admission by each _____ to any other _____ are permitted.

A maximum of _____ requests for production by each _____ to any other _____ are permitted.

A maximum of _____ depositions by each _____ are permitted. Each deposition (other than of _____) is limited to a maximum of _____ hours, unless extended by agreement of the parties.

Supplementation under **Fed.R.Civ.P. 26(e)** is due **30 days** after the party acquires the information.

In appropriate cases, the attorneys are to submit a stipulated order providing for the independent medical examination pursuant to **Fed.R.Civ.P. 35(a)**.

EXPERT WITNESSES

Plaintiff(s) shall comply with **Fed.R.Civ.P. 26(a)(2)** no later than _____. All other parties shall comply with **Fed.R.Civ.P. 26(a)(2)** no later than _____.

Counsel are admonished that any motion pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) must be served by the deadline for serving Other Pretrial Motions.

JOINDER AND AMENDMENT

Plaintiff(s) shall be permitted until _____ to join additional parties and until _____ to amend the pleadings.

All other parties shall be permitted until _____ to join additional parties and until _____ to amend the pleadings.

OTHER PRETRIAL MOTIONS

Pretrial motions, other than discovery motions, shall be served on or before _____. Any pretrial motions, other than discovery motions, filed after the above date, may be subject to summary denial in the discretion of the Court.

OTHER MATTERS

By agreement of the parties the following are the issues remaining in the case:

Plaintiff: (Itemize causes of action)

Defendant: (Itemize defenses)

Plaintiff withdraws the following causes of action:

Defendant withdraws the following defenses:

This case is classified as:

_____ Standard

_____ Complex

_____ Expedited

PRETRIAL ORDER

Counsel are directed to submit a consolidated pretrial order as follows: Plaintiff(s) to all other parties on or before _____; all other parties are to submit one, consolidated, proposed pretrial order directly to Joe H. Galvan, United States Magistrate Judge, 200 E. Griggs Ave., Las Cruces, NM 88001 by _____.

PRETRIAL CONFERENCE

A tentative pretrial conference is set for _____ at _____ .m. in _____, **New Mexico** before Joe H. Galvan, United States Magistrate Judge. Any

pretrial conference set by the assigned district judge shall supersede this setting.

SETTLEMENT CONFERENCE

A tentative settlement conference is set for _____ at _____ .m in _____, **New Mexico** before Joe H. Galvan, United States Magistrate Judge.

At the request of all parties, a settlement conference may be set at an earlier date. The parties, or claims personnel with ultimate settlement authority, are required to attend any settlement conference before Joe H. Galvan, United States Magistrate Judge **in person**. There are **no exceptions** to this rule.

ESTIMATED TRIAL TIME

The parties estimate that trial will require _____ days, including jury selection.

SETTLEMENT

At this time, counsel rate the possibility of settlement in this case as:

Poor _____ Fair _____ Good _____ (check one).

SUBMITTED BY:

Counsel for Plaintiff

Counsel for Defendant

APPROVAL RECOMMENDED:

**APPROVED AND ADOPTED AS THE
ORDER OF THE COURT:**

**JOE H. GALVAN
UNITED STATES MAGISTRATE JUDGE**

UNITED STATES DISTRICT JUDGE

Sample Form 21

FORM 1 (ND/SD Miss. Dec. 2000)

UNITED STATES DISTRICT COURT
_____ **DISTRICT OF MISSISSIPPI**

Plaintiff

v.

CIVIL ACTION NO.

Defendant

CASE MANAGEMENT ORDER

This Order, including the deadlines established herein, having been established with the participation of all parties, can be modified only by order of the court upon a showing of good cause supported with affidavits, other evidentiary materials, or reference to portions of the record. IT IS HEREBY ORDERED:

**1. CASE
TRACK:**

_____ **Expedited**
_____ **Standard**
_____ **Complex**

_____ **Administrative**
_____ **Mass Tort**
_____ **Suspension Track**

2. ALTERNATIVE DISPUTE RESOLUTION [ADR].

_____ **A.** Alternative dispute resolution techniques appear helpful and will be used in this civil action as follows:

_____ **B.** At the time this Case Management Order is offered it does not appear that alternative dispute resolution techniques will be used in this civil action.

3. CONSENT TO TRIAL BY UNITED STATES MAGISTRATE JUDGE.

_____ **A.** The parties consent to trial by a United States Magistrate Judge.

_____ **B.** The parties do not consent to trial by a United States Magistrate Judge.

4. DISCLOSURE.

_____ **A.** The pre-discovery disclosure requirements of Uniform Local Rule 5.1(A) have been complied with fully.

_____ **B.** The following additional disclosure is needed and is hereby ordered:

5. MOTIONS; ISSUE BIFURCATION.

_____ **A.** The court finds and orders that early filing of the following motion(s) might significantly affect the scope of discovery or otherwise expedite the resolution of this action:

_____ **B.** The court finds and orders that staged resolution, or bifurcation of the issues for trial in accordance with FED. R. CIV. P. 42(b),

_____ **(1)** Will assist in the prompt resolution of this action.

_____ **(2)** Will not assist in the prompt resolution of this action.

Accordingly, the court orders that:

6. DISCOVERY PROVISIONS AND LIMITATIONS.

A. Interrogatories, Requests for Production, and Requests for Admissions are limited to
_____ [Expedited: 15; Standard and Complex: 30] succinct questions.

B. Depositions are limited to the parties and no more than

_____ [Expedited: 3; Standard: 5; Complex: 10] fact witness depositions per party without additional approval of the court.

C. _____ There are no further discovery provisions or limitations.

D. _____ The court orders that further discovery provisions or limitations be imposed:

- 7. Scheduling Deadlines** *The appropriate scheduling deadlines based upon the track designation shall not be included in the proposed Case Management Order. (Deadlines shall be determined at the telephonic case management conference).*

SCHEDULING DEADLINES
(To be completed by the court only)

IT IS HEREBY ORDERED AS FOLLOWS:

8. Trial.

- A.** This action is set for trial commencing on: _____
- B.** Reserved Trial Period (two-week limitation): _____
- C.** Conflicts (the court will only consider conflicts specified in this Case Management Order):

9. Pretrial. The pretrial conference is set on: _____

10. Discovery. All discovery shall be completed by: _____

11. Amendments. Motions for joinder of parties or amendments to the pleadings shall be served
by: _____

12. Experts. The parties' experts shall be designated by the following dates:

- A.** Plaintiff: _____
- B.** Defendant: _____

13. Motions. All motions other than motions *in limine* shall be filed by:

The deadline for motions *in limine* is ten days before the pretrial conference; the deadline for responses is five days before the pretrial conference.

14. Settlement Conference. A judicial officer shall conduct a settlement conference on:

ORDERED:

Date

UNITED STATES MAGISTRATE JUDGE

Sample Form 22

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Plaintiff,	:	
	:	
	:	
vs.	:	CIVIL ACTION
	:	
	:	
Defendant.	:	

RULE 16(b) SCHEDULING ORDER

After consideration of the Fed.R.Civ.P. 26(f) report (Doc. 4) and the pleadings of the parties, the following scheduling order is entered pursuant to Fed.R.Civ.P. 16(b):

1. **TRIAL**. This action is set for jury selection on _____, at 9:00 a.m., and for trial sometime during the month of _____, the specific date to be set once the total number of actions going to trial that month is determined. The parties estimate that the trial of this action will take _____ days.

This non-jury action is set for trial sometime during the civil term beginning _____, the specific date to be set once the total number of actions going to trial that month is determined. The parties estimate that the trial of this action will take _____ days.

2. **FINAL PRETRIAL CONFERENCE**. This action is set for final pretrial conference before the District Judge on _____ at _____. **This is a firm setting and the parties are expected to be ready for trial on that date.**

A COPY OF THE DISTRICT JUDGE'S STANDING ORDER GOVERNING HIS FINAL PRETRIAL CONFERENCES IS ATTACHED. NO ADDITIONAL NOTICE REGARDING THE FINAL PRETRIAL CONFERENCE WILL BE GIVEN. [Editor's Note: The referenced standing order governing pretrial conferences appears at the beginning of Sample Form 35.]

3. DISCOVERY COMPLETION DATE. All discovery is to be completed on or before _____. **Requests for extension will be viewed with great disfavor and will not be considered except upon a showing (1) that extraordinary circumstances require it and (2) that the parties have diligently pursued discovery.**

For all actions, "completed" means that all interrogatories, requests for admissions, and requests for production have been filed and responded to; physical inspections and testing concluded; physical and mental examinations concluded; experts' reports exchanged; all depositions, including experts' depositions, taken; and motions to compel filed.

4. INITIAL DISCLOSURES. The initial disclosures required by Fed.R.Civ.P. 26(a)(1) shall be/were made by the parties on _____.

5. AMENDMENTS TO PLEADINGS AND JOINDER OF PARTIES. Any motion for leave to amend the pleadings or to join other parties must be filed on or before _____.

6. EXPERT TESTIMONY. The disclosure of expert testimony as required by Fed.R.Civ.P. 26(a)(2) is to be made by Plaintiffs on or before _____, and by Defendants on or before _____.

7. SUPPLEMENTATION. Supplementation of disclosures and responses as required by Fed.R.Civ.P. 26(e) is to be accomplished "at appropriate intervals" and "seasonably."

8. PRETRIAL DISCLOSURES. The disclosure of information regarding the evidence that each party may present at trial as required by Fed.R.Civ.P. 26(a)(3) is to be made on or before _____.

9. DISCOVERY LIMITS. Discovery is limited as follows:

a. Not more than _____ interrogatories, including all discrete subparts, may be served by each party upon any other party. Responses are due within thirty (30) days of service;

b. Not more than _____ depositions may be taken by each party. Each deposition is limited to a maximum of _____ hours (Plaintiff and 30(b)(6) representative limited to _____ hours) unless extended by agreement of the parties;

c. Not more than _____ requests for admissions, including all discrete subparts, may be served by each party upon any other party. Responses are due within thirty (30) days of service;

d. Not more than _____ requests for production of documents, including all discrete subparts, may be served by each party upon any other party. Responses are due within thirty (30) days of service. Subpoenas duces tecum to a party ordering such party to produce documents or things at trial shall not be used to circumvent the limitations placed on discovery.

In applying these limits, all parties represented by the same counsel will be treated as a single party.

10. DISCOVERY MOTIONS. The following requirements pertain to discovery motions filed in this Court:

a. Conferencing by Counsel. The conferencing requirement of Fed.R.Civ.P. 26(c), 37(a)(2), and 37(d) will be strictly enforced. This requirement will also apply to a motion for physical and mental examination pursuant to Fed.R.Civ.P. 35(a) and a motion to determine sufficiency pursuant to Fed.R.Civ.P. 36(a). Any such motion not containing the required certification will be stricken.

b. Time of Filing; Form. A motion for protective order pursuant to Fed.R.Civ.P. 26(c), a motion for physical and mental examination pursuant to Fed.R.Civ.P. 35(a), a motion to determine sufficiency pursuant to Fed.R.Civ.P. 36(a), and a motion to compel pursuant to Fed.R.Civ.P. 37 shall be brought in a timely manner so as to allow sufficient time for the completion of discovery according to the schedule set by the Court. Any such motion shall quote in full (1) each interrogatory, request for admission or request for production to which the motion is addressed, or otherwise identify specifically and succinctly the discovery to which objection is taken or from which a protective order is sought, and (2) the response or the objection and grounds therefor, if any, as stated by the opposing party. Unless otherwise ordered by the Court, the complete transcripts or discovery papers are not to be filed with the Court unless the motion cannot be fairly decided without reference to the complete original.

c. Time for Response. Unless within eleven (11) days after the filing of a discovery motion the opposing party files a written response thereto, the opportunity to respond shall be deemed waived and the Court will act on the motion. Every party filing a response shall file with the response a memorandum of law, including citations of supporting authorities and any affidavits and other documents setting forth or evidencing facts on which the response is based.

d. Privilege or Protection of Trial Preparation Materials. The provisions of Fed.R.Civ.P. 26(b)(5) will be strictly enforced in those rare situations in which privilege or work product protection is invoked. Rule 26(b)(5) information shall be disclosed in a "privilege log" served with the objections to production. The "privilege log" shall, at a minimum, contain the facts suggested in paragraphs K.2.(a & b) (pages 9-10) of the Introduction to Civil Discovery Practice in the Southern District of Alabama,

Civil Practice Federal Court Committee (1998) (distributed by the Clerk with the Local Rules).

11. SUMMARY JUDGMENT. Motions for summary judgment and any other dispositive motions which require little or no discovery should be filed as soon as possible; all other motions for summary judgment should be filed as soon as possible after the discovery completion date, but not later than _____. Neither the final pretrial conference nor the trial of this action will be delayed pending a ruling on such motions.

12. SETTLEMENT. On or before _____, the parties shall confer for the purpose of discussing settlement and shall file with the Clerk of Court by that date, a joint statement setting forth the parties' positions regarding settlement of this action through any of the approved alternative dispute resolution procedures. However, the parties may contact the Court at any stage of the proceedings if they believe mediation or a settlement conference would be beneficial. Given that most actions settle, early settlement negotiations are strongly encouraged. The Court adopted an alternative dispute resolution plan on February 8, 1995, a copy of which can be obtained from the Clerk of the Court.

13. BRIEFS; LETTERS; COURTESY AND DUPLICATE COPIES; FAXING OF DOCUMENTS. **Unless prior permission of the Court is given:**

a. A brief filed in support of or in opposition to any motion shall not exceed thirty (30) pages in length and a reply brief by movant shall not exceed fifteen (15) pages in length. Attachments to the brief do not count toward the page limitations.

b. An application to the Court for an order shall be by motion, not by letter. See Fed.R.Civ.P. 7(b). Any objection or response to a motion or to any other matter is to be done in a properly-styled and captioned paper, not by letter.

c. Courtesy copies of pleadings, motions or other papers filed in the action are not to be provided to the Judge or the Judge's chambers. A copy of a pleading, motion, or other paper that has been previously filed in the action is not to be attached to a subsequently filed pleading, motion or other paper; it may be adopted by reference.

d. Papers transmitted to the Court by facsimile will not be accepted for filing. A copy of this Court's policy regarding the faxing of documents may be obtained from the Clerk of Court.

14. LOCAL RULES. All parties are reminded that the Local Rules of this district contain important requirements concerning motions to dismiss and for summary judgment, class actions, and other matters. They are reprinted in ALABAMA RULES OF COURT (West Publishing Co.) and ALABAMA RULES ANNOTATED (The

Michie Company), but are amended from time to time. A current version may be obtained from the Clerk. Local Rule 5.5(a) proscribes the filing of most discovery materials.

DONE this _____.

UNITED STATES MAGISTRATE JUDGE

Sample Form 23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

PLAINTIFF(S)

VERSUS

CIVIL ACTION NO.

DEFENDANT(S)

RULE 16.1(A) INITIAL ORDER

The above captioned cause is set for a **TELEPHONIC CASE MANAGEMENT CONFERENCE (CMC)** on _____ at _____.M. before:

Magistrate Judge Jerry A. Davis
P.O. Box 726
Aberdeen, Mississippi 39730
Telephone: (662) 369-2138

UNLESS OTHERWISE AGREED, IT SHALL BE THE RESPONSIBILITY OF COUNSEL FOR THE PLAINTIFF TO SET UP THE CONFERENCE CALL AT THE SCHEDULED TIME.

RULE 16.1(B)(1) ATTORNEY CONFERENCE

No later than twenty-one (21) days prior to the CMC, counsel shall confer, either in person or telephonically, regarding the following matters:

1. Identify the principal factual and legal issues in dispute;
2. Discuss the principal evidentiary basis for claims and defenses;
3. Determine the differentiated case management case track, days required for trial, and whether the case should be considered for Alternative Dispute Resolution (ADR);
4. Discuss when voluntary disclosure of documents or other information should be made pursuant to Rule 26.1 [no later than fourteen (14) days after the attorney conference, Local Rule 16.1(B)(7)];

5. Identify any motions whose early resolution would have significant impact on the scope of discovery or other aspects of the litigation;
6. Consistent with the case track recommendations, determine what additional discovery is required beyond the voluntary disclosures and initial depositions of the parties, with designated time limitations;
7. Discuss whether all parties consent to jurisdiction by a magistrate judge;
8. Discuss a time for the Local Rule 16.1(C) settlement conference;
9. Discuss settlement prospects fully with each other and their respective clients and represent to the Court that they have done so and communicate the costs of going through litigation and the appeal process with each other's respective clients and represent to the Court that they have done so;
10. Discuss preparation of a proposed case management order. Scheduling deadlines based on the track designation should not be included in the proposed case management order. All deadlines shall be determined at the telephonic case management conference.

PROPOSED CASE MANAGEMENT ORDER
CONFIDENTIAL SETTLEMENT MEMORANDA

Counsel are instructed to submit a proposed case management order **by mail (NO FAXES)** to the appropriate magistrate judge **no later than fourteen (14) days after the attorney conference**. By the same deadline, counsel shall also submit an original and one (1) copy of a memorandum (3 page maximum) setting forth a brief explanation of the case, and a candid appraisal of the respective positions, including possible settlement figures. Counsel will also furnish in their memorandum a good faith estimate of the expense of carrying the litigation through trial and the appellate process, if not settled, and will have discussed and will represent to the Court that they have so discussed these costs with their respective clients and will be prepared to candidly discuss them with the Court. These memoranda are **not** to be exchanged and will be viewed only by the Court. These will not become a part of the record and will be destroyed upon the resolution of the case.

CASE MANAGEMENT PLAN

At the conference, the Court and the parties shall:

1. Identify the principal factual and legal issues in dispute;
2. Identify the alternative dispute resolution procedure which counsel intend to use, or report specifically why no such procedure would assist in the resolution of the case;
3. Indicate whether all parties consent to jurisdiction by a magistrate judge;
4. Review the parties' compliance with their disclosure obligations and consider whether to order additional disclosures;
5. Determine whether to order early filing of any motions that might significantly affect the scope of discovery or other aspects of the litigation, and provide for the staged resolution, or bifurcation of issues for trial consistent with 42(b) FRCivP.;
6. Determine the plan for at least the first stage of discovery; impose limitations on each discovery tool, time periods and other appropriate matters;
7. Determine the date for the Local Rule 16.1(C) settlement conference or mediation;
8. Discuss scheduling and set appropriate scheduling deadlines including dates for settlement conference, completion of discovery, motions, final pretrial conference and trial.

CASE MANAGEMENT ORDER

A Case Management Order shall be entered by the Court within ten (10) days of the conference. A Uniform Case Management Order has been developed and is available on the Court web site at www.msnd.uscourts.gov and as Form No. 1 in the revised Uniform Local Rules, effective December 1, 2000. [Editor's Note: The Uniform Case Management Order also appears as Sample Form 21 in this Appendix.] Counsel shall use that format in discussions and preparation.

SO ORDERED this the _____ day of _____, 20__.

U.S. MAGISTRATE JUDGE

Sample Form 24

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

)	
	)	Civil Action No.
)	
Plaintiff(s))	
)	
	)	PRETRIAL SCHEDULING ORDER
)	
v.)	
)	
)	
)	
Defendant(s).)	
)	
)	

This matter having come before the Court for a scheduling conference pursuant to Civil Rule 16; good cause appearing;

IT IS on this _____ day of _____

ORDERED THAT:

I. DISCOVERY

1. Civil Rule 26(a)(1) disclosures shall be made not later than _____.
2. Interrogatories and document requests shall issue not later than _____.
3. Absent leave of Court, no party shall serve more than one set of Interrogatories on any other party.
4. Absent leave of Court, no party shall serve more than one document request (with no limit on the categories of documents requested) on any other party. This restriction shall not, however, bar the service of Rule 30(b)(6) notices by any party.

5. Discovery shall remain open through _____. No discovery is to be issued or engaged in beyond that date.

6. No objections to questions posed at depositions shall be made except as permitted by Civil Rules 30(d)(1) and 32(d)(3)(A). No instruction not to answer shall be given except as permitted by Civil Rule 30(d)(1).

7. Any discovery dispute shall be brought to the Court's attention in the first instance by letter or by telephone conference call immediately after the parties' good faith attempt to resolve the dispute has failed. Local Civil Rule 16.1(f)(1).

II. MOTION PRACTICE

8. Any motion to amend pleadings or add new parties shall comply with Local Civil Rule 7.1(d) and shall be returnable not later than _____.

9. (a) Any dispositive motion in a civil action assigned to Judges Debevoise or Hayden shall comply with Local Rule 7.1(d). Motion papers shall be filed and served not later than _____ and shall be returnable.

(b) Any dispositive motion in a civil action assigned to Judge Politan shall comply with Local Civil Rule 7.1(b) and Appendix N to the Local Civil Rules. Motion papers shall be served not later than _____. Opposition shall be served not later than _____. The entire motion papers shall be filed not later than _____.

(c) The parties are directed to Local Civil Rule 7.2, which sets limits to the length of briefs and describes the format thereof.

III. EXPERTS

10. Not later than _____ the report of any proposed affirmative expert witness shall be served, together with all other disclosures required by Civil Rule 26(a)(2)(B).

11. Not later than _____ the report of any proposed rebuttal expert witness shall be served, together with all other disclosures required by Civil Rule 26(a)(2)(B).

12. Each expert report shall conform with Civil Rule 26(a)(2)(B).

13. No expert shall testify at trial as to any opinions or base those opinions on facts not substantially disclosed in the expert's report.

IV. FINAL PRETRIAL CONFERENCE

14. A final pretrial conference shall be conducted pursuant to Civil Rule 16(d) at _____ a.m./p.m. on _____.

15. All counsel are directed to assemble at the office of counsel for plaintiff(s) not later than ten (10) days before the pretrial conference to prepare the Pretrial Order in the form and content required by the Court. Counsel for plaintiff(s) shall prepare the Pretrial Order and shall submit it to all other counsel for approval.

16. The original of the Pretrial Order shall be delivered to Chambers not later than twenty-four (24) hours before the pretrial conference. All counsel are responsible for the timely submission of the Pretrial Order.

V. MISCELLANEOUS

17. The Court may from time to time schedule conferences as may be required, either sua sponte or at the request of a party.

18. Since all dates set forth herein are established with the assistance and knowledge of counsel there shall be no extensions except for good cause shown and by leave of Court.

19. Failure to appear at subsequent conferences or to comply with the terms of this or any other Order may result in the imposition of sanctions. Civil Rule 16(f).

20. A copy of every pleading, document or written communication with the Court shall be served on all other parties to the action. Any such communication which does not recite or contain a certification of such service may be disregarded by the Court.

21. There shall be a status/settlement conference on _____.

RONALD J. HEDGES
UNITED STATES MAGISTRATE
JUDGE

Original: Clerk
cc: U.S.D.J.
File

Sample Form 25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

vs.

CIVIL ACTION NO. _____

PRETRIAL ORDER - JURY CASE

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, it is hereby ORDERED:

1. Closure Date. Discovery in this case shall be closed as of _____ unless otherwise ordered by the Court. Said date, or such other date as the Court may subsequently specify, shall be referred to as the "Closure Date."

2. Time for Discovery. On or before the Closure Date, all interrogatories and requests for production must be served, and all depositions and other discovery must be completed. No discovery may be conducted after the Closure Date except by agreement of all counsel or by order of the Court. A motion for such an order shall identify the particular discovery sought, the reasons it is necessary, and the reasons why it was not done prior to the Closure Date. Nothing contained in this order shall excuse a party from its continuing obligation, under the Rules, to update responses to discovery or to respond to discovery requests made before the Closure Date.

3. Expert Witnesses. Any party intending to utilize the testimony of an expert witness shall, upon request, disclose the identity of such witness promptly. If the expert is retained subsequent to such request, disclosure shall be made immediately after retention and before Closure Date. Any such witness not so

disclosed may be barred from testifying unless the Court otherwise directs for good cause shown.

4. Time for Motions. All motions, including motions to amend pleadings, motions for leave to file counterclaims, cross claims or third party complaints, motions to add parties, motions for summary judgment, motions for judgment on the pleadings, and motions to dismiss, shall be filed promptly after counsel discovers, or should have discovered, the bases for such motions. No motion, other than a motion to modify this Order or a motion to compel compliance with a discovery request made prior to the Closure Date, may be filed after the Closure Date.

5. Format for Motions. Every motion and every objection to a motion shall be accompanied by a supporting memorandum bearing a title identifying the motion in support of or in opposition to which it is filed; shall contain a "Facts" section as described in Subparagraph D; and shall set forth the basis for the motion or objection together with the statute, rule or other provision of law relied upon. Photocopies of all cases and authorities cited shall be included with the memorandum as a separate appendix. In the case of dispositive motions (e.g., motions to dismiss or for summary judgment) such memorandum shall include in the following order:

- A. A table of contents page;
- B. A section entitled "Pleadings" that summarizes the pertinent allegations and contentions of both parties as set forth in their respective pleadings and cites the paragraph numbers of the pleadings in which said allegations or contentions are made;
- C. A section entitled "Description of Motion" that identifies the movant(s) and the party against whom the motion is directed and that describes

the motion and the precise nature of the order or relief sought;

- D. A section entitled "Facts" that contains a clear and concise recitation of those facts necessary to enable the reader to understand what the case is about and the basis for the motion or objection without reviewing other documents (whether those documents are appended to the motion or not);
- E. A section entitled "Issues" that contains a numerical listing of the specific issues that the Court will be required to address in ruling on the motion;
- F. A section entitled "Points and Authorities" that states and discusses, under separately labeled headings, each argument or contention advanced in support of or in opposition to the motion together with citations to any authorities relied upon;
- G. A Table of Authorities Cited that includes the page numbers on which reference is made to each authority listed; and
- H. A separate appendix consisting of photocopies of those cases, statutes and authorities cited in the memorandum.

No other memoranda, supplemental memoranda or reply memoranda shall be filed in support of or in opposition to a motion nor shall any memorandum exceed 15 pages in length without leave of Court.

In addition to the aforesaid memorandum, a motion for summary judgment also shall be accompanied by a Statement of Undisputed Facts that concisely sets forth, in separate numbered paragraphs, all material facts which the movant contends are

undisputed and that entitle the movant to judgment as a matter of law. An objection to a motion for summary judgment shall specify which, if any, of the material facts cited by the movant are genuinely disputed. The party opposing the motion also shall set forth, in separate numbered paragraphs, any additional facts that it contends preclude summary judgment.

Each stated fact and each statement that a material fact is disputed shall cite the source relied upon, including the page and line of any document to which reference is made. In either case, each paragraph shall cite the title, page and/or paragraph number of the document supporting the statement contained in that paragraph.

No memoranda or other documents relating to a motion may be filed after a hearing date has been set for the motion unless the Court otherwise orders for good cause shown. The purpose of this provision is to prevent the Court from being deluged with voluminous last minute filings that it cannot review prior to argument and to prevent the unfairness to opposing counsel of being placed in the same position. This prohibition will be strictly enforced.

Documents shall be submitted with a motion and/or memorandum only if the contents of the document are disputed and necessary to decide the motion and, then, only to the extent that references to specific portions of said documents are made in the accompanying memorandum.

Motions shall also comply with any additional requirements set forth in the Local Rules.

No motion for summary judgment may be filed until counsel proposing to file such motion has, first, conferred with the Court and other counsel for the purpose of discussing the need for and the utility of the proposed motion. The matters that counsel should be prepared to address at that conference shall include: the nature of the proposed motion; the "undisputed"

facts upon which it is based; how many of the counts and/or issues the motion would resolve; whether and to what extent the non-moving party contests the motion and the "undisputed" facts asserted and whether the matters in question can be resolved more simply, less expensively and more expeditiously through a trial. Prior to requesting such a conference, counsel for the proponent shall inform opposing counsel of the nature of the proposed motion and the "undisputed" facts upon which it is based. Counsel for the opponents shall inform counsel for the proponent whether, and to what extent, they oppose the motion and dispute the "facts" upon which the motion is based. Such discussion shall be initiated by counsel that proposes to file the motion who, by requesting a conference, will certify that he or she has complied with the provisions of this paragraph.

6. Addition of Parties. If any party is added to the case after the date of this Order, it shall be the duty of counsel responsible for adding such party to promptly serve a copy of this Order upon such party or its counsel. This Order shall be binding upon such party unless subsequently modified by the Court, at the request of such party, or otherwise.

7. Duty to Confer. Within 20 days after the Closure Date, counsel for all parties shall confer and make a diligent, good faith effort to settle the case. Such effort shall include the presentation of a demand by each claimant of the terms it would accept in satisfaction of its claim and the presentation of an offer by each party against whom a claim is made of what it is willing to tender to resolve such claim. If such effort is unsuccessful, counsel shall, at that time, make a diligent, good faith effort to:

- A. Identify those facts that are disputed;
- B. Identify those documents that they intend to offer as evidence at trial and stipulate as to

the admissibility and/or authenticity of such documents; and

- C. Take whatever action is appropriate to narrow and simplify the issues, avoid unnecessary proof, and expedite trial of the case.

It shall be the duty of plaintiff's counsel to initiate this conference, and it shall be the duty of other counsel to respond promptly. If any counsel is unable to obtain the cooperation of any other counsel, it shall be his or her duty to immediately communicate that fact, in writing, to the Court.

8. Pretrial Filings. Within 60 days after the Closure Date, each party shall file an original and one copy of a Pretrial Memorandum, together with a Certificate of Counsel and any proposed voir dire questions as described in Paragraphs 9-11.

At time of impanelment, each party shall file an original and one copy of a Supplement to the Pretrial Memorandum containing a witness list, an exhibit list and proposed jury instructions as described in paragraphs 12 and 13.

Prior to the commencement of trial each party shall submit to the Court and to opposing counsel an Exhibit Book as described in paragraph 14.

Failure to submit any pretrial filing on or before the due date may result in the imposition of sanctions and/or the exclusion of any evidence that should have been disclosed in a timely submission.

9. Pretrial Memorandum. The Pretrial Memorandum shall not exceed 25 pages in length and shall consist of the following sections:

- A. Parties - a list of all parties and their trial counsel.
- B. Facts - a concise recitation of the relevant facts that the party filing the Memorandum is relying upon and/or intends to prove at trial.

- C. Claims and Defenses - a brief statement of each claim for relief and/or defense asserted by the party filing the Memorandum. Any claim or defense not included shall be deemed waived.
- D. Damages - a brief and specific description of the nature, extent and amount of all damages claimed by the party filing the Memorandum together with a description of the manner in which such amount was calculated.
- E. Issues - a numbered list of the factual and legal issues (including any anticipated evidentiary questions) that must be resolved in order to adjudicate the case.
- F. Arguments - a concise statement of the arguments made in support of each claim and/or defense described in paragraph 9C together with citations to the authorities relied upon. Copies of any statutes, opinions, or other authorities cited shall be affixed to the Memorandum.
- G. Pending Matters - a list and description of any motions pending or contemplated, any special issues appropriate for determination in advance of trial, and any other matters that counsel believe ought to be considered by the Court prior to trial.
- H. Estimated time of trial - Counsel's precise estimate of the time required to present his or her evidence and the time required to litigate the entire case.

Any claims, defenses and/or arguments not included in the Pretrial Memorandum shall be deemed waived whether or not they are contained in the pleadings.

10. Certificate of Counsel. The Certificate of Counsel shall consist of a signed statement that counsel has fully complied with the requirements of Paragraph 7 of this Order; and it shall include a representation that counsel has made a diligent, good faith effort to settle this action but has been unsuccessful.

11. Voir Dire Questions - shall consist of a list of all questions that counsel requests the Court ask of prospective jurors during voir dire examination, and a list of specific topics that counsel wishes to question prospective jurors about, directly, together with a statement of the reasons why such inquiry is necessary and why examination by the Court would be inadequate.

12. Witness and Exhibit List. The following witness and exhibit lists shall be submitted:

- A. Witnesses List - a list of all witnesses whose testimony the party filing the list intends to present at trial (indicating whether such testimony will be live or by way of deposition) and concise statements of the subjects of their testimony.
- B. Exhibit List - A list of all exhibits that the party filing the Supplement intends to offer at trial. The list should sufficiently describe the exhibit and include the date on which it was created. In addition, 1-2 lines of space should be provided between each exhibit to permit the Court to make brief notes with respect to the exhibit. The following format is illustrative:

Identification	Full	Exhibit Number	Description of Exhibit
		1	3/22/96 letter from John Doe to Mary Smith
		2	7/10/96 purchase agreement between X Corp. and Richard Roe
		3	9/1/96 photo of 101 Elm St.

Before submitting their respective lists, counsel should confer to eliminate duplication (i.e., exhibits that appear on both lists) to the maximum extent possible.

13. Jury Instructions. Plaintiff's counsel, counsel for any other parties asserting claims (e.g., counterclaims, cross claims, third-party claims, etc.) and counsel for all parties asserting affirmative defenses shall file with the Court and serve upon counsel for all other parties proposed jury instructions relating to the substantive issues raised by such claims and/or defenses. Such proposed instructions shall include:

- A. A brief statement explaining to the jury the nature of the claims and/or defenses asserted by that party;
- B. A summary of the applicable law pertaining to each such claim and/or defense; and
- C. An enumeration of the elements that must be proven to sustain each claim and/or defense.

All proposed instructions shall include specific citations to the authority relied upon for the charge.

Each request shall be numbered and shall be set forth on a separate page in order to facilitate possible integration into the Court's charge.

After service of such proposed instructions, counsel shall confer and attempt to resolve any disagreements with respect to the proposed charge(s).

On the day before trial, counsel shall present to the Court a list of those charges proposed by other parties to which counsel objects and all counsel shall be prepared to confer with the Court regarding the charge to be given.

Any claim or defense for which no proposed charge is submitted may be deemed waived and failure to object to any proposed charge may be deemed a waiver of any objection to such proposed charge.

14. Exhibit Books. A party's Exhibit Book shall consist of copies of those documents and/or photographs that the party intends to offer at trial. Said copies shall be arranged in order in one or more three-ring binders and shall be separated by tabs bearing labels corresponding to each exhibit's designation (e.g., Ex. A, Ex. B, etc.). The exhibit designations shall correspond to those on the Exhibit List furnished to the Court and to the pre-markings on the original documents and photographs that will be offered as evidence.

Plaintiff's exhibits shall be marked numerically; and, in the case of groupings of related exhibits, they shall be marked with a number and a letter (e.g., 1A, 1B, 1C).

Defendant's exhibits shall be marked alphabetically; and groupings of related exhibits shall be marked with a letter and a number (e.g., A1, A2, A3). After the letters of the alphabet have been exhausted, Defendant's exhibits shall be marked with double letter designations (e.g., AA, BB, CC).

Failure to timely file a witness list and/or exhibit list or to include a witness or exhibit may be grounds for sanctions or excluding from evidence the witness or exhibit not disclosed.

15. Trial. This case shall be in order for trial at any time after the date fixed for filing pretrial memoranda. Once the case is placed on the Court's trial calendar, counsel should be prepared to proceed at time of impanelment or upon 24 hours notice thereafter. It is the duty of counsel to maintain contact with the calendar clerk to ascertain the status of the case from time to time.

16. Use of Recorded Testimony at Trial. Because of the difficulties and delays inherent in editing and ruling on objections in videotaped depositions, such depositions may not be used at trial unless previously authorized by the Court. See Local Rule 14(c).

Any party proposing to read or play during trial evidence that has been previously recorded (e.g., depositions, interrogatory answers, admissions, tape recordings) shall:

- A. Identify those portions of testimony that may be eliminated as irrelevant, redundant or otherwise inadmissible in order that the proceedings may be expedited by presenting only those portions that are necessary.
- B. Furnish all opposing counsel with a specification of those portions that are to be read or played no later than the time of impanelment.
- C. Confer with all opposing counsel in an effort to reach agreement as to what portions should be read or played so that unnecessary objections may be eliminated.
- D. On the date trial commences, furnish the Court with a transcript highlighting, in yellow,

the portions that the proponent proposes to offer and, in some other color or colors, the portions that other parties propose to offer.

17. Post Trial Exhibit List. At or before the conclusion of the evidence, counsel for each party shall submit a "clean" list of only those exhibits offered by such party that have been admitted into evidence. Such lists shall be in a form suitable for submission to the jury and shall set forth the following information with respect to each exhibit to the extent applicable:

- A. Exhibit Number
- B. Date
- C. A brief description of the exhibit that will enable the jurors to identify it but which does not characterize the exhibits or its contents (e.g., letter from A to B; photograph of 100 Main Street).

18. Jury Costs. In cases that are settled after a jury has been summoned, jury costs and/or attorneys' fees may be assessed against one or more of the parties and/or their counsel if the Court determines the tardiness of the settlement was due to unreasonable or vexatious conduct. Therefore, every effort should be made to settle cases before that time.

BY ORDER:

Deputy Clerk

ENTER:

Ernest C. Torres
United States District Judge
Date: _____

forms\ptojur.wpd
rev. Dec. 12, 2000

Sample Form 26

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
_____ DIVISION

vs. : Civil Action No. _____
 :
 :
 :
 :
 :
 :
 :
 :

Preliminary Report and Discovery Schedule

1. Description of Case:

(a) Describe briefly the nature of this action.

(b) Summarize, in the space provided below, the facts of this case. The summary should not be argumentative nor recite evidence. _____

(c) The legal issues to be tried are as follows: _____

(d) The cases listed below (include both style and action number) are:

(1) Pending Related Cases: _____

(2) Previously Adjudicated Related Cases: _____

2. This case is complex because it possesses one (1) or more of the features listed below (please check):

- _____ (1) Unusually large number of parties
- _____ (2) Unusually large number of claims or defenses
- _____ (3) Factual issues are exceptionally complex
- _____ (4) Greater than normal volume of evidence
- _____ (5) Extended discovery period is needed
- _____ (6) Problems locating or preserving evidence
- _____ (7) Pending parallel investigations or action by government
- _____ (8) Multiple use of experts
- _____ (9) Need for discovery outside United States boundaries
- _____ (10) Existence of highly technical issues and proof

3. Counsel:

The following individually-named attorneys are hereby designated as lead counsel for the parties:

Plaintiff:

Defendant:

4. Jurisdiction:

Is there any question regarding this court's jurisdiction?

____ Yes ____ No

If "yes," please attach a statement, not to exceed one (1) page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.

5. Parties to This Action:

(a) The following persons are necessary parties who have not been joined:

(b) The following persons are improperly joined as parties:

(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted:

(d) The parties shall have a continuing duty to inform the court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.

6. Amendments to the Pleadings:

Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed.R.Civ.P. 15. Further instructions regarding amendments are contained in LR 15.

(a) List separately any amendments to the pleadings which the parties anticipate will be necessary: _____

(b) Amendments to the pleadings submitted LATER THAN THIRTY (30) DAYS after the preliminary report and discovery schedule is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

7. Filing Times For Motions:

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below.

All other motions must be filed WITHIN THIRTY (30) DAYS after the preliminary report and discovery schedule is filed or should have been filed, unless the filing party has obtained prior permission of the court to file later. Local Rule 7.1A(2).

(a) *Motions to Compel*: before the close of discovery or within the extension period allowed in some instances. Local Rule 37.1.

(b) *Summary Judgment Motions*: within twenty (20) days after the close of discovery, unless otherwise permitted by court order. Local Rule 56.1.

(c) *Other Limited Motions*: Refer to Local Rules 7.2; 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

(d) *Motions Objecting to Expert Testimony*: Daubert motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted.

8. Initial Disclosures:

The parties are required to serve initial disclosures in accordance with Fed.R.Civ.P. 26. If any party objects that initial disclosures are not appropriate, state the party and basis for the party's objection.

9. Request for Scheduling Conference:

Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.

10. Discovery Period:

The discovery period commences thirty (30) days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed before expiration of the assigned discovery period.

Cases in this court are assigned to one of the following three (3) discovery tracks: (a) zero (0)-months discovery period, (b) four (4)-months discovery period, and (c) eight (8)-months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing.

If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery, please state those reasons in detail below:

11. Settlement Potential:

(a) Lead counsel for the parties certify by their signatures below that they conducted a Rule 26(f) conference that was held on _____, 20____, and that they participated in settlement discussions. Other persons who participated in the settlement discussions are listed according to party.

For plaintiff: Lead counsel (signature): _____

Other participants: _____

For defendant: Lead counsel (signature): _____

Other participants: _____

(b) All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:

- () A possibility of settlement before discovery.
- () A possibility of settlement after discovery.
- () A possibility of settlement, but a conference with the judge is needed.
- () No possibility of settlement.

(c) Counsel () do or () do not intend to hold additional settlement conferences among themselves prior to the close of discovery. The proposed date of the next settlement conference is _____, 20____.

(d) The following specific problems have created a hindrance to settlement of this case.

12. Trial by Magistrate Judge:

Note: Trial before a Magistrate Judge will be by jury trial if a party is otherwise entitled to a jury trial.

(a) The parties () do consent to having this case tried before a magistrate judge of this court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the clerk of court this _____ day of _____, 20____.

(b) The parties () do not consent to having this case tried before a magistrate judge of this court.

Counsel for Plaintiff

Counsel for Defendant

SCHEDULING ORDER

Upon review of the information contained in the Preliminary Report and Discovery Schedule form completed and filed by the parties, the court orders that the time limits for adding parties, amending the pleadings, filing motions, completing discovery, and discussing settlement are as stated in the above completed form, except as herein modified:

IT IS SO ORDERED, this _____ day of _____, 20____.

UNITED STATES DISTRICT JUDGE

APPENDIX F

CIVIL COVER SHEET SHOWING ASSIGNMENT OF CATEGORIES OF CIVIL ACTIONS TO TRACKS FOR PURPOSES OF DISCOVERY

CIVIL COVER SHEET

The JS44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket record. (SEE INSTRUCTIONS ATTACHED)

I. (a) PLAINTIFF(S)**DEFENDANT(S)****(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF**

(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT

(IN U.S. PLTF. CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)**ATTORNEYS (IF KNOWN)****II. BASIS OF JURISDICTION**

(PLACE AN "X" IN ONE BOX ONLY)

- () 1 U.S. GOVERNMENT PLAINTIFF () 3 FEDERAL QUESTION (U.S. GOVERNMENT NOT A PARTY)
- () 2 U.S. GOVERNMENT DEFENDANT () 4 DIVERSITY (INDICATE CITIZENSHIP OF PARTIES IN ITEM III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) (FOR DIVERSITY CASES ONLY)

- | PLF | DEF | PLF | DEF |
|---|-------|---|-------|
| () 1 | () 1 | () 4 | () 4 |
| CITIZEN OF THIS STATE | | INCORPORATED OR PRINCIPAL PLACE OF BUSINESS IN THIS STATE | |
| () 2 | () 2 | () 5 | () 5 |
| CITIZEN OF ANOTHER STATE | | INCORPORATED AND PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE | |
| () 3 | () 3 | () 6 | () 6 |
| CITIZEN OR SUBJECT OF A FOREIGN COUNTRY | | FOREIGN NATION | |

IV. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- () 1 ORIGINAL PROCEEDING () 2 REMOVED FROM STATE COURT () 3 REMANDED FROM APPELLATE COURT () 4 REINSTATED OR REOPENED () 5 TRANSFERRED FROM ANOTHER DISTRICT (SPECIFY DISTRICT) () 6 MULTIDISTRICT LITIGATION () 7 APPEAL TO DISTRICT JUDGE FROM MAGISTRATE JUDGE JUDGMENT

V. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE - DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

(IF COMPLEX, CHECK REASON BELOW)

- | | |
|--|---|
| () 1. Unusually large number of parties. | () 6. Problems locating or preserving evidence |
| () 2. Unusually large number of claims or defenses. | () 7. Pending parallel investigations or actions by government |
| () 3. Factual issues are exceptionally complex | () 8. Multiple use of experts |
| () 4. Greater than normal volume of evidence. | () 9. Need for discovery outside United States boundaries. |
| () 5. Extended discovery period is needed. | () 10. Existence of highly technical issues and proof. |

CONTINUED ON REVERSE**FOR OFFICE USE ONLY**

RECEIPT # _____ AMOUNT \$ _____ APPLYING IFP _____ MAG. JUDGE (IFP) _____

JUDGE _____ MAG. JUDGE _____ NATURE OF SUIT _____ CAUSE OF ACTION _____
(Referral)

VI. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT - "0" MONTHS DISCOVERY

TRACK

- ☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
☐ 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL. VETERANS)
☐ 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS

CONTRACT - "4" MONTHS DISCOVERY

TRACK

- ☐ 110 INSURANCE
☐ 120 MARINE
☐ 130 MILLER ACT
☐ 140 NEGOTIABLE INSTRUMENT
☐ 151 MEDICARE ACT
☐ 160 STOCKHOLDERS' SUITS
☐ 190 OTHER CONTRACT
☐ 195 CONTRACT PRODUCT LIABILITY

REAL PROPERTY - "4" MONTHS DISCOVERY

TRACK

- ☐ 210 LAND CONDEMNATION
☐ 220 FORECLOSURE
☐ 230 RENT LEASE & EJECTMENT
☐ 240 TORTS TO LAND
☐ 245 TORT PRODUCT LIABILITY
☐ 290 ALL OTHER REAL PROPERTY

TORTS - PERSONAL INJURY - "4" MONTHS

DISCOVERY TRACK

- ☐ 310 AIRPLANE
☐ 315 AIRPLANE PRODUCT LIABILITY
☐ 320 ASSAULT, LIBEL & SLANDER
☐ 330 FEDERAL EMPLOYERS' LIABILITY
☐ 340 MARINE
☐ 345 MARINE PRODUCT LIABILITY
☐ 350 MOTOR VEHICLE
☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
☐ 360 OTHER PERSONAL INJURY
☐ 362 PERSONAL INJURY - MEDICAL MALPRACTICE
☐ 365 PERSONAL INJURY - PRODUCT LIABILITY
☐ 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

TORTS - PERSONAL PROPERTY - "4"

MONTHS DISCOVERY TRACK

- ☐ 370 OTHER FRAUD
☐ 371 TRUTH IN LENDING
☐ 380 OTHER PERSONAL PROPERTY DAMAGE
☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY

BANKRUPTCY - "0" MONTHS DISCOVERY

TRACK

- ☐ 422 APPEAL 28 USC 158
☐ 423 WITHDRAWAL 28 USC 157

CIVIL RIGHTS - "4" MONTHS DISCOVERY

TRACK

- ☐ 441 VOTING
☐ 442 EMPLOYMENT
☐ 443 HOUSING/ ACCOMMODATIONS
☐ 444 WELFARE
☐ 440 OTHER CIVIL RIGHTS

PRISONER PETITIONS - "0" MONTHS

DISCOVERY TRACK

- ☐ 510 MOTIONS TO VACATE SENTENCE
☐ 530 HABEAS CORPUS
☐ 535 HABEAS CORPUS DEATH PENALTY
☐ 540 MANDAMUS & OTHER
☐ 550 CIVIL RIGHTS (PRISONER)
☐ 555 PRISON CONDITION(S)

FORFEITURE/PENALTY - "4" MONTHS

DISCOVERY TRACK

- ☐ 610 AGRICULTURE
☐ 620 FOOD & DRUG
☐ 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
☐ 630 LIQUOR LAWS
☐ 640 R.R. & TRUCK
☐ 650 AIRLINE REGS.
☐ 660 OCCUPATIONAL SAFETY/HEALTH
☐ 690 OTHER

LABOR - "4" MONTHS DISCOVERY TRACK

- ☐ 710 FAIR LABOR STANDARDS ACT
☐ 720 LABOR/MGMT. RELATIONS
☐ 730 LABOR/MGMT. REPORTING & DISCLOSURE ACT
☐ 740 RAILWAY LABOR ACT
☐ 790 OTHER LABOR LITIGATION
☐ 791 EMPL. RET. INC. SECURITY ACT

PROPERTY RIGHTS - "4" MONTHS

DISCOVERY TRACK

- ☐ 820 COPYRIGHTS
☐ 840 TRADEMARK

PROPERTY RIGHTS - "8" MONTHS

DISCOVERY TRACK

- ☐ 830 PATENT

SOCIAL SECURITY - "0" MONTHS DISCOVERY

TRACK

- ☐ 861 HIA (1395ff)
☐ 862 BLACK LUNG (923)
☐ 863 DIWC (405(g))
☐ 863 DIWW (405(g))
☐ 864 SSID TITLE XVI
☐ 865 RSI (405(g))

FEDERAL TAX SUITS - "4" MONTHS

DISCOVERY TRACK

- ☐ 870 TAXES (U.S. PLAINTIFF OR DEFENDANT)
☐ 871 IRS - THIRD PARTY 26 USC 7609

OTHER STATUTES - "4" MONTHS DISCOVERY

TRACK

- ☐ 400 STATE REAPPORTIONMENT
☐ 430 BANKS AND BANKING
☐ 450 COMMERCE/ICC RATES/ETC.
☐ 460 DEPORTATION
☐ 470 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
☐ 810 SELECTIVE SERVICE
☐ 875 CUSTOMER CHALLENGE 12 USC 3410
☐ 891 AGRICULTURAL ACTS
☐ 892 ECONOMIC STABILIZATION ACT
☐ 893 ENVIRONMENTAL MATTERS
☐ 894 ENERGY ALLOCATION ACT
☐ 895 FREEDOM OF INFORMATION ACT
☐ 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE
☐ 950 CONSTITUTIONALITY OF STATE STATUTES
☐ 890 OTHER STATUTORY ACTIONS

OTHER STATUTES - "8" MONTHS DISCOVERY

TRACK

- ☐ 410 ANTITRUST
☐ 850 SECURITIES / COMMODITIES / EXCHANGE

OTHER STATUTES - "0" MONTHS

DISCOVERY TRACK

- ☐ ARBITRATION (CONFIRM/VACATE/ORDER/MODIFY)

*** PLEASE NOTE DISCOVERY TRACK FOR EACH CASE TYPE. SEE LOCAL RULE 26.2**

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS A **CLASS ACTION** UNDER F.R.Civ.P. 23 DEMAND \$ _____

JURY DEMAND ☐ YES ☐ NO (CHECK YES **ONLY** IF DEMANDED IN COMPLAINT)

VIII. RELATED CASE(S) IF ANY

JUDGE _____

DOCKET NO. _____

CIVIL CASES ARE DEEMED RELATED IF THE PENDING CASE INVOLVES: (CHECK APPROPRIATE BOX)

- ☐ 1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
☐ 2. SAME ISSUE OF FACT OR ARISES OUT OF THE SAME EVENT OR TRANSACTION INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
☐ 4. APPEALS ARISING OUT OF THE SAME BANKRUPTCY CASE AND ANY CASE RELATED THERETO WHICH HAVE BEEN DECIDED BY THE SAME BANKRUPTCY JUDGE.
☐ 5. REPETITIVE CASES FILED BY PRO SE LITIGANTS.
☐ 6. COMPANION OR RELATED CASE TO CASE(S) BEING SIMULTANEOUSLY FILED (INCLUDE ABBREVIATED STYLE OF OTHER CASE(S)):

SIGNATURE OF ATTORNEY OF RECORD

DATE

Sample Form 27

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

Plaintiff,

vs.

Case No. 8:

**WILLIAM A. HALTER,
Acting Commissioner of
Social Security,¹**

Defendant.

_____ /

SCHEDULING ORDER

This is an action seeking review of the determination of the Commissioner of the Social Security Administration. The case is at issue and, in accordance with the provisions of 42 U.S.C. § 405(g), the Commissioner has filed his Answer to the complaint which includes a certified copy of the transcript of the record before the agency. The correct style of the case number is: 8:_____. In deciding an action for judicial review under the Social Security Act, the Court can look no further than the pleadings and transcript of the record before the Agency. No de novo hearing is authorized. It is therefore,

¹ William A. Halter became Acting Commissioner of Social Security on January 22, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, William A. Halter is substituted, therefore, for Commissioner Kenneth A. Apfel, as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

ORDERED:

1. That Plaintiff is hereby directed to submit a memorandum of law in support of the allegations of the complaint within sixty (60) days of the date of this Order.

2. That the Commissioner is hereby directed to submit a memorandum of law in support of his position within sixty (60) days of the serving of Plaintiff's memorandum.

3. The parties' legal memoranda must set forth the parties' respective contentions as to the issues presented and the grounds for the relief requested. The parties' contentions must be supported by specific reference to the pages of the records relied upon and by appropriate citations to legal authority supporting the parties' respective positions. The issues before the Court shall be deemed limited to those issues properly raised and supported by either party.

4. In the absence of consent to magistrate judge jurisdiction, a Report and Recommendation as to the disposition of the matter will be prepared by the magistrate judge for consideration by the district judge. In the event of consent to magistrate judge jurisdiction, then the magistrate judge will issue a final order.

5. Motion practice under Fed. R. Civ. P. 12(c) (judgment on the pleadings) or Fed. R. Civ. P. 56 (summary judgment) is not appropriate.

So Ordered.

DONE AND ORDERED in chambers at Tampa, Florida, this _____ day of
_____, 20__.

ELIZABETH A. JENKINS

UNITED STATES MAGISTRATE JUDGE

Sample Form 28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

)	
vs.	)	Civil No.
)	
William A. Halter,)	
Acting Commissioner,)	
Social Security Administration,)	
)	
Defendant.)	

ORDER

IT IS ORDERED:

1. Plaintiff shall have until _____ (40 days following filing/receipt of answer & administrative transcript) to file a summary judgment motion and supporting brief.
2. Defendant shall have until _____ (30 days following plaintiff's motion) to respond and file a summary judgment motion.
3. Plaintiff shall have until _____ (15 days following defendant's motion) to respond, if counsel deems it necessary.

Dated: _____

Karen K. Klein
United States Magistrate Judge

Sample Form 29

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Plaintiff,

vs.

Civ. No. /WWD

Defendant.

PROVISIONAL DISCOVERY PLAN

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on _____ at _____ and was attended by:
_____ for Plaintiff(s)
_____ for Defendant(s)

2. Discovery Plan. The parties jointly propose to the Court the following discovery plan: (use separate paragraphs or subparagraphs as necessary if parties disagree.)

Discovery will be needed on the following subjects:

(brief description of subjects on which
discovery will be needed)

All discovery commenced in time to be completed by _____ date _____. Discovery on (issue for early discovery) to be completed by _____.

Maximum of _____ interrogatories by each party to any other party. (responses due _____ days after service).

Maximum of _____ requests for admission by each party to any other party. (response due _____ days after service.

Maximum of _____ depositions by Plaintiff(s) and _____ by Defendant(s)

Each deposition (other than of _____) limited to maximum of _____ hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:

from Plaintiff(s) by _____

from Defendant(s) by _____

Supplementation under Rule 26(e) due _____ (set
time(s) or interval(s)).

3. Other Items. (use separate paragraphs or subparagraphs
as necessary if parties disagree.)

The parties request a settlement conference in
_____.

The parties request a pretrial conference in
_____.

Plaintiff(s) should be allowed until _____ to join
additional parties and until _____ to amend the pleadings.

Defendant(s) should be allowed until _____ to join
additional parties and until _____ to amend the pleadings.

All potentially dispositive motions should be filed by
_____.

Plaintiff(s) shall provide the Pretrial Order to
Defendant(s) by _____ and Defendant(s) shall submit to
the Court by _____.

Settlement (is likely) or (is unlikely) or (cannot be
evaluated prior to _____) or (may be enhanced by use of
the following alternative dispute resolution
procedure: _____).

Attorney for Plaintiff

Attorney for Defendant

Sample Form 30

(Rev. 11/5/97)

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

_____)	
)	
Plaintiffs)	
	)	CIVIL ACTION
v.	)	NO. -REK
)	
)	
Defendant)	
_____)	

Memorandum and Order Regarding Discovery _____, 20____

Discovery disputes have arisen in this case. On the basis of an examination of matters on file, the court is concerned that this may be an instance in which counsel on both sides are taking positions that do not comply with either the letter or the spirit of the Federal Rules of Civil Procedure. An excessive discovery demand, knowingly made, violates Rule 26(g). An inadequate response, knowingly made, violates Rule 26(g), and other rules as well. For example:

(a) Fed. R. Civ. P. 33(a) requires that a party "furnish such information as is available to the party." That you may have an objection to interrogatories as excessively burdensome is not an excuse for your responding with nothing but objections or a motion for a protective order. You must forthwith furnish the information responsive to the interrogatories that is available through reasonable efforts. Failure to do so in this court is regarded as sufficient ground for imposition of sanctions.

(b) Fed. R. Civ. P. 34(b) provides that "[i]f objection is made to part of an item or category, the part shall be specified." It is implicit, if not explicit, that production or allowance of inspection "will be permitted as requested" except as to the part or parts to which stated objections apply. Thus,

the fact that a demand for production is objectionable in part is not an excuse for producing nothing. Failure to produce documents or parts of documents to which no objection applies is in this court regarded as sufficient ground for imposition of sanctions.

(c) Fed. R. Civ. P. 36(a) provides that "when good faith requires that a party ... deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder." Thus, an objection that goes only to some part or parts of requests for admission is not an excuse for failure to respond to all other parts to which the ground of objection is not applicable. Failure to respond accordingly is in this court regarded as sufficient ground for imposition of sanctions.

(d) Fed. R. Civ. P. 26(g) provides that a party's attorney must sign each discovery request, response, or objection. The signature constitutes a certification that to the best of the attorney's knowledge, information, and belief formed after a reasonable inquiry, the discovery request, response, or objection is: "(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive" Certification in violation of Rule 26(g) is sufficient ground for imposition of sanctions.

The court will not serve, or acquiesce in a magistrate judge's serving, as a mediator for settlement of disputes over discovery in which each party takes unreasonable positions with the purpose of conceding what is plainly due under the rules only when before a judge. If counsel make excessive demands or insufficient responses after this cautionary order by the court, an order may be entered providing for more stringent controls over discovery, including the following:

(1) Having determined that both sides have been unreasonable, the court may impose an appropriate sanction, under Fed. R. Civ. P. 26(g) and 37. An appropriate sanction in this case may include an order in which the court declines to undertake the burdensome task of working out some position that is a reasonable accommodation within the range counsel should have agreed upon; the court may instead determine only which side has been more unreasonable and, as a sanction for misconduct,

enter an order that discovery proceed in accordance with the other side's position.

(2) The court may award attorney fees against a party, or against counsel, to the extent authorized to do so by applicable statutes, rules, and precedents, including those regarding inherent authority.

(3) The court may order that no client be charged for any of the time of counsel on either side spent on the discovery dispute in which counsel on both sides were taking unreasonable positions.

ORDER

For the foregoing reasons, it is ORDERED:

The parties are allowed [a multiple of 7 days] (until _____, 20__) to resolve all outstanding discovery disputes or modify their respective positions to come into compliance with the Federal Rules of Civil Procedure, including Rule 26(g), and other rules relating to discovery. A hearing is scheduled for _____ at _____ m., to be held only if the parties have not succeeded in resolving all discovery disputes.

United States District Judge

Sample Form 31

Items for Possible Inclusion in the Rule 16 Case Management Conference Notice When Significant Electronic Discovery Is Anticipated

**Kenneth J. Withers
Federal Judicial Center**

When a case involves significant electronic discovery, it is important that the judge and lawyers give early attention to the issues that may arise. Enumerated below are suggested items a judge may want to instruct attorneys to consider as they prepare for an early Rule 16 conference. The items can be tailored as necessary for the case.

One problem with listing in a Rule 16 notice the many potential repositories of evidence that a party might have is that the notice itself might trigger a more extensive and expensive discovery effort than the parties might otherwise undertake. On the other hand, the judge supervising discovery does not want to have surprises later in the process when one party assumes all possible sources have been examined and another claims that they were never contemplated by the original discovery plan. Judges may wish to consider on a case-by-case basis whether the situation calls for a detailed Rule 16 notice with lists like those presented here, or for a more general one that will allow the judge to see what the parties have in mind for discovery first.

With those caveats in mind, here are some suggested indicators of when a detailed Rule 16 notice might be most appropriate:

- When the substantive allegations involve computer-generated records, e.g., software development, e-commerce, unlawful Internet trafficking, etc.
- When the authenticity or completeness of computer records is likely to be contested
- When a substantial amount of disclosure or discovery will involve information or records in electronic form, e.g., e-mail, word processing, spreadsheets, and databases
- When one or both parties is an organization that routinely used computers in its day-to-day business operations during the period relevant to the facts of the case

- When one or both parties have converted substantial numbers of potentially relevant records to digital form for management or archival purposes
- When expert witnesses will develop testimony based in large part on computer data and/or modeling, or when either party plans to present a substantial amount of evidence in digital form at trial
- In any potential “big document” case in which costs associated with managing paper discovery could be avoided by encouraging exchange of digital or imaged documents (especially if multiple parties are involved).

1. **Preservation of Evidence**

- A. What steps have counsel taken to ensure that likely discovery material in their clients’ possession (or in the possession of third parties) will be preserved until the discovery process is complete? If counsel have not yet identified all material that should be disclosed or may be discoverable, what steps have been taken to ensure that material will not be destroyed or changed before counsel’s investigations are complete?

If more specific direction is needed:

- B. Have counsel identified computer records relevant to the subject matter of the action?
- Word processing documents, including drafts or versions not necessarily in paper form
 - Databases or spreadsheets containing relevant information
 - E-mail, voicemail, or other computer-mediated communications
 - Relevant system records, such as logs, Internet use history files, and access records
- C. Have counsel located all such computer records?
- Active computer files on network servers

- Computer files on desktop or local hard drives
 - Backup tapes or disks, wherever located
 - Archival tapes or disks, wherever located
 - Laptop computers, home computers, and other “satellite” locations
 - Media or hardware on which relevant records may have been “deleted” but are recoverable using reasonable efforts
- D. Have counsel made sure all relevant computer records at all relevant locations are secure? For instance, have they
- Suspended all routine electronic document deletion and media recycling
 - Segregated and secured backup and archival media
 - Created “mirror” copies of all active network servers, desktop hard drives, laptops, and similar hardware
- E. Have counsel considered entering into an agreement to preserve evidence?
- F. Does either party plan to seek a preservation order from the court?

2. **Disclosure and Preliminary Discovery**

- A. Have counsel designated technical point-persons who know about their clients’ computer systems to assist in managing computer records and answering discovery requests?
- B. Have counsel prepared a description of their respective party’s computer systems for exchange? Does either party need to know more before discovery can proceed?

If the judge determines that the parties are unclear as to what they need to know at this stage, the judge may provide further guidance by suggesting that they exchange information on the following points:

- Number, types, and locations of computers currently in use
 - Number, types, and locations of computers no longer in use, but relevant to the facts of the case
 - Operating system and application software currently in use
 - Operating system and application software no longer in use, but relevant to the facts of the case
 - Name and version of network operating system currently in use
 - Names and versions of network operating systems no longer in use, but relevant to the facts of the case
 - File-naming and location-saving conventions
 - Disk or tape labeling conventions
 - Backup and archival disk or tape inventories or schedules
 - Most likely locations of records relevant to the subject matter of the action
 - Backup rotation schedules and archiving procedures, including any backup programs in use at any relevant time
 - Electronic records management policies and procedures
 - Corporate policies regarding employee use of company computers and data
 - Identities of all current and former personnel who had access to network administration, backup, archiving, or other system operations during any relevant time
- C. Do counsel anticipate the need to notice any depositions or propound any interrogatories to obtain further information about the opposing party's computer systems or electronic records management procedures?

- D. Have counsel explored with their clients (in appropriate situations) the procedures and costs involved in:
- Locating and isolating relevant files from e-mail, word processing, and other collections
 - Recovering relevant files generated on outdated or dormant computer systems (so-called “legacy data”)
 - Recovering deleted relevant files from hard drives, backup media, and other sources
- E. Do counsel anticipate the need to conduct an on-site inspection of the opposing party’s computer system?
- Consideration of an agreed-upon protocol
 - Permission to use outside experts
 - Agreement on neutral expert

3. Electronic Document Presentation

- A. Will counsel use computerized litigation support databases to organize and store documents and other discovery material?
- B. Have counsel considered common formats for all electronic document exchange, e.g., TIFF images with OCR-generated text, e-mail in ASCII format?
- C. Have counsel (particularly in multi-party cases) considered a central electronic document repository?
- D. Have counsel considered an attorney-client privilege non-waiver agreement, to avoid the costs associated with intensive privilege screening prior to production?
- E. Do counsel anticipate requesting data in non-routine format, e.g.,
- Printing by respondent of electronic documents not normally in print form

- Creation by respondent of customized database reports
 - Performance by respondent of customized searches or data mining
- F. Have counsel agreed upon cost allocation, e.g.,
- Parties to absorb their own disclosure costs
 - Requesting parties to pay non-routine retrieval and production costs
 - Parties to negotiate data recovery and legacy data restoration costs
- G. Does either party anticipate objecting to the production of computer records or software necessary to manipulate the records based on
- Trade secret restrictions
 - Licensing restrictions
 - Copyright restrictions
 - Statutory or regulatory privacy restrictions

4. TESTIFYING EXPERTS

- A. Will any testifying expert rely on computer data provided by either party, or rely on his or her own data?
- B. Will any testifying expert use custom, proprietary, or publicly available software to process data, generate a report, or make a presentation?
- C. Do counsel anticipate requesting discovery of either the underlying data or the software used by any testifying expert?

5. ANTICIPATING EVIDENTIARY DISPUTES

Ask whether counsel have considered discovery procedures designed to reduce or eliminate questions of authenticity, e.g.,

- Computer discovery supervised by neutral party
- Neutral, secure electronic document repository
- Exchange of read-only disks or CD-ROMs
- Chain-of-custody certifications

Sample Form 32

NOTE: Form revised as of 2/24/97

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Plaintiff,)
)
)
vs.)
)
)
Defendants.)

ORDER FOR SETTLEMENT CONFERENCE

IT IS ORDERED:

A settlement conference will be held before the court in the ADR Conference Rooms, Suite 240, Quentin N. Burdick United States Courthouse, 655 1st Avenue North, Fargo, North Dakota, on _____.

The conference shall be attended by an authorized representative of each party, together with trial counsel for each party. An insured party need not attend unless the settlement decision will be made in part by the insured. When the settlement decision will be made in whole or part by an insurer, the insurer shall send a representative in person with full and complete authority to make settlement decisions. A corporate party shall send a representative with full and complete authority to bind the company. A governmental entity shall send a representative authorized to act on its behalf. Failure to produce the appropriate person(s) at the conference may result in an award of costs and attorney fees incurred by the other parties in connection with the conference and/or other sanctions against the noncomplying party and/or counsel.

At least five court days prior to the conference, each party shall submit a

confidential settlement statement to the magistrate judge. The settlement statement shall not become a part of the file of the case, but shall be for the exclusive use of the magistrate judge in preparing for and conducting the settlement conference.

The settlement statement shall contain a specific recitation of the facts, a discussion of the strengths and weaknesses of the case, the parties' position on settlement, including a present settlement proposal, and a report on settlement efforts to date. If not already part of the court file, copies of any critical agreements, business records, photographs or other documents or exhibits shall be attached to the settlement statement. The settlement statement should not be lengthy, but should contain enough information to be useful to the magistrate judge in analyzing the factual and legal issues in the case. The parties are directed to be candid in their statements.

The settlement statement shall not be filed with the clerk, but shall be mailed to the magistrate judge at Suite 440, 655 1st Avenue North, Fargo, North Dakota 58102-4952. Copies of the settlement statement shall not be provided to the other parties in the case.

Counsel are directed to confer with their clients in advance of the conference to explore the party's settlement position, and the parties are encouraged to exchange settlement proposals prior to the conference. These steps will enable the conference to progress more expeditiously.

Dated: _____.

Karen K. Klein
United States Magistrate Judge

Sample Form 33

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	)	CASE NO.:
)	
Plaintiff,)	
)	
v.)	
	)	<u>ORDER</u>
)	
)	
Defendant.)	

The court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that this action is hereby dismissed, without prejudice. The court retains complete jurisdiction to vacate this Order to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

Dated:

Patricia A. Hemann
United States Magistrate Judge

Sample Form 34

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	)	Case No.
)	
Plaintiff(s),)	
)	
vs.	)	<u>ORDER</u>
)	
)	
Defendant(s).)	

Upon representation of counsel that the above entitled cause of action has been settled between the parties,

IT IS ORDERED that the docket be marked “settled and dismissed with prejudice, each party to pay their own costs.”

Any subsequent order setting forth different terms & conditions relative to the settlement and dismissal of the within action shall supersede the within order.

IT IS SO ORDERED.

UNITED STATES MAGISTRATE JUDGE

Sample Form 35

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

ORDER

It is ORDERED that effective April 1, 1995 the following special requirements shall prevail for pretrials set before Judge Charles R. Butler, Jr.

1. Counsel shall confer and shall prepare a single proposed Pretrial Order in the form attached, which must be filed with the Clerk of Court by 5:00 p.m. on Wednesday, one week prior to pretrial.

2. Counsel shall make a genuine effort to stipulate as to the following:

A. Jurisdiction.

B. Propriety of parties, correctness of identity of legal entities, necessity for appointment of guardian ad litem, guardian, administrator, etc., and validity of appointment if already made, and correctness of designation of party as partnership, corporation or individual d/b/a trade name.

C. If the above be not agreed to, counsel shall certify the question to the Court for resolution at the conference.

3. Settlement. At the Conference counsel will discuss settlement potential with the Court. The Court expects that counsel will have conferred prior to the pretrial conference and will have engaged in meaningful settlement discussion. Counsel should be prepared to discuss the status of any settlement negotiations, including the last settlement proposal made by you and to you; and also whether any form of Alternate Dispute Resolution would be beneficial to resolving the case prior to trial.

4. The proposed Pretrial Order shall contain:

A. A comprehensive written statement of uncontested facts, in sufficient form that if the Court elects to do so, it can be read to the jury.

B. A written statement of contested facts that will explain to the Court the nature of the parties' disputes. It is not necessary for the parties to set forth every possible variation of every factual dispute involved in the case for fear that they may waive the presentation of some evidence at trial. What the Court is interested in is a concise statement of what fact or facts are in dispute that relate to the legal issues (see C below) that are to be tried in the case.

1. Whenever an alleged breach of contractual obligation is in issue, a statement of the act(s) or omission(s) relied upon by the party or parties asserting such breach.

2. Whenever negligence or wantonness is an issue, a statement of the act(s) or omission(s) relied upon by the party or parties asserting same.

3. Whenever the meaning or interpretation of a contract or other writing is in issue, each party shall separately state all facts and circumstances relied upon which serve to aid in the interpretation.

4. Whenever duress, fraud or mistake is an issue, the facts and circumstances relied upon by the parties as constituting the claimed duress or fraud or mistake (see Federal Rule of Civil Procedure 9(b)) shall be specified with particularity.

5. Whenever a conspiracy is charged the party contending same shall set forth the facts and circumstances relied upon as constituting the conspiracy, listing the names of all conspirators making up the conspiracy, together with a narrative of the testimony of such witnesses in regard to the facts of the conspiracy.

C. The triable issue or issues. State the triable issue or issues in the context of the facts or factual disputes in the case (e.g., whether, if the defendant's vehicle crossed the center line, such constituted negligence; whether, if the defendant failed to deliver the goods by a certain date, this constitutes a breach of the contract; whether the defendant's actions in terminating the plaintiff's employment were racially motivated).

D. Rule 16(d) requires the parties to "formulate a plan for trial, including a program for facilitating the admission of evidence," so that the Court may consider "an order establishing a reasonable limit on the time allowed for presenting evidence" (R.16(c)(15)). Therefore the parties should include in the pretrial order not only an estimate of the number of trial days required, but also a statement of the number of witnesses they reasonably expect to testify on behalf of each party. (See 4(H) below.)

E. A statement indicating whether the case is a jury or non-jury case. If a jury case, whether the jury trial is applicable to all aspects of the case or only to certain issues, which shall be specified. In view of Rule 48 allowing not fewer than six and not more than twelve jurors, the parties are to include a statement of their respective (or collective if they can agree) positions with regard to the number of jurors they request be selected to sit in this case. If the parties are unable to agree, the Court will cause a jury of eight to be selected.

(In jury cases, counsel shall file with the Court, not later than one week prior to the beginning of the civil jury term in which the case is set, copies of all proposed jury instructions and any special questions for voir dire examination of the jury venire, and shall furnish opposing counsel a copy of same. In addition, all motions in limine must be filed with the Court not later than one (1) week prior to the beginning of trial, except with respect to matters which could not have been anticipated by counsel by such time.)

F. A list and description of any legal issues or motions pending or contemplated.

G. If a party desires to offer deposition testimony into evidence at the trial, he shall designate only those relevant portions of same which he wishes read at trial and advise opposing counsel of same. Opposing counsel shall then designate those relevant portions of such deposition which he wishes to offer in evidence. All objections to any such testimony shall be made in writing and submitted with the Joint Pretrial Document so that the Court may consider whether ruling on such objections will either facilitate the conduct of the trial or result in the disposition of certain evidentiary matters that may assist continuing settlement negotiations. The parties should bring to the Court's attention at the pretrial conference whether any specific rulings by the Court will so facilitate the conduct of the trial or ongoing settlement negotiations.

H. Counsel shall list the names and addresses of all witnesses who shall or who they reasonably expect will be called to testify at the trial. It is the desire of the Court that such witness lists be kept to a reasonable minimum and additional witnesses may be added only for good cause shown and on written motion. With respect to expert witnesses, counsel shall furnish the Court and opposing counsel with a curriculum vitae of such experts. When an expert witness is called to the stand, counsel will read to such expert all his qualifications and inquire as to whether same are correct. If correct, the next question will be relative to the merits of the case. In addition, counsel shall furnish the Court and opposing counsel with a brief statement of the opinion or opinions which counsel expects to elicit from such expert. Any objections to an expert's qualifications shall be separately set forth in the Joint Pretrial Document.

I. Whenever damages are claimed and are ascertainable, the parties shall agree as to the amount of the ascertainable damages and shall so state them. If the parties are unable to agree, then the plaintiff shall state with specificity the amount of damages and the category or categories of damages (e.g., doctor and hospital bills \$____, lost wages \$____, pain and suffering \$____). If the damages are agreed upon, then no further testimony will be required to substantiate the amount thereof. The listing of such damages shall not constitute an agreement as to the recoverability of same unless so stated.

J. Each party shall list and furnish counsel for all parties, for copying and inspection, all exhibits which are to be offered in evidence. All exhibits to which there are objections shall be noted and by whom the objection was made, setting forth the nature of the objection and the authority supporting same. Failure to comply shall constitute a waiver of any such objection. All exhibits to which there is no objection shall be deemed admitted. Except for good cause shown, the Court will not permit the introduction of any exhibits unless they have been listed in the Pretrial Order, with the exception of exhibits to be used solely for the purpose of impeachment. Markers obtained from the Clerk shall be attached to all

exhibits, and such exhibits delivered to the Clerk immediately prior to the commencement of trial.

CAVEAT: Should a party or his counsel fail to appear at the Pretrial Conference and such failure is not otherwise satisfactorily explained to the Court, (a) the cause shall stand dismissed for failure to prosecute, if such failure occurs on the part of the plaintiff; (b) default judgment shall be entered if such failure occurs on the part of the defendant, or (c) the Court may take such other action as it deems appropriate.

The Court is conscious of the fact that where one or more out of town attorneys are involved in a case, travel to Mobile to attend a pretrial conference may be unduly burdensome and expensive to the client. The Court recognizes that there are some types of cases (generally those that are not complex, or involve relatively few issues necessary for resolution) where a meaningful pretrial may be conducted by telephone conference call between the attorneys and the Court. Therefore, the parties are encouraged to discuss among themselves whether they feel they can adequately conduct the conference by telephone, and then to confer with the Court prior to the date set for the pretrial conference to see if it can be agreed to so conduct the conference.

Failure to strictly comply with this Order in the form and under the terms contained herein, unless previously excused, may result in the offending party being found in civil contempt, and such civil contempt shall continue from day to day until compliance with the Order. Failure to comply within a period of five (5) days thereafter, and explanation satisfactory to the Court not having been given and accepted, may result in the cause being dismissed or default judgment being entered, or such other action taken by the Court which it deems under the circumstances to be appropriate.

5. The Pretrial Order shall constitute the final statement of the issues involved, govern the conduct of the trial, and shall constitute the basis for any relief afforded by the Court. However, the Pretrial Order may be amended at any time by the Court or on motion of a party for good cause to avoid manifest injustice.

6. FOR THE PURPOSES OF YOUR PREPARATION OF SUGGESTED PRETRIAL ORDERS, IT IS RECOMMENDED THAT YOU FOLLOW THE FOLLOWING FORMAT:

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA

STYLE OF CASE

PRETRIAL ORDER

There is no contest as to the jurisdiction of this Court or as to the correctness of the named defendant(s) or the named plaintiff(s).

I.

AGREED FACTS

(See Paragraph 4A of Pretrial Order)

II.

DISPUTED FACTS

(See Paragraph 4B of Pretrial Order)

IIA.

In contract, fraud, negligence or conspiracy cases, set forth the requirements of Paragraphs 4B(1) (2) (3), and/or (4).

III.

TRIABLE ISSUES

1. (Not to be a restatement of the disputed facts but a catalogue of the legal issues such as negligence, contributory negligence, assumption of risk, etc.)
- 2.
- 3.

IV.

TRIAL TIME

It is estimated that this case will take _____ days to try, exclusive of jury selection time. The plaintiff expects to call ____ witness(es), and the defendant(s) _____.

V.

TYPE OF TRIAL

JURY

NON-JURY

VI.

MOTIONS

State any outstanding motions, etc., as per Paragraph 4F of the Pretrial Order.

VII.

DEPOSITIONS

List those portions of depositions to be used at trial. State any objections. (See Paragraph 4G of the Pretrial Order.)

VIII.

WITNESSES

1. The plaintiff will or may call the following witnesses:

A.

B.

C.

Of the named witnesses, the following will be called as experts:

A. (listing qualifications)

B. (listing qualifications)

Defendant contests the qualifications of

_____. (State reasons)

2. The defendant will or may call the following witnesses:

A.

B.

C.

Of the above named witnesses, the following will be called as experts:

A. (listing qualifications)

B. (listing qualifications)

The plaintiff contests the qualifications of

_____. (State reasons)

IX.

DAMAGES

(See Paragraph 4I of Pretrial Order)

X.

EXHIBITS

Attorneys are to list their exhibits numerically on the attached list with a brief description of each exhibit. Please mark your exhibits to correspond with the exhibit list.

XI.

Attach list of names of attorneys in any firm or copy of the letterhead.

TRIAL DATE

This case is set for trial on

_____.

CHIEF DISTRICT JUDGE

APPROVED:

Attorney for Plaintiff

Attorney for Defendant

Sample Form 36

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

)	
)	
Plaintiff(s),	)	CASE NO.
)	
vs.	)	CJRA TRACK
)	
)	
Defendant(s).	)	JUDGE

FINAL PRE-TRIAL ORDER

This matter is before the Court at a Final Pre-Trial Conference held pursuant to Rule 16, Federal Rules of Civil Procedure.

PLAINTIFF(S) COUNSEL:

(Insert name, address, and telephone number.)

DEFENDANT(S) COUNSEL:

(Insert name, address, and telephone number.)

I. NATURE OF THE CASE

The parties should prepare a brief statement of the nature of the case including the claims of the parties (personal injury, Federal Tort claim, breach of contract, etc.). The principal purpose of this statement is to assist the Court in explaining the case to prospective jurors upon selection of a jury.

II. JURISDICTION

- A. This is an action for:
(State the remedy sought, such as damages, injunctive or declaratory relief.)
- B. The jurisdiction of the Court is not disputed (or is disputed).
 - 1. If not disputed, state the statutory, constitutional or other basis of jurisdiction.
 - 2. If disputed, the basis on which jurisdiction is contested.

(Rev. 3/99)

III. UNCONTROVERTED FACTS

The following facts are not disputed or have been agreed to or stipulated to by the parties:

(This section should contain a comprehensive statement of facts which will become a part of the evidentiary record in the case and which, in jury trials, may be read to the jury.)

IV. AGREED TO ISSUES OF LAW

The parties agree that the following are the issues to be decided by the Court:

V. WITNESSES

- A. List of witnesses the plaintiff expects to call, including experts.
 - 1. Expert witnesses.
 - 2. Non-expert witnesses.
- B. List of witnesses defendant expects to call, including experts:
 - 1. Expert witnesses.
 - 2. Non-expert witnesses.
- C. If there are any third parties to the action, they should include an identical list of witnesses as that contained in parts A and B above.
- D. Rebuttal Witnesses. Each of the parties may call such rebuttal witnesses as may be necessary, without prior notice thereof to the other party.

VI. EXHIBITS

The parties shall prepare and append to the Final Pre-trial Order a Pre-trial Exhibit Stipulation, which shall be on a separate schedule.

The Pre-trial Exhibit Stipulation shall contain the style of the case, be entitled "Pre-trial Exhibit Stipulation," shall contain each party's numbered list of trial exhibits, other than impeachment exhibits, with objections, if any, to each exhibit, including briefly the basis of the objection. All parties shall list their exhibits in numerical order. Where practicable, copies of all exhibits to which there is an objection will be submitted with the stipulation. The burden for timely submission of a complete list is on the plaintiff. Each party is to submit a pre-marked copy of each exhibit for the Court's use at trial.

The list of exhibits shall be substantially in the following form:

PRE-TRIAL EXHIBIT STIPULATION

Plaintiff(s)' Exhibits

<u>Number</u>	<u>Description</u>	<u>Objection</u>	<u>If objection, state grounds</u>
---------------	--------------------	------------------	------------------------------------

Defendant(s)' Exhibits

<u>Number</u>	<u>Description</u>	<u>Objection</u>	<u>If objection, state grounds</u>
---------------	--------------------	------------------	------------------------------------

VII. DAMAGES

An itemized statement of all damages, including special damages.

VIII. BIFURCATED TRIAL

Indicate whether the parties desire a bifurcated trial, and if so, why.

IX. TRIAL BRIEFS

Trial briefs should be filed with the Court at the Final Pre-Trial Conference on any difficult factual or evidentiary issue and also set forth a party's theory of liability or defense.

X. LIMITATIONS, RESERVATIONS AND OTHER MATTERS

A. **Trial Date.** Trial of this cause is set for the week of _____.

B. **Length of Trial.** The probable length of trial is ____ days. The case will be listed on the trial calendar to be tried when reached.

Mark Appropriate Box: JURY. ☐

NON-JURY. . . . ☐

C. **Number of Jurors.** There shall be a minimum of six jurors.

D. **Jury Voir Dire.** The Court will conduct voir dire. Limited participation by counsel may be permitted. If voir dire questions are to be tendered, they should be submitted with the Final Pre-trial Order.

E. **Motions in Limine.** All motions in limine shall be filed no later than ten (10) days before the final pre-trial conference. Responses, if any, shall be filed within five (5) days thereafter.

(Rev. 3/99)

- F. **Jury Instructions.** All jury instructions of all parties shall be submitted with a completed jury instruction order prepared in compliance with this Court's instructions no later than the first day of trial. In both civil and criminal cases, each instruction submitted to the Court shall be accompanied by a copy and a copy shall be delivered to opposing counsel. The copies shall be numbered and indicate which party suggests them. The original shall be on 8 ½" x 11" plain white paper without any designation or number. Jury instructions should be produced in a word processing program and submitted on diskette or by electronic means as provided by the Court.

IT IS ORDERED that the Final Pre-trial Order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice or for good cause shown. Such modification may be made either on application of counsel for the parties or on motion of the Court.

DATED: _____

DISTRICT JUDGE
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM AND SUBSTANCE:

ATTORNEY FOR PLAINTIFF(S)

ATTORNEY FOR DEFENDANT(S)

NOTE: Where a third-party defendant is joined pursuant to Rule 14(a) of the Federal Rules of Civil Procedure, the Pre-trial Order may be suitably modified. The initial page may be modified to reflect the joinder. List attorney's name, address, and telephone number.

INSTRUCTIONS FOR PREPARING FINAL PRE-TRIAL ORDER

1. Although primary responsibility for the preparation of the Final Pre-Trial Order lies with the plaintiff's attorney, full cooperation and assistance on the part of the defendant's attorney is expected and required.
2. The parties are directed to stipulate to the authenticity of exhibits and shall indicate in the Final Pre-Trial Order those exhibits to which authenticity has not been stipulated and specific reasons why not.
3. The Final Pre-Trial Order should be filed in duplicate on the date designated as the date of the Final Pre-Trial Conference or as otherwise directed by the Court.
4. Failure to comply with the substance or intent of these instructions may result in appropriate sanctions pursuant to **Federal Rule 16 or 37 and 28 U.S.C. § 1927**, among others.
5. The Court greatly appreciates any and all efforts on the part of counsel to be brief and concise in preparing pretrial memorandums and findings of fact and conclusions of law.

Sample Form 37

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

_____,
Plaintiff,

No. C SBA

ORDER FOR PRETRIAL PREPARATION

v.

_____,
Defendant.

Pursuant to Rule 16(e) of the Federal Rules of Civil Procedure ("FRCP"), IT IS HEREBY ORDERED AS FOLLOWS:

A. DISCOVERY CUT-OFF

All discovery, except for expert discovery, shall be completed and all depositions taken on or before _____. The parties are responsible for scheduling discovery so that motions to resolve discovery disputes can be heard before the above discovery cut-off.

B. EXPERT DESIGNATION AND DISCOVERY

Plaintiff shall designate any experts by _____; defendant by _____; rebuttal disclosure by _____. Any expert not so named may be disallowed as a witness. No expert will be permitted to testify to any opinion, or basis or support for an opinion, that has not been disclosed in response to an appropriate question or interrogatory from the opposing party. Expert discovery shall be completed by _____.

C. MOTION CUT-OFF

All dispositive motions shall be *heard* on or before _____, at 11:30 a.m. The parties must meet and confer *prior* to filing any motion. The movant shall certify to the Court in its moving papers that it has complied with this requirement. Should the parties fail to meet and confer, the Court may decline to entertain the motion.

THIS MOTION DATE IS NOT RESERVED. The parties are advised to contact Judge Armstrong's Deputy Clerk, Lisa Clark, to determine the next available hearing date, particularly in the case of dispositive motion. The parties are advised *not* to wait until 35 days prior to the law and motion cut-off date to file and serve their motion. As the Court's law and motion calendar tends to fill quickly, there is ***no*** guarantee that a hearing date within the law and motion cut-off date will be available.

Pursuant to Civil Local Rule 7-1, 7-2 and 7-3, all civil motions shall be noticed for a hearing not less than thirty-five (35) calendar days after service. The opposition and supporting papers shall be filed not less than twenty-one (21) days before the noticed hearing date. The reply shall be filed not less than fourteen (14) days before the hearing date. Documents not filed in compliance with these time specifications will not be considered by the Court.

The failure of the opposing party to file a memorandum of points and authorities in opposition to any motion shall constitute a consent to the granting of the motion.

The parties are not required to file a statement of undisputed facts in connection with a motion for summary judgment. However, if filed only one joint statement of undisputed facts signed by all parties shall be filed. All separate statements will be stricken. If the parties are unable to agree that a fact is undisputed, they should assume that fact is in dispute.

Note that pursuant to Civil L.R. 7-1(b), the Court may, in its discretion, adjudicate motions *without* oral argument.

D. MANDATORY SETTLEMENT CONFERENCES

All parties are ordered to participate in a mandatory settlement conference during the following time period:

E. PRETRIAL CONFERENCE

All Counsel who will try the case shall appear for a pretrial conference in Courtroom 3 on _____ at 11:30 a.m. All counsel shall be fully prepared to discuss all aspects of the trial. Failure to file the requisite pretrial documents in advance of the pretrial conference may result in vacation of the pretrial conference and/or the imposition of sanctions.

F. PRETRIAL PREPARATION DUE

1. Not less than *thirty (30) calendar days* prior to the pretrial conference, Counsel shall meet and confer in good faith in advance of complying with the following pretrial requirements in order to clarify and narrow the issues for trial, arrive at stipulations of facts, simplify and shorten the presentation of proof at trial, and explore possible settlement. In addition, Counsel shall meet and confer regarding anticipated motions in limine, objections to evidence, jury instructions, and any other matter which may require resolution by the Court.

2. The following matters shall be accomplished no later than *twenty-one (21) calendar days* prior to the pretrial conference:

a. Joint Pretrial Statement

Counsel are required to file a pretrial conference statement which complies with Civil L.R. 16-15(b).

b. Trial Briefs

Each party shall serve and file a trial briefs which shall briefly state their party's contentions, the relevant facts expected to be proven at trial, and the law on the issues material to the decision.

c. Findings of Fact

In non-jury cases, each party shall serve and lodge with the Court proposed findings of fact on all material issues and conclusions of law. Findings shall be brief, clear, written in plain English and free of pejorative language, conclusions and argument.

d. Witnesses

Each party shall serve and file with the Court a list of all persons who may be called as witnesses. The list shall include a summary of the substance of each witness' proposed testimony. (Civil L.R. 16-15(4)(A))

e. Designation of Discovery Excerpts

Each party expecting to use discovery excerpts as part of its case in chief shall serve and lodge with the Court a statement identifying (1) by witness and page and line, all deposition testimony and (2) by lodged excerpt, all interrogatory answers and request for admissions to be used as part of its direct case. Each interrogatory answer intended to be offered as an exhibit shall be copied separately and marked as an exhibit. The original of any deposition to be used at trial must be produced at the time of trial. (Civil L.R. 16-15(4)(E))

f. Jury Instructions

The parties shall file a joint set of jury instructions as to those instructions on which the parties have reached agreement. As to any disputed instructions, each party shall separately submit its "proposed" instruction(s) supported by a memorandum setting forth the authority for its use. Responses or objections to any "proposed" jury instruction shall be filed no later than the date of the pretrial conference. All instructions shall be written in plain English which is comprehensible to jurors, concise and free of argument, and shall be organized in a logical fashion so as to aid jury comprehension, and are also to be provided on a 3.5" computer disk. The Court's practice is to utilize, whenever possible, instructions found in the Ninth Circuit Manual of Model Jury Instructions.

g. Jury Voir Dire and Verdict Forms

Each party shall submit proposed questions for jury voir dire and a proposed form of verdict.

h. Exhibits

Each party shall provide every other party one set of all exhibits, charts, schedules, summaries and diagrams and other similar documentary materials to be used at the trial together with a complete list of all such exhibits. The Court requires one original version of exhibits (as described above) for the Clerk and two copies (one for the Bench and one for the witness stand). All such versions of the exhibits, including the originals, should be indexed into a binder for easy and quick reference by all parties. The first page of each binder should have a copy of the exhibit list (see attached) appropriately completed with each exhibit description and its designated number. Plaintiffs shall refer to their exhibits numerically and Defendants shall label theirs alphabetically. Exhibit labels are also attached for your convenience. Exhibits should be brought to Court on the first day of trial.

3. The following matters shall be accomplished no later than *fourteen* (14) *calendar* days prior to the pretrial conference: **Motions in Limine and Objections to Evidence due:**

_____. Each party anticipating making motion(s) in limine and/or objection(s) to any testimony or exhibits expected to be offered shall file and serve a statement briefly identifying each item objected to and the grounds for the objection.

4. Responses to objections to evidence or motions in limine shall be filed and served no less than *seven (7) calendar days* prior to the pretrial conference due:_____.

G. TRIAL DATE

Trial before the Court or Jury will begin on _____, at 8:30 a.m., for an estimated _____ trial days, or as soon thereafter as the Court may designate. The parties are advised that they must be prepared to go to trial on a trailing basis. The trial will take place in Courtroom 3 of the United States Courthouse, 1301 Clay Street, 3rd Floor, Oakland, California 94612. The Court's trial hours are from 8:30 a.m. to 2:00 p.m., with two fifteen-minute breaks, on Monday, Wednesday, Thursday and Friday.

H. TRANSCRIPTS

If transcripts will be requested during or immediately after the trial, arrangements must be made with the Court Reporter Coordinator (Telephone No. 510-637-3534) at least one week before trial commences.

I. STATUS AND DISCOVERY CONFERENCES

Any party desiring to confer with the Court may, upon notice to all other parties, arrange a conference through the courtroom deputy (Telephone No. 510-637-3541). Conferences may be conducted telephonically, upon request (preferably in writing).

J. SANCTIONS

Failure to comply with this order may result in the imposition of sanctions pursuant to FRCP 16(f).

IT IS SO ORDERED.

Dated:

SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES DISTRICT COURT
for the Northern District of California

Case No. _____ Date _____

_____ vs. _____

EXHIBIT LIST

☐ Plaintiff

☐ Defendant

EXHIBIT NUMBER	DESCRIPTION	SPONSORING WITNESS	DATE	Admitted in Evidence
			Marked for indentification	

Plaintiff's Exhibit Markers

π PLAINTIFF π

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

π PLAINTIFF π

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

π PLAINTIFF π

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

π PLAINTIFF π

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

Defendant's Exhibit Markers

Δ DEFENDANT Δ

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

Δ DEFENDANT Δ

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

Δ DEFENDANT Δ

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

Δ DEFENDANT Δ

United States District Court
Northern District of California

Case No. _____

Case Title _____

Exhibit No. _____

Date Entered _____

By: _____, Deputy Clerk
Richard W. Wieking, Clerk

Counsel shall meet and confer pursuant to Civ. L.R. 30-3(b) and assign blocks of numbers to the exhibits (i.e., Plaintiff 1 - 199; Defendant 200 - 400.)

Exhibit markers should be placed on the lower right-hand corner of the exhibit. Exhibits should be contained within a binder with each exhibit separated by a tabbed page denoting the exhibit number.

Sample Form 38

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

_____ ,

Plaintiff,

vs.

No. CIV

_____ ,

Defendant.

PRETRIAL ORDER

This matter is before the Court pursuant to Fed.R.Civ.P. 16. The parties conferred and submit the following Pretrial Order.

I. APPEARANCES

Attorneys who will try the action:

For Plaintiff(s)

For Defendant(s)

For other parties

II. JURISDICTION AND RELIEF SOUGHT

A. Subject Matter Jurisdiction.

1. Was this action removed or transferred from another forum? ____ Yes ____ No. If

yes, was the action removed or transferred?

____ Removed ____ Transferred _____ Original forum

2. Is subject matter jurisdiction of this Court contested?

____ Uncontested ____ Contested _____ Party contesting

3. Asserted basis for jurisdiction.

____ Federal Question ____ Diversity ____ Other

Statutory Provision(s) Invoked: _____

B. Personal Jurisdiction and Venue.

1. Is personal jurisdiction contested?

____ Uncontested ____ Contested

Identify the party contesting personal jurisdiction and basis for objection:

2. Is venue contested?

____ Uncontested ____ Contested _____ Party contesting

C. Are the proper parties before the Court?

____ Uncontested ____ Contested

If contested, identify each missing party or improper party and the basis for the contention:

D. Identify the affirmative relief sought in this action.

1. Plaintiff seeks:
2. Defendant seeks:
3. Other party seeks:

III. BRIEF DESCRIPTION OF NATURE OF CLAIMS/DEFENSES

A. Plaintiff's claims:

B. Defendant's defenses: *(A defendant claiming entitlement to qualified immunity must set forth with specificity the basis of the defense.)*

C. Claims or defenses of other party(s):

(Where counterclaims or cross-claims exist, also give brief description.)

IV. FACTUAL CONTENTIONS UNDERLYING CLAIMS/DEFENSES

A. Stipulated Factual Contentions.

The parties agree to the following facts listed separately below:

B. Contested Material Facts.

1. Plaintiff's Contentions:
2. Defendant's Contentions:
3. Contentions of Other Party(s):

V. APPLICABLE LAW

A. Do the parties agree which law controls the action?

_____ Yes _____ No

If yes, identify the applicable law. _____

If no, identify the dispute and set forth each party's position regarding the applicable law.

1. Plaintiff
2. Defendant
3. Other party

VI. CONTESTED ISSUES OF LAW

Identify the specific issues of law which are contested.

1. Plaintiff
2. Defendant
3. Other Party

VII. MOTIONS

A. Pending Motions (indicate the date filed):

1. Plaintiff
2. Defendant
3. Other party

B. Motions which may be filed:

1. Plaintiff
2. Defendant
3. Other party

The briefing package must be complete and filed with the Court by _____.

VIII. DISCOVERY

A. Has discovery been completed? ☐ Yes ☐ No

If no, discovery terminates on _____.

B. Are there any discovery matters of which the Court should be aware?

IX. ANTICIPATED WITNESSES

Each party is under a continuing duty to supplement this list and the description of anticipated testimony. This does not, however, apply to a rebuttal witness. Indicate if the witness will testify in person or by deposition and include a brief description of the anticipated testimony. If the testimony is by deposition, identify the deposition by page number and line number. A witness who has not been identified and whose testimony has not been disclosed may not testify at trial unless good cause is shown.

A. Plaintiff's Witnesses:

1. Plaintiff will call or have available at trial the following witnesses:
2. Plaintiff may call the following witnesses:

B. Defendant's Witnesses:

1. Defendant will call or have available at trial the following witnesses:
2. Defendant may call the following witnesses:

X. TRIAL PREPARATION

A. Exhibits.

The parties must confer over all trial exhibits. This does not apply to rebuttal exhibits that cannot be anticipated before trial. The parties must file an original plus three (3) copies of the parties' "consolidated exhibit list identifying all exhibits that the parties have stipulated are admissible" and a "consolidated exhibit list identifying all exhibits the parties have stipulated to be authentic, but to

which there are other objections" no later than _____ calendar days before trial.

For those exhibits on which a stipulation could not be reached, the offering party must file a separate "contested exhibit list" no later than _____ calendar days before trial. An original plus three (3) copies of each party's contested exhibit list must be filed on the date identified in the preceding paragraph. In addition, two courtesy copies of the contested and uncontested exhibit list must be delivered to the judge's chambers.

All exhibits must be marked before trial. Exhibits must be marked numerically and identify the party offering the exhibit. The identification number or letter will remain the same whether the exhibit is admitted or not.

B. Witness Lists.

An original and three (3) copies of a party's witness list must be filed with the Clerk and served on all parties by _____. Indicate whether the witness is testifying by deposition or in person. Objections to use of deposition testimony are due within fourteen (14) calendar days of service of the witness list. The objecting party must highlight those portions of the requested deposition testimony to which the party objects. Plaintiff must use a yellow highlighter and defendant must use a blue highlighter. The parties must confer about any disputes and, if unable to resolve any differences, must notify the Court in writing at least _____ calendar days before trial.

C. Voir Dire.

1. If allowed, do the parties wish to participate in *voir dire*?

Plaintiff _____ Yes _____ No

Defendant _____ Yes _____ No

Other Party _____ Yes _____ No

2. Each party wishing to participate in *voir dire* must serve on all parties and file with the Clerk, a pleading entitled "Proposed Voir Dire Questions." The pleading must identify the specific areas about which the party wishes to inquire and must set forth proposed *voir dire* questions. This request must be filed at least _____ calendar days prior to jury selection.

D. Jury Instructions and Verdict.

1. In General. The parties must confer about proposed jury instructions. The Court will prepare and provide the parties with a Court-proposed set of general "stock" instructions that will be given. The stock instructions are available from the Clerk. The instructions that the parties must submit to the Court will be those which set forth the elements and definitions of the claims or charges, and the elements and any definitions of any defenses.

2. Sources for Instructions. If pattern instructions are followed by the judge, the judge will indicate at the pretrial conference his or her preference for the source of instruction.

3. Submission of Proposed Instructions. The parties must submit one mutually approved set of jury instructions no later than _____ calendar days before trial. For those instructions the parties were unable to agree upon, each party must submit its own proposed instructions at the same time as submission of the mutually agreed instructions.

4. Form of Instructions.

a. Submit sets of double-spaced instructions as follows:

____ set(s) of originals without citations and headed "Instruction No.____"; and

____ set(s) with citations and numbered accordingly (Fig 1), one of which will be filed.

- b.** If available, also submit a hard 3.5 diskette of all instructions in a format compatible with Word Perfect 5.1.
- c.** Submit no more than one instruction to a page.
- d.** All deviations from pattern instructions must be identified as "modified" in the citation and the modification must be highlighted in the body of the instruction.
- e.** Submit a cover sheet on all sets of instructions.

5. Deadlines for Submitting Instructions.

- a.** Instructions and diskette shall be filed _____ calendar days before trial.
- b.** Supplemental unanticipated jury instructions may be submitted at trial.

E. Statement of Case.

The parties must confer and submit an agreed statement of the case to the Court that will be read to the jury panel during jury selection. The statement must be submitted to the Court _____ days before jury selection.

F. Submissions for Bench Trials.

- 1.** The parties must submit one mutually approved set of proposed findings of fact and conclusions of law no later than _____ calendar days before trial. For those findings of fact and conclusions of law the parties were unable to agree upon, each party must submit its own proposed findings of fact and conclusions of law at the same time as submission of the mutually approved set.
- 2.** If available, submit a hard 3.5 diskette on Word Perfect 5.1 format of the findings of fact and conclusions of law.

XI. OTHER MATTERS

A. Settlement Possibilities.

1. The possibility of settlement in this case is considered:

_____ Poor _____ Fair _____ Good _____ Excellent _____ Unknown

2. Do the parties have a settlement conference set with the assigned Magistrate Judge?

_____ Yes _____ No If yes, when? _____

If a settlement conference has already been held, indicate approximate date.

Would a follow-up settlement conference be beneficial? _____ Yes _____ No

3. Does either party wish to explore any alternatives for dispute resolution such as mediation or a summary jury trial? If yes, please identify. _____ If no, explain why not. _____

B. Length of Trial and Trial Setting.

1. This action is a _____ Bench trial _____ Jury Trial _____ Both

2. The case is set for trial on _____. If there is no setting, the parties estimate they will be ready for trial by _____.

3. The estimated length of trial is _____ day(s).

XII. EXCEPTIONS

XIII. MODIFICATIONS-INTERPRETATION

The Pretrial Order when entered will control the course of trial and may only be amended *sua sponte* by the Court or by consent of the parties and Court approval. The pleadings will be deemed

merged herein.

The foregoing proposed Pretrial Order (prior to execution by the Court) is hereby approved
this _____ day of _____, 20 ____.

Attorney for Plaintiff
Address: _____

Attorney for Defendant
Address: _____

Attorney for other parties (if any)
Address: _____

Dated: _____

UNITED STATES DISTRICT JUDGE

Sample Form 39

UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF IOWA

ORDER SETTING JURY TRIAL, FINAL PRETRIAL CONFERENCE, AND
REQUIREMENTS FOR THE PROPOSED FINAL PRETRIAL ORDER

***IT IS ORDERED:*¹**

I. TRIAL DATE: This case has been placed on the calendar of United States Magistrate Judge Paul A. Zoss for a jury trial scheduled to commence [in the first floor district courtroom of the Federal Courthouse in Sioux City,][in the third floor courtroom in the Federal Building and Post Office in Fort Dodge,] Iowa, beginning on [date].

II. CONTINUANCE OF TRIAL OR FINAL PRETRIAL CONFERENCE DATES: Unless requested within **fourteen days** after the date of this order, no continuance of the trial date will be granted except upon written application and for good cause.

III. FINAL PRETRIAL CONFERENCE: A final pretrial conference (“FPTC”) is scheduled before Judge Zoss on [date], at [time]. [*approximately three weeks before trial.*] The FPTC will be held in person at the U.S. Courthouse in Sioux City, Iowa, unless the parties agree in advance to a telephonic FPTC and so notify Judge Zoss at least **two court days** before the FPTC. The court will initiate the conference call. The parties must advise the court of the contact numbers for each party and counsel who will participate in a telephonic FPTC at least **one court day** before the FPTC.

IV. FINAL PRETRIAL ORDER: Before the FPTC, pro se parties and counsel for represented parties all must agree upon, prepare, and sign a proposed Final Pretrial Order prepared for Judge Zoss’s signature in the format attached to this order. All parties are jointly responsible for the preparation of the proposed Final Pretrial Order. A copy of the proposed order must be received by Judge Zoss (via mail, facsimile, e-mail,² or hand-delivery, but not filed) at least two court days before the FPTC.

V. WITNESS AND EXHIBIT LISTS: Witness and exhibit lists must be exchanged by the parties (but not filed) at least **twenty-one days** before the FPTC. Exhibit lists must be attached to, and witness lists must be included as part of, the proposed Final Pretrial Order in accordance with the instructions in

¹ This Order was revised on April 17, 2000, and the parties are alerted to the fact that their duties and responsibilities with respect to the matters contained herein may have changed from prior trial setting orders.

² paul_zoss@iand.uscourts.gov

the attached form order. The parties are not required to list rebuttal witnesses or impeachment exhibits.

VI. EXHIBITS: Copies of all exhibits as to which there may be objections must be brought to the FPTC. If an exhibit is not brought to the FPTC and an objection to the exhibit is asserted at the FPTC, the exhibit may be excluded from evidence for noncompliance with this order. Exhibits must be prepared for trial in accordance with the following instructions:

A. Marking of Exhibits. All exhibits must be marked by the parties before trial. The plaintiff(s) should use numbers and the defendant(s) should use letters, unless prior approval is obtained from the trial judge for a different exhibit identification scheme. (For example, the parties may want to obtain approval to utilize a sequential numbering system related to the numbering of exhibits as they were numbered in discovery.) Exhibits also must be marked with the case number. ***All exhibits longer than one page must contain page numbers at the bottom of each page.***

B. Elimination of Duplicates. The parties should compare the exhibits and eliminate duplicates. If more than one party wants to offer the same exhibit, then it should be marked with a number and listed as a joint exhibit on the exhibit list of the plaintiff(s).

C. Listing of Exhibits and Objections. Exhibits must be listed separately, unless leave of court is granted for a group exhibit. If a party objects to parts of an exhibit but not to other parts, the offering party must prepare separate versions of the exhibit, one that includes the parts to which objections are being asserted and the other that redacts those parts.

D. Copies for the Court. Before trial, each party must supply the trial judge with a copy of all exhibits to be used at trial. The court's copies of exhibits should be placed in a ringed binder with a copy of the exhibit list at the front and with each exhibit tabbed. The parties must supply the Clerk of Court with a second set of exhibits, also tabbed and in a ringed binder, to be used as the original trial exhibits in the official records of the court.

VII. PRETRIAL SUBMISSIONS: A telephonic *preliminary* pretrial conference will be held on [date], at [time]. [*approximately three months before trial.*] Judge Zoss will initiate the conference call. During this conference, Judge Zoss will discuss the nature of the case and the status of trial preparations with counsel and any unrepresented parties. If the case is not complex and presents only routine issues, Judge Zoss may order informal, simplified pretrial submissions. Otherwise, the following procedures shall apply:

A. Trial Briefs. If the trial of the case will involve significant issues not adequately addressed by the parties in connection with dispositive motions or other pretrial motions, the parties must prepare trial briefs addressing such issues. Before the FPTC, the parties must serve copies of their trial briefs on all other parties, and file an original and two copies with the Clerk of Court.

B. Other Pretrial Submissions. At or before the FPTC, the parties must deliver to Judge Zoss's chambers, but not file, the following: (1) a joint proposed jury statement, (2) joint proposed jury instructions, (3) requested voir dire questions, (4) proposed verdict forms, (5) any requested special interrogatories, and (6) a copy of all of these items on a 3.5" computer disk in any version of Word or WordPerfect.

The joint proposed jury statement, the joint requested jury instructions, and any requested voir dire questions must be prepared and submitted in accordance with the following instructions:

(1) **Jury Statement:** The joint proposed jury statement will be read to the jury panel before voir dire. The statement must set forth briefly and simply, in a noncontentious manner, the background of the case and the claims and defenses being asserted. The parties should make every effort to agree upon the language for the statement. To the extent the parties cannot agree, they should use the following format: "Plaintiff contends . . . ; Defendant contends"

(2) **Jury Instructions:** Jury instructions must be prepared and submitted in accordance with the following directions:

(a) At least **two weeks** before the FPTC, the parties must serve on each other (but not file) proposed jury instructions. Counsel for the defendant(s) must provide a computer disk containing proposed instructions to counsel for the plaintiff(s). Proposed jury instructions should only include proposed preliminary jury instructions to the extent the standard preliminary jury instructions used by the court would be inadequate or inappropriate in this case.

(b) At least **one week** before the FPTC, counsel for the parties must consult, either personally or by telephone,

and attempt to work out any differences in their proposed jury instructions.

(c) Counsel for the plaintiff(s) must organize the proposed jury instructions into one document, prefaced by a table of contents. Instructions proposed by opposing parties on the same subject matter must be grouped together. For example, if Instruction No. 10 is a proposed marshaling instruction and each party proposes a different marshaling instruction, then Instruction No. 10A should be the marshaling instruction proffered by the plaintiff(s) and Instruction No. 10B should be the marshaling instruction proffered by the defendant(s).

(d) Each instruction should treat a single subject, and should be numbered individually, on a separate sheet of paper, and double-spaced. At the bottom of each instruction, the party proposing the instruction must cite the decisions, statutes, regulations, or other authorities supporting the proposed instruction.

(e) The following information must be stated at the bottom of each proposed jury instruction: (i) the party offering the instruction; (ii) whether the opposing party objects to the proposed instruction; and if there is an objection, whether the objection is to (A) the language of the instruction, (B) the giving of the instruction, or (C) both. If a party is objecting to the language of a proposed instruction, the objectionable language must be identified. Objections must be supported by citations to applicable authorities.

(f) Pattern instructions need not be reproduced, but may be requested by reference to the publication, page number, and instruction number. Any modification to a pattern instruction should be disclosed as follows: additions should be underscored and deletions should be set forth by striking out the language sought to be deleted or setting out the deletions in parentheses.

(g) Instructions not requested as set forth above shall be deemed waived unless the subject of the instruction is one arising in the course of trial which reasonably could

not have been anticipated before trial from the pleadings, discovery, or nature of the case.

(h) The court will use preliminary jury instructions, which will be read to the jury before opening statements. A copy of Judge Zoss's standard preliminary jury instructions may be requested from the judge's office or found on the court's web site at www.iand.uscourts.gov (under "Downloads"). About **five court days** before trial, the parties will receive proposed preliminary jury instructions from the court. Any objections to the proposed preliminary jury instructions must be served, filed, and delivered to Judge Zoss's chambers no later than **two court days** before trial. Failure to file timely objections to the preliminary jury instructions will constitute a waiver of the right to make objections.

(3) **Requested Voir Dire Questions:** The parties may request that the trial judge ask voir dire questions specific to this case. In addition, the parties will be permitted to conduct voir dire in the manner set out in the attached voir dire instructions.

VIII. RESTRICTIONS ON WITNESSES:

A. Exclusion of Witnesses. A witness who may testify at the trial or at an evidentiary hearing shall not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial or hearing until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or unless the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph also is prohibited from reviewing a verbatim record of the testimony of other witnesses at the trial or hearing until after the witness has completed his or her testimony at the trial or evidentiary hearing, unless the court orders otherwise.

B. Restrictions on Communications with Witnesses. Unless the court orders otherwise, after the commencement of the trial or an evidentiary hearing and until the conclusion of the trial or hearing, a witness who may testify at the trial or hearing is prohibited from communicating with anyone about what has occurred in the courtroom during the trial or hearing. If the witness does testify at the trial or hearing, after the witness is tendered for cross-examination and until the

conclusion of the witness's testimony, the witness is prohibited from communicating with anyone about the subject matter of the witness's testimony. A witness may, however, communicate with his or her attorney about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

C. Duties of Counsel. Any attorney who may call a witness to testify at the trial or evidentiary hearing must, before the trial or hearing, advise the witness of these restrictions.

D. Parties. These restrictions do not apply to the parties.

IX. TESTIMONY BY DEPOSITION: With respect to any witness who will appear by deposition, at least **three weeks** before trial, the party intending to offer the witness must serve on the opposing parties a written designation, by page and line number, of those portions of the deposition the offering party intends to have read into evidence. At least **two weeks** before trial, an opposing party must serve on the offering party any objections to the designated testimony and a counter-designation, by page and line number, of any additional portions of the deposition which the opposing party intends to have read into evidence. At least **one week** before trial, the party offering the witness must serve upon the opposing parties any objections to the designated testimony and a written designation, by page and line number, of any additional portions of the deposition the offering party intends to have read into evidence. At least **two court days** before trial, the parties must consult, either personally or by telephone, and attempt to work out any objections to the proposed deposition testimony.

The party intending to offer the deposition testimony must notify the trial judge at least **twenty-four hours** before the deposition is to be read to the jury so that the judge may review any objections, listen to any further arguments, and make any necessary rulings outside the presence of the jury. The court will rule on problems and objections before the deposition is read into evidence so there can be a "clean read" of deposition testimony at trial. The court also will expect the parties to edit any video deposition accordingly.

All references in the deposition to exhibit numbers or letters must be changed to correspond to the exhibit designation for trial. The parties are not to file depositions with the Clerk of Court.

X. MOTIONS IN LIMINE: The parties should notify the court of any novel, unusual, or complex legal, factual, or procedural issues reasonably anticipated to arise at trial by motion in limine or by motion under Federal Rule of Evidence 104(a) served and filed at least **two weeks** before trial. Resistances to

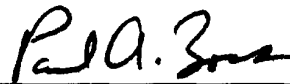
such motions must be served and filed within **one week** after service of the motion, but in any event, at least **two court days** before trial.

XI. SETTLEMENT CONFERENCE: Any party desiring a settlement conference should contact Judge Zoss in Sioux City, Iowa, 712/233-3921, at the earliest opportunity. Such contact may be *ex parte* for the sole purpose of requesting a settlement conference. A settlement conference will be scheduled with a judge who will not be involved in trying the case.

XII. SETTLEMENT DEADLINE: The court hereby imposes a settlement deadline of **5:00 p.m., three court days** before the first scheduled day of trial. If the case is settled after that date, the court may enter an order to show cause why costs should not be imposed on the party or parties causing the delay in settlement.

IT IS SO ORDERED.

DATED _____.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF IOWA
_____ DIVISION

[INSERT PARTIES AND CASE NUMBER]

**FINAL PRETRIAL
ORDER
[PROPOSED]**

[NOTE: Instructions for preparing this form appear in brackets and should not be reproduced in the proposed Final Pretrial order. All material not appearing in brackets should be reproduced in the proposed Final Pretrial Order.]

This final pretrial order was entered after a final pretrial conference held on [date]. The court expects the parties to comply fully with this order. ***[Full compliance with the order will assist the parties in preparation for trial, shorten the length of trial, and improve the quality of the trial. Full compliance with this order also will help “secure the just, speedy, and inexpensive determination” of the case. Fed. R. Civ. P. 1.]***

The following counsel, who will try the case, appeared at the conference:

1. For plaintiff(s):
Name(s)
Street Number, Street Name and/or Box Number
City, State and Zip Code
Phone Number [include area code]
Facsimile Number [include area code]
E-mail address [if available]

2. For defendant(s):
Name(s)
Street Number, Street Name and/or Box Number
City, State and Zip Code
Phone Number [include area code]
Facsimile Number [include area code]
E-mail address [if available]

I. STIPULATION OF FACTS: The parties agree that the following facts are true and undisputed:[The parties are to recite all material facts as to which there is no dispute. Special consideration should be given to such things, for example, as life and work expectancy, medical and hospital bills, funeral expenses, cause of death, lost wages, back pay, the economic value of fringe benefits, and property damage. The parties should stipulate to an undisputed fact even if the legal relevance of the stipulated fact is questioned by one or more party, but in such instances the stipulated fact should be followed by an identification of the objecting party and the objection (e.g. “Plaintiff objects to relevance.”)]

A.

B.

II. EXHIBIT LIST: The parties' exhibit lists are attached to this Order.[The parties are to attach to this order exhibit lists that list all exhibits (except for impeachment exhibits) each party intends to offer into evidence at trial. The exhibit lists are to be prepared in the following format.

Plaintiff(s) Exhibits	Objections (Cite Fed. R. Evid.)	Category A, B, C	Offered	Admit/Not Admitted (A) - (NA)
1. <i>[describe exhibit]</i>				*
2. <i>[describe exhibit]</i>				

Defendant(s) Exhibits	Objections (Cite Fed. R. Evid.)	Category A, B, C	Offered	Admit/Not Admitted (A) - (NA)
A. <i>[describe exhibit]</i>				*
B. <i>[describe exhibit]</i>				

* This column is for use by the trial judge at trial. Nothing should be entered in this column by the parties.

The following categories are to be used for objections to exhibits:

- A. **Category A.** These exhibits already will be in evidence at the commencement of the trial, and will be available for use by any party at any stage of the proceedings without further offer, proof, or objection.
- B. **Category B.** These exhibits are objected to on grounds **other than** foundation, identification, or authenticity. This category should be used for objections such as hearsay or relevance.
- C. **Category C.** These exhibits are objected to on grounds of foundation, identification, or authenticity. This category **should not** be used for other grounds, such as hearsay or relevance.

All exhibits are to be made available to opposing counsel for inspection at least **twenty-one days** before the date of the FPTC. Failure to provide an exhibit for inspection constitutes a valid ground for objection to the exhibit, and should be noted on the exhibit list.

Copies of all exhibits as to which there may be objections must be brought to the FPTC. If an exhibit is not brought to the FPTC and an objection is asserted to the exhibit at the FPTC, the exhibit may be excluded from evidence by the court. Any exhibit not listed on the attached exhibit list is subject to exclusion at trial. The court may deem any objection not stated on the attached exhibit list as waived.]

III. WITNESS LIST: The parties intend to call the following witnesses at trial:[Each party must prepare a witness list that includes all witnesses (except for rebuttal witnesses) whom the party intends to call to testify at trial. The parties are to exchange their separate witness lists at least **twenty-one days** before the date of the FPTC. The witness lists are to be included in the following format. A witness testifying by deposition must be listed in the witness list with a designation that the testimony will be by deposition.]

- A. **Plaintiff(s) witnesses** [list name, **substance of testimony**, whether any party objects to the witness, and the nature of and grounds for any objection]:
 - 1.
 - 2.
- B. **Defendant(s) witnesses** [list name, **substance of testimony**, whether any party objects to the witness, and the nature of and grounds for any objection]:
 - 1.
 - 2.

All parties are free to call any witness listed by an opposing party. A party listing a witness guarantees his or her presence at trial unless it is indicated otherwise on the witness list. ***Any objection to the offer of testimony from a witness on the witness list is waived if it is not stated on this list.***

IV. RESTRICTIONS ON WITNESSES: A witness who may testify at the trial shall not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph also is prohibited from reviewing a verbatim record of the testimony of other witnesses at the trial until after the witness has completed his or her testimony, unless the court orders otherwise.

Unless the court orders otherwise, after the commencement of trial and until its conclusion, a witness who may testify at the trial is prohibited from communicating with anyone about what has occurred in the courtroom during the trial. If the witness does testify at the trial, after the witness is tendered for cross-examination and until the conclusion of the witness's testimony, the witness is prohibited from communicating with anyone about the subject matter of the witness's testimony. A witness may, however, communicate with his or her attorney about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

These prohibitions do not apply to the parties. Any attorney who may call a witness to testify at trial must, before the trial, advise the witness of these restrictions.

V. EVIDENTIARY AND OTHER LEGAL ISSUES:

A. Plaintiff(s) Issues:

- 1.
- 2.

B. Defendant(s) Issues:

- 1.
- 2.

[The parties must list all unusual evidentiary and legal issues which are likely to arise at trial, including such things as disputes concerning the admissibility of evidence or testimony under the Federal Rules of Evidence; the elements of a cause of action; whether recovery is barred as a matter of law by a particular defense; disputes concerning the measure, elements, or recovery of damages; and whether the Statute of Frauds or the Parol Evidence Rule will be raised. The

purpose of this listing of issues is to advise the court in advance of issues and problems that might arise at trial.]

IT IS SO ORDERED.

DATED this ____ day of _____, 20____.

**PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT**

Sample Form 40

NOTE: Form revised as of 01/02/2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
_____ DIVISION

)	
Plaintiff,)	
	)	Case No.:
vs.)	
)	
)	
Defendants.)	

ORDER FOR FINAL PRETRIAL CONFERENCE

IT IS ORDERED:

A final pretrial conference will be held before this court at the Quentin N. Burdick U.S. Courthouse, 655 1st Avenue North, Suite 440, Fargo, North Dakota on _____.

The conference shall be attended by lead counsel for each party, with authorization to bind the party on all matters addressed at the conference.

Prior to the date of the final pretrial conference, counsel shall confer in person or by telephone (not just in writing) for the purpose of preparing a joint Final Pretrial Statement and examining and marking exhibits as indicated in this Order. **The proposed Final Pretrial Statement must be received by the court 24 hours in advance of the Final Pretrial conference either by U.S. Mail or Facsimile transmission.**

Final Pretrial Statement and Stipulations: Counsel will jointly prepare for submission to the court at the pretrial conference or 14 days prior to trial, whichever is earlier, a Final Pretrial Statement in substantially the same form as the attached sample. Rule 26(a)(3) disclosures shall be incorporated in the Final Pretrial Statement.

Counsel are not required to stipulate or waive anything. They are required to confer in advance of the conference and prepare and sign a joint final pretrial statement covering the matters set out in this order for pretrial. The joint final pretrial statement, including exhibit list, preservation of objections to exhibits, and designation of deposition testimony must be submitted to the court at the final pretrial conference, or 14 days before trial, whichever is earlier. If counsel are able to stipulate uncontested facts and stipulate admissibility of exhibits or at least waiver of foundation for exhibits, it will expedite the trial of the case.

The Final Pretrial Statement must be complete and signed by all counsel, signifying acceptance, and upon approval of the court, with such additions as are necessary, will be signed by the court as an order reflecting the final pretrial conference.

Exhibits: Counsel are directed to complete the physical marking and numbering of all papers and objects expected to be introduced as exhibits. The exhibits are to be marked with an exhibit sticker. All exhibits in the case are to be numbered consecutively using a “P” for plaintiff and “D” for defendant (**for example P1-P20, D31-D40, leaving a sufficient gap for unanticipated or rebuttal exhibits**), and listed in the form of the attached sample (including horizontal and vertical lines as indicated). Counsel will retain the exhibits in their possession but shall submit the list as an attachment to the Final Pretrial Statement. Counsel must disclose and list all exhibits relating to an issue on which their client has the burden of proof or the burden of going forward with the evidence. Each listed exhibit shall be designated as “will offer” or “may offer.”

Documents to be used solely for rebuttal purposes need not be numbered or listed until identified at trial.

Failure to list an exhibit required by this order to be listed or to disclose such exhibit to adverse counsel will result, except upon a showing of good cause, in the nonadmissibility of the exhibit into evidence at the trial. Each party shall make its exhibits available for inspection by other parties prior to the pretrial conference.

For each listed exhibit, counsel shall determine whether they will stipulate to admissibility for all purposes or at least waive foundation for the opposing party's exhibits. The court strongly encourages such agreement and expects counsel to at least waive foundation, unless there is a strong, specific objection to a particular exhibit. Any stipulation to admissibility or waiver of foundation shall be indicated in the appropriate column on the exhibit list.

The nonoffering party shall list in the final pretrial statement any objections of that party to admissibility of exhibits listed by the offering party. Objections not so preserved (other than objections under Federal Rules of Evidence 402 and 403) shall be deemed waived unless excused by the court for good cause shown. See Fed. R. Civ. P. 26(a)(3). Timely submission of the pretrial statement will comply with the deadline in Rule 26(a)(3).

Expert Reports: Copies of expert reports prepared in accordance with Rule 26(a)(2)(B) by those experts the parties anticipate calling as witnesses at trial shall be submitted to the court as an attachment to the Final Pretrial Statement.

Failure to file the report(s) required by this order may result in the exclusion of the expert's testimony, except upon a showing of good cause. The disclosure of the report(s) shall otherwise be made by the parties in accordance with the scheduling order of the court.

Depositions: The offering party shall designate in the pretrial statement those portions of any depositions which will be presented at trial, and the manner in which each of those depositions was recorded. A transcript of the pertinent portions of any deposition not stenographically recorded shall accompany the designation. Timely submission of the pretrial statement will comply with the deadline in Rule 26(a)(3).

The other parties shall have until 7 days before trial to designate additional portions of any deposition appearing on the offering party's list.

Any party who objects to admissibility of deposition testimony to be offered shall have until 4 days prior to trial to file a list of objections it intends to preserve. All other objections will be deemed waived. Counsel shall then confer prior to commencement of the trial to edit the depositions.

As to any deposition which may be used only if the need arises (other than solely for impeachment purposes), the offering party shall notify the court and other parties at least 48 hours in advance that it will be offering the deposition at trial, and identify the portions to be offered. The other parties shall then have 24 hours to identify additional portions and to preserve any objections to admissibility of the deposition testimony. Objections not specifically preserved will be deemed waived. Counsel shall then confer prior to the offering of the deposition to edit the testimony.

Jury Instructions: In jury cases, an agreed upon set of jury instructions and verdict form shall be submitted to the court seven days prior to trial. The original shall be filed with the clerk and two copies sent to the trial judge along with a computer disk version, if possible, in WordPerfect 6.1 or 8.0 format. A party requesting an instruction upon which counsel cannot agree should submit that instruction, along with a statement of authority to the court. There is reserved to counsel the right to supplement requests for instructions during the course of the trial, or at the conclusion of the evidence, on matters

that cannot reasonably be anticipated.

Trial Memorandum: Counsel for the respective parties shall file a trial memorandum with proof of service upon opposing counsel with the clerk, for presentment to the court, at least five (5) days before the commencement of trial. The trial memorandum shall contain: A general statement of the case, citation of the authority upon which the party relies on unresolved legal issues, a general statement of the evidence to be offered, and a statement of any evidentiary or procedural problem expected to arise, with citations of authority.

Motions in Limine: Motions in limine shall be filed at least thirty (30) days prior to trial unless otherwise instructed by the court.

Failure to Appear/Comply: Failure of counsel to appear at any scheduled final pretrial conference, or otherwise to comply with the provisions of this order, may result in dismissal or default, as may be appropriate.

Dated: _____

Karen K. Klein
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
_____ DIVISION

)	
)	
)	
Caption of Case)	Civil No. _____
)	
)	
)	

FINAL PRETRIAL STATEMENT

A final pretrial conference was held on the _____ day of _____,
20__.

Appearing for the parties as counsel were: (List the counsel who will attend the final pretrial conference).

1. Exhibit List: A list of the exhibits to be offered by the parties is attached to this statement, including a “will offer” or “may offer” designation.

The list indicates which exhibits the parties stipulate be received in evidence and available for use at trial for all purposes (unless otherwise indicated below), and for which exhibits the parties (though not stipulating to admissibility) have agreed to waive foundation.

Plaintiff specifically objects to the following exhibits listed by defendant(s):

<u>Exhibit No.</u>	<u>Ground(s) of Objection</u>
--------------------	-------------------------------

Defendant specifically objects to the following exhibits listed by plaintiff(s):

<u>Exhibit No.</u>	<u>Ground(s) of Objection</u>
--------------------	-------------------------------

2. Fact Witnesses:

- A. Plaintiffs—All witnesses, other than experts, to be called to testify by plaintiff(s), except those who may be called for rebuttal purposes only, are: (Designate in manner set out below)

<u>Name of Witness</u> <u>Address/Tel. No.</u>	<u>Will Call/</u> <u>May Call</u>	<u>Indicate if by</u> <u>Written/Video Deposition</u> <u>or Videoconference</u>
---	--------------------------------------	---

- B. Defendants—All witnesses, other than experts, to be called to testify by defendant(s), except those listed in the preceding paragraph as expected to be called by the plaintiff(s) and except those who may be called for rebuttal purposes only, are: (Designate in manner set out above)

(If there are other parties, a similar list is to be made for each.)

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear herein shall be permitted to testify over objection for any purpose except rebuttal.

3. Expert Witnesses:

- A. Plaintiff(s)—The expert witnesses to be called by plaintiff (s) are: (Designate in manner set out below)

<u>Name & Address</u>	<u>Field of</u> <u>Expertise</u>	<u>Issues</u>	<u>Indicate if by</u> <u>Written/Video</u> <u>Deposition or</u> <u>Videoconference</u>
---------------------------	-------------------------------------	---------------	---

- B. Defendant(s)—The expert witnesses to be called by defendant(s) are: (Designate in manner set out above)

NOTE: Expert reports prepared in accordance with Rule 26(a)(2)(B) by those experts the parties anticipate calling as a witness at trial shall be submitted to the court as an attachment to the Final Pretrial Statement.

4. Depositions: Plaintiff hereby designates the following deposition testimony that will be offered at trial:

<u>Name of Witness</u>	<u>Deposition pages & lines</u>
------------------------	-------------------------------------

Defendant hereby designates the following deposition testimony that will be offered at trial:

Name of Witness

Deposition pages & lines

5. Discovery Materials: All specific answers to written interrogatories or responses to requests for admissions which are expected to be offered in evidence by the plaintiff, except for impeachment or rebuttal purposes only, are: (Specifically designate answers to interrogatories and responses to requests for admissions by answer or response number).

All answers to written interrogatories or responses to requests for admissions which are expected to be offered in evidence by the defendant, except for impeachment or rebuttal purposes only, are: (Specifically designate in the manner set out above).

(If there are other parties, a designation should be made by each.)

(Discovery materials to be offered in evidence shall not be filed prior to commencement of trial. The clerk will file the materials as they are offered in evidence. At the conclusion of trial, discovery material which has been received in evidence may be withdrawn.)

6. Uncontroverted Facts: The parties agree that the following may be accepted as established facts for purposes of this case only:

7. Issues to be Determined at Trial: The issues remaining to be determined at trial are: (separately & specifically list each genuinely controverted issue on the merits).

8. Other Issues for the Court's Attention: Other matters requiring the court's attention prior to or during trial are: (List legal and procedural issues to which the court should be alerted).

9. The parties do/do not agree to waive exclusion of witnesses from the courtroom pending completion of their testimony.

10. Length & type of trial: Counsel estimate the trial will consume not less than ____ day(s), nor more than ____ days. Trial will be (jury/nonjury).

(Signatures of all counsel, signifying acceptance).

ORDER

The foregoing Final Pretrial Statement is adopted as the order of the court with the following modifications:

Dated: _____

Karen K. Klein
United States Magistrate Judge

Sample Form 41

Civil Jury Trial Order/Courtroom Instructions

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

	)	CASE NO.
)	
)	
PLAINTIFF,	)	JUDGE PETER C. ECONOMUS
)	
v.)	
)	
	)	TRIAL ORDER
)	
)	
DEFENDANT.)	

This case is set for jury trial on _____. The parties and their counsel shall report to the Court's chambers no later than 8:30 a.m. on the first day of trial.

The dispositive motion deadline is _____.

The Final Pretrial is scheduled for _____ at _____. Lead trial counsel for all parties shall be present and prepared with full authority to discuss settlement of the case. All parties shall attend in person unless counsel has requested and received prior approval from the Court for a party to attend telephonically. Parties attending telephonically must be readily available at all times during the conference.

SCHEDULE

1. The following shall be accomplished **SEVEN (7) DAYS PRIOR TO THE FINAL PRETRIAL CONFERENCE**:

a. PRETRIAL STATEMENT

Each party shall submit a pretrial statement setting forth the following:

1. the cognizable claims and defenses;
2. the applicable law with specific citations to all statutes and case law to support each claim and defense;
3. the status of settlement negotiations; and
4. the estimated length of trial.

b. JOINT STATEMENT OF CONTESTED AND UNCONTESTED FACTS

1. Plaintiffs' Proposed Facts: Plaintiff(s) shall submit 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.

2. Defendants' Response and Proposed Facts: Defendant(s) shall submit a statement:

(a) indicating separately as to each statement of fact whether they contest or do not contest it;

(b) stating all additional facts proposed to be proved by them at trial in opposition to, or in defense against, the plaintiffs' claim; and

(c) stating all facts proposed to be proved by them at trial in support of their counterclaim(s), cross claim(s), or third party claim(s) IF applicable.

3. Narration of Proposed Facts: In stating facts proposed to be proved, counsel shall do so in brief, 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.]

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. Each party may, however, list additional proposed facts relating to positions unique to it.

For each proposed fact, the parties shall, at the time of proposing to prove that fact, list the witnesses (including expert witnesses), documents and any depositions and answers to interrogatories or requests for admissions that they will offer to prove that fact. In their response, parties shall, (1) if they object to any such proposed fact or proposed proof, state precisely the grounds and the rule of evidence relied on for their objection and, (2) 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. Objections to the admissibility of a proposed fact (either as irrelevant or on other grounds) may not be used to avoid indicating whether or not the party contests the truth of that fact. Except for good cause shown, a party will be precluded at trial from offering any evidence on any fact not disclosed and from making any objection not so disclosed other than purely for impeachment purposes.

The uncontested facts shall be taken at the trial as either an admission under Fed. R. Civ. P. 36 or a stipulation without the need for independent proof. A COMPREHENSIVE STATEMENT OF ADMITTED OR STIPULATED FACTS SHALL BE FILED SEPARATELY AND MADE PART OF THE RECORD. To the extent relevant to a resolution of contested issues and otherwise admissible, these facts may be read to the jury. Independent proof of uncontested facts will be allowed only if incidental to the presentation of evidence on contested facts or if such proof will better enable the jury to resolve contested facts.

4. 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] imposing undue burdens on opposing parties shall be subject to sanctions under Fed. R. Civ. P. 16(f).

c. WITNESSES

Each party shall provide opposing counsel and the Court with a list of all witnesses to be called at trial, including potential rebuttal witnesses. A summary of

the testimony to be offered by each witness shall be included in the JOINT STATEMENT OF CONTESTED AND UNCONTESTED FACTS. No witness will be permitted to testify at trial if his or her name is not provided to opposing counsel at this time, unless the Court determines that the witness is needed to offer rebuttal testimony which could not have been reasonably anticipated prior to trial or that exceptional circumstances warrant amendment of one or both of the witness lists. Expert witnesses will be bound by the opinions expressed in their reports prepared in accordance with Fed. R. Civ. P. 26(2)(B) and will not be permitted to offer new matters at trial.

d. DEPOSITION TESTIMONY

Whenever depositions (videotape or written) are to be used at trial, opposing counsel shall submit an index of objections to counsel offering the testimony along with a statement as to the basis of the objection and reference to the specific rule of evidence upon which counsel relies. The proponent shall respond with a statement giving the reasons for admissibility.

Counsel shall consult in an effort to resolve any objections raised. Where objections have been raised and not resolved, those objections shall be noted in the margin of the index. The Court will make every effort to rule on the objections at the final pretrial.

e. EXHIBITS

The parties shall exchange and file an index of exhibits along with a brief

description of such exhibits in accordance with LR 39.1. If a party against whom an exhibit is being offered objects to the same, the procedure set forth in subsection d. above applies. Exhibits which have not been provided as required by this paragraph will not be received at trial.

2. MOTIONS IN LIMINE

All legal issues of importance, including evidentiary ones, which have not been previously resolved shall be raised by written motion on or before **THREE (3) DAYS PRIOR TO THE FINAL PRETRIAL CONFERENCE**. Responses shall be filed twenty-four (24) hours before the Final Pretrial Conference.

The Court will not hold bench or chamber conferences during trial to consider legal issues including evidentiary rulings that could have been raised before trial without a showing that counsel could not, by the exercise of due diligence, have anticipated them in advance of trial.

In all cases, Pretrial Statements and Motions *in Limine* are to be exchanged with opposing counsel by hand delivery or fax.

3. The following shall be accomplished **THREE (3) DAYS PRIOR TO TRIAL:**

a. PRELIMINARY STATEMENTS

Counsel shall prepare a joint statement in simple terms describing the nature of the case including the claims and defenses of the parties to be read by the Court during jury orientation and voir dire. This statement will be used to set the context

of the trial for the jury.

b. TRIAL BRIEFS

Each party shall serve and file a trial brief on all significant disputed issues of law, setting forth briefly the party's position and the supporting arguments and authorities.

c. VOIR DIRE

The Court will conduct the initial voir dire of prospective jurors. Counsel will be permitted a reasonable time to conduct supplemental voir dire following the questioning by the Court.

Proposed questions by counsel are to be submitted to the Court for review and approval. Counsel will be permitted to ask questions approved by the Court only, unless it develops during voir dire that additional questions on a particular point are necessary to insure impartiality of the jury.

d. JURY INSTRUCTIONS

Counsel shall file proposed jury instructions, verdict forms and interrogatories to the jury that are drafted to fit the facts of this case. Counsel should confer regarding their respective proposals in an effort to reach an agreement regarding as many jury instructions as possible. A joint submission shall be made indicating (1) agreed instructions; (2) instructions proposed by plaintiffs, but opposed by defendants; and (3) instructions proposed by defendants, but opposed by plaintiffs. Objecting counsel must state in writing specific objections citing authorities and any alternative instruction counsel considers more appropriate.

During trial or at the close of all evidence, the parties may submit supplemental requests for instructions on matters not anticipated prior to trial.

Counsel may provide the agreed-upon jury instructions to the Court in writing and on a 5.25" or 3.5" computer diskette. The diskette should be formatted for an IBM compatible computer. The Court is equipped with WordPerfect 6.1 for Windows. When submitting the disk to the Court, to avoid accidental erasure, counsel are advised to alert the security guards and avoid the x-ray machine.

4. CONTINUANCES

No party shall be granted a continuance of a trial or hearing without a written motion from the party or counsel stating the reason for the continuance, endorsed in writing by all moving parties and their lead counsel of record, and showing the consent of all other counsel or, if objected to, with the movant's certification of efforts to obtain such consent.

The Court will not consider any motion for a continuance due to a conflict of trial assignment dates unless a copy of the conflicting assignment is attached. The motion shall be filed within fifteen (15) days of counsel becoming aware of the conflict and not less than thirty (30) days prior to trial.

5. COURTROOM CONDUCT AND PROCEDURE

- a.** The Trial shall be conducted from 9:00 a.m. to 4:00 p.m., Monday through Friday.
- b.** When appearing in this Court, all counsel (including, where the context applies, all persons at counsel table) shall abide by the following:
 - 1.** Stand as Court is opened, recessed or adjourned.
 - 2.** Stand when the jury enters or retires from the courtroom.

3. Stand when addressing the Court. When making an objection, state the legal basis only. If a response is necessary, be brief, without making a speech. If it is **critical** to the case that counsel be heard in more detail, a bench conference may be called to explain the basis for an objection. Otherwise, bench conferences will not be permitted.
4. Stand at the lectern while examining any witness; except that counsel may approach the witness for purposes of handling or tendering exhibits.
5. Stand at the lectern while making opening statements or closing arguments.
6. Address all remarks to the Court, not to opposing counsel.
7. Avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill feeling between the litigants or witnesses.
8. Refer to all persons, including witnesses, other counsel and the parties by their surnames and not by their first or given names.
9. Only one attorney for each party shall examine, or cross examine each witness. The attorney stating objections, if any, during direct examination, shall be the attorney recognized for cross examination.
10. Prior to testifying, counsel shall place before the witness all exhibits to which he or she will testify; and, at the same time, copies of said exhibits shall be handed to opposing counsel.
11. Diagrams or exhibits should be drawn or marked by the witness before taking the stand.
12. Any witness testifying at the time of recess or adjournment must be back on the witness stand when the Court reconvenes. If a new witness is to be called, he/she must be standing in front of the witness box ready to be sworn.
13. In examining a witness, counsel shall not repeat or echo the answer given by the witness.
14. Gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

One copy of all filings set forth in this Order shall be delivered to Chambers at the time of filing with the Clerk.

IT IS SO ORDERED.

PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

Sample Form 42

JURY QUESTIONNAIRE

To be completed by jurors called to the courtroom of Judge Vaughn Walker, U.S. Dist. Ct., N.D. Calif. PLEASE PRINT YOUR ANSWERS.

PROPOSED TRIAL DATES: _____

ARE YOU AVAILABLE DURING THIS TIME? ____ YES ____ NO. IF NO,

WHY NOT? _____

YOUR NAME: _____

BIRTHDATE: _____ BIRTHPLACE: _____

EDUCATION: ____ HIGH SCHOOL ____ COLLEGE ____ GRADUATE SCHOOL

DEGREES _____

AREAS OF STUDY _____

SPOUSE: _____

SPOUSE'S OCCUPATION: _____

CHILDREN: _____

MILITARY SERVICE (Branch, Rank, Years of Service): _____

CURRENT JOB (Position, Dates or Length of Service, Duties)

PRIOR JOB (Position, Dates or Length of Service, Duties)

REGULARLY READ THESE NEWSPAPERS OR PERIODICALS: _____

ACTIVE IN THESE ORGANIZATIONS: _____

HOBBIES OR RECREATIONS: _____

PRIOR JURY DUTY: _____ YES _____ NO. IF YES, WHEN, WHERE AND TYPE
OF TRIAL _____

Sample Form 43

**HONORABLE NAPOLEON A. JONES, JR.
U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF CALIFORNIA
JURY QUESTIONNAIRE-CIVIL**

1. What is your business or occupation?
2. What is the business or occupation of your spouse if you are now married, or, your significant other?
 - (A) If you are divorced or if your spouse is deceased, what was his or her business or occupation during the marriage or during his or her lifetime?
3. Of whom does your family consist?
 - (A) If adult children, what is their business or occupations, and that of their spouse or cohabitating significant other, if any?
4. In what area of San Diego or Imperial County do you reside?
(Do not state your home address)
5. What prior jury experience have you had?
 - (A) How many civil cases have you tried? Did any of these cases go to the jury, and did you reach a verdict? (Answer **yes** or **no** as to whether or not you reached a verdict, **do not** state what the verdict was)
 - (B) How many criminal cases have you served on as a juror? What was the charge or charges filed against the defendant?
6. Have you, or any relative or close friend ever been a party or a witness in any lawsuit?
7. Do you have any acquaintances, friends, or relatives who are or have been involved in law-enforcement work such as:
 - (A) police officers
 - (B) agents of the FBI
 - (C) lawyers
 - (D) U.S. Attorneys
 - (E) judges
 - (F) probation officers
 - (G) immigration officers
 - (H) or other similar occupations?
8. Do you know of any reason why you cannot serve on this case and render a completely fair and impartial decision based solely upon the evidence received here in the courtroom during the course of the trial and the law of the United States of America as I shall state to you?

Sample Form 44

UNITED STATES DISTRICT COURT (Rev. 5/99)
DISTRICT OF MASSACHUSETTS

_____)	
Plaintiff(s)	)	NO.
)	
v.)	
)	
Defendant(s))	
_____)	

**Stipulation and Order for
Tailored Jury Trial**
_____, 20__

IMPORTANT DATES

FINAL PRETRIAL CONFERENCE DATE. _____ m., _____,
20__ (FPTC DATE).

TRIAL DATE. _____ m., _____, 20__ (TRIAL DATE). If the trial date has not been fixed by an earlier order, the court usually determines the TRIAL DATE during the Final Pretrial Conference and sets the trial for a Monday within 14 to 28 DAYS from the FPTC date.

OTHER IMPORTANT DATES. If blanks are not filled in, these dates are fixed at the bracketed time before or after the TRIAL DATE.

[TWO WEEKS] before the TRIAL DATE/_____, 20__
If Part VI applies, see VI.7, VI.9.

[ONE WEEK] before the TRIAL DATE/_____, 20__
If Part VI applies, see VI.8.

[TWO COURT DAYS] before the TRIAL DATE/_____, 20__
See III.A.1, IV.A.2, IV.B.1, V.A.2 If Part VI applies, see VI.8.

TWO COURT DAYS before EACH DAY OF TRIAL
See V.B.1

BEFORE TRIAL COMMENCES

See V.B.1

DAILY DURING TRIAL

See V.B.5, V.F.1

I. Statement of Aim

The aim of this Stipulation and Order is to create a set of procedures tailored to fit the distinctive characteristics of this case and "to secure the just, speedy, and inexpensive determination of [this] action," Fed. R. Civ. P. 1. The parties and the court intend

- (a) that "the mode and order of interrogating witnesses and presenting evidence" be such as will "(1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment," Fed. R. Evid. 611(a),
- (b) that "interim summations" by counsel be allowed from time to time as the presentation of evidence proceeds, in order to promote jury understanding of the evidence and the contentions of the parties, and
- (c) that, with the consent of the parties or upon motion and hearing under Fed. R. Civ. P. 42(b), the court may order phasing of the trial "in furtherance of convenience" or when "conducive to expedition and economy," *id.*, and may receive a separate verdict on one or more separate issues before other issues are tried to the same jury.

II. Stipulations

1. Recognizing the right of each party to insist that "the testimony of witnesses must be taken orally in open court," Fed. R. Civ. P. 43(a), the parties waive this right to the extent stated in this Stipulation and Order and agree that in this case direct

examination of each witness will be presented by affidavit, unless as to a particular witness an exception is allowed by the court under the provisions of this Stipulation and Order.

2. The parties agree that the time allowed to each party, for proceedings within each of the categories listed, will be as stated in this paragraph, subject to any modification ordered by the court upon a showing of good cause. Within each of the three categories of time allowances, a party may allocate the allowed time as it sees fit.

	<u>Plaintiff(s)</u>	<u>Group One Defendant(s)</u>	<u>Group Two Defendant(s) (If Any)</u>
A. Total for Opening State-ments and All Summations (in-cluding Interim Summations)	___ hours	___ hours	___ hours
B. Total for Exami-nation and Cross-Examination of All Witnesses	___ hours	___ hours	___ hours
C. Total for Making and Arguing Motions and Ob-jections Orally	___ hours	___ hours	___ hours
SUM	___ hours	___ hours	___ hours

TOTAL FOR THE CASE _____ hours
(exclusive of time for the court's instructions to the jury, which may be given in part as the case proceeds, as "interim instructions").

[Do the parties wish to propose any other stipulations? The parties may wish to consider agreeing upon a time-limited trial—see Part VI below—and upon shorter time limits than the court would otherwise impose.

Paragraphs 3-5, below, are examples of other terms the parties may consider.]

3. At any time more than 30 days before the trial begins either party may serve upon another party [or parties] [and file with the clerk] an offer of judgment. If within 10 days after the service of the offer a party upon whom the offer is served accepts by written notice served on the offeror, the clerk will enter judgment accordingly. An offer not accepted within this time is no longer open, and evidence of an offer not accepted is not admissible at trial. If the offer is not accepted and the judgment finally entered is not more favorable to the offeree, the offeree will be liable to the offeror for stipulated damages for the costs of trial, in the sum of _____ thousand dollars, which shall be included in the final judgment as an addition to or offset of the amount otherwise due (or as a net amount due if the offset exceeds the amount of a judgment otherwise to be entered against the offeror).

4. A jury of [8] will be selected. No alternates will be selected. The parties stipulate that if the court finds it necessary to excuse one or more jurors for cause after trial has commenced, the trial may proceed through deliberations to verdict as long as at least 5 qualified jurors remain.

5. If the deliberating jury consists of 5 persons, the verdict must be unanimous; if 6, a 5-1 verdict will be accepted; if 7, a 6-1 verdict; if 8, a 6-2 verdict.

III. Order Regulating Trial

A. Jury Selection

1. At least 2 court days before trial commences, counsel jointly (or each separately) must file for use by the court during voir dire a list identifying parties, lawyers, and witnesses. The lists must be over-inclusive rather than under-inclusive in case of any doubt, in order to avoid risks of loss of jurors during trial because of acquaintance with a person whose possible relationship to the case was not made known during voir dire.

2. [If para. II.4 is included in the Stipulations and defendants are separated into Group One and Group Two.] The plaintiff group will have 3 peremptory challenges and each of the two defendant groups will have 2 peremptory challenges. A panel of 15 will be seated and questioned by the court (including any voir dire questions proposed by the parties, either in advance or during voir dire, and found acceptable by the court). Whenever a panel member is excused for cause, another person will be called by the clerk to fill the vacant seat, and the voir dire will proceed. At the conclusion of voir dire, after 15 not subject to challenge for cause are seated, the court will invite each of the 15 panel members to speak about his or her personal background and experience (including such things as occupation, marital status, spouse occupation (if any), children, hobbies, reading interests). The parties will then deliver to the clerk in writing, simultaneously,

their peremptory challenges. The first 8, in order of seating, who are not challenged will be the jury.

IV. Proposed Jury Instructions

A. Preliminary Interim Instructions

1. Before testimony begins, the court will instruct the jury on the functions and roles of the jury and of counsel in the case, and on the jury's obligations to decide the case solely on the evidence presented, to refrain from discussing the case (with each other or anyone else), and to avoid contact with the parties and with published or broadcast accounts of the trial.

2. The court may also give preliminary instructions on the law applicable to the claims and defenses in the case. The court will advise the parties of its tentative decision on this matter before opening statements, and will offer the parties an opportunity to be heard. Any requests for preliminary instructions must be filed with the court at least 2 court days before trial commences.

3. The court may give interim instructions upon a determination of a need to do so to aid jury understanding. Requests by the parties for such instructions are invited, and the parties are encouraged to propose the content of requested instructions in written drafts.

B. Final Jury Instructions

1. The court will give the final charge orally and ordinarily expects to deliver a copy to the jury in writing. It will consist of the following components: (a) general instructions to guide the jury throughout its deliberations; (b) special interrogatories requesting the jury's findings on specific questions of fact and explanatory instructions on the law bearing specially upon the questions submitted in the special interrogatories; and (c) limiting instructions, including instructions as to evidence received against less than all the parties in the action. No general verdict will be requested. The court does not give, along with interrogatories, the type of instructions that are needed when the jury is to return a general verdict.

1(a). General Instructions: A draft of the court's proposed general instructions will be distributed on or before _____. Any objections or proposed amendments must be served and filed within ____ court days thereafter.

1(b). Special Interrogatories and Explanatory Instructions on the Law: Initial requests for special interrogatories and explanatory instructions on the law must be filed on or before _____.

2. Limiting Instructions: Limiting instructions may include instructions as to evidence received for a limited purpose or purposes, or against less than all the parties in the action. If the occasion for a limiting instruction can be anticipated, parties will be expected to have their requests prepared in advance in writing. If any evidence is received for a limited purpose, a party seeking the benefit of a limiting instruction in the court's final instructions will have the burden of assuring that a copy of the court's oral instruction is delivered to the Clerk for inclusion in the final charge, and in the case of documentary evidence, for attachment to the exhibit. A form that may be used with exhibits is attached to this order as "Exhibit A."

C. Jury Deliberation: All jurors selected and not excused for cause at any time after selection will deliberate and the verdict must be unanimous, unless the parties have stipulated otherwise with the approval of the court.

V. Procedure at Trial

A. Opening Statements

1. Opening statement by the plaintiff(s) will occur before any evidence is presented in the presence of the jury.

2. Opening statement by each defendant will occur immediately after plaintiffs' opening statement, unless one or more defendants have elected otherwise by notice filed and served at least two days before trial commences.

3. In a lengthy trial, the court may allow Interim Statements from time to time to allow counsel to clarify issues for the jury.

B. Evidence

1. Each party must give advance notice to the court and the other parties, before jury selection, of the identity of all witnesses whose testimony (by affidavit, by deposition, or by oral testimony in trial) it may offer during trial. At least two court days before it seeks to use the testimony of any witness, or on shorter notice for good cause shown, each party must advise the court and all other parties of its intent to use the testimony of the witness on the specified day. Except for good cause shown, no party will be allowed to use the testimony of a witness other than the witnesses already listed on the filings with the court before trial commences. Except for good cause shown, no party may introduce during direct examination documentary evidence other than those exhibits already listed with the court and furnished to the other parties before trial commences. These provisions with regard to documentary evidence do not apply to cross-examination.

2. Absent a showing of good cause, the court will not exercise its discretion under Fed. R. Evid. 611(b) to allow the subject matter of the cross-examination to extend beyond the subject matter of the direct examination and matters, admissible in evidence, affecting the credibility of the witness. A showing of good cause will also be required if the subject matter of the redirect is to be allowed to extend beyond matters covered on cross-examination. That a witness has come from a distance or will be unavailable later in the trial may be found to constitute good cause to allow a party to treat him or her as its witness during what would otherwise be cross-examination, and to extend the examination beyond the scope of direct.

3. Use of Depositions at Trial:

Except for good cause shown no deposition testimony may be introduced as direct examination, or during oral direct examination, other than those pages or portions thereof noted in previous filings with the court. This limitation does not apply to the use of deposition testimony in cross-examination.

4. Stipulations may be read at any time, unless otherwise ordered in a particular instance upon a showing of good cause.

5. At least one-half hour before commencement of trial each day, counsel must furnish the court reporter with a copy of any document from which counsel intends to read that day, except depositions to be read by two people in question and answer form. Documents to be used during cross-examination are excepted.

6. Whenever a single person is reading deposition testimony, in order to enable jurors and the reporter to understand clearly, the reader will say "Question" before each question is read and "Answer" before each answer is read.

7. All documents or other non-testimonial evidence that will be admitted at least in part without objection are to be pre-marked as numbered exhibits. To effect the pre-marking and to avoid duplicative numbering, each of the parties will assign consecutive numbers to these documents, as follows: Plaintiff(s), 1-500; Group One Defendant(s), 501-999; Group Two Defendant(s), 1001-1,500. The term "Exhibits" is to be used only for documents or objects that are to be received without objection or have been received in evidence by court order over objection.

The term "Marked Items" will be used for documents and other items (for identification as they are referred to in the proceedings) that are not Exhibits. A lettering system must be used by each of the parties to pre-mark, as Marked Items (for identification), each piece of non-testimonial evidence it will offer to which objection has been made by the party against whom the document is sought to be admitted. The clerk will supply the parties with stickers to be used in pre-marking documents and other non-testimonial evidence, either as Exhibits or as Marked Items (for identification).

C. Objections, Motions to Strike, and Conferences Out of the Hearing of the Jury

1. Counsel have the court's permission at all times to interrupt proceedings merely to object or move to strike. Counsel need not state the ground(s) of objection unless the court asks for the ground(s), but (unless the court orders otherwise in a specific instance) counsel may without invitation by the court state the ground(s) merely by reference to a Rule designated by number, among the Federal Rules of Evidence. Also, unless otherwise ordered (as may be done, for example, when the court interrupts to sustain an objection because valid grounds are obvious), counsel may state the grounds in customary legal jargon (e.g., "hearsay," "irrelevant," "lack of essential foundation"). Counsel are not to go beyond a bare statement of the ground(s) in one of these ways; supporting or opposing arguments will not be stated in the hearing of the jury without the court's permission.

2. Offers of proof ordinarily will be received only after the jury has been excused for a recess or for the day.

3. Conferences out of the hearing of the jury will be held to a minimum. They will never occur at the beginning of a court day unless that timing is unavoidable. When the court has directed jurors to be present at a designated hour, counsel asking for a conference out of the hearing of the jury at that hour will be required to show good cause why the need should not have been anticipated so the jury could have been released early the preceding day and why the conference cannot be deferred until the end of the current day, or at least until the next recess.

4. Short conferences out of the hearing of the jury may be held at the side bar farthest from the jury box. The jury will be sent to the jury room if a more extended conference out of their hearing is required. The jury will be instructed to interrupt and tell the court immediately if any of the conversation at a side-bar conference is loud enough for any of them to hear.

D. Rules of Proof

1. The objection of interrogating counsel to an answer that is nonresponsive will usually be sustained. Objections by other counsel solely on the ground that an answer is nonresponsive will usually be overruled. Sustaining such an objection is likely to lead to a new question that elicits exactly the same information as was stated in the struck answer, and time is wasted. Of course, if some other valid ground of objection is added, a statement that the answer was nonresponsive may be needed and appropriate to explain why no objection was made to the question.

2. The court ordinarily will not instruct a witness to "answer YES or NO" to (1) a multiple question, (2) a question that requires the witness to make or accept an inference or characterization rather than merely acknowledging or denying an observable fact, or (3) a question that is argumentative in form or in substance.

3. Questions framed to have more impact as arguments than as requests for testimony that the witness is competent to give are out of bounds. They will be excluded on objection and may be excluded on the court's initiative, without objection.

4. Ordinarily, questions asking one witness to comment on the credibility of another are out of bounds. A lawyer who wishes to ask such a question must make a request out of the presence of the jury for leave to do so.

[Do counsel wish to propose other Rules of Proof for this trial?]

E. Schedule

1. The court will aim for conducting this trial __ a.m. to __ p.m. Monday-Friday.

2. This case will not be in trial on the following days: [Holidays and other days specially committed].

F. Sequestration of Witnesses

A person who is expected to testify as a witness in this civil action must not be present in the courtroom during the presentation of evidence (or have access to a transcript or summary of that evidence) except as follows:

1. Professional persons engaged by a party or its counsel for the purpose of offering testimony as witnesses having specialized knowledge or experience may be present whenever evidence is being received, unless otherwise ordered.

2. One representative of each party, designated by counsel to the court in advance of the trial as that party's representative, may be present throughout the trial.

3. A person who has testified and who is not expected to testify again for any party may be present in the courtroom after his or her testimony has been completed, but that person must not state or

summarize his or her own testimony or the testimony of others to prospective witnesses.

4. Counsel must not state or summarize the testimony of others to any prospective witness (other than one within paragraph 1) and must not permit a prospective witness (other than one within paragraph 1) to read transcripts or summaries of previous testimony of other witnesses.

G. Miscellaneous Matters

1. Documents filed in court during trial: A party filing a document in court rather than in the Clerk's Office must file, with the original, a copy of the first page. Each document will be given a docket number by the clerk.

2. All discovery is concluded.

3. Jurors will be permitted to take notes. Instructions will be given in the form of Exhibit B.

4. Drafts (not final) of interrogatories to the jury and the Charge will be distributed soon after requests of counsel have been filed (in accordance with Part IV-B above) and have been considered by the court. A final conference on the verdict and the charge will occur promptly after the evidence is closed and before arguments begin. The court expects that extensive consultation will have occurred previously and that this conference will be brief. Any requests or objections made to preserve a contention for appeal must, of course, be made after the charge has been given and before the jury commences deliberations.

VI. Time Limits

These provisions regarding Time Limits apply only if the court specifically so orders. The other provisions of this Order Regulating Jury Trial ordinarily assure a trial of reasonable length. The court expects to invoke Part VI only if finding it likely that the trial would be longer than [5] court days without these provisions.

1. Time limits provide an incentive to make the best possible use of the limited time allowed. The limits that the court may order, absent agreement, will not be as stringent as those the parties might agree would serve their mutual interests in achieving a shorter, less expensive, and better quality trial. The court encourages the parties to agree on limits before the procedures described immediately below are implemented.

2. Absent agreement of the parties to time limits that are approved by the court, the court will order a presumptive limit of a specified number of hours for this trial, to be allocated equally between opposing parties (or groups of aligned parties) unless otherwise ordered for good cause.

3. A request for added time will be allowed only for good cause. An explicit purpose of this provision is to create an incentive for using time exclusively on issues material to disposition on the merits.

4. In determining whether to allow a motion of any party for an increased allotment of time, the court will take into account (a) whether or not that party has used the time from commencement of trial forward in a reasonable and proper way, in compliance with all orders regulating the trial, (b) the party's proffer with respect to the way in which the added time requested would be used and why it is essential to fair trial, (c) any other facts the party may wish to present in support of the motion, if determined by the court to be material, and (d) any opposing submission. The court will be receptive to motions for reducing or increasing allotted time to assure that allotments are fair among the parties and adequate for developing the evidence. Any party that makes only proper use of its time throughout the trial is assured that an extension will be allowed if more time is needed to present all its material and admissible evidence adequately.

5. Presumptive allotments of time to a party will be stated as a total number of hours available to that party, rather than allocations of times for particular witnesses or proceedings. Thus, each party will be free, without a showing of good cause, to allocate time as that party chooses among different uses—opening statement, direct and cross-examination of various witnesses, closing argument, objections, and motions—as long as the party's total allotment is not exceeded.

6. Time taken to argue objections will be charged against the time allocation of the party against whom the court rules, and will be allocated between parties if the court rules partly for and partly against the objecting party.

7. Not less than [TWO] WEEKS before the TRIAL DATE, each party (or group of aligned parties) must serve on the opposing party (or group of aligned parties) and file its NOTICE OF DIRECT EXAMINATION (1) listing its witnesses and an estimate of the time to be used in direct examination of each witness, (2) listing the precise pages and lines of any deposition testimony to be offered during the case in chief, with time estimates for reading that testimony into evidence, (3) affidavits of any expert witnesses whose depositions have not been taken, fairly summarizing the substance of their expected testimony, fully disclosing every opinion to be expressed, and estimating the time of direct examination, and (4) listing all the exhibits it intends to offer and an estimate of time, if any, to be used in publishing each exhibit to the jury. If the expected content of direct examination and exhibits has not previously been disclosed, the

NOTICE must include a fair summary of the content of each direct examination and each exhibit.

8. Not less than [ONE] WEEK before the TRIAL DATE, each party (or group of parties) must serve and file its NOTICE OF CROSS-EXAMINATION estimating time to be used in cross-examination of each of the opposing party's listed witnesses. If any party, after seeing an opposing party's NOTICE OF DIRECT EXAMINATION, proposes to call additional witnesses or offer additional exhibits, it must, when serving and filing its NOTICE OF CROSS-EXAMINATION, also serve and file a SUPPLEMENTAL NOTICE of DIRECT EXAMINATION, including time estimates. An opposing party's SUPPLEMENTAL NOTICE OF CROSS-EXAMINATION must be filed not later than TWO COURT DAYS BEFORE THE TRIAL DATE.

9. The parties are encouraged to confer and agree upon witness and exhibit lists and time limits for direct and cross-examination, and to file a stipulation not less than TWO WEEKS before the TRIAL DATE in lieu of the separate submissions otherwise required by paragraphs 7 and 8.

Part VI, Time Limits,

_____ does apply to this case.

_____ does not apply to this case.

Date Ordered: _____

United States District Judge

EXHIBIT A

EXHIBIT MARKING SLIP

The attached document or object is Exhibit No. ____.

Instructions to the Jury:

You may consider this document or object as evidence only with respect to any party whose name is checked below. You may not consider this document or object as evidence with respect to any party whose name is not checked. If any limited purpose is set forth below then you may consider this document or object for that limited purpose only. If no limited purpose is set forth below, then you may consider this document or object for all purposes.

Party

Plaintiff(s)

Group One Defendant(s)

Group Two Defendant(s)

Limited Purpose

EXHIBIT B

INSTRUCTIONS TO JURORS ON NOTE-TAKING

Members of the Jury:

You have the permission of the court to take notes during the evidence, the summations of attorneys at the conclusion of the evidence, and during my instructions to you on the law.

In many courts—probably in most—jurors are not permitted to take notes. The reasons are concerned with fear that taking notes may cause the jury, as a whole, to be less effective in serving as a completely fair and impartial factfinder. Because of the potential usefulness of taking notes, you will be permitted to take notes in this trial. For the purpose, however, of protecting against the possible disadvantages that have led many courts to order that notes not be taken, I am instructing you to observe the following limitations:

1. Note-taking is permitted, not required. Each of you may take notes. No one is required to take notes.
2. Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.
3. Be brief. Over-indulgence in note-taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note-taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made an observation itself.
4. Your notes are for your own private use only. Do not use your notes, or any other juror's notes, as authority to persuade fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. Notes are valuable as a stimulant to your memory. They are personal memory aids, as are the notes of the judge and the notes of the lawyers. Each of us, including each of you, might make an error in observing, and might make a mistake in recording what we have seen or heard. You are not, therefore, to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

5. Do not take your notes away from court. At the end of each day, please place your notes in the envelope provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened. At the conclusion of the case, after you have used your notes in deliberations, a court officer will collect and destroy them, to protect the secrecy of your deliberations.

United States District Judge

Sample Form 45

**UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF IOWA**

JUDGE PAUL A. ZOSS'S VOIR DIRE

The following are Judge Zoss's jury selection procedures.

1. Approximately twenty-five randomly-selected potential jurors will be notified to appear at the courthouse at 8:30 a.m. on the first day of trial. About a week before trial, the attorneys will receive from the Clerk of Court a list of the potential jurors, together with copies of their jury questionnaires. The attorneys also will receive a list of the first fourteen potential jurors in the order in which they were randomly drawn. The court will be provided with a separate list of all of the potential jurors in the order in which they were randomly drawn.
2. The first fourteen preselected potential jurors will be seated in order in the jury box, and will be the potential jurors first considered for impanelment on the jury.
3. At 9:00 a.m., the Clerk of Court will open court.
4. Judge Zoss will greet the jury, counsel, and the parties; announce the name of the case to be tried; and ask counsel if they are ready to proceed.
5. The Clerk of Court will swear in the entire jury panel.
6. Judge Zoss will make some introductory remarks to the jury about the jury selection process.
7. Judge Zoss will ask the entire jury panel if they are aware of any circumstance that might prevent their service on the jury, and may excuse anyone for whom he believes jury service would be an undue burden.
8. Judge Zoss will make some brief opening remarks, and will read a statement of the case.
9. Judge Zoss will introduce the courtroom staff. He then will ask the attorneys to identify themselves, the members of their firm, their clients, and the witnesses they expect to call at trial.

10. Judge Zoss will engage the potential jurors in the jury box in an extensive voir dire, which will include individual questioning of each potential juror concerning his or her family and employment, and also may include questions for the panel requested by a party who has filed a timely pretrial request for voir dire.

11. After Judge Zoss has completed his questions, each side will be permitted to conduct up to one-half hour of jury voir dire. A request for additional time for attorney voir dire because of the complexity or unusual nature of a case, or in multi-party cases, should be made at the final pretrial conference.

12. The parties will be permitted to challenge any potential juror for cause. These challenges may be made at the side-bar. If a potential juror is excused for cause, he or she will be replaced by the next potential juror on the jury list, who then will undergo the same questioning as the other potential jurors. There will be fourteen potential jurors remaining in the jury box at the conclusion of voir dire.

13. The Clerk of Court will give counsel for the plaintiff(s) a list of the names of the potential jurors. Counsel for the plaintiff(s) is to draw a line through one of the names, note in the margin, "Plaintiff's first peremptory challenge," and then state aloud, "Exercised." The Clerk of Court then will take the list and hand it to counsel for the defendant(s), who is to draw a line through one of the names, note in the margin, "Defendant's first peremptory challenge," and then announce aloud, "Exercised." This procedure will be repeated until each side has exercised three peremptory challenges and eight jurors remain in the jury box.

14. The names of the eight remaining jurors will be announced by the Clerk of Court. Those persons will be placed in the jury box and will constitute the jury in the case. The rest of the panel will be excused.

15. The Clerk of Court will swear in the jury.

16. THERE ARE NO ALTERNATE JURORS. ANY VERDICT MUST BE UNANIMOUS. During trial, if any of the eight jurors has to be excused from jury service for any reason, the case can be decided by as few as six jurors.

17. Upon stipulation of the parties, the verdict can be less than unanimous or decided by fewer than six jurors, or both.

18. Upon the request of any party, Judge Zoss will consider modifying jury selection procedures in a particular case. Such modifications include, but are not limited to, a twelve-person jury or an increase in the number of peremptory challenges.

Sample Form 46

Civil Jury Trial Checklist

NOTE: Roll will have been taken, and the appropriate number of prospective jurors will have been seated in “the box” in front of the bar.

1. Call case. Are the parties present and ready?

2. The entire jury panel will please stand and be sworn for examination on voir dire.

3. Ladies and gentlemen, the court will now ask you questions to determine whether you can sit as fair and impartial jurors in this case. I hope you understand that these questions are not intended to embarrass you or to pry into your personal affairs. If your answer to a question is “yes,” please raise your hand so that additional questions can be asked. If the answer to a question is “no,” you need do nothing; we will assume by your silence that your answer is no. Those jurors who have not been seated in “the box” should listen closely to these questions, because you may be seated in “the box” if other prospective jurors are excused. If in response to any question you would feel more comfortable responding to the court at the bench, please let me know.

4. The case which will be tried today is entitled _____ vs. _____. The plaintiff claims _____ which occurred on _____ at _____. The defendant denies any responsibility for the damages claimed by plaintiff.

a. Have any of you ever seen or heard anything about this case from any source whatsoever? (I take it by your silence that none of you have.)

b. The plaintiff is seated at counsel table. Mr./Ms. _____, will you please stand. Do any of you know the plaintiff? Plaintiff is represented by _____. Mr./Ms. _____ is a member of the firm of _____. Do any of you know Mr./Ms. _____ or any member of their firm on a social or professional basis? (Or introduce the attorney and let him introduce his client.)

c. The defendant is seated at the other counsel table. Mr./Ms. _____, will you please stand? Do any of you know the defendant? Defendant is represented by Mr./Ms. _____. Mr./Ms. _____ is a member of the firm of _____. Do any of you know Mr./Ms. _____ or any member of their firm on a social or professional basis?

d. I am going to read a list of witnesses who may be called during this trial. Please raise your hand if you know any of these persons (read list).

e. I have briefly described the nature of this case. Have you, any members of your family or close friends ever been involved in a (insert appropriate facts). When did the accident take place? Who was driving? Who was hurt? How badly? Was any claim made for injuries? Was there litigation? Do you feel that this accident might have some bearing on your judgment if you were chosen as a juror in this trial?

f. The plaintiff claims the following injuries: _____. Have you, any member of your family or close friends ever sustained similar injuries?

g. Have any of you, any member of your family or close friend ever been a plaintiff or a defendant, or a witness in any lawsuit other than a domestic relations or a probate proceeding?

h. Do any of you have strong feelings either for or against a party who brings a personal injury suit?

i. Do any of you not drive a car?

j. Is there anything which has occurred to any of you or are there any facts which you think we should know about which might have a bearing on your judgment in this case?

k. Do all of you understand that this is a civil case which is to be decided by the relative weight of evidence on each side? And that this is different from a criminal case where the government has to prove its case beyond a reasonable doubt?

1. Do all of you understand that you are to wait until all the evidence has been presented and you have been instructed as to the law which is to be applied before making up your minds as to any fact or issue in this case?

m. (If you were either the plaintiff or the defendant, would you be willing to have six jurors with the same frame of mind that you now have sit in judgment in your case?)

n. This case is expected to take ____ days. Would the length of the trial create an undue hardship for any of you?

o. Do any of you have any other reasons whatever, such as a physical defect, a health problem or home problems which might interfere with your serving as fair and impartial jurors in this case?

p. Pose questions submitted by counsel.

5. Ladies and gentlemen, on the easel you will see a number of questions. (See jury questions at end of checklist.) Starting with _____, please stand and answer the questions. The last question asks you about your service on prior juries. With respect to civil cases, please indicate the nature of the subject matter involved in each of the civil juries you have been on.

Do counsel have any additional questions to be presented to panel? **Do counsel pass the panel?**

6. (After the court has finished voir dire) Those jurors who have not been called forward and seated in “the box” are excused subject to call by the jury clerk. Thank you for assisting us in this selection process.

7. Ladies and gentlemen, we will now take a 15 minute recess while counsel are selecting those of you who will serve as jurors on this case. I admonish you not to discuss this case among yourselves or with anyone else during the entire course of the trial. NOTE: Any *Batson* challenge should be asserted at this time so that, if necessary, corrective action can be taken before seating the jury.

8. (After recess) The record may show the presence of the defendant and the presence of the jury panel of __ with roll call waived. The clerk will please read the names of the jurors selected to try this case. As your name is called, please come forward and be seated as directed by the bailiff.

9. Those members of the jury panel who were not selected as trial jurors are excused subject to call by the jury clerk. Thank you for assisting in this jury selection process.

10. Will those who have been chosen as jurors in this case please stand and be sworn.

11. Admonition and instructions to jury prior to the commencement of a civil case.

Admonitions and General Instructions to Jury Prior to
Commencement of Civil Case

Ladies and gentlemen, you have been sworn as the jury to try this case. I take this opportunity to explain to you your function and duties, the role of the court, and the part the lawyers will play in the trial.

You and I are to be the judges in this case. You are the judges of the facts. I will decide all questions of law that arise during the trial. At the conclusion of the trial, I will instruct you on the law governing this case.

You must not discuss this case among yourselves or with anyone else during the course of the trial. You are not to permit anyone to talk about the case within your hearing. You are to avoid visiting the scene of any incidents referred to in the trial.

You must not form any opinion regarding any fact or issue in the case until you have received the entire evidence, have heard arguments of counsel, have been instructed as to the law of the case, and have retired to the jury room.

In order that you decide this case only upon the evidence presented, I direct you not to read, listen to, or observe any newspaper, radio or television account of the trial while it is in progress.

You must avoid even the *appearance* of any improper conduct. In this regard, I caution you not to talk with any of the parties, lawyers, or witnesses in the case at any time during the trial, even upon matters

unconnected with the case. Should anyone approach you about the case in any manner, report it promptly to me or to one of the bailiffs.

From time to time I will be asked to rule on the admissibility of evidence or the propriety of questions asked of witnesses. You are not to be concerned with the reasons for the court's rulings. You must not attempt to draw any inference in favor of either side, because the rulings will simply be based upon the law.

In our adversary system, it is the duty of the lawyers to present their client's case in its most favorable light. You must remember, however, that arguments and comments of counsel are not evidence in the case and must not be treated by you as evidence.

You will be the sole judges of the credibility of witnesses and the weight to be given to the testimony of each of them. You may consider each witness's ability and opportunity to observe, their manner while testifying and any interest they may have in the case.

You will be permitted to take notes during the trial—for your use only—don't be too detailed. The court will maintain custody of the notes during recesses and they will be destroyed after the trial has concluded.

You are not permitted to ask questions of witnesses. However, if you have a question relating to any significant matter, write it out and give it to the bailiff so that it may be brought to the court's attention.

(Include if appropriate) If any of you from out of town have any questions concerning accommodations, transportation or other arrangements, please see the bailiff during the recess.

On our staff we have a bailiff. If you need anything, the bailiff will assist you.

At this time, I would like to introduce the court staff to you.

Making a verbatim record of the trial proceedings is our court reporter _____.

Swearing in all witnesses, keeping the exhibits in order and entering all minutes relating to the trial is our courtroom deputy clerk _____.

Finally, to assist in the smooth function of this trial is my law clerk and courtroom bailiff _____.

12. Rule of Exclusion of Witnesses. Will all the witnesses please come forward and give your names to the clerk. (Note: more dignity is given to the oath if each witness is sworn individually just before he testifies. This procedure is recommended.)

To Witnesses: Ladies and gentlemen, the rule of exclusion of witnesses has been invoked in this case. This means that you are to remain outside the courtroom during the entire progress of this trial except when you are called to the witness stand. You are not to discuss your testimony with anyone except counsel and then, only when no one else is present, until after the trial has been completed. You may now leave the courtroom until you are called by the bailiff to testify.

13. Opening statements of counsel.

14. Short Admonition to Jury. Ladies and gentlemen, we will now take a short recess. Please remember the admonition given to you by the court about not discussing this case or forming any conclusions until after all of the evidence is in. You are to be back in the jury box at _____.

Admonition at Noon and Evening Recess. Ladies and gentlemen, we are now going to take the noon (evening) recess. Please remember the admonition given to you by the court about not discussing any aspect of this case with anyone. You are not to make up your mind as to any fact or issue until all the evidence has been presented and the case is finally submitted to you. You are to avoid visiting the scene of any incident that may have been referred to in the evidence. I instruct you not to read, listen to, or observe any newspaper, radio or television account of this trial while it is in progress. Please be back in the jury box at _____. (The audience will remain seated while the jurors retire from the courtroom.)

15. (After each recess) The record may reflect the presence of the jury with roll call waived.

16. Presentation of evidence.

17. Settlement of instructions—permit counsel to make record in absence of jury. (See Fed. R. Civ. P. 51)
18. Arguments of counsel.
19. Instruct the jury. (NOTE: Consider instructing jury before counsel present closing arguments.)
20. Do counsel have any additions or corrections to the instructions.
21. Designate by lot, then dismiss and thank alternate juror.
22. The clerk will please swear the bailiffs.
23. The bailiffs will conduct you to the jury room. Ladies and gentlemen, if you have any questions during your deliberations which pertain to the evidence, the instructions or the verdicts, please write them out and give them to the bailiff. You need not write out requests for coffee, phone calls or for care of your car. (Give anticipated time for meal, if appropriate.) The jury will now retire to deliberate.
24. (After jury returns) Ladies and gentlemen, have you reached a verdict? (Foreman hands verdict to bailiff, who gives it to the court. The court reads it and hands it to the clerk.) The clerk will please read and record the verdict.
25. Does either counsel wish to have the jury polled?
26. Ladies and gentlemen, thank you for your services in this case. I am proud of the fact that citizens such as yourselves are willing to serve on juries. The jury is dismissed.

Release Jurors
From Admonitions

Sample Form 47

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

Judge Vaughn R. Walker

Guidelines for Preparation of Jury Instructions

The purpose of jury instructions is to inform jurors of the legal principles they must apply in deciding the case. It is essential, therefore, that instructions be written and organized so that they will be understood by the jurors. To this end counsel are requested to follow these guidelines in preparing jury instructions.

The court has prepared standard procedural instructions for civil and criminal cases which can be found in the Ninth Circuit Manual of Model Jury Instructions. Counsel may request revisions, additions or deletions in the standard instructions appropriate for the case. There will ordinarily be no need, however, to submit procedural instructions.

Substantive instructions should be submitted as directed by the order for pretrial preparation. Counsel may submit both preliminary instructions and instructions to be given at the close of the case. Verbatim copies of Devitt & Blackmar or other pattern instructions will ordinarily not be accepted. Instructions should be drafted for the particular case. This means that their text will be confined to what the jury needs to decide that case.

Instructions should be organized so as to state, first, the essential elements of the offense, claim or defense, followed by explanation or clarification of each element as needed in light of the facts of the case. Commonly, the explanation will give the jury the relevant factors to be considered.

The instructions as a whole should be organized into a logical sequence conforming to the analytical approach the jury should take to the case. It is well to explain this organization to the jury in the instructions and to provide transitional statements.

If the instructions cover controversial points of law, those should be discussed, with citation of authorities, in a brief accompanying memorandum.

In drafting instructions, counsel should follow these guidelines:

1. Instructions should be an accurate statement of the law;
2. Instructions should be as brief and concise as practicable;
3. Instructions should be understandable to the average juror;
4. Instructions should be neutral, unslanted and free of argument.

Counsel should avoid submitting formula instructions, statements of abstract principles of law (even if taken from appellate opinions), lengthy recitations of the parties' contentions, additional cautionary instructions (unless clearly required), and instructions on permissible or prohibited inferences (this will normally be left to closing argument).

Sample Form 48

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Judge Sterling Johnson, Jr.

CHAMBERS
(718) 260-2460
Courtroom Deputy Clerk
August Marziliano
(718) 260-2465

Memorandum To Counsel - By The Hon. Sterling Johnson, Jr.

Re: Expectations And Requirements For Trials

1. Trial sessions will begin promptly.
2. Counsel should be prepared with witnesses to proceed continuously to the end of trial without interruption.
3. Applications: If counsel has any applications to make before testimony begins at any trial session, (s)he should alert his or her adversary and notify the courtroom deputy clerk well before the judge takes the bench.
4. All counsel shall remain seated and attentive while a witness is being sworn.
5. Counsel will question all witnesses from behind the lectern and should approach a witness only with permission of the court.
6. Objections: a) Counsel should rise when making objections or addressing the Court. b) In making objections, counsel should initially state that (s)he objects and the broad ground for the objection, e.g., leading, argumentative, irrelevant, etc. If argument is needed, the Court will request it or, if the significance of the objection is not clear, the counsel should ask for a side bar conference. There should be no argument on objections before the jury.

7. Learned Treatises: In all cases in which counsel intends to read statements from "learned treatises" to the jury pursuant to Fed. R. Evid. 803(18), the following procedure should be followed:

a. Copies of any statements to be used shall be marked and designated in the same manner as exhibits in the Pretrial Order. At trial the court shall be provided with an extra copy of each statement to be read to the jury.

b. Before reading the statement, counsel will indicate to the Court, out of the jury's hearing, how the statement has been established as a reliable authority.

These requirements do not apply to impeachment on cross-examination by textbook or treatise material acknowledged by the expert witness to be a reliable authority.

8. Documentary Exhibits: All documents to be offered in evidence which contain multiple pages shall be paginated by proposing counsel in advance of trial. Where it is anticipated that a witness will refer to documentary evidence in the course of his or her direct testimony, proposing counsel is strongly advised to have copies of the document available for opposing counsel, each juror and the court.

Dated: Brooklyn, New York
_____, 20__

Sterling Johnson, Jr.
United States District Judge

Sample Form 49

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

Judge Vaughn R. Walker

Procedure for Presentation of Direct Testimony by Written Statement

In bench trials the court expects counsel to prepare and exchange a narrative written statement for each witness whose direct testimony will involve considerable expository matter but no significant issues of credibility. These witness statements shall be used at trial in accordance with the following procedure.

Form of statement. For each witness whose direct testimony will be presented in statement form, counsel shall prepare a statement setting forth in declaratory form all of the facts to which that witness will testify. The facts shall be stated in narrative form, not by question and answer. The statement shall contain all of that witness's direct testimony so that a person reading it will know all of the relevant facts to which the witness would testify. It shall not be sworn or notarized.

Use of statements. At the trial, each witness whose direct testimony has previously been submitted in statement form shall take the stand and under oath shall adopt the statement as true and correct. The party offering that witness shall then offer the statement as an exhibit, subject to appropriate objections by the opposing party on which the court will then rule.

The witness will then be allowed to supplement his/her statement by any additional live direct testimony considered necessary by counsel.

Thereafter cross-examination shall proceed in the ordinary course, followed by redirect, etc.

Exceptions to use of statements. Statements will be required of the parties and other witnesses under their control, such as employees, contractors, experts, associates, etc. They are not to be used for adverse parties or for persons whose attendance is compelled by subpoena.

Exhibits. Documents to be offered as exhibits shall not be attached to witness statements but shall be pre-marked and exchanged along with other proposed exhibits in the usual fashion.

Schedule for exchange of statements. Ordinarily, witness statements will be exchanged one week in advance of the pretrial conference. The court will set dates for the serving and filing of witness statements in connection with the pretrial schedule.

Sample Form 50

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____x **STANDARD**
 REFERRAL ORDER
_____x **CV**_____

The civil case hereinabove set forth is referred to Magistrate Judge _____ for the following pretrial purposes:

_____ All of the following;

or

Those purposes indicated below:

_____ 1. To enter the scheduling order provided for in Fed. R. Civ. P. 16(b);

_____ 2. To consider holding a discovery conference and entering the related order provided for in Fed. R. Civ. P. 26(f);

_____ 3. To hear and determine any disputes arising from discovery;

_____ 4. To hear and determine any other pretrial matters to the extent allowed by 28 U.S.C. § 636(b)(1)(A);

_____ 5. To consider the possibility, if any, of settlement and to assist therewith as may be appropriate;

_____ 6. To prepare a pretrial order where such order seems indicated;

_____ 7. To schedule an appropriate trial date, in consultation with the chambers of the undersigned;

_____ 8. To file a report with the undersigned within 120 days [] as to the status of the case, in the event the tasks set forth above are not then completed.

_____ 9. _____

_____ 10. _____

SO ORDERED.

U. S. D. J.

Dated: Brooklyn, New York

_____, 20____.

Sample Form 51

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

IN RE: UNITED STATES MAGISTRATE JUDGES

ORDER OF GENERAL REFERENCE

Pursuant to 28 U.S.C. § 636(a) and (b), the following cases are hereby ORDERED referred to those United States Magistrate Judges who are authorized to perform in any such case any and all functions authorized for full-time United States Magistrate Judges by Local Rule 26 of the United States District Court for the Southern District of Alabama as now effective or hereinafter amended. In each such case, the Magistrate Judges shall proceed in accordance with Rule 72, FED.R.CIV.P. In the event the parties in any such case consent to proceed to trial and judgment before the Magistrate Judges pursuant to 28 U.S.C. § 636(c), the Magistrate Judge is hereby AUTHORIZED to proceed in such cases in accordance with the applicable statutes, Rules 73, 74, 75 and 76, FED.R.CIV.P., and Local Rule 26. The referred categories of cases are:

1. All appeals from decisions of the Secretary of Health and Human Services regarding Social Security benefits including applications for attorney's fees after a successful appeal.
2. All misdemeanor cases unless or until the person charged with the misdemeanor elects to be tried before a Judge of this Court, pursuant to 18 U.S.C. § 3401(b).
3. All prisoner cases filed pursuant to 42 U.S.C. § 1983.
4. All prisoner cases filed pursuant to 28 U.S.C. § 2254, except those cases where the petitioner was sentenced to death.
5. All procedural or discovery motions or other pretrial matters in a civil or criminal case, other than the motions which are specified in 28 U.S.C. § 636(b)(1)(A) and motions for extension of discovery deadlines.
6. All procedural or discovery motions or other pretrial matters in a civil case pending before Senior Judge Virgil Pittman.

7. Any motion or request for the Court to enter an order to withdraw registry funds in the following proceedings:
- a. Civil cases disposed of by a Magistrate Judge pursuant to 28 U.S.C. § 636(c);
 - b. Misdemeanor and petty offense cases disposed of by a Magistrate Judge pursuant to 18 U.S.C. § 3401; 28 U.S.C. § 636(a)(3);
 - c. Bail release proceedings in which a Magistrate Judge has ordered bail money to be deposited into court pursuant to 18 U.S.C. § 3141, et seq; 28 U.S.C. § 636(a)(2); and
 - d. Pretrial matters referred to the Magistrate Judge for determination pursuant to 28 U.S.C. § 636(b)(1)(A).

In each of the above-described cases, this order shall act as a reference to the Magistrate Judges and no further order of reference need be prepared or docketed by the Clerk. The Clerk shall advise the parties in each such case of this General Order of Reference, the identity of the Magistrate Judge assigned, and of their right to consent to final disposition by the Magistrate Judges under 28 U.S.C. § 636(c).

IT IS SO ORDERED, this 27th day of September, 1991.

<s>

ALEX T. HOWARD
CHIEF UNITED STATES DISTRICT JUDGE

<s>

CHARLES R. BUTLER, JR.
UNITED STATES DISTRICT JUDGE

<s>

RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

<s>

DANIEL H. THOMAS
SENIOR UNITED STATES DISTRICT JUDGE

<s>

VIRGIL PITTMAN
SENIOR UNITED STATES DISTRICT JUDGE

<s>

WILLIAM BREVARD HAND
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court Northern District of Mississippi

NOTICE, CONSENT, AND ORDER OF REFERENCE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

Plaintiff

v.

CASE NUMBER:

Defendant

NOTICE OF AVAILABILITY OF A UNITED STATES MAGISTRATE JUDGE TO EXERCISE JURISDICTION

In accordance with the provisions of 28 U.S.C. § 636(c), and FED. R. CIV. P. 73, you are hereby notified that a United States Magistrate Judge of the Northern District of Mississippi is available to conduct any or all proceedings in this case, including a jury or non-jury trial, and to order the entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

You may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge shall be taken directly to the United States Court of Appeals for the Fifth Circuit in the same manner as an appeal from any other judgment of a district court.

CONSENT TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. § 636(c), and FED. R. CIV. P. 73, the parties in this case hereby voluntarily consent to have a United States Magistrate Judge conduct any and all further proceedings in the case, including trial, order the entry of a final judgment, and conduct all post-judgment proceedings.

Signatures

Party Represented

Date

ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case be referred to the Honorable _____, United States Magistrate Judge, for all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c), FED. R. CIV. P. 73, and the foregoing consent of the parties.

DATE

UNITED STATES DISTRICT JUDGE

NOTE: RETURN THIS FORM TO THE CLERK OF COURT ONLY IF ALL PARTIES HAVE CONSENTED ON THIS FORM TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

Sample Form 53

NAME, ADDRESS & TELEPHONE NUMBER
OF ATTORNEY(S) FOR PLAINTIFF OR
DEFENDANT IF PLAINTIFF IS PRO PER

ATTORNEYS FOR:

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER CV _____

PLAINTIFF(S),

v.

CONSENT TO PROCEED BEFORE A UNITED STATES
MAGISTRATE JUDGE AND DESIGNATION

DEFENDANT(S).

I. CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. §636(c), ALL parties to the above-captioned civil matter hereby waive their right to proceed before a Judge of the United States District Court and consent to have a United States Magistrate Judge conduct any and all further proceedings in the case (including the trial) and order the entry of final judgment.

II. DESIGNATION/ASSIGNMENT OF A UNITED STATES MAGISTRATE JUDGE

The parties may stipulate to the designation of a specific Magistrate Judge to conduct all further proceedings unless a particular Magistrate Judge has already been assigned to the case under General Order 194, in which event it shall remain with that Magistrate Judge.

The parties hereby stipulate to the designation of Magistrate Judge _____ to conduct any and all further proceedings in this case.

III. APPELLATE REVIEW

Any appeal from a judgment of the Magistrate Judge shall be taken to the United States Court of Appeals in the same manner as an appeal from any other judgment of the District Court in accordance with 28 U.S.C. §636(c)(3).

IV. NOTICE TO COURT REGARDING DATE OF FILING

Pursuant to General Order 194, if the consent is filed after the date of the pretrial conference, it will require the approval of the District Court Judge.

(See Reverse)

The parties hereby notify the Court that the consent to proceed before a United States Magistrate Judge is submitted for filing: **(check one)**

☐ Prior to the date of the pretrial conference. Therefore, the approval of the District Court Judge is not required.

☐ After the date of the pretrial conference. Therefore, the approval of the District Court Judge is required.

ALL parties hereby consent to proceed before a United States Magistrate Judge for all further proceedings and stipulate to the designation/assignment of a United States Magistrate Judge and consent to any appellate review by the United States Court of Appeals. DO NOT SUBMIT AN INCOMPLETE FORM, ALL parties must consent before the case may proceed before a United States Magistrate Judge. Use additional sheets if necessary to list all parties.

Name of Counsel OR Party if Pro Per

Signature

Counsel for (Name Parties)

Date

Date

Date

Date

TO BE USED ONLY IF THE CONSENT IS SUBMITTED AFTER THE DATE OF PRETRIAL CONFERENCE

WHEREAS, the consent to proceed before a United States Magistrate Judge was submitted for filing after the date of the pretrial conference:

☐ The consent of the parties to proceed before a United States Magistrate Judge to conduct all further proceedings IS HEREBY APPROVED.

☐ The consent of the parties to proceed before a United States Magistrate Judge to conduct all further proceedings IS HEREBY DENIED.

DATE

UNITED STATES DISTRICT JUDGE

NOTICE TO COUNSEL FROM CLERK:

This case has been reassigned to United States Magistrate Judge _____.

On all documents subsequently filed in this case, please substitute the initials _____ after the case number in place of the initials of the prior judge so that the case number will read _____.

This is very important because documents are routed to the assigned Magistrate Judge by means of the initials.

APPENDIX B

Court Administration and Case Management Committee, Guidelines for Ensuring Fair and Effective Court-Annexed ADR

**Guidelines for Ensuring Fair and Effective Court-Annexed ADR:
Attributes of a Well-Functioning ADR Program and
Ethical Principles for ADR Neutrals**

**Report of the ADR Task Force of the
Court Administration and Case Management Committee**

December 1997

I. Background

In June 1995, the Court Administration and Case Management Committee established an ADR Task Force, composed of Magistrate Judge John Wagner (OK-N), Bankruptcy Judge Barry Russell (CA-C), and District Judge Jerome Simandle (NJ), who served as chair. The purpose of the Task Force was to consider the issue of ethical guidelines for private sector attorneys who serve as neutrals in court-annexed ADR programs. This step was prompted by the substantial growth of such programs during the 1990s, programs which at this time are governed only by local rules. The Task Force's concerns were driven largely by rapid change in the district courts, but it recognized that ADR has grown apace in the appellate and bankruptcy courts as well.

To determine the incidence and nature of ethical problems in district court ADR proceedings, the Task Force held a series of meetings with those involved in court-annexed programs, including judges, court ADR staff, attorneys who serve as neutrals, and academics. There was general agreement that the incidence of ethical problems is low but that the combination of rapidly growing programs, sometimes inadequate training of ADR neutrals, and judges who are unfamiliar with ADR creates a potential for serious ethical breaches.

Through its meetings with the various ADR experts, the Task Force identified four areas where problems are likely to arise when courts use private sector attorneys as ADR neutrals: past, present, and future conflicts of interest; confidentiality of materials and information disclosed during ADR; exposure of the neutral to subpoena to testify in subsequent litigation; and protection of ADR neutrals from civil liability through immunity.

For a number of reasons, the Task Force determined that national ADR ethics rules would be premature at this time. Not only did the ADR experts advise against them, but the Task Force believes there is considerable value in encouraging further experimentation at the local level before national rules, if any, are drafted. Furthermore, some issues, such as immunity and conflicts of interest, are either very complicated, are currently the

subject of in-depth study by other organizations, or would require statutory authorization, which the Task Force is not prepared to recommend.

Nonetheless, the Task Force did conclude that it would be useful for the Committee to issue a general statement encouraging courts to give careful consideration to several specific ethical issues and advising the courts on the attributes of a well-functioning court-annexed ADR program. A recommendation to this effect was made and accepted at the June 1996 Committee meeting. The Task Force has subsequently identified the attributes of a well-functioning court-annexed ADR program and has developed a set of ethical principles for ADR neutrals. These are presented below.

II. The Attributes of a Well-Functioning Court-Annexed ADR Program

Our Task Force agrees with the consensus view that a federal court must make a conscious effort to determine whether some type of ADR is an appropriate response to local dockets, customs, practices, and demands for ADR services. We also believe that, for ADR to be most responsive to local conditions, it should be implemented at the local court level (district, appellate, or bankruptcy). There is sufficient breadth in the Federal Rules of Civil Procedure and other legislation, as the Judicial Conference has found, to foster and support implementation of varying ADR programs in the local courts.

Although we have witnessed the gradual development of a preference for mediation, we have not seen the emergence of a single type of ADR that should serve as a paradigm for all courts and we recommend none here. Nevertheless, the Task Force believes there are common attributes of well-functioning ADR programs that all courts should strive to incorporate into their ADR programs and that should be enunciated through local rules.

At the same time, we recognize the need for flexibility in providing a means for dispute resolution that is informal, inexpensive, and adaptable. ADR is often valued, in fact, as an alternative to rule-bound and costly procedures like motion practice and trial. One cannot lose sight of the fact, however, that federal cases referred to ADR can be factually or legally complicated and can have high stakes. In such an environment, the basic ingredients of a fair and effective court-annexed ADR program should include at least minimal rules with respect to the expectations placed upon the court staff and judicial officers, the appointed neutrals, and the participants (attorneys and litigants).

Both research and anecdote suggest that, to date, litigants in federal court ADR programs have had positive experiences.¹ Our goal is to ensure that this remains true in the future. As use of ADR and understanding of its characteristics continue to grow, we feel that some guidance is both warranted and now possible. Thus, we offer the following eight attributes of a well-functioning court-annexed ADR program, drawn from our dis-

1. Research has consistently shown high attorney and litigant satisfaction with ADR procedures, including the fairness of these procedures. For the most recent research in federal courts, see *Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND 1997) and *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Federal Judicial Center 1997).

cussions with ADR experts, our own experiences, and other sources.² Given the critical role played by ADR neutrals, on whom the effectiveness, integrity, and reputation of court ADR rests, we address this attribute of court programs separately in Section III.

1. **The local court should, after consultation among bench, bar and participants, define the goals and characteristics of the local ADR program and approve it by promulgating appropriate written local rules.**

Comment: The program's structure follows the identification of its goals. The court should identify its needs after consultation with all constituencies, especially the advisory group set up under the CJRA if it is still in operation. The necessity for written guidance is self-evident, and the local rules process provides the surest means of careful promulgation. These rules should contain provisions to address each of the attributes discussed here, with special attention to ethical guidelines for ADR neutrals.³

2. **The court should provide administration of the ADR program through a judicial officer or administrator who is trained to perform these duties.**

Comment: An ADR program does not run itself and cannot succeed without leadership. The selection of cases, administration of the panel of neutrals, matters concerning compensation of neutrals, and ethical problems will need to be addressed from time to time by a person with authority to speak for the court. During the past five years, a number of courts have appointed full-time, professional ADR staff, to whom they have assigned many core ADR functions, such as recruitment and training of neutrals, assignment of cases to neutrals, and evaluation of program effectiveness. Professional ADR staff can be particularly helpful in handling problems that arise in ADR, providing a buffer between the parties, neutral, and assigned judge. Although courts can retain these staff through the use of local funds, additional funding will depend on actions taken by the Judicial Resources Committee and the Judicial Conference of the United States. Where such staff are not available, their important functions can be and often ably have been performed by an ADR liaison judge. The important point is to have someone who is responsible for the program.

2. Other sources include two symposia offered by the Federal Judicial Center for representatives from district and bankruptcy courts with new or established ADR programs, as well as the National ADR Institute for Federal Judges, co-sponsored by the Federal Judicial Center, the Center for Public Resources, and the ABA's Litigation Section. A handbook prepared for the Institute, *Judge's Deskbook on Court ADR* (Center for Public Resources 1993), has served as a useful guide for courts interested in ensuring the quality of their ADR efforts.

3. For guidance in designing an ADR program and determining what topics should be covered by local rules, courts are strongly encouraged to consult the *Judge's Deskbook on Court ADR*, *supra* note 2 (available from the Federal Judicial Center).

3. **When establishing a roster of neutrals for cases referred to ADR, the court should define and require specific levels of training and experience for its ADR neutrals, and appropriate training should be provided through the court or an outside organization. Training should include techniques relevant to the neutral's functions in the program, as well as instruction in ethical duties.**

Comment: Court-appointed ADR neutrals are typically experienced attorneys from the local bar or, less frequently, attorneys specializing in an ADR practice. We have found, however, great variability in the training of these appointed neutrals. Some courts require no training, some provide training by judicial officers, and some provide training by expert consultants. No funding for training of attorney-neutrals has been available from central budget sources, so courts have sometimes funded training from local sources, such as bar associations or attorney admission funds, or have required the trainees to bear the cost. The training of a court's ADR neutrals, tailored to the goals and structure of the local program, is an essential ingredient of a well-functioning court-annexed ADR program. ADR neutrals cannot be expected to perform the sensitive functions of their role unless they have the necessary skills. Mediation and other techniques require special insights into the process that may be unavailable to ordinary litigators, no matter how experienced. Training should include instruction on ethics, to increase the sensitivity of the court-appointed neutral to the ethical demands of these duties.

4. **The court should adopt written ethical principles to cover the conduct of ADR neutrals.**

Comment: Well-defined ethical principles are part and parcel of a well-functioning ADR program and are discussed in greater detail in Section III. Principles addressing past, present, and future conflicts, impartiality, protection of confidentiality, and protection of the trial process all should be included in a court's ADR rules. No national model for such ethical rules has yet emerged. It should be apparent that the American Bar Association's (ABA) Model Rules of Professional Conduct (RPC) (which derive from an adversarial conception of an attorney-client relationship that is not pertinent to an attorney-neutral) and the Code of Conduct for United States Judges (which addresses the ethics of judges who adjudicate cases by exercise of judicial power) do not precisely fit the roles and functions of the appointed ADR neutral in most court programs. Similarly, the Model Standards of Conduct for Mediators, promulgated in 1995 by the American Arbitration Association (AAA), ABA, and Society for Professionals in Dispute Resolution (SPIDR), provide a helpful and thoughtful guide for mediators generally but not necessarily for mediators in court-annexed programs. Therefore, until national federal rules or guidelines, if any, are promulgated, courts should make certain their local rules spell out the duties of and constraints upon ADR neutrals.

5. **Where an ADR program provides for the attorney-neutral to receive compensation for services, the court should make the method and limitations upon compensation explicit. A litigant who is unable to afford the cost of ADR should be excused from any fees.**

Comment: Methods of compensation for ADR neutrals vary widely from court to court.⁴ Some courts use a panel of neutrals who serve completely pro bono. Other courts use a modified program, where a certain number of hours are rendered free of charge, with a fixed hourly rate thereafter, while still others have a fixed per-case payment schedule (such as in the statutory arbitration courts under 28 U.S.C. § 651, et seq.). [Editor's note: Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659-62 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651 to 658 (1994)). After preparation of these guidelines in December 1997, the ADR Act of 1998 was codified at 28 U.S.C. §§ 651-658 (1998). Before passage of the ADR Act in October 1998, these U.S. Code provisions were more limited in scope, authorizing mandatory arbitration in ten districts and voluntary arbitration in another ten districts and setting out provisions for implementing the arbitration programs. The ADR Act of 1998 retains the authority of the twenty districts to refer cases to arbitration (see 28 U.S.C. § 654(d) (1998)), but it also authorizes ADR more generally for the district courts.] Other programs have left the matter of compensation to the participants themselves, for negotiation with the neutral. Whatever funding mechanism is decided upon, the court's rule should minimize undue burden and expense for ADR, yet not impose on the ADR neutrals to render sophisticated or prolonged services on a pro bono basis as a matter of course. Where the court draws upon a panel of federal litigators to render service as ADR neutrals, the court must avoid the appearance of an attorney earning a benefit in litigation as a result of service to the court as an ADR neutral.

6. **The local court should adopt a mechanism for receiving any complaints regarding its ADR process and for interpreting and enforcing the local rules for ADR, including the ethical principles it adopts.**

Comment: Courts have adopted a variety of mechanisms for handling problems in ADR, ranging from the appointment of a compliance judge (or ADR liaison judge) with general supervisory authority to the appointment of an ADR administrator who receives such complaints or other feedback and channels them appropriately to the court. It is important, whatever mechanism is decided upon, that the parties be aware of its availability and that it be relatively speedy and simple. Among the problems such a mechanism can address are failures of a party to attend the ADR session, scheduling difficulties, ineffectiveness of the ADR neutral and ethical problems.

4. For the range of fee arrangements used in the district courts, see *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 29-56 (Federal Judicial Center 1996).

7. **The court should carefully define the scope of confidentiality intended for information exchanged in its ADR program, striking a balance between absolute protection of ADR process information and the need to avoid shielding misconduct by participants or neutrals.**

Comment: The candor of adversaries in a negotiation process can often depend on the confidentiality of negotiations, although this concern may be lessened in an evaluative or arbitral settlement process involving little or no confidential exchange. The rules of confidentiality and disclosure for attorney-client information under RPC 1.6 [Editor's note: RPC refers to the American Bar Association's Model Rules of Professional Conduct] will generally not apply to negotiations between adverse parties or discussions with an ADR neutral, and likewise Fed. R. Evid. 408 will not render confidential, but merely inadmissible for most purposes, evidence of conduct or statements made in compromise negotiations. In addition, most states have not adopted a statutory ADR privilege and therefore the degree of protection given by a local confidentiality rule will vary.

A blanket rule deeming the entire ADR process confidential has appeal, to protect the need of participants to share settlement facts with each other and with the attorney-neutral without fear that such information will be used against them in another forum. If the ADR process permits ex parte communications with the neutral, the participants should be assured that information imparted in confidence will not be shared unless authorized. A rule of complete confidentiality may be overbroad, however, and therefore costly if, for example, a participant has abused the process or revealed a fraud or crime. As in Rule 408, evidence does not become confidential merely because it was presented to the ADR neutral if it was otherwise discoverable by an adverse party independently of the ADR proceeding.

To avoid the problems of an overbroad rule, the confidentiality rule could provide that (a) all information presented to the ADR neutral is deemed confidential unless disclosure is jointly agreed to by the parties and (b) shall not be disclosed by anyone without consent, except (i) as required to be disclosed by operation of law, or (ii) as related to an ongoing or intended crime or fraud, or (iii) as tending to prove the existence or terms of a settlement, or (iv) as proving an abuse of the process by a participant or an attorney-neutral.

Whatever rule of confidentiality a court chooses, it will be informing the expectations of the ADR participants. The parties' expectations at the outset are material and will shape the ADR neutral's duties of confidentiality, as reflected in suggested Principle 6 below. The AAA/ABA/SPIDR standards, *supra*, thus state as to confidentiality: "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality." It is best practice to assure that the participants understand the contours of the confidentiality requirements and protections at the outset by having the ADR neutral review the court's rule with them.

8. The court should evaluate and measure the success of its ADR program, perhaps in conjunction with its advisory group.

Comment: In many districts with successful ADR programs, the advisory groups established by the CJRA have had important roles in designing, implementing, and evaluating the court's ADR processes. Whether an advisory group is used or not, however, it remains the responsibility of the local court to ensure that its program provides the quality and integrity of service that is commensurate with the court's aspirations and the parties' expectations. Unless such evaluation and measurement are included, the court may remain unaware of areas in need of improvement.

These attributes of healthy and responsive ADR programs are not meant to provide an exclusive list. Courts may have needs and goals that go beyond these principles. The Task Force recommends the consideration of these principles as constituting a benchmark for a court-annexed ADR program.

III. Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs

If courts continue to use practicing attorneys as neutrals in court-annexed ADR programs, they must make sure their local rules satisfactorily address the role of the attorney-neutral. Particularly important are rules regarding ethical issues, such as maintaining confidentiality and revealing conflicts of interest. When adopting such rules, courts should make sure the rules are consistent with the type of ADR program established. For example, while existing rules for judges and lawyers operating in advocacy roles may translate to some extent to adjudicative ADR processes such as arbitration, they cannot properly be applied to non-adjudicative ADR processes such as mediation, where the attorney-neutral acts neither as judge nor advocate but rather as a neutral facilitator in a non-binding process. In designing ethical guidelines appropriate to the type of ADR program adopted, courts should be encouraged to consider each of the following principles.

1. An attorney-neutral appointed or selected by the court should act fairly, honestly, competently, and impartially.

Comment: This is an objective, not subjective, standard. Should the integrity or competency of an attorney-neutral be questioned, the inquiry should be whether an attorney-neutral has acted fairly, honestly, competently, and impartially. Whether this standard has been met should be measured from the point of view of a disinterested, objective observer (such as the judge who administers the ADR program), rather than from the point of view of any particular party.

The imposition of a subjective appearance standard would unfairly require the neutral to withstand the subjective scrutiny of the interested parties, who, for example, might seek to attack the neutral's impartiality if disappointed by the settlement. As this would undermine the important public interest in achieving binding settlements, there is no intention to impose such a subjective standard under this principle.

- 2. An attorney-neutral should disqualify himself or herself if there is a conflict of interest arising from a past or current relationship with a party to the ADR process.**

Comment: Ordinarily, an attorney-neutral cannot perform effectively as a neutral if there is a past or present representational or other business relationship with one of the parties to the dispute, even if that relationship existed only in connection with entirely unrelated matters. However, such conflicts of interest may be waived by the parties, so long as the particulars of the representational or other business relationship are first fully disclosed on a timely basis. Family relationships, and relationships that give rise to an attorney-neutral's having a financial interest in one of the parties or in the outcome of the dispute, or prior representation with regard to the particular dispute to be addressed in the ADR process, cannot be waived.

The Code of Conduct for United States Judges, which incorporates 28 U.S.C. § 455, provides guidance as to the grounds for disqualification of judges. Although the Code of Judicial Conduct is not directly applicable to the attorney-neutral context, it does set out some guiding principles that can be applied if modified to accommodate the different orientation of an attorney-neutral operating in an ADR, as opposed to a public adjudication, context. Keep in mind, however, that § 455 is expressly required as the appropriate standard when evaluating the actions of arbitrators (28 U.S.C. § 656(a)(2)). [Editor's note: See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4662 (1988) (previously codified at 28 U.S.C. § 656(a)(2) (1994)). See also 28 U.S.C. § 655(b)(2) (1998).]

- 3. An attorney-neutral should avoid future conflicts that may arise after the ADR proceeding is complete. Thus, an attorney-neutral should be barred from representing a party to the ADR proceeding with regard to the same or substantially related matters, as should his or her law firm, except that no future conflict with regard to substantially related matters will be imputed to his or her law firm after the expiration of one year from completion of the ADR process, provided that the law firm shields the ADR neutral from participating in the substantially related matter in any way.**

Comment: Parties to an ADR proceeding have a reasonable expectation that they will not be harmed in the future from an ADR neutral's knowledge about them, especially confidential information gained during the ADR process. Thus, this principle would preclude the ADR neutral from representing any other ADR party in the same or substantially related matters, recognizing the sensitive nature of information, opinions, and strategies learned by the ADR neutral. The same impairment would be im-

puted to the neutral's law firm in the same case, but it would dissipate with the passage of time, our recommendation being one year, in any substantially related matter. This safe harbor recognizes that it would be far too draconian to automatically preclude the law firm's representation of a prospective client for all time merely because an attorney-neutral in that firm conducted ADR proceedings involving that party in the past, even in a substantially related matter. This provision assumes that the attorney-neutral has observed the duty of confidentiality and that he or she can be screened from any future related matter undertaken by the firm.

A conflict rule that generally disqualifies an entire law firm from representing any party that participates in an ADR proceeding conducted by an attorney in the firm will have severe and adverse effects on court-annexed ADR programs that use active lawyers as neutrals. Finally, because an attorney who serves as a court-appointed ADR neutral does not thereby undertake the representation of the participants as clients in the practice of law, ethical rules governing future conflicts of interest arising from past representation, such as the ABA Model Rules of Professional Conduct 1.9 and 1.10, do not appear to apply.

- 4. Before accepting an ADR assignment, an attorney-neutral should disclose any facts or circumstances that may give rise to an appearance of bias.**

Comment: Once such disclosure is made, the attorney-neutral may proceed with the ADR process if the party or parties against whom the apparent bias would operate waive the potential conflict. The best practice is for the attorney-neutral to disclose the potential conflict in writing and to obtain written waivers from each party before proceeding.

- 5. While presiding over an ADR process, an attorney-neutral should refrain from soliciting legal business from, or developing an attorney-client relationship with, a participant in that ongoing ADR process.**

Comment: This provision prohibits the development of a representational attorney-client relationship, or the solicitation of one, during the course of an ADR process. It is not intended to preclude consideration of enlarging an ADR process to include related matters, nor is it intended to prevent the ADR neutral from accepting other ADR assignments involving a participant in an ongoing ADR matter, provided the attorney-neutral discloses such arrangements to all the other participants in the ongoing ADR matter.

- 6. An attorney-neutral should protect confidential information obtained by virtue of the ADR process and should not disclose such information to other attorneys within his or her law firm or use such information to the advantage of the law firm's clients or to the disadvantage of those providing such information. However, notwithstanding the foregoing, an attorney-neutral may disclose information (a) that is re-**

quired to be disclosed by operation of law, including the court's local rules on ADR; (b) that he or she is permitted by the parties to disclose; (c) that is related to an on-going or intended crime or fraud; or (d) that would prove an abuse of the process by a participant or an attorney-neutral.

Comment: This provision requires protection of confidential information learned during ADR processes. For this purpose, information is confidential if it was imparted to the ADR neutral with the expectation that it would not be used outside the ADR process; information otherwise discoverable in the litigation does not become confidential merely because it has been exchanged in the ADR process. This principle also permits disclosure of information that is required to be disclosed by operation of law. This provision accommodates laws such as those requiring the reporting of domestic violence and child abuse.

- 7. An attorney-neutral should protect the integrity of both the trial and ADR processes by refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the ADR process, unless all of the participants agree and jointly ask the attorney-neutral to communicate in a specified way with the assigned trial judge.**

Comment: Courts implementing ADR programs should specifically adopt a written policy forbidding attorney-neutrals from speaking with the assigned trial judge about the substance of confidential negotiations and also prohibiting the assigned trial judge from seeking such information from an attorney-neutral. Docket control should be facilitated by means of the attorney-neutral's report of whether the case settled or not or through other periodic reporting that does not discuss parties' positions or the merits of the case. Such reports should be submitted to the ADR administrator, judicial ADR liaison, or the court clerk or his or her designee.

Public confidence in both the trial and settlement processes can be undermined if direct communication is permitted between the attorney-neutral and the assigned trial judge regarding the merits of the case or the parties' confidential settlement positions. However, it does no harm to communicate with the trial judge at the joint request of the parties, such as requests for continuances, discovery accommodations, more time to pursue the effort, or administrative closure of the case pending implementation of a settlement agreement.

- 8. An attorney-neutral should fully and timely disclose all fee and expense requirements to the prospective participants in the settlement process in accordance with the rules of the program. When an ADR program provides for the attorney-neutral to receive a defined level of compensation for services rendered, the court should require the parties to make explicit the method of compensation and any limits upon compensation. A participant who is unable to afford the cost of ADR should be excused from paying.**

Comment: If the court intends to require a certain level of pro bono service in order to participate as an attorney-neutral in a court-annexed ADR program, the level of the pro bono commitment should be explicitly defined. Where courts permit neutrals to charge a fee to ADR participants, disputes about ADR fees, though rare, can be prevented through disclosure at the outset of the fee arrangements.

APPENDIX C

Differentiated Case Management System: Local Rules and Forms

Rule 16.1 Differentiated Case Management

(a) **Purpose and Authority.** The United States District Court for the Northern District of Ohio ("Northern District") adopts Local Rules 16.1 to 16.3 in compliance with the mandate of the United States Congress as expressed in the Civil Justice Reform Act of 1990 ("CJRA" or "Act"). These Rules are intended to implement the procedures necessary for the establishment of a differentiated case management ("DCM") system.

The Northern District has been designated as a DCM "Demonstration District." The DCM system adopted by the Court is intended to permit the Court to manage its civil docket in the most effective and efficient manner, to reduce costs and to avoid unnecessary delay, without compromising the independence or the authority of either the judicial system or the individual Judicial Officer. The underlying principle of the DCM system is to make access to a fair and efficient court system available and affordable to all citizens.

(b) **Definitions.**

(1) "Differentiated case management" ("DCM") is a system providing for management of cases based on case characteristics. This system is marked by the following features: the Court reviews and screens civil case filings and channels cases to processing "tracks" which provide an appropriate level of judicial, staff, and attorney attention; civil cases having similar characteristics are identified, grouped, and assigned to designated tracks; each track employs a case management plan tailored to the general requirements of similarly situated cases; and provision is made for the initial track assignment to be adjusted to meet the special needs of any particular case.

(2) "Case Management Conference" is the conference conducted by the Judicial Officer where track assignment, Alternative Dispute Resolution ("ADR"), and discovery are discussed and where discovery and motion deadlines, deadlines for amending pleadings and adding parties, and the date of the Status Hearing are set. Such conference shall, as a general rule, be conducted no later than thirty (30) days after the date of the filing of the last permissible responsive pleading, or the date upon which such pleading should have been filed, but not later than ninety (90) days from the date counsel for the defendant(s) has entered notice of appearance, regardless of whether a responsive pleading has been filed by that date.

The Court may, upon motion for good cause shown or *sua sponte*, order the conference to be held before such general time frame. Unless otherwise ordered, no Case Management Conference shall be held in any action in which the sole plaintiff or defendant is incarcerated and is appearing pro se.

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(3) "Status Hearing" is the mandatory hearing which is held approximately midway between the date of the Case Management Conference and the discovery cut-off date.

(4) "Case Management Plan" ("CMP") is the plan adopted by the Judicial Officer at the Case Management Conference and shall include the determination of track assignment, whether the case is suitable for reference to an ADR program, the type and extent of discovery, the setting of a discovery cut-off date, directions regarding the filing of discovery materials, deadline for filing motions, deadlines for amending pleadings and adding parties, and the date of the Status Hearing.

(5) "Dispositive Motions" shall mean motions to dismiss pursuant to Fed. R.Civ. P. 12(b), motions for judgment on the pleadings pursuant to Fed. R.Civ. P. 12(c), motions for summary judgment pursuant to Fed. R.Civ. P. 56, or any other motion which, if granted, would result in the entry of judgment or dismissal, or would dispose of any claims or defenses, or would terminate the litigation.

(6) "Discovery cut-off" is that date by which all responses to written discovery shall be due according to the Federal Rules of Civil Procedure and by which all depositions shall be concluded. Counsel must initiate discovery requests and notice or subpoena depositions sufficiently in advance of the discovery cut-off date so as to comply with this rule, and discovery requests that seek responses or schedule depositions after the discovery cut-off are not enforceable except by order of the Court for good cause shown.

(c) **Date of DCM Application.** Local Rules 16.1 to 16.3 shall apply to all civil cases filed on or after January 1, 1992 and may be applied to civil cases filed before that date if the assigned Judge determines that inclusion in the DCM system is warranted and notifies the parties to that effect.

(d) **Conflicts with Other Rules.** In the event that Local Rules 16.1 to 16.3 conflict with other Local Rules adopted by the Northern District, Local Rules 16.1 to 16.3 shall prevail.

Rule 16.2 Tracks and Evaluation of Cases

(a) Differentiation of Cases.

(1) Evaluation and Assignment. The Court shall evaluate and screen each civil case in accordance with subsection (b) of this Local Rule, and then assign each case to one of the case management tracks described in subsection (a)(2).

(2) Case Management Tracks. There shall be five (5) case management tracks, as follows:

(A) Expedited - Cases on the Expedited Track shall be completed within nine (9) months or less after filing, and shall have a discovery cut-off no later than one hundred (100) days after filing of the CMP. Discovery guidelines for this track include interrogatories limited to fifteen (15) single-part questions, ten (10) requests for production of documents, ten (10) requests for admissions, no more than one (1) non-party fact witness deposition per party (in addition to party depositions) without prior approval of the Court, and such other discovery, if any, as may be provided for in the CMP.

(B) Standard - Cases on the Standard Track shall be completed within fifteen (15) months or less after filing, and shall have a discovery cut-off no later than two hundred (200) days after filing of the CMP. Discovery guidelines for this track include interrogatories limited to thirty-five (35) single-part questions, twenty (20) requests for production of documents, twenty (20) requests for admissions, no more than three (3) non-party fact witness depositions per party (in addition to party depositions) without prior approval of the Court, and such other discovery, if any, as may be provided for in the CMP.

(C) Complex -- Cases on the Complex Track shall have the discovery cut-off established in the CMP and shall have a case completion goal of no more than twenty-four (24) months.

(D) Administrative - Cases on the Administrative Track, except actions under 28 U.S.C. § 2254 and government collection cases in which no answer is filed, shall be referred by Court personnel directly to a Magistrate Judge for a report and recommendation. See Local Rule 72.2(b). Discovery guidelines for this track include no discovery without prior leave of Court, and such cases shall normally be determined on the pleadings or by motion.

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Administrative Track cases shall be exempt from the procedures specified in Local Rule 16.3, unless otherwise ordered by a Judicial Officer, and shall be controlled by scheduling orders issued by the Judicial Officer.

(E) Mass Torts -- Cases on the Mass Torts Track shall be treated in accordance with the special management plan adopted by the Court.

(b) Evaluation and Assignment of Cases. The Court shall consider and apply the following factors in assigning cases to a particular track:

(1) Expedited:

- (A) Legal Issues: Few and clear
- (B) Required Discovery: Limited
- (C) Number of Real Parties in Interest: Few
- (D) Number of Fact Witnesses: Up to five (5)
- (E) Expert Witnesses: None
- (F) Likely Trial Days: Less than five (5)
- (G) Suitability for ADR: High
- (H) Character and Nature of Damage Claims:
Usually a fixed amount

(2) Standard:

- (A) Legal Issues: More than a few, some unsettled
- (B) Required Discovery: Routine
- (C) Number of Real Parties in Interest: Up to five (5)
- (D) Number of Fact Witnesses: Up to ten (10)
- (E) Expert Witnesses: Two (2) or three (3)
- (F) Likely Trial Days: five (5) to ten (10)
- (G) Suitability for ADR: Moderate to high
- (H) Character and Nature of Damage Claims: Routine

(3) Complex:

- (A) Legal Issues: Numerous, complicated and possibly unique
- (B) Required Discovery: Extensive
- (C) Number of Real Parties in Interest: More than five (5)
- (D) Number of Witnesses: More than ten (10)
- (E) Expert Witnesses: More than three (3)
- (F) Likely Trial Days: More than ten (10)
- (G) Suitability for ADR: Moderate
- (H) Character and Nature of Damage Claims:
Usually requiring expert testimony

Last revised 4/7/97. See Historical
Notes for full revision history.

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(4) Administrative: Cases that, based on the Court's prior experience, are likely to result in default or consent judgments or can be resolved on the pleadings or by motion.

(5) Mass Torts: Factors to be considered for this track shall be identified in accordance with the special management plan adopted by the Court.

Rule 16.3 Track Assignment and Case Management Conference

(a) Notice of Track Recommendation and Case Management Conference.

(1) The Court may issue a track recommendation to the parties in advance of the Case Management Conference, or may reserve such determination for the Case Management Conference. If the notice of Case Management Conference does not contain a track recommendation, counsel shall confer to determine whether they can agree to a track recommendation, which shall be subject to the Judicial Officer's approval at the Case Management Conference. The track recommendation shall be made in accordance with the factors identified in Local Rule 16.2(b).

(2) In any action in which the defendant (or all defendants in any action with multiple defendants) is in default of answer, no track recommendation will be made and no Case Management Conference held so long as such default continues. In such a case the plaintiff shall go forward and seek default judgment within one hundred and twenty (120) days of perfection of service (or of sending of a request for a waiver of service under Fed. R.Civ. P. 4(d)), or show cause why the action should not be dismissed for want of prosecution. If such default occurs and the party/parties in default is/are thereafter granted leave to plead, issuance of a track recommendation and scheduling of the Case Management Conference shall proceed in accordance herewith, based upon the date set for the filing of the responsive pleading.

(b) Case Management Conference.

(1) The Judicial Officer shall conduct the Case Management Conference. Lead counsel of record shall participate in the Conference and parties shall attend unless, upon motion with good cause shown or upon its own motion, the Judicial Officer allows the parties to be available for telephonic communication. Counsel, upon good cause shown, may seek leave to participate by telephone.

(2) The agenda for the Conference shall include:

- (A) Determination of track assignment;
- (B) Determination of whether the case is suitable for electronic filing;
- (C) Determination of whether the case is suitable for reference to an ADR program;
- (D) Determination of whether the parties consent to the jurisdiction of a Magistrate Judge pursuant to 28 U.S.C. § 636(c);

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- (E) Disclosure of information that may be subject to discovery, including key documents and witness identification;
- (F) Determination of the type and extent of discovery;
- (G) Setting of a discovery cut-off date;
- (H) Setting of a deadline for joining other parties and amending the pleadings;
- (I) Setting of deadline for filing motions; and
- (J) Setting the date of the Status Hearing, which shall be on a date approximately midway between the date of the Case Management Conference and the discovery cut-off date.

(3) Counsel for all parties are directed to engage in meaningful discussions regarding any track recommendation issued by the Court and each of the other agenda items established by the Court with the goal of timely filing with the Clerk for submission to the Court at least two working days before the Conference a written stipulation agreed to by all parties with respect to each agenda item. This discussion shall also be generally guided by the provisions of Fed. R.Civ. P. 26(f). It shall be the responsibility of counsel for the plaintiff(s) to arrange such pre-Conference discussions sufficiently in advance of the Conference so that, in the event of disagreement about any agenda item, each party may, if it chooses, file and serve a brief written submission of its position on each such disputed item not later than three (3) days prior to the Conference. The Court shall provide forms to counsel for all parties for indicating the parties' positions regarding all such agenda items when it issues its track recommendation.

(4) At the conclusion of the Case Management Conference, the Judicial Officer shall prepare, file, and issue to the parties an order containing the Case Management Plan governing the litigation.

(c) Notification of Complex Litigation.

(1) Definitions.

(A) As used in this Rule, "Complex Litigation" has one or more of the following characteristics:

- (i) it is related to one or more other cases;
- (ii) it arises under the antitrust laws of the United States;
- (iii) it involves more than five (5) real parties in interest;

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(iv) it presents unusual or complex issues of fact;

(v) it involves problems which merit increased judicial supervision or special case management procedures.

(B) As used in this Rule, a "case" includes an action or a proceeding.

(C) As used in this Rule, a case is "related" to one or more other cases if:

(i) they involve the same parties and are based on the same or similar claims;

(ii) they involve the same property, transaction or event or the same series of transactions or events; or

(iii) they involve substantially the same facts.

(2) Notice Identifying Complex Litigation. An attorney who represents a party in Complex Litigation, as defined above, shall, with the filing of the complaint, answer, motion, or other pleading, serve and file a Case Information Statement which briefly describes the nature of the case, identifies by title and case number all other related case(s) filed in this and any other jurisdiction (federal or state) and identifies, where known, counsel for all other parties in the action who have not yet entered an appearance. (See Local Rule 3.13(b).)

(3) Manual For Complex Litigation. Counsel for each of the parties receiving notice of a Case Management Conference shall become familiar with the principles and suggestions contained in the most recent edition of the Manual for Complex Litigation.

(4) Case Management Conference. (See subsection (b)). In preparation for the Case Management Conference, at least seven (7) days prior to the date of the conference counsel for each party shall file and serve a proposed agenda of the matters to be discussed at the conference. At the Case Management Conference, counsel for each party shall be prepared to discuss preliminary views on the nature and dimensions of the litigation, the principal issues presented, the nature and extent of contemplated discovery, and the major procedural and substantive problems likely to be encountered in the management of the case. Coordination or consolidation with related litigation should be considered. Counsel should be prepared to suggest procedures and timetables for the efficient management of the case.

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(5) Determination By Order Whether Case to be Treated as Complex Litigation. At the conclusion of the Case Management Conference, the Court shall prepare, file, and issue an order containing the Case Management Plan which shall set forth whether the case thereafter shall be treated as Complex Litigation pursuant to orders entered by the Court consistent with the principles and suggestions contained in MCL 3d. An order under this subdivision may be conditional and may be altered and amended as the litigation progresses.

(6) Subsequent Proceedings.

(A) Once the Court has determined by order that an action shall be treated as Complex Litigation, thereafter the Court shall take such actions and enter such orders as the Court deems appropriate for the just, expeditious and inexpensive resolution of the litigation. Measures should be taken to facilitate communication and coordination among counsel and with the Court.

(B) Throughout the pendency of a case which has been determined to be treated as Complex Litigation, counsel for the parties are encouraged to submit suggestions and plans designed to clarify, narrow and resolve the issues and to move the case as efficiently and expeditiously as possible to a fair resolution.

(d) Status Hearing. The parties, each of whom will have settlement authority, and lead counsel of record shall participate in the Status Hearing. The parties shall participate in person unless, upon motion with good cause shown or upon its own motion, the Judicial Officer allows the parties to be available for telephonic communication. Counsel, upon good cause shown, may seek leave to participate by telephone. When the United States of America or any officer or agency thereof is a party, the federal attorney responsible for the case shall be deemed the authorized representative for the purpose of the Status Hearing. At the Status Hearing the Judicial Officer will:

- (1) review and address:
 - (A) settlement and ADR possibilities;
 - (B) any request for revision of track assignment and/or of the discovery cut-off or motion deadlines; and
 - (C) any special problems which may exist in the case;

Local Civil Rules -- Northern District of Ohio

- (2) assign a Final Pretrial Conference date, if appropriate; and
- (3) set a firm trial date.

If, for any reason, the assigned Judicial Officer is unable to hear the case within one week of its assigned trial date, the case shall be referred to the Chief Judge for reassignment to any available District Judge or, upon consent of the parties, Magistrate Judge for prompt trial.

(e) Final Pretrial Conference. A Final Pretrial Conference, if any, may be scheduled by the Judicial Officer at the Status Hearing. The parties and lead counsel of record shall be present at the conference. When the United States of America or any officer or agency thereof is a party, the federal attorney responsible for the case shall be deemed the authorized representative for the purpose of the Final Pretrial Conference. The Final Pretrial Conference shall be scheduled as close to the time of trial as reasonable under the circumstances. The Judicial Officer may, in the Judicial Officer's discretion, order the submission of pretrial memoranda.

(f) Video and Telephone Conferences. The use of telephone conference calls and, where appropriate, video conferencing for pretrial and status conferences is encouraged. The Court, upon motion by counsel or its own instance, may order pretrial and status conferences to be conducted by telephone conference calls. In addition, upon motion by any party and upon such terms as the Court may direct, the Court may enter an order in appropriate cases providing for the conduct of pretrial and status conferences by video conference equipment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:00cv

Plaintiff (s),

Judge David A. Katz

vs.

NOTICE:

CASE MANAGEMENT

CONFERENCE

Defendant(s).

This case is subject to the provisions of LR 16.1 of the Local Rules of the Northern District of Ohio entitled Differentiated Case Management (DCM). All counsel are expected to familiarize themselves with the Local Rules as well as with the Federal Rules of Civil Procedure. The Court shall evaluate this case in accordance with LR 16.1 and assign it to one of the case management tracks described in LR 16.2(a). Each of the tracks (expedited, standard, complex, mass tort and administrative) has its own set of guidelines and time lines governing discovery practice, motion practice and trial. Discovery shall be guided by LR 26.1 et seq. and motion practice shall be guided by LR 7.1(b)-(k) et seq.

SCHEDULING OF CASE MANAGEMENT CONFERENCE

All counsel and/or parties will take notice that the above-entitled action has been set for a Case Management Conference ("CMC") on _____ at _____ before Judge David A. Katz, in Room 210, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.

Local Rule 16.3(b) requires the attendance of both parties and lead counsel. "Parties" means either the named individuals or, in the case of a corporation or similar legal entity, that person who is most familiar with the actual facts of the case. "Party" does not mean in-house counsel or someone who merely has "settlement authority." If the presence of a party or lead counsel will constitute an undue hardship, a written motion to excuse the presence of such person must be filed well in advance of the CMC, with copies of said motion delivered to all other counsel in the case, at least two (2) days prior to the conference.

TRACK RECOMMENDATION

Pursuant to Local Rule 16.2(a), and subject to further discussion at the CMC,
the Court recommends the following track:

_____ EXPEDITED _____ STANDARD
_____ ADMINISTRATIVE _____ COMPLEX
_____ MASS TORT
_____ RECOMMENDATION RESERVED FOR CMC.

APPLICATION OF FED.R.CIV.P. 26(a) and Local Rule 26.2

Rule 26(a) of the Federal Rules of Civil Procedure, as amended December 1, 1993, mandates a series of required disclosures by counsel in lieu of discovery requests unless otherwise stipulated or directed by order of the Court or by local rule. In the above entitled case, Rule 26(a) shall apply as follows:

- _____ All disclosures mandated by Rule 26(a) shall apply, including Initial Disclosures (Rule 26(a)(1)), Disclosure of Expert Testimony (Rule 26(a)(2)), and Pre-Trial Disclosures (Rule 26(a)(3)).
- _____ Initial Disclosures (Rule 26(a)(1)) shall not apply; Disclosure of Expert Testimony (Rule 26(a)(2)) and Pre-Trial Disclosures (Rule 26(a)(3)) shall apply.
- _____ Prior to the Case Management Conference, the parties may undertake such informal or formal discovery as they mutually agree. Absent such agreement, counsel are reminded that, pursuant to Local Rule 26.2, no preliminary formal discovery may be conducted prior to the CMC except “such discovery as is necessary and appropriate to support or defend against any challenges to jurisdiction or claim for emergency, temporary, or preliminary relief.” This limitation in no way affects any disclosure required by Fed.R.Civ.P.26(a)(1) or by this order.

CONSENT TO JURISDICTION OF MAGISTRATE JUDGE

The parties are encouraged to discuss and consider consenting to the jurisdiction of the Magistrate Judge.

PREPARATION FOR CMC BY COUNSEL

The general agenda for the CMC is set by Local Rule 16.3(b). **Counsel for the plaintiff shall arrange with opposing counsel for the meeting of the parties as required by FED.R.CIV.P. 26(f) and Local Rule 16.3(b). A report of this planning meeting shall be jointly signed and submitted to the Clerk for filing not later than 3 days before the CMC WITH A COPY DELIVERED TO CHAMBERS (ROOM 210).** The report shall be in a form substantially similar to Attachment 1.

FILING OF DISCOVERY MATERIALS

Unless otherwise ordered by the Court, initial disclosures, discovery depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto shall not be filed with the Clerk's Office, except that discovery materials may be filed as evidence in support of a motion or for use at trial.

DEPOSITIONS PRACTICES

The Judges of the Northern District of Ohio have recently adopted LR 30.1 which governs the taking of depositions. Counsel are expected to comply with the rule in its entirety.

OTHER DIRECTIVES

In all cases in which it is anticipated that a party will seek fee shifting pursuant to statutory or case-law authority, any party so anticipating requesting fees shall file with the Court (and serve all counsel) at or prior to the CMC a preliminary estimate and/or budget of the amount of fees and expenses anticipated to be the subject of any such claim. Such estimate shall include, but not be limited, to the following:

<u>ATTORNEY'S FEES</u>		<u>COSTS</u>	
Preliminary Investigation &			
Filing Complaint	\$_____	Depositions	\$_____
Procedural motions practice	\$_____	Experts	\$_____
Discovery	\$_____	Witness Fees	\$_____
Dispositive Motions Practice	\$_____	Other	\$_____
Settlement Negotiations	\$_____		
Trial	\$_____		
TOTAL FEES	\$_____	TOTAL COSTS	\$_____

RESOLUTION PRIOR TO CMC

In the event that this case is resolved prior to the CMC, counsel should submit a jointly signed stipulation of settlement or dismissal, or otherwise notify the Court that the same is forthcoming.

GERI M. SMITH, _____
Clerk of Court

Carol J. Bethel
Courtroom Deputy for Judge Katz

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

	Case No.
Plaintiff,	
	Judge
-vs-	<u>REPORT OF PARTIES' PLANNING</u> <u>MEETING UNDER FED.R. CIV. P. 26(F)</u> <u>L.R. 16.3(b)</u>
Defendant.	

1. Pursuant to Fed. R. Civ. P. 26(f) and L.R. 16.3(b), a meeting was held on _____, and was attended by:

_____ Counsel for Plaintiff(s) _____

_____ Counsel for Plaintiff(s) _____

_____ Counsel for Defendant(s) _____

_____ Counsel for Defendant(s) _____

2. The parties:

_____ have exchanged the pre-discovery disclosures required by Rule 26(a)(1) and The Court's prior order;

_____ will exchange such disclosures by _____

_____ have not been required to make initial disclosures.

3. The parties recommend the following track:

_____ Expedited _____ Standard _____ Complex
_____ Administrative _____ Mass Tort

4. This case is suitable for one or more of the following Alternative Dispute Resolution (“ADR”) mechanisms:

_____ Early Neutral Evaluation _____ Mediation _____ Arbitration
_____ Summary Jury Trial _____ Summary Bench Trial
_____ Case not suitable for ADR

5. The parties _____do/_____do not consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

6. Recommended Discovery Plan:

(a) Describe the subjects on which discovery is to be sought and the nature and extent of discovery.

(b) Discovery cut-off date: _____

7. Recommended dispositive motion date: _____

8. Recommended cut-off for amending the pleadings and/or adding additional parties: _____

9. Recommended date for a status hearing: _____

10. Other matters for the attention of the Court: _____

Attorney for Plaintiffs: _____

Attorney for Plaintiffs: _____

Attorney for Defendants: _____

Attorney for Defendants: _____

APPENDIX D

Sample Statistical Reports

REPORT DATE: 04/20/01

ANSWER REPORT
DISTRICT OF COLORADO

CASE NUMBER	CASE FILED	SERVICE STATUS	ANSWER FILED	RESPONSIVE PLEADING	DEFAULT ENTERED	PRETRIAL ORDER
<hr/>						
JUDGE:Doe, John						
1:00cv016250	08/14/00	Cause: 28:1332 Diversity—Breach of Fiduciary Duty				No. of Dfts: 00004
	Bonhoef v. Heller et al.					
dft	Tech Corp.	8/21/00 (E)	09/26/00	11/22/00	**/**/**	07/02/01(D)
		Pleading Type:	Motion to dismiss			
dft	Herrald, Evan A.	**/**/**	**/**/**	**/**/**	**/**/**	07/02/01(D)
dft	Thomas, Daphne	**/**/**	09/26/00	11/22/00	**/**/**	07/02/01(D)
		Pleading Type:	Motion to dismiss			
dft	Heller, John D.	**/**/**	09/26/00	11/22/00	**/**/**	07/02/01(D)
		Pleading Type:	Motion to dismiss			
1:00cv016731	8/21/00	Cause: 15:77 Securities Fraud				No. of Dfts: 00002
	Mumbai et al. v. Peters et al.					
dft	Greiss, Lewis	8/23/00(E)	**/**/**	**/**/**	10/23/00	**/**/**
dft	Peters, Kyle G.	**/**/**	09/19/00	**/**/**	**/**/**	**/**/**
1:00cv019299	9/26/00	Cause: 29: 621 Job Discrimination (Age)				No. of Dfts: 00001
	Young v. NCL, Inc.					
dft	NCL, Inc.	**/**/**	10/13/00	10/13/00	**/**/**	**/**/**
		Pleading Type:	Motion summary judgment			

[Editor's Note: Names and other identifying information have been changed in these reports.]

Civil Trial Settings

U.S. District Court for the District of Colorado

Jury and Nonjury Trials Cases Set for Trial

Today: 04/20/01

Honorable John Doe

As of: 04/20/01 4:06

Case Number	Case Title	Filed	NOS/Cause/Remarks	Dates
1:99cv017734	Doss et al. v. Wayward Winds Corp.	08/31/00	NOS: 442 Civil Rights: Jobs CAUSE: 42:2000 Job Discrimination (Race) RMK: ORDER R16,stat,slmt,pt,pto referred to Magistrate Judge Jury Demand: p	Refer to Arb.: 09/29/00 PTO Received: 12/18/00 Trial Set: 05/07/01
1:98cv006171	Van Voorst v. Mincus	03/26/99	NOS: 442 Civil Rights: Jobs CAUSE: 42:2000e Job Discrimination (Employment) RMK: ORDER R16,stat,slmt,pt,pto referred to Magistrate Judge Jury Demand: b	Refer to Arb.: 05/28/99 PTO Received: 11/05/00 Trial Set: 04/14/02
1:98cv016333	Steinberg v. Norris	06/22/99	NOS: 440 Civil Rights: Other CAUSE: 42:1983 Civil Rights Act RMK: ORDER R16,stat,slmt,pt,pto referred to Magistrate Judge Jury Demand: b	Refer to Arb.: 09/02/99 PTO Received: 05/26/00 Trial Set: 05/21/01
1:99cv021862	Smith et al. v. Far West Corp.	01/08/00	NOS: 442 Civil Rights: Jobs CAUSE: 42:2000 Job Discrimination (Sex) RMK: ORDER R16,stat,slmt,pt,pto referred to Magistrate Judge Jury Demand: p	Refer to Arb.: 02/22/99 PTO Received: 11/28/00 Trial Set: 06/11/01

U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO

Tickler Report as of 04/20/01 Run Date 04/20/01 09:35

Actions due between 02/01/01 and 04/20/01 PAGE:1

JUDGE: Doe, John

DOCKET: 1:90-14312

DeMuth Excavating v. Leland

Cause: 42:1983 Civil Rights Act

Schd Action: appeal record return ddl 03/20/01

Date Filed: 11/17/00 Ref to:

DOCKET: 1:98-15123

Souvani v. Mountain Mfg.

Cause: 42:12101 Americans with Disabilities Act

Schd Action: reporter's transcript due 01/19/01

Date Filed: 12/15/00 Ref to:

DOCKET: 1:98-21349

Franzen v. Cappelli et al.

Cause: 28:0158 Notice of Appeal re Bankruptcy

Schd Action: appeal record return ddl 03/28/01

Date Filed: 11/27/00 Ref to:

DOCKET: 1:99-21275

Pliny v. Edelman

Cause: 28:2254 Petition for Writ of Habeas Corpus

Schd Action: appeal record return ddl 02/15/01

Date Filed: 10/18/00 Ref to:

CIVIL INVENTORY/SCHEDULING REPORT

DISTRICT OF COLORADO

CASE NUMBER	FILED	JURY DMD	STAT/STLMT CONFERENCE	MAG CONF DATE	PRETRIAL CONF	PTO FILED	TRIAL DATE	REFERRED DATE	
JUDGE: Doe, John									
OFFICE: (City)									
1:0cv018891	Graves v. Research Corp. 09/26/00 p	04/11/01	**/**/**	11/02/01	**/**/**	02/25/02	01/10/01		Smith
NOS: Civil Rights: Jobs									
COMMENTS: ORDER R16,stat,stlmt,pt,pto referred to Magistrate Judge									
1:0cv022749	Stoner v. Green County 11/14/00 p	04/09/01	**/**/**	08/17/01	**/**/**	**/**/**	01/18/01		Jones
NOS: Labor: Fair Standards									
COMMENTS: ORDER R16,stat,stlmt,pt,pto referred to Magistrate Judge									
1:0cv022392	Doss Passos v. S&S Co. 11/21/00 p	05/31/01	**/**/**	11/15/01	**/**/**	04/08/02	01/18/01		Smith
NOS: Civil Rights: Jobs									
COMMENTS: ORDER R16,stat,stlmt,pt,pto,mtnrec,pto referred to Magistrate Judge									
1:0cv 025808	Roy v. Best Ins. Co. 12/28/00 n	04/10/01	**/**/**	**/**/**	**/**/**	**/**/**	02/27/01		Jones
NOS: Contract: Insurance									
COMMENTS: ORDER settlement only referred to Magistrate Judge									
1:1cv001403	Wright v. Hometown Inc. 01/18/01 b	**/**/**	**/**/**	10/18/01	**/**/**	**/**/**	03/12/01		Smith
NOS: P. I. : Assault, Libel & Slander									
COMMENTS: ORDER R16,stat,stlmt,pt,pto referred to Magistrate Judge									

MONTHLY AP REPORT FOR JUDGE JOHN DOE FOR MARCH 2001

CASE NUMBER	BK OR AA	PRE- BRIEFING CONF SET	PRE- BRIEFING CONF HELD AWAITING BRIEFS	EXPEDITED	ALL BRIEFS FILED, AT ISSUE	AT ISSUE 30 DAYS	AT ISSUE 60 DAYS	AT ISSUE 90 + DAYS
98-AP-12391	AA	Reopened		no				
98-AP-23165	AA	Reopened		no				
98-JD-17427	AA	REMOVED	FROM AP	DOCKET				
99-JD-11943	AA	REMOVED	FROM AP	DOCKET				
00-JD-8669	AA			no	9/25/00			X
00-JD-9244	BK			no	7/27/00			X
00-JD-11688	BK			no	9/11/00			X
00-AP-12326	AA		1/9/01	no				
00-AP-12652	BK	STLMT PND	8/1/00	no				
00-JD-14969	BK			no	11/24/00			X
00-AP-15842	AA		10/18/00	no				
00-AP-15781	AA		11/7/00	no				
00-AP-16738	AA		2/6/01	no				
00-JD-17813	AA			no	2/20/01	X		
00-JD-18126	AA				2/2/01		X	
00-AP-20804	AA		4/3/01	no				

1915 PAYMENT RECORD

NAME	CASE NUMBER	DT INITIAL PAYMENT	DELINQUENT	CASE DISMISSED
Alley, O.P.	97-17194			
Awidah, M.	99-12903			Paid in full
Bennema, J.	98-732			3/20/98
Blanstein, G.A.	97-16126	12/12/97	1/99	5/10/99
Crofton, J.E.	96-21878	10/7/96		Paid in full
Dice, F.H.	97-6370	4/17/97	9/98	6/30/97
Fishbein, A.T.	99-7218	5/13/99		
Jefferson, B.D.	98-1151	7/17/98	9/98	8/98
Jefferson, B.D.	98-1938	2/25/98	1/99	
Jones, S.A.	98-12159	Overdue		
Lugano, L.S.	96-25697			2/14/98
Madison, F.M.	98-25013		1/99	9/10/99
Nira, A.R.	99-12723			
Rodriguez, T.S.	97-19646	11/3/97		10/2/97
Rodriguez, T.E.	99-1734	3/12/99	4/99	5/28/99
Rouse, C.	96-16057	9/05/96	10/96	10/22/96
Rouse, C.	98-7365	6/17/98		Paid in full
Salida, E.H.	97-6171	10/9/97	9/98	2/27/98
Scanlon, P.	97-24499	1/7/98	2/98	1/30/98
Tybeck, G.A.	99-16482			
Whistler, N.	95-J-15090	8/11/98	8/99	

APPENDIX E

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APPENDIX F

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