ADVISORY COMMITTEE
ON
CIVIL RULES

Tucson, Arizona
October 16-17, 2000

AGENDA
Advisory Committee on Civil Rules
October 16-17, 2000

1. Opening Remarks of Chair

   A. Introduction of new committee chair and members
   B. Standing Committee's and Judicial Conference's actions on proposed rules amendments
   C. Status docket on suggested rules changes
   D. Remarks of outgoing chair

2. Approval of Minutes of April 10-11, 2000, Meeting

3. Report of Class Action Subcommittee

   A. Status report
   B. August 28 draft language
   C. "Plain English" class action notice form

4. Report of Subcommittee on Rule 53 — Special Masters

5. Report and Panel Discussion of "Simplified Procedures" Proposal

   A. Introduction
   B. Draft rules
   C. Data relating to simplified procedures compiled by the Federal Judicial Center
   D. 1982 draft of "experimental local rules" amendments to Rule 83
   E. Judge William Schwarzer's Judicature article on a "small claims calendar"
   F. Federal Judicial Center's report on differentiated case-management practices in the Western District of Michigan
   G. Case-management practices in the Eastern District of Missouri
   H. Case-management practices in the Eastern District of Virginia

6. Proposed Amendments to Rule 51: Jury Instructions Requests Submitted before Trial

   - Proposed amendments to Criminal Rule 30 (Jury Instructions) published for comment

7. Proposed Amendments to Admiralty Rules to Conform to Forfeiture Act

8. Report of Discovery Subcommittee

9. Proposed Amendment to Rule 43: Trial Based on Submitted Papers

10. Next Meeting, April 23-24, 2001 (tentative)

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JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 19, 2000

****

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and to whatever priorities the Conference might establish for the use of available resources.

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At its September 19, 2000 session, the Judicial Conference:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service will end in 2000.

Agreed to communicate to Congress the following views on legislation to restrict judges' attendance at private educational seminars:

a. S. 2990 (106th Cong.) is overly broad; would have unintended consequences, such as prohibiting federal judges from reimbursed attendance at bar association meetings and law school seminars; raises potential constitutional issues, such as imposing an undue burden on speech; and would mandate an inappropriate censorship role for the Federal Judicial Center;

b. The proposed legislation raises a number of serious issues that deserve due consideration, including congressional hearings and an opportunity for the Judicial Conference to study and comment upon those issues and to take such action as is necessary and appropriate; and

c. In its present form, the Judicial Conference of the United States opposes S. 2990.

Committee on the Administration of the Bankruptcy System

Agreed to take the following actions with regard to bankruptcy judgeships:

a. Recommend to Congress that no bankruptcy judgeship be statutorily eliminated;

b. Advise the First, Eighth, and Ninth Circuit Judicial Councils to consider not filling vacancies in the District of Maine, the District of South Dakota, the Northern District of Iowa, and the District of Alaska (respectively) that currently exist or may occur by reason of resignation, retirement, removal, or death, until there is a demonstrated need to do so; and

c. Advise the Eighth Circuit Judicial Council that if a vacancy were to occur in the State of Iowa by reason of resignation, retirement, removal, or death of a bankruptcy judge, it should authorize the three remaining Iowa bankruptcy judges to administer cases within both Iowa districts.

Approved proposed amendments to chapter 5 of the Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges, dealing with reappointment of incumbent bankruptcy judges.

Approved the designation of Wilkesboro, North Carolina, as an additional place of holding bankruptcy court, and deleted the designation of Statesville as a place of holding bankruptcy court in the Western District of North Carolina.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2002, as amended by a Defender Services Committee recommendation to seek funds for a panel attorney hourly rate of $113 (see below), subject to amendments necessary as a result of new legislation, actions of the Judicial Conference, or any other reason the Director of the Administrative Office considers necessary and appropriate.

Committee on Codes of Conduct

Approved a revision to the Compliance Section of the Code of Conduct for United States Judges to clarify the Code's applicability to judges retired from regular active service.

Committee on Court Administration and Case Management

With regard to the posting of local rules on individual court websites:

a. Agreed to encourage appellate, district and bankruptcy courts to (1) post their local rules on their own websites by July 1, 2001, and if they do not have a website, to develop one, if only to post their local rules; (2) establish a local rules icon or post their local rules in a prominent location on their websites, to which a user could have ready access; and (3) include a uniform statement indicating that the rules are current as of a date certain; and

b. Directed the Administrative Office to link local court websites to its federal rules Internet web page.

Agreed to seek an amendment to the Jury Selection and Service Act so that the first sentence of 28 U.S.C. § 1866(g) reads as follows:

> (g) Any person summoned for jury service who fails to appear as directed may be ordered by the district court to appear forthwith and show cause for failure to comply with the summons.

With regard to the juror qualification questionnaire:

a. Agreed to revise the juror qualification questionnaire to read as follows:

> 10. RACE/ETHNICITY
>
> a. To assist in ensuring that all people are represented on juries, please fill in completely one or more circles which describe you. (See Note on reverse side.) Nothing disclosed will affect your selection for jury service.
>
> O -Black O -Asian O -Native American Indian
> O -White O -Native Hawaiian/Pacific Islander
> O -Other (specify) _____
>
> b. Are you Hispanic? O -yes O -no

and

b. Directed the Administrative Office to revise its Form JS-12 "Report on the Operation of the Jury Selection Plan" to add columns for courts to report the number and percentage of prospective jurors in their jury wheels who identify themselves on the juror questionnaire as Native Hawaiian/Pacific Islander, or who identify themselves in more than one racial group, and make any changes to both the juror qualification questionnaire and the JS-12 form necessary to implement these amendments.

Agreed to amend the language of subpart a of the addenda to the miscellaneous fee schedules for the appellate, district and bankruptcy courts, the United States Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation (adopted by the Judicial Conference pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code) to read as follows:

> a. The Judicial Conference has prescribed a fee for access to court data obtained electronically from the public records of individual cases in the court, including filed documents and the docket sheet, except as provided below.

Committee on Criminal Law

Approved for publication and distribution to the courts *Criminal Monetary Penalties: A Guide to the Probation Officer's Role*, Monograph 114, including revised forms for judgments in criminal cases (AO 245B-245I).

Committee on Defender Services

Agreed to request FY 2002 funding sufficient to raise Criminal Justice Act panel attorney rates to $113 per hour, effective April 1, 2002, to reflect implementation of the $75 hourly rate plus the Employment Cost Index adjustments from 1988 through 2002.

Supported legislation that would provide federal defenders with the same eligibility for student loan forgiveness as is granted to their counterparts in United States attorney offices.

Committee on Federal-State Jurisdiction

Took the position that if Congress determines to provide for complete relief for the resolution of Fifth Amendment takings claims in one judicial forum, then that forum should be an Article III court, and the present jurisdictional monetary ceiling of $10,000 for such claims brought under 28 U.S.C. § 1346 should be eliminated.

Committee on Financial Disclosure

Agreed to amend the Regulations on Access to Financial Disclosure Reports Filed by Judges and Judiciary Employees Under the Ethics in Government Act of 1978, as Amended, to add the following new paragraph:

> 5.2(g) A request for redaction and its supporting documents, except for copies of the financial disclosure report and any amendments thereto, are considered confidential and will only be used to determine whether to grant a request for redaction. Such documents are not considered to be a part of any report releasable under section 105(b)(1) of the Act.

Committee on the Judicial Branch

Resolved to pay on behalf of (a) all active Article III judges aged 65 and above, (b) senior judges retired under 28 U.S.C. § 371(b) or 372(a), and (c) judges retired under 28 U.S.C. § 371(a), who are enrolled in the Federal Employees' Group Life Insurance program, the full amount of any increases in the cost (and any expenses associated with such payments) of the judges' life insurance imposed after April 24, 1999.

Approved an amendment to the Travel Regulations for United States Justices and Judges to provide that a judge must submit his or her claim for reimbursement within 90 days after the judge completes official travel, and permit the Director to make an exception when necessary to meet special circumstances or in the best interest of the government.

Approved an amendment to the Travel Regulations for United States Justices and Judges to provide that on the day of return to a judge's official duty station or residence, a judge may (a) claim a *per diem* allowance for meals and other expenses of $46, or (b) itemize meals and other subsistence expenses up to a daily maximum of $100.

Approved an amendment to the Travel Regulations for United States Justices and Judges to clarify that judges should report non-case related travel using the Judges' Non-Case Related Travel Reporting System, and authorized the Director of the Administrative Office to make a conforming change to the judges' travel regulations should the title or website address of that system change.

Committee on Judicial Resources

In order to provide the staffing needed to perform the federal judicial support requirements and functions of the appellate court and circuit clerks' offices, the district clerks' offices, the district court pro se law clerk offices, the probation and pretrial services offices, and the bankruptcy clerks' offices, approved proposed staffing formulae for these offices for implementation in fiscal year 2001, and also approved the one-year continued use of high-year prisoner petition reporting as an interim device for the district clerks' offices.

Approved two additional court interpreter positions for the Southern District of Texas and five additional court interpreter positions (two of which are presently temporary positions) for the Western District of Texas for fiscal year 2002; if possible, the five additional court interpreter positions for the Western District of Texas should be funded in fiscal year 2001.

Approved a United States Court of Federal Claims request for seven clerk's office positions as part of the fiscal year 2002 budget request with the proviso that if the number of that court's senior/recalled judges should decrease, the court's allocation will be adjusted accordingly; and also supported accelerated funding for these seven positions as an unfunded requirement in fiscal year 2001.

Authorized a revision to the judiciary's leave policy to increase from seven days to 30 days each calendar year the amount of paid leave for employees to serve as organ donors.

Committee on the Administration of the Magistrate Judges System

Changed the methodology for reviewing magistrate judge positions to provide for district-wide reviews every five years for all district courts instead of the current cycle of every four years for districts with part-time magistrate judge positions and every five years for districts with full-time magistrate judge positions.

Approved an amendment to Section 4.02 of the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges to require that all part-time magistrate judge appointees to full-time magistrate judge positions, including those who were the subject of a full-field investigation prior to appointment to the part-time position, undergo an FBI full-field background investigation prior to appointment.

Approved recommendations for changes in specific magistrate judge positions.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Bankruptcy Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed revisions to Official Bankruptcy Form 7.

Approved proposed amendments to Civil Rules 5, 6, 65, 77, 81, and 82, and a proposed abrogation of the Copyright Rules and agreed to transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted.

Committee on Security and Facilities

Agreed to amend jury box standards for courtrooms in the *United States Courts Design Guide* to accommodate only 12 jurors in magistrate judge courtrooms, 16 jurors in district courtrooms, and 18 jurors in special proceedings courtrooms or where otherwise required.

Endorsed, as a matter of policy, a cyclical maintenance program for court-occupied space, subject to the availability of appropriated funds.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 7-8, 2000. All members attended the meeting. The Department of Justice was represented by Daniel Marcus, Acting Associate Attorney General. Roger A. Pauley, Director, Department of Justice, Office of Legislation, Criminal Division, also attended part of the meeting.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, attending on behalf of Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Milton I. Shadur, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Judge James A. Parker, former chair of the Subcommittee on Style; Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro, Deputy Chief of the Administrative Office's Rules Committee Support Office; Abel J. Mattos, chief of

the Court Administration Policy Staff; Marie Leary of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Professor R. Joseph Kimble and Joseph F. Spaniol, consultants to the Committee.

PARALLEL LANGUAGE OF RULES

Different sets of rules, i.e., Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules, often deal with the same subjects. Over the years, independent actions by different advisory committees have produced differences of expression that may generate confusion. The Standing Committee is now assisting the advisory committees in adopting language that is as uniform as possible when the rules deal with common topics. Amendments requiring a party to disclose financial interests and establishing procedures governing service of papers by electronic means are two such overlapping issues addressed by the advisory committees.

New Civil Rule 7.1 and Criminal Rule 12.4 are based on a revised Appellate Rule 26.1, which requires a nongovernmental corporate party to disclose any parent corporation. The rules and amendments proposed for publication are very similar to each other with minor differences accounting for different contexts. Meanwhile, the Advisory Committee on Bankruptcy Rules continues to consider similar amendments, but it requires additional time to study the issues, which are more complicated in the bankruptcy field.

The Advisory Committees on Bankruptcy and Civil Rules are submitting to the Judicial Conference for approval proposed rule amendments permitting service of papers and transmission of court notices by electronic means on parties who consent, and providing a three-day response time in these cases similar to the three days provided under the general "mail rule." The proposed amendments to Civil Rules 5, 6, 77 and Bankruptcy Rules 9006 and 9022

implementing these proposals are similar to amendments to Appellate Rules 25, 26, 36, and 45, which are proposed for publication.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules proposed amendments to Rules 4, 5, 21, 25, 26, 26.1, 36, and 45. At the January 2000 meeting, the Standing Committee approved publication for comment of proposed amendments to Rules 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and new Form 6, which were discussed in the Committee's March 2000 report to the Judicial Conference. With the notable exceptions of amendments to Rules 4(a)(7) and 26.1, the presently proposed changes, as well as those approved in January for publication, are generally "housekeeping." Several amendments have been under study since 1997, but have been reserved until now to allow the bench and bar to become familiar with the comprehensive restyled appellate rules, which took effect in December 1998. For comparison purposes, the proposed rule amendments would take effect no earlier than December 2002.

Rule 4(a)(7)(Entry Defined) would be amended to address conflicting decisions of the courts of appeals regarding the time to appeal judgments. The issue arises when a district court's order or judgment has been entered on the civil docket but not on a separate document in accordance with Civil Rule 58, because neither the time to bring a post-judgment motion nor the time to appeal ever begins to run. Consequently, judgments improperly entered years ago may still be open to appeal. The proposed amendment to Rule 4(a)(7), in combination with proposed amendments to Civil Rule 58, cures this problem. The rules provide that when a separate document is required, judgment is entered on either of two events, whichever is earlier: when the judgment is entered on the civil docket and set forth on a separate document, or when 60 days

legislation were to pass, the rules and Official Forms would need substantial and prompt revision to implement the statutory changes.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 5, 6, 65, 77, 81, and 82, and abrogation of the Copyright Rules with a recommendation that they be approved and transmitted to the Judicial Conference. With the exception of the amendments to Rule 82, which involve only a technical conforming change, the amendments were published for comment by the bench and bar in August 1999. The scheduled public hearing was canceled because the single request to testify was withdrawn.

Electronic and Other Service

The proposed amendment of Rule 5(b) (Service and Filing of Pleadings and Other Papers) would permit electronic service on parties who give written consent. Under the amendment, electronic service would be complete on transmission. But service by electronic means is not effective if the party making service learns that the attempted service did not reach the person served. (Civil Rule 5 is cross-referenced in Bankruptcy Rule 7005 and Criminal Rule 49(b), which extend the application of Rule 5 to adversary proceedings in bankruptcy cases and to criminal cases.) The language and formatting of Rule 5(b) also were restyled.

Rule 6(e) (Time) would be amended to provide a party with an additional three days to respond to a paper served by electronic means. Although electronic service often is instantaneous, delays frequently occur. The added three-day response time is consistent with the three-day "mail rule" and is intended to eliminate any perceived disadvantage in using electronic means.

The proposed amendments to Rule 77(d) (District Courts and Clerks) would permit courts to serve notices by electronic means on parties who have so consented.

Copyright Rules

The Copyright Rules of Practice were prescribed by the Supreme Court and are set out in 17 U.S.C.A. following § 501. They deal only with prejudgment seizure of copies alleged to infringe a copyright. The rules were written for the 1909 Copyright Act and have not been changed to reflect inconsistent provisions in the 1976 Copyright Act. They do not conform to modern concepts of due process. In 1964 the advisory committee challenged the seizure procedure as one that:

> is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

These problems prompted the advisory committee in 1964 to recommend that the Copyright Rules be abrogated and that Civil Rule 65 be amended to provide an impoundment procedure for articles involved in an alleged copyright infringement. The recommendation was withdrawn because Congress was considering a thorough revision of the copyright laws that was eventually enacted in 1976.

The advisory committee actively solicited comment in 1997 from organizations and experienced counsel on the need to update the Copyright Rules. The advisory committee notified staff of the House Judiciary Subcommittee on Courts and Intellectual Property of its intent to recommend that the Copyright Rules be abrogated. Representative Howard Coble (R-NC), chairman of the subcommittee, expressed concern that any proposed amendment might interfere with pending copyright legislation and ongoing United States multilateral treaty obligations. The

United States has been actively encouraging all countries to provide effective intellectual property protections. At Chairman Coble's request, the advisory committee deferred recommending publication of the proposals for one year.

During the one-year delay, Congress acted on pending measures. The advisory committee has now concluded that the Copyright Rules should be abrogated and Civil Rule 65 be amended to expressly govern impoundment proceedings. Under the proposed amendments, impoundment may still be ordered on an ex parte basis if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. But the proposed changes would eliminate the concern that the rules may be invalid and will help ensure that the United States is in compliance with its international obligations.

Amendments to Rule 81 (Applicability in General) are proposed to conform to the abrogation of the Copyright Rules, to eliminate an outdated reference to mental health proceedings, and to clarify a reference to the Bankruptcy Rules.

Technical Conforming Amendment

Rule 82 (Jurisdiction and Venue Unaffected) would be amended to correct a citation to a repealed section of title 28 of the United States Code. In accordance with Judicial Conference procedures governing the rulemaking process, the Committee determined that the change need not be published for comment because it was solely a technical conforming amendment.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and the abrogation of the Copyright Rules are in Appendix B together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 5, 6, 65, 77, 81, and 82, and a proposed abrogation of the Copyright Rules and transmit these changes to the Supreme Court for its

consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 54, 58, 81, and a new Rule 7.1 with a recommendation that they be published for comment.

Proposed new Rule 7.1 (Disclosure Statement) would require a nongovernmental corporate party to disclose any parent corporation and any publicly held corporation that owns 10 percent of its stock, or state that no such corporation exists. Under the amendment, a party is also required to disclose any information that may be required by the Judicial Conference and supplement the disclosure when circumstances change. The proposed new rule is similar to proposed changes to the Appellate and Criminal Rules. But it adds a requirement that clerks deliver the disclosure statement to the judge acting in the proceeding to account for the greater likelihood at the civil trial stage that another judge may act on a part of the case.

The proposed amendments to Rules 54 (Judgments; Costs) and 58 (Entry of Judgment) are intended to address problems caused when a judgment or order is not entered on a separate document and as a result the time for appeal purposes never begins to run under the Appellate Rules. In conjunction with proposed changes to Appellate Rule 4(a)(7), the amended rules cure this problem by providing that when a separate document is required, judgment is entered on either of two events, whichever is earlier: when the judgment is entered on the civil docket and set forth on a separate document, or when 60 days have run from entry of the judgment on the civil docket. Under the proposed amendments to Rules 54 and 58, moreover, orders disposing of certain post-judgment motions would no longer have to be entered on a separate document.

Rule 81(a)(2) (Applicability in General) would be amended to conform the time limits governing a writ of habeas corpus with the rules governing § 2254 and § 2255 proceedings.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendments to the bench and bar for comment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules completed a style revision of Criminal Rules 1-60 using uniform drafting guidelines. It also proposed substantive amendments to several rules that have been under consideration outside the style project. The advisory committee has submitted both sets with a recommendation that they be published separately for public comment.

Proposed Comprehensive Style Revision of Criminal Rules

The style revision of the Criminal Rules is part of a comprehensive effort to clarify and simplify the language of the procedural rules. It is similar in nature to the revision of the Federal Rules of Appellate Procedure; which took effect in December 1998. As in that earlier project, the advisory committee has identified ambiguities in the rules that require substantive revisions. These limited changes have been specifically identified in the Committee Notes to the rules.

In its style project, the advisory committee focused on several major elements. First, it attempted to eliminate the existing confusion regarding key terms and phrases that appear throughout the rules by simplifying and standardizing them. Second, it deleted provisions that no longer are necessary, usually because case law has evolved since the rule was first promulgated. Third, it completely reorganized several rules to make them easier to read and apply. Over the years, these rules have evolved inconsistently, resulting in convoluted provisions.

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AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall 8/99 — Published 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud. Conf. Approves **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to Subcmte. 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Simplified Procedures] — federal small claims procedures	Judge Niemeyer 10/00	10/99 — Considered, subcmte appointed 4/00 — Considered
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Sub cmte. 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Standing Cmte approved 9/99 — Judicial Conference approved 4/00 — Supreme Court Approved 12/00 — Effective **COMPLETED**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Sub cmte. 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Sub cmte. rec. Refer to other cmte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte. Approves 9/00 — Jud Conf approves **PENDING FURTHER ACTION**
[CV5] — Resolution of dispute between court and carrier as to whether courier or court was at fault for failure to file	Lawrence A. Salibra, II, Senior Counsel, Alcan Aluminum Corp. 6/5/00 (00-CV-C)	6/00 — Referred to reporter, chair, and Agenda Subc. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**
[CV5(d)]— Does non-filing of discovery material affect privilege	St Cmte 6/99	10/99 — Discussed **PENDING FURTHER ACTION**
[CV6] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approves 9/98 — Jud. Conf. Approves and transmits to Sup. Ct. 4/99 — Supreme Court approve 12/99 — Effective **COMPLETED**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV6(e)] — Amend the rule to treat service by electronic means the same as service by mail	See Rule 5	4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves **PENDING FURTHER ACTION**
[CV7.1] — See Financial Disclosure	Request by Committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication 6/00 — Stg Comte approves publication 8/00 — Published **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmte 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Removed under consent calendar **COMPLETED**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — rejected by cmte **COMPLETED**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, & Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full committee consideration (4) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. 4/00 — Supreme Ct transmits to Congress 12/00 — Effective **COMPLETED**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. 4/00— Supreme Court approved 12/00 — Effective **COMPLETED**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV 15(c)(3)(B)] —Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considered **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 — Referred to reporter, chair, and Agenda Sub cmte. 4/00 — Referred to Class Action subcomte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Preserve right to appeal for *unnamed* class members who do not file motions to intervene; and class members not named plaintiffs have right to appeal judicial approval of proposed dismissal or compromise without first filing motion to intervene	Bill Lockyer, Attorney General, for State of California DOJ 3/29/00 (00-CV-B) 6/21/00	4/00 — Referred to reporter, chair, Agenda Subcmte,, and Class Action Subcmte 6/00 — Referred to reporter, chair, Agenda Subcmte, and Class Action Subcmte **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV26] —Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; Sub cmte. appointed 1/97 — Sub cmte. held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Sub cmte. 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV26] —Does inadvertent disclosure during discovery waive privilege	Discovery Subcmte	10/99 — Discussed **PENDING FURTHER ACTION**
[CV26] — Presumptive time limits on backward reach of discovery	Al Cortese	10/99 — Removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Electronic discovery		10/99 — Referred to Subcmte 3/00 — Subcmte met 4/00 — Considered **PENDING FURTHER ACTION**
[CV26] — Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	Gregory K. Arenson, Chair, NY State Bar Assn Committee 8/7/00 (00-CV-E)	8/00 — Referred to reporter, chair, incoming chair, and Agenda Subcmte **PENDING FURTHER ACTION**
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by Sub cmte. and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — rejected by cmte **COMPLETED**
[CV30(b)] — Inconsistency within Rule 30 and between Rules 30 and 45	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. 4/00 — Referred to Disc. Subcomte **PENDING FURTHER ACTION**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — rejected by cmte **COMPLETED**
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — referred to Agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Sub cmte. (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Comte approves 9/99 — Rejected by Jud. Conf. **COMPLETED**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV40] — precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Sub cmte. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Remove from agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Sub cmte., and Discovery Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined t take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration 4/99 — Cmte considered 4/00 — Cmte considered 10/99 — Discussed **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcmte appointed to study issue 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/99 — Discussed (FJC requested to survey courts) 4/00 — Considered (FJC preliminary report) **PENDING FURTHER ACTION**
[CV54(d)(2)] —attorney fees and interplay with final judgment CV 58	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves publicatipon 8/00 — Published **PENDING FURTHER ACTION**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, & Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends rejection 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision **PENDING FURTHER ACTION**
[CV58] — 60-day cap on finality judgment	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves 8/00 — Published **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Cmte approves 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves **COMPLETED**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Sub cmte. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV77(d)] — Electronic noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 6/99 — Stg Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 4/00 — Comte considered 6/00 — Stg Comte approves publication 8/00 — Published **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves **PENDING FURTHER ACTION**
[CV81(a)(2)] — Time to make a return to a petition for habeas corpus	CR cmte 4/00	4/00 — Request for comment 6/00 — Stg Comte approves publication 8/00 —Published **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee 4/00 — Comte approved for transmission without publication 6/00 — Stg Comte approves 9/00 — Jud Conf approves **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considers **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte 6/00 — CACM assigned issue and makes recommendation for Judicial Conference policy **COMPLETED**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Schedule for further study (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[Electronic Filing] — To require clerk's office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-I)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes]	Tom Scherer 3/2/00 (00-CV-D)	7/00 — Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
[To provide procedures for a "summary bench trial"]	Judge Morton Denlow 8/9/00 (00-CV-F)	8/00 — Referred to reporter, chair, incoming chair, and Agenda Subcmte **PENDING FURTHER ACTION**

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 10 and 11, 2000

The Civil Rules Advisory Committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Professor Myles V. Lynk; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, Judge Michael Boudin attended as liaison from the Standing Committee, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Norman C. Roettger attended as liaison member from the Bankruptcy Rules Advisory Committee. Professor Patrick J. Schiltz attended as Reporter for the Appellate Rules Advisory Committee. Marilyn Holmes, Peter G. McCabe, Nancy Miller, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Joseph F. Spaniol, Jr., attended as Consultant to the Standing Committee. Thomas E. Willging, Laural Hooper, Marie Leary, Robert Niemic, and Molly Treadway-Johnson represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (ABA Litigation Section); John Beisner; Alfred W. Cortese, Jr.; Francis Fox (American College of Trial Lawyers); Jeffrey Greenbaum (ABA Litigation Section — class actions); James Rooks (ATLA); and Fred Souk.

Judge Niemeyer greeted Professor Jeffries to his first meeting, and expressed appreciation for the life and regret on the passing of Edward H. Levi.

Introduction

Judge Niemeyer noted that the discovery proposals sent forward last year are now before the Supreme Court, as transmitted from the Judicial Conference. It is hoped that the Supreme Court will act by the end of the month to transmit the proposals to Congress.

If the discovery amendments take effect December 1, the process will have taken rather more than four years. The deliberate pace of the rulemaking process may at times seem frustrating, but it seems better than a process that, with greater efficiency, might efficiently make troubling mistakes.

Judge Scirica said that the Civil Rules Committee will have to start thinking about the style project. The project to rewrite the rules of procedure into clearer language goes back a full decade. The Appellate Rules have been completed, adopted, and applied in practice. That experience is a success. The Criminal Rules should

be submitted to the Standing Committee in June with a recommendation for publication this August. If the Criminal Rules restyling is successful, the Civil Rules will be next in line. It is accepted that the Evidence Rules will not be restyled.

Judge Niemeyer responded that the style project will be an enormous undertaking. The benefits of consistency and clarity are real. But early work has proved the difficulty of making changes that affect style only, not substance. This difficulty is particularly acute when the present text is ambiguous; resolving uncertainty as to present meaning can easily change the meaning. It is possible to identify the "gaps and inconsistencies" separately, asking comment whether there is a change in meaning and whether the change is desirable. But the sheer number of these problems may hamper the public comment process that will be indispensable to successful completion of the project. Some well-established phrases, moreover, should remain sacrosanct, whatever their stylistic sins may be. The difference between "transaction or occurrence" and "conduct, transaction, or occurrence" may seem elusive, but it would be a mistake to adopt a single phrase to replace all of the variations that presently appear in the rules. Even the numbers of the rules are important. Renumbering Rule 12(b)(6), Rule 56, and like familiar rules could complicate research and confuse newer generations of lawyers as they come to earlier cases.

Judge Scirica noted that the Style Project has been coordinated with the expectation that the separate sets of Rules will be done in sequence.

Judge Niemeyer turned to mass torts problems. This committee has worked with Rule 23 for many years. It has come to seem that many of the questions surrounding Rule 23 are better addressed by legislation than by rulemaking. The desirability of legislative solutions seems particularly clear with respect to mass torts. The Mass Torts Working Group was formed to bring in the contributions of other Judicial Conference committees. The Working Group recommended creation of an ad hoc committee constituted by members of several other committees, but that recommendation has not been taken up. The other committees, however, can continue to coordinate their efforts. The chairs of other committees attended the mass torts symposium at the University of Pennsylvania Law School last November. They expressed willingness to work together. The chairs and other representatives met at the March Judicial Conference, and agreed to maintain coordination, in part by meeting at each Judicial Conference. The efforts of this committee and the work of the Mass Torts Working Group have generated much good learning. Major portions of the fruits are preserved in documentary form. The Federal Judicial Center, and Thomas Willging, help to provide continuity and consistency.

Judge Scirica agreed that mass tort issues involve the need to consider procedure, substance, court management, and judicial education. The Federal-State Jurisdiction Committee is working actively in this area, considering such bills as the venerable single-event mass tort bill, state class-action bills, a bill to supersede the Lexecon decision by expanding § 1407 to permit transfer and consolidation for trial, and asbestos bills. The Court Administration and Case Management Committee, Bankruptcy Committee, and Judicial Panel on Multidistrict Litigation are all involved as well. The Federal Judicial Center is rewriting the Manual for Complex Litigation. All of these forces will share continual information about their work. Coordination by this means will prove more difficult than it would be through an ad hoc committee, but it can achieve real results. It is time to put to use all of the knowledge that has been accumulated.

Judge Niemeyer introduced the legislation report by noting that Congress is interested in many civil-procedure topics. Bills are regularly introduced to amend one rule or another by direct

legislative action. With the help of the Rules Committee Support Office, coordinating with the legislation staff of the Administrative Office, we attempt to have the underlying issues and concerns rerouted into the Enabling Act process.

John Rabiej gave the legislation report. The Support Office is currently monitoring some 30 bills, which are listed in the agenda materials. The asbestos bill reported out by the House Judiciary Committee is modeled on the Georgine settlement; it is being considered by the Federal-State Jurisdiction Committee. The Support Office has been interested in a provision that, as first drafted, would severely limit the aggregation of parties or claims. The bill's sponsors were persuaded to ameliorate this provision quite extensively. There also is a peculiar class-action provision that seems to be an artifact of the structure that was adopted for the aggregation provision, but that might be read to prohibit a request to be excluded from a Rule 23(b)(3) class. Efforts are being made to win clarification of this provision. The bill, and indeed the problems of asbestos litigation in general, are quite contentious in Congress.

Another rules topic in Congress involves the Marshal's Service. Congress came close to passing a bill that would virtually require a judge to approve any service by a marshal. This provision was reduced in conference to a requirement that a report be made. The Marshal's Service wants to eliminate the provision in Rule 4(c)(2) that requires a direction for service by a marshal or other specially appointed person when the plaintiff is authorized to proceed in forma pauperis or as a seaman. They proposed a bill to amend Rule 4. It now seems likely that the Service will instead request that the question be considered by this committee.

The Minutes of the October 1999 meeting were approved with correction of a typographical error.

Rules 5(b), 6(e), 77(d) Recommended for Adoption

Amendments to Rules 5(b) and 77(d) were published for comment in August 1999, along with a request for comment on a possible related amendment of Rule 6(e). The proposals were designed to open the way for electronic service of papers other than initial process. Other means of service were added as well. Parallel proposals were published for comment by other advisory committees.

Rule 5(b) is restyled. Rule 5(b)(2)(D) is entirely new. It provides for service by any means not listed in subparagraphs (A), (B), or (C), with the consent of the person served. Service by electronic means would be complete on transmission.

In response to public comments, possible changes were prepared for the text of the rule and for the Committee Note. Rule 5(b)(2)(D) would require that the consent to service by electronic or other means be in writing. A new paragraph (3) would provide that service under Rule 5(b)(2)(A), (B), or (D) is not effective if the party making service learns that the attempted service did not reach the person to be served and the person to be served did not deliberately defeat the attempted service. The Note might be expanded by stating that the consent must be express, not implied; by observing that service through a court's facilities might include a notice of filing with an electronic link that

allows viewing, downloading, or printing; and making suggestions about the information that should be provided on giving consent.

Discussion began with the observation that Department of Justice concerns would be substantially satisfied by adding to the Rule a requirement that consent be in writing, and by one version of the draft note on the information to be provided in giving consent. A Note statement that consent must be express, not implied, also is useful. There has been at least one instance in which a court took an e-mail address on a letterhead to imply consent to receive electronic service, an approach that should not be condoned by the rule. A motion was made to add the writing requirement to the rule, and to add to the Note the statement that consent must be express and the advice on the information to be provided on giving consent.

Nancy Miller is working on implementation of the electronic case files project. She noted that the project is now operating in four district courts and five bankruptcy courts; the District of New Mexico also is operating an electronic filing system. The number of courts will increase gradually over the next few years. The project will take filings over the internet. Rule 5(b) electronic service will, for the next several years, occur in two distinct contexts. In many courts, parties will be serving each other electronically even though they are not filing electronically. In other courts, the parties will both file and serve electronically. The capability to effect electronic service through the court's system is built into the CM/ECF system. Adoption of this system, however, will be optional with each district. She urged that the Committee Note should include the statement, made in one of the alternative versions, that a district court may establish a registry that allows advance consent to receive electronic service in future actions.

It was noted that the District Court for the District of Columbia automatically sends out a form that becomes an electronic directory. Whenever a lawyer fills out the form, the lawyer can be found in the directory for purposes of all future actions.

Responding to experience in the Western District of Missouri, one of the present electronic filing courts, a sentence was added to the Committee Note stating that electronic service through court facilities can be accomplished by a notice that provides a link to the filed paper. The initial draft referred to this as a "hyperlink"; concern was expressed that the term may be as evanescent as so much computer technology has been, and the more generic "electronic link" was substituted.

The sentence referring to a district court registry was first drafted to refer to establishment of a registry by local rule. It was observed that the bankruptcy rules have a similar provision for electronic notice that does not require a local rule. There is no apparent reason to require a local rule for this purpose. The reference to local rules was deleted by common consent.

The draft also refers to description of the "format" for consented service. It was asked whether this term is universally accepted. One response was that much depends on the mode of "electronic" service. Facsimile transmission needs only the telephone number as "format." Internet messages may be little more complicated. Attachments, however, can present real problems as different word-processing systems are used. The extent of these problems depends again on context. The electronic case filing system uses a portable document format that is designed to preserve the original paging system for all users; it is a major inconvenience if different users cannot readily refer

to the location of items in the document by a common page number. It was suggested that when the court system is up and running, every user will have adopted a uniform capacity. But for the time being, it is desirable to suggest in the Committee Note that a person consenting to electronic service should specify the format in which attachments can be received.

The court registry for electronic service is likely to be a registry of attorneys, rather than parties. Consent under Rule 5(b)(2)(D) is to be consent of the person served; carrying forward the long-standing provisions of Rule 5(b), Rule 5(b)(1) will continue to provide that service on a party represented by an attorney is made on the attorney. But there are circumstances in which the distinction between attorney and party is ambiguous — the United States employs its own attorneys, as do many corporations. If an Assistant United States Attorney or a member of a corporate counsel office registers for electronic service, does that bind the party? May law firms encounter similar problems? This discussion was curtailed by the observation that electronic service is happening already. Every effort should be made to keep the process simple and to encourage people to use it. Courts should be able to develop their own registries or similar systems without the questionable help that might be supplied by the dubious foresight of this or any other committee familiar only with current technology. What is important is that a court adopting a system make it clear to those who sign on just what the system means.

The committee then agreed to recommend Rule 5(b) to the committee with several particular changes. Consent under Rule 5(b)(2)(D) must be in writing; the Note will observe that the writing can be provided by electronic means. Reference will be made to local district registries and like means to facilitate advance consent to electronic service. Reference will be made to electronic notice from the court with an electronic link to the paper electronically filed with the court. The second sentence of the Department of Justice recommended Note language, set out at page 8 of the agenda materials, will be incorporated in the Note with minor revisions.

It also was agreed that the Committee will consider adding consent to electronic service as an item in the Form 35 Report of Parties' Planning Meeting.

In deliberating the draft Rule 5(b) that was proposed for publication, this committee considered whether the rule should address the problem that arises when a person who has attempted to make electronic service learns that service was not completed. The published proposal provides that service is complete on transmission. But notice of nondelivery may be received after transmission. The committee concluded then that this problem could be addressed in the Committee Note. Virtually all lawyers who learn that attempted service was not made will do whatever is required to correct the failure. It was believed that no court would hold that service is effective when the party attempting to make service actually knows that the attempt had failed. The Committee Note, as published, observed that "actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service."

The Appellate Rules Advisory Committee is considering a rule provision, supported by the committee chair, that would read: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." This divergence from the

proposed Civil Rule raises the question whether this committee should reconsider. Draft Rule 5(b)(3), offered for consideration, would apply to all methods of service other than leaving a copy with the clerk for a person who has no known address. It would provide that attempted service is not effective if the party making service learns that the attempted service did not reach the person to be served and the person to be served did not deliberately defeat the attempted service.

The first observation was that if Rule 5(b) is to address the question of knowledge that attempted service has failed, it should address it for ordinary mail as well as electronic mail, facsimile, and even — for the bizarre situations that at least can be imagined — personal service. A provision that speaks only to electronic service might create unintended negative implications for other modes of service.

It was asked whether it is prudent to propose an addition to the rule without publication and comment. There are a number of significant questions that need to be addressed. A litigant is supposed to keep the clerk informed of a current address. If a party moves and does not tell the court, the unsuccessful attempt at mail service should count as effective service. At least if we are going to address failures of ordinary mail, this should be published for comment. There may be far-reaching practical consequences that we do not fully understand.

The discussion turned to the variety of problems that may be encountered. One is the party who fails to provide an effective address; mail or other modes of service cannot be made. Another arises when an effort to reach a valid address fails — paper mail is mangled in postal machinery or meets a physical accident en route, and is returned to the sender for want of a workable address; an electronic message is bounced back as undelivered; an office worker served on behalf of an employer brings it back to the serving party objecting to any obligation to deliver it. It is important to distinguish two separate problems. One is whether an attempt to make service counts as effective. The other is whether, after an unsuccessful attempt to make service, a duty remains to try again. The duty to serve may be excused in some circumstances, as when a party has failed to maintain a current address with the court clerk. There also may be circumstances in which a person to be served deliberately seeks to avoid service.

The view was repeated that if these topics are to be addressed, they should be addressed at least to postal mail as well as electronic mail. The combined topics, however, are too complex to take on without publication for comment. The proposal should be sent to the Standing Committee with a recommendation for adoption without any provision that addresses a party's actual knowledge that attempted service has failed. The problem of failed service can then be studied more carefully.

Professor Schiltz noted that the Appellate Rules Committee felt that something should be said about electronic service because e-mail "so often comes back." For postal mail, the problem almost never arises. There is a danger that if the rule speaks to the problem in general terms, people will seek to take unfair advantage of the opportunity for creating confusion.

Rule 5(b)(3) could be revised to address only electronic mail. It was protested again that this approach would create negative implications for other failed methods of service. But it was rejoined that the Committee Note can say that no negative implications are intended.

A motion was made to recommend Rule 5(b)(3) to the Standing Committee, limited to electronic service. The motion was supported with the observation that in the real world there has been no problem with ordinary mail. But it was agreed that the problem of deliberate efforts to defeat service need not be addressed; this portion of the draft was deleted. As changed, the motion was adopted.

At the April 1999 meeting the committee considered a proposal to amend Rule 6(e) to treat electronic service in the same way as postal service. Rule 6(e) now allows an additional 3 days to respond when service is made by mail. The committee was divided on the question. The conclusion was a recommendation that Rule 6(e) not be amended, but that a revised Rule 6(e) be published with a request for comment on the need for revision. Public comments were divided, but several comments suggested that additional time should be allowed. The essence of these comments ran in at least three directions. The popular image of e-mail as instantaneous is exaggerated; often there are substantial delays in transmission. In addition, messages are often received in garbled form, a problem that arises most commonly with attachments; it can take a few days to arrange for delivery in intelligible form. Finally, the added time to respond is likely to encourage use of electronic service — the added time is not likely to deter a party from seeking consent to electronic service, and it is likely to encourage some parties to give consent. It might be possible to add only one day for electronic service; one proposal was to add one day for electronic service or service by overnight courier, and three days for ordinary courier delivery. The Department of Justice is among those urging that at least some additional time be allowed to respond after electronic service.

The Bankruptcy Rules Committee clearly favors allowing the additional three days. It also believes that it is important to maintain consistency between the Civil Rules and the Bankruptcy Rules on this question.

A motion was made to recommend to the Standing Committee adoption of the revised Rule 6(e) as it was presented for public comment. Support of the motion was voiced by Judge Roettger, who noted that the Bankruptcy Rules Committee unanimously favored a 3-day extension. A practitioner observed that his firm regularly receives electronic messages that can be deciphered only with the assistance of the firm "help desk," if at all. And it was noted that there are likely to be cases in which different parties are served by different means, and perhaps at different times, destroying any uniform response time anyway.

The motion to recommend adoption of the revised Rule 6(e) was adopted.

Rule 77(d) was published in a form that would allow the clerk to serve an order or judgment in the manner provided for in Rule 5(b). The published version failed to change the provision for a docket note to refer to "service" rather than "mail." This change was agreed upon. A Committee Note reference to local rules that should have been deleted before publication also was deleted. With these changes, the committee voted to recommend adoption of the Rule 77(d) amendments to the Standing Committee.

Copyright Rules, Rule 65(f), and Rule 81(a)(1): Recommended for Adoption

The proposals published in August 1999 include a second package that would abrogate the

obsolete Copyright Rules of Practice adopted under the 1909 Copyright Act. A new Rule 65(f) would be adopted, confirming the common practice that has substituted Rule 65 preliminary relief procedures for the widely ignored Copyright Rules. Rule 81(a)(1) would be amended to delete the obsolete references to copyright rules, and also to improve the expression of the relationship between the Civil Rules and the Bankruptcy Rules. Such little public comment as was provided on these changes was favorable. The committee voted to recommend the changes for approval by the Standing Committee and transmission to the Judicial Conference.

Rule 82 Recommended for Adoption

The final sentence of Rule 82 provides that an admiralty or maritime claim "shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93." A member of the public has suggested that since § 1393 was repealed in 1988, Rule 82 should be amended to refer to §§ 1391-1392." The committee approved this suggestion, and decided to recommend to the Standing Committee that the amendment be transmitted to the Judicial Conference as a technical and conforming change that does not require publication for comment.

Rule 7.1: Recommendation for Publication

Judge Niemeyer opened discussion of the draft Rule 7.1 on disclosure by observing that there have been news reports of cases in which judges have inadvertently failed to disqualify themselves because of a failure to connect with financial information that requires disqualification. The Codes of Conduct Committee is working on these problems, and has urged the Standing Committee to adopt procedural rules governing disclosure. Marilyn Holmes, who provides staff support for the Codes of Conduct Committee, is attending this meeting to help the discussion. At present, Appellate Rule 26.1 is the only procedural rule that addresses financial disclosure. The Codes of Conduct Committee believes that Rule 26.1 is a satisfactory model for the district courts. The Standing Committee is taking the lead on this topic, because coordination is required among four advisory committees; only the Evidence Rules Committee can disclaim any interest.

Judge Scirica agreed that this project has, in part, come "from the top down," contrary to the usual Standing Committee policy of waiting for proposals to originate in the advisory committees. It makes sense to have the same provision for the Civil and Criminal Rules. There are special concerns that may justify different provisions in the Bankruptcy Rules. If the district court rules head in a different direction from present Appellate Rule 26.1, a process that seems to be developing as to some details, the Appellate Rules Committee must become involved as well. John Rabiej and Marilyn Holmes brought the chairs of the Standing Committee and the Codes of Conduct Committee together to seek a common approach.

There have been two recent waves of embarrassing publicity about inadvertent failures to recuse. Congress is sensitive to the problem. Members of Congress understand that the failures were inadvertent, but do not want the problem to recur. They would prefer that the Judicial Conference come up with an answer, and the rules process seems to provide the best available Judicial Conference approach.

The Standing Committee hopes the Advisory Committees will develop the same proposal,

or at least very similar proposals, so that in June the Standing Committee can frame a common proposal. The proposals would be published for public comment in August.

There is a persuasive argument that this topic is one that should not be addressed in the rules of procedure. But there is strong reason to act. And Appellate Rule 26.1 has opened the door. The Committee Note to Rule 26.1, which was first adopted in 1989, recognizes that some courts may wish to exact more detailed disclosures by local circuit rule. This approach may be the most satisfactory means of establishing a national policy.

Adoption of rules for the district courts similar to Appellate Rule 26.1 will not address the specific incidents of implementation. Development of the right software for computer matching, and judicial alertness, are critical to successful implementation.

It must be recognized, further, that district judges face problems distinct from those commonly encountered in the courts of appeals. Default judgments, dismissals, and requests for emergency or routine administrative action often come before the judge with little warning and little occasion for deliberation or inquiry. Judicial action is routine in many matters.

The Federal Judicial Center study shows that many circuits have expanded on the requirements of Appellate Rule 26.1. They broaden the scope of disclosures, and the character of the parties that must make disclosures. (Appellate Rule 26.1 applies only to nongovernmental corporations.) And, although there is no rule for the district courts akin to Rule 26.1, several districts have adopted their own local disclosure rules, often requiring more extensive disclosure than that mandated by Rule 26.1. And of course disclosures are required by a variety of other district court practices.

There is a difficult question whether local rules should be prohibited when a national rule is adopted. The Committee on Codes of Conduct is inclined to the view that local rules should be prohibited. But there are at least two concerns that must be considered. First, disqualification decisions are a matter of great sensitivity. Judges are anxious to have all the information needed to protect their own integrity and the integrity of their courts. Second, some of the local variations may be valuable; allowing local practices to continue may generate information that can be useful in expanding the approach of Appellate Rule 26.1.

There also is a question, framed by draft Rule 7.1., whether expansion of the Appellate Rule 26.1 model of disclosure should be accomplished only through the protracted and cumbersome Enabling Act process. The draft rule provides for adoption of disclosure forms by the Judicial Conference if greater disclosure seems desirable.

Professor Coquillette reported on the deliberations of the Bankruptcy Rules Committee. That committee reached several conclusions. There should be a national rule for the district courts modeled on Appellate Rule 26.1. The rule might well allow the Judicial Conference to adopt forms requiring greater disclosure if the Judicial Conference comes to believe that greater disclosure is desirable. The Judicial Conference process could allow more frequent and smaller adjustments than can be accomplished by continually revising national court rules. The Judicial Conference should have sole discretion whether to adopt any form at all. Local rules should be permitted. But — and

perhaps most important — room should be left to adopt distinctive Bankruptcy Rules. Bankruptcy practice often involves thousands of parties in a single proceeding, and some adjustments may be required to reflect this fact. Judge Roettger seconded the observation that bankruptcy practice encounters unique problems that may require a unique rule.

Professor Schiltz observed that the Appellate Rules Committee continues to support Appellate Rule 26.1. Over time the Appellate Rules Committee has tried to require more expansive disclosures than Rule 26.1 now requires, but that has proved impossible to "sell." The Appellate Rules Committee supports local rules. It seems likely that the Appellate Rules Committee will support amendment of Rule 26.1 to authorize development of disclosure forms by the Judicial Conference, in terms similar to draft Rule 7.1, and also will support amendment of Rule 26.1 to require supplementation when there is a change in the circumstances reflected in the initial disclosure statement.

Marilyn Holmes agreed with the common observation that Appellate Rule 26.1, and the parallel draft Rule 7.1(a)(1), is a narrow rule. The rule reaches only financial interests, and not all of those. The Committee on Codes of Conduct is interested only in disclosure of financial information that automatically disqualifies a judge. Thus it would like to discourage local rules. The local rules do not seem to work well. Additional information would, to be sure, lead at times to disqualification. But the Committee is interested in developing conflicts screening software; a similar program will be built into the electronic case filing program that the Administrative Office is developing. Information will be put into the system as the parties and firms involved in any particular litigation supply it; the system then will compare this information to all of the information the judge has put into the system.

The draft Rule 7.1 was then introduced. The agenda materials include several different model rules, and a variety of Committee Note drafts. Provisions from the different rules and paragraphs from the different Notes could be mixed and combined in many different ways. The model that seems to command the greatest support, however, is the one that is put first. This model is based on Appellate Rule 26.1. The core disclosure requirement is the same as Rule 26.1. But there are several variations. The first variation requires a nongovernmental corporation to file a "null" report when it has no information to report. This provision was added to the draft at the suggestion of the Codes of Conduct Committee, and should prove helpful to show that the lack of any disclosure information reflects a lack of information to disclose rather than inadvertent failure to file. The task of court clerks will be considerably eased by this provision. A duty to supplement the initial disclosure is added. Other variations reflect differences in the circumstances of the district courts as compared to the courts of appeals. Because district judges often are called upon to act immediately on filing, or soon after, the time for filing provision is made more demanding. The number of required copies is reduced to two because district courts rarely act in panels of three. And a provision is added to require the clerk to transmit the disclosure information to the judge assigned to the case.

The most important departure of this model from Appellate Rule 26.1 is Rule 7.1(a)(2). This provision requires all parties to file a form providing any additional information required by the Judicial Conference. The prospect that additional disclosures may be found desirable seems

supported by the fact that most of the courts of appeals have adopted local rules that expand on the requirements of Rule 26.1.

Unlike some of the other models, this draft rule does not speak to the local rules question. A number of different approaches to local rules are reflected throughout the other drafts. Some of these approaches explicitly note the part of the Note to the original Appellate Rule 26.1 that recognizes that the circuits may wish to require additional disclosures by local rule.

Judge Niemeyer observed that the question requires sensitive accommodation to the views of the other advisory committees, the Standing Committee, and the Codes of Conduct Committee. The question whether to require more information than Appellate Rule 26.1 requires may be compromised by adopting Rule 26.1 but providing a discretionary power to supplement by Judicial Conference form if the Judicial Conference comes to believe that supplementation is desirable. The means of accomplishing disclosure remains essentially a matter of court administration, not procedure, and action by the Judicial Conference with the support of the Codes of Conduct Committee and the Administrative Office may prove more flexible than the Enabling Act process. This approach does not mandate any additional disclosures, but leaves the path open.

Judge Niemeyer further observed that the question of local rules is particularly difficult. Over the years this committee has tried to preserve the view that national problems deserve answer by uniform national rules. Local rules are appropriate only when there is a reasonable prospect that variations in local conditions warrant divergent rules. Local rules are a hardy species, however, and constant vigilance is required. It is uncomfortable to adopt a national rule and, at the same time, to countenance local rules without any hint of different local circumstances that might justify disuniformity. But at the same time, it will be difficult to require abandonment of present local rules. Rather than bless local rules in the text of the Rule, it may be best simply to recognize the legitimacy of local rules in the Committee Note.

Judge Roettger suggested that the brief and noncommittal recognition of local rules in a sentence appearing on page 7 of the agenda materials was consistent with what the Bankruptcy Rules Committee had in mind.

Professor Coquillette confessed to being "the archetypical opponent of local rules," but urged that a modest exception would be wise in this instance. The Appellate Rules Committee recognized the legitimacy of local rules when it developed the original 1989 version of Rule 26.1. The Bankruptcy Rules Committee supports this approach. Many courts, moreover, are firmly attached to their rules, and likely will fight for them in the Judicial Conference. This is an exceptional situation.

Discussion began with the note that the Judicial Conference form provision extends beyond nongovernmental parties. All parties and lawyers could be included. This would be a very broad expansion beyond the reach of Appellate Rule 26.1. It would be useful to add to the Note some version of the Note paragraph on page 16 of the agenda materials that suggests that any form that is adopted may not apply to all parties, and in any event may be limited to information that is not relevant to some parties. It will be up to the Judicial Conference to decide what to do in that situation. But there will be a great advantage in either allowing noncovered parties not to file the

form or, if it is not likely to be evident whether a party is covered, to file a form that simply says that none of the requested items of information is relevant to a particular party. This approach would greatly ease the burden on court clerks, who otherwise could not readily determine whether the absence of a form represents the absence of relevant information or inadvertence to the filing obligation. There would be little burden on the parties if it becomes established routine to file a "null" report on a party's first appearance.

The local rules issue was addressed with the suggestion that it makes sense to permit local rules. The Judicial Conference form, if one is developed, and the Administrative Office case filing software, will exert a strong pull toward uniformity. But if recognition of local rules is expressed only in the Note, it will be difficult to retract the comment without revising the rule. The Judicial Conference may develop a form that, at some stage of evolution, warrants preemption of local rules. If we put permission for local rules into the text of Rule 7.1, as some of the drafts do, the Rule can be amended in the future to defeat local rules. It also is intrinsically desirable to address so important an issue in the text of the rule.

Another suggestion about local rules was that it will be difficult to stop a judge or court from asking for more information.

Marilyn Holmes said that the Codes of Conduct Committee defers to the rules committees on the local rules question. But she urged that if the Note does speak to the question, it should speak in a discouraging way. Even as sympathy was expressed for this view, it was noted that many courts believe that their present local rules are important and are working well. It would be difficult to persuade the Judicial Conference to disregard their views. One approach might be to say nothing in the Note, leaving the possible preemptive effect of Rule 7.1 for future decision. Since Rule 7.1 is closely modeled on Appellate Rule 26.1, however, the Committee Note to Rule 26.1 that expressly recognizes local rules likely would carry over at least until the Judicial Conference should act to adopt a disclosure form.

Looking to the various draft Note provisions on local rules, it was thought that the language of one, noting that districts are "free to adopt" local rules was too permissive. The Note should say that Rule 7.1 does not prohibit local rules. And it should say that if the Judicial Conference adopts a form, the Judicial Conference can decide whether the form preempts local rules.

It was asked whether there is any need to include the proposed subdivision (c), which directs the clerk to deliver a copy of the form to each judge assigned to the action or proceeding. Clerks are charged with many responsibilities that do not appear on the face of the rules: why note this one in an express rule provision? It was responded that in some districts the clerks do not do this. Delivery to the judge should be made routine. A mechanism should be provided to help the judge. A different response was that in a different district, the clerk does this now. It also was asked whether it is sufficient to require delivery to each judge assigned to the action or proceeding. A judge or magistrate judge may be asked to act in a case assigned to another judge, often in emergency circumstances. It was agreed that the rule should direct the clerk to deliver a copy of the disclosure to each judge "acting in the action or proceeding." It was recognized that there may be some circumstances of emergency action in which this direction cannot feasibly be honored, but the

general direction seems useful. Professor Schiltz ventured the prediction that the Appellate Rules Committee likely will not add to their Rule 26.1 a provision that parallels this provision, for fear that it might create negative implications about the nature and extent of the clerk's duties in other situations.

The committee voted to recommend publication of the preferred form of Rule 7.1, as modified to reflect the discussion.

Rules 54, 58: Recommendation for Publication

The Appellate Rules Committee has devoted intense study to the problems that arise from the interplay of Civil Rules 54 and 58 with Appellate Rule 4(a)(7). Rule 4 governs appeal time. The Supreme Court has ruled that the appeal time periods set by Rule 4 are "mandatory and jurisdictional"; an out-of-time appeal must be dismissed for lack of jurisdiction. The event that signals the beginning of the appeal time period is important. In 1963, to assure a clear signal, Civil Rule 58 was amended to require that every "judgment" be set forth on a separate document. Entry of the separate document would avoid any ambiguity. Appellate Rule 4(a)(7) borrows Rule 58: "A judgment or appeal is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure."

This well-intended and simple requirement has encountered several obstacles. One of them arises from Civil Rule 54(a), which defines a "judgment" to include "a decree and any order from which an appeal lies." This definition does not stand up well. Opportunities for appeal have expanded since this part of Rule 54(a) was adopted in 1938. As one example, Rule 54(a) includes as a "judgment" any interlocutory order that would be found appealable under the collateral-order doctrine. One puzzling consequence seems to be that the time to appeal a collateral-order appeal does not begin to run unless the order is entered on a separate document, an awkward conclusion. A worse consequence is that Rule 58 also provides that a judgment "is effective only when" set forth on a separate document. Read literally, this combination of Rules 54(a) and 58 would mean that, for example, an order denying a claim of privilege made to resist discovery cannot be "effective" until it is entered on a separate document if a court of appeals would conclude (as the Third Circuit now routinely does) that the order is appealable.

This relationship between Rule 54(a) and Rule 58 has been the source of one of the specific concerns of the Appellate Rules Committee. Many judges do not follow the separate document drill when ruling on motions of the sort that — when timely made — suspend appeal time. These motions, enumerated in Appellate Rule 4(a)(4)(A), include post-trial motions under Rules 50, 52, 54(d)(2)(B), 59, and 60. Failure to enter the order on a separate document is no problem in the circuits that hold that an order denying one of these motions is not separately appealable, that the appeal must be timely taken from the underlying judgment. Some circuits, however, have concluded that a separate document is required because the order is appealable.

Another untoward consequence of the separate document requirement has caused greater concern to the Appellate Rules Committee. If a clearly and truly final judgment is not entered on a separate document, appeal time does not start to run. This consequence of the rules would not be troubling if district courts routinely adhered to the simple and easily implemented separate document

requirement. Routine adherence, alas, has not been achieved despite more than a third of a century to become accustomed to Rule 58. There are large numbers of judgments entered years ago, in litigation long-since believed to have been concluded, that remain eligible for appeal. The Appellate Rules Committee views these judgments as "time bombs" waiting to explode.

The Appellate Rules Committee initially undertook to address this problem solely through Appellate Rule 4. The price for this approach, however, arises from the way in which Civil Rule 58 interacts with other Civil Rules as well as with the Appellate Rules. The times set for post-judgment motions by Civil Rules 50, 52, 54(d)(2), 59, and 60 begin to run from the entry of judgment. If the Appellate Rules and the Civil Rules set different events as the entry of judgment, the integration between post-judgment motions and appeal time is destroyed. The initial Appellate Rules proposal would have set the entry of judgment on one of two events: compliance with Civil Rules 58 and 79(a), or 150 days after entry of the judgment on the docket under Rule 79(a) notwithstanding failure to set the judgment forth on a separate document. This approach would reduce the "time bomb" period for appeal purposes, but would not affect the time for post-trial motions. Termination of the opportunity to appeal would not terminate the time to make a post-judgment motion, which could be cut short only by entry on a separate document. The judgment might remain subject to revision in the district court, even though time to appeal had passed. And if the district court denied relief, that order itself would be appealable — and, under the most troubling view, might support some measure of review of the original judgment as well as the denial of post-judgment relief. (This troubling view could draw directly from Appellate Rule 4(a)(4), which provides that if a party timely files a motion under Rules 50, 52, 54(d)(2)(B), 59, or 60, the time to appeal runs from entry of the order disposing of the last timely motion. For want of entry of judgment, the motion perforce is timely.)

Convinced of the need to undertake a joint approach, the Civil and Appellate Rules Committees have proposed integrated amendments to Civil Rule 58 and Appellate Rule 4(a)(7). A conforming change would be made to Civil Rule 54(d)(2)(B), but the Civil Rule 54(a) definition of "judgment" would remain untouched.

The recommendation to bypass revision of Rule 54(a) rests on great uncertainty as to the consequences that might follow. Not surprisingly, the word "judgment" appears at many places throughout the Civil Rules. The Rule 54(a) definition does not integrate well with all of them. There are compelling arguments that the definition, by encompassing any order from which an appeal lies, includes too much. There are persuasive arguments that the definition, expressed as "includes," is not exclusive — that "judgment" at times should be read to include an event that is not a decree and is not an order from which an appeal lies. Very few reported decisions tangle with these problems, and the outcome is often uncertain. Despite a parade of theoretical problems, the rule does not seem to have caused any real problems in practice. The committee agreed that it is better to leave Rule 54(a) untouched.

Rule 58 is styled, and would be changed in two major ways. Rule 58(a) would continue to require that every judgment and amended judgment be set forth in a separate document, but also would make it clear that a separate document is not required for an order disposing of a motion for judgment under Rule 50(b), to amend or make additional findings of fact under Rule 52(b), for

attorney fees under Rule 54, for a new trial or to alter or amend a judgment under Rule 59, or for relief under Rule 60. This change would address directly the lesser of the Appellate Rules Committee's concerns.

The major change in Rule 58 is reflected in draft Rule 58(b)(2). This rule provides that judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62, when it is entered on the civil docket under Rule 79(a) and, if a separate document is required, when one of two other events has occurred. It is enough that the judgment is set forth on a separate document. But if a separate document is required but has not been provided, judgment is entered after 60 days from entry on the civil docket. Although these terms do not speak directly to appeal time, draft Appellate Rule 4(a)(7) completes the circle by providing that judgment is entered for purposes of appellate Rule 4 when it is entered for purposes of Civil Rule 58(b).

Judge Niemeyer opened committee discussion by suggesting that there is no perfect solution to the problems created by the inability of the system to accomplish routine compliance with the separate document requirement. The reporters for the two committees have labored diligently to craft a reasonably effective solution. The rules intertwine in ways that should be approached with care. The proposed solution might well be accepted unless clear flaws can be found.

Professor Schiltz, summarizing the Appellate Rules Committee approach, observed that there are indeed many complicated problems. The combined present proposals, however, seek to approach only the least complicated of the problems. As matters now stand, failure to enter judgment on a separate document means that the time for post-judgment motions and the time for appeal never starts to run. There is widespread disregard of the separate document requirement. In reading some 500 separate document cases, many appeared in which appeals were taken 3, 4, 5, and even 6 years after final judgment was entered. We want to make sure that these time periods do not stretch on forever. The First Circuit has addressed the problem by ruling that after three months the separate document requirement is waived. Other courts of appeals have admired this approach, but have concluded that it is not an available interpretation of the rules. The Appellate Rules Committee cannot address the problems alone, unless it is prepared to decouple the time for appeal from the time for post-judgment motions.

The question whether a separate document is required for an order that denies a post-judgment motion has generated nightmarish complexities. Some circuits hold that such an order is appealable, but in terms that frequently involve contradictions within a single circuit. To make it worse, some circuits have read a separate document requirement into Appellate Rule 4, independent of the Civil Rule 58 requirement that is limited by the Civil Rule 54(a) definition of a judgment. But these circuits cannot agree on when the imputed Appellate Rule 4 separate document requirement applies.

If proposed Civil Rule 58 is adopted, the Appellate Rules Committee can put aside its plan to adopt its own bypass of the separate document requirement.

The first question in the ensuing discussion asked whether there is an inconsistency between draft Rule 58(a) and 58(b). Rule 58(a) says a judgment must be set forth on a separate document. Rule 58(b) seems to say that this requirement is excused for some purposes. The response was that

the requirement is not actually excused. Draft Rule 58(d) provides that any party may ask that the judgment be set forth on a separate document, and Rule 58(a) establishes the court's duty to do so. All that happens is that an efficient central means is used to avoid writing repetitively into Rules 50, 52, 54(d)(2)(B), 59, and 60 the provision that motion time starts to run when the judgment is set forth on a separate document and entered on the civil docket, or 60 days after it is entered on the civil docket.

An example was offered of the benefits that may flow from this new approach. Many actions are dismissed under the Prison Litigation Reform Act, often without even serving the defendant. The separate document requirement is not always observed. Under the present rules, appeal time does not start to run — a defendant who does not even know the suit has been filed and dismissed remains subject to the prospect of an appeal several years in the future. Under the proposal, appeal time will start to run 60 days after the order of dismissal is entered on the civil docket.

It was asked how widespread is this reported disregard of the separate document requirement. Answers were offered that the requirement is observed in the vast majority of cases, and "all the time in certain circumstances." Professor Schiltz thought that the cases he has read suggest that most of the problems will be addressed by the draft Rule 58(a) exemption of orders that dispose of the enumerated post-judgment motions. One judge agreed that a separate document is never used for an order denying a new trial.

The question was raised whether it would be better to abandon the separate document requirement. Or, perhaps, the requirement could be limited to cases in which a party asks for one. The virtue of the separate document requirement is partly the clear signal for motion and appeal time limits, and partly as reassurance that the court indeed believes that it has entered a final and appealable order. This virtue could be achieved for the benefit of any party who cares for clarity and understands the rule by requiring a separate document only when requested. It was suggested that if the Rule 58 proposal is published for comment, the transmittal letter should solicit comment on the alternative of abandoning or limiting the separate document requirement.

Discussion turned to questions of style. The draft in the agenda materials converted the present Rule 58 requirement that a judgment be "set forth" on a separate document to a requirement that it be "entered" on a separate document. It was readily agreed that this effort at streamlining was ill-advised. Entry and setting forth are distinctive requirements and events. The "set forth" locution will be restored.

A motion was made to recommend to the Standing Committee publication of the Reporter's version of the Style Subcommittee's version of Rule 58, on terms that ask for comment on whether the separate document requirement should be retained. It was noted that although publication itself would call attention to the buried time bombs and perhaps stir some belated appeals, the Appellate Rules Committee has concluded that the risk must and will be run. It also was noted that the Supreme Court order transmitting proposed rules amendments to Congress ordinarily addresses the question of application to pending cases, and that this process in turn is limited by the provision in 28 U.S.C. § 2074(a) that the pre-amendment rule applies when, "in the opinion of the court in which * * * proceedings are pending," application of the new rule "would not be feasible or would work

injustice." After these observations, the motion was adopted.

Two minor changes were proposed in Rule 54(d)(2)(B). The first would parallel the Rule 58(a) proposal by eliminating the requirement that an order on attorney fees be entered on a separate document. The second would conform Rule 54(d)(2)(B) procedure to recent changes made in Rules 50, 52, and 59 that establish a uniform requirement that a post-judgment motion be "filed" no later than 10 days after entry of judgment. These two changes can be effected by simply striking a few words from the present rule. The Style Subcommittee has proposed a complete style revision of Rule 54(d)(2)(B) since the rule will be published for comment. It was observed that the modified Style Subcommittee version presented to the committee was a vast style improvement on the present rule. But concern was expressed that considerable time must be invested to ensure that unintended consequences do not flow from a style revision. In addition, there is a risk that problems might arise from the obvious differences in style and structure between this part of Rule 54 and other parts. A motion to recommend the restyled version for publication failed. The motion to recommend publication of the simpler revision of Rule 54(d)(2)(B) was adopted.

A brief discussion ensued about the general difficulty of integrating new style conventions with the ongoing process of rule amendment. Real advantages can be achieved by piecemeal style revision. Piecemeal revision, however, runs the risk of multiplying still further the many stylistic variations that have emerged in rules that have been revised on the advice of many different committees. With rules that touch fundamental aspects of the civil adversary system, moreover, attempts to restyle provisions that are not slated for changes of meaning may prove dangerous. The recent project to amend the discovery rules and the ongoing project to consider class-action rules, for examples, have deliberately put aside any effort to make stylistic changes. These topics have widespread impact and generate intense feelings. It was urged that the Standing Committee not adopt any requirement that a general style revision be made of any rule, or even rule subdivision, whenever any amendment is offered.

Rule 81(a)(2): Recommendation for Publication

Rule 81(a)(2) now includes provisions governing the time to make a return to a petition for habeas corpus. These provisions are inconsistent with statutory provisions, and also are inconsistent with provisions in the separate habeas corpus rules that are still more inconsistent with the statutory provisions. The Criminal Rules Committee will propose some changes in the rules that govern habeas corpus proceedings and those that govern § 2255 motions to vacate sentence. The Criminal Rules Committee has recommended that all reference to these matters should be stricken from Rule 81(a)(2). The committee agreed, voting to recommend publication of the draft Rule 81(a)(2) revision in the agenda materials at the same time as the parallel Criminal Rules Committee proposal is published.

Report: FRAC

The Standing Committee Subcommittee on Rules of Attorney Conduct continues to gather information and to deliberate, without any need to move immediately toward conclusion of the project. Judge Scirica and Judge Niemeyer opened the report, noting that the Standing Committee has pursued this topic over a period of several years. The initial draft set of ten Federal Rules of

Attorney Conduct remains "in the wings." Variations of a simpler dynamic conformity model are being considered.

Professor Coquillette reminded the committee that the attorney rules topic began not in the Standing Committee but in Congress. In 1986 and 1987 Congress studied the questions raised by local rules, leading both to amendments of the Enabling Act and to creation of the Local Rules Project. So many local rules dealing with professional responsibility were found by the Local Rules Project that the topic was put aside while other local rules issues were pursued. But several years ago the question was taken up. The process has included several meetings to seek the advice of lawyers, judges, and academics who have special knowledge of professional responsibility issues. The attorney conduct issues are very sensitive. The local rules take many and inconsistent approaches. The inconsistencies have caused problems, particularly for the Department of Justice. The regimes adopted by local rules often are inconsistent with state rules — in Delaware, for example, the district court adopts the Model Rules, while the state adheres to the Model Code.

Professional responsibility issues cut across all committees. The joint subcommittee met in February to host a group of experts. The discussion focused on issues raised by a set of drafts of a Federal Rule of Attorney Conduct 1. Five versions were presented, moving in progression from a detailed model that expressly addresses several issues to a very simple model that simply incorporates local state rules. There will be another subcommittee meeting in August or early fall. The deliberate pace has been adopted deliberately, to work toward a strong and generally acceptable solution.

As work continues, there may be a FRAC 2 to regulate areas in which the Department of Justice has encountered difficulties with state rules of professional responsibility. Particular problems have emerged with respect to contact with represented persons and calling lawyers as grand-jury witnesses. The American Bar Association, the Conference of Chief Justices, and the Department are discussing possible solutions, aiming toward revision of Model Rule 4.2. Congress is interested in these questions. 28 U.S.C. § 530B was an effort to address state regulation of federal government attorneys, but it is unfortunately drafted. By commanding compliance with both state rules and local federal court rules, the statute at times requires the impossible task of complying with inconsistent rules. Pending bills would either repeal § 530B or refer these problems to the Judicial Conference for recommendations.

There also may be a FRAC 3 to deal with bankruptcy issues. Bankruptcy is distinctive because the bankruptcy statutes address some matters of professional responsibility, there are unique conflicts-of-interest problems that arise from the multiparty nature of bankruptcy proceedings, and there is a national bar. The Bankruptcy Rules Committee is considering these matters, but is not aiming at immediate action.

The Standing Committee continues to study the alternatives, honoring its obligation to promote consistency of rules and otherwise serve the interests of justice. In the end, the decision may be that there is no need for new rules.

The ABA has set an October target to distribute a preliminary draft of "Ethics 2000" proposals. It may be that the target will not be hit. There is no point in attempting to move out

ahead of these proposals in considering such specific issues as Model Rule 4.2. Discussion of these specific issues includes not only the ABA committees but also the Department of Justice and the Conference of Chief Justices. The ABA recognizes that simple adoption of a Model Rule does not accomplish adoption by any state. The Model Rules have not been unanimously adopted; the states that have not adopted them include such large states as New York and California.

And it has not been decided whether any federal rules addressing professional responsibility should be incorporated into the existing sets of rules of procedure or whether an independent set of Federal Rules of Attorney Conduct should be adopted.

Report: Discovery Subcommittee

Judge Niemeyer introduced the report of the Discovery Subcommittee by noting that although the Subcommittee has guided deliberations on the discovery amendments that now rest in the Supreme Court, it has important issues left to consider. The question of privilege waiver in document production is an important one that attorneys still worry about, but it is also complex. Computer-based information presents another great set of problems. Enormous bodies of information are now kept in computer-based systems. Discovery problems are beginning to emerge. The subcommittee met on March 27 with groups of experts to learn more about the problems, and to begin to consider the question whether rules changes are appropriate.

Judge Levi began the report by stating that the subcommittee is in an information-gathering mode. He and Professor Marcus attended the January leadership meeting of the ABA Litigation Section and listened to a discussion about the opportunity to do something by rules changes to address discovery of computer-based information. Lawyers who typically seek information are worried about spoliation. Lawyers who typically provide information are worried about the costs and burdens of responding.

The March meeting presented three panels. The first panel, comprised primarily of lawyers, provided information about the problems that have been encountered in practice. The second panel, comprised primarily of judges but with a few lawyers, addressed possible solutions, including the possibility of rules changes. The third panel, comprised entirely of forensic computer experts, provided information about technological problems and prospects, costs, and the like.

One persisting problem arises from information that the creator has attempted to delete from the computer. Vast amounts of intentionally "deleted" material remain subject to retrieval. Heroic measures are required to completely and assuredly delete information beyond the prospect of retrieval. Like an ancient palimpsest, the investigator need only chisel away the overlying material to reach the original underlying information.

There is some interest in developing safe-harbor guides to information preservation. Uniformly accepted retention protocols would be welcomed by many.

Privilege problems remain very much under study. One particular source of privilege problems arises from the fact that the systems that "back up" computer information to protect against system failures typically back up all information in the order received, without any differentiation or ordering. Searches through back-up tapes for relevant information must indiscriminately review

everything.

Battles continue to be waged over the form in which computer-based information is produced. The party that has the information may prefer to produce it in hard-copy form, while the requesting party may prefer to receive it in electronic form for easier searching. The party who has the information may, on the other hand, prefer to produce it in its current electronic form, shifting to the requesting party the burden of search; the requesting party may have a contrary preference that the producing party do the search.

Cost-bearing has come back to the discussion. Texas Rule 196.4 includes cost-shifting as part of its regulation of computer-based information discovery. It has been suggested that the abandoned effort to make explicit provision for cost-bearing as part of the balance between discovery costs and discovery benefits might be revived for computer-based information.

It has been suggested that the Rule 34 definition of "document" may deserve further consideration. More explicit wording might make it easier for lawyers to convince clients of the extent of the obligation to provide computer-based information in discovery.

Additions to Rules 16(c), 26(a), and 26(f) have been suggested to focus the parties and courts on the need to prepare for, and to manage, computer-based discovery.

With all of this, many remain uncertain whether any rules amendments would be helpful. The subcommittee thinks that a second conference would be helpful, again on a reasonably modest scale. The Federal Judicial Center is willing to help. One possible study would be to undertake an in-depth analysis of ten cases that have involved high levels of computer-based discovery. It also may be possible to develop a survey of magistrate judges through the computer system that links them together.

A subcommittee member observed that the March 27 meeting was very informative. The judge participants made it clear that early intervention case management is very important.

Another observation was that often the discovery fight is over the nature of the search. It might help to provide in the rules that the notice of discovery can define the search method, subject to objection. Various methods of search are followed in practice. In some circumstances, the requesting party is allowed direct access to an adversary's computer system. In other circumstances, a party with computer-based information may regard the very set-up of its computer system as highly sensitive and confidential information. The magistrate judges at the conference were not inclined to adopt a special rule for computer-based discovery.

Professor Marcus began his summary of the conference by observing that we have come a long way without getting closer to the finish line. There was agreement on some points.

Issues surrounding discovery of computer-based information do matter, and will continue to matter. People make such pronouncements as that 35% of business information is never rendered in hard-copy form. No one has a "silver bullet." But there is a view that the internet will force greater uniformity in the means of generating and preserving computer-based information.

There is disagreement whether we need rules changes at all, and on what rules changes might

be desirable if any are to be made. This is a moving target. Rules changes are costly. If the proposed amendments now in the Supreme Court take effect, many districts will have to adjust to deletion of the right to opt out of the national rules. Immediate adoption of still further discovery rules changes might prove burdensome for them.

Why is computer-based information different?

Discovery could be made easier by computers. Electronic searching can be both more thorough and much faster than a document-by-document paper review. A "word search" may be sufficient for many inquiries.

But one limit arises from information preserved in forms that can be searched only with obsolete software or hardware.

The problems presented by back-up tapes probably are unique. They are created in a form that makes search difficult. They may or may not be preserved over long periods of time.

Computers create "embedded" data that the user frequently does not know about. There is back-up information, cache files, and the like as well as encoded information about time of creation, changes over time, recipients of e-mail, and so on.

A lot of information can be found after a long time, including embedded information, supposedly deleted information, preserved back-up tapes, and so on.

Preservation is a problem. Simply turning on a computer can destroy information, and the destruction is in a random and unpredictable sequence. But not turning on the computer can be crippling. Even something as seemingly simple as turning off an automatic deletion program can immobilize a system after a relatively brief interval.

On-site inspection may be very important. Querying the system of another party, or of a nonparty, may be the most effective means of finding information.

The existence of experts in the field of computer-based discovery is itself a symptom of the differences between traditional forms of information and computer-based forms.

All of this leaves the questions of what to do. Work at educating judges and lawyers on the problems and prospects of computer-based discovery? Urge creation of a manual, similar to the Manual for Complex Litigation? Make changes in the discovery rules?

Current suggestions begin with those that are relatively modest. Rule 16(c) could be amended to make computer-based discovery a specific topic for the pretrial conference; Rule 26(f) could be amended to make it a subject of the parties' meeting to plan discovery. Initial disclosure requirements could be expanded to include information about a party's computer-based information system. Rule 30(b)(6) could focus on discovery addressed to the people within an organization that know how computer-based information is maintained and retrieved. Rule 34 could require production of information in computer-readable form; requests could be put in computer-readable form to expedite the exchange. More modern terminology could be adopted into the rules. And Rule 26(a)(3) could be expanded to require advance disclosure of computer-generated trial evidence;

Maryland is working on these issues now.

Broader issues may be considered as well. (1) Presumptive limits might be established for discovery of back-up tapes, perhaps providing that there is no need to search except on court order, or perhaps providing presumptive time limits for the backward search. (2) Something might be addressed to information preservation, although the rules do not now address preservation issues. One focus for a preservation rule might be coupled to the Rule 26(d) discovery moratorium, requiring that information be preserved through the moratorium period; immediate creation of mirror copies might be required, although it will be difficult to define the portions of widely dispersed computer systems that must be preserved in this fashion. (3) The problem of "deleted" information might be addressed, perhaps in Rule 26(b)(2). The purpose would be to limit the circumstances in which a responding party is required to incur great expense to recover deleted information. One challenge would be to define deletion of material that may have come into many computers and have been deleted from fewer than all. (4) Cost-bearing provisions may be more appropriate with respect to computer-based information than in more general terms. (5) Perhaps there is room to inject courts into the task of regulating "on-site" inspection and query processes. Some protocol or predicate might be created. (6) Privilege waiver by inadvertent production remains a challenging problem. The long-pending provision for a "quick look" that does not qualify as production and does not support waiver may not work for computer-based information: the quick look is the only look. There may be vast amounts of information that cannot be comfortably screened in any other way. An alternative has been suggested, allowing a defined period of time after production to assert privilege and retrieve the assertedly privileged information. But the amounts of material involved may mean that this approach simply shifts the time frame without reducing the burdens. (7) Some claims have been made that computer-based information cannot be produced because access is possible only through use of copyrighted software. These claims may well be bogus. But it may be difficult to attempt to define the substantive reach of fair use or similar copyright concepts, or to control the interpretation of copyright licenses, by court rule. (8) It might be possible to define the extent of a reasonable search by adopting a preference for key-word, boolian, or other search methods. (9) So-called "legacy" data may present special problems of burden, involving the need for archival searches for obsolete equipment and software to retrieve information preserved independently of the means of access. But it is difficult to know what a rule provision might do.

All of this reduces to the general proposition that if possible, it would be desirable to reduce unnecessary burdens on parties who face requests to discover computer-based information, and also to reduce the unnecessary hurdles that may confront those who make the requests. But we are far from reaching that goal. Advice will be welcomed.

General discussion began with Rule 34(b), which provides that a party who produces documents shall produce them in orderly form. The "shuffled response" used to occur regularly, but is supposed to be prohibited now. Perhaps an equivalent provision can be adopted for discovery of computer-based information. But back-up tapes will present a problem; there is little apparent reason in the business purposes they serve to adopt a more orderly system of preservation.

It also was noted that a "freeze" order to preserve computer information against accidental or deliberate destruction can be disruptive. The disruption grows as information is dispersed more

broadly throughout numerous desk- and lap-top computers. There seems to be a transition from centralized record-keeping of the sort that characterized the "main-frame" computer era. Migration to personal computers has led to dispersed and unorganized records.

Stories are growing that plaintiffs with modest assets are deterred from bringing litigation on strong claims by the costs of computer discovery. A plaintiff who has even a small number of personal computers in a business office may find that a thorough search in response to routine discovery requests can be prohibitively expensive. If we start fiddling with the rules we may expand the actual hours required for discovery — present levels are quite modest in most litigation, as revealed by the FJC study.

The March 27 meeting and other sources of information make it clear that there is intensive work with consultants to effect computer-based discovery, both in making discovery requests and in responding. Discovery may be made easier if the experts are brought together early in the process. But all of this is very expensive. And it may seem frightening that the parties and lawyers cannot manage discovery without the help of nonlawyer experts.

It has been suggested that the cost of retaining computer experts may decline as the market responds to expand the number of experts. But such reductions may not occur. There are a growing number of actions between parties who both have much computer-based information and who are seeking extensive discovery of each other. This seems a new phenomenon.

It will be important, if it is possible, to differentiate by rule between the basic information that is really needed for litigation and the costly and marginal information. Cost-bearing may be an appropriate approach: it puts the burden of deciding how much a computer search is worth on the party who wants the information.

Another observation was that the ranks of computer experts may expand to include experts based in the big accounting-consulting firms, and that this could in turn exert pressure toward the multidisciplinary practice firms that are the subject of current debate.

Both business practices and litigation practices seem to be evolving at a revolutionary rate. One development that could bring important relief is quite outside the civil rules. There is said to be real pressure toward greater uniformity of document creation, and toward commonly accepted standards for document preservation. If brought to fruition, these developments could be quite helpful.

With all of these possibilities, it remains important to ask whether we need new discovery rules. It was suggested that the present rules provide adequate tools. What judges need for effective management is not so much new rules as real knowledge of the technology. These problems should be addressed in the opening stages of case management. It may be enough to educate judges, and perhaps amend Rules 16(c) and 26(f) to encourage early attention to these issues.

It was urged that it takes so long to make a rule that the subcommittee should continue to work vigorously. Rule 34 might be revised; "data compilations from which information can be obtained" has a 1970-like ring and is no longer adequate. Perhaps Rule 34 should be amended to establish a presumption that computer-based records are to be produced in computer-based form.

Another suggestion was that the ease of instantaneous, dispersed access to computer-based information has implications for discovery in mass litigation. Document depositories may be outmoded; more efficient means may be available to ensure easy access to the information that makes multiple actions easy.

The need for continued work was expressed from a different perspective. "Games are being played." Discovery burdens are being imposed deliberately — first a demand is made for hard-copy information, then a demand is made for the same information in computer format. This is happening in litigation that pits business firm against business firm. In consumer litigation, wafted on the wings of notice pleading, discovery is changing rapidly. The costs can be staggering. In all sorts of litigation, nationwide and worldwide firms, in which everyone has a computer, present enormous difficulties in knowing where to go, who to talk to, how to retrieve and download the relevant information.

The theme of dispersed information continued in the observation that there is no way to view every computer in a party's organization. Going through a complete information system may be clearly out of any proportion to the reasonable pursuit of good-faith litigation. There is bad-faith litigation behavior that makes matters even worse.

A problem unique to computers is that a lot of private and often intensely personal information seems to reside in business computers. Few businesses, if any, have found any effective means to control the mingled business and personal use of office computers. The corresponding discovery problems are as difficult to manage as the habits of computer users.

It was noted that in criminal prosecutions, it is becoming common to seize computers to preserve evidence. Defendants then commonly assert that the computers must be returned because that is the only source of records needed to carry on daily life and business. Making mirror-image copies of all the information in the computer may provide an alternative to seizure, but the alternative itself is fraught with questions.

The discussion concluded with the agreement that the subcommittee should arrange a second conference, to be organized as a special meeting of the advisory committee, early next fall. Professor Marcus will prepare some draft rules for consideration. This work does not reflect a prejudgment that rules amendments are desirable, but only that the questions are important and should be pursued. "Little" changes will be in the mix. And the committee must be prepared to hear that it may prove difficult to draft even roughly satisfactory models. The fear of unintended consequences in an area of continual rapid evolution must haunt us continually.

Subcommittee Report: Rule 23

Judge Niemeyer introduced the Rule 23 subject by noting that there have been "several generations of Rule 23 proposals." The only amendment accomplished by the process so far has been adoption of Rule 23(f). This provision for permissive interlocutory appeals from orders granting or denying class certification bids fair to assist in the development of more orderly Rule 23 jurisprudence.

The work on Rule 23 has generated much information and has stirred, or revealed, much

946 controversy. There was nothing simple about the reactions to early proposals. We still need to ask
947 whether there are changes that would improve the practice and the rule. Are there problems that we
948 can address effectively? The committee should provide such guidance as can be to the
949 subcommittee.

950 Judge Rosenthal reported for the subcommittee. The subcommittee has focused its task less
951 on gathering new information than on sorting through the incredible mass of information that has
952 been gleaned through seven years of work, published proposals and reactions to them, conferences,
953 and related efforts. Rule 23(f) will generate new data on proper certification practices.

954 The proposal to soften the Rule 23(c)(1) requirement that class certification be decided as
955 soon as practicable by requiring that certification be decided only "when practicable" was advanced
956 because it seemed to make the rule fit actual practice. The proposal was resisted, however, because
957 it was feared that it would open the way to some consideration of the merits of the underlying claims.
958 Still, the one-time proposal to allow some examination of the merits before certification has not been
959 fully resolved.

960 Consideration was given to adding new factors to the calculus of predominance and
961 superiority in Rule 23(b)(3). Some of these factors would have tended to discourage certification.
962 A maturity factor would have pointed toward caution in mass-tort class actions. A "just ain't worth
963 it" factor, (F), was found not ready for advancement.

964 Another proposal would have confirmed the power to certify for settlement a class that could
965 not be certified for trial. Work on this proposal was postponed to await the decision in the Amchem
966 case, and then further postponed to consider the impact of the Amchem decision in the lower courts.
967 The Amchem and Ortiz decisions have put important limits on certification for settlement.

968 Through all of this, nothing has become easier or simpler. The RAND class-action study has
969 been completed, and will be helpful. But sorting through all of the RAND information will itself
970 require substantial study. Much additional information is found in the committee's own four-volume
971 set of working papers, the FJC study done for the committee, and the Report and papers of the Mass
972 Torts Working Group.

973 There also appears to be an ongoing shift of class-action litigation from federal courts to state
974 courts. There seems to be a concomitant proliferation of overlapping and competing class actions.

975 The volume of dollars flowing through class actions has continued to grow. Asbestos has
976 ceded to breast implants as a focus of high-volume litigation, and tobacco litigation looms
977 increasingly large. The amounts at stake can be huge.

978 There are fundamental choices to be made in considering every stage of class actions. Many
979 of the abuses and problems do not yield readily to rulemaking. Amchem, for example, teaches that
980 settlement classes cannot safely deal with many kinds of future claims, particularly the "future
981 futures" who are not even aware of past exposure to the products or conditions that may cause future
982 injury.

983 Congress is studying the problems of overlapping and competing classes. There may not be

much that can be done about these problems in the Enabling Act process.

Other of the real or perceived abuses may yield to more determined use of existing rules.

Earlier committee efforts were incredibly ambitious, addressing head-on some of the most important questions about class-action practice. But the rulemaking process itself will make it difficult to implement whatever answer may be found to some of these questions. The subcommittee has concluded that it is better to focus future efforts on the process of class actions. The final section of the RAND report says something familiar: Rules can help by identifying when judicial intervention is most needed, and by facilitating intervention when it is needed. Rule 23 does not say much about this. Case law helps to fill in the gaps, but not as effectively as a more explicit rule might do. We can set out criteria for addressing the process.

The first issue the subcommittee offers for discussion is the certification of settlement classes that would not be certified for trial. Rule 23 was read by the Court in the Amchem case to permit certification for settlement rather than trial only when "manageability" is the sole obstacle to certification for trial. Because the decision rests on interpretation of the present rule, amendment is possible to adopt a different approach. Models are provided with the subcommittee report that would allow certification beyond the limits of the Amchem decision. One model is a new Rule 23(b)(4); the other works through amendment of Rule 23(b)(3). There are strong arguments both for and against pursuing this possibility.

On the side of principle, the Amchem decision reminds us of the tension between individual and representative litigation. If the bonds that tie class members together are not strong enough for trial, can we say in a meaningful sense that there is a class at all?

If settlement classes are made more easily available, one consequence will be an increased number of opt-out classes. The financial risk to class lawyers is reduced when settlement is available. Do we want to encourage the continued growth of class actions in this way? And a permissive rule will in turn be expanded as courts, in the pursuit of convenience or other goals, find ways to approve settlements that lie outside the intended reach of any new rule. The limits carefully written into a new rule will, at times, be ignored.

Failure to expand the uses of Rule 23, on the other hand, may lead to still more class actions in state courts. The state courts may, with some delay, come to emulate the more stringent attitudes of the federal courts, but this cannot be predicted with confidence.

So we could decide to do nothing, to continue to rely on the Amchem decision to supply the rule that guides us. Case law will clarify what weight can be given to settlement or the prospect of settlement. Rather than criteria, we could focus on the process, on such matters as attorney appointment and attorney fees. This, at any rate, is the first question: should we encourage certification for settlement of a class that could not be certified for trial?

Regulation of the settlement process itself presents another set of questions. The draft Rule 23(e) in the agenda materials addresses such issues as support for, and containment of, those who make objections to a proposed class settlement. It also enumerates an extensive list of factors drawn from case law to articulate the matters to be considered on reviewing a proposed class settlement.

There are many different issues to consider.

A very rough draft addresses appointment of class-action counsel in a way that is designed to enlist the court in enhancing the prospect of effective class representation and to emphasize the fiduciary obligations of class counsel.

Another proposal that needs further development in the subcommittee would regulate the acts that counsel can undertake on behalf of a class before it is certified.

Attorney fee issues also are being considered. The executive summary of the RAND report suggests that fees are the most important source and symptom of abuse. And this may be the most easily addressed problem. Much good can be done if courts are able and willing to understand proposed settlements and fee awards. And a new rule can help equip courts to discharge this responsibility. One frequent suggestion, for example, is that fee awards should be based on the amount actually distributed to class members, not on the amount theoretically available if all class members choose to participate in the distribution.

There is a continuing need to examine the evolution of the cases. Mass torts are particularly likely to shift quickly. Three years ago, the Court said in the Amchem opinion that asbestos litigation is a terrible problem, but one that cannot be addressed through present Rule 23 without doing violence to the system. Can we amend Rule 23 to address it without doing violence to the system? Amchem may be read to give warnings on that score.

And so we can consider the "23(b)(4)" model that would go beyond Amchem. This is simply one picture of what a rule might look like if we were to decide to follow this path. Even with this model, it would not be possible to duplicate the Amchem settlement, at least to the extent of resolving the claims of victims who do not yet know even that they have been exposed to injury. Defendants seem to be saying now that they no longer think it necessary to be able to capture all of these future claims in a single settlement. Closure as to present claims is a sufficiently real benefit to promote settlement. But it remains to decide whether it is useful to pursue broader settlement opportunities, in the face of the difficulty of predicting what the impact might be. It is hard to know whether Amchem has restricted pre-Amchem settlement practices. The subcommittee believes that more class actions are going to state courts, and that the migration is fueled in part by perceived restrictions in federal courts. Although prediction remains uncertain, it is a fair guess that adoption of a proposal like this would increase the number of class actions brought to federal court.

The settlement class proposals are not limited to "mass torts." They are drafted in general terms that apply to all varieties of class actions, reflecting the established uses of settlement classes before the Amchem decision. But it was urged that the committee should focus on the problems presented by mass torts that involve different state laws. It was suggested, by way of elaboration, that the "manageability" aspect of Rule 23(b)(3) certification rulings is all that Amchem focuses on, and that manageability does not speak to choice-of-law issues.

Several comments were addressed to the package as a whole. Of the two drafts that would go beyond Amchem, it was observed that the (b)(4) draft would include (b)(1) and (b)(2) classes as well as (b)(3) classes, and this scope was thought to be a mistake. If, for example, there is a "not

really limited" fund, it would be wrong to certify a mandatory class on the theory that (b)(4) goes beyond (b)(1) limits. The same is true of a (b)(2) class — if declaratory or injunctive relief is not appropriate with respect to the class as a whole, why approve settlement with respect to a class? The provision proposed for discussion in Rule 23(e) that would permit a class member to opt out of a settlement was thought undesirable as to (b)(1) and (b)(2) classes because it would defeat the very purpose of certifying such a class. This set of comments then moved on to recognize that there are choice-of-law problems, but to suggest that an attempt to paper them over by certification of a settlement class may trespass so far on substantive rights as to violate the limits of the Enabling Act. Finally, it was asked whether the drafts on attorney appointment and attorney fees were intended to displace the inconsistent provisions of the Private Securities Litigation Reform Act. If this is not intended — as it is not — the draft should be modified to provide for inconsistent statutory procedures in the text of the rule, rather than leaving the issue to an observation in the Committee Note.

Further discussion of the "(b)(4) Beyond Amchem" draft recognized that the settlement-class questions are complex, and have been the occasion for frequent discussions over the years of committee deliberations. Views vary. Often plaintiffs' attorneys disagree on these questions among themselves, as do defendants' attorneys. The committee should attempt to focus on the public policy: what is appropriate for class actions generally? On the defense side, many defendants want a strong settlement rule that can be used to "get rid of problems." Many others fear the massive pressures that can flow from certification of a class for any purpose, whether for settlement only or for trial. Plaintiffs' lawyers include those who prefer truly individual representation of small numbers of plaintiffs, those who prefer to aggregate representation of many plaintiffs by formal or informal means, and those who prefer large-scale class-action resolution. These differences should be evaluated as a matter of public interest, not self-interest.

The adoption of Rule 23(b)(3) in 1966 introduced a new element. Many critics worry about what happens to class members: how well are their interests represented? If the parties stipulate that the case will not be tried, and we allow anyone who wishes to be heard, what are we doing in replacing adjudication with settlement? Facilitating settlement generates many problems. Class members who are not represented, except by the self-appointed, are in a very dangerous position. There is force in the argument that a device as powerful as the settlement class should be approved by legislation, not rulemaking. "This is pretty heady stuff. We should confront it head-on."

Returning to the choice-of-law problem, the committee was reminded that concern was expressed in earlier discussions of these issues that settlement circumvents state law. The manageability advantages of settlement run roughshod over state law. And if a case cannot be tried, there are weird incentives for the lawyers who represent a plaintiff class. But the Amchem decision accepts these consequences of settlement. Now we seem to be worried about conflicts of interest within the class and the need to subclass. In mass torts, differences in the nature of injury among class members can be a problem on this score. It is a fair question whether the advantages of settlement are so great that we should put aside theoretical concerns in favor of designing procedural tools that will advance better justice.

The choice-of-law discussion continued with the argument that the Amchem decision does

not speak to the effect of state-law differences on the predominance of "questions of law or fact common to the members of the class." The statement that only "manageability" concerns can justify certification for settlement of a class that would not be certified for trial is not clear, but it seems to refer to concerns more mundane than choice of law.

The question whether to attempt to amend Rule 23 to expand the role of settlement classes beyond limits of the present rule, as interpreted in the Amchem decision, came back. If expansion is pursued, it could be along lines similar to the "(b)(4)" draft, or instead could be done in terms similar to the (b)(3) draft. If expansion is not pursued, there is another choice — the Amchem interpretation could be made explicit in the rule, or the rule could be left unchanged. There might be some advantage in amending the rule to confirm the Amchem interpretation, but the advantages are not clear. Something might turn on whether other changes are to be made; an express confirmation of the Amchem interpretation could help if other changes might seem to imply some doubt.

Mass-tort classes present special problems of binding class members who, without the class disposition, would be likely to undertake individual litigation. One of the problems involves notice. The Federal Judicial Center has agreed to help by gathering models of notice for certification, for settlement, and for both certification and settlement together. A number of illustrative forms will be prepared for different substantive areas, and will be made widely available.

The desirability of encouraging settlement was discussed directly. It was urged that it is anachronistic to express doubts about the values of settlement — settlement is the fact. But what is the impact of expanding the opportunity to settle class actions in federal court when state courts remain available?

Settlement was simultaneously praised and damned in a comment that sought to set practical advantages and broad-scale theoretical advantages against the more familiar conceptual objections. The practical advantages lie in the abilities to resolve claims at lower, and perhaps far lower, transaction costs, leaving more money for victims and less for lawyers; to assure an orderly distribution of perhaps limited assets so compensation is available to those who are worst injured and those who are slowest to sue (including "future" plaintiffs), without disproportionate early payments to those who are least injured or for punitive damages; to provide like treatment as to both liability and damages for victims who have suffered similar injuries inflicted by a common course of action, free from artificial distinctions based on the choices of different law and differently inclined tribunals; and to marshall judicial capacities in an orderly manner. The theoretical advantages are implicit in these practical advantages, emphasizing the like treatment of like cases. The familiar conceptual objections assert that these practical and theoretical advantages come at too high a sacrifice of traditional values. The like treatment of like cases involves a homogenization that defies the customary opportunity of plaintiffs to pick the time, the court, the coparties, and the adversaries. Settlements defy governing state law by disregarding the different social policies that are reflected in different legal rules. The settlement, moreover, is controlled by class counsel who — most pointedly in a class certified only for settlement — get nothing if there is no settlement. The ability of defendants to influence the choice of settlement terms in this setting cannot be controlled effectively by judicial review because the range of plausible alternative settlements is far too wide

to support any but the most general appraisal of actual settlement terms. Choice between these warring views is exquisitely difficult.

Adoption of the proposed (b)(4) would support an argument to approve the actual Amchem settlement, at least without the "future futures" (those who, at the time of settlement, do not know of their exposures to the injury-causing event or condition). The Amchem settlement is so attractive that it has furnished the model for pending asbestos legislation. The importance of these questions is reflected in the opening of Judge Becker's opinion in the Third Circuit reversal of the Amchem settlement. In paraphrase, he observed that every decade presents a few great cases that force courts to choose between resolving a pressing social problem and preserving their own institutional values. Certification for settlement on behalf of a class that could not be certified for trial solves a problem, but at a price.

Turning to the question of the interplay between state and federal courts, it was thought difficult to predict what would be the consequences of adopting an expanded federal settlement-class rule. State courts are beginning to enter the arena of nationwide class settlements. A great many choices might be made in the federal rule, facing such questions as control of competing and overlapping classes, control of multiple actions by injunction, and the like. A federal rule that treats a class certification as an event establishing exclusive federal jurisdiction over the certified class might support effective federal control, if such a rule can be written within Enabling Act limits. The res judicata effects of a refusal to certify, or a refusal to approve a particular settlement proposal, also could affect federal-state relationships in pervasive ways. Many dimensions of federalism are involved. That fact of itself demonstrates the need for care.

The role of the rulemaking process was questioned from another direction. The attempted settlements in the Amchem and Ortiz cases seemed to many observers to go beyond the limits of what should be done by settlement. A rule that explores ways of improving settlement class practice within the limits of the Amchem opinion could present reasonably comfortable alternatives. But it would be a bold step to go at all beyond the Amchem limits. Caution should be observed in pursuing the practical values of class actions and class settlements.

A veteran committee member who "was here for the Rule 23 wars" noted that proposals that emerged from years of hard work failed for want of any consensus for reform. The chances for de facto rule changes by court decision are better than the chance for achieving consensus within the Enabling Act process.

The subcommittee is determined to continue the committee's effort to be "sensitive to reality." The settlement-class question is the most prominent question that the committee decided to put aside to await first the decision in the Amchem case and then lower-court reactions to the decision. The Amchem opinion itself recognizes the question whether Rule 23 should be changed. Any attempt to go beyond Amchem will meet the practical difficulties that were recognized in the earlier deliberations. The question is not really whether to favor or disfavor settlement. It is a question of class certification criteria at the point where the most money is involved.

It was urged again that it is difficult to say that a set of representative plaintiffs do not qualify to try a case but do qualify to settle the case. A lot of public policy is established by litigants in class

actions; establishing public policy by settlement, not adjudication, is a precarious undertaking.

The Amchem decision was approached from a different angle with the observation that the opinion is not entirely clear and the dissent is persuasive. Has the decision caused problems in practice? A response was that the Amchem decision does not seem to be preventing settlements. A settlement has been reached in the fen-phen litigation, the biggest mass tort since breast implants. State court plaintiffs are objecting strenuously to the settlement, however, and it remains to be seen whether the settlement will be approved. And some cases are going to state courts. Another response was that there are decisions that retract initial certifications on the basis of the Amchem decision. A limited-fund settlement was initially approved in the pedicle screw litigation, but was decertified after the Ortiz decision on the view that the only true limited fund requires assigning complete ownership of the defendant to the plaintiff class. And there is anecdotal evidence that fear of the Amchem decision is driving cases to state courts. But there seems to be an increase in federal class actions of the sort emphasized in the Amchem opinion — not mass torts, but consumer actions on claims that would not be brought by class members as individual plaintiffs, employment cases, and the like.

Another dimension of the questions left open in the Amchem and Ortiz opinions was noted with the suggestion that the "case-or-controversy" perspective makes the approach to Rule 23 seem odd. What is odd is that usually the committee acts by reacting to problems that are brought to it. Is anyone coming to the committee now, saying that there is a problem with Rule 23 that needs to be addressed? Why not let the subcommittee continue its work, waiting to see whether real problems emerge?

The response was offered that we are in a period of transition. Interlocutory appeals under new Rule 23(f) offer a new safety valve that may release some of the pressures that to many defendants have made settlement the only available course after class certification. The Amchem and Ortiz decisions are the first Supreme Court interpretations of Rule 23 in several years. They have changed what some courts were doing. The Amchem opinion is opaque in parts, and Justice Breyer's dissent has a strong practical grounding in the real importance of settlement in the process itself. The subcommittee is asking now only for a threshold determination of the most useful present direction to follow, not for a committee determination that will permanently close off any alternative. The RAND report is an indication that there still are problems. So of the many problems that were described by lawyers at committee conferences and hearings, and the problems that were discussed in the conferences held by the Mass Torts Working Group.

The subcommittee thus is looking for directions to focus its work for the immediate future. It seeks to find proposals that may survive and that will improve ongoing administration of Rule 23. There is no present belief that some specific part of Rule 23 needs to be fixed as an independent source of problems. The Rule is, for what it does, a very short and general rule. The proposals set out in the agenda materials would make specific in the rule practices that have emerged in the cases or developing practice. They would add flesh to the structure in places where the rule now says nothing. The draft Rule 23(e) provisions for reviewing class settlements are very much in this vein.

With all of this, it was argued that settlement classes should not be further explored. There

is no clear reason to take on these questions, unless it be to make the practical impact of the Amchem decision more clear. Why go beyond, into uncharted territory? A parallel argument was made that no practical case has yet been articulated for going forward with the (b)(4) draft. We should see real benefits before making any investment or running any risk in this area.

The subcommittee agreed that for the time being, it should be assumed that Rule 23 will remain within the limits sketched in the Amchem decision. The subcommittee will work to improve the workings of Rule 23 within those limits.

That objective leads to the question whether an attempt should be made to restate the Amchem decision in the body of Rule 23. It was urged that it is difficult to be confident of the decision's meaning, and that in any event it is awkward for an advisory committee to purport to interpret Supreme Court pronouncements. The Amchem decision can be read to authorize settlement classes on a broad scale; perhaps it should be left alone. But a majority of the committee concluded that the subcommittee should continue to work toward a proposal that would constructively capture the meaning of the Amchem decision in Rule 23. A careful review of lower-court developments will be a central part of this task.

Apart from the settlement-class question, the subcommittee is pursuing several "process" questions. The approach to these questions has been to attempt to capture in Rule 23 the best practices that courts sometimes, but not always, honor now.

Draft Rule 23(e) sets out a long list of criteria for review of a proposed settlement. Objectors are noted in a way that reflects the difficulty of sorting out beneficial from harmful manifestations of the objection process. Many of the points covered in the draft respond to concerns that have been repeatedly expressed during the Rule 23 review process.

The draft provisions for court appointment of class attorneys and for determination of attorney fees are in "very preliminary" form. These issues are very sensitive. The attorney appointment draft reflects an attempt to increase court control. An application is required. There must be a hearing if more than one application is filed. The fiduciary role of class counsel is emphasized.

The draft fee rule also is intended to increase court control. It does not purport to resolve the choice between measuring fees by a percentage of the class recovery and by "lodestar" calculation. The factors identified in the draft, indeed, emphasize that there are many common elements that affect both approaches.

Both drafts reflect the fear that there are continuing abuses, and a continuing need to strengthen judicial regulation.

Discussion began with the assertion that the drafts respond directly to real problems. These are highly controversial topics, but the committee should not shy away from them on that account. There are existing paradigms in the case law. The subcommittee should focus its attention on these issues as its first priority.

Regulation of appointment and fees involves issues that overlap concerns of professional

responsibility. The "Ethics 2000" committee is considering rules that overlap these issues with such matters as fees, competency, and conflicts of interest. Proposals in these areas will be as controversial as anything the committee has considered. It may be desirable to seek a preview of what the controversy will be like. On possibility might be to seek advice at one of the conferences held to discuss possible federal rules of attorney conduct, recognizing that more drafting work remains to be done before such discussion would be useful.

It was agreed that the subcommittee should continue to develop rules regulating appointment of class counsel and determination of fees for class counsel.

Report: Agenda Subcommittee

The Agenda Subcommittee advanced the proposal to amend Rule 82 described with the other proposals of rules to be recommended for adoption.

The Agenda Subcommittee further reported that, with the help of support staff, the subcommittee process is functioning smoothly.

Report: Rule 53 Subcommittee

The Federal Judicial Center study of special masters, undertaken at the request of the Rule 53 Subcommittee, has been completed. The report was distributed to committee members for this meeting.

Thomas Willging launched the report presentation. Phase 1 of the study was a statistical study of the incidence of special master activity in all federal-court cases closed during a two-year period. There is consideration of appointment in about 3 cases out of every 1,000, and appointment in about 2 cases out of every 1,000. The statistics cover such matters as the stages of proceedings at which masters act (all stages), who initiates appointment, and the like. Phase 2 selected a sample of all the cases identified, and undertook interviews with judges, masters, and attorneys to examine the use of masters in greater detail. One focus of the inquiry is how actual practice is influenced, if at all, by the apparent focus of Rule 53 on trial activities. The sample of cases was not random. Instead, it was targeted, including a purpose to examine some cases in which appointment of a master was discussed but not made.

Marie Leary described the findings as to the reasons that led to appointment of special masters. Approximately half of the appointments were made at the judge's suggestion. One reason for appointing discovery masters was experience with insurmountable discovery disputes and hostility between counsel in discovery; masters appointed for this reason were given authority to manage every phase of discovery. A pretrial appointment may instead be designed to help the court's understanding of complex technical issues. In several civil rights cases, magistrate judges were appointed to act as special masters because of statutory encouragement and the opportunity to save scarce judicial resources.

For trial, Evidence Rule 706 experts were used to help the court. Another case involved appointment of a master for one of the most traditional reasons, performance of a partnership accounting. Another master was appointed to handle all activity in an insurance interpleader action.

The motivations were similar to many pretrial appointments — to accommodate limitations of judicial resources and to keep the cases moving.

Post-trial masters were appointed to obtain competences the courts could not muster on their own. One example involved administration of a class-action settlement. Another was to implement settlement of a tax-assessment case involving a large defendant class. Implementing institutional changes is another reason, including a desire to get information about actual implementation and its effects that the court may not be able to obtain from the parties. Nearly unique reasons were given for the multiple uses of masters in the silicone gel breast implant litigation.

Generally the judges, attorneys, and masters themselves agreed that the masters had functioned effectively. The appointments would have been made again with all the benefits of hindsight.

The greatest concern about appointing masters was that the parties must bear the cost.

Laural Hooper presented two of the areas of problems found in the study.

One set of problems arises from the methods used to select masters. The methods are set out in Table 6 of the study at p. 34. Problems are most likely to be perceived when the judge appoints a former law clerk or someone recommended by another judge. Lawyers who did not object to such appointments nonetheless reported doubts whether the person appointed was the best person. About three-fourths of the masters are attorneys. Some are magistrate judges. In Phase 1 of the study, some screening for conflicts of interest was visible in the record of about 11% of the cases. In Phase 2, it was found that courts rarely inquire into possible conflicts unless the parties raise the issue. Nonetheless, the overall finding was that parties generally were satisfied with the selection process, apparently because they were actively involved.

A second set of problems arises from ex parte communications between the master and either the judge or the parties. The nature of the appointment controls the approach to ex parte communications. If the master is to perform administrative, procedural, or settlement functions, ex parte communication with the parties is permitted, especially in post-trial decrees. Party consent is often sought. Most of the parties said they would not engage in ex parte communications unless the order of appointment permitted it. Some orders specifically forbid ex parte communications with judge or the parties. Courts that entered these orders did so to protect the masters against being lobbied. One court permitted a Rule 706 expert to communicate with the court during breaks in trial, but then put the communications on the record. In another case the judge talked to the expert off the record; this was a rare event. Several masters thought a rule on ex parte communications would be desirable; they want guidance.

Thomas Willging concluded the report. He began by noting that party consent (or acquiescence) is important to appointment. Phase 1 found, Table 3, p. 24, that 70% of motions or sua sponte orders for appointment were unopposed. Appointment is twice as likely when there is no opposition.

Authority for the appointment was found in Rule 53 in 40% of the cases, Table 5, p. 29. In another 40% of the cases, no authority at all was cited. The explanation for the failure to cite any

authority may well lie in the fact that most appointments were done with consent. Often there is express consent of all parties. In other cases, the judge expressed an interest in getting the help of a master and the parties consented; interviews with the attorneys suggested that in some of these cases consent was given despite unvoiced misgivings. The rules provide a backdrop for the negotiation.

The Phase 2 interviews disclosed only a bit of reaction to the apparent limits of Rule 53. One very experienced judge suggested that pre- and post-trial uses can involve "fact finding," so there is some Rule 53 support for these appointments. The persons interviewed did not see problems for their cases, but some would like the rule to provide express authorization for what was done. Page 69 of the report quotes a very experienced judge, who observed that it would help to clarify authority, but the task should be approached carefully. If the rule is written in broad terms, it may seem to authorize too much; if it is written in narrow terms, it may seem to impose undesirable restrictions.

Some judges believe they have inherent authority to appoint masters outside Rule 53. Those who focus on development of Rule 53 want broad, flexible authority. Flexibility is thought particularly desirable as to the role of "monitor." The monitor practice has evolved in a lot of directions.

At times the respondents talked of specific rules changes. Ex parte communications were noted, with expressions of feeling inhibited or restrained by the lack of clear guidance in rule or the appointing order. In one case a motion to remove was brought because the master engaged in settlement discussions with two of the three parties. And it was noted that Evidence Rule 706 does lay out an appointment process.

Judge Scheindlin expressed the subcommittee's thanks to the Federal Judicial Center for this fine empirical research.

Judge Scheindlin did some more impressionistic research by sending the Rule 53 draft prepared some years ago to people who have worked in the field. Six written responses were received and provide additional useful insights. Generally the responses indicate that revision of Rule 53 is long overdue. Rule 53 as it stands covers the least frequent, and the least popular, use of masters to prepare findings of fact. Findings prepared for review by the court may prove wasteful. Findings prepared for reading to a jury are "scary." One respondent said that current practice is essentially lawless; there is much that remains outside Rule 53.

The respondents in this informal survey thought that consent is important in making appointments. They believed that an "exceptional circumstances" test should continue to restrain appointments when there is no consent.

All respondents favored use of masters for discovery or mediation. The parties will readily consent when a discovery master is actually needed. And post-trial uses also were approved.

As to selection of the master, it was thought that something has to be done about possible conflicts of interest. One suggestion was that Rule 53 should invoke the 28 U.S.C. § 455 standard. And it should be required that the master be competent.

Standards of review should be adjusted to the circumstances. The respondents did not want an abuse-of-discretion standard, preferring clear error. But for "trial facts," a preference was expressed for de novo review by the court on the record compiled by the master.

The respondents thought that generally the parties should share equally in paying the master's compensation, but that the master should be given power to recommend a different allocation.

Ex parte communications should be addressed by Rule 53. It would be sufficient to provide that the order of appointment should address the question, prohibiting ex parte communications or authorizing them in defined circumstances.

With this background, the subcommittee asks whether it should proceed with the work of developing a new rule to replace the current outmoded rule. The subcommittee believes that it would be desirable to proceed with preparation of a rule.

Judge Niemeyer recalled that the Rule 53 project was put aside several years ago because it seemed a daunting subject, and because the committee was committed to working on other demanding projects. The subject is complicated by the need to relate the use of special masters to the opportunities to rely on magistrate judges. Masters in fact are doing many different things.

It was agreed that Rule 53 is out of date. It seems to conflict with the magistrate-judge statute and Rule 72.

At the same time, Judge Roettger observed that Rule 53 is flexible in some ways that may be surprising. Many years ago he wanted to take testimony outside of his district, but could not contrive a way to do it until the Administrative Office said that he could do it if the parties would consent to an order by which he appointed himself as special master. It worked, and was very useful.

A committee member described extensive experience with special masters in California state practice. Specialized lawyers are routinely appointed as masters, with consent to all the terms of appointment, in Leaking Underground Storage Tank litigation. There are hundreds of these actions. Ex parte communications are prohibited. Most of the actions wind up successfully by mediation. The practice works well. More recently, litigation about the MTV gasoline additive has involved enormous discovery. The state court discovery commissioners bogged down. Special masters — retired appellate judges — have worked out successfully.

The committee approved a motion directing the subcommittee to develop draft Rule 53 for consideration by the committee.

Report: Simplified Rules of Procedure Subcommittee

The subcommittee on simplified rules of procedure plans to work toward a draft of simplified rules for further consideration. An effort will be made to identify people who may have relevant experience to help guide the process. If a modest number of people can be identified who are willing to confer together, a small meeting will be convened in late summer to gain new perspectives.

Discussion began with Judge Niemeyer's report that district judges at the Judicial Conference and elsewhere have reacted with enthusiasm to the concept of simplified rules for some cases. The

ABA and the American College of Trial Lawyers also seem enthusiastic.

Some valuable information may be found in studies of experience with differential case management under the Civil Justice Reform Act. Experience in the Southern District of New York, however, is not promising. Parties or lawyers do not want to be assigned to a track that seems to diminish their procedural rights, even though the "rights" are not likely to be useful or used, and are costly. This project may be a solution in search of a problem.

It was responded that an incentive to use simplified rules might be provided by empowering plaintiffs to invoke the rules by making a binding election that caps total recovery. The cap would in turn provide an incentive for defendants.

Concluding Thanks

Judge Niemeyer closed the meeting by observing that the committee should not take for granted the great work of the Rules Committee Support Office. John Rabiej is unfailing in his great and imaginative support. And Mark Shapiro, who has been of great help as well, will be moving to London, England. The appreciation and good wishes of the committee were extended to him.

Next Meeting

The next meeting was set for October 16 and 17 in Phoenix, Arizona.

Respectfully submitted,

Edward H. Cooper
Reporter

3 A

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MEMORANDUM

DATE: October 4, 2000

TO: Members, Civil Rules Committee

FROM: Lee H. Rosenthal, Chair
The Class Actions Subcommittee

SUBJECT: Proposed changes for Rule 23

Attached to this report is the present draft of proposed changes under consideration for Rule 23. This draft addresses four topics: judicial review and approval of class action settlements; appointment of class counsel; determination of class attorney fees; and appeal by class members who have not intervened. The present draft continues to focus more on the process rather than on the substance of class action litigation. This draft is still at a tentative and preliminary stage. The subcommittee plans to have a set of specific recommendations to present to the Committee at the April 2001 meeting.

The draft raises three categories of problems that must be addressed. The first set of problems is whether the topics are appropriately addressed by rule, as opposed to developing case authority. The problem is particularly acute for proposed rules that take the form of "laundry lists" of factors courts are to consider in making different rulings affecting class

actions. Such lists are not unknown in rules, but are more typically reserved for case law. The case authorities on class actions are growing at a pace previously unknown in this field, thanks to a combination of the interlocutory appeal amendment and a flurry of appellate cases addressing not only certification decisions, but also attorney appointment under the Securities Litigation Reform Act and fee awards. This development of appellate authority must be considered as we decide what should be addressed through Rule 23 and what should be left to the case law, and whether specific proposed amendments should deferred until the case law develops further.

The second set of problems is whether the specific draft proposals are wise. The present draft introduces some proposals that are not–at least not yet–the subject of extensive case authority. For example, the draft rule on judicial review of class settlements proposes a right to opt-out after notice of the settlement terms, even in (b)(1) and (b)(2) class actions, and recognizes discovery rights in objectors. The draft on attorney appointment raises the question of whether, and what, restrictions should be put on attorneys before the court appoints them as class counsel. The present proposal is very broad and would preclude much of what lawyers now do routinely before class counsel is formally appointed. These are a few examples of proposals that go beyond an attempt to identify and codify "best practices" - an attempt some criticize as unnecessary - to propose additional requirements or limits - an attempt some criticize as unwise.

The third set of problems is whether this Committee should revisit proposals raised in the last round of rulemaking or raise additional topics. One modest proposal that almost became part of the rule in the last round of

proposals is the change from "as soon as practicable" to "when practicable" in Rule 23(c)(1)'s mandate for the timing of certification decisions. The public comment revealed that many viewed this as a helpful change that brought the rule more in line with prevailing practice. The Standing Committee rejected this proposal, in part because of a desire to avoid piecemeal rulemaking, and in part because of a concern that it would lead district courts to allow discovery into the merits before deciding certification motions. If we propose other amendments and can address the Standing Committee's concern, this proposal might merit reconsideration.

Conspicuously absent from the proposals now in draft is a direct effort to address overlapping, competing, and duplicative class actions. There are certainly limits to a rules approach to this problem, but the importance of the problem suggests that the subcommittee should give much more study to whether it can be addressed directly.

Our reporter has received helpful comments on the drafts that we will certainly consider as we continue work. The subcommittee plans to meet at the end of this year for a drafting session that will focus on specific proposals. We plan on bringing the full committee the results of that work as a set of recommendations at the April 2001 meeting. Your comments and insights are sought throughout the process.

These issues, and their application to the proposed rules, are discussed in more detail below.

(e) SETTLEMENT, DISMISSAL, AND COMPROMISE

Comments, Issues, and Questions:

Consistent with the direction the Committee provided in April 2000, this draft does not attempt to restate or revise the Supreme Court decisions in *Amchem* and *Ortiz*. Nor does the draft attempt to distinguish between classes certified for settlement only and classes certified for trial, then settled.

(e)(3) The proposal that class members be allowed to opt-out after the terms of a settlement are known has at least two controversial features. The first is that, as drafted, it would apply to (b)(1) and (b)(2) classes, as well as (b)(3) classes. Does an opt-out right make sense with respect to settlements involving only injunctive or declaratory relief? An opt-out right may make particular sense in "hybrid" classes, that seek relief under more than one section, but it is unclear that a court lacks the ability to require such an opportunity under the present rule. There is a practical issue of whether such a feature would make settlements less likely because the binding effect is less predictable. On the other hand, there are a number of successful settlements that allow class members to opt-out after preliminary approval of the settlement terms and notice of those terms.

(e)(4) The proposals that affect the role of objectors are also contentious. The rule proposes to provide objectors a right to discovery to support the objections and allows a discretionary power to award fees if an objection is "successful." Objectors may provide an important source of support for a judge's evaluation of the settlement terms. Objections may also be asserted abusively. The level of skepticism that accompanies a proposed

rule to increase the tools available to objectors, and the increased leverage they may provide, is itself revealing. Professor Cooper notes, with great understatement, how difficult it is to distinguish in a rule the differences between "good" objectors and "bad" objectors. The rule attempts to deter "bad" objections by referring to Rule 11. Such a reference may be redundant and ineffective. Another approach might be to condition or limit objectors' discovery rights on a threshold showing of good cause for asserting the objection. However, any increase in the recognized role of objectors raises the potential for abuse and delay.

Requiring disclosure or discovery of "agreements or understandings made in connection with the proposed settlement," or "side agreements," also provokes controversy, although many courts require this today. It is unclear whether this proposal is contentious as framed because it is linked to objectors' discovery, or because it is an additional layer of judicial intrusion into private parties' settlement.

(e)(5) The factors for reviewing proposed settlements draw on cases that thoughtfully articulate the requirements. A threshold issue is whether it is necessary, or appropriate, to list such factors in a rule. Case law addressing these factors is growing. There is much agreement about many of the factors courts identify as essential to reviewing class settlements. Codification of the "best practices" does provide more guidance and support to courts as they review settlements. However, there is no guarantee that putting the factors in a rule, as opposed to reported opinions, increases the likelihood that courts will rigorously and carefully apply them. In addition, any list of rules is inevitably incomplete. A factor that is not specifically

included will likely be viewed as having less significance than those that are specifically listed. A strong "including, but not limited to" clause may ameliorate, but not eliminate, this problem.

Some of the proposed factors provoke controversy. Linking review of the settlement terms to review of attorney fee awards and allocations of fees, and to review of the plan for administering the settlement, may be beyond prevailing practice. These factors require further study. The critical question is whether judges, lawyers, and absent class members need the support and discipline that placing a list of factors in the rule itself supplies.

CLASS-ACTION ATTORNEY APPOINTMENT RULE

Comments, Issues, and Questions:

The case law on class action attorney appointment is less developed than the case law on certification and settlement approval. That creates both more uncertainty and more opportunity for rulemaking. Court regulation of class action attorney appointment is also an area in which the rules can address, although indirectly, the issue of overlapping and competing class actions. That is a strong argument in favor of developing a proposal for comment.

The draft rule proceeds from an assumption that a greater degree of court involvement in class action attorney appointment is desirable, both to increase the adequacy of representation for absent class members and to improve judicial abilities to prevent potentially abusive aspects of class suits. Current practice (outside areas that are developing under the Securities Litigation Reform Act and an increased interest in "bidding" lead counsel

roles) is often based on a rebuttable presumption that the lawyer who files the suit will represent the class. That presumption can give the lawyer an ability to exert enormous immediate pressure on the class adversary, pressure that is largely unregulated until court appointment. However, any broad limit on what counsel for a putative class can do before court appointment runs the risk of ignoring common practice. Lawyers routinely negotiate with their class adversaries long before suit is filed. Once a case is filed, a considerable amount of time can pass before formal appointment of class counsel. It may be both unrealistic and unwise to impose significant limits on the representation of the putative class during this period. Broad limits may either be ignored or greatly reduce the ability to consolidate, coordinate, or settle different forms of aggregate litigation, not just class actions. Both plaintiffs' counsel and defense counsel may find this broad approach to pre-appointment restrictions unworkable. Moreover, because counsel cannot bind the class until appointment occurs, there may be little need to regulate what counsel for a putative class does before appointment.

In short, the present broad approach raises many concerns. The next step should include drafting narrow alternatives to test whether such limits on pre-appointment representation offer more promise than either broad restrictions or no restrictions.

The issues of the procedure for class counsel appointment and the factors to be considered in making an appointment are somewhat different. The proposed rule lists factors a court should consider in deciding an application for appointment. This raises the threshold issue of whether such factors should be left to case development rather than rule codification. The

case law is presently less developed in this area than in the area of certification and settlement approvals, which may create a greater need for a rules approach. Importantly, the last proposed factor provides a mechanism for a court to consider the ability of appointed counsel to "facilitate coordination or consolidation" of other, parallel suits, including overlapping or duplicative class suits. It is one of the few places the rules can provide such a mechanism to judges.

The express requirement for a hearing before class counsel is appointed if more than one application is received is new, but it is consistent with the "codify best practices" approach. This is an area in which best practice is not necessarily common practice. The proposal carefully avoids dictating any "case management" approach, such as bidding or other techniques that might apply in different cases.

CLASS ACTION ATTORNEY FEE RULE

Comments, Issues, and Questions:

More than any other single factor, attorney fee issues lend heat to the debates over class actions. There is certainly case authority on attorney fees generally, but the case law on attorney fee awards in class actions, particularly in class action settlements, is less plentiful. There is much general sentiment in favor of "doing something" in the rule to assist judges and lawyers in making careful and analytically sound fee awards. There is less agreement on whether specific factors are appropriately listed in a rule, as opposed to case law or the *Manual for Complex Litigation*, and on what the specific factors should be.

The proposed rule draws on the empirical data supplied by the Rand study on class actions, as well as the information obtained through the voluminous public comment record that resulted from the Committee's earlier work. The factors listed directly respond to frequently and loudly expressed concerns over judges' ability to detect and prevent abusive practices, such as attorneys settling consumer class action cases to receive large amounts of cash while class members receive coupons. The factors are framed to be applicable to either a lodestar and a percentage of fund analysis, and in all kinds of class suits, from small consumer claim suits to mass tort actions. The proposed rule continues the debate over the proper institutional role for objectors by a specific provision for discovery into objections to fee applications. The proposed rule continues to require the disclosure of "side agreements" that affect fee division.

A threshold issue is whether rule reform is necessary, given increasing appellate scrutiny over class action fee awards and the concerns raised by a "laundry list" approach to a rule. The premise of the draft rule, that it is necessary to increase the oversight role of district court judges into the fee award process, and to do so in very specific ways, is likely to generate significant comment from both judges and lawyers. On the other hand, both recent appellate case authority and empirical data support the need for district judges to subject fee applications to increasingly detailed scrutiny. The present rule neither guides nor supports such scrutiny; the proposed draft attempts to provide such a foundation.

APPEAL STANDING: NEW RULE 23(G)

Comments, Issues, and Questions:

This is new. As the draft comments state, this proposal attempts to change by rule the holding in some circuits that a class member cannot appeal without formally intervening in the trial court or the court of appeals. Cases reaching such a holding recognize a need to avoid disruption to the orderly control of class litigation. However, the result is that persons are bound by judgments from which they cannot appeal. The proposed rule attempts to strike a balance between the need to avoid disruption and delay on the one hand, and the undesirable preclusion of appellate rights on the other. The rule removes the separate intervention requirement for an appeal from a judgment approved under Rule 23(e), or from a judgment that was not entered under Rule 23(e) and from which a class representative has not appealed. Any appeal is limited to issues properly preserved in the trial court.

The issues raised by this proposal include whether it is necessary to protect against unfair settlements, in light of the possibility of objectors who have the ability to move to intervene, and whether it will invite mischief in the form of uninformed or ill-intentioned appellants, who have not participated in the litigation at the trial court. The proposal does address a specific gap in present practice and deserves further study.

CLASS ACTION NOTICE FORMS

Rule 23(b)(3) proceeds on the premise that notice to class members provides an informed basis for opt-out decisions. However, class action notices are often so dense and turgid as to be not merely incomprehensible, but unreadable. This Committee asked the Federal Judicial

Center to develop "model forms" of notice that judges and lawyers can use to improve the intelligibility of class notices. This work, headed by Tom Willging, proceeded by gathering and studying a large number of recent class action notices; picking the most readable and useful; testing them on nonlawyers at the Center; and drafting the proposed model form included in these agenda materials. The Center has concentrated on drafting a single "basic" form that can be readily tailored to different subject matters. Although the draft is for a combined notice of pendency, class certification, hearing, and settlement approval, it can easily be separated to a stand-alone form for notice of pendency and class certification, without settlement; a combined form; or a form appropriate for settlement after class certification.

The FJC intends to continue to work using toward even "plainer" English in the notice forms, without changing the substance. The resulting forms can be made available through the Center, in print and electronic form, in a variety of ways, and can be included in judges' training. This project promises significant improvement to a difficult area of class action practice, and does not depend on any Rules changes for implementation.

3 B

(e) Settlement, Dismissal, ~~or~~ and Compromise.

(1) A class or subclass representative may, with the court's approval, settle, dismiss, or compromise all or part of the class or subclass claims, issues, or defenses.

(2) The court may not approve settlement, dismissal, or compromise of all or part of ~~A class~~an action certified as a class action ~~shall not be dismissed or compromised~~ without ~~the approval of the court~~ a hearing, and notice of ~~the~~ a proposed settlement, dismissal, or compromise ~~shall~~ must be given to all members of the class in such reasonable manner as the court directs. [The notice of a proposed settlement, dismissal, or compromise must include a summary of the terms of all agreements or understandings made in connection with the proposed settlement, dismissal, or compromise.]

[(3) A settlement, dismissal, or compromise of a class action binds a class member only if the class member was afforded an opportunity to request exclusion from the class after notice of the terms of the settlement, dismissal, or compromise, unless the class member had an opportunity to request exclusion after notice of a proposed settlement, dismissal, or compromise that was less favorable to the class member.]

(4)(A) Any class or subclass member may [, subject to the obligations set forth in Rule 11,] object to a proposed settlement. An objector must be afforded discovery reasonably calculated to aid the court in appraising the apparent merits of the class claims, issues, or defenses[, and to reveal the terms of any incidental agreements or understandings]. The court may award as costs the actual reasonable expenses (including attorney fees) incurred to support a successful objection.

(B) An objector may settle, dismiss, or compromise the objections in the trial court or on appeal only with the trial court's approval. The court may approve a settlement or compromise that affords the objector terms more favorable than the objector would receive under the class settlement only if the objector's terms are reasonably proportioned to facts or law that distinguish the

objector's position from the position of other class members.

(5) In reviewing a proposed settlement, the court should consider, among other factors:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the [class] claims,issues, or defenses could be maintained through trial on a class basis;

(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement [compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A)];

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;

[**(J)** whether class or subclass members are accorded the right to opt out of the

settlement;]

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

(6) A proposal to settle, dismiss, or compromise part or all of an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposal. The expenses of the investigation and report and the fees of a person specially appointed will be paid by the parties as directed by the court.

Committee Note

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. It applies to all classes, whether certified only for settlement; certified as an adjudicative class and then settled; or presented to the court as a settlement class but found to meet the requirements for certification for trial as well.

Paragraph (1) expressly recognizes the power of a class representative to settle class claims, issues, or defenses. The reference to settlement is added as a term more congenial to the modern eye than "compromise."

Paragraph (2) confirms the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The factors to be considered under paragraph (5) are complex, and should not be presented simply by stipulation of the parties. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

[*Reporter's Note: The paragraph (2) provision for notice of related agreements is an alternative to the discovery provision on paragraph (4).* Class settlements at times have been

accompanied by separate agreements or understandings that involve such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, division of fees among counsel, the freedom to bring related actions in the future, or still other matters. Any such agreements must be disclosed to the court so that the notice to class members can include a verifiable summary of the agreement terms, and so that these agreements can be considered in reviewing the class settlement terms.]

[*Reporter's Note: Paragraph 3 met opposition in Subcommittee discussion on the ground that a right to opt out of the settlement of a previously certified class would defeat many settlements that are achieved under present practice. But it also was observed that in most cases class certification and tentative approval of a settlement occur at the same time, so that there is a single opportunity to request exclusion at a time when settlement terms are known. This provision is retained in the draft to support further discussion.* Paragraph (3) recognizes the essential difference between disposition of a class member's rights through a court's adjudication and disposition by private negotiation between court-confirmed representatives and a class adversary. No matter how careful the inquiry into the settlement terms, a settlement does not carry the same reassurance of justice as an adjudicated resolution. A class member is better protected by a right to request exclusion after the terms of a proposed settlement are known. There is no need for a second opportunity to request exclusion, however, if there was a right to request exclusion after a proposed settlement and a new settlement is reached on terms that are unambiguously more favorable to class members. The right to opt out of a proposed settlement may add little protection to individual class members when there is little realistic alternative to class litigation, other than by providing an incentive to negotiate a settlement that encourages class members to remain in the class. The protection is quite meaningful as to class members whose individual claims will support litigation by individual action, or by aggregation on some other basis — including another class action. The settlement agreement can be negotiated on terms that allow any party to withdraw from the agreement if a specified number of class members request exclusion. The negotiated right to withdraw protects the class adversary against being bound to a settlement that does not deliver the repose initially bargained for, and that may merely set the threshold recovery that all subsequent settlement demands will seek to exceed.]

[Paragraph (3) does not address all of the questions that arise from opting out of a proposed settlement. If the settlement fails, those who opted out of the settlement should {continue to be treated as members of the class}{be allowed to opt back into the class}. If the settlement survives, those who opted out of the settlement remain free to pursue their individual claims by any appropriate procedural means, including a new class action. The judgment entered on the settlement does not bind those who opted out as a matter of res judicata. Courts, however, remain free to devise means to protect against collateral attacks that upset judgments in (b)(1) and (b)(2) class actions.]

[A court may structure the opportunity to opt out of a proposed settlement in a way that affords an opportunity to object to the settlement before exercising the opportunity to opt out. A class member who makes an unsuccessful objection and then opts out of the settlement may be bound by res judicata as to matters adjudicated in rejecting the objection.]

Paragraph (4) increases the support provided those who wish to object to a proposed settlement. This support is important even though there also is a right to request exclusion. Class disposition may be the most efficient means of resolving class members' claims, and often may be the only means. Discovery as to the apparent merits of the class position is particularly important if the settlement agreement has been reached without substantial discovery in the class action or in other litigation. [*The provision for discovery of incidental agreements is an alternative to the provision for disclosure and notice in subparagraph (2).* Discovery as to any "incidental agreements or understandings" should extend to all arrangements proximately related to the class settlement, including contemporaneous settlements of other claims, agreements with respect to representation of future clients, and understandings as to attorney fees.]

The provisions for awarding expenses to objectors recognize the vital importance of objections in the settlement review process. Our judicial system is designed to depend on adversary presentation. Effective adversary exploration of a proposed settlement can be provided only by objectors. The reasonable expenses of making a successful objection generally should be compensated. An objection may be counted as successful for this purpose if it leads to changes in a proposed settlement, either by agreement or as a result of a court ruling.

As valuable as objectors can be, there is a risk that objections may be advanced for improper purposes. An objection may be ill-founded, yet exert a powerful strategic force. Litigation of an objection can be costly, and even a weak objection may have a potential influence beyond what its merits would justify in light of the inherent difficulties that surround review and approval of a class settlement. Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members. Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries. The provisions of Rule 11 apply to objections, and it seems helpful to include an express reminder of Rule 11 obligations in this rule.

Paragraph 4(B) responds to a problem illustrated in one form by *Duhaime v. John Hancock Mut. Life Ins. Co.*, 1st Cir.1999, 183 F.3d 1. An objector may remain a class member, make objections on behalf of the class, and then settle the objections without seeking court approval. Settlement might involve abandonment of the objections and acceptance of the settlement terms as they apply to all other class members. But settlement also may involve terms that are more favorable to the objector than the terms generally available to other class or subclass members. The different terms may reflect genuine distinctions between the objector's position and the positions of other class members, and make up for an imperfection in the class or subclass definition that lumped all together. Different terms, however, may reflect the strategic value that objections may have. So long as an objector is objecting on behalf of the class, it is appropriate to impose on the objector the same fiduciary duty to the class as a named class representative assumes. The objector may not seize for private advantage the strategic power of objecting. To avoid this risk, the rule expressly provides that an objector may settle only with court approval and that the court may approve terms more favorable than those applicable to other class members only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from the position of other class

members.

Paragraph (5) sets out an incomplete list of factors that should be considered in determining whether to approve a proposed settlement. See *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect on the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause significant individual sacrifice by class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Settlement is designed to avoid trial, and the settlement terms properly reflect the uncertainties of the trial process. The cost and delay of preparing for and concluding the trial process, and the range of likely outcomes of a trial on both liability and damages, as opposed to the swifter and more certain relief settlement provides, are the most important measures of settlement fairness. Unfortunately, often they are the most unmanageable. Subparagraphs (A) and (B) serve as reminders of these central factors and the importance of a court's specific findings in analyzing whether a settlement is fair, adequate, and reasonable.

A critical factor is the comparison of probable trial outcomes with the value of the proposed settlement terms for the class and for individual class members. Such a comparison can be difficult, particularly in the absence of detailed discovery or objectors to the proposed settlement. Three examples illustrate the range of difficulty. A forecast of the result of a trial on classwide liability issues might turn on vigorously disputed causation theories that science does not yet reliably answer. A forecast as to the damages award that might result from a trial may require an estimation of losses at a time when relevant information may be most lacking and calculation most difficult. With respect to single-event transactions that have not been litigated to judgment in separate actions, the only secure basis for predicting the outcome might be an actual trial. Curtailed showings as part of the settlement review may be highly persuasive in some cases, but less satisfactory in others. If the class action involves a subject that has been litigated or settled in a substantial number of actions before the class settlement is proposed, there may be a very strong basis for predicting outcomes.

Determining the value to assign to proposed settlement terms has difficulties recognized in case law and commentary. (Citations to be provided.) A court must require the parties proposing a class settlement to provide detailed disclosure of the estimated class losses; how they were calculated; and how the value of the proposed settlement compares to those losses. If the proposal involves non-monetary relief, such as coupons, regulatory enforcement, or other injunctive measures,

a court should require information about the basis for assigning money value to such relief. A court should require the parties to present plans for disbursing the proposed settlement benefits in sufficient detail to permit the court to analyze what the amounts actually paid to individual members is likely to be.

Predictions of the cost of further class litigation will often be made by those with a motive to bolster the settlement, and predictions of staggering costs will draw force from comparison to the vast sums that have been spent on complex actions. A court must analyze expenditure predictions with care.

Subparagraph (C) emphasizes one of the most basic uncertainties — whether the action could in fact be pursued through trial [and whether it could be maintained on a class basis]. If it is unlikely that the claims pleaded or certified as a class action will survive dispositive pretrial motions, or that class certification will be maintained, comparison to the likely outcome of a classwide trial may not provide a realistic basis for appraising the settlement. If the class is certified only for settlement, review of a proposed settlement is likely to involve some measure of reconsideration of the elements that made settlement for this class seem more promising than litigation in other forms. Even if the class was previously certified for trial, consideration should include the prospect that trial might be more probable if the class were redefined [or if the class certification could not be maintained and the litigation had to proceed as individual cases or smaller classes].

The maturity of the underlying substantive issues, described in subparagraph (D), is more important in some cases than in others. The concern with maturity is greatest with respect to mass torts that inflict serious personal injury or extensive property damage in events that are dispersed in time and place. Individual litigation is possible, and often is pursued. Settlements in these circumstances should be attempted only after it is clear that the results of individual cases have provided significant and reliable information necessary to evaluate the terms proposed. Many class actions, on the other hand, grow out of unique and closed events, and often present issues that cannot realistically be litigated outside the class-action context. In these circumstances, there may be little reason to hope for improved understanding through independent litigation.

Negotiation of a class-action settlement entirely among class lawyers and their adversaries may generate understandable concerns about the fairness and effectiveness of the settlement terms. Subparagraph (E) does not require that others participate in the negotiations, in part because attempts to control the negotiation process by rule may often do more harm than good. But subparagraph (E) does encourage efforts to engage class members, representatives of class members, or judicial personnel in appropriate ways. Class representatives may be the named representatives, but also might be a class guardian, class steering committee, or other independent class representative acting with or without appointment by the court. Such representatives may participate in the settlement negotiations or may provide independent information to the court. If a judge or other judicial officer is significantly involved in the settlement negotiations, review of the resulting settlement agreement should be provided by a different judge.

Although the focus of subparagraph (F) on the number and force of objectors may seem

redundant, it directs attention to the tensions discussed with subdivision (4). The fact that a settlement draws few objections, or none at all, may mean only that class members are apathetic because individual stakes are low or because it has not been possible to communicate information about the settlement in an easily accessible and meaningful form. A settlement that draws many objections may be a good settlement, particularly if the number of objections is low in proportion to the total size of the class. Seemingly plausible objections may lack force because they rest on grandiose but ill-informed notions about the costs and uncertainties of litigating the class position.

Settlement is a pragmatic process that must take account of a defendant's ability to pay and a plaintiff's ability to enforce a settlement. If a settling party asserts that its ability to answer claims is constrained by its resources in relation to these and other claims against it, a showing should be made as to its assets and claims. Reasonably anticipated difficulties in actually enforcing a class judgment by execution, contempt, or other relief should be treated in the same way. Discovery on these issues will be an important part of the review process.

A settlement on behalf of a class that does not include all potential claimants is properly affected by the existence and probable outcome of claims by other classes or subclasses. This subparagraph (H) factor, and the corresponding subparagraph (I) factor, may invite inquiry into the comparative merits of other class claims. Some exploration of these comparisons may be appropriate, but the court must guard against litigating a claim not before it and the likelihood that such a comparison may not amount to more than speculation. The presence of competing or overlapping class actions also raises difficult questions when a defendant lacks resources sufficient to pay all claims or to perform the settlement obligations. A defendant's ability actually to perform the settlement may be affected by the unresolved claims. And actual performance of a present settlement may impair the ability of others to win comparably effective relief. Responses to these problems may be complicated. Concern for other claimants cannot readily be implemented by disapproving a settlement as too generous to the class before the court, but might warrant an effort to bring the other claimants into the proceedings. One approach might be to expand the class definition and then establish subclasses to represent groups with conflicting interests. Concern for class members may require modification of settlement terms to establish adequate assurances of performance.

Both in negotiating settlements and in appraising a particular settlement, people naturally consider the actual or probable disposition of similar claims. Subparagraph (I) recognizes the importance of this factor.

[*Subparagraph (J) is inserted in the expectation that the paragraph (3) right to opt out will prove controversial. If there is always a right to opt out of the class after notice of settlement terms, subparagraph (J) will be deleted. If paragraph (3) is deleted, the Note observations will be modified to suit subparagraph (J).*]

The reasonableness of attorney fees provided by settlement is an important element to the public perception of fairness. Excessive fees also raise the image of conflicting interests, in which attorneys have bargained away possible class relief in favor of their own fees. Application of

subparagraph (K) should be affected by the negotiation process and the source of fees. There are structural reassurances of reasonableness if fees are negotiated separately after conclusion of the class-relief portion of the settlement, and if the fees are to be paid by the class adversary rather than out of class relief.

Apart from the reasonableness of the fees to be paid to class attorneys, evaluation of a settlement may also take account of any incidental agreements dividing fees among counsel. A division that seems calculated to forestall possible objections to the settlement, for example, might properly be modified or rejected. In addition, it may be proper to consider whether attorneys representing individual claimants will remain free to enforce full-rate contingent fee agreements in circumstances that present little risk and exact little effort.

Settlements often establish procedures for processing individual claims. Proofs of claim often are required and may be indispensable, and there may be systems for resolving disputed facts. Other procedures may be very useful in providing low-cost and accurate resolution of individual entitlements under the settlement. Subparagraph (L) underscores the importance of ensuring that these procedures are fair, effective, and reasonable.

Subparagraph (M) addresses the possibility that parties seeking court approval of a class settlement substantially similar to a settlement previously rejected by one or more courts may attempt to "shop" the settlement by filing an action in another court on behalf of substantially the same class. It is tempting to prohibit approval of a settlement that has once been rejected, invoking preclusion principles. Relying on judicial scrutiny and approval to prevent abusive settlement class agreements is not effective if the parties can avoid the consequences of one judge's rulings by finding another judge who will reach a different result. A strict application of preclusion principles, however, may not allow a court sufficient flexibility to recognize changed circumstances. One court's disapproval of a settlement may be followed by improved information about the facts, intervening changes of law, results in individual adjudications that undermine the class position, or other events that enhance the apparent fairness of a settlement that earlier seemed inadequate. Discretion to reconsider and approve should be recognized. A second court, however, should approach the settlement review responsibility much as it would approach a request that it reconsider its own earlier disapproval, demanding a strong showing to overcome the presumption that the earlier refusal to approve.

All of the factors enumerated in paragraph (5), and others, bear on fairness. Fairness often is measured in addition by a process that is not readily articulated. Subparagraph (N) recognizes the legitimacy of considering apparent intrinsic fairness on a basis that draws from accumulated judicial wisdom and experience.

Paragraph 6 establishes an opportunity to acquire independent information about the wisdom of a proposed class-action settlement. The parties who support the settlement cannot always be relied upon to provide adequate information about the reasons for rejecting the settlement. Information may be provided through objections by class members, and paragraph 4 is designed to enhance the objection process. But objectors often find it difficult to acquire sufficient information,

and the burdens of framing comprehensive and persuasive objections may be insurmountable. A magistrate judge or person specially appointed by the court to make an independent investigation and report may be better able to acquire the necessary information and — with expenses paid by the parties — better able to bear the burdens of acquiring and using the information. The opportunity provided by this paragraph should, however, be exercised with restraint. In most cases it is better that the trial judge assume responsibility for directing the parties to provide sufficient information to evaluate a proposed settlement. Direction by the judge will ensure that the judge receives the needed information and bears the primary responsibility for evaluating the settlement in light of this information.

The choice whether to appoint a magistrate judge to conduct the paragraph 6 investigation will depend on a variety of factors. The costs to the parties are reduced because there is no need to pay fees for the magistrate judge's time. A magistrate judge provides the reassurances of expertness and impartiality that go with public office. Appointment of a private person to undertake the inquiry may be desirable, however, if the inquiry is to extend beyond the traditional judicial role of receiving information provided by the parties. It may seem out of role for a magistrate judge to undertake or direct an active investigation of the sort traditionally left to adversary parties. If the judge contemplates an investigation of the sort that might be taken by a well-supported but impartial objector, it may be better to appoint a private person.

An appointment under paragraph 6, whether of a magistrate judge or a private person, need not be made under Rule 53 and is not subject to its constraints. [This issue needs further consideration. We could provide that Rule 53 simply does not apply. But it may be better to hold open the alternative of Rule 53 appointment. Reliance on a special master seems appropriate, if at all, only if the court intends to appoint a surrogate judge in circumstances that defeat the court's opportunity to undertake the first review of the settlement directly or with the aid of a magistrate judge. If a more open-ended investigation is contemplated, then the procedures and strictures of Rule 53 — as it now is or as it may be revised — do not make sense.]

CLASS-ACTION ATTORNEY APPOINTMENT RULE

(a) Appointment of Class Counsel.

(1) When persons sue or are sued as representatives of a class, an attorney may act on behalf of the class only after the court appoints the attorney to represent the class. [Before the court appoints an attorney to represent the class no one may conduct court proceedings on any matter related to class certification or to the merits of the class claims, issues, or defenses, and no one may engage in out-of-court discussions related to settlement with a potential class adversary.]

(2) An attorney appointed to represent a class is a fiduciary responsible to represent the best interests of the class.

(b) Notice, Applications, Hearing, and Order.

(1) The court may not certify a class action until at least one application for appointment as class counsel is filed.

(2) An application for appointment as class counsel should include information about the following, among other matters:

(A) counsel's experience in litigating actions that grow out of the subject matter of the class claims, issues, or defenses;

(B) counsel's experience in litigating class actions and other complex actions;

(C) counsel's ability to administer the action;

(D) whether counsel represents a client who might be a class representative;

(E) whether counsel has done independent work in identifying and investigating potential class claims, issues, or defenses;

(F) the resources that counsel will commit to representing the class;

(G) the terms proposed for attorney fees and expenses; and

(H) whether appointment of counsel who represents parties or a class in parallel litigation may facilitate coordination or consolidation with the class before the court.

(3) The court must hold a hearing to appoint class counsel if one or more applications are filed. [If the intent is not to require an oral or evidentiary hearing before appointing class counsel, particularly if there is only one applicant, the Note should make this clear.]

(4) The court must consider the matters described in paragraph (2) in appointing class counsel, and [must not consider]{should not give significant weight to} whether any applicant has filed the action in which appointment is requested.

(5) The court may reject all applications, recommend that an application be modified, invite new applications, and make any appropriate orders to select and appoint class counsel.

Draft Committee Note

[Subdivision (a) requires the court to appoint class counsel, a responsibility that formalizes but also moves beyond the review of counsel competence that is part of the determination whether a class representative will adequately represent the class. In addition, paragraph (1) attempts to address the problems that may arise when an attorney attempts to act on behalf of class members solely on the basis of selection by a member of the putative class or on the basis of seeking out a class to represent. It also attempts to limit the ability to craft private agreements on settlement that, although subject to court review and approval under Rule 23(e), are de facto complete before a court has approved representation of the class and perhaps even before the case has been filed. An earlier version of this proposal stirred significant doubts, and was said to be greatly at odds with current class-action practice. It was protested that such rigid formality could sharply reduce the ability of all parties to achieve effective settlements by discussions that emerge before certification and that may begin while numerous separate but related actions are developing. Paragraph (1) is presented to solicit reaction and suggestions as to how to achieve the intended purpose without introducing new problems. Paragraph (2) emphasizes that class attorney has fiduciary responsibilities to the class and to each class member, not to the representative class members alone. It does not address the questions that may arise from potential conflicts of interest between the class and representative class members — who may have been individual clients of the class attorney before the appointment as class attorney, and who in any event may have distinctive individual relationships with the class

attorney.]

[The Subcommittee rejected a provision that would have required "publication in suitable public media of notice that describes the subject of the action and invites applications for appointment as class counsel." This model, drawn from the Private Securities Litigation Reform Act, was thought inappropriate for general adoption. The cost of notice may prove crippling in many forms of class actions, not only those to enforce small "consumer" claims but also those for civil rights relief and the like. Often there will be little point in inviting applications — many class actions continue to be brought as matters of principle, not profit, and there will be no contenders for the honor of vindicating the principles involved. Other actions may invite a chaos of applications that seek a free ride on the work initially done by the lawyer who filed the action. The latter concerns suggest that there is no point in exploring such low-cost means of notice as development of a "class-action register" on the judiciary web page. For the moment, at least, subdivision (b)(5) would authorize the court to reject all applications for appointment and "invite new applications." Perhaps this authority too should be deleted.]

[Subdivision (b)(2)(H) is a very tentative and limited illustration of the possibility that one approach to the problem of overlapping and competing class actions may be to appoint common counsel. Enthusiastic pursuit of this course by several courts at once might accomplish some surprising things. But there are obvious problems not only of conflicting interests but of home-player preferences. We should open the prospect that rules governing attorney appointment and fees might accomplish something in this area, but legislative provisions for removal, transfer, and consolidation seem better.]

NB: The appointment process will have to be different for a defendant class. It does not make sense to require counsel for a named defendant to apply — no one may, and counsel unrelated to any defendant may apply. Of course there may be some advantage in that: perhaps class counsel should be entirely independent of any particular defendant. But we do not require that for a plaintiff class (should we?). And should we address the particular problems of relations among counsel when there is class counsel and other class members have their own attorneys? When, perhaps, different defendant class members vie for representative status so as to have a greater influence on class (their own) counsel? These problems seem terribly difficult, but it does not seem wise to ignore them for that reason. Advice is urgently requested on the provisions that might be made in the rule, and the observations that might be made in the Committee Note.

CLASS ACTION ATTORNEY FEE RULE

(a) Class Counsel Fee. The judgment in an action certified as a class action may award a reasonable fee to class counsel, to be paid:

(1) as directed by statute; or

(2) (A) from the relief awarded to the class,

(B) by members of the class,

(C) by a party opposing the class, or

(D) by any combination of the sources described in paragraphs (A), (B), and (C).

(b) Notice of Fee Application. Notice of an application for a fee award to class counsel must be served on all parties and provided by reasonable means to class members.

(c) Objections. A party or class member may object to an application for a fee award to class counsel. The court may allow discovery in aid of proposed objections, including discovery on any factor described in subdivision (e).

(d) Hearing. The court must hold a hearing on an application for a fee award to class counsel, whether or not any objection has been made, and must find the facts and state its conclusions of law as provided in Rule 52(a).

(e) Fee amount. In setting the amount of a fee award to class counsel, the court should consider, among other factors, the following:

(1) the results actually achieved for class members;

(2) the time reasonably devoted to the action, given its nature, complexity, and duration;

(3) the presence, extent, and quality of any objections to the fees requested;

(4) the terms proposed by counsel in seeking appointment;

(5) the financial risks borne in discharging the duties of class counsel;

(6) the professional quality of the representation;

(7) any agreements among the parties with respect to the fee application;

(8) any agreements by class counsel to divide the fee with others;

(9) any fees to be charged by class counsel or others for representing individual claimants or objectors; and

(10) fee awards in similar cases.

Draft Committee Note

In assessing "the results actually achieved" for class members as the first step in analyzing requested attorney-fee awards, courts should: (1) consider the amounts actually distributed to class members, not only the theoretically possible distributions; (2) critically examine relief in the form of coupons and view assignments of dollar values to coupons skeptically, particularly if no clearing house or other exchange or redemption device is established; (3) view skeptically attempts to assign dollar values to injunctive relief; (4) phase the distribution of fee awards if class recovery is spread out over time so that the award is linked to amounts actually distributed; (5) exercise heightened scrutiny if the fee amount is negotiated separately by class counsel and defendants prior to settlement; and (6) require detailed expense reports. [Cite to RAND report.] Several of the factors should combine together to support the suggestion that a percentage-of-recovery approach should recognize that smaller percentages are appropriate when the aggregate recovery is large. It is difficult to guess from the RAND summary at the reasoning for reducing the award when a cy pres recovery goes to recipients who are not class members. It is hard to suppose that a cy pres beneficiary is more worthy than the unreachable class member who actually was injured; expenses of administering the award are likely to be reduced, but that can be accounted for directly.]

This proposal is intended to identify criteria for fee awards in the class-action context that would apply whether the applicable law recognizes a lodestar approach or follows a different method, such as a percentage-of-recovery method, in evaluating requests for fee awards. Courts increasingly rely on a cross-check analysis, in which the fee that would result from applying a percentage-of-recovery method is compared to the fee that would result from applying the lodestar method. *See, e.g, Gunter v. Ridgewood Energy Corporation*, 2000 WL 1038142 (3d Cir.2000). Under either method or a different approach, the emphasis is on ensuring that attorney fees are based on the benefits actually realized by individual class members and that those benefits are realistically valued.

The provision in subdivision (d) that invokes Rule 52(a) serves only as a reminder of the

general obligation imposed by Rule 54(d)(2)(C) to make findings of fact and to state conclusions of law in passing on a fee motion.

Appeal Standing: New Rule 23(g)

(g) Appeal Standing. A class member who would be bound by a class-action judgment has standing to appeal:

(1) a judgment approved under Rule 23(e); and

(2) a judgment that is not appealed by a class representative.

Draft Committee Note

Several courts have ruled that appeal standing is not established by the fact that a class member will be bound by a class judgment. To appeal, a class member must win intervention in the trial court or the court of appeals. These decisions express concern that allowing any class member to appeal would disrupt the orderly control of class litigation by court, class counsel, and the designated class representatives. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir.1997). (Other cases are summarized in 15A Federal Practice & Procedure: Jurisdiction 2d, § 3902.1, p. 105, n. 6.)

Rule 23(g) reflects the belief that a person who is bound by a judgment should have the assurance that appellate review is available. The need for review is greatest when judgment rests on settlement, not adjudication. Paragraph (1) accordingly allows any class member to appeal a judgment approved under Rule 23(e). A judgment that results from judicial decision does not present the same risks of inadequate representation as a settlement. The risk of inadequate representation remains, however, most particularly when no class representative has appealed. Paragraph (2) allows any class member to appeal whenever no class representative has appealed. If a class representative has appealed, other class members can adequately protect their interests by seeking to intervene or to participate as amici curiae. A class member who wishes to appeal under paragraph (2) must file a notice of appeal within the regular appeal time period. If a class representative files a timely notice of appeal, the class member's standing to appeal is suspended, and should expire upon submission of the appeal on the merits.

Appeal standing only entitles the class member to invoke appeal jurisdiction. The appellant can ask review only of issues that were properly preserved for appeal. It need not, however, be the appellant who has preserved the issue. Any issue that has been properly preserved by a class representative or other party, a class member, or an objector is open to review.

The court of appeals can designate one or more of the appellants to serve as class representative on appeal if appeals are taken by so many class members as to threaten orderly presentation of the appeal.

The Committee has not considered extension of Rule 23(g) by adoption of a parallel provision for derivative actions governed by Rule 23.1. There are plausible arguments that a class member is different from a shareholder who has not intervened in a derivative action. The judgment

in a class action binds a class member as to an individual claim. The judgment in a derivative action addresses only the corporation's claim. See *Felzen v. Andreas*, 7th Cir.1998, 134 F.3d 873, affirmed by equally divided Court sub nom. California Public Employees' Retirement System v. Felzen, 1999, 119 S.Ct. 720, 525 U.S. 315, 142 L.Ed.2d 766.

[Rule 23(f) and § 1292(b) must be addressed. As drafted, Rule 23(g)(2) confers standing to petition for review under Rule 23(f) and to appeal under § 1292; see the Rule 54(a) definition of "judgment." There is something to be said for allowing appeal by a class member to challenge the definition of the class on certification — whether to argue that it is too narrow or too broad or is wrong altogether. The same holds for denial of certification. Standing is particularly appropriate if it is a "mandatory" class under (b)(1) or (b)(2). Similar arguments can be made as to orders granting, refusing, modifying, etc. injunctions (including permanent injunctions that are not yet appealable under § 1291), and even as to permissive interlocutory appeal under § 1292(b). Nonetheless, these more-or-less interlocutory appeals could severely disrupt progress of the action for captious or deliberately subversive reasons. One approach would be to limit (2): "a *final* judgment that is not appealed by a class member."]

3 C

United States District Court for the
Northern[1] District of *Georgia*

John Smith and Mary North, on behalf of themselves and all others similarly situated,
Plaintiffs

v.

XYZ Corporation
and
Anne Adams,
Defendants

Civil Action No. 00-1234

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT, RIGHT TO EXCLUSION, AND HEARING

To: All persons and entities[2] who *purchased one or more shares of stock of XYZ Corporation during the time period from January 1, 1999 through December 31, 1999.*

Read this notice carefully. Your rights may be affected.

This is <u>not</u> a lawsuit against you. You are <u>not</u> being sued.

Why did you receive this notice?

This notice has been sent to you because you may be a member of a group, or class, of individuals for whom a proposed class-action settlement with defendants has been reached. If the proposed settlement is approved by the court, you may be eligible for money *and other benefits*, unless you decide to exclude yourself from the class. This notice informs you of your rights in connection with the proposed settlement. This notice will help you answer the following questions:

- What is a class action?
- Are you a member of this class?
- What is this lawsuit about?
- What are the terms of the proposed settlement?

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[1] Generally, italicized information in this sample notice refers to a hypothetical example and is not intended to be part of the notice itself.

[2] It may be necessary to include in this notice additional information for brokers and other nominal owners.

- What can you expect to receive under the proposed settlement?
- What options are available to you?
- What happens if you do nothing in response to this notice?
- What happens if you file a claim?[3]
- What happens if you exclude yourself from the class?
- How can you object to the proposed settlement?
- Will there be a hearing in court about this proposed settlement? Should you attend the hearing?
- Do you need to hire your own attorney?
- Where do you get more information?

What is a class action?

This notice refers to a class action. A class action is a lawsuit in which one or more persons sue on behalf of other persons who appear to have similar claims.[4] Plaintiffs *John Smith and Mary North, purchasers of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999*, filed this lawsuit as a class action against *XYZ Corporation and Anne Adams, its Chief Executive Officer*. The lawsuit is pending in the United States District Court for the *Northern* District of *Georgia* before Judge *Jones*. Plaintiffs filed the lawsuit to assert their own individual claims and to represent a class of persons who have similar claims.

By order of *October 4, 2000*, United States District Judge *Jones* determined *conditionally* that the lawsuit can proceed as a class action *for settlement purposes only* on behalf of a class consisting of all persons *who purchased shares of XYZ stock during the period from January 1, 1999 through December 31, 1999*. Excluded from the class are the defendants, *including officers and directors of XYZ Corporation, and members of Anne Adams's immediate family*. Any class member who files a notice of exclusion as described below will also be excluded from the class and will not participate in the proposed settlement, also described below.

Are you a member of the class?

You are a member of the class if you

- *purchased shares of XYZ Corporation stock during the period from January 1, 1999 through December 31, 1999, and*
- *are not a defendant, an officer or director of XYZ Corporation, or a member of Anne Adams's immediate family.*

[3] Information referring to filing claims is highlighted because not all class action settlements use a claims process to distribute benefits. The highlighted material is only relevant to settlements that use claims processes.

[4] Note: a defendant's class would involve a very different description and very different statements throughout the notice about consequences and the like. This notice is not intended to apply to defendant class actions.

What is this lawsuit about?

Plaintiffs claim that defendants *intentionally overstated the anticipated earnings of XYZ Corporation to mislead potential investors*. Defendants deny these claims. Plaintiffs and defendants continue to assert that their claims and denials are valid, but have agreed to settle the lawsuit.

[Include short history of the lawsuit, summarizing rulings on dispositive motions and describing the extent of discovery.]

What are the terms of the proposed settlement (including benefits to the class, attorney fees and expenses, and costs of administering the settlement)?

On *September 10, 2000*, the parties in the lawsuit arrived at a proposed settlement of the lawsuit. The proposed settlement is subject to Judge *Jones's* approval. The terms of the proposed settlement are summarized below. The full settlement terms are contained in a settlement agreement dated *October 4, 2000*. You can obtain a copy of the settlement agreement by calling *1-800-xxx-xxxx*, writing to *Herman Green, Esq.* at *P.O. Box 6226, Atlanta, GA 30303*, or visiting *www.xxxxx.com* on the Internet.

[Describe monetary and nonmonetary terms of the proposed settlement. For example:

In the proposed settlement, defendants have agreed to create a settlement fund in the amount of *$10,000,000.00*. Judge *Jones* will appoint a claims administrator who will distribute this fund, including accrued interest, to members of the class who have filed valid Claim Forms (explained further below). Attorney fees and expenses, the costs of administering the settlement, and *special payment(s) of a total of $10,000.00 to the class representatives* will be deducted from the settlement fund before the distribution to class members, as described below.

The attorneys for the class intend to ask the court to award them fees for their services in representing the class in this lawsuit, in an amount not to exceed *$2,500,000.00* plus accrued interest. This amount will be paid from the settlement fund. An award of attorney fees in the amount of *$2,500,000.00* amounts to *25%* of the settlement fund.

The attorneys for the class also intend to ask the court to award them *no more than $300,000.00 plus accrued interest* to reimburse them for expenses they incurred in conducting this lawsuit. This amount would be paid from the settlement fund. An award of expenses in the amount of *$300,000.00* would be *3%* of the settlement fund. The defendants have agreed not to oppose the above applications for fees and expenses.

The settlement agreement also provides that the costs of administering the settlement, including the costs of this notice to class members, will be paid out of the settlement fund. The estimated cost of administering the settlement is *$200,000.00*, which is *2%* of the settlement fund.

In summary, an award of attorney fees of *$2,500,000.00*, an award of expenses of *$300,000.00*, and costs of administration of *$200,000.00* would be, in total, *30%* of the settlement fund. The court may award less than this amount.]

What can you expect to receive under the proposed settlement?

If the court approves the proposed settlement, the parties estimate that class members purchased approximately 40,000,000 shares of XYZ stock during the period from January 1, 1999 through December 31, 1999. The proposed $10,000,000 settlement will produce an average recovery *per share of stock* of *$.25 per share* before deduction of court-awarded attorney fees, expenses, costs of administering the settlement, *and special payment(s) to the class representatives*. The parties estimate that attorney fees, expenses, costs of administering the settlement, *and the special payment to the class representatives* will amount to *$.075 per share*, **leaving approximately *$.175 per share* as the expected distribution to class members.** The actual amount to be distributed will depend on the number of claims filed, the amount of the attorney fees, expenses, administrative costs, and *special payments to class representatives* approved by the court, and _____ [list any other contingencies].

Alternative.[5] If the court approves the proposed settlement, each class member will receive an equal share of the settlement fund. Until the proposed settlement is approved or disapproved by the court, the exact value of each member's share of the fund will not be known. The value of each member's share of the settlement fund will be determined by dividing the *net* settlement fund (that is, the *$10,000,000.00* fund minus attorney fees, expenses, the costs of administering the settlement, and *the special payment(s) of $10,000.00 to the class representatives*) by the number of class members *who have filed valid claims*. As explained above, attorney fees, expenses, and costs of administration are estimated to be *$3,000,000.00* and *the payment(s) to class representatives will be $10,000.00*, leaving an estimated net settlement fund of *$6,990,000.00*.

The parties estimate that there are *30,000* class members who are entitled to receive a payment under the proposed settlement. If all *30,000* class members share the award, the value of the proposed settlement will be approximately *$230.00* for each class member, plus any accrued interest. If fewer than *30,000* share the award, each individual's share will be more than $*230.00*. If more than *30,000* share the award, each individual's share will be less than $*230.00*.

What nonmonetary benefits are part of the proposed settlement?

[Describe any nonmonetary aspects of the proposed settlement.]

What options are available to you as a class member?

If you are a member of the class, you have the following options. You may:

1. do nothing (see "What happens if you do nothing in response to this notice?" below)
2. file a Notice of Exclusion Form (see "What happens if you exclude yourself from from the class?" below)
3. object in writing to the proposed settlement [even if you file a Claim Form] (see

[5] This alternative applies where distribution is not based on units, such as shares of stock, but where distribution is an equal dollar amount for each class member.

"What happens if you object to the proposed settlement?" below)

4. file a Claim Form [even if you file an objection] (see "What happens if you file a claim?" below).

For any of the above options, you may, but do not need to, hire an attorney to represent you.

The sections that follow identify the consequences of pursuing each option.

Note: If you do not file a Notice of Exclusion Form or a Claim Form, you will not receive any payment from the proposed settlement, and if the court approves the proposed settlement you will be barred from bringing any further claim against any of the defendants regarding[6] *the alleged overstatement of earnings in relation to the purchase of shares of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999.*

1. What happens if you do nothing in response to this notice?

If you do nothing, you will not receive the monetary benefits of the proposed settlement. If you do nothing and the court approves the proposed settlement, you will also be barred from bringing a lawsuit against any of the defendants based on *the alleged overstatement of earnings in relation to the purchase of shares of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999.* If you do not want to be barred from bringing such a lawsuit, consider excluding yourself from the class. The next section discusses that option.

2. What happens if you exclude yourself from the class?

If you exclude yourself from the class

- you will not share in the proposed settlement, the benefits of which are described in "What can you expect to receive under the proposed settlement?" above; and
- you may pursue, on your own or as a representative or member of another class (if there is one), whatever claims you may have against any of the defendants regarding *the alleged overstatement of earnings in relation to the purchase of shares of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999.*

Note: You will have to prove any claim you might file, and the claim will be subject to any defenses defendants may have.

How do you exclude yourself from the class?

To exclude yourself from the class, you must complete and sign the enclosed Notice of Exclusion Form and send it by prepaid first class mail post-marked by *December 1, 2000.* Send the Notice of Exclusion to:

Claims Administrator
P.O. Box 32453
Atlanta, GA 30348

[6] The language of a sample release remains under consideration. The narrow release language that appears in several places in this draft is retained as a place marker until we draft a more appropriate version after further discussion with the subcommittee and committee.

Reminder: If you exclude yourself from the class *or you do not properly file a Claim Form,* you will not share in the proposed settlement and you will be barred from bringing any further claim against any of the defendants regarding *the alleged overstatement of earnings in relation to the purchase of shares of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999.*

3. What happens if you object to the proposed settlement?

If you are a class member and do not send a timely Notice of Exclusion Form, you may object to, or comment on, the proposed settlement, by sending a written statement to the court in the manner described below. The written statement should contain any reasons you believe support your objections or comments. For example, you may wish to discuss any of the following subjects:

- whether the proposed settlement is fair, reasonable and adequate
- whether the proposed settlement should receive court approval
- whether the class should be certified or redefined
- whether *John Smith and Mary North and their attorneys* adequately represent the class
- whether the application(s) for attorney fees' and expenses is (are) reasonable
- whether such application(s) should receive court approval
- any other aspect of the proposed settlement or the payment and distribution process for the proposed settlement.

Judge *Jones* will consider your objections or comments in deciding whether to approve the proposed settlement. *She* may decide the way you ask *her* to decide, but even if *she* does not you will not incur any penalty for making an objection or comment.

Note: **Even if you file a comment or objection, you still must file a Claim Form if you want to share in any settlement the court may approve. Filing a Claim Form does not affect your comment or objection.**

How do you submit an objection to the proposed settlement?

Your written statement must identify the name and case number of this lawsuit (that is, *Smith. v. XYZ Corporation, No. 00-1234*), your name and address, and the name and address of your lawyer, if you have one. You should sign and date your statement.

Your written statement should indicate whether you intend to appear at the hearing described below. If you plan to appear at the hearing, you must timely file and serve your written statement as described below. However, your attendance at the hearing is not required and your written statement will be considered whether or not you appear at the hearing.

Send any written statement of objections or comments to the court by prepaid first class mail so that the statement is received no later than *January 2, 2001*. Send the statement to:

Clerk of the United States District Court for the *Northern* District of *Georgia*
P.O. Box 6226
Atlanta, GA 30303

[Is service to the attorneys required for pro se class members?]

You must at the same time send a copy of the written statement to the lead attorney for the class:

Herman Green, Esq.
P.O. Box 1628
Atlanta, GA 30348

and to defendant's attorney:

John Simmons, Esq.
835 Peach Street
Suite 950
Atlanta, GA 30304

Attorneys for the class and attorneys for the defendants will have an opportunity to file a response to any objections or comments that are filed and to ask you questions if you decide to appear at the hearing.

4. What happens if you file a claim?

If you are a class member and file a valid claim by completing and mailing by *December 1, 2000* the Claim Form enclosed with this notice, and if the court approves the proposed settlement, you will receive the benefits of that settlement as described in this notice. See "What can you expect to receive under the proposed settlement? " above. See also "How do you file a Claim Form?" below. In exchange for receiving the benefits of the settlement, you will be barred from bringing a lawsuit against any of the defendants based on *the alleged overstatement of earnings in relation to the purchase of shares of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999.*

How do you file a Claim Form?

To be eligible to participate in the distribution of the settlement fund, you must complete and sign the enclosed Claim Form and send it by prepaid first class mail post-marked by *December 1, 2000* addressed as follows:

Claims Administrator
P.O. Box 32453
Atlanta, GA 30348

Will there be a hearing in court about this proposed settlement? Should you attend the hearing?

On *February 15, 2001 at 9am*, Judge *Jones* will hold a hearing on the settlement in *her* courtroom located at *75 Spring Street, Atlanta, Georgia*. The purpose of the hearing is to determine whether the proposed settlement is fair, reasonable, and adequate and deserves court approval. Judge *Jones* will also consider the application(s) of attorneys for the class for attorney fees and expenses. You may attend the hearing if you

wish but you are not required to attend. Instead of attending the hearing, you may if you wish send the court a written statement of objections or comments as described above.

If you attend the hearing and if you have filed a written statement as described above, you or your attorney will be entitled to briefly state your objections to, or comments on, the proposed settlement. Your written statement will be considered whether or not you appear at the hearing.

Do you need to hire your own attorney?

With respect to hiring an attorney, your options are:

- do nothing and you will be represented by the plaintiffs and attorneys for the class;
- file a Claim Form as described above and you will be represented by the plaintiffs and attorneys for the class;
- hire an attorney to represent you at your own expense; or
- represent yourself.

If you decide on either of the last two choices above, you or your attorney will have to file a Notice of Appearance Form as described below.

If you remain a member of the class

If you do not exclude yourself from the class, plaintiffs and attorneys for the class will act as your representatives. Attorney fees and expenses for those attorneys will be paid by the defendants as part of the settlement fund [or otherwise]. You may, however, if you wish, remain a member of the class and hire an attorney of your own choosing to represent you in this matter. If you hire your own attorney, however, you will be responsible for paying your own attorney's fees and expenses under whatever fee arrangement you make with your attorney. Your attorney [does not/does] have to be admitted to practice before the United States District Court for the *Northern* District of *Georgia*. Any payment you make to your attorney will [may?] not affect the amount paid from the settlement fund to the class attorneys.

How do you or your attorney enter an appearance in this lawsuit?

If you hire your own attorney, to participate in the hearing your attorney must send a Notice of Appearance Form (enclosed with this notice) to the Clerk of Court so that it is received no later than *January 2, 2001*. Send it to the following address:

Clerk of the United States District Court for the *Northern* District of *Georgia*
P.O. Box 6226
Atlanta, GA 30303

You must at the same time send a copy of the Notice of Appearance Form to the lead attorney for the class at the following address by *January 2, 2001*.

Herman Green, Esq.
P.O. Box 1628
Atlanta, GA 30348

and to defendant's counsel:

John Simmons, Esq.
835 Peach Street
Suite 950
Atlanta, GA 30304

You also have the right to represent yourself before the court without an attorney,[7] subject to the court's rules. If you do represent yourself, you must send a Notice of Appearance Form in the manner described in the preceding box. You do not have to file a Notice of Appearance Form if you only wish to object to or comment on the proposed settlement. You may simply send a written statement containing your objections or comments, as described above.

If you exclude yourself from the proposed settlement

If you exclude yourself from the class, you will be free to pursue whatever legal rights you may have against any of the defendants. You may do this by hiring an attorney or by representing yourself. If you do this, you should not expect any financial contribution from the proposed settlement, the attorneys for the class, or the class representatives.

How will the settlement fund be distributed?

Each Claim Form will be reviewed by the claims administrator under the supervision of attorneys for the class. Together, they will decide the extent to which your claim satisfies the terms for eligibility as described in the settlement agreement. You will be eligible to receive a part of the net settlement fund only if you are a class member and *purchased one or more shares of XYZ Corporation stock during the period from January 1, 1999 through December 31, 1999.*

The claims administrator will notify you in writing if your claim has been rejected in whole or in part and will give you the reasons for any such rejection. You will have *thirty days* after that to correct any deficiencies in your claim.

As described above, the terms of the proposed settlement call for defendants to create a settlement fund of *$10,000,000.00*. If Judge *Jones* approves the proposed settlement, the *$10,000,000.00* will be distributed as follows: First, up to *$3,000,000.00* will be awarded as attorney fees, expenses, and the costs of administering the settlement. In addition to a distribution based on the number of shares purchased, the class representatives, *John Smith and Mary North* will each receive a payment of *$5,000.00* for serving as class representatives, for a total payment to class representatives of *$10,000.00*. Then, the amount remaining, at least *$6,990,000.00,* will be distributed to class members who submit valid Claim Forms.

If Judge *Jones* approves the proposed settlement, each eligible class member who submits a valid Claim Form will receive a payment in the form of a check. The amount of each check will be based on *the number of shares purchased* in relation to *the number of*

[7] An entity other than an individual—a corporation, for example—generally must have an attorney represent it in legal proceedings.

shares purchased by all the class members who filed valid Claim Forms. The claims administrator expects to distribute checks within *six months* of the judge's action on the proposed settlement.

Where can you get additional information?

This notice provides only a summary of matters regarding the lawsuit. The documents and orders in the lawsuit provide greater detail and may clarify matters that are described only in general or summary terms in this notice. The settlement agreement dated *October 4, 2000* may be of special interest. If there is any difference between this notice and the settlement agreement, the language of the settlement agreement controls. Copies of the settlement agreement, other documents, court orders, and other information related to the lawsuit may be *examined at www.xxxx.com on the Internet.* You may also obtain a copy of the settlement agreement and other information by *calling 1-800-xxx-xxxx.*

You also may examine the court papers, the settlement agreement, the orders entered by Judge *Jones* and the other papers filed in the lawsuit at the Office of the Clerk of the United States District Court for the *Northern* District of *Georgia at 75 Spring Spring Street, Atlanta, GA* 30303 during regular business hours.

If you wish, you may seek the advice and guidance of your own private attorney, at your own expense.

If wish to communicate with or obtain information from attorneys for the class, you may do so by letter [*or e-mail*] at the address listed below. You should address any such inquiries concerning the Claim Form—or other matters described in this notice—to either:

The Claims Administrator
P.O. Box 32453
Atlanta, GA 30348 Email: *admin@xxx.com*

or

Attorneys for the class
P.O. Box 1628
Atlanta, GA 30348 Email: *classatt@xxx.net*

The parties created the above sources specifically to provide information about this case. They welcome your calls, e-mails, or letters. **Please do not call the judge or the clerk of the court.**

Summary of Important Information		
Date	**Deadline**	**If you file on time:**
December 1, 2000	Deadline for mailing a Claim Form	You will: • be bound by the proposed settlement if it is approved • share in the settlement if your claim is valid; • be barred from suing defendant based on the alleged wrongdoing
December 1, 2000	Deadline for mailing an exclusion	You will: • not be bound by the proposed settlement; • be free to pursue any claims you may have; • not share in the proposed settlement
January 2, 2001	Deadline for court to receive an objection or comment	You may object to or comment on proposed settlement
January 2, 2001	Deadline for court to receive a notice of appearance for the hearing	You may notify the court of your intention to appear at the hearing on the proposed settlement and, if you so choose, to be represented by your own attorney
February 15, 2000	Hearing	The judge will: • determine whether the proposed settlement is fair, reasonable, and adequate • consider attorney-fee and attorney- expense requests • allow time for you or your attorney to briefly state objections or to comment on the proposed settlement

United States District Court for the
Northern[1] District of *Georgia*

John Smith

v.

XYZ Corporation *Civil Action No. 00-1234*

NOTICE OF EXCLUSION FORM[2]

Instructions:

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

If you want to exclude yourself from the class, you must complete this form and mail it by *January 2, 2001* to:

Claims Administrator
P.O. Box 32453
Atlanta, GA 30348

Each *purchaser of XYZ Corporation stock* who wishes to be excluded from the class should complete and mail a separate Notice of Exclusion Form.

I have received the "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing," dated *October 4, 2000* and do NOT wish to remain a member of the plaintiff class *conditionally* certified *for settlement purposes* in the case of *Smith v. XYZ Corporation, Civil Action No. 00-1234,* in the United States District Court for the *Northern* District of *Georgia.*

(Additional information and signature line are on the back of this form.)

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[1] Generally, italicized information in this sample form refers to a hypothetical example and is not intended to be part of the form itself.

[2] This form is designed for use by an individual person. Corporations, partnerships, tenants in common, and others will have to modify this form as appropriate.

I understand that by signing and mailing this form:

- I will not receive any of the monetary benefits of the proposed settlement as described in the "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing;"

- I will not be represented in this action as a class member if the proposed settlement is not approved; and

- I may pursue, at my own expense, whatever claims I may have against any of the defendants, including claims regarding *the alleged overstatement of earnings in relation to the purchase of shares of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999.* I understand that I would have to prove any claim I might file, and that any claim would be subject to any defenses defendants may have.

Your signature _____

Date: _____

Please type or print:

Your name _____

Address _____

_____

City, State, Zip Code _____

Telephone _____

Your e-mail address (if any) _____

United States District Court for the
Northern[1] District of *Georgia*

John Smith

v.

XYZ Corporation *Civil Action No. 00-1234*

CLAIM FORM[2]

Instructions:

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

If you want to be eligible to participate in the distribution of the settlement fund, you must complete and return this form and mail it by *December 1, 2000* to:

Claims Administrator
P.O. Box 32453
Atlanta, GA 30348

Attach additional sheets if you need more space.
Retain records of purchases, such as *confirmations, statements, and similar documents.*

Section I. Identification (Please type or print)

Your name_____

Address _____

_____

City, State, Zip Code _____

Telephone _____

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[1] Generally, italicized information in this sample form refers to a hypothetical example and is not intended to be part of the form itself.

[2] This form is designed for use by an individual person. Corporations, partnerships, tenants in common, and others will have to modify this form as appropriate.

Your e-mail address (if any)_____

(Additional information and signature line are on the back of this form.)

Section II. Purchases of *shares of stock in XYZ Corporation* (Please type or print)

Date of Purchase	**Number *of shares***	**Type *of shares* (_____ or _____)**	**Total Purchase Price**

(Use Additional Sheets If Necessary)

I understand that by signing and mailing this Claim Form, if the proposed settlement is approved, I am giving up any rights I might have to bring a lawsuit based on *the alleged overstatement of earnings in relation to the purchase of shares of stock of the XYZ Corporation during the period from January 1, 1999 through December 31, 1999.* In exchange, I will receive any share of the settlement to which I may be entitled.[3]

Your signature _____

Date: _____

[3] The language of a sample release remains under consideration. The narrow release language that appears in several places in this draft is retained as a place marker until we draft a more appropriate version after further discussion with the subcommittee and committee.

United States District Court for the
Northern[1] District of *Georgia*

John Smith

v.

XYZ Corporation *Civil Action No. 00-1234*

NOTICE OF APPEARANCE FORM[2]

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

Please enter my appearance as counsel for _____,[3] who is a member of the class in the case captioned above.

I (circle one) [will] [will not] appear at the hearing scheduled in this case for *February 15, 2001 at 9:00 A.M.* in the courtroom of Judge *Jones*, located at *75 Spring Street, Atlanta, Georgia.*

Your signature _____ (To be signed by counsel or by the class member if the class member does not have his or her own attorney)

Date: _____

Please type or print:

Your name _____

Address _____

_____

City, State, Zip Code _____

Telephone _____

Your e-mail address (if any) _____

_____

[1] Generally, italicized information in this sample form refers to a hypothetical example and is not intended to be part of the form itself.

[2] This form is designed for use by an individual person. Corporations, partnerships, tenants in common, and others will have to modify this form as appropriate.

[3] If you are an individual representing yourself, leave this line blank.

4

Special Masters

Revision of Rule 53 was first considered in response to suggestions made by local committees framing Civil Justice Reform Act plans. After a Reporter's draft was prepared the topic was put aside. There were at least two concerns. One was the press of more important matters — the Advisory Committee was hard at work on class-action and discovery questions, and needed to ration its own resources and to guard against distractions that might limit the attention devoted to Rule 53 in the public comment process. Another was uncertainty whether there is any need to revise Rule 53. Rule 53 was framed to address the use of special masters as judicial adjuncts for trial or a rather narrow view of administering an "accounting" remedy. Special masters have come to be appointed to perform a wide variety of pretrial functions, and also to assist in formulating and enforcing complex decrees. Rule 53 does not reflect these realities, and does not provide any guidance or establish any control. At the same time, courts seem to be muddling along reasonably well. If there are no visible problems with the gradual evolution of special masters' functions, the justification for rule revision may be questioned.

When the Committee agenda seemed to allow space for renewed consideration of Rule 53, a subcommittee was appointed. The Federal Judicial Center undertook to study the use of special masters. Its report, *Special Masters' Incidence and Activity*, FJC 2000, has been sent to all Advisory Committee members. Compressing far too much into a small nutshell, the report found that indeed masters are frequently appointed for pretrial or postjudgment purposes; that the uncertain reach of Rule 53 in these areas is overcome largely by "consent and acquiescence"; and that many judges do not trouble to cite any source of authority, whether Rule 53 or something else, in making appointments. The two areas of concern that seemed to generate the most questions went to the process of selecting the master and to ex parte communications between the master and either the court or the parties. There was a pervasive sense that things are working well, but also a number of suggestions for rules amendments. The attitude toward amending Rule 53 was, on the whole, ambivalent. But it seemed to be agreed that any changes should be broad and flexible — recognizing that breadth and flexibility may lead to unintended consequences.

The question of flexibility and generality is very much presented by the draft that follows. It was prepared in the general spirit that has guided many first drafts: it is easier to examine and discard specific proposals than it is to generate specific proposals in committee debate, easier to move from many specifics to a few generalities. So here. There are many details. We may wish to substitute more general provisions at several points.

The subcommittee has begun its consideration of the details, but has not concluded this work. Two devices are used to present the questions that are most salient on the level of details. Footnotes are used to present, in anonymous form, criticisms and suggestions from subcommittee members. Several of these suggestions might be adopted without more, but it seemed better to identify them

on the chance that other Committee members will have other thoughts. The footnote device does not indicate that these are marginal issues. The issues are real, and deserve attention.

The second device that raises several questions is a set of "Reporter's Notes" that responds to outside reviews. These Notes have been considered in the course of subcommittee deliberation, and are preserved here for the time being. They may prove distracting, however, and should be put off for consideration after reviewing the text of the draft Rule, including footnotes, and after reading the draft Committee Note.

The emergence of magistrate judges raises a number of questions about the use of special masters. At least three should be borne in mind while reading the draft rule. First, many of the duties that may be assigned to a special master are duties that can be performed by a magistrate judge; it seems appropriate to restrict the use of special masters accordingly. Second, there may be occasions when it seems appropriate to appoint a magistrate judge to act as a special master, discharging duties that could not be performed in the role of magistrate judge; we need decide whether this confusion of roles is ever appropriate. Third, the relationships between special master and district judge are in many ways similar to the relationships between magistrate judge and district judge; it may be desirable to describe the duties appropriate for a special master in open-ended terms that reflect the flexibility and generality of the magistrate-judge statutes, and to define the standards and scope of review in similar terms.

This is a report on work in progress. The subcommittee will launch the discussion, and can develop in detail the issues that seem to it most prominent. But the best help from the Committee will be guidance on the broad issues. With a good sense of general direction, the subcommittee can refine the present draft for further consideration at a later Committee meeting.

RULE 53. MASTERS

(a) Appointing.

(1) A court may appoint a master only:

(A) if the parties consent;

(B) if some exceptional condition[1] in an action to be tried to the court requires a master to recommend [or make][2] findings of fact on the merits of the claims, defenses, or issues presented for decision;

(C) if, in an action to be tried by a jury, the issues are extraordinarily complicated and consideration of the master's report is likely to substantially assist the jury;[3] or

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[1] The "exceptional condition" language is a modification of the present Rule 53(b) provision that appointment of a special master "shall be the exception and not the rule." This emphasis should be maintained.

[2] One recommendation is to delete "or make" — findings on the merits should be only "recommendations," but should be adopted by the court unless clearly erroneous. But concern has been expressed that there is an ambiguity in the reference to "findings of fact on the merits of the claims, defenses, or issues presented for decision." This phrase is intended to refer only to the duties of a "trial" master, but it may be read to refer to a pretrial master. A pretrial master should have authority to make findings, reviewed only for clear error, in doing such things as ruling on discovery disputes. Need we find a better way of saying these things? Another suggestion is that this provision should anticipate (i)(3)(B), which provides that with the parties' consent the master's findings can be final: "recommend, or with the consent of the parties, make findings of fact * * *." This suggestion is in part a drafting suggestion: draft (b)(15) provides for "other duties agreed to by the parties." The parties can consent to almost anything. Is it helpful to duplicate this authority, or cross-reference it, at other places?

[3] There is strong subcommittee support for the view that use of a special master in a jury trial is so dangerous that it should be abandoned.

(D) if the master is assigned {other}[4] duties [outside Rule 53(a)(1)(A), (B), or (C)] that [clearly][5] cannot be performed adequately by an available district judge or magistrate judge [of the district][6].

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 [unless the parties consent to appointment of a particular person][7].

(3) A master cannot, during the period of the appointment, appear as an attorney before the judge who made the appointment; this disability is not imputed to other attorneys associated with the master.[8]

[(4) A master must be qualified for the assigned duties by training, experience, and

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[4] There is a strong argument that the bracketed reference to the duties "outside" the prior subparagraphs is confusing; it would be better to find another expression. "Other duties" is suggested, although it may not be as precise.

[5] There is strong sentiment to delete "clearly." (This word was meant to limit the power to appoint a special master; the question seems to be one of substance rather than style.)

[6] It is generally agreed that we should retain "of the district" for the reasons stated in the Note.

There is a question whether the relationship between subparagraphs (B) and (D) is clear, and whether it is correct. The case law that requires exceptional circumstances to appoint a master arises primarily under the language of present Rule 53, which seems to focus on "trial" masters. Subparagraph (B) is intended to carry forward this case law, absent consent of the parties. Subparagraph (D), addressing "other duties," does not require exceptional circumstances; it demands only that the appointed duties cannot be adequately performed by an available judge or magistrate judge of the district. Should the standard be higher for a settlement master, discovery master, or the like? If it is not as high as the trial master standard, should the draft do more to make this clear?

[7] It is proper to allow waiver by the parties. There are good reasons to refuse to recognize party waiver as to a judge because a party who appears regularly before the same judge may feel pressure to waive. That problem is not likely to arise with respect to a special master.

[8] "I agree with Sol [Schreiber] and would therefore leave the current draft unchanged."

temperament.][9]

(5) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.[10]

(b) **Master's Duties.**[11] The court may appoint a master [or masters][12] to:

(1) mediate or otherwise facilitate settlement;

(2) formulate a disclosure or discovery plan; supervise disclosure or discovery; make disclosure or discovery orders under Rules 26 through 31, 32(d)(4), 33 through 36, and 45; make recommendations [to the court] for orders under Rules 26 through 36 and 45; make orders under Rule 37(a) or (g); or make recommendations [to the court] for orders under Rule 37;[13]

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[9] Although some concern has been expressed about the qualifications of some special masters, this pious reminder does not belong in the text of the rule. Drop it entirely.

[10] The effort to protect against unreasonable expense and delay is a good idea.

[11] This long list of "duties" is the most salient illustration of the regular "drafting-in-detail" question. Do we need all of this detail, or is it better to provide more open-ended directions that will have greater capacity to grow over time? One reaction: Paragraphs (4) through (15) "most trouble me because I just don't like listing the potential duties. I would prefer a broader approach similar to the statutory approach of 28 U.S.C. § 636(b)(1) and (b)(3). This provides for future flexibility. The notes could then contain a recitation of contemplated uses or the rule could include some recitation preceded by something like 'includes but is not limited to' language. It is obviously impossible to catalog all possible uses in a rule."

[12] It may prove useful to appoint more than one master in a single action. A settlement master, for example, may function better if other pretrial or trial functions are assigned to someone else. But there is no need to add "or masters" to the rule to emphasize this point.

[13] This is confusing. A judge should have power to refer any of these matters to a master for orders, rather than attempt to make fine distinctions that allow any of these matters to be referred for recommendations, but that allow only a subset to be referred for orders. There may be some doubt as to some of the orders contemplated by Rule 37. Review should be for abuse of discretion unless sanctions are involved; sanctions should be reviewed de novo. It would be simpler, and better, to say only that a court may appoint a master "to manage discovery and issue appropriate orders and make appropriate recommendations."

(3) conduct conferences and make orders or recommendations for orders under Rule 16;

(4) hear and determine any other pretrial motion, except a motion:

(A) for injunctive relief,

(B) to dismiss for failure to state a claim,

(C) for judgment on the pleadings,

(D) to strike any claim or defense,

(E) for involuntary dismissal, transfer, or remand,

(F) for summary judgment,

(G) to certify, dismiss, or approve settlement of a class action, or

(H) to establish for trial under Evidence Rule 104 the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence;

(5) conduct hearings and make proposed findings and recommendations for disposition of a[14] motion described in Rule 53(b)(4);

(6) manage other pretrial proceedings;[15]

(7) assist in coordinating separate proceedings pending before the court or in other courts, state or federal;

(8) assist the court in discharging its trial duties in a nonjury case;[16]

(9) preside over an evidentiary hearing and:

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[14] A point of style. The official style prefers "a," with "any" to be used only for special emphasis. Perhaps this is a place to use "any."

[15] There is one vote to delete this paragraph. And also a vote to retain it as necessary if we retain the long catalogue of duties.

[16] There are two votes to delete this paragraph.

(A) report the evidence to the court in a nonjury action;

(B) recommend findings of fact and conclusions of law; or

(C) make findings of fact or conclusions of law in a nonjury action, subject to review as provided in Rule 53(i);[17]

(10) conduct ministerial[18] matters of account;

(11) assist in framing an injunction [when the parties have not been able or willing to provide sufficient assistance][19];

(12) assist in supervising enforcement of a complex decree;[20]

(13) assist in administering a class-action judgment or an award to multiple claimants;

(14) conduct independent investigations to assist in framing an injunction or in enforcing

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[17] This should be revised to delete any reference to jury actions, in line with the deletion of subdivision (a)(1)(C):

(9) preside over an evidentiary hearing in a nonjury action and:
(A) report the evidence to the court; or [and]
(B) make [or recommend] findings of fact or conclusions of law subject to review as provided in Rule 53(i);

Or it could be revised still further: "preside over evidentiary hearings and recommend findings of fact and conclusions of law." We need to distinguish more clearly between pretrial and trial functions. A master can make findings in pretrial proceedings, such as discovery, but should only recommend findings on the merits. (And, implicitly, there is no reason to continue, in 9(A), the present Rule 53(c) provision that a master may be appointed "to receive and report evidence only.")

[18] Perhaps we should drop "ministerial" on the theory that any accounting is appropriate for reference to a master. But the explanation in the Committee Note is persuasive: if the "accounting" involves the ordinary trial function of resolving credibility, the master should be appointed as a trial master. Perhaps the distinction should be embodied in the Rule — one approach would be to add a few words: "(10) conduct ministerial matters of account that do not require resolution of credibility disputes by appointment under Rule 53(b)(8) or (9).

[19] There is at least one vote to delete the bracketed language.

[20] This section "should not be made more specific. It allows the needed flexibility."

a decree;[21] or

(15) perform other duties agreed to by the parties.[22]

(c) Order Appointing Master.

(1) Hearing. The court must give the parties notice and an opportunity to be heard[23] before appointing a master. A party may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state as precisely as possible:

(A) the master's name , business address, and numbers for telephone and other electronic communications;

(B) the master's duties under Rule 53(b)[24];

(C) any limits on the master's authority under Rule 53(e) and (f);

(D) the dates by which the master must first meet with the parties, make interim and final reports to the court, and complete the assigned duties;[25]

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[21] "I question the wisdom of including this section. It may be that the power to investigate is the power that a court wants a monitor to exercise. If so, the court can include that power in the order appointing the special master."

[22] Agreement between the parties and the court is desirable. "[I]t is a toss-up whether we say it in the notes or the text."

A different question is whether it is clear that the court does not have to make the appointment simply because all parties agree. Subdivision (b) begins: "the court may appoint a master." Mere agreement of the parties should not supersede the court's discretion. Do we need more words?

[23] The "opportunity to be heard" is a good idea.

Should the rule or Note say more about the notice? Require that it include the proposed duties, the level of compensation (and any caps on compensation), the expected time to complete the master's assignment, or other matters? Some notices have done this.

[24] Delete "under Rule 53(b)."

[25] Two votes to delete subparagraph (D) entirely.

(E) the circumstances in which the master may communicate ex parte with the court or a party;

(F) the time limits, procedures, and standards for reviewing the master's orders and recommendations;

[(G) any bond required of a master who is not a United States magistrate judge;][26] and

(H) the basis, terms, and procedure for fixing the master's compensation — if any[27] — under Rule 53(j).

(3) **Amendment.** The order appointing a master may be amended at any time [after notice to the parties].[28]

(d) **Master's Powers.** Unless expressly limited by the appointing order, a master may regulate all proceedings and take all measures necessary or proper to perform efficiently the duties assigned under Rule 53(b).

(e) **Master's Authority.** Unless limited by the appointing order, a master has authority to:

(1) set and give notice of reasonable dates and times for meetings of the parties, hearings, and other proceedings;

(2) proceed in the absence of any party who fails to appear after receiving actual notice

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[26] Two votes to delete subparagraph (G) entirely.

[27] Judge Brazil suggests the "if any" addition to reflect that in some situations a master may serve without compensation. The question is whether this need be emphasized in the text of the rule, or whether it is better to leave it to approving comment in the Committee Note. A similar reference to "compensation — if any — " in the draft class-action attorney fee rule was deleted for fear of popular reaction. There is at least one vote to delete "if any."

[28] Sol Schreiber is right. We should add a subdivision that requires the master to file an affidavit that there are no conflicts of interest, and that requires the master to take the oath administered to judges under 28 U.S.C. § 453, "to administer justice in conformance with the order of appointment." See SD and EDNY Joint Rule 53.1.

under Rule 53(e)(1), or — in the master's discretion — adjourn the proceedings;

(3) hold hearings under Rule 53(f); and

(4) do all things necessary or proper for fair and efficient performance of the master's duties.

(f) Hearings. When a master is authorized to conduct hearings:

(1) the parties or the master may compel witnesses to provide evidence by subpoena under Rule 45, and the master may compel a party to provide evidence without resort to Rule 45;

(2) the master may put the witnesses on oath;

(3) the parties and the master may examine the witnesses;

(4) the master may rule on the admissibility of evidence;

(5) the master must make a record of the evidence, and — if requested by a party or directed by the court — must make a record of excluded evidence as provided in the Federal Rules of Evidence for a court sitting without a jury;

(6) the master may impose the noncontempt consequences, penalties, and remedies provided in Rules 37 and 45 on a party who fails to appear, testify, or produce evidence; and

(7) the master may recommend to the court sanctions against a nonparty witness, or contempt sanctions against a party, who fails to appear, testify, or produce evidence.

(g) Master's Orders. A master who makes an order must file the order and promptly serve[29] a copy on each party. The clerk must enter the order on the docket.

(h) Master's Reports. A master must report to the court as required by the order of

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[29] Should this be "send to" rather than "serve on"? See the note to subdivision (h)(2) below.

appointment[, and may report on any other matter].[30] Before filing a report, the master may submit a draft to counsel for all parties and receive their suggestions. The master must:

(1) file the report, together with any relevant exhibits and a transcript of any relevant proceedings and evidence; and

(2) promptly {serve}[send][31] a copy of the report {on}[to] each party.

(i) **Action on Master's Order, Report, or Recommendations.**[32]

(1) Time and Hearing.

(A) A master's order, report, or recommendations become the court's action unless a party timely objects or moves for review, or the court reviews on its own.

(B) A party may file objections, a motion to review, or a motion to adopt, and the court may give notice of review on its own, no later than 10 days[33] from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(C) The court must afford an opportunity to be heard and may receive evidence in

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[30] A master should be allowed to report on "any other matter"; this is not a "serious change" to the adversary system as suggested by the draft committee note.

[31] The master should not be required to serve the report on each party. It is enough, and a courtesy at that, to require the master to "send" a copy to each party. [Present Rule 53(e)(1) requires the master to file the report with the clerk and to serve notice of filing on the parties. The choice becomes important with respect to the time to file objections under subdivision (i): it is difficult to set a time deadline that begins with the moment a report is sent, and burdensome to set a short deadline that begins with filing.]

[32] This subdivision "really seems cumbersome." It should be brief and more flexible.

[33] The 10-day period, drawn from present Rule 53(e)(2), is very short. It can be enlarged under Rule 6(b). But attorneys surveyed by the FJC found 10 days not enough. Is it better to lengthen the period, or to provide a cross-reference to Rule 6(b) in Rule or Note?

acting under Rule 53(i)(1)(A).[34]

(2) **Action.** In acting on a master's order, report, or recommendations, the court may:

(A) adopt or affirm[35] it;

(B) modify it;

(C) wholly or partly reject or reverse it; or

(D) resubmit it to the master with instructions.

(3) **Fact Findings.** The court in a nonjury case may set aside a master's fact findings or recommendations for fact findings only if clearly erroneous, unless:

(A) the order of appointment provides for de novo decision by the court, or

(B) the parties stipulate that the master's findings will be final.

(4) **Jury Issue Findings.**[36] A trial master's findings on issues to be tried to a jury are

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[34] This paragraph should be rewritten: a "motion to review" is puzzling. The opportunity to be heard should clearly apply to any action on an order, report, or recommendation:
(1) Time and Hearing.
(A) A master's order, report, or recommendations become the court's action unless the court takes a different action based either on its own motion or on timely objection by any party [or other affected person].
(B) A party [or other affected person] may file objections no later than 10 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.
(C) The court must afford an opportunity to be heard and may receive evidence before it acts on a master's order, report or recommendation.

[Extending the opportunity to object to an affected person who is not a party may raise difficult questions. The strongest need is likely to arise in the decree stage of institutional reform litigation. Although a decree may directly affect intense interests of nonparties, opening the door this wide may create difficulties.]

[35] Perhaps it is enough to "adopt," as a term that better describes the responsibility of a court with respect to a master's recommendation, report, or even "order."

[36] As in note 2 above, it would be better to bar any use of a trial master in a jury case.

admissible as evidence and may be read to the jury unless the court excludes them in its discretion or for legal error.

(5) **Legal questions.** The court must decide de novo questions of law raised by a master's order, report, or recommendations, unless the parties stipulate that the master's disposition will be final.

[(6) **Discretion.** *Alternative 1.* The court may establish standards for reviewing other acts or recommendations of a master by order under Rule 53(c)(2)(F).][37]

[(6) **Discretion.** *Alternative 2.* The court may set aside a master's ruling on a matter of procedural discretion only for an abuse of discretion.]

(j) **Compensation.**

(1) **Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment unless a new basis and terms are set after notice and opportunity to be heard.

(2) **Payment.** The compensation fixed under Rule 53(j)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) **Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties,[38] and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

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[37] This is the better alternative, but "may" should be changed to "must."

[38] It has been urged that it is unfair to consider the means of the parties unless the parties consent to this criterion at the outset. But the FJC "found quite a bit of case law permitting courts to look at the ability of the parties to pay for court-appointed experts and to allocate responsibility depending on the means of the parties."

(k) **Application to Magistrate Judge.** A court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances.[39] A magistrate judge is not eligible for compensation ordered under Rule 53(j).

[39] Judge Brazil is right in suggesting that consent of the parties should be required if a magistrate judge is to serve as a trial master. The first sentence should be: "A court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge, and the parties must consent to appointment of a magistrate judge as trial master." But another comment is that "trial master" is confusing: a magistrate judge can exercise "case dispositive jurisdiction" only on consent of the parties — otherwise the findings must be reviewed de novo by a district judge.

Reporter's Notes

(a)(1): Read carefully, the draft did the job. But very able reviewers have found the combination of trial functions with other functions confusing. Former (B) is divided into three parts.

(A), allowing appointment with the parties' consent, is important. There is a risk that consent may be mere acquiescence in a judge's desires. The FJC study, however, shows that consent is central to most appointments. It is reasonable to object that the consent process enables wealthy litigants to buy speedier or better justice than others can afford, but that objection should not defeat reliance on party consent. Among other reasons, the result of taking some litigation outside the regular judicial track is that a greater share of judicial resources is free for those who remain on the regular track.

(B) retains the "exceptional condition" phrase now used for trial masters in Rule 53(b). The brackets introduce a question that will reappear regularly: whether a master should have power to "make" findings of fact. Present Rule 53(e)(1) contemplates that the master may be required to make findings of fact. There is a strong argument that a master's responsibility should be described only as recommending findings of fact. The approach taken in this draft reflects a compromise. As to matters going to the merits of the action — the "claims, defenses, or issues presented for decision" — the master only recommends. This locution can be coupled with a "clearly erroneous" standard of review if that seems desirable, but also can be tied to the court's responsibility to decide de novo on the record compiled by the master. (There may be cogent objections to de novo decision: why split the chore of compiling the record from the responsibility to decide? And the master may be appointed specifically because the master can understand the subject better than the judge can understand it.)

(C) continues the present practice that permits a master to report to a jury. The Reporter thinks this practice so dangerous that it should be abandoned. The practice continues to be used, however, and probably overlaps the role of court-appointed expert witnesses. We should seriously consider prohibiting the practice; a court-appointed expert witness at least would be subject to cross-examination.

(D) includes a word suggested by Wayne Brazil: the duties "clearly" cannot be performed adequately by judge or magistrate judge. The Reporter is shy about words of this sort, and believes it should be stricken. On a separate point, the bracketed phrase "of the district" is meant to address this question: should a court exhaust the possibility of inter-district assignments before appointing a special master? Inter-district assignment has a reasonably neutral air when the reason for seeking help is docket pressure. It seems rather pointed if the search is for a judge particularly suited to a difficult subject; but since a master would be appointed for like reasons, perhaps the risk of recognizing distinctions within the otherwise randomly assigned Article III judiciary is not as great as it seems.

(a)(2) introduces another suggestion by Wayne Brazil. The disqualification standards of § 455 are expressly adopted. Brackets have been added to flag the question whether the parties should be allowed to consent to a specific appointment that would be barred by § 455.

(a)(3) now includes a suggestion by Sol Schreiber by stating that although a master cannot appear

as attorney before the appointing judge, the disability does not extend to other attorneys associated with the master.

(a)(4) was suggested by Wayne Brazil. The Reporter believes this sort of thing should go without saying. The question of "temperament" is particularly awkward to state in a rule, although it surely is at least as important as training and experience.

(a)(5) adds to the original draft the duty to protect against unreasonable expense or delay. It reflects the provision in present Rule 53(d)(1): "It is the duty of the master to proceed with all reasonable diligence." This paragraph may not be needed at all.

(b) The first line includes "or masters" in brackets. This suggestion does not seem desirable. The authority to appoint "a" master does not impliedly limit the authority to appoint more than one master in a single action. If there is concern on this score, it can be addressed in the Committee Note.

(b)(2) is another illustration of the line between acting and making recommendations. The delegable authority to act on discovery matters is limited to exclude a few potential powers; the authority to make recommendations is plenary. Even if a master should not be assigned the responsibility to "make" findings of fact on the merits of the action, it may be desirable to delegate authority to decide discovery disputes. Review — clear error for matters of fact, de novo for issues of law, and abuse of discretion for matters of discretion — should be protection enough. A subsidiary question is whether the few limits on delegation are the right ones if indeed there should be any limits.

(b)(3) again allows delegation, this time to "make orders" under Rule 16.

(b)(4) presents a central question. Barbara Wrubel urges that the preface should be changed: "conduct hearings and make proposed findings and recommendations for the disposition of any pretrial motion, except * * *." All of the exceptions would remain as listed, and (b)(5) would be deleted. The result is that a master could not decide any pretrial motion, and could not even be asked to make recommendations with respect to the listed motions. This position is most cogent with respect to motions addressed to the pleadings, involuntary dismissal, transfer, or remand. A master may be very useful with respect to a complex motion for summary judgment. Certification or dismissal of a class action may be too sensitive for reference to a master, although such questions as potential conflicts of interest within a proposed class might benefit from a master's work. A master may be very useful with respect to review of a proposed class-action settlement. And a master may be very useful in helping determine the admissibility of expert testimony.

(b)(5) would be deleted under the suggestion explored with (b)(4). The purpose of (b)(5) is to permit the court to limit a master to making recommendations on motions that could be assigned to the master to hear and determine under (b)(4), and to authorize recommendations with respect to any pretrial motion, including a motion that under (b)(4) could not be delegated for decision.

(b)(7) was inspired by the tasks assigned to Francis McGovern in the silicone gel breast implant litigation.

(b)(8) is an open-ended provision for functions that support trial in a nonjury action; it may not be needed in light of the more pointed provisions in (b)(9).

(b)(9) allows three functions. The first is to report the evidence to the court in a nonjury action. Present Rule 53(e)(3) prohibits a report of the evidence in a jury action. It is not clear that it is desirable to allow a report of the evidence on a nonjury action if there are no proposed findings. Why separate the evidence-hearing function from the responsibility to decide? The second function allows recommended findings of fact and conclusions of law; this is the only one that applies both in jury and nonjury actions. As noted above, it may be better to eliminate any trial function in jury cases. The third function is to make findings of fact or conclusions of law in a nonjury action, subject to review under new subdivision (i). Present Rule 53(e)(1) allows delegation of the duty to make findings of fact and conclusions of law; Rule 53(e)(2) establishes a clear error standard of review; and Rule 53(e)(4) empowers the parties to stipulate that the findings shall be final. Margaret Farrell in particular raises the question whether an Article III court should be authorized to continue this delegation of responsibility. The question seems to go to the heart of the trial function. If de novo findings of fact by the judge are required — with a possible exception for party consent — the advantages of delegating the hearing function may be more than offset by the disadvantage of requiring de novo decision by the judge. A judge faced with recommended findings and the obligation to decide de novo might well find it difficult to provide a genuinely de novo decision, particularly if the master has expert knowledge in the matters to be resolved. At any rate, if we decide to allow only recommendations for findings of fact, (C) can be deleted.

(b)(10) refers to "ministerial" matters of account. This limitation is intended to require trial-like proceedings if the accounting is more than just ministerial. The limit may be unnecessary or unwise.

(b)(11) might be improved, as Wayne Brazil suggests, by deleting the bracketed portion. He observes that able parties may be unwilling. More generally, the assistance of a master in framing an injunction may serve a function akin to mediation and settlement.

(b)(12) is open-ended. The FJC study suggests that the "monitor" role in institutional-reform litigation has become important and very complex. Should we try to provide greater guidance?

(b)(13) is changed to refer explicitly to a class-action judgment. This includes administration of a judgment against a defendant class, one of the functions observed in the FJC study.

(b)(14) is intended to address the monitor role. Margaret Farrell, who has been given "broad investigatory powers" to monitor compliance with a decree and to make recommendations on contempt issues suggests that greater detail would be helpful. Should a master have access only to information that could be obtained through discovery, or is a broader inquisitorial power desirable? Can a master enter a protective order when sensitive information is provided to an expert for advice? These are important questions, but it may prove difficult to draft wise answers in the text of the rule.

(b)(15) is a catch-all inserted as a matter of caution. Wayne Brazil suggests that it should provide that the court must agree. Since all of this is prefaced by "the court may appoint a master," a reminder may not be necessary. Perhaps this should be added to the Committee Note.

(c)(1) Wayne Brazil suggested "to be heard," replacing "for a hearing," on the theory that an "opportunity to be heard" can be satisfied by receiving written presentations. Written presentations likely should suffice; does the language work?

(c)(2) Sol Schreiber thinks we should delete the (G) provision for a bond. "[I]n all my experience, this matter has never been considered." Wayne Brazil would expand the (H) provision on compensation by adding "if any." I think the present language includes the power to set compensation at zero; perhaps the Note should comment on this point.

(c)(3 new) Sol Schreiber thinks this subdivision should require the master to file an affidavit that there are no conflicts of interest, and should require the master to take the oath administered to judges under 28 U.S.C. § 453, to "administer justice in conformance with the order of appointment." See SD and EDNY Joint Rule 53.1.

(d), (e), (f) and (g) have provoked little comment.

(h) The power to report on a matter not required by the order of appointment is retained in overstrike form to renew this question. It is possible that a pretrial or postjudgment master may come upon matters that have not been raised by the parties but that seem important to the action. This prospect seems particularly important as to a "monitor" whose task is to ensure compliance with an institutional reform decree. An open report to the court seems more attractive than ex parte communication. But authorizing such reports is a serious change in the adversary system. This proposal provoked opposition six years ago, and perhaps should be deleted completely.

(i)(1) has been redrafted and, in present form, is rather ungainly. The presumptive 10-day period for seeking review may be too short.

(i)(3)(A) originally provided for "a more demanding standard of review." Margaret Farrell found this term ambiguous. "de novo decision" has been substituted, but with this uncertainty: is it possible to specify a meaningful standard of review that lies between clear error and de novo decision? And of course this provision brings back the question whether all review should be de novo. Note that "findings of fact" remains relevant even if a master is allowed only to make recommendations for findings of fact that go to the merits of the dispute, subdivisions (a)(1)(B), (b)(9)(C).

(i)(5) Wayne Brazil asks whether it is proper to give the master the last word on the law even when the parties stipulate to that. Present Rule 53(e)(4) provides only for stipulation that findings of fact shall be final, leaving open questions of law. But if the parties wish to treat the master as a sort of super arbitrator, bound to judicial procedure, should that be permitted? Suppose the dispute is governed by the law of another country?

(i)(6) provides alternative provisions for reviewing administrative and procedural acts. Alternative 1 originally provided that the standard of review could be set at the time of review or in the order of appointment; this has been collapsed into the reference to Rule 53(c)(2)(F) because the original appointment order can be amended. Is that satisfactory? Alternative 1 frees the court to set whatever standards of review it likes; that may be more attractive than the attempt to prescribe an abuse-of-discretion standard in Alternative 2.

(j)(1) led Wayne Brazil to ask why the court should be allowed to fix compensation after judgment. The idea was that adjustments might be made in light of the quality and efficiency of service; the total cost; the allocation between the parties; and other information not available at the time of

appointment. And of course the rule must reach post-judgment masters. But perhaps the troubling phrase, "before or after judgment," can be deleted without loss.

(j)(3) led Roy Reardon to protest that the means of the parties should be considered only if the party with greater means consents. We should think about that. Our tradition of no-charge public adjudication may stand in the way, even when a complicated dispute involving technical issues inaccessible to the judge would benefit from the attentions of a master whose compensation lies beyond the reasonable means of one party, even as to one-half. In a related vein, are there any statutes that provide for allocation of master fees? If so, the rule should incorporate a general provision for "as directed by statute."

(k) Wayne Brazil suggests that the rule should prohibit appointment of a magistrate judge to serve as a trial master. That is a powerful suggestion — if the magistrate judge could serve as trial judge only with the parties' consent, why allow the statute to be circumvented? Cf. the entire debate whether masters should be used for any fact finding on the merits, even in the form of recommendations.

COMMITTEE NOTE

[The "redlined" material that should print out with funny-looking backshading, has been added to respond to many of the comments described in the Reporter's Note. The underlining is an artifact of past additions to the original text; it has been retained only for the similar purpose of showing material added in response to other suggestions and not considered with much care.]

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform pretrial and post-trial functions. This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, and clarifies the provisions that govern the appointment and function of masters for all purposes. The core of the original Rule 53 remains. Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.

The new provisions reflect the need for care in defining a master's role. It may prove wise to appoint a single person to perform multiple master roles. Yet separate thought should be given to each role. Pretrial and post-trial masters are likely to be appointed more often than trial masters. The question whether to appoint a trial master is not likely to be ripe when a pretrial master is appointed. If appointment of a trial master seems appropriate after completion of pretrial proceedings, however, the pretrial master's experience with the case may be strong reason to appoint the pretrial master as trial master. The advantages of experience may be more than offset, nonetheless, by the nature of the pretrial master's role. A settlement master is particularly likely to have played roles that are incompatible with the neutral role of trial master, and indeed may be effective as settlement master only with clear assurance that the appointment will not be expanded to trial master duties. For similar reasons, it may be wise to appoint separate pretrial masters in cases that warrant reliance on a master both for facilitating settlement and for supervising pretrial proceedings. There may be fewer difficulties in appointing a pretrial master or trial master as post-trial master, particularly for tasks that involve facilitating party cooperation.

Subdivision (a). District judges bear initial and primary responsibility for the work of their courts. A master should be appointed only if the parties consent or the master's duties cannot adequately be performed by an available district judge or magistrate judge of the local district. The search for a judge need not be pursued by seeking an assignment from outside the district.

United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that often deters appointment of a master is much reduced. There is no need

to impose on the parties the burden of paying master fees to a magistrate judge. A magistrate judge, moreover, is less likely to be involved in matters that raise conflict-of-interest questions.

Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of paragraph (1)(B) that restrict appointments to exercise the trial functions described in subdivision (b)(8) and (9). The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

The use of masters in jury-tried cases is retained as well, but the practice is narrowed even further than former requirements that the issues be complicated and that reference be the exception. If the master's findings are to be of any use, the master must conduct a preliminary trial that reflects as nearly as possible the trial that will be conducted before the jury. This procedure imposes a severe dilemma on parties who believe that the truth-seeking advantages of the first full trial cannot be duplicated at a second trial. It also imposes the burden of two trials to reach even the first verdict. The actual usefulness of the master's findings as evidence also is open to doubt. It would be folly to ask the jury to consider both the evidence heard before the master and the evidence presented at trial, as reflected in the longstanding rule that the master "shall not be directed to report the evidence." If the jury does not know what evidence the master heard, however, nor the ways in which the master evaluated that evidence, it is impossible to appraise the master's findings in relation to the evidence heard by the jury. It might be better simply to abandon the use of masters in jury trials. Rather than take this final step, however, room is left for an exceptional circumstance that requires appointment of a master. Courts should be very reluctant to conclude that any circumstance is so special as to require the appointment.

The statute specifically authorizes appointment of a magistrate judge as special master. § 636(b)(2). In special circumstances, it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be ~~readily~~ undercut by resort to Rule 53. Subdivision (k) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.

Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of another person as pretrial master. Appointment of a master is readily justified if the parties consent. Even then, however, a court is free to refuse appointment, exercising directly its own responsibilities. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that

require review of numerous documents, or perhaps supervision of depositions at distant places. Post-trial accounting chores are another familiar example of time-consuming work that requires little judicial experience. Expert experience with the subject-matter of specialized litigation may be important in cases in which a judge or magistrate judge could devote the required time. At times the need for special knowledge or experience may be best served by appointment of an expert who is not a lawyer. In large-scale cases, it may be appropriate to appoint a team of masters who possess both legal and other skills.

(This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. A master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination can be dangerous and can cause justifiable resentment. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer. Present experience is insufficient to justify more than cautious experimentation with combined functions.)

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. A lawyer, for example, may be involved with other litigation before the appointing judge or in the same court, directly or through a firm. The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. It does not prohibit other members of the same firm from appearing before the appointing judge, but special reasons should be found before appointing a master whose firm is likely to appear before the appointing judge. Other conflicts are not enumerated, but also must be avoided. For example, a lawyer may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A lawyer or nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

Apart from conflicts of interest, there is ground for concern that appointments frequently are made in reliance on past experience and personal acquaintance with the master. The appointing judge's knowledge of the master's abilities can provide important assurances not only that the master can discharge the duties of master but also that the judge and master can work well together. It also is important, however, to ensure that the best possible person is found and that opportunities for this public service are equally open to all. Suggestions by the parties deserve careful consideration, particularly those made jointly by all parties. Other efforts as well may prove fruitful, including such devices as consulting professional organizations if the master may be a nonlawyer.

The benefits of appointing a master must be weighed against the cost to the parties. The fairness of imposing master fees is affected by many factors, including the stakes in the litigation, the means of the parties, the conduct of any party that contributes to the need for a master, and the

ability to apportion responsibility for the fees between the parties.

Subdivision (b). The duties that may be assigned to a master are loosely grouped as pretrial duties in paragraphs (1) through (7), trial duties in paragraphs (8) and (9), post-trial duties in paragraphs (10) through (14), and other duties agreed to by the parties in paragraph (15). These groupings should not divert attention from the need to consider the justifications for assigning each particular duty to a master, and the need for care in assigning multiple duties to the same master.

Pretrial masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See *Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

The risk of imposing unfair costs on a party is a particular concern in determining whether to appoint a pretrial master. Appointment of a trial master under Rule 53 will be an exceptional event, and a post-trial master is likely to be appointed only in large-scale litigation in which the costs can fairly be imposed on parties able to bear them or be paid from a common fund. Pretrial masters may seem desirable across a broader range of litigation, more often involving one or more parties who cannot readily bear the expense of a master. Parties are not required to defray the costs of providing public judicial officers, and should not lightly be charged with the costs of providing private judicial officers. Disparities in party resources are not automatically cured by disproportionate allocations of fee responsibilities — there is some risk that a master may appear beholden to a party who pays most or all of the fees. Even when all parties can well afford master fees, appointment is justified only if the expense is reasonable in relation to the character and needs of the litigation. The character and needs of the litigation need not be assessed in a vacuum. Appointment of a master may be justified when economically powerful adversaries conduct their litigation in a manner that threatens to consume an unfair share of the limited resources of public judicial officers. Consent of all parties may significantly reduce these concerns, although even then courts should strive to avoid situations in which the parties feel constrained to consent because reasonable attention from a judge or magistrate judge is not available.

Pretrial masters have been used for a variety of purposes. The list of powers and duties in paragraphs (1) through (7) is intended to illustrate the range of appropriate assignments. The only

explicit limitation is set out in paragraph (4), but courts must be careful in assigning pretrial tasks, just as care must be taken in assigning trial tasks. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1926). Ordinarily public judicial officers should discharge public judicial functions. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort. At the extreme, broad and unreviewed delegations of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir.1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir.1991); *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir.1991). Judicial time is not unlimited, however, and at some point fair allocation among the competing demands of the caseload may require that particularly time-consuming chores be delegated to a master. In addition, some special cases may call for special knowledge that few judges have and that is better supplied by a master.

Although many different functions may properly be performed by a pretrial master in an appropriate case, care should be taken in combining different functions. It is particularly important to remember that a master may be better able to facilitate settlement if this function is kept separate from other possible functions, if need be by appointment of separate masters.

Paragraph (1) confirms the frequent practice of relying on masters to mediate or otherwise facilitate settlement. A master may have several advantages in promoting settlement. The parties may share with a master information they would not reveal to a judge who might try the case or hear an important motion. The master may be able to offer assessments of the case and suggestions for settlement that would not be appropriate from a trial judge. The parties may have special respect for advice from a master with experience in a particular field, whether as litigator or otherwise. In multiparty cases, a master may be able to develop models of injury and damages that facilitate settlement of large numbers of claims. The advantages, however, do not all weigh in favor of a master. A master may lack the extensive experience and aura of office that can lend special weight to a judge's efforts to promote settlement. A master whose sole function is to promote settlement, moreover, may attach exaggerated importance to the value of settling.

Paragraph (2) covers discovery and disclosure duties. Supervision of discovery has been one of the tasks most frequently assigned to masters. The need for a master may be acute in overworked courts presented with claims that privilege, work-product, or protective order shield thousands of documents against disclosure or discovery. A master also may be able to help the parties plan realistic discovery programs in ways that parallel help in settlement negotiations, to reduce the tensions of contentious discovery maneuvers, or to resolve disputes or even preside at depositions when reason fails. The limits of the adversary process must, however, be observed. It would be improper, for example, to appoint a master with "the power to restate the questions and to recommend the answers," see *Wilver v. Fisher*, 387 F.2d 66 (10th Cir.1967). Often the court will retain power to make orders, directing the master only to make recommendations. Often, however, the court will prefer to delegate initial power to make discovery and disclosure orders, retaining review power. The rule permits the court to delegate power to make many types of orders, but allows only recommendations as to categories of discovery orders that are closely tied to a party's

ability to litigate its positions on the merits or the conduct of trial.[40]

Paragraph (3) permits a master to conduct Rule 16 pretrial conferences and make or recommend pretrial orders. Final pretrial conferences directly focused on shaping the trial, however, ordinarily should be conducted by the trial judge. A pretrial master's special experience and knowledge of the case can be tapped by having the master participate in the conference.

Paragraph (4) permits assignment of authority to hear and determine pretrial motions, with stated exceptions. The listed exceptions are frequently encountered matters of great importance. It is not possible to capture in a general list all matters that may be equally important in a particular case. Trial judges must be careful to retain responsibility for the initial as well as final decision of all matters central to a case. Hearings conducted by a master are governed by ordinary court practices of notice, record, and public access.

Paragraph (5) complements paragraph (4) by permitting reference to a master for hearings and recommendations for disposition of any motion described in paragraph (4), including those listed in paragraphs (A) through (H). Even though the court retains responsibility for independent determination of matters of law, and can retain responsibility for independent determination of matters of fact in the order referring the proceedings to the master, references should be limited to cases presenting special needs. Courts have frequently noted the undesirability of referring dispositive motions to masters. See *Prudential Ins. Co. v. U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir.1993); *In re U.S.*, 816 F.2d 1083 (6th Cir.1987); *In re Armco*, 770 F.2d 103 (8th Cir.1985); *Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698, 711-713 (7th Cir.1984). An assignment to recommend disposition of a motion for a temporary restraining order or preliminary injunction, for example, should be made only if severe constraints make it impossible for a judicial officer to provide an opportunity for effective relief.

Paragraph (6) is a general authorization to assign authority to manage pretrial proceedings. This provision reflects the difficulty of foreseeing the innovative procedures that may evolve under the spur of litigation that is complex in subject matter, number of parties, or number of related actions. It also can encompass a variety of alternative dispute resolution devices. A master might, for example, preside at a summary jury trial. Matters that bear directly on the conduct of trial, however, are seldom apt to be suitable for delegation to a pretrial master. See Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U.Pa.L.Rev. 2131, 2147 n. 88 (1989).

Paragraph (7) reflects an emerging practice of relying on masters to help coordinate separate proceedings that involve the same subject matter. One form of coordination is to appoint the same person as master in several actions. Other, often informal, forms of coordination may be possible as well. As experience develops with this practice, it may be possible to achieve many of the benefits of consolidation without the complications that might arise from attempts to consolidate actions pending in different court systems.

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[40] If subdivision (b)(2) is changed so the master can make orders or recommendations with respect to all discovery matters, this part of the Note will be changed.

Trial masters. The policies that have severely restricted — indeed nearly eliminated — appointment of masters to discharge trial functions are described with subdivision (a)(1)(B) [at page 19 above.][41]

The central function of a trial master is to preside over an evidentiary hearing. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master appointed under subdivisions (b)(8) or (9). The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master may often need to conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials, and has prohibited a master's report of the evidence in a jury trial. These features are retained. There may be cases in which a mere report of the evidence is useful to the trial judge, although responsibility for credibility determinations must prove difficult. A report of the evidence in a jury trial, on the other hand, would compound unbearably the burdens of the master system. Trial before the master would be followed by simultaneous jury review of the first trial and a second trial.[42]

Recommended findings may prove useful in nonjury trials as a focus for deliberation, leaving the judge free to decide without any required deference to the master. If a master is ever to be used in a jury-tried case, recommended findings represent the outer limit of proper authority.

If a master is to hold an evidentiary hearing in a nonjury case, the most common and sensible practice is to delegate the task of decision as well as hearing, retaining the power of review. Under subdivision (i), fact findings are reviewed only for clear error unless a different standard is specified by the court.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing. Courts occasionally have appointed judicial adjuncts to perform a variety of tasks that mingle the duties of court-appointed expert witnesses with more active functions, or that involve giving advice to the court. Perhaps the clearest combination of functions may arise when a court-appointed expert witness is given power to gather information on which to base expert testimony. Courts should observe great caution in making such

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[41] This cross-reference to an earlier portion of the Committee Note is confusing. The reference is intended to avoid a second statement of the severe limits on use of trial masters that were suggested by the Supreme Court in LaBuy v. Howes Leather Co., 352 U.S. 249. It has been common to express the view that only truly extraordinary needs justify reference to a master for trial even in a case that will not be tried to a jury. But the FJC study shows more use of trial masters than the LaBuy opinion seems to contemplate. Perhaps this deserves greater, albeit duplicating, elaboration.

[42] These two sentences are confusing. If we do not abolish use of trial masters in jury cases, they should be rephrased.

appointments until there is a sufficient body of experience to provide substantial guidance. The order of appointment should be framed with particular care to define the powers and authority of a master appointed to relatively unfamiliar trial tasks.

Post-trial masters. Courts have come to rely extensively on masters to assist in framing and enforcing complex decrees, particularly in institutional reform litigation. Current Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes.

It may prove desirable to appoint as post-trial master a person who has served in the same case as a pretrial or trial master. Intimate familiarity with the case may enable the master to act much more quickly and more surely. The skills required by post-trial tasks, however, may be significantly different from the skills required for earlier tasks. This difference may outweigh the advantages of familiarity. In particularly complex litigation, the range of required skills may be so great that it is better to appoint two or even more persons. The sheer volume of work also may conduce to appointing more than one person. The additional persons may be appointed as co-equal masters, as associate masters, or in some lesser role — one common label is "monitor."

Absent party consent, a post-trial master should be appointed only if no district judge or magistrate judge is available to perform the master's duties in adequate fashion. As with other masters, strong reasons must be found before the parties are forced to pay for the services of private judicial adjuncts. Masters — except those with prior public judicial service — ordinarily have little experience with the judicial role. Adding another layer to the judicial process can easily add to delay as well as cost. Yet masters may make important contributions. Overburdened courts simply may not have enough time to tend to all current business. A particularly complex case could absorb far too much of a judge's time, defeating the opportunity of litigants in many more ordinary cases to receive prompt official attention. A master may not only free up judge time but also give more time to the complex case than a judge could. The master also may bring to bear specialized training and experience that cannot be matched by any available judge. If all parties consent to appointment of a master, on the other hand, the court may freely grant the request if it wishes. Consent greatly reduces concern for possible burdens of cost, delay, and denial of direct judicial attention. Of course party consent does not require appointment of a master. The court may prefer to supervise post-trial matters directly, particularly in cases that affect broad public interests that may not be adequately represented by the parties.

Paragraph (10) establishes authority to appoint a master to conduct ministerial matters of account on terms somewhat different from the provision in former Rule 53(b). It is not required that the reference be "the exception and not the rule." This change reflects the restriction of the appointment to ministerial matters that do not call for judicial resolution. More complicated matters, whether referred to as accounting or damages, should be treated under the trial master provisions of paragraphs (8) or (9) if the case involves the ordinary trial function of resolving fact disputes. Administration of an award to multiple claimants is covered by paragraph (13).

Paragraph (11) reflects the increasingly frequent practice of using masters to help frame injunctions. Several factors may combine in different proportions to support this practice. Ordinarily the subject is quite complicated. Often the parties remain at loggerheads even after

disposition of the basic issues of liability, advancing widely different remedy proposals that offer little help in framing a fair and workable decree. The parties, moreover, may not adequately represent public interests — even when one or more parties are public officials or agencies. Frequently expert knowledge is important. If a court-appointed expert has testified at trial, it may be appropriate to appoint that expert as post-trial master. A party's expert, however, should not be appointed.

Paragraph (12) authorizes appointment of a master to supervise enforcement of complex decrees in circumstances that require substantial investments of time or expert knowledge. Masters also may be important when the parties have proved unable [or unwilling] to provide sufficient guidance on implementing a workable decree, and may be particularly important when independent inquiry is needed to supplement adversary presentation. As with framing the decree, a master also may be important because the parties do not fully represent and protect larger public interests.

It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional circumstance" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late Twentieth Century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. Apart from requiring that a decree be "complex," the rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to such routine matters as contempt of a simple decree; see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987). Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir.1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir, 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir.1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir.1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir.1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir.1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir.1979).

Paragraph (13) covers administration of an award to multiple claimants, another task that may call for appointment of a master or even creation of a small administrative organization. Class action awards may require creation of procedures and facilities for identifying claimants entitled to participate in the award, determining the shares of different claimants, maintaining the financial and ethical integrity of a common fund, and other purposes. In truly mammoth cases, these arrangements may take on the character of claims processing facilities.

Paragraph (14) contemplates powers of investigation quite unlike the traditional role of judicial officers in an adversary system. The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent

decree that had been in effect for nearly twenty years. A classic explanation of the need for — and limits on — sweeping investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir.1982), cert. denied 460 U.S. 1042 (1983).

Party consent can be helpful in defining the duties of a post-trial master. Party consent, however, no more controls definition of the master's duties than it controls the decision whether to appoint a master.

Other duties. Paragraph (15) emphasizes the importance of party consent. Just as parties may consent to arbitration, so consent has an important bearing on the means of processing disputes under judicial auspices. Party consent reduces concerns about expense and limiting access to public judges. Courts cannot, however, be asked to abandon all responsibility for proceedings conducted under their authority or judgments entered on their rolls. There are many illustrations of settings in which courts need not — and at times should not — accede to party consent. Consent of representative parties should be reviewed carefully in class actions. Arrangements that significantly alter the nature of adversary litigation also should be undertaken carefully; the use of masters to organize investigations by the parties, or to become active investigators, must be approached with caution. Usually it is better that the assigned judge directly resolve requests for interim relief, such as temporary restraining orders or preliminary injunctions.

Subdivision (c). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and powers. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment.

Long experience has demonstrated the danger that appointment of a master may lengthen, not reduce, the time required to reach judgment. From the beginning, Rule 53 has included a variety of terms designed to encourage prompt execution of the master's duties. Rule 53(d)(1), carried over from the original rule, now establishes "the duty of the master to proceed with all reasonable diligence." These provisions are summarized in the phrase in paragraph (2) requiring that a master proceed with all reasonable diligence.[43] Additional assurances are provided by the requirement that deadlines be set. A party may make a motion to the master or to the court to compel expeditious action.

The simple requirement that the master be named does not address the means of selecting the master. Often it will be useful to engage the parties in the process, inviting nominations and review of potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement. However much the parties are involved, courts should guard against repetitive selection of a single small group of familiar candidates.

Precise designation of the master's duties and powers is essential. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or

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[43] The time has come to delete this carry-over from history. Sol Schreiber reports that masters now expedite rather than delay progress of an action toward resolution.

recommendations is an important part of this process. It also is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

Ex parte communications between master and court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that would not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule does not provide direct guidance, but does require that the court address the topic in the order of appointment.

There should be few occasions for requiring that a master be bonded.[44] If special circumstances suggest a risk that inadequate performance may cause significant harm, however, a court may wish to ensure a source of damage payments. Although a court rule cannot address the question of official immunity, it is proper to provide for a bond that — in the manner of an injunction bond furnished under Rule 65(c) — provides a source of compensation without regard to the possibility of individual liability.

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guides to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. If compensation is to be fixed by an hourly rate, it may help not only to set the rate but also to set an expected time budget.[45] When there is an apparent danger that the expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for regular reports on cumulative expenses. The court has power under subdivision (j) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise to the parties.

The provision for amending the order of appointment is as important as the provisions for the initial order. New opportunities for useful assignments may emerge as the pretrial process

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[44] This paragraph will be deleted if the bonding requirement is deleted.

[45] A time budget does not make sense. This suggestion should be deleted.

unfolds, or even in later stages of the litigation. Conversely, experience may show that an initial assignment was too broad or ambitious, and should be limited or revoked. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

Subdivision (d). Subdivision (c) requires that the subdivision (b) duties of the master must be specified in the appointing order. Subdivision (e) describes the general scope of a master's authority. This subdivision recognizes that it is not possible to capture in a detailed rule all powers that may be necessary or appropriate for a master, and confirms the existence of powers that otherwise would have to be inferred.

Subdivision (e). The general authority of a master described in subdivision (e) is taken from past practice.

Subdivision (f). The provisions for hearings are taken from present Rule 53. Stylistic changes have been made. The present rule's detailed description of the power to compel production of documents is included in the Rule 45 power to compel production of documents or tangible things, or inspection of premises. This power to compel production of evidence may be exercised in advance of a hearing in order to make the hearing as fair and efficient as possible.

It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

Subdivision (g). A master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (h). The report is the master's primary means of communication with the court. The nature of the report determines the need to file relevant exhibits, transcripts, and evidence. A report at the conclusion of unsuccessful settlement efforts, for example, often will stand alone. A report recommending action on a motion for summary judgment, on the other hand, should be supported by all of the summary judgment materials. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Sealing is much less likely to be appropriate with respect to a trial master's report. ~~Recognition of the possibility of reporting on matters not specifically delegated to the master does not imply a broad license to exceed the bounds of the court's assignment. Diligent discharge of assigned duties, however, may inform the master of important matters that should be brought to the court's attention. A formal report, available to the parties, may be the best means of highlighting these matters.~~[46]

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[46] The overstricken material is an alternative to the paragraph that follows immediately and that may show as redlined. If we retain the Rule 11(h) master's authority to "report on any other matter," the overstricken material would be relevant. If that authority is deleted, the paragraph that follows is the replacement.

A master may learn of matters outside the scope of the reference. Rule 53 does not address the question whether — or how — such matters may properly be brought to the court's attention. Matters dealing with settlement efforts, for example, often should not be reported to the court. Other matters may deserve different treatment. If a master concludes that something should be brought to the court's attention, ordinarily the parties should be informed of the master's report.

Subdivision (i). The time limits for seeking review of a master's order, or objecting to — or seeking adoption of — a report, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to excuse the failure to seek timely review.

The clear error test provides the presumptive standard of review for findings of fact. ~~The clear error phrase is used in place of the clearly erroneous standard of Rule 52 to suggest the subtle distinctions that may justify somewhat more searching review of a master.~~ The "clearly erroneous" phrase is as malleable in this context as it is in Rule 52, and account may be taken of the fact that the relationship between a court and master is not the same as the relationship between an appellate court and a trial court. A court may provide a more demanding standard of review in the order of appointment. The order should be amended to provide more searching review only for compelling reasons. Special characteristics of the case that suggest more searching review ordinarily should be apparent at the time of appointment, and action at that time avoids any concern that the standard may have been changed because of dissatisfaction with the master's result. In addition, the parties may rely on the standard of review in proceedings before the master. A court may not provide for less searching review without the consent of the parties; clear error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may stipulate that the master's findings will be final.

The use of masters in jury cases is discouraged by subdivision (b)(2)(B).[47] A master's findings cannot be binding on the jury, and may confuse the jury as to any finding contested by a party. The court must exclude any finding that is affected by legal error, and may in its discretion exclude any finding. If a finding on an issue is admitted in evidence and no other evidence is admitted on that issue, judgment should be entered as a matter of law as to that issue. If other evidence is admitted, the finding is to be treated as any other evidence on the same issue, and does not affect the burden of persuasion.

Absent consent of the parties, questions of law cannot be delegated for final resolution by a master. The subordinate role of the master may at times warrant treating as questions of law matters that would be treated as questions of fact on reviewing a trial court.[48]

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[47] All of this paragraph would be deleted if we forbid the use of a trial master in a jury case.

[48] This sentence is a cryptic statement of a thought that may deserve either to be deleted or to be stated more fully. Many issues involve application of legal concepts to historic fact. For purposes of Civil Rule 52, characterization depends on an appellate court's preference. If full review is desired, the issue is characterized as one of law or, increasingly, as a "mixed issue of law and fact." If limited review is preferred, the issue is characterized as one of fact. There may be good reasons

Apart from factual and legal questions, masters often may make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The subordinate and ad hoc character of the master often will justify more searching review or de novo determination by a judge. It is important, however, to establish the master's strong working authority. Appointment of a master would be counterproductive or worse if the court routinely duplicates the master's efforts, encouraging frequent review requests by parties who are dissatisfied or who simply hope to increase delay and expense. If an "abuse of discretion" standard is used, the master's discretion is less broad than the discretion of a judge as to comparable matters. The rule does not catalogue these matters or attempt to suggest more specific standards of review. The court may, for the guidance of the parties and master, establish standards for specific topics in the order appointing the master. ~~Ordinarily, however, the standard of review will be determined during the review process.~~ The standard of review set in the appointing order may not foresee all questions, however, or may appear inappropriate when review is actually undertaken. The court has power under subdivision (c)(3) to amend the standard initially set.

Subdivision (j). The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be compensated at a rate of about half that earned by private attorneys in commercial matters. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir.1979). Even if that suggestion is followed, a discounted public-service rate can impose substantial burdens.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control.[49] Many factors, too numerous to enumerate, may affect the allocation. The amount in controversy may provide some guidance in making the allocation, although it is likely to be more important in the initial decision whether to appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up against a party who can ill afford to pay. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case. The factors that

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for reviewing special master findings more carefully than district court findings are reviewed. One way to act on these reasons is to call them issues of fact but to apply a different test of clear error. Another way is to characterize some of these issues as so much affected by the law element as to require de novo determination as a matter of law.

[49] It would be better to delete the redlined material. And the question whether to consider the means of the parties in allocating a master's fees and expenses deserves further discussion.

informed the initial allocation remain important, however. It may be unfair to impose these payments on a relatively poor party, and a victory on the merits is little reason to relieve an obstreperous party from the expenses of a master appointed to control that party's behavior. There is no presumption that a master's fees should be paid by the least successful party.

The basis and terms for fixing compensation should be stated in the order of appointment under subdivision (c)(2)(I). The court retains power to alter the initial basis and terms, after notice and opportunity for hearing, but should protect the parties against unfair surprise.

Subdivision (k). This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize the need to confuse the roles of magistrate judge and master only when justified by exceptional circumstances. See the Note to Subdivision (a).

5 A

INTRODUCTION TO SIMPLIFIED PROCEDURE PANEL

The Advisory Committee is in the early stages of considering a proposal to adopt simplified rules of procedure for an as-yet undefined range of cases. The underlying concern is that the full-blown set of procedures available under the Civil Rules is simply "too much" for some cases. Some of these cases are brought in federal court despite the burden of excessive procedural opportunities. Some of these cases may be removed to federal court because of the burden that can be imposed by exploiting excessive procedural opportunities. Other of these cases may not come to federal court at all. A party contemplating litigation on such a claim may decide not to file in federal court, and perhaps not to file at all. Simplified procedures might draw to federal court some actions that should be in federal court and are not now filed there. Whatever the impact on filing patterns, simplified rules might provide better justice in cases that are the proper concern of federal courts.

This topic was put on the Advisory Committee agenda by Judge Niemeyer. His descriptions of the project to various groups of district judges have met substantial enthusiasm. A draft set of simplified rules was prepared by the Reporter to illustrate the nature of the issues that might be addressed. The draft proposes more detailed pleading, enhanced disclosure obligations, and restricted discovery opportunities. Other provisions seek to reduce the burden of motion practice and establish an early and firm trial date. The core justification for this approach is that the current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery.

The draft rules also address the problem of choosing the cases that would be governed by a simplified procedure. The choices made in this dimension affect the nature of the simplified procedure in many ways. If the rules were to apply only with the consent of all parties, for example, it would be possible — if that seemed desirable — to dispense with jury trial or to require consent to trial before a magistrate judge. To offer a much narrower example, if the rules were to apply only to actions for review on an administrative record, they would look very different from the rules that might apply to discrimination claims involving relatively small sums of money.

The draft rules provided the foundation for preliminary consideration at the October 1999 Advisory Committee meeting. The conclusion was that a subcommittee should be appointed to study the matter further.

The subcommittee has begun its work by inquiring into the needs that may justify the attempt to craft simpler procedures for some federal civil actions. The questions are, in part, empirical. Two sorts of empirical questions can be used to illustrate the issues. One range of questions is whether there are many actions in federal court for relatively small sums of money. The Federal Judicial Center has examined the available data and found that amount-of-demand information is available only for about one quarter of the actions filed in federal court. In that subset of cases, about 40% of the demands fell between one dollar and $50,000; more than half the cases sought less than $150,000. Of course the nature of the action affects the likely damages demand. The figures, at any rate, suggest that *if* there is reason to fear that the ordinary Civil Rules are too elaborate for actions that involve relatively low amounts of money, there are many such actions in federal court.

Another range of empirical questions is whether general federal procedure is indeed too

elaborate for many of the actions brought in federal court. There are many reasons to question the premise that federal procedure often proves unnecessarily burdensome. Empirical studies of discovery have repeatedly disclosed that for most cases in federal court there is no discovery or only a few hours devoted to discovery. Recent amendments have sought to reduce the burden of discovery still further by adopting and then modifying disclosure requirements and by providing for the Rule 26(f) meeting of the parties. Many practicing lawyers have reported that the Rule 26(f) meeting has proved useful. If lawyers actually confer about the realistic needs of the case, they commonly agree to behave reasonably. There also are reasons to ask whether the procedures followed in the courts of general jurisdiction in most states are less onerous than the supposedly burdensome federal rules.

Even if there is reason to fear that general federal procedure should not apply in all its sweep to every case in federal court, it is not clear that "general federal procedure" is as procrustean as the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions. Judges are given general and discretionary authority to cabin discovery and to manage the litigation. Vigorous use of this authority can directly limit the dangers of excessive procedure. Indirect benefits may prove even greater as lawyers come to understand that they will be forced to behave reasonably.

The general power to shape procedure to specific cases has been elaborated in some districts by adoption of differentiated case management plans. Several courts have established tracking systems that are designed to provide expedited procedures for cases that do not require full utilization of all the tools made available by the Civil Rules. The experience of these courts is important to the simplified procedure proposal for at least two reasons. The first is that these practices may provide all the relief that is needed. If so, reliance on these procedures may prove more effective than an attempt to generate special rules and to identify the categories of cases to be covered by special rules. The second is that if special rules remain a promising approach, local tracking systems may point the way toward the kinds of procedures that prove useful and the kinds of cases that benefit from them.

Examples of the more specific issues presented by local tracking systems are easy to provide. Several systems attempt to assign tracks by case categories only for cases that can be categorized with relative ease — cases involving review on an administrative record, bankruptcy appeals, and so on. Other cases are assigned to tracks by a judge after a Rule 16 conference that considers such matters as the number of parties, the degree of contentiousness, the stakes, the level of agreement on what issues need to be resolved, and so on. Most cases wind up on the "standard" track. "Expedited" tracks seem not to draw many cases. All of this may suggest that case-by-case determinations by a judge who is actively involved in the early stages are better than an attempt to establish more abstract definitions and categories.

Another example is provided by the common requirement in differentiated case management plans, similar to the Rule 26(f) meeting, that attorneys meet to prepare a joint statement before the first Rule 16 conference. This joint statement supports the track assignment. When approached in the proper spirit, the attorney conference and Rule 16 conference may provide a far more direct and effective method of identifying the nature of the dispute and the issues that need to be resolved than

any method that relies on detailed pleading and unilateral disclosure.

The immediate purpose of the October panel is to provide information about alternatives to simplified rules. One alternative is the differentiated case management plans. Another is to adopt local rules that more generally require expeditious pursuit of all litigation — the Eastern District of Virginia system is the most familiar plan. The simplified rules already drafted are an illustration of a universe of other alternatives, grouped around the common question whether ad hoc case-specific adjustments should be supplemented by more general provisions.

Yet another alternative is possible. In 1992 the Advisory Committee proposed to amend Civil Rule 83 to authorize adoption, with Judicial Conference approval, of experimental local rules inconsistent with the national rules. The proposal was withdrawn in the June 1992 Standing Committee meeting. The proposal presented obvious statutory difficulties — 28 U.S.C. § 2071(a) authorizes district courts to prescribe rules "consistent with * * * rules of practice and procedure prescribed under section 2072 * * *." It may seem circular to make an inconsistent local rule consistent with the national rules by adopting a national rule that authorizes inconsistent local rules. There also may be some hesitation about wishing the tasks of review and approval on the Judicial Conference. But as compared to the uncontrolled proliferation of local rules, more or less at random, there may be real advantages in facilitating well-designed and carefully monitored local experiments. Empirical data are hard to come by in the world of procedure. "Pilot" and "demonstration" programs may yield valuable insights. Rather than adopt national rules that apply to all federal courts at once, local experiments might better advance progress toward simplified procedure, whether for some distinctive portion of the federal docket or for all cases.

At the end of the day, the panel discussion will shape the Committee's consideration of the best direction to follow in considering procedural simplification. One outcome may be to put aside the task of identifying categories of cases that should be brought within a distinctive simplified system, asking instead whether simplification can be pursued for all cases by encouraging further development of individual case management, general "tracking" systems, and specific rules changes. A quite different outcome might be a new confidence that it is possible to identify categories of cases that would benefit from simplified rules and to begin work on the simplification. Other possible outcomes should emerge from the discussion.

Simplified Procedure

Introduction

Some of the persisting questions about the Federal Rules of Civil Procedure arise from the "one size fits all" character of the Rules. The Committee has struggled regularly with the "transsubstantive" character of the rules, ordinarily reaching the conclusion that serious Enabling Act questions are posed by any effort to create special rules for specific substantive problems. Perhaps the time has come to consider a different aspect of the Rules' unvarying uniformity. As they stand now, and as they have been from the beginning, the Rules apply alike to all cases, no matter how complex or how simple. It has been common to wonder whether the inevitable compromises have produced rules that work well for most litigation in the middle range, but do not work as well for cases at the extremes. One extreme has been frequently studied. The recent discovery proposals are only the most recent in a long line of efforts to adapt the rules to the needs of complex or contentious litigation. Not as much has been done for simple litigation. It is possible to adopt special provisions for simple litigation without in any way departing from the transsubstantive principle. The purpose would not be to establish a second-class set of procedures for second-class litigation, but to provide procedures that provide more efficient, more affordable, and better justice for litigation that cannot reasonably bear the costs of unnecessarily complex procedures.

The simplified rules that follow are very much a first draft. Coverage is limited to actions demanding only money damages, and in relatively small amounts, unless all parties agree to adopt the rules. The central feature is a major transfer of pretrial communication away from discovery and to fact pleading and disclosure. There also is a demand-for-judgment procedure that could accelerate and clarify disposition of many actions that today go by default. Use of Rule 16(b) scheduling orders is made optional. Finally, there is a beguiling proposal to require court permission for presentation of expert testimony under Evidence Rules 702, 703, or 705.

The draft is presented to stimulate thinking at several levels. The first is consideration whether it is sensible to launch a project of this nature. It should be easier to consider this question in light of a model, however crude, of the core topics that are likely to be addressed in any effort to create a simplified procedure track.

A second set of questions goes directly to the topics addressed by the draft. Can we effectively restore fact pleading that achieves the hopes of the Field Code drafters, not the sorry legalisms that lawyers and judges conspired to inflict on the worthy Code provisions? Should we require pleading of law as well as fact — something not done by the draft? Should we at least provide limited law-pleading requirements for special situations? (One possibility would be to require a party to plead the source of the governing law — federal or state, which state or foreign country, and so on.) How far should initial disclosure be expanded beyond the 1993 26(a)(1) model? How far should discovery be restricted — an illustration is provided by the alternatives in Rule 106 that either allow three depositions as a matter of right or require court permission for any deposition?

A third set of questions goes to the questions that might be addressed outside the core. One possibility, for instance, would be to encourage the parties to agree to a partly paper trial, in which witness statements or deposition transcripts are used in place of direct testimony and live trial testimony focuses on cross-examination and, perhaps, rebuttal. Or, as a variation, trial could be

that either allow three depositions as a matter of right or require court permission for any deposition?

A third set of questions goes to the questions that might be addressed outside the core. One possibility, for instance, would be to encourage the parties to agree to a partly paper trial, in which witness statements or deposition transcripts are used in place of direct testimony and live trial testimony focuses on cross-examination and, perhaps, rebuttal. Or, as a variation, trial could be integrated with summary judgment in a process by which the court first considers the paper record, then determines what witnesses should be heard in court and shapes the trial accordingly. The following list exemplifies, but does not begin to exhaust, the questions that might be addressed.

Finally, review of questions not addressed suggests a different issue. It is tempting to adopt in the simplified rules provisions that seem to be improvements for all actions but that also seem easier to move through the Enabling Act process if limited to actions that do not have an actively involved constituency. Summary judgment procedure is an illustration. Rule 56 could be substantially improved. A substantially improved Rule 56 failed in the Judicial Conference nearly a decade ago, and it has been difficult to muster enthusiasm for a renewed attempt. But it might be possible to adopt revisions for the simplified rules.

Should permissive Rule 13(b) counterclaims be permitted in a simplified action? Why not make optional counterclaims that arise out of the same transaction or occurrence as the claim, and prohibit others? If counterclaims are permitted, should all claims be aggregated to determine whether the simplified rules apply? Should a counterclaim for injunctive relief automatically oust application of the simplified rules in the cases identified by Rule 102 for mandatory application?

It seems likely that a relatively high proportion of simplified procedure cases will be resolved by default. The Rule 104 demand for judgment is a beginning effort to expedite and clarify this outcome, but — even if something like Rule 104 is adopted — cannot resolve all default cases. Should we adopt an express requirement for proof of the claim by affidavit? Should the requirement be measured differently than the test that would justify summary judgment on the affidavits if there are no opposing affidavits? Is this an illustration of a reform that should be adopted as part of Rule 55 for all cases?

Direct attorney-fee provisions seem outside the scope of Enabling Act rules. But many people believe that the rules can affect implementation of fee statutes. One temptation is to revise the offer-of-judgment procedure so that a Rule 68 offer does not cut off the right of a prevailing plaintiff to recover statutory attorney fees. (An illustration: the rejected offer is for $100,000; the plaintiff wins $90,000. The offer now destroys the right of the plaintiff to recover statutory attorney fees if, but only if, the statute describes the fee recovery as "costs." This wildly improbable result cries out for correction for all cases. But correction quickly becomes bogged down in the dismal swamp of Rule 68.) There may be a special justification for addressing this question in the simplified rules, since they will apply in many actions that will be feasible only if there is a realistic prospect of recovering attorney fees. Fear of the strategic gamesmanship inherent in Rule 68 may deter initial filing, and may easily distort the decision whether to accept an unfair Rule 68 offer.

Now that the rulemaking power includes determinations of appealability, it would be possible to seek out rules that impose particular burdens in small-stakes litigation. The most obvious

candidate, official-immunity appeals, is likely to prove untouchable. The sorrily confused discussion in 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10 (current supplement) reflects an even deeper confusion in the law. One suspicion, increasingly voiced by the courts of appeals, is that official defendants are using immunity appeals to inflict delay. There may be a substantial number of small-stakes § 1983 actions and potential actions that are deterred by the availability of (potentially multiple) interlocutory appeals. The deterrent effect is likely to be greater in small-stakes cases, affording some excuse to approach these problems in the simplified rules. One easy but partial remedy would be to provide that only one pretrial immunity appeal may be taken. A more effective remedy would be to expand the scope of the one permitted appeal, permitting direct review of a denial of summary judgment. Official-immunity appeal doctrine, however, derives from the substantive perception that this form of immunity — unlike many other important protections, such as the rules of personal jurisdiction — affords a right to be protected against the burdens of pretrial and trial procedures. Even with the enthusiastic cooperation of the Appellate Rules Committee and staunch support of the Standing Committee, efforts to address these problems could undermine a simplified rules project.

As drafted, the simplified rules model does not address a set of scope problems that likely require consideration. If application of the rules is defined in terms of amount in controversy, what happens when cases are consolidated or claims are severed?

Would it be desirable to consider a majority-verdict rule for jury trials? (There is no possibility of ousting jury trial, and little point in making it more difficult to demand jury trial.)

Should the Rule 53 special masters Subcommittee be asked to consider a provision barring reference to a special master in a simplified rules case?

How about a rule that establishes presumptive time limits for trial — perhaps one day per "side"? (See this again with Rule 109.)

Traditionally the rules have left res judicata to be developed by decisional law. But the nature of simplified procedure raises at least one question. Is it fair to base nonmutual issue preclusion on a simplified-procedure judgment? How far should this question depend on the nature of the simplified rules: is it unwise to belittle the fairness and adequacy of the rules by providing that the results are acceptable to dispose of "small" claims but not to govern something that "really matters"?

If simplified rules are adopted, Rule 81 should be amended to recognize them.

There is another frustrating choice that also must be considered. The draft simply incorporates the Civil Rules for most questions. That approach makes the project much easier. But it also defeats one of the goals of a simplified procedure. A pro se party will not find any of the comfort that might be provided by a self-contained, short, and clearly stated set of rules. This draft does not address directly any of the questions that are raised by the proposal of the Federal Magistrate Judges' Association that a special set of rules should be adopted for pro se actions.

Many other questions are likely to be raised as collective deliberation is brought to bear. The immediate questions are two: Should this project be developed? And if it is to be developed, what

forms of support might be sought in developing a more polished model for publication?

A more general question might be added. What sorts of actions are likely to be encouraged by these rules? Will the result be to bring to federal courts actions that otherwise would be brought in state courts — and is that a good use of federal judicial resources? Will the result be to encourage people to bring in federal court actions that otherwise would not be brought in any court? If the ceiling for mandatory application is set at $50,000, is there something awkward about wishing on civil rights actions, or maintenance-and-cure claims, or proceedings that cannot readily be inflated above $50,000, procedures that are not invoked for any diversity action?

5 B

XII. SIMPLIFIED PROCEDURE

Rule 101. Simplified Rules

These simplified rules govern the procedure in actions described in Rule 102. They should be construed and administered to secure the advantages of simplified procedure to serve the just, speedy, and economical determination of these actions.

Committee Note

The Civil Rules have applied a single general form of procedure to all civil actions. Many changes have been made over the years to facilitate individualized adaptation of the general rules to the distinctive needs of complex litigation and to the need to provide increased judicial management when adversary contentiousness threatens to disrupt orderly disposition. Not as much has been done to adapt the rules to the needs of simple litigation that can be managed by the parties with little need for elaborate discovery or pretrial management. Often the parties meet this need on their own. Several studies have shown, for example, that no discovery at all is conducted in a significant portion of federal civil cases. See *Willging, Shapard, Stienstra, & Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997). The lack of discovery, and the limited use of formal discovery in another significant portion of cases, often reflects a low level of fact dispute. In other cases the parties recognize the need to hold the costs of litigation in sensible proportion to the stakes. Yet such restraint is not universal. Whether from excessive zeal, ineptitude, or deliberate motive to increase cost and delay, notice pleading and sweeping discovery practices can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation. These rules are designed to provide an improved package of pleading and discovery procedures that will enhance the opportunity to avoid costly discovery. More exacting pleading and disclosure requirements are provided to reduce further the need for formal discovery.

Other changes are made to complement the alternative pleading, disclosure, and discovery practices. These changes, however, are modest. The core of the simplified procedure is the alternative pleading, disclosure, and discovery practice.

Rule 102. Application of Rules

(a) Except as provided in Rule 102(b), these simplified rules apply in an action:

(1) in which the plaintiff seeks only monetary relief and the amount is less than $50,000; or

(2) in which the plaintiff seeks only monetary relief and the amount is less than $250,000, if all plaintiffs elect [in the complaint] to proceed under these rules [and if no defendant objects to application of these rules by notice filed no later than 20 days after service of the summons and complaint {on the objecting defendant}].

(b) These simplified rules do not apply in an action described in Rule 102(a):

(1) for interpleader under Rule 22 or under 28 U.S.C. § 1335;

(2) under Rules 23, 23.1, or 23.2;

(3) under 28 U.S.C. §§ 1602-1611;

(4) for condemnation of real or personal property under Rule 71A;

(5) in which the United States is a party and objects to application of these rules

(A) in the complaint, or

(B) — if a defendant — by notice filed no later than

(i) 30 days after service of the summons and complaint, or

(ii) a motion to substitute the United States as party-defendant; or

(6) if the court, on motion or on its own, finds good cause to proceed under the regular rules.

(c) These simplified rules apply in an action in which:

(1) all plaintiffs offer in the complaint to proceed under these rules,

(2) all defendants named in the complaint accept the offer by notice filed no later than 20 days after the last of these defendants is served, and

22 (3) no party involuntarily joined after the offer is accepted shows good cause to proceed under the regular rules.

Committee Note

Determination of the actions that the simplified rules govern should be approached conservatively at the outset. Broader application may prove appropriate after experience with the rules determines their success and points the way to improvements.

Subdivision (a) establishes the basic core of application. The simplified rules apply to all actions in which the plaintiff seeks only monetary relief less than $50,000. They apply also to actions for only monetary relief less than $250,000 if the plaintiff elects to invoke them and no defendant makes timely objection. The rules do not apply if the plaintiff seeks specific relief such as a declaratory judgment, an injunction, specific performance, or habeas corpus, unless the parties agree to apply the rules under subdivision (c). The exclusion of actions for specific relief enables a plaintiff to impose the regular civil rules on a defendant who would prefer simplified procedures. The cost of attempting to measure the significance of the stakes in actions that seek more than money, however, seems too great to bear, at least while the simplified rules are new.

Subdivision (b) excludes specific categories of actions that do not seem amenable to simplified procedure because of the dignity of a party or the potential complexities of multiparty proceedings. Paragraph (6) allows the court to exclude any other action for good cause. The court may exercise this power at any time, and may act at the behest of a party or on its own.

Subdivision (c) allows the parties to any action to agree to follow the simplified rules. The agreement is made by the plaintiffs and defendants identified in the initial complaint; a party who is involuntarily joined after the agreement may move to have the action governed by the regular rules for good cause.

Reporter's Comment

The scope of the simplified rules is critical. The choice as to scope is bound up with the actual rules. The more curtailed the simplified rules, the narrower the scope of initial application. The more closely the simplified rules approach the regular rules, the broader the scope of application might be.

The brackets in Rule 102(a)(2) flag one of the issues that deserves attention: Should the plaintiff be given sole choice whether to invoke these rules for an action seeking less than $250,000? Or should the plaintiff be given only the power to invite the defendant to accept the rules? There is a powerful argument that allowing a defendant to opt back into the regular Civil Rules will lead many defendants to choose the more cumbersome, prolonged, and expensive procedure for wrong reasons — the hope is to harass and wear down the plaintiff, not to achieve a better disposition on the merits. On the other hand, few people would regard stakes between $50,000 and $250,000 as insignificant, and lawsuits are brought against real people as well as institutions that may view the loss of a quarter of a million dollars with equanimity. The issues may have a factual complexity beyond the dollars involved. In the end, the choice may turn on our level of confidence in the rules

that emerge. If we believe that they will work well even in more complex cases, we might simply raise the mandatory threshold, or give the plaintiff — but not the defendant — a choice. Giving the plaintiff a unilateral choice may not be unfair — if the action is indeed one that requires resort to the regular rules, the plaintiff may be relied upon to choose them.

All of the exclusions in Rule 102(b) are tentative; perhaps none of them deserve adoption. The exclusion of the United States, for example, may be challenged; an accommodation is made in Rule 109 to allow an additional month before trial when the action involves the United States or a United States agency or employee.

Subdivision (c) is an effort to allow all parties to agree to proceed under the simplified rules, free from any of the limits in (a) or (b). The provision that allows later-added parties to defeat the initial election is limited in two ways. It does not apply to those who voluntarily become parties, as by an amended complaint or intervention. And it requires a showing of good cause. These limitations are suggested because of the risks of disruption that would follow if it were too easy to shift procedural tracks after the initial election. Perhaps it would be better to add a simpler alternative: "These simplified rules apply in an action in which all parties agree to proceed under these rules, or * * *."

If we go down this road, consideration must be given to several complicating factors. Rule 81(c) applies "these rules" to removed actions, but requires repleading only if ordered by the court. Pleading a dollar amount may not be required, or even permitted, by state practice. Must we provide for this in the rule?

Another problem arises from Rule 54(c) — "every final judgment shall grnat the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." More than $50,000 or $250,000? Injunctive relief? Can we allow curtailed procedure to yield unrestricted judgments? To the extent that we make the simplified rules mandatory, we cannot rely on a waiver theory, unless it is waiver by choosing to go to federal court [and not be removed]. (A much smaller problem arises with respect to declaratory judgments: there is no apparent reason to oust these rules in a "reversed parties" action in which the declaratory plaintiff seeks only to establish nonliability for less than $50,000.)

Rule 103. Pleading

(a) General Rules. Except as provided in Rule 103(b), (c), (d), (e), (f), and (g), pleading in actions governed by these rules is governed by Rules 7 through 15.

(b) Stating a claim. A pleading that asserts a claim for relief must, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim; and

(2) attach each document the pleader may use to support the claim.

(c) Answering a claim. A pleading that answers a claim for relief must admit or deny the matters pleaded in asserting the claim under Rule 8(b) and also, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim to the extent those details are not admitted; and

(2) attach each document the pleader may use to support its denials or Rule 103(c)(1) statement.

(d) Avoidances and affirmative defenses. A pleading that asserts an avoidance or affirmative defense must:

(1) identify the avoidance or affirmative defense as an avoidance or affirmative defense; and

(2) plead the avoidance or affirmative defense under the requirements of Rule 103(b) for making a claim for relief[, including attachment of each document the pleader may use to support the avoidance or affirmative defense].

(e) Reply.

(1) A party must reply to an avoidance or affirmative defense identified under Rule 103(d)(1) by admissions, denials, and avoidances or affirmative defenses.

(2) A party must serve a reply no more than twenty days after being served with the pleading addressed by the reply.

(f) Length. No pleading may exceed a limit of twenty pages, eight and one-half inches by eleven inches, with reasonable spacing, type size, and margins.

(g) Forms. Forms 3 through 22 in the Appendix of Forms do not suffice under Rule 103.

Committee Note

The fact pleading required by Rule 103 is, with the expanded disclosure requirements in Rule 105, the foundation for the Rule 106 discovery limits and the core of the simplified rules. Fact pleading is adopted for these rules to encourage careful preparation before filing. The general system of notice pleading and sweeping discovery works well for most litigation, but can, when misused, impose undue costs. It is hoped that shifting part of the pretrial exchanges between the parties from discovery to more detailed pleading and disclosure can enhance the realistic opportunity of all parties to litigate effectively claims that involve amounts of money that are relatively small in relation to the costs that litigation can entail. Plaintiffs can better afford to pursue worthy claims, and defendants can better afford to resist rather than capitulate to unworthy claims.

Fact pleading cannot be successful if it is approached in a spirit of technicality, much less hypertechnicality. Neither can it be successful if it assumes the mien of detailed witness statements or deposition transcripts. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement of the pleader's claim, denial, or defense in the detail that might be provided in proposed findings of fact, recognizing that the information available at the pleading stage often is not as detailed or as reliable as the information available at the trial stage.

The test for measuring attachment of a document as one a party "may use" to support a claim, denial, or defense is the same as the test used under Rule 26(a)(1)(A) and (B). The duty to supplement the initial attachments to reflect information gained after filing the pleading is not a matter of pleading but of disclosure under Rule 105.

A reply is required to respond to an avoidance or affirmative defense, but only if the avoidance or affirmative defense is identified under Rule 103(d). To the extent that a reply asserts an avoidance or affirmative defense, a reply to the reply is required, although it is expected that this situation will arise infrequently. The twenty-day period to reply is borrowed from Rule 12(a)(2) because it seems better to have a single period to reply to a pleading that states both an avoidance or affirmative defense and also a counterclaim.

A party who believes that its positions cannot be pleaded adequately in 20 pages may seek leave to amend under Rule 15.

Reporter's Comment

This rule really gets to the heart of the project.

The decision to invoke the general pleading rules has great and obvious advantages. One

obvious question is whether to incorporate all of Rule 9, which includes particularity requirements not only in the oft-invoked provisions of Rule 9(b) but also in Rules 9(a) and 9(c). Rule 9(g) on pleading special damage may raise a similar question. On balance, it seems better to retain these familiar provisions. The fact pleading required by this draft should not be equated automatically to the "particularity" requirements attached to specific claims, and most especially should not be equated to the statutory pleading requirements in the securities laws.

Another question is whether to retain the time provisions of Rule 12. The 60-days to answer allowed the United States or its employees seems long, but the reasons for allowing the additional time seem compelling even in this setting. Compare the proposal that the United States be allowed to opt out of the simplified rules, Rule 102(b)(5). There also is a temptation to expedite matters by providing that the time to answer is not suspended by a Rule 12(b) motion. On balance, this temptation seems better resisted.

Perhaps the most important question is whether to retain without change the Rule 15 amendment provisions. A policy of free amendment might undermine the purposes of fact pleading. But easy amendment may be even more important in a system that requires the parties to state relatively detailed positions early in an action; this need may be enhanced by the prospect that expensive prefiling investigation may not make sense in low-stakes actions. The greatest temptation, indeed, is to use the simplified rules as the excuse for a change in Rule 15 that may well be warranted for all cases. There is much to be said for allowing a plaintiff to amend once, as a matter of course, after an answer points out defects in the complaint. The same is true when a reply points out defects in an answer. Present Rule 15(a) allows amendment once as a matter of course if a defect is pointed out by motion but not if it is pointed out by pleading. This question deserves further consideration.

The reply obligation is limited to an avoidance or affirmative defense identified as such. Too much grief would come from requiring a reply to "new matter."

The particularized pleading requirement raises interesting questions about compliance with Rule 11: is more careful investigation required to support more careful pleading? Is that backward — we make it more difficult to bring a small-stakes action, even though the burdens are less, than to bring a more complex action?

Rule 104. Demand for Judgment

(a) Demand for judgment. A party may attach a demand for judgment to a pleading that asserts a contract claim for a sum certain. The demand must be supported by:

(1) a verified copy of any writing that evidences the obligation, and

(2) a sworn statement of

(A) facts establishing any obligation that is not completely evidenced by a writing,

(B) facts establishing total or partial nonperformance of the obligation, and

(C) the amount due.

(b) Response to demand for judgment.

(1) Within the time provided for answering the pleading asserting the claim, a party served with a demand for judgment must admit the amount due stated in the demand or file a response.

(2) The response must be sworn, and must respond specifically by admission, denial, avoidance, or affirmative defense to each matter set forth in the demand for judgment. The answer to the pleading asserting the claim may incorporate the response by reference.

(c) Judgment. Unless the court directs otherwise, the clerk must prepare, sign, and enter judgment for any amount admitted due under Rule 104(b). A judgment that does not completely dispose of the action is not final unless the court directs entry of final judgment under Rule 54(b).

Committee Note

The demand-for-judgment procedure is new. A substantial number of actions in federal court are brought by the United States to collect relatively small sums that are due on unpaid loans or overpaid benefits. The demand procedure is essentially a motion for summary judgment that is made with the pleading that states the claim, paving the way for efficient and inexpensive disposition of the cases in which the plaintiff sues only for the amount that in fact is due. This procedure also may be useful in other small claims brought under federal law, and in diversity actions that fall under these rules through Rules 102(a)(2) or 102(c).

Reporter's Comment

It may be asked why this procedure is not available to defendants as well as plaintiffs: an opportunity to confess judgment in a stated amount. At least two observations may be offered. Defendants have summary judgment. And a competing offer-of-judgment procedure would be just that: a Rule 68-like device. Probably we do not want to go down that road with a simplified procedure. A defendant always can concede liability even if the plaintiff does not make a demand for judgment.

Rule 104A. Motion Practice

(a) Rule 12 applies to actions under these simplified rules except as provided by Rule 104A(b), (c), and (d).

(b) The times to answer provided by Rule 12(a)(1), (2), and (3) are not suspended by any motion; Rule 12(a)(4) does not apply to an action governed by these simplified rules.

(c) The answer to a pleading stating a claim for relief must state any defenses described in Rule 12(b).

(1) A motion to dismiss based on any of the defenses enumerated in Rule 12(b)(2), (3), (4), (5), or (7) may be made in the answer or by separate motion filed no later than 10 days after the answer is filed.

(2) A motion under Rule 104A(c)(1) does not suspend any time limitation for further proceedings unless the court by order in the particular case directs a different time limitation.

(d) A party seeking an order under Rules 12(b)(6), 12(c), 12(f), or 56 must combine the relief sought under any of those Rules into a single motion filed no later than 30 days after the filing of the answer or reply to the pleading stating the claim for relief addressed by the motion. If one party makes a timely motion under this Rule 104A(d), any other party may file a motion under this Rule 104A(d) no later than 20 days after being served with the first Rule 104A(c) motion.

Committee Note

Many lawyers and judges express frustration with the delays that arise from pretrial motion practice, and often note a suspicion that pretrial motions frequently are made for the purpose of inflicting delay and expense on an adversary. Rule 104A is designed to reduce the delay, while preserving the necessary functions served by Rules 12 and 56. Other pretrial motions are not affected by Rule 104A.

Subdivision (b) removes the delay that may be occasioned by Rule 12(a)(4). To make the meaning clear, the redundant clauses both state that Rule 12(a)(4) does not apply and that the time to answer is not suspended by any motion. It is important to establish the basic framework of the pleadings as early as possible so that other pretrial activities can proceed.

Subdivision (c) sets outer limits on the time to move to dismiss on grounds that go to personal

jurisdiction or venue. A motion based on failure to join a party under Rule 19 is included as well, but the court retains power to act on its own or on suggestion by a party when needed to protect the interests of an absent person. This subdivision further provides that a motion to dismiss under paragraph (1) does not suspend the time limitations for further proceedings; Rule 105 disclosures provide an immediate illustration.

Subdivision (d) combines into a single motion the motions to dismiss for failure to state a claim, for judgment on the pleadings, to strike matters from the pleadings, and for summary judgment. Because the time provided is short with respect to summary judgment, the moving party may add to the motion a request for additional time under Rule 56(f).

Reporter's Comment

This is a very rough first pass at a very complicated set of questions. The questions addressed seem likely candidates for discussion. It is possible that we will want to consider time limits on motion practice, or perhaps elimination of some motions, even if we decide to abolish the dramatic 6-month trial date proposed in Rule 109. But if we adhere to Rule 109 or anything much like it, we almost certainly will have to do something to prevent the use of motion practice to make a shambles of pretrial preparation.

It might be possible to add deadlines for ruling on motions. There are so many problems, however, that perhaps this question can be put aside.

Rule 105. Disclosure

(a) General. Disclosure requirements are governed by Rule 26(a), 26(e), 26(f), 26(g), [and 37(c)(1)], except as provided in Rule 105(b), (c), (d), and (e).

(b) Plaintiff's disclosure. No later than twenty days after the last pleading due from any present party is filed, each plaintiff must, with respect to its own claims, provide to other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to facts disputed in the pleadings, identifying the subjects of the information *{, together with a sworn statement of relevant facts made by plaintiff, if the plaintiff has discoverable information, and by any other person whose sworn statement is reasonably available to the plaintiff}*;

(2) a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are known to be relevant to facts disputed in the pleadings; and

(3) the damages computations and insurance information described in Rule 26(a)(1)(C) and (D).

(c) Other Parties' Disclosures. No later than twenty days after a plaintiff's Rule 105(a) disclosures are due, unless the time is extended by stipulation or court order, each other party must provide to all other parties a disclosure that meets the requirements of Rule 105(a)(1), (2), and (3) *{, including a sworn statement made by the disclosing party, if the disclosing party has discoverable information, and by any other person whose sworn statement is reasonably available to the disclosing party and has not already been provided in the action}*.

(d) Disclosure of Expert Testimony. If the court permits expert testimony under Rule 108, Rule 26(a)(2) governs disclosure unless the court limits or excuses the disclosure.

(e) Available Information; Obligation not Excused.

(1) A disclosure under Rule 105(a), (b), (c), or (d) must be based on the information then reasonably available to the disclosing party.

(2) The disclosure obligation is not excused because the disclosing party:

(A) has not fully completed its investigation of the case,

(B) challenges the sufficiency of another party's disclosure, or

(C) has not been provided another party's disclosures.

Committee Note

The disclosure obligation is expanded beyond Rule 26(a)(1)(A) and (B) obligations to disclose witnesses and documents in the belief that disclosure will prove more efficient than discovery for many of the actions governed by these simplified rules. Disclosure is required, however, only with respect to facts disputed in the pleadings. If a defendant defaults, or concedes liability under Rule 104, a plaintiff need not make any disclosure.

As to witnesses, it is required that a party provide the party's own sworn statement if the party has discoverable information, and also the sworn statement of any other witness that is reasonably available to the disclosing party. The test of reasonable availability is deliberately pragmatic, and is to be administered in the understanding that a party is not always able to secure a statement from a person that seemingly would be willing to cooperate. If a person's sworn statement has already been provided in the action, another disclosing party need provide a supplemental statement by the same person only if the disclosing party wishes to elicit additional evidence from that person. Disclosure of these statements is an important support for the restrictions on deposition practice in Rule 106(d).

Disclosure requires copies of documents, not mere identification, but extends only to documents known to be relevant to facts disputed in the pleadings. A document is "known to be relevant" if a party, an agent of a party, or an attorney responsible for participating in the litigation is consciously aware of the document and its relevance. No duty is imposed to search for documents that a party does not seek out in its own investigation and preparation of the case.

Disclosures are sequenced, with plaintiffs going first, so that the plaintiffs' disclosures will provide a framework for more meaningful disclosures by other parties. Disclosures by other parties are due twenty days after plaintiffs' disclosures are due, whether or not plaintiffs have complied with their disclosure obligations. The parties may stipulate to a later date for disclosures after the first plaintiff's disclosure. The court likewise may order a later date; the best reason for deferring disclosure by other parties is a substantial failure of disclosure by the plaintiffs. A plaintiff who makes Rule 105(b) disclosures with respect to its own claims may make separate disclosures as to the claims of other parties under Rule 105(c), but may elect instead to combine those disclosures with its Rule 105(b) disclosures.

Rule 108 discourages the use of expert testimony in actions governed by these simplified rules. But if expert testimony is to be permitted at trial, Rule 26(a)(2) disclosure may be an important substitute for discovery. In determining whether to direct Rule 26(a)(2) disclosure, the

court should consider whether the need for disclosure justifies the expense of securing a written report from the expert.

Reporter's Comment

Rule 105(e)(2) is taken from the final paragraph of Rule 26(a), as a matter of emphasis without cross-reference.

Rule 106. Discovery

(a) General. Discovery is governed by Rules 26 through 37, except as provided in Rule 106(b), (c), (d), (e), (f), and (g).

(b) Discovery Conference. A Rule 26(f) conference must be held only if requested [in writing] by a party. The request may be made before or after disclosures are due under Rule 105.

(c) Timing of Discovery. A party may make discovery requests only after a Rule 26(f) conference, or on stipulation of all parties or court order.

(d) Depositions.

(1) Number. The number of depositions permitted under Rule 30(a)(2)(A) and Rule 31(a)(2)(A) without leave of court is three. *{Alternative: A deposition may be taken under Rule 30 or Rule 31 only on stipulation of all parties or court order.}*

(2) Duration. The presumptive time limit for a deposition under Rule 30(d)(2) is one day of three, not seven, hours.

(e) Interrogatories. The presumptive number of interrogatories permitted under Rule 33 is ten.

(f) Rule 34 Discovery. A request for production or inspection of documents and tangible things under Rule 34 must specifically identify the things requested *{unless the court grants permission to identify the things requested by reasonably particular categories}*.

(g) Requests to Admit. A party may serve more than ten Rule 36 requests to admit on another party only on stipulation of all parties or court order.

Committee Note

The Rule 106 limitations on discovery are made possible by the expanded pleading requirements of Rule 103 and the expanded disclosure requirements of Rule 105. Together, these rules seek to assure plaintiffs that an action for relatively small stakes can be brought without undue expense, and to provide comparable assurance to defendants contemplating the costs of defending rather than defaulting.

The Rule 26(f) discovery conference is made available on request by any party. The discovery is not made mandatory because it is expected that the pleading and disclosure requirements of Rules 103 and 105, supplemented by the Rule 104 demand for judgment, will greatly reduce the

need for discovery. But if a party wishes to use any discovery device, it must request a discovery conference or obtain a stipulation or court order allowing discovery without the conference.

Limits on the numbers of depositions and interrogatories are reduced to match the predictable reasonable limits of discovery in cases governed by the simplified rules. Expansion in the numbers may be obtained in the same way as under Rules 30, 31, and 33. A parallel limitation has been created for requests to admit.

Rule 34 requests are subjected to an obligation to specifically identify the documents or tangible things requested. Rule 105 imposes an obligation to produce, as disclosure, copies of all documents known to be relevant to facts disputed in the pleadings. Full and honest compliance with this obligation, including the duty to supplement initial disclosures under Rule 26(e)(1), will meet the reasonable needs of most litigation governed by these simplified rules. *{Although no express limit is built into the provision allowing a court to permit a request that identifies the things requested by reasonably particularized categories, permission should be granted only if there is some reason to suspect that a reasonable further inquiry will produce useful information.}*

Reporter's Comment

Rules 106(d) and (e) are drafted by reference. The intention is to incorporate, for example, all of Rule 30(a)(2)(A), substituting "three" for "ten." That means all plaintiffs get three depositions, all defendants get three, all third-party defendants get three. It may be better to adopt a lengthier, but self-contained version that tracks the language of Rules 30, 31, 33, and 36.

Rule 107. Scheduling Orders

A rule 16(b) scheduling order is not required, but the court may, on its own or on request of a party, make a scheduling order.

Committee Note

Although Rule 16(b) scheduling orders may be useful in an action governed by the simplified rules, it is hoped that the shift in the balance between pleading, disclosure, and discovery will enable the parties to manage most actions without need for judicial administration.

Reporter's Comment

It is tempting to attempt to provide firm a discovery cutoff and a firm trial date by uniform rule. It seems likely, however, that the obstacles that persuaded the Advisory Committee not to adopt that approach for all civil actions will be found even with simplified actions. There may be a significant number of districts where it is not possible to provide a meaningfully firm trial date even for small-claims actions. In addition, it may be wondered whether it is wise to introduce an indirect docket priority for these actions by way of a firm trial date.

Rule 108. Expert Witnesses.

A party who wishes to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence must move for permission no later than the time for serving its initial disclosures under Rule 105, ten days after another party has moved for permission to present such evidence, or a different time set by the court. The court should consider the nature of the disputed issues, the amount in controversy, and the resources of the parties in determining whether to permit expert testimony. The court also may consider appointment of an expert under Rule 706 of the Federal Rules of Evidence as an alternative to hearing testimony from experts retained by the parties.

Committee Note

There is a risk that a party to an action governed by these simplified rules may seek to increase the costs of litigating by offering expert testimony that would not be offered if the only motive were a desire to invest an amount reasonably proportioned to the stakes of the litigation. A party who seeks to offer expert testimony that is reasonably justified in terms of the difficulty of the issues to be tried should be allowed to present the testimony, even though the expense seems great in relation to the money at stake, unless the result may be an unfair advantage in relation to another party who cannot reasonably incur the cost of securing its own expert testimony.

Rule 108 cannot be applied to exclude expert testimony that is required by applicable substantive law. In professional malpractice actions, for example, expert testimony often is required to establish the elements of the claim.

Rule 109. Trial date

(a) Trial Date Set on Filing. At the time an action governed by these rules is filed, the clerk must set a trial date that is [no later than]:

(1) six months from the filing date, or

(2) seven months from the filing date if any party is the United States, an agency of the United States, an officer or employee of the United States sued in an official capacity, or an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States.

(b) Serving Notice of Trial Date. Notice of the Rule 109(a) trial date must be served

(1) with the summons and complaint or,

(2) if a defendant has waived service, promptly after the action is {filed} [commenced].

(c) Amending Trial Date. The Rule 109(a) trial date may be extended by order [of the court] to a date later than the period set by Rule 109(a) only on showing that:

(1) the plaintiff had good reason for failing to serve a defendant within 20 days from the filing date, or

(2) extraordinary reasons require a deferred trial date, but it is not sufficient reason **(A)** that the parties have not completed disclosure or discovery, nor **(B)** that the nature of the action requires deferral.

Committee Note

Expeditious disposition is an important element of these simplified rules. Setting a firm trial date when the action is filed will prompt the parties to proceed expeditiously. This effect requires that the date be quite firm. Extensions are allowed only when there is good reason for failing to effect service within 20 days from filing, or when extraordinary reasons require greater time. Failure to complete disclosure and discovery, and pleas that an action is by its nature too complex to prepare in six months (or seven months if the parties include the United States or its agents), do not provide sufficient reason. It is expected that courts will manage their dockets so that only extraordinary docket conditions will require an extension because the court is unable to honor the initial trial date.

Reporter's Note

This provision might well be moved up to lie between Rule 103 and Rule 104.

The draft Committee Note points to the objections that may be advanced to the "speedy trial" requirement. Particularly with individual docket systems, it may prove very difficult to honor a trial date set at the time of filing. On the other hand, the importance of speedy trial cannot be denied, particularly with a procedural system that is designed to achieve economy. These issues are important, and deserve hard work to craft the best possible rule. A firm six-month trial date could be more easily achieved if districts that have a substantial number of judges would adopt a

centralized docket for these cases. If indeed these cases are amenable to simplified procedure, a centralized docket system might work reasonably well.

Because this draft rule was a last-minute addition, it has been created without attempting to work through the many issues that should be considered if it is to be adopted. A six-month trial date could create havoc if the plaintiff is allowed to make service at any time within the 120-day period allowed by Rule 4(m). Many other time periods also need to be considered, including those that suspend the time to answer while a Rule 12 motion is pending, the time to complete disclosure, and so on. Beyond the time periods set in the Rules, it may be necessary to consider time periods set by local rules — a lengthy notice requirement for motions in general, or more specific timing requirements for summary judgment motions, could be incompatible with the 6-month trial date.

Another source of time problems may arise from local ADR practices. Commonly ADR establishes a "time out" from ordinary requirements. Adjustments may be needed on this score as well.

All of these firm timing requirements suggest another problem. If firm deadlines are set for several steps along the way, the result may be more expensive litigation. Forced to "do it now or never," lawyers may feel compelled to do many things that, without this pressure, would never be done. It is not necessarily a good answer to require that all motions be made within X days, or to require that an answer be filed before the court decides a motion to dismiss or for more definite statement, and so on.

A firm trial date provision could be drafted in different terms that might reduce these difficulties. For example, the date might be set by order after the pleadings are closed.

In addition to a firm trial date, it also may be desirable to think about trial time limits. It might be provided, for instance, that good cause must be shown to obtain more than one trial day for all plaintiffs or for all defendants.

highly likely to fall within the smaller brackets: all had approximately 70% or more of their cases in the $1-150K brackets. (Figure 2).

- More than 90% of the enforcement and recovery cases are concentrated in the $1-50K bracket (Figures 2 & 3).∂
- In the $1-150K brackets there were 339,538 cases over the ten year period. In $1-500K brackets, there were 430,300 cases. (Figure 3).
- Tort and contract cases comprise the majority of cases in the $1-50K and $51K-150K brackets, but those two types of cases also comprise the majority in each of the sub-$1 million brackets. (Figure 3).

Based on data from the past ten years, one could expect a sizeable number of tort, contract, (loan) recovery, prisoner, non-prisoner civil rights, labor law, and real property claims to qualify for a simplified procedure for claims under $150,000. Estimated very conservatively, at least 34,000 cases a year could be expected to qualify for the simplified procedures for claims under $150,000, and 43,000 per year if the proposed threshold were raised to $500,000, as the committee discussed in Kennebunkport.

A majority (56%) of the cases for which we have information fall within the $1-150K bracket. While we do not know about the remaining 72% of the federal docket, if we assume that the same proportions were to apply, approximately 125,000 cases per year would include a demand for between $1 and $150,000. We recognize that the above assumption is unrealistic because the "unknown" cases include large numbers of social security and bankruptcy appeals that might be excluded from a simplified procedure. Accordingly, 125,000 cases is probably the maximum one could expect in the lowest brackets given the current mix of cases.

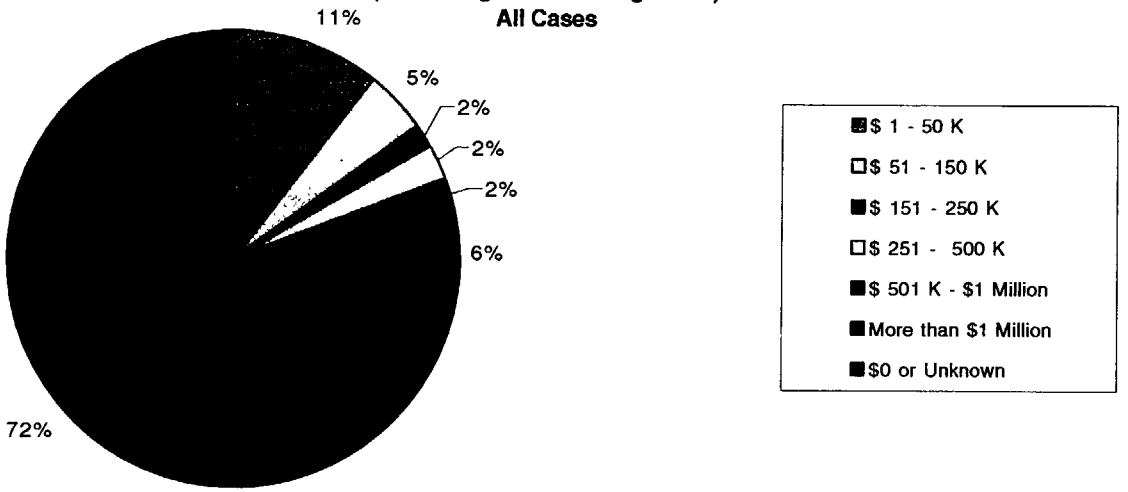
In summary, based on current data and on the assumption that cases with missing information do not differ from those for which we have information, we can expect a minimum of 34,000 cases and a maximum of 125,000 cases to include a demand for damages in the $1 to $150,000 range. These approximations, of course, cannot take into account the number of cases a simplified procedure might attract into the federal system—cases that might otherwise be filed in state court or deemed uneconomical to pursue.

You also asked for information about the length of time spent in trial for cases in which a jury trial was held within six months or a year of the filing date. We are working on that request and will provide information by early next year.

cc Sheila Birnbaum, Esq.
Honorable David Levi
Honorable John Padova
Professor John C. Jeffries, Jr.
Professor Edward Cooper
Professor Richard Marcus
Mr. James Eaglin
Mr. John Rabiej

Figure 1

Amount Demanded
Civil Filings FY 89 - 98
(Excluding Default Judgments)
All Cases



Breakdown of Nature of Suit Category by Demand Category

	Amount Demanded							
Nature of Suit Category	$ 1 - 50 K	$ 51 - 150 K	$ 151 - 250 K	$ 251 - 500 K	$ 501 K - $1 Million	More than $1 Million	$0 or Unknown	**Total**
Antitrust	315	111	35	67	150	570	4998	6246
Bankruptcy Appeals & Withdrawals	584	119	56	61	77	188	47894	48979
Contract	46562	35171	12341	13401	10828	17869	161753	297925
Copyright, Patent, Trademark	2938	2062	570	1010	888	1269	53112	61849
Forfeiture & Penalty	2191	495	136	120	100	182	28156	31380
Labor Laws	18279	4371	1341	1659	1367	2622	101538	131177
Non-Prisoner Civil Rights	17999	9705	4789	10148	10046	22651	229263	304601
Other Statutes	16934	5493	1942	1894	1895	4403	104933	137494
Prisoner Petitions	24116	13407	6224	7440	8596	19348	452705	531836
Real Property	6307	6895	1276	1328	953	1747	30576	49082
Recovery & Enforcement	26518	683	204	211	680	2177	16333	46806
RICO	565	316	162	298	378	1416	5876	9011
Securities, Commodities	855	671	266	371	498	1036	16171	19868
Social Security	332	48	19	26	31	267	101716	102439
Torts - Personal Injury	66500	20637	7486	13065	17602	45692	263971	434953
Torts - Property Damage	5217	3142	1280	1536	1335	2841	19550	34901
All Cases	236212	103326	38127	52635	55424	124278	1638545	2248547

Figure 2
Demand Category Percentage for Each Casetype Category for Cases With a Known Demand of $1 Million or Less

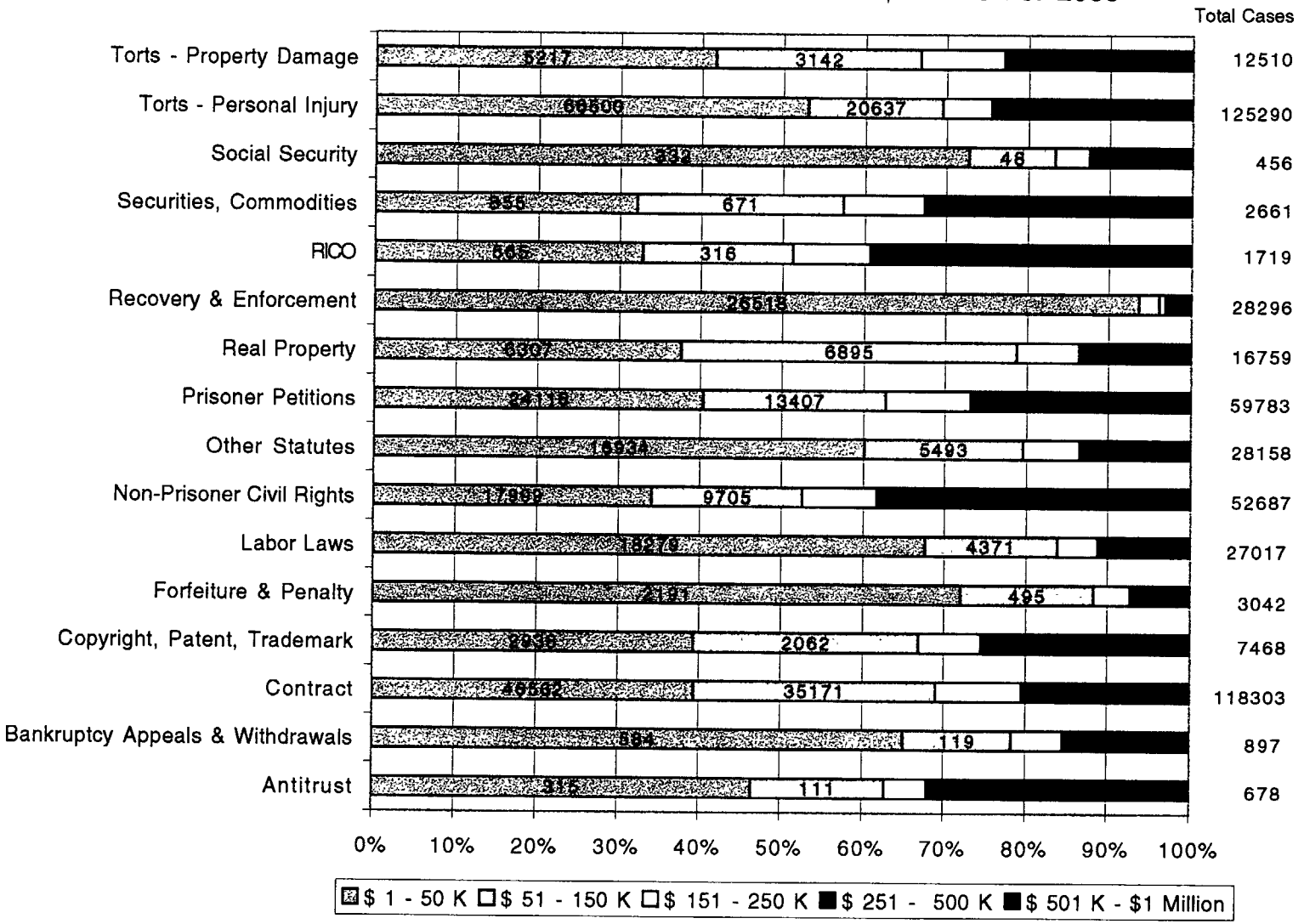
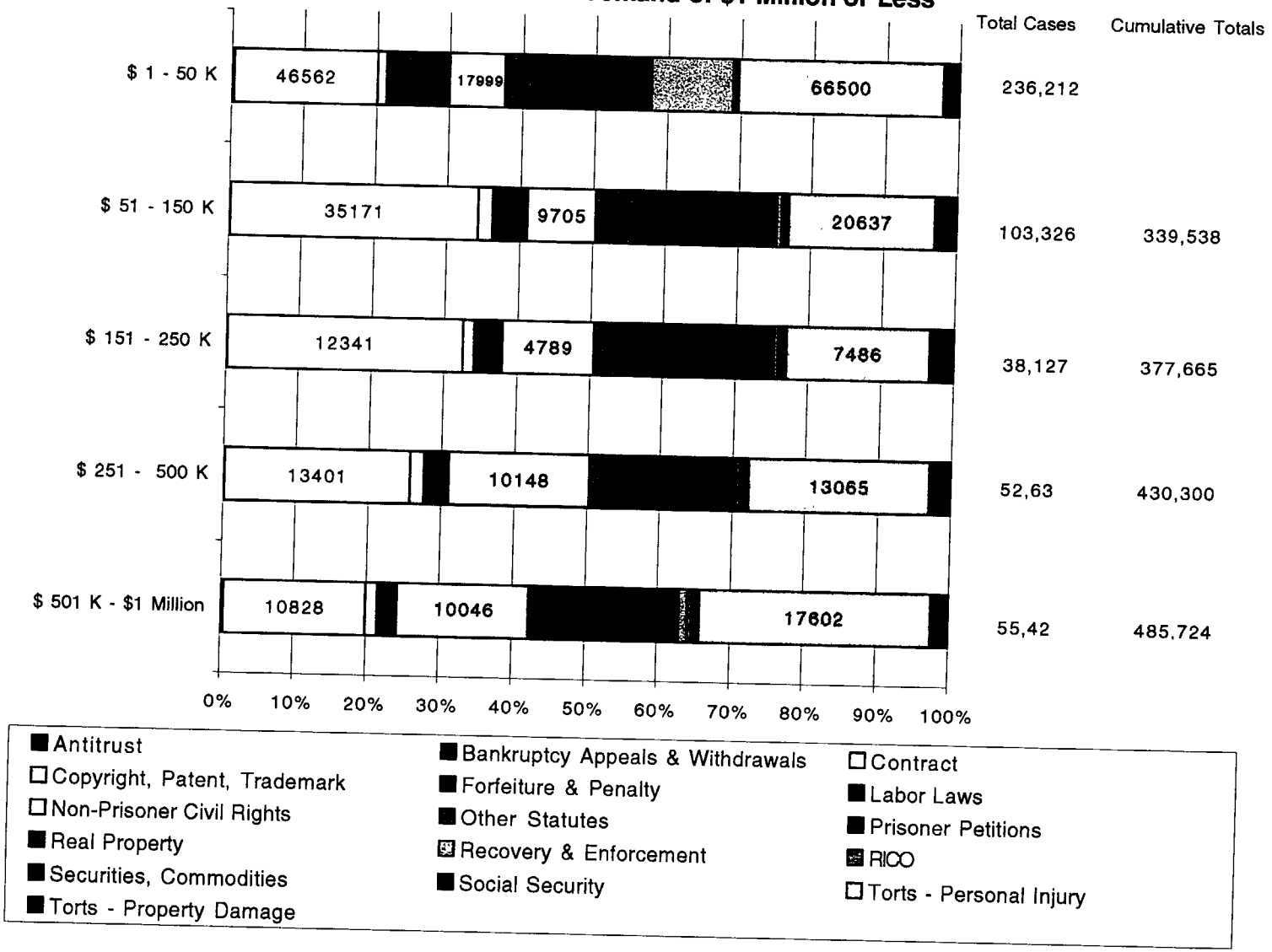


Figure 3
Casetype Category Percentages for Each Demand Category for Cases with a Known Demand of $1 Million or Less



Federal Judicial Center
Research Division

memorandum

Writer's Direct Dial Number:
202-502-4049
FAX 202- 502-4199

To: Judge Paul Niemeyer, Chair
Civil Rules Advisory Committee

From: Tom Willging

Date: December 21, 1999

Subject: Data relating to simplified procedures

After the October 1999 meeting in Kennebunkport, you and Rick Marcus asked for some statistical data that might be relevant to your proposal to establish a set of simplified procedures for certain damages cases. You asked for data about the number of cases in various nature of suit categories, excluding cases resolved by default judgment, that contained information about the amount demanded. Pat Lombard and George Cort of our staff put together the attached figures to provide information for various levels of monetary demands, starting at $1-50,000 and proceeding in stages up to $1 million for all cases filed in the federal courts during the decade between 1989 and 1998.

As Ed Cooper mentioned at the meeting, there is no useful information available about plaintiffs' demands for damages in more than three-quarters of the cases. The demand amount is often missing from the opening case information that the courts report to the Administrative Office. One should be cautious about inferring anything about the cases for which there is no information. One can, of course, say that the cases for which we have information represent the minimum number one might expect in the future.

I encourage you to look at the three figures that follow and draw your own conclusions. Here are a few of my observations:

- Overall, only 28% of the cases had information about the amount of money damages demanded. A few types of cases had more information: recovery and enforcement (e.g., student loans) (65%), contracts (45%), torts (40-45%), and real property (40%). On the other hand, bankruptcy and social security cases were, not surprisingly, highly unlikely (less than 2%) to have such information. (Figure 1 and attached table).

- More than half of the cases for which there is data fell within the $1-150K range. Almost 40% of the known monetary demands were in the $1-50K bracket (Figure 1)

- All case types had more than 30% of their reported monetary demands in the $1-50K bracket and more than half were in the $1-150K brackets. Torts, real property, other federal statutes, labor law, copyright, patent, trademark, contract, and (loan) enforcement & recovery cases were

Federal Judicial Center
Research Division

memorandum

Writer's Direct Dial Number:
202-502-4049
FAX 202-502-4199

To: Judge Paul Niemeyer, Chair
Civil Rules Advisory Committee
From: Tom Willging
Date: January 11, 2000
Subject: Jury trial data relating to simplified procedures

In addition to the information presented in my December 21, 1999 memo, you had also asked for statistical information about the length of time spent in trial for cases in which a jury trial was held within six months or a year of the filing date. This memo and the attached figures present data relating to that request. Pat Lombard of our staff compiled the information and created the attached figures.

As with our December 21 memo, these data relate only to cases for which information is available about the amount of damages demanded by plaintiffs. I remind you that fewer than 25% of civil cases include such information because the demand amount is often missing from the opening case information that the courts report to the Administrative Office. As I mentioned before, one should be cautious about inferring anything about the vast majority of cases for which there is no information. Such cases may be markedly different in regard to the dimensions of interest to you—whether or when a jury trial of whatever length took place.[1]

We examined two variables for each damages demand category: the time from filing to jury trial and the length of the jury trial. Note that these data relate only to cases in which a jury trial commenced and that very few civil cases proceed to the jury trial stage. Accordingly, these cases may have different characteristics than civil cases that do not reach jury trial. For example, as Figure 1 suggests, the time from filing to disposition for the jury trial subset may be much longer than the typical civil case.[2]

---

[1] I also want to note that the data on length of jury trials came from a different source than the data on damages demanded. For about one-third of the cases with information about damages demanded and some indication that a jury trial had commenced, we were unable to find matching records to determine the length of the jury trial. We do not know of any reason why the unmatched cases would be likely to differ in any material way from the matched cases.

[2] The median time from filing to disposition for all civil cases during the years 1993 to 1998 ranged from 7 to 9 months. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS 167 (1998). The median time from the date of filing to the beginning of a civil trial ranged from 16 to 19 months during that time. *Id.*

Time from filing to jury trial

Figure 1 illustrates vividly that there is very little difference in the time from filing to jury trial based on the amount of the demand. All three groups were about equally likely to have half of their cases come to jury trial within about 18 months from the time of filing. Beyond that point, high demand cases (more than $500K) appear to have taken a month or two longer to go to jury trial.

Relatively few cases in any of the three groups proceeded to jury trial within six months of the date of filing, Overall, 322 of 9,346 (3%) of the cases examined went to jury trial within six months (Based on data from Figure 2).

Based on the data supporting Figures 1 and 2, a simplified trial procedure would require the courts to provide speedier trials than now provided. Proposed Rule 109 in the August, 1999 simplified procedure draft provides that the trial date would be six or seven months from the date of filing. Only 3% of the cases that would be eligible for a simplified procedure began a jury trial within six months. Approximately one-third began a jury trial within 12 months. Both of the above statements apply to the low demand group ($1-150K) as well as the low and middle groups combined ($1-500K).

Length of jury trial

Figure 2 also indicates that in all three demand categories, cases going to jury trial sooner tend to be shorter than cases going to jury trial later. One can imagine plausible reasons for this: cases going to jury trial faster have had less time for discovery and motions practice. They may simply be simpler cases.

None of the three case groups, however, appeared to have exceptionally short jury trials. The typical (median) trial for the earliest cases (reaching trial in less than 6 months) lasted somewhat longer than one business day, between about 9.5 and 12 hours for the three groups (Figure 2). The typical jury trial for all cases reaching trial in less than 12 months lasted between 11 and 14.5 hours for the three groups (Figure 3). Finally, the typical jury trial for cases reaching trial in more than 12 months lasted between 15 and 20.5 hours (Figure 4).

The typical low demand case that reached jury trial more than 12 months after filing lasted five hours longer than low demand cases that reached trial within 12 months (12.5 vs. 17.5 hours; Figures 3 & 4). For reasons that are not readily ascertainable,[3] jury trials in the mid-level demand group were shorter (11 and 15 hours for earlier and later trials; Figures 3 & 4) than those in the low demand group. Trials in the high demand group lasted 14.5 and 20.5 hours for the earlier and later trials (Figures 3 & 4).

In general—assuming that there are no meaningful differences between the cases examined and cases in which demand information was not

[3] One speculative explanation comes to mind. The low demand group may include a substantial number of cases seeking injunctive relief that required additional time. The data needed to test that hunch do not exist.

available—cases that are eligible for the proposed simplified procedure can be expected to have shorter jury trials than cases that are not eligible. This is true regardless of whether a cutoff of $150K or $500K is used to define eligibility. In fact, including the mid-level group of $151-500K brings in cases that typically had the shortest jury trials of the three groups.

Please let me know if you have any additional questions about the data presented in this memo or if you have identified any new questions that you would like us to pursue regarding the proposed simplified procedure.

cc Sheila Birnbaum, Esq.
Honorable David Levi
Honorable John Padova
Professor John C. Jeffries, Jr.
Professor Edward Cooper
Professor Richard Marcus
Mr. James Eaglin
Mr. John Rabiej

Figure 1

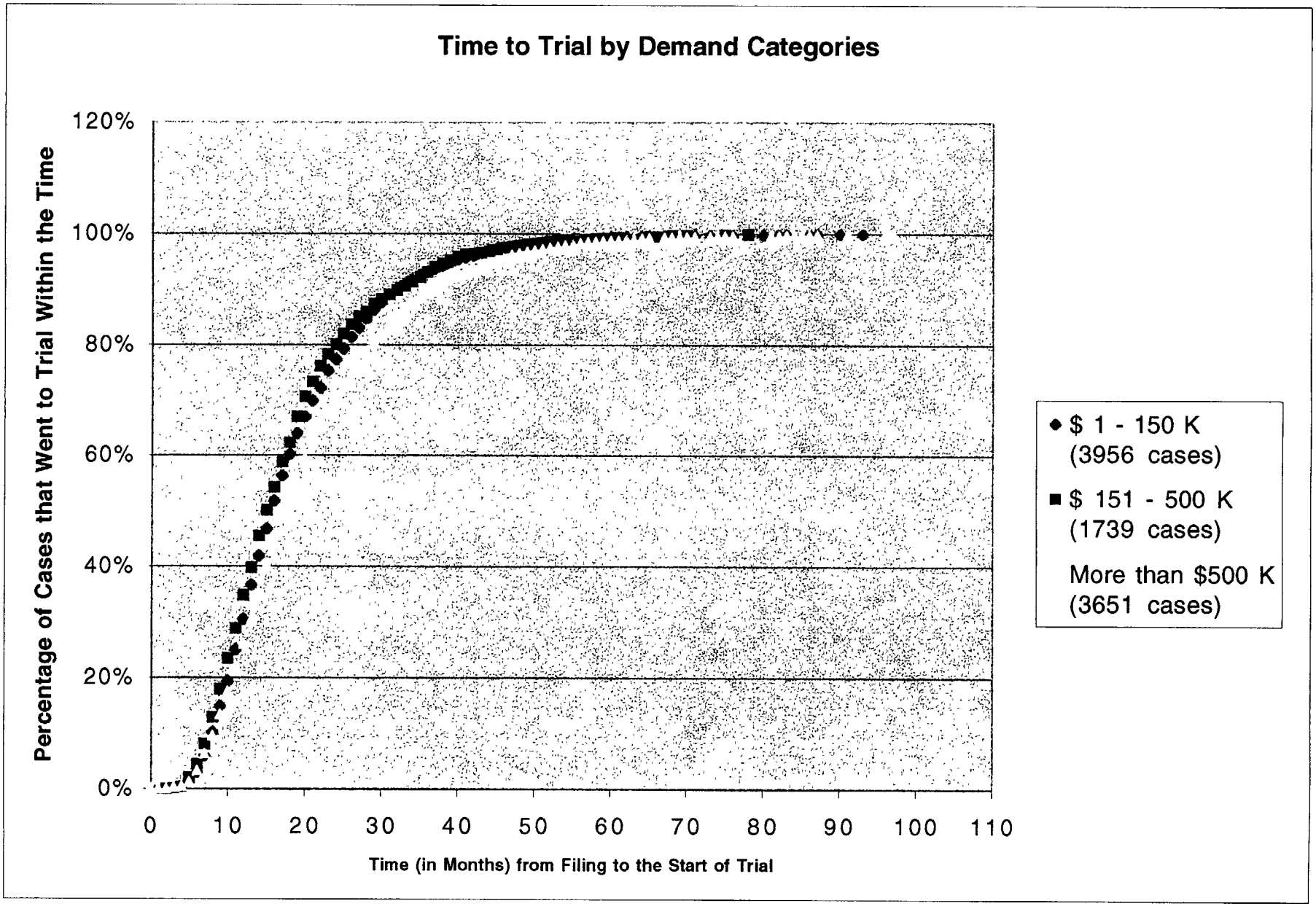

Time to Trial by Demand Categories
Percentage of Cases that Went to Trial Within the Time
120%
100%
80%
60%
40%
20%
0%
0
10
20
30
40
50
60
70
80
90
100
110
Time (in Months) from Filing to the Start of Trial
$ 1 - 150 K (3956 cases)
$ 151 - 500 K (1739 cases)
More than $500 K (3651 cases)

Figure 2

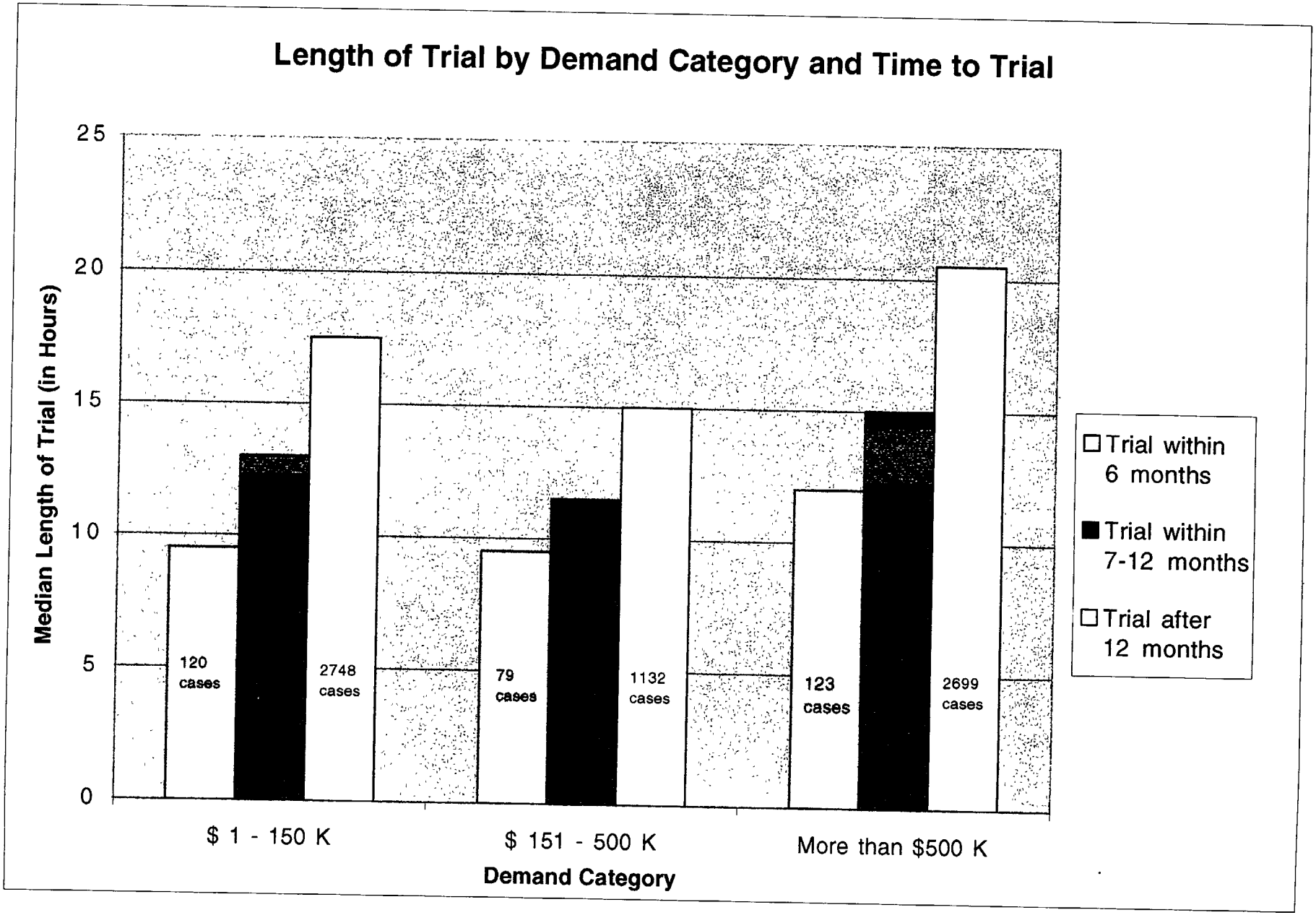
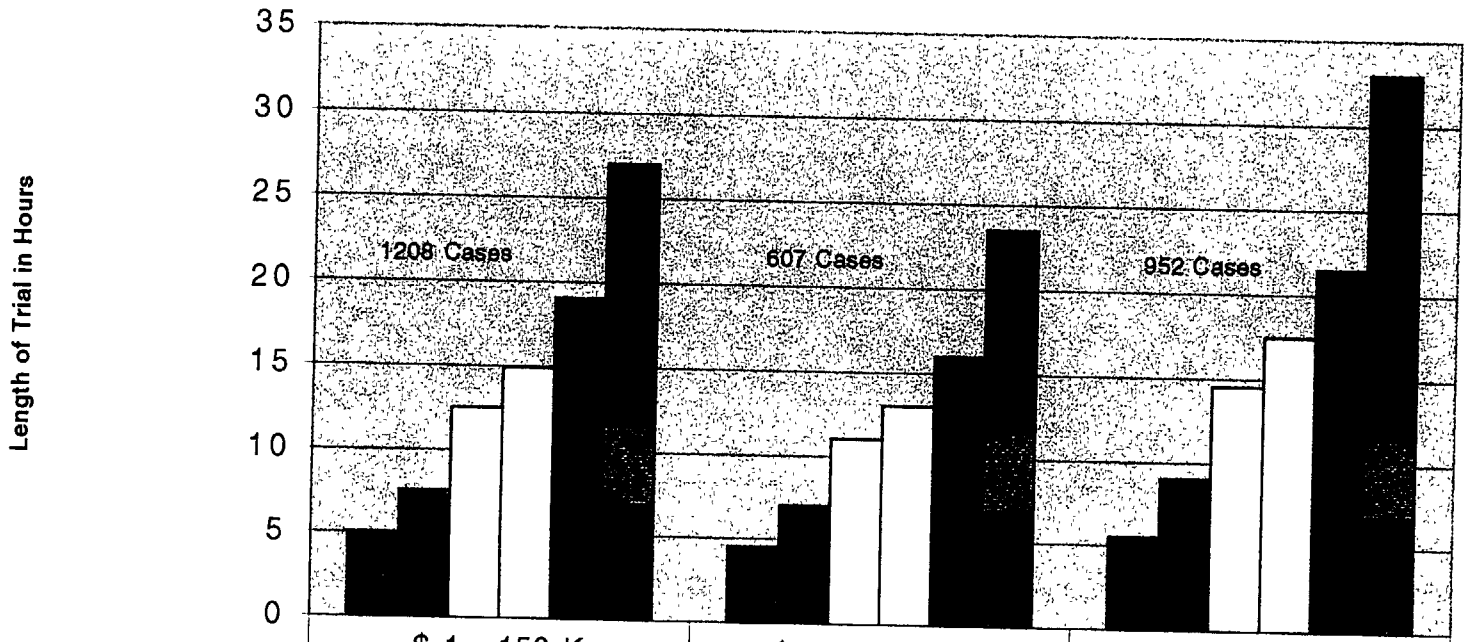

Length of Trial by Demand Category and Time to Trial
Median Length of Trial (in Hours)
25
20
15
10
5
0
120 cases
2748 cases
79 cases
1132 cases
123 cases
2699 cases
$ 1 - 150 K
$ 151 - 500 K
More than $500 K
Demand Category
Trial within 6 months
Trial within 7-12 months
Trial after 12 months

Figure 3

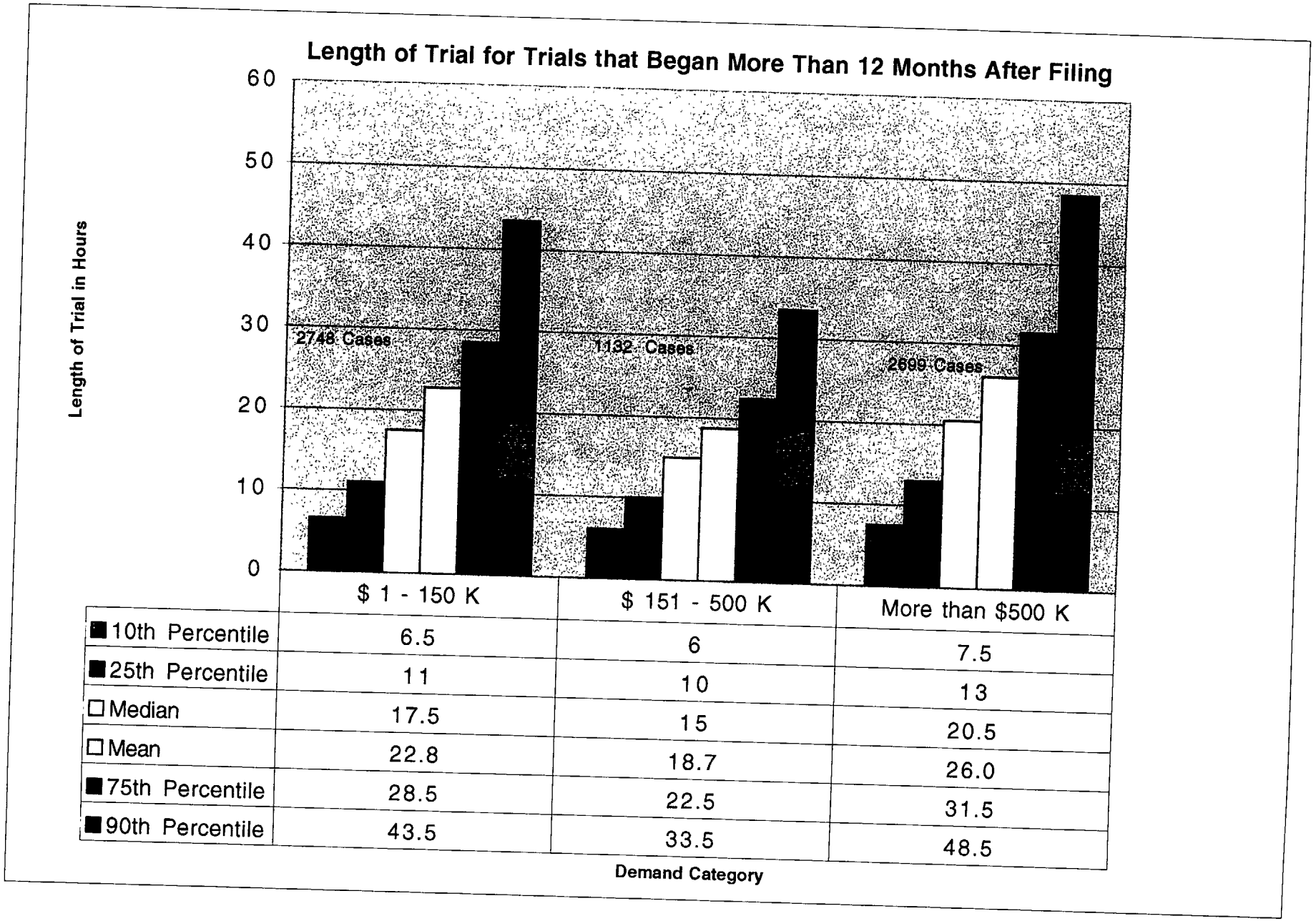
Length of Trial for Trials that Began within 12 Months of Filing



	$ 1 - 150 K	$ 151 - 500 K	More than $500 K
10th Percentile	5	4.5	5.5
25th Percentile	7.5	7	9
Median	12.5	11	14.5
Mean	14.9	13.0	17.4
75th Percentile	19	16	21.5
90th Percentile	27	23.5	33

Demand Category

Figure 4



	$ 1 - 150 K	$ 151 - 500 K	More than $500 K
10th Percentile	6.5	6	7.5
25th Percentile	11	10	13
Median	17.5	15	20.5
Mean	22.8	18.7	26.0
75th Percentile	28.5	22.5	31.5
90th Percentile	43.5	33.5	48.5

5 D

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 15, 2000

MEMORANDUM TO PROFESSOR EDWARD H. COOPER

SUBJECT: *"Experimental" Local Rules Authorized for Five-Year Periods*

I have attached records about proposed amendments to Civil Rule 83(b) that would authorize courts — subject to approval of the Judicial Conference — to promulgate local rules inconsistent with the federal rules for up to five years.

The amendments to Rule 83(b) were published for comment in August 1991. After reviewing public comments, the committee revised the proposal to: (1) expand its coverage to include local rules prescribed by bankruptcy courts; (2) add a uniform numbering requirement for local rules; and (3) add a special note alerting the Supreme Court and the Congress that the proposal may exceed the limits of the Rules Enabling Act.

The revised amendments to Rule 83(b) were submitted by the advisory committee to the Standing Committee in May 1992. At the Standing Committee meeting, however, Chairman Sam Pointer withdrew the proposal from the committee's consideration. He noted that the other advisory committees were considering a change to their respective rules requiring uniform numbering and other similar changes. The withdrawal would give his committee time to work with the other committees on common language. Professor Coquillette said that each of the advisory committees would be considering the same issues at their next meetings, and the reporters would be meeting to discuss a uniform approach.

The Standing Committee agreed with the withdrawal, but several members expressed concern about the experimental local rules provision. For example, Judge Sloviter agreed with the reservations of Professor Leo Levin contained in a contemporaneous law review article that challenged the proposed amendments as exceeding the Rules Enabling Act constraints. Professor Resnick said that the Bankruptcy Rules Committee did not comment on the original published version because there was no reference to bankruptcy rules. He knew that the committee was particularly concerned with individual bankruptcy courts promulgating local rules inconsistent with national rules. He predicted that the committee would be especially skeptical about any national rule promoting divergent local rules, even if on a temporary five-year basis. Judge Pointer replied that experimental local rules could be prescribed only after obtaining Judicial Conference approval, so that the proposal could lead to a reduction of the number of inconsistent local rules.

After working with the advisory committee reporters, Professor Coquillette on February 5, 1993, circulated a draft of uniform amendments requiring a uniform local rule numbering system and changes to Rule 84, which authorized the Judicial Conference to prescribe technical or conforming rules amendments. But the experimental local rule provision was omitted. Professor Coquillette and I recall that the Bankruptcy Rules Committee was strongly opposed to it. (I believe that the Rule 84 amendments were proposed in lieu of the experimental local provision as a compromise to handle some of the matters that led to the original Rule 83(b) proposal.) The change to Rule 84 was adopted by the advisory committees. But after public comment, the Civil Rules Committee rejected the proposal because it concluded that "these proposals would violate the procedure established by the Rules Enabling Act, 28 U.S.C. § 2072. The underlying principle, however, is sound. Legislation should be proposed authorizing the Judicial Conference to make the described changes through the Standing Committee and advisory committees structure."

For your information, I have also attached a suggestion submitted on an informal basis by Roger Pauley, the Department of Justice representative on the Criminal Rules Committee, that would authorize the Judicial Conference to prescribe rules on an emergency basis.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica (without attach.)
Honorable David F. Levi (with attach.)
Peter G. McCabe, Secretary (with attach.)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

SUBMITTED TO

STANDING COMMITTEE
ON
RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

MAY 1992

Rule 83. Rules by District Courts; *Orders*

(a) Local Rules. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not in~~consistent with *Acts of Congress and consistent with, but not duplicative of,* ~~these~~ rules *adopted under 28 U.S.C. §§ 2072 and 2075*. A local rule so adopted shall *conform to any uniform numbering system prescribed by the Judicial Conference of the United States and shall* take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(b) Experimental Rules. With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with rules adopted under 28 U.S.C. §§ 2072 and 2075 if it is otherwise consistent with Acts of Congress and is limited in its period of effectiveness to five years or less.

(c) Orders. In all cases not provided for by rule, the district judges and magistrates *judges* may regulate their practice in any manner ~~not in~~consistent with *Acts of Congress, with* ~~these~~ rules ~~or~~ *adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules* ~~those~~ of the district in which they act.

(d) Enforcement. Rules and orders pursuant to this rule shall be enforced in a manner that protects all parties against forfeiture of rights as a result of negligent failure to comply with a requirement of form imposed by such a local rule or order.

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (b). Should this limited authorization for adoption of rules inconsistent with national rules without Supreme Court and Congressional approval be rejected, the Committee nevertheless recommends adoption of the balance of the rule, with subdivisions (c) and (d) being renumbered. The Committee Notes would be revised to eliminate references to experimental rules.

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and the nationally-promulgated rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar explicit authorization in other rules should not be viewed as precluding by implication the adoption of other local rules subject to the constraints of this Rule 83.

Subdivision (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules as to such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Subdivision (b). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with the national rules should be permitted only with approval of the Judicial Conference of the United States, and then only

for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Subdivision (c). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a "standing order") if the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (d). This provision is new. Its aim is to protect against loss of rights in the enforcement of local rules and standing orders against by who may be unfamiliar with their provisions.

Local rules and standing orders have become quite voluminous in some courts. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by proliferation of local rules and standing orders enforced so rigorously that attorneys might be reluctant to hazard an appearance or parties might be reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local directives poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the rights of the parties.

RULE 83

The Admiralty and Maritime Litigation Committee of the ABA expresses concern that (d) may be compromised by the 1991 revision of Rule 5 which they fear may authorize the court to refuse to accept for filing papers that are defective only in form.

Theodore Tetzlaff, Chair, opposes this revision as an invitation to further localization of the rules.

American Board of Trial Advocates suggests that disclosure rules should be tried in demonstration districts.

The American Civil Liberties Union strongly supports (d), but opposes authorization for experimental rules.

American Insurance Association supports this revision.

ABCNY would prefer to postpone discovery reform until the Civil Justice Reform Act has been implemented, which will entail some experimentation. It is puzzled that the Civil Rules Committee should go forward with a national experiment with disclosure and at the same time authorize local experimentation. ABCNY endorses subdivision (d).

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Chicago Bar Assn favors this revision.

The Connecticut Bar committee favors experimental rules so that its district can experiment with its present rules for five years, there being no reason to change.

The Federal Bar Association approves this revision.

Fisher & Phillips of Atlanta express concern that (d) will defeat the efficacy of local rules.

Hunton & Williams of Richmond urges that experimental rules should be subject to the notice and comment requirements of (a).

Kincaid Gianunzio Caudle & Hubert of Oakland CA oppose the provision for experimental rules; they believe the rules should be uniform.

The Judicial Conference of the United States favors uniform numbering of local rules. Judge Keeton informs the Civil Rules Committee that the Standing Committee has offered to assist courts in achieving uniformity in numbering.

The Los Angeles County Bar approves this revision.

The Los Angeles Chapter of the Federal Bar Association favors this revision.

The Philadelphia Bar opposes this revision as unnecessary.

The Public Citizen Litigation Group is skeptical of new authority to make local rules.

Professor Kim Dayton of the University of Kansas is horrified that the Committee would favor experimental rules. This he finds inconsistent with the CJRA of 1990.

Professor Leo Levin, University of Pennsylvania, strongly approves of the content of Rule 83, but urges that it should be enacted by Congress in order to avoid any possible supersession of 28 USC §2071(a). His views are published at 139 U PA L REV 1567.

Frank, Napolitano & Resnik oppose localism in the rules. They argue that too much local discretion is authorized in proposed rules 26 and 54. They would delete 83(b), and also the words "of form imposed" in 83(d).

RULE 84

The Los Angeles County Bar approves this revision.

The Philadelphia Bar favors this revision.

EVIDENCE RULE 702

Alliance for Justice opposes this revision.

The Alliance of American Insurers urges that the presentation of expert opinion should be a matter of right to the parties and not for the discretion of the court.

The ABA Section on Antitrust favors this revision.

Theodore Tetzlaff, Chair, believes that further study of this revision is desirable.

The American Board of Trial Advocates opposes this change as an affront to the Seventh Amendment. They resolved on February 18, 1992 that this revision was of such consequence that further hearings should be conducted.

The American Civil Liberties Union urges that the committee notes should make it clear that an expert opinion need not be "generally accepted" in order to be reliable. It opposes a requirement that such testimony be substantially helpful; such decisions should be left to counsel. If expert reports are to be required, it favors the requirement that the experts stick to those reports.

The American College of Trial Lawyers favors this revision.

The Arkansas Bar Association opposes this revision.

ACCA expresses the opinion that this revision does not go far enough to prevent the use of opinion testimony not rooted in good science.

American Insurance Association supports this revision.

ATLA opposes this revision for the reasons stated by Judge Weinstein.

5 E

Judicature
March-April 1995

Viewpoint

*221 LET'S TRY A SMALL CLAIMS CALENDAR FOR THE U.S. COURTS

William W. Schwarzer [FNa]

WESTLAW LAWPRAC INDEX
JUD--Judicial Management, Process & Selection

The federal courts, both district and appellate, are experiencing a sharp and steady increase in filings by pro se litigants. In many districts, filings by self-represented parties are approaching 50 percent of all civil filings. This volume, and the peculiar problems it creates, imposes increasingly heavy burdens on both the courts and litigants.

A related problem involves the increasing number of counseled cases filed in district courts for which the stakes are too small to make it economically feasible to proceed through discovery and trial. For the pro se cases, there is an urgent need to lighten the burdens they pose on the courts. For both categories of cases, there is an equally urgent need to improve accessibility and quality of justice.

One solution may be for federal district courts to establish a small claims calendar to further the fair and efficient disposition of some portion of their pro se and small claims litigation.

An overview of the problems

Pro se litigation covers a wide range of cases, including civil rights cases and habeas corpus petitions mostly filed by state prisoners, employment and other discrimination cases, routine civil cases by or against people unable to retain counsel, and miscellaneous personal grievances, many against the government. Data collected by the Federal Judicial Center five years ago indicate that at that time, 23 percent of all civil filings had at least one pro se party, and of those about two-thirds were prisoner cases. Approximately one-fifth of all employment discrimination cases and nearly one-third of all other civil rights cases were pro se. The trend since then has been upward.

The volume and composition of pro se filings varies across districts. In some districts with large state prisons, prisoner cases predominate. In other districts the mix is more eclectic. But pro se cases for the most part share certain characteristics that create particular difficulties for the courts. Many are frivolous or at least unmeritorious, but the absence of counsel often makes it difficult to determine with assurance whether dismissal is warranted. When a case goes to discovery and motion practice, the pro se's lack of legal competence injects disorder and confusion into the proceedings and makes it more difficult for the judge to arrive at an appropriate ruling. If the case goes to trial, these difficulties are aggravated.

Because self-represented litigants are often firmly convinced of their victimization and lack legal competence and confidence in their judgment about the merits of their cases, mediation, settlement, and other ADR procedures are rarely effective. Moreover, the role of the neutral is likely to be compromised by the pro se litigant's need for advice and assistance. Some pro se litigants are given to filing repetitive actions, and some present security concerns. And when pro se cases reach the courts of appeals, they sometimes result in decisions that increase the burdens on the district court.

While the vast majority of these cases are probably without merit, any pro se case challenges the courts to see that justice is done. Judges must try to identify the potentially meritorious cases and make it possible for the litigants to develop and pursue them. Since the merits are frequently obscured by indecipherable pleadings, and the litigants often are not competent to develop and pursue their cases effectively, judges and their staff, who must stand in for absent

counsel, face a disruptive and burdensome task.

Much of the work is done by pro se law clerks, but most courts do not have enough of them. Some of the burden then falls on the judges' law clerks, and some of it is also done by magistrate judges, but they too are fully occupied by other work. In the end, however, each case requires the attention of a district judge. Given the special problems these cases present and the burdens of the judge's other duties, there is considerable risk that these cases, even meritorious ones, may languish in the courts and receive only perfunctory attention.

Pro se litigation also imposes burdens on represented parties. Especially in prisoner cases, a large amount of legal and paper work is required of counsel responding to pro se pleadings. Discovery, motion practice, and trial are much more difficult to conduct without counsel on the other side. Attempts to settle can be frustrating.

As for cases that, though counseled, involve only small stakessuch as those involving minor injuries or commercial disputes over modest amountsthe inability to fully litigate them economically impedes access to justice. While ADR in various forms can help parties resolve such cases, often it is not a realistic option. ***222** Although these cases present no special problems for the courts, expediting their disposition will help ease docket burdens.

Addressing the problems

No comprehensive information on the courts' responses to these problems is available. From the limited information at hand, it appears that courts have only recently realized the magnitude of the pro se problem, and their efforts to deal with it are still episodic and fragmentary. Some courts have included provisions in their local rules or civil justice expense and delay reduction plans, such as exempting pro se cases from certain pretrial requirements, creating a separate litigation track with streamlined discovery and motion practice, providing pro se litigants with information, and simplifying the paper work. A few courts have attempted to provide pro bono counsel to at least some indigent litigants, reimbursing some of the discovery costs out of the court's attorneys' admission or library funds. Some individual judges have devised case management techniques intended to facilitate the efficient resolution of pro se and small claims cases.

The small claims calendar proposed here is intended to achieve three objectives: expedite the resolution of cases; reduce the amount of activity required to resolve them; and promote fair outcomes and litigant satisfaction. The calendar would give the parties the choice of a substantially streamlined process of resolution, in which some traditional elements are exchanged for early and less costly adjudication and a ceiling on exposure. With the consent of the parties, discovery, motion practice, jury trial, and the right to an Article III judge are waived in exchange for a speedier and less costly judicial resolution. For the courts, the incentive is the accelerated yet fair termination of cases with minimal expenditure of judicial resources.

People concerned that a small claims calendar may provide second-class justice to parties with small claims and to pro se litigants may challenge the concept. But the response is that it is entirely voluntary, requiring the consent of both parties. Rather than providing second-class justice, the small claims calendar offers an additional option, an economical alternative for all litigants willing to accept the procedure. It also provides quick and unconditional access to a final and binding adjudication by either an Article III or a magistrate judge, depending on who is assigned to the calendar.

How the calendar would work

The details of a small claims calendar will vary with the circumstances of a particular court and the court's preferences, but here in broad outline is how it might operate:

Establishing the calendar. A court could establish a small claims calendar by local rule or general order; no further authority would be required. Although the use of general orders has been discouraged by the Judicial Conference's Standing Committee on Rules of Practice and Procedure, if the calendar is established as a pilot, and particularly if it has a sunset provision, a general order may be preferable to a local rule. The order could provide for automatic termination of the pilot on a specified date unless renewed by the court.

The calendar could be assigned on a rotating basis to the court's district and magistrate judges, perhaps for a month at a time for each judge. Depending on how the assignment procedure is handled, litigants would not know with certainty what judge will try the case. To show the importance the court attaches to the calendar and to encourage consents, enough district judges (preferably all judges on the court) should participate to have a fair proportion of the trials before an Article III judge. To encourage consents, a court might also consider permitting the parties to stipulate to the judge to hear their case.

The judge assigned to the calendar would set cases as the need appears, as in the case of the motion calendar. For the period that the judge has the calendar, it would be given priority as necessary to achieve a trial date within 30 days of the filing of the consent. Since trials would be brief and since any judge should have the calendar for only a month, this should be feasible.

Although a single court-wide small claims calendar with all judges participating would be preferable, individual judges could establish their own calendars for their cases incorporating features similar to those discussed here. Upon the parties' consent, the judge would offer an early streamlined trial and prompt judgment by either the judge or a magistrate judge.

Jurisdiction. The local rule or order would provide that any civil case may be transferred to the calendar with the written consent of all parties. The amount a plaintiff could recover, and a defendant could lose, in a small claims calendar trial would be capped to induce consent. The cap amount would be specified in the consent form and set by the court in light of local circumstances and preferences. It should be high enough to capture a significant number of small claims cases but low enough to be suitable for adjudication by streamlined procedures. The amount suggested here is $75,000. Neither punitive damages nor injunctive or other specific relief (such as habeas corpus) could be awarded.

Transfer of cases to the calendar. All civil cases would continue to be assigned to individual judges, the assignment remaining in effect until termination. Upon execution by all parties, any case could at any time be transferred to the small claims calendar without further action by a judicial officer. ***223** Parties could consent at any time during the litigation, but early consents should be encouraged to maximize savings in time and money for litigants and to minimize judicial involvement. In some cases the consent might not come until after the parties have been informed about this option by the judge in the initial conference.

Procedures need to be designed with care to ensure that consent will be informed. To avoid manipulation of the process, it is essential that once consent has been given it cannot be withdrawn. The small claims calendar judge hearing the case, however, would have discretion to remand it to the assigned judge if for any reason the case did not appear to be suitable for the calendarif, for example, it appeared to involve a substantial question of law, extensive proof, or complex evidentiary issues.

Pretrial proceedings. Once the consent has been filed, all pretrial proceedings would end except as otherwise agreed by the parties. No discovery would take place except by stipulation. Since the parties have consented to the calendar, they could be expected, though not compelled, to voluntarily exchange relevant documents and make key witnesses available for interviews, and the judge may order such disclosures once the case comes to trial. No motion practice would occur, but parties could agree that specified motions, such as a Rule 12 motion, may first be submitted for a ruling by the assigned judge and that the case would be transferred to the calendar in the event the motion is denied.

Trial. Because an objective of the calendar is early disposition of cases with minimum cost, it should be managed in order to assure consenting parties that their cases will come to trial within 30 days of the filing of the consent. The accelerated schedule would limit the amount of legal activity. Requests for continuances would require the approval of the small claims calendar judge and should be granted only if necessary to prevent injustice. While this accelerated procedure without discovery would not be suitable for many cases, there are others in which the critical facts are well known and the evidence and testimony are readily at hand. Not so long ago, after all, many cases went to trial without discovery. Even now, in a fair number of cases, little or no discovery takes place.

At trial, the parties would appear with all witnesses and exhibits, ready to proceed. Although the rules of evidence

should generally apply, in the absence of a jury the judge would have wide discretion to apply them liberally. The judge should control the proceeding to develop the material facts quickly and bring about a speedy yet fair resolution of the pivotal factual disputes. The judge may issue subpoenas and require the attendance of witnesses and the production of documents if that appears necessary. If legal questions arise that the judge feels unable to resolve promptly and that would delay disposition of the case, the case may be remanded to the assigned judge.

Inevitably the judge's role will be more inquisitorial than usual. There may be times when the judge must assist an unrepresented party in presenting the case. Judges, however, encounter that need even now in cases tried by pro se litigants. To protect the integrity of the proceedings, they should be on the record unless both parties waive it. Formal findings of fact and conclusions of law are waived by the consent, but the judge will be expected to give a statement of reasons for the decision sufficient to help the parties understand the outcome.

Trials would ordinarily be held at the courthouse. But when consents are filed in prisoner cases, trials should be held at the institution to avoid the cost and delay of transporting prisoners and witnesses to court.

Assistance of counsel and others. Since the calendar would be open to all consenting cases, parties may appear through counsel even if the opponent is unrepresented. Represented plaintiffs in civil rights cases would be entitled to recover attorneys' fees subject to the limitation that the aggregate of attorneys' fees and damages may not exceed the specified jurisdictional limit stipulated to as a part of the consent (here suggested to be $75,000). An unrepresented party would be permitted to have the assistance of a lay person where appropriate, for example, when the party experiences language difficulties or otherwise lacks competence, but lay assistants would not be entitled to an award of attorneys' fees. The judge would have discretion to exclude lay people or limit their participation if necessary for the fair and orderly conduct of proceedings.

Appeals. Although the final termination of cases would be expedited and costs reduced if consent also waived appeal rights, waiver of appeal should probably not at first be required since waiver could be a substantial deterrent to consents. While the scope of any appeal would be narrow, given the breadth of the consent and the nature of the proceeding, preserving a measure of protection against serious error at trial may help overcome some of the resistance to the calendar.

Questions to consider

The proposal raises a series of questions that warrant further consideration.

Litigant consent. Ensuring that consent to the small claims calendar is informed is critical. The consent form that litigants would receive must explain clearly and concisely the rights waived: the right to conduct discovery and file motions, to having a trial by jury, to object to entry of judgment by a magistrate judge in the event the case is tried when a magistrate judge has the small claims calendar, and to recover more than a specified amount. The form must explain that the case will go directly to trial before a district or magistrate judge who will control the presentation of evidence at the trial and render a decision promptly. It must give a fair and balanced statement of the advantages and disadvantages of consent. The court would probably need to provide means for responding to questions, such as a pamphlet that answers commonly asked questions; a person (perhaps a volunteer) in the clerk's office to provide information (but not to give legal advice); and, if the numbers warrant, an interactive electronic kiosk or an informative videotape. Parties could also be advised that they can defer giving consent until after the case has been called for an initial ***263** conference (which, in prisoner cases, could be held by telephone), giving them an added opportunity to receive information.

Relationship to ADR programs. ADR is rarely practical or successful in cases brought by prisoners and other pro se litigants, since most are unable to participate in meaningful ways and lack the competence, experience, sophistication, and trust in the system to evaluate their prospects objectively and accept a compromise. Most ADR programs specifically exclude pro se cases since, under the circumstances, ADR would merely add a layer to the litigation, and the neutral's role could be compromised by the need to advise or assist the pro se litigant. Although ADR is suitable for counseled small stakes casessuch as fender bender or slip and fall cases and small commercial casesthat cannot be economically litigated, the small claims calendar could offer an additional option. ADR, though it helps bring many

cases to an early and economical resolution, does not offer a complete answer because it does not lead to final and binding disposition; a dissatisfied party can still pursue adjudication. The small claims calendar offers another alternative: quick, inexpensive, one- stop access to adjudication.

Appeals. Support for a small claims calendar in a district may be sufficient to make it successful even with a waiver of appeal rights. The promise of a quick and inexpensive trial alone may induce parties to waive appeal, particularly since trials will be largely devoted to resolving fact disputes, and there will be little from which to appeal. A district may want to seek the views on this of the bar and other interested organizations, and perhaps of a sample of litigants.

Pro bono legal assistance. It could be argued that providing pro bono legal assistance to indigent litigants is preferable to the "rough and ready" justice of the small claims calendar. But, with some exceptions, the experience of courts that have attempted to provide it is not encouraging. Some districts, usually working with local bar associations, have organized panels of volunteer lawyers or law firms to take cases of people meeting specified standards of indigence whose own efforts to obtain counsel have been unsuccessful. The court may reimburse a limited amount of discovery costs out of a fund created from attorneys' admission or library fees. Lawyers are permitted to withdraw if satisfied that the case is wholly lacking in merit.

The major obstacles to success have proved to be lack of interest among most of the bar and lawyers' well founded fear of malpractice claims brought by disgruntled litigants. Even under the best of circumstances, volunteer legal assistance cannot be expected to provide representation to more than a small fraction of pro se litigants.

The judge's role. Judges trying pro se cases would be thrust into a much more activist role than normal. When a litigant appeared to have a potentially meritorious case, the judge might need to help develop the legal theory and bring out the facts since pro se litigants are often not able to distinguish between what is relevant and what is not. The judge would have to conduct a trial that would not only be expeditious but would also beand be perceived to befair. To keep trials brief, the judge would need to exercise firm control to ensure that the parties streamline their presentations and focus on the issues. The judge might be able to determine quickly that no claim is stated and, if so, promptly dismiss without the need for a motion. If additional facts are needed, the judge might order the parties to produce documents and witnesses. Although the subject of settlement or compromise is likely to come up from time to time, the calendar should not become another settlement conference. It is important that litigants who seek adjudication see the calendar as a legitimate opportunity to obtain it.

Incentives for litigants. A crucial question is whether a small claims calendar would attract cases in sufficient numbers to justify it. Only a pilot program could give the answer. Although in several types of cases one or the other party would not be expected to give consentsuch as cases involving significant questions of law or complex fact disputes, or cases that are frivolous on their face and thus subject to prompt dismissalin many other kinds of cases the calendar should offer an attractive alternative.

Many prisoner cases, for example, involve disputes over a minor altercation, medical treatment, discipline, food, or the conditions in a cell. The prisoner might well be attracted by the prospect of prompt access to a judge who will hear and decide the case, and the chance of recovering up to $75,000. For the lawyers representing the state, the inordinate amount of time and paper work normally required to defend prisoner cases could be reduced. The burden of motion practice and other pretrial activity would be eliminated. The case would be rapidly resolved in a brief trial, in the institution if there are enough cases to warrant holding the calendar there from time to time. The ceiling of $75,000 and the exlusion of injunctive relief limit exposure, and the risk of reversal when a case is dismissed on motion is avoided.

Similar incentives should operate in non-prisoner cases. The cathartic effect of telling one's story to a judge should attract plaintiffs even when the amount of recovery is limited. This was the experience in the claims adjustment process in the Dalkon Shield litigation. Many claimants opted for the lower dollar alternative in order to have an early hearing at which they could tell their story to an arbitrator. Even when the outcome was disappointing the process has given litigants satisfaction. While a represented defendant's first instinct might be to preserve the dubious advantages of technical procedures and delay, the substantial reduction in litigation cost and time and the limit on exposure should encourage some to give the small claims calendar a try.

***264** Even where both sides are represented, the calendar could be attractive. Consider the routine Federal Tort Claims Act case (which would in any event be tried without a jury), the small stakes civil rights claim, or a commercial dispute where the facts indicate that a recovery of much more than $100,000 is unlikely. Lawyers may find it attractive (and profitable) to return to the earlier practice of taking such cases to trial quickly without discovery or motion practice. They, as well as their clients, may well prefer a quick and inexpensive adjudication over having to invest time and effort in non-binding ADR procedures and often frustrating settlement negotiations. With some encouragement, lawyers and clients may come to see the small claims calendar as the most effective vehicle for achieving real reductions in the cost and delay of litigation.

A court considering the establishment of a small claims calendar should make a study of its pro se and small stakes litigation for a representative period to provide a basis for an estimate of the volume and kinds of cases that might be suitable. With this information in hand, the court should seek the reaction of the bar and other groups interested in the types of litigation for which the calendar is designed and solicit their views and suggestions about the various features of the calendar (such as the recovery cap and right to appeal). Since most pro se cases involve an attorney on one side, the calendar must be made sufficiently attractive for lawyers to be willing to consent. Surveying the bar may provide information the court can use to design a scheme that will attract consents.

Incentives for the court. Whether the small claims calendar will bring about a net saving of judicial resources can only be determined after experience with a pilot program. There is reason to believe, however, that it could. Once a case is transferred to the calendar it would no longer require the expenditure of judge and staff time associated with motion practice, discovery management, pretrial conferences, and sometimes lengthy trials. These savings could well exceed the demands on judge time made by trials of cases on the calendar. While some cases might go to trial that would otherwise have terminated in the pretrial phasethough generally only after the expenditure of some judicial resourcesmany cases on the small claims calendar may not go to trial at all since parties would be induced to settle by the imminent and certain trial dateand they may settle sooner than otherwise.

Many pro se cases would still be disposed of by motion because the opponent will not consent when the case is frivolous or the lack of legal grounds is clear. But other cases in which the grounds for dismissal are doubtful could be more efficiently decided by a trial, saving the time and effort the judge and judge's staff must spend to deal with motions and reducing the risk of reversible error.

The unknown in the benefits versus burdens equation is how much time trials will take. The premise of the proposal is that many cases could be tried and decided quicklyperhaps half in about an hour, most of the rest in a morning or an afternoon, and only a few in as much as a day. Some cases could probably be decided in less time than judges now devote to helping parties negotiate a settlement. Experience in state small claims courts, although involving generally simpler cases, suggests that these time estimates may be reasonable. The experience in Rule 16 conferences in which the legal issues and essential evidence in a case can often be fully discussed in less than an hour can also be instructive. For a modest investment of judge time, many cases could be resolved in less than 60 days.

The innate caution and conservatism of the bar is likely to cause the small claims calendar to get off to a slow start. A pilot program would need to allow enough time for the bar to gain experience and build up confidence. However, even if only a few parties consent, the availability of the calendar should have no adverse impact on the court. While nothing will be lost, there could be a gain in increased public approval from the demonstration of the court's commitment to easing access to justice for those with fewer resources.

If the calendar were to become successful, some might say that some of the cases it attracts would not otherwise be filed or, if filed, might otherwise settle. One answer, of course, is that it is the function of the courts to provide access to justice. If the effect of the calendar is to facilitate that, it should not be a ground for criticism. It does not follow, however, that the burden on the court will be increased. The overall demand on judges' time may be decreased due to a decline in pretrial activity. And this may be associated with a decline in the court's caseload, indicating an increase in the speed with which cases are disposed.

A proposal worth trying

Obviously there are unknowns. Answers to the questions posed can come only through carefully designed and controlled pilot programs followed by a thorough assessment of the results. There is reason to believe, however, that a small claims calendar may help the courts deal with the flood of pro se and small stakes civil cases. It also has the potential of being a useful experiment in the administration of justice: Can the courts provide an acceptable quality of justice without some of the procedural encumbrances that now make the civil justice process so costly and slow? Can lawyers and parties, many of whom have themselves objected to the present cost and delay, be weaned from the expensive accouterments of the process?

The small claims calendar is not held out as a panacea, but as an idea worth a try, a try that would cost nothing. It would offer less than perfect justicebut it would offer access to justice where none might otherwise exist. As one commentator has observed, the notion that justice is a pearl beyond price has a price of its own. Logic tells us that striving for perfection of the process tends to diminish its affordability. In Voltaire's words, "the best is the enemy of the good." There may be a need, as Chief Justice Williamm Rehnquist recently noted, for the courts to offer "rough and ready justice" where appropriate. So long as the choice is left to the litigants, giving them this additional option should improve the quality of justice.

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The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

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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

The Federal Judicial Center
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Part I

The Case Management Demonstration Programs

Chapter I

The Western District of Michigan's Differentiated Case Management Program

In response to the Civil Justice Reform Act's designation of the court as a demonstration district, the Western District of Michigan adopted a differentiated case management system in September 1992. That system, also called a tracking or DCM system, is the subject of this chapter.

Like each pilot and demonstration program developed in response to the CJRA, the DCM system in the Western District of Michigan was implemented in part to reduce the time and cost of litigation. However, the court and its advisory group had a number of other goals in mind as well, which are also considered in this examination of the court's program.

This chapter is divided into three main sections. Section A presents our conclusions about the court's implementation of its DCM program and the impact of that program. Sections B and C provide the detailed documentation that supports our conclusions: section B gives a short profile of the district and its caseload, describes the court's DCM program, discusses the process by which the court designed and set up that program, and examines how the court has applied the DCM rules; section C summarizes our findings about the program's effects, looking first at the judges' experience with the program, then at its impact on attorneys, and finally at its effect on the court's caseload.

A. Conclusions About the DCM Program in This District

Set out below are several key questions about the demonstration program in the Western District of Michigan, along with answers based on the research findings discussed in sections B and C. Many of the findings summarized below are based on interviews with judges and surveys of attorneys. While their experiences are essential for understanding the effects of the DCM program, their subjective views should not be taken as conclusive evidence of DCM's actual impact.

How great a change did DCM bring to the district?

The advisory group and judges adopted the DCM program in part because of the statutory instruction to do so. They were not necessarily believers in a tracking system, nor did they think the court particularly needed such a system. The key case management element in the view of the advisory group was the initial case management conference, and they shared with the court the view that most judges in the district were already active case managers. Further, the court was moving its caseload so well that there was doubt it could be improved upon. Consequently, the expectations for change were modest. Nonetheless, the district fully implemented and supported its program, but focused less on litigation time than on other benefits that might come from it.

Four years later, 75% of the surveyed attorneys who had litigated in the district both before and after implementation of DCM think there has been some or a substantial change in the court's management of its cases. The judges, too, reported substantial change. First, one or two judges who did not routinely hold case management conferences in their cases now do so. Second, the court's practices are now uniform across the judges. And third, the automated case tracking system developed to monitor performance of cases on the DCM tracks provides information critical for keeping individual cases and the caseload as a whole on schedule. Having moved from caution to commitment, the court is preparing to incorporate the DCM system into its local rules.

Has the DCM program reduced disposition time in civil cases?

Caseload data show that disposition time in civil cases decreased during the demonstration period, particularly for the non-administrative caseload, where median disposition time dropped from nine months in 1992 to seven months in 1995 and mean disposition time dropped from about twelve months to about nine months. Early in the demonstration period the court terminated cases faster than new cases were being filed; more generally, the court has been able to terminate more cases at the very earliest stage. While the DCM program may be a cause of these improvements, we cannot say so with certainty, as there are several other possible explanations, including CJRA reporting requirements, the addition of a temporary judgeship, and the court's tickler system, which closely monitors the answer period.

Only a slight majority of attorneys said the DCM system as a whole expedited their cases, with most of the remaining attorneys saying it had no effect on time. Nearly two-thirds of the attorneys, however, reported that several specific DCM components helped move their cases along. These were the early case management conference with the judge, the judge's case management order, and the opportunity DCM provides for more contact with the judges. The practice most helpful in moving cases along, attorneys reported, was use of the telephone for conferences with the court.

Has the DCM program reduced litigation costs in civil cases?

As with disposition time, a majority of attorneys reported that DCM either reduced litigation costs or had no effect on costs, but the percentage reporting a positive effect was substantially less than those reporting a positive effect on litigation time. Cost savings were most likely to come from use of the telephone for court conferences, more contact with the judges, and the early case management conference.

More attorneys—though still a small minority—reported increased costs from DCM than reported increased litigation time. Increased costs were most likely to arise from the court's paper-work requirements, the attorneys' joint case management report, the judges' handling of motions, and the court's requirement that a party with settlement authority attend settlement conferences.

What other benefits has DCM brought to the court?

Both attorneys and judges identified a number of benefits other than reductions in time and cost. For the judges, the greatest benefit has been increased uniformity in case management across the judges. The judges also find DCM effective for giving close attention to each case, involving attorneys in case management decisions, using ADR more effectively, allocating judicial time effectively, and deciding motions promptly.

Attorneys noted the assistance DCM provides for planning their case and for staying aware of deadlines, but their written comments highlighted in particular the critical importance of contact with the judges for disposing of litigation expeditiously. The primary forum for such contact is the case management conference.

Although not a consequence of DCM per se, the judges also noted the benefit of going through the process of designing and implementing the DCM system. In doing so, they were able to discuss and examine the practices of each judge and adopt the features of each that seemed most promising.

Are particular kinds of cases more likely to be assisted by DCM?

The attorneys most likely to report that DCM moved their case along were those whose cases had been referred to ADR and those in cases with low to medium levels of factual complexity and formal discovery, lower monetary stakes, higher agreement between the attorneys on the issues involved, less contentiousness in the attorneys' relationship, and a low to medium likelihood of trial. The same pattern was generally true for litigation costs, except that referral to ADR was less likely to be associated with lower costs. Where a case was complex or contentious, attorneys were more likely to report that DCM increased costs. The DCM system in this district appears to be most effective, then, for standard or average cases.

Are certain case management practices more effective than others?

Our study suggests there is an identifiable cluster of case management practices that attorneys believe move litigation along and decrease costs. Those practices most likely to be seen as having beneficial effects on both are use of the telephone for conferences with the court, the initial case management conference, and more contact with the judges. Both judges and attorneys emphasized the critical importance of the initial case management conference.

How judges handle motions is also an important factor in litigation time and cost. Many attorneys reported that the judges' practices had a beneficial effect, but sizable minorities reported negative effects, suggesting the critical role judges' motions practices play in the progress of litigation. Although the wording of the question did not permit identification of specific judicial practices regarding motions, attorneys' written comments suggest litigation is delayed and costs rise when rulings on motions are delayed.

Two other requirements—that parties with settlement authority attend settlement conferences and that attorneys file a joint case management report before the case management conference—

also cut both ways, with more than half of the attorneys reporting that these requirements move a case along but sizable minorities reporting that they increase costs.

From the attorneys' perspective, paperwork requirements are a significant factor in increased costs and time, a finding that holds across all types of cases and attorneys. The question wording on the survey did not include any specific paperwork requirements, nor did attorneys identify any specific requirements in their written comments.

How is a system of case management tracks different from individualized judicial case management?

The judges generally acknowledged that there is little difference between a tracking system and individualized judicial case management except that a formal tracking system provides two additional benefits. First, it provides information to attorneys about how their case is likely to be managed, so they can better plan their case and so they are better prepared for the initial case management conference. Second, tracks provide a set of performance standards for each judge and the court as a whole to monitor how closely they are adhering to the court's disposition goals.

Although few attorneys reported detrimental effects from placing cases on case management tracks, a number of written comments noted that judges must take care not to apply the system rigidly. Sometimes, they said, it is appropriate to vary the track requirements or reassign a case to a different track if case developments reveal such a need. These concerns echo those of the advisory group that DCM not be applied by rote and the concerns of some judges that the measures of court performance not constrain judges from doing what is right for a case.

B. Description of the Court and Its Demonstration Program

Section B describes the demonstration program adopted by the Western District of Michigan in September 1992. To provide context for the rest of the chapter, it begins with a brief profile of the court's judicial resources and caseload. It then describes in detail the steps taken by the court to design, implement, and apply its DCM system.

1. Profile of the Court

Several features of the court are noteworthy for an understanding of its implementation of DCM and the impact of the program on the district: the stability of the bench and the civil caseload during the demonstration program; the court's decision in 1995 to request that a temporary fifth judgeship not be made permanent; the relatively low caseload per judgeship; and the very large portion of the caseload made up of prisoner petitions.

Location and Judicial Resources

The Western District of Michigan is a medium-sized court, with a main office in Grand Rapids and divisional offices in Lansing, Kalamazoo, and Marquette. The three offices in the southern part of the district each have at least one resident district and magistrate judge; the distant office in the northern part is served by a magistrate judge and periodic visits by a district judge.

In the year before the court became a demonstration district it was allocated a temporary fifth judgeship, having had four judgeships throughout the 1980s. The new judgeship, plus another that had been vacated by a judge taking senior status, were filled during the time the court was designing its demonstration program. The court's four magistrate judges also have been with the court since before the demonstration program began. During the demonstration period, then, the court's bench has been stable, with a change in the chief judge and clerk but no judicial vacancies, retirements, or changes from active to senior status.

In addition to the active district and magistrate judges, the court's two senior judges each carry 25% of a regular caseload. The court is noteworthy for having asked in 1995 that the temporary fifth judgeship not be made permanent by Congress.

Size and Nature of the Caseload

During the decade leading up to the demonstration program, the court's caseload nearly doubled, from 1,053 cases in FY80 to 2,030 in FY90.[16] About the time the program was implemented, however, the overall caseload and civil caseload dropped, with the civil caseload only recently returning to about the same level it was before the program began (see Table 12). Criminal felony filings on the whole have risen during the demonstration period. The court has not, however, seen caseload increases during the past five years that even approach the increases experienced during the 1980s. Like the court's judicial resources, then, its overall caseload has for the most part been stable throughout the court's experiment under the CJRA.

Table 12
Cases Filed in the Western District of Michigan, FY90-95[17]

Statistical Year	Cases Filed			Filings Per Judgeship	
	Total	Civil	Felony Criminal	Actual	Weighted
1990	1,909	1,753	156	477	374
1991	1,889	1,704	185	378	327
1992	1,791	1,621	170	358	305
1993	1,884	1,664	220	377	351
1994	1,894	1,684	210	379	355
1995	1,967	1,746	221	393	379

[16] Source: Annual reports of the director of the Administrative Office, 1980 and 1990.

[17] Source: Administrative Office of the U.S. Courts, Federal Court Management Statistics, 1995.

While case filings tell us something about demands on a court, a better measure is the court's weighted filings per judgeship, which takes into account the relative demand of different types of civil and criminal cases. As Table 12 shows, the court's weighted filings are somewhat less than its actual filings. Parallel with the drop, then rise, in civil case filings, the weighted filings dropped, then rose during the demonstration period. Nonetheless, the court's weighted filings remain well below the national average of 448 cases per judgeship in FY95.

The court's relatively low-weighted filings can be explained to some extent by the makeup of the civil caseload. Table 13, which identifies the principal case types filed in the district, shows that prisoner petitions—a low-weight case type—make up by far the single largest group of cases filed in the district. The court's 49% is substantially higher than the national average of 26% and is due in part to the large number of prisons in this district. The remainder of the court's caseload is made up of the same principal case types as most district courts, though proportionally its other case type filings are below the national averages due to the high number of prisoner cases. The court's caseload mix has remained quite stable since the late 1980s.

Table 13
Principal Types of Civil Cases Filed, Western District of Michigan, FY95[18]

Case Type	Percent of Civil Filings
Prisoner Petitions	49.0
Civil Rights	14.0
Torts	8.0
Contract	7.0

Unlike some of the demonstration programs, the program adopted by the Western District of Michigan applies to all case types. Thus, our examination of DCM's effects includes the entire spectrum of civil cases.

2. Designing the Demonstration Program: How and Why

The statutory obligation of this court and its advisory group was to "experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time-frames for the completion of discovery and for trial" (Judicial Improvements Act of 1990, Title 1, Sec. 104). Below we describe their work, relying on the advisory group's report to the court and on interviews with advisory group members, court staff, and judges.[19]

[18] *Id.*

[19] For a description of our research and data collection process, see Appendix A.

Issues Considered and Recommendations Made by the Advisory Group

The initial design of the court's differentiated case management program (DCM) was prepared by the advisory group and three consultants, who were assisted by a full-time, temporary staff of four persons. Using interviews, questionnaires, and examination of docket information, the consultants and staff developed a profile of the district's caseload and gathered other information for determining how many case management tracks should be created and what the track requirements should be.

In the course of their analyses, the advisory group and consultants made several findings about the court's caseload and management practices. Since 1987, they found, the court had been terminating cases faster than new cases were being filed, which had eliminated a substantial backlog.[20] The group found as well that the court's median disposition time was below the national average, and that only 4% of the district's civil cases had been pending for more than three years, leading them to conclude that "litigation is not excessively delayed" in this district.[21] The advisory group also found that the judges received effective support from the magistrate judges, court staff, and an advanced automation system.[22]

Among the methods used by the court in managing its caseload, the advisory group noted, was extensive use of alternative dispute resolution methods. About half of the personal injury and personal property cases were referred to one of the court's ADR programs, as were about one-third of contract and civil rights cases.[23] While attorneys in the district were thus very familiar with ADR, the advisory group was concerned that its use had become perfunctory and that some changes might be necessary.

Although the court's resources and its caseload appeared to be in good condition, the advisory group was concerned that litigants might be experiencing excessive litigation costs and delay that they as an advisory group did not perceive. In interviews with attorneys and litigants, however, they found few who believed costs or delays were too high, but they did find several areas in which case management might be improved: use of reasonable deadlines, such as sixty days, for rulings on motions; more discriminate use of ADR, with attorney participation in deciding whether one of the court's ADR methods should be used; greater use of the telephone to decide motions; and case-by-case, rather than mandatory, participation of clients in Rule 16 conferences.[24]

In addition, attorneys and litigants voiced substantial concern about two problems: the trailing trial calendar, which they said might span one to two months and led to unnecessary trial preparation, and the absence of limits on discovery, which led to excessive numbers of depositions, interrogatories, and requests for admission. Both problems were seen as causing higher-than-

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[20] Report of the Advisory Group of the United States District Court, November 22, 1991, p. 13.

[21] *Id*, p. 35.

[22] *Supra*, note 20, pp. 18, 19, 40, and 69

[23] *Supra*, note 20, p. 36.

[24] *Supra*, note 20, pp. 89-91.

necessary costs and prompted the advisory group to recommend changes. Regarding discovery in particular they stated, "[I]t is imperative that each judge embrace the case assigned to him at the earliest possible moment to provide both direction and management to litigants in all aspects of discovery."[25]

At the same time, the advisory group noted that most of the judges had historically taken an active role in case management, using Rule 16 conferences where appropriate and developing, in effect, a system of differentiated case management. In some senses, said one advisory group member, DCM was "already up and running when the statute was passed" and the group did not expect the new program to lead to great changes. In this context, their goal became to give shape to already existing practices by providing judges and attorneys guidelines—or tracks—for determining how much management each case should receive.

To determine the appropriate number of case management tracks and their requirements, the advisory group, through its consultants, examined the behavior of different types of cases in the past. They found that cases tended to clump into various categories by disposition time, and they therefore recommended six case management tracks based on the length of time and amount of judicial involvement needed for resolving cases. To encourage consents to trial by magistrate judges, the advisory group recommended that access to the fastest track be permitted only on consent to magistrate judge jurisdiction. And, at the recommendation of its consultants, the advisory group created a seventh track to which 10% of cases would be randomly assigned to create a control group for research purposes.

For each track, the advisory group recommended a time frame for resolution of the case, described the characteristics of cases appropriate for that track, recommended whether case management conferences, case management orders, and ADR should be used, and commented on likely discovery needs. The group did not, however, recommend specific limits on interrogatories and depositions because they felt these limits should be established after the court had had some experience with tracking.

Throughout its discussions the advisory group was concerned that track assignments not be made automatically or on the basis of case type. In fact, except for the statutory requirement to adopt a tracking system and the consultants' recommendation that tracking would provide a method for measuring success in case management, it is not clear the advisory group would have recommended tracks. The most important case management tool in their view was the initial Rule 16 conference, and they emphasized the role of the judge in determining, with attorney participation, the appropriate management of each case. To forestall assignment of cases by "rote formula," the group made their views explicit in their report to the court. The single most important element in effective case management," they wrote, "... is the prudent exercise of sound judicial discretion ..."[26]

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[25] *Supra*, note 20, p. 120.

[26] *Supra*, note 20, p. 133.

In giving shape to existing practices through a system of differentiated case management, the advisory group hoped not so much to improve litigation timeliness, which they had not found to be a problem, but to increase uniformity among the judges in case management, increase predictability in case handling, involve attorneys and litigants in case management decisions, and maximize the use of judicial resources.[27] And in their recommendations that judges limit the trailing calendar and constrain discovery, they hoped to improve the two areas in which they thought litigation costs might be too high.

The Court's Role and Goals in Designing the DCM System

During the advisory group's development of the DCM plan, a liaison judge and the clerk of court represented the court's views to the group. Upon receipt of the advisory group's recommendations, the court accepted the basic plan of seven tracks and the requirements for each track but made one major change. Just before the plan was implemented, the court decided, in response to advice from an outside review panel, to adopt specific numerical limits on interrogatories and depositions.[28] The court had not considered such limits in prior discussions and the suggestion prompted vigorous debate, but ultimately specific limits were added to each track.

The court also did not accept the advisory group's recommendation that the trailing docket be abandoned. In the court's view, setting multiple cases for a trial term was a far more efficient use of court time than setting a single trial for specific dates. The court nonetheless promised to try to shorten the elapsed time of the docket, set fewer cases on it, and use fixed trial dates whenever possible.[29]

Among the elements of the plan that were readily accepted by the judges was the move from mandatory ADR to a case-by-case determination of ADR's suitability. Like the advisory group, the judges were concerned that the court's ADR programs had become ineffective through indiscriminate use, including multiple referrals to ADR. Thus, with adoption of the DCM plan, the court's ADR programs became voluntary (except for a specific class of cases governed by Michigan law).

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[27] *Supra*, note 20, pp. 128-129.

[28] The Civil Justice Reform Act instructed the Judicial Conference of the U.S. Courts to review the cost and delay reduction plans established by the district courts (28 U.S.C. § 474(b)). Oversight of CJRA implementation has been the responsibility of the Conference's Court Administration and Case Management Committee, which reviewed the DCM plan in Michigan Western and reported its assessment in a letter from the then-chair Judge Robert M. Parker. The letter, dated July 30, 1992, stated that the "committee ... believes limits on the number of discovery requests, interrogatories, and depositions should be considered in conjunction with limits on the length of time to complete discovery." Letter on file at the Federal Judicial Center.

[29] Differentiated Case Management Plan of the United States District Court for the Western District of Michigan. December 18, 1991, p. 5.

Although the judges accepted the DCM plan and the idea of using case management tracks, they were not sure it would bring substantial change to the court. Like the advisory group, nearly all the judges reported that the court had already been actively managing cases. "We've only renamed what we've been doing," said one judge. Several judges also noted that the court had no civil backlog and a small criminal caseload and thus was not unduly burdened. Consequently, they expected it would be hard to see a measurable change in the condition of the court's caseload after DCM implementation. Several judges expressed some concern that in fact the system might increase cost through more paperwork requirements and disputes over discovery limits.

At the same time, the judges were not opposed to tracking and hoped it would achieve several goals, including, said about half, a reduction in litigation time and cost through early attention to cases and control of discovery. About half the judges also said they supported DCM because one of its purposes was to place case management firmly in the control of the judges rather than the lawyers. A third purpose, noted by three judges, was to serve the public better through standardization of the court's practices and thus greater predictability. Several judges also said the court hoped DCM would give attorneys more contact with the judges so problems could be worked out informally. Finally, several judges noted that one reason the court accepted a tracking system was the consultant's argument that by placing cases on tracks the court would be able to measure performance of the court's case management practices.

3. Description of the DCM System

The court adopted its *Differentiated Case Management Plan* on December 18, 1991, effective September 1, 1992, for cases filed on or after that date.[30] This plan, which is described below, was issued as a general order on September 1, 1992, and has been amended through several subsequent general orders, which remain the court's local authority for DCM.

The System of Case Management Tracks

The DCM plan provides for six case management tracks, each with its own guidelines and time-frames for discovery and trial. The plan also established a seventh, non-management track, to which 10% of the court's filings were randomly assigned to create a control group for research purposes. The tracks are listed in Table 14 (next page), along with their requirements and several characteristic features of cases on each track.

Although the DCM plan sets out specific requirements for each track, including a fixed number of interrogatories and depositions, these requirements are guidelines only and may be modified by the judge at the Rule 16 scheduling conference or upon motion made later in the case. This is in keeping with the advisory group's strong recommendation against rote assignment to tracks.

[30] Pursuant to the Civil Justice Reform Act (28 U.S.C. § 474), the court's plan was reviewed and approved by the Judicial Conference and a committee of judges in the Sixth Circuit.

Table 14
Differentiated Case Management Tracks, Their Requirements, and Typical Characteristics of Cases Assigned to Each Track
Western District of Michigan

Track	Requirements and Case Characteristics
Voluntary Expedited	9 months from filing to termination Parties must waive right to Article III judge if case goes to trial; therefore assignment is voluntary with full consent of all parties Voluntary exchange of discovery encouraged Discovery completed within 90 days after Rule 16 scheduling conference 2 fact witness depositions 15 single-part interrogatories per party Few parties Few disputed legal or factual issues Small monetary amounts Use of ADR unlikely
Expedited	9-12 months from filing to termination Discovery completed within 120 days from Rule 16 scheduling conference 4 fact witness depositions 20 single-part interrogatories per party Few parties Few disputed legal or factual issues Selective use of ADR
Standard	12-15 months from filing to termination Discovery completed within 180 days from Rule 16 scheduling conference 8 fact witness depositions 30 single-part interrogatories per party Multiple parties Third party claims, multi-count complaints A number of disputed factual or legal issues ADR will almost always be used
Complex	15-24 months from filing to termination Series of case management conferences likely Discovery completed within 270 days from Rule 16 scheduling conference 15 fact witness depositions 50 single-part interrogatories per party Large number of parties Complicated issues ADR will almost always be used

Table 14, con'd

Track	Requirements and Case Characteristics
Highly Complex	24 months from filing to termination Pretrial schedule and discovery limits are at judge's discretion Series of case management conferences likely
Administrative[31]	Normally determined on pleadings or by motion Terminated within 180 days after dispositive motions are fully briefed or case is otherwise ready for disposition 15 interrogatories 5 requests for documents No depositions without consent of the judge Social security cases, bankruptcy appeals, habeas corpus, etc.
Non-DCM[32]	10% of civil caseload not assigned to a track to serve as control group for research purposes Randomly assigned at filing Minimal court-initiated management Parties may request additional management, including assignment to a track

Except for cases on the administrative and minimally managed tracks, which are assigned by the clerk's office, the track assignment is made only after the judge has considered the views of counsel and independently reviewed the case. When the DCM program began, counsel were required to file a Track Information Statement (TIS) with their complaint or first responsive pleading to allow the judge to assess the case and counsel's recommended track assignment in preparation for the Rule 16 scheduling conference. The TIS proved not to be useful, and the local rule requiring it was suspended in April 1994. To make the track assignment, the judges now use the attorneys' joint status report and discussions held at the first Rule 16 conference.

Attorneys' Joint Status Report

At least three days before the first Rule 16 conference, attorneys must file a joint status report prepared in accord with the Order Setting the Rule 16 Scheduling Conference, which is issued upon completion of responsive pleadings. The order directs counsel to address a number of matters in the joint status report, including their claims and defenses, the names of witnesses, a date for discovery completion, any limitations that may be placed on discovery, whether some form of ADR should be used, the prospects for settlement, and their recommended track assignment. The order instructs counsel that all dates they recommend must correspond to the deadlines established by the track they

[31] In November 1993, through an order amending the DCM plan, limits on discovery were added for this track.

[32] The court voted on September 27, 1996 to abolish the non-DCM track as of October 1, 1996.

propose. It also allows them to set forth special characteristics that may warrant extended discovery, accelerated disposition by motion, or other factors relevant to the track assignment they propose.

Because the court decided not to implement all the amendments of Fed. R. Civ. P. 26, attorneys are not required as part of their preparation for the Rule 16 conference to automatically disclose discovery information or hold a Rule 26(f) meeting before beginning discovery. After revision of Fed. Rule Civ. P. 26 in December 1993, the court authorized its judges to apply the rule amendments in individual cases at their discretion.

Initial Rule 16 Scheduling Conference

The court's DCM plan initially directed that the Rule 16 scheduling conference be held in all cases (except those on the administrative and minimally managed tracks) within thirty days after receipt of the last defendant's first responsive pleading. When the court found that this left too little time to schedule the conference and for counsel to prepare, the timing for the scheduling conference was changed in December 1993 to forty-five days after filing of last defendant's first responsive pleading. Because the court follows the time frames permitted in Fed. R. Civ. P. 4 and 12 for service and answer, the case management conference may occur anywhere from forty-five to 225 days after filing.

The DCM plan states that the conference will be held pursuant to Fed. R. Civ. P. 16 but does not spell out the specific topics for discussion. The order scheduling the conference states that the purpose of the conference is to review the joint status report and explore expediting the case by establishing early and ongoing case management; discouraging wasteful pretrial activity; facilitating settlement; establishing an early, firm trial date; and improving the quality of trial through thorough preparation. After the Rule 16 conference, a case management order is issued. The order states the track assignment; sets a number of dates, including dates for trial, completion of discovery, filing of motions, and the final pretrial conference; identifies whether ADR will be used; and sets out matters to be addressed in the final pretrial order.

Below is a time line setting out the schedule for pretrial events in the Western District.

Table 15
Time Line for Pretrial Events
Western District of Michigan

Event	Timing
Court issues order setting Rule 16 scheduling conference	Upon filing of last defendant's first responsive pleading (0-180 days after filing)
Counsel file joint statement	3 days before Rule 16 scheduling conference held
Court holds Rule 16 scheduling conference	45 days after filing of last defendant's first responsive pleading (45-225 days after filing)

Methods for Monitoring Schedules

To enable the court to assure timely disposition in all cases, the court adopted a new local rule as part of its DCM approach that permits the judge to issue an order to show cause why a case should not be dismissed for lack of prosecution or for failure to comply with local or federal rules (Local Rule 33). To make the rule effective, the DCM plan calls for a computerized reporting system to monitor all case management deadlines.

The plan also directs the court to develop standardized court orders, notices, and other forms to promote uniformity throughout the district and to increase efficiency and accuracy in docketing.

Alternative Dispute Resolution

Each of the DCM tracks predicts the likelihood that ADR will be used for cases on that track. For cases on the standard track, for example, ADR use is highly likely while it is very unlikely for cases on the voluntary expedited track. The DCM plan expects counsel to address the suitability of ADR in their joint status report and each judge to explore the use of ADR at the Rule 16 scheduling conference.

The court's local rules provide several ADR options and state that "[t]he judges of this District favor initiation of alternative formulas for resolving disputes, saving costs and time, and permitting the parties to utilize creativity in fashioning noncoercive settlements" (L.R. 41). The court has two long-standing ADR programs, the nonbinding, mandatory arbitration program established in the 1980s as a federal court pilot project and the case valuation program patterned after a state program.[33] Since adoption of DCM, arbitration is no longer mandatory but is offered as one of the court's ADR options.[34] The court's third and newest program is a facilitative mediation program, implemented in January 1996 and adopted because the court wanted to provide a true facilitative mediation option.[35]

Local rules spell out the procedures for the use of arbitration (L.R. 43) and case valuation (L.R. 42), including how cases are selected and referred, whether written materials must be submitted, who must attend ADR sessions, what fees must be paid, and what degree of confidentiality is required. The voluntary facilitative mediation program has not yet been incorporated into the local rules; its

[33] The case valuation program, also called Michigan Mediation, provides parties a hearing before three neutrals who place a value on the case. It is mandatory for certain diversity cases in which the rule of decision is provided by Michigan law.

[34] The court initially established its arbitration program as one of the ten mandatory arbitration pilot programs authorized by 28 U.S.C. §§ 651-658. Under DCM, with its voluntary use of arbitration, the court no longer maintains the program authorized by the statute. The mandatory program was included in the Federal Judicial Center's study of the ten mandatory arbitration programs. See B. Meierhoefer, Court-Annexed Arbitration in Ten District Court. Federal Judicial Center, 1990.

[35] In contrast to the court's "Michigan mediation" program, where a panel of three neutrals give parties an evaluation of the case's value and likely outcome if adjudicated, the "facilitative" mediation program provides a single neutral who assists parties with negotiations.

procedures are set forth in an order entered in the specific case, with the program description attached to the order. An arbitration/mediation deputy clerk manages the ADR programs.[36]

4. Implementing and Maintaining the DCM System

Once the court and advisory group had designed the DCM system, it became the task of the court to put it into place. Both court staff and judges were deeply involved in this process.[37]

The Role of Court Staff and Judges

As the advisory group and court developed the DCM plan, the court took a number of steps to make sure the new system would be fully and smoothly implemented. The court first created a DCM task force made up of each judge's case manager and courtroom deputy, representatives from the clerk's office, the automation systems administrator, and the DCM coordinator, a new position created by the court for the purpose of establishing and monitoring the DCM system.[38] To assist the task force, the court retained two consultants who had extensive experience in developing DCM systems in state courts.

The task force examined the implications of DCM for the court's internal procedures and for its communications with attorneys. The outcome of these efforts, in conjunction with the judges' policy decisions about track requirements, resulted in adoption of standardized forms and orders by all chambers. For both judges and staff, this outcome was unexpected and has been one of the primary benefits of the DCM system. It was achieved in large part by the judges' willingness to examine their practices and be flexible, but it was aided as well by participation of the judges' case managers in the DCM task force. Through the task force meetings, the case managers developed a consensus on the most effective methods and forms for carrying out their work and were able to receive the judges' approval of them. Another factor in prompting standardization was the court's commitment to monitoring the effects of the DCM system, which required that each chambers agree to submit standardized information.

From the beginning of the implementation process, the court paid particular attention to the need court staff and judges would have for adequate information about and participation in the development of DCM. To introduce the basic DCM system design and to make sure all personnel could discuss and influence its effect on their work, the court held a two-and-a-half day workshop for all judges and court staff several months before DCM's effective date. A second meeting was held during the first week of DCM operation to make sure everyone was familiar with the final

[36] Local Rule 44 provides for several additional forms of ADR—summary jury and bench trials, mini-hearings, and early neutral evaluation—which are infrequently used.

[37] This section is based on interviews and the court's 1994-1995 CJRA annual assessment, United States District Court for the Western District of Michigan, Annual Assessment, September 1, 1994-August 31, 1995, pp. 2-5.

[38] When the work of the temporary staff hired for the advisory group's study of the district was completed, a member of that staff became the DCM coordinator.

design and procedures. At the end of the first year of operation, a third meeting was held to discuss system performance and assess the need for modifications. Each meeting was attended by all court personnel, including the judges, and the members of the court's advisory group. This process of full-court meetings and participation in the procedural design is seen in retrospect as critical to the smooth transition to DCM when it took effect on September 1, 1992.

Once the DCM system was in place, the court established a DCM Implementation Committee to monitor the system's performance. The committee, which is made up of one district and one magistrate judge, the clerk of court, the advisory group chair, the DCM coordinator, and the systems administrator, meets regularly to review statistical information about the DCM system's performance. They examine, for example, such matters as the percentage of initial Rule 16 conferences held within forty-five days of responsive pleadings and the percentage of cases terminated within each track's guidelines. They investigate the cause of any anomalies they see and suggest changes as needed. The committee also proposes changes in the standardized orders to keep them uniform. And the committee monitors attorney reaction to the DCM system through a questionnaire sent at case closing and reports all of its findings, both those from the questionnaire and those based on the court's routinely kept statistics, in the court's CJRA annual assessment.

The implementation of DCM did not change in fundamental ways the role of clerk's office or chambers staff, but it has added several new elements to their routines. The docketing clerks, for example, now screen cases for assignment to the administrative track and also make some additional docket entries. The case managers' role also remains unchanged for the most part, but their centrality to monitoring the flow of cases has given the position greater status. In fact, had it not been for the already-existing position of case manager, several judges and court managers said, the court probably would have had to redefine staff roles to create such a position.

From the outset, the court's automation staff has played a particularly central role in implementation and maintenance of the DCM system. To permit monitoring of the system and to provide judges the information they would need to enforce case deadlines the staff developed a sophisticated computer tracking system. This system not only provides monthly status reports on each judge's pending cases, but through an automated tickler system generates daily reminders to the case managers about case-related events and deadlines that must be satisfied each day. Among the messages delivered by the tickler each morning might be the following: "It is 90 days after the complaint was filed in 96-cv-0000. Defendant has not yet been served. Please do Notice of Impending Dismissal to plaintiff." This system has made it much easier for staff to ensure that all events in each case are timely.

Although nearly everyone who participated in DCM's implementation attested to the hard work involved, there was little question they viewed it as worthwhile. One of the most useful parts of designing the system was the process itself, which prompted the judges to discuss their practices with each other and draw on the best of each. On the whole, the court seemed surprised at how smoothly implementation had gone, a success they attributed to the small size of the court, which permitted involvement by everyone; the already-existing position of case manager; the critical assistance of the automation staff; the DCM's coordinator's role in guiding the development of

forms and new routines; the two DCM consultants, who helped the court understand what a DCM system is and requires; and, not least, the willingness of the judges to try other procedures.

Forms Used by the DCM System

Development of standard forms and orders was a central part of the implementation process. Nearly two dozen forms, including the automated tickler system notices, were either developed or standardized as a direct result of DCM. (Altogether, more than sixty forms and orders, including several criminal orders, were standardized during the implementation process.)

The management of cases rested until recently on three principal forms. (See Appendix B for copies of the forms.) Two were used early in the case to inform attorneys of their obligations regarding the initial Rule 16 conference with the court. One, the Notice of Assignment to Non-DCM Track, notified attorneys in that 10% of the caseload that judicial involvement in the case would be minimal and that responsibility for bringing issues to the assigned judge's attention would lie with the attorneys. With the recent elimination of the non-DCM track, this form is no longer in use. The second form, the Order Setting Rule 16 Scheduling Conference, notifies attorneys in the remaining cases that the case is subject to DCM, gives them the date of the conference, and instructs them in the items to be addressed in their joint status report to the court. The court also uses a third form, the standard case management order issued to parties after the initial Rule 16 conference, which sets out the track assignment; dates for trial, discovery cut-off, and filing of motions; the ADR referral, if any; and instructions for preparing the final pretrial order.

Education of and Input by the Bar

Throughout the design and implementation process, the court and its advisory group used a variety of mechanisms for keeping attorneys informed about the changes underway and to hear their ideas. Press releases and a brochure about the DCM system were distributed and talks were given at local bar and legal secretaries' meetings. The federal bar association and court held a seminar to introduce DCM to the bar, and the court developed an informational packet to give to attorneys upon admission to practice in the court.

To provide the bar another opportunity for input regarding DCM, the court has used a short questionnaire to ask attorneys how satisfied they are with the use of DCM in their cases. Until recently, the questionnaire was sent to all attorneys upon termination of their case, and about 80% returned it, providing the court an abundance of information about attorney reactions to DCM.[39] Because the questionnaire, after four years in use, became burdensome to the court and attorneys, it is now sent to a stratified random sample of terminated cases.

Problems in Implementation

If there was any area in which implementation did not proceed smoothly it was in the matter of discovery limits. When the court decided, just a few weeks before DCM's effective date, to add

[39] For a discussion of the findings from this questionnaire, see the court's 1994-1995 CJRA annual assessment, *supra* note 37.

numerical limits on depositions and interrogatories, the bar was caught by surprise. The advisory group, one member noted, was not consulted, which "caused hard feelings." Another advisory group member said there was an outcry from the bar about imposition of rigid rules rather than a case-by-case approach to discovery. In the end, the adoption of limits turned out to be more of a public relations problem than a real problem, but the last minute change gave the program a rocky start.

The judges agreed that the late inclusion of discovery limits was, in the words of one judge, "a public relations disaster." If the court had had more time to explain it to the bar, he felt, the problem might have been avoided. Because the court has traditionally respected the bar's professionalism and sought their advice, another judge said, the abrupt decision, with its implications of bar irresponsibility regarding discovery, was felt as a particular sting. Over time, both the court and advisory group members said, the problem eased as the judges made it clear that they intended to use the discovery limits as guidelines, not as rigid rules.

The Budget for DCM

Because the court relied heavily on consultants and additional temporary staff during the design and implementation of DCM, its costs during the first two years were substantial, as Table 16 shows. During these first two years the court also had substantial costs for upgrading its computer system, for providing office space for the temporary staff, for education of the bar, for travel of the advisory group and staff, and for printing and postage related to the court's educational efforts. Funds for these expenditures were acquired under the CJRA; as a demonstration district, the court could receive additional funding.

Table 16
CJRA Expenses, Fiscal Years 1991 to 1996
Western District of Michigan

FY	Consultants	Travel	Supplies#	Space	Automation	Training	Staff	ADR	Total
1991	$30,291	$3,597	$10,831	$5,715	$24,000*	$0	$17,741	$0	$92,175*
1992	$99,794	$19,101	$26,754	$22,860	$11,000*	$21,018	$131,490	$0	$332,017*
1993	$31,233	$6,661	$10,693	$5,715	$661	$160	$89,762	$0	$144,885
1994	$17,202	$4,844	$1,948	$0	$292	$745	$83,118	$0	$108,149
1995	$12,819	$3,363	$2,432	$0	$600	$0	$92,884	$3,219	$115,317
1996+	$1,257	$0	$1,663	$0	$0	$0	$84,290	$0	$87,210
Total	$192,596	$37,566	$54,321	$34,290	$36,553*	$21,923	$499,285	$3,219	$879,753*

\+ As of 9/1/96
\# Includes supplies, furniture, printing, postage, and telephone.

* Approximate

Compared to the costs for designing and implementing DCM, the court's costs for maintaining the system are much smaller. The largest, and almost only, costs in the current calendar year are the salaries of the DCM coordinator and DCM secretary. Small expenses have been incurred for supplies and postage, principally for sending out the attorney questionnaires and for consultation with the DCM experts who helped the court design the system. In 1995 the court experienced its only ADR-related expenditure when it hired two consultants to train neutrals appointed to serve in the new facilitative mediation program.

In providing these budget figures, the court noted that its early expenditures were incurred largely because the court had to develop its demonstration program under tight time constraints and turned to experts to assist with that task. For a court not under such constraints, the court noted, developmental costs could be much less. Further, the court noted, the expertise developed by the court could well substitute for the assistance of consultants. In fact, the Michigan Western staff has already assisted several courts.[40]

5. The Court's Application of the DCM Rules

Court Application of and Attorney Adherence to the Rules

In interviews in the spring of 1996, almost four years after DCM implementation, all of the district and magistrate judges said DCM was still fully operational in their chambers (as they had reported in 1993). For one or two of the judges, the move to DCM meant considerable change in their practice because of the requirement to hold a Rule 16 conference in all eligible cases. Yet all do hold that conference, as well as assign cases to tracks and issue case management orders in every eligible case.

The judges said the attorneys, too, for the most part comply with the DCM requirements. Most, for example, submit the joint status report prior to the Rule 16 conference. While the judges said attorneys with federal court experience generally provide a better report than those with no experience, the judges on the whole find the attorneys' compliance satisfactory and the reports useful. The judges also find that attorneys are now usually prepared to discuss the case at the Rule 16 conference. At the outset, said one judge, it was hard to convince the bar that they had to be prepared for this conference, but that is rarely a problem today. He said it took two to three years for the bar to learn the expectations of the court regarding the joint report and Rule 16 conference. Attorneys appear to have adjusted very quickly, on the other hand, to the track assignments. Seldom, the judges reported, do attorneys argue with each other over the track assignment or ask later for a track reassignment.[41]

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[40] Letter from S. Rigan to D. Stienstra, September 18, 1996, on file at the Federal Judicial Center.

[41] The court's internal monitoring shows that the track assignment was changed in fewer than 1% of the cases assigned to a track. See *supra* note 37, p. 36. We have not independently verified the court's data.

As described earlier, the court prompted an outcry when it adopted numerical limits on depositions and interrogatories at the time the DCM plan was implemented. That problem has subsided because the judges use the discovery limits specified by each track as guidelines rather than rules. However, most said, while they may adjust the discovery amount upward, they usually retain the track designation and time limits of the lower level track.[42] More recently, some of the judges have been using the Rule 16 conference to have attorneys identify documents that can be exchanged and then setting a deadline for doing so. "We are moving," said one judge, "toward voluntary disclosure."

Although the court created a track for cases involving administrative reviews and prisoner petitions, several judges pointed out that these cases are not handled differently now than before DCM. Most are decided on summary judgment motions or dismissed as frivolous, as in the past, and are handled quickly. The only change under the DCM plan has been to set an outer time limit of 240 days after filing of a summary judgment motion for the magistrate judges' rulings on it.

Several judges also pointed out that the non-DCM track was not a pure control group, and as noted above, the court has recently eliminated this track. Since the inception of the DCM system, the court had been uneasy about giving these cases no attention and in November 1993 adopted a standardized case management order to provide for more uniformity in their treatment. The order, which was issued approximately forty-five days after the last responsive pleading is filed, gave a deadline for filing motions, a date and instructions for the final pretrial conference, and a trial date one year from the filing of the complaint. One judge noted, as well, that because of the CJRA requirements to report motions pending for more than six months, judges did not leave these cases unattended.

On the whole, however, the court appears to have fully implemented the DCM system and to have followed its guidelines for the past four years.

Distribution of Cases Across DCM Tracks

In applying the DCM guidelines, the judges make decisions each day about the appropriate track for new cases, with implications for the amount of discovery and length of time each case will be permitted. When making this decision, the judges said, they rely on their experience, the attorneys' advice, and several case characteristics, such as the number of parties and witnesses, whether parties and witnesses reside outside the state or country, and the number and difficulty of the issues. The significance of these characteristics is primarily their implications for discovery, because for most judges the time needed for discovery, in addition to the time needed for dispositive motions, is a key determinant of the track assignment. Table 17 (next page) shows the resultant distribution of cases across DCM tracks for the years since DCM was implemented.

[42] In 83% of the cases, according to the court's internal monitoring, the numbers of depositions and interrogatories set at the Rule 16 conference are within the guidelines of the track assigned to the case. See *supra* note 37, p. 36. We have not independently verified the court's data.

Table 17
Track Assignments of Civil Cases Filed 9/1/92-7/31/96
Western District of Michigan[43]

Track	No. of Cases Assigned	As % of all cases assigned	As % of all cases assigned to non-administrative tracks[44]
Total Cases Assigned	5065		
Voluntary Expedited	36	1.0	3.0
Expedited	382	8.0	27.0
Standard	803	16.0	56.0
Complex	175	4.0	12.0
Highly Complex	28	1.0	2.0
Administrative	3361	66.0	
Non-DCM	280	6.0	
Total Cases Unassigned	1625		
Total Cases Filed	6690		

Table 17 shows that the majority of non-administrative cases are assigned to the standard track, with a much smaller number assigned to the expedited or complex tracks, and the rare cases assigned to the court's fastest and longest tracks, the voluntary expedited and highly complex tracks. As would be expected from the high prisoner caseload, over half of the cases assigned to tracks are assigned to the administrative track.

Table 17 also reveals that about a fifth of the caseload is not assigned to a track at all. This occurs because many cases terminate before the initial Rule 16 conference, where the track assignment is made. At any given time, some pending cases will also be unassigned because they have not yet had that conference. As the table shows, however, most of the court's civil cases are assigned to a case management track.

[43] Data derived by the Federal Judicial Center from the court's electronic docketing system.

[44] Non-DCM cases not included.

C. The Impact of the Court's Demonstration Program

We turn now from description of the court's DCM system and begin to consider how it has affected the court's caseload and those who work within the system, looking first at the judge's experiences, then at the attorneys' assessments, then at the performance of cases on the DCM tracks, and finally at the condition of the caseload since DCM was adopted.

Within the context of the statutory requirement and the district's needs, the advisory group and court sought to achieve the following goals:

To reduce litigation time and costs
To control discovery
To increase uniformity in judicial case management
To provide guidelines for how much management each case needs
To maximize judicial resources
To involve attorneys in case management decisions
To provide for more discriminate use of ADR
To decide motions more quickly
To make greater use of the telephone for conferences and motions
To prompt more consents to magistrate judge jurisdiction

Our principal findings, which are discussed in substantial detail in the remainder of this report, are listed below:

- The judges are enthusiastic about the DCM program and believe that it has delivered a number of benefits, foremost among them greater uniformity in case management across the judges, including holding the initial Rule 16 conference in all eligible cases. For the judges, DCM has met most of the goals the court established for the program.

- Features of the program considered critical by the judges are the early case management conference, assignment of cases to a case management track, and use of the computer to monitor individual cases and the court's caseload.

- Only a little more than half of the attorneys reported that the DCM system *as a whole* expedited their case, but a greater percentage reported that *specific, individual* DCM and other case management components were effective in reducing litigation time. There appears to be a cluster of case management practices effective for this purpose, with the most effective being use of the telephone for court conferences, the early case management conference, the scheduling order, and more contact with the judges. The problems most likely to cause delay, reported by a minority of attorneys, are judges' handling of motions and paperwork requirements, while the scheduling of trials appears not to be a problem.

- Attorneys were less likely to think the DCM system reduced litigation costs, although nearly half found the case management conference effective for this purpose. Most attorneys found most DCM components neutral in their effect on cost, but a substantial minority identified several components as increasing cost: the joint case management report, requiring a party with settlement authority to attend settlement conferences, the judges' handling of motions, and the court's paperwork requirements.

- Attorneys most likely to say DCM expedited their case and reduced costs were those with more standard cases—i.e, of low to medium factual complexity, low to medium formal discovery and monetary stakes, higher agreement among the attorneys about the issues in the case, and low to medium likelihood of trial. Attorneys whose cases had been referred to ADR were also more likely to say DCM expedited their case.

- Most cases that survive to the case management conference are assigned to a track, and at least half and perhaps as many as three-quarters of the cases terminate within the time guideline for their assigned track.

- Consents to jurisdiction of a magistrate judge jumped sharply after implementation of the DCM program.

- An analysis of caseload trends and disposition times reveals that during the demonstration period the condition of the court's overall caseload improved, including reduction in the number of older cases, earlier disposition of cases generally, and lowered median disposition time. To what extent these improvements are due to the DCM system cannot be determined, as there are several other possible explanations, including the court's additional temporary judgeship, the CJRA reporting requirements, and the court's tickler system.

- The DCM program appears to have fulfilled many of the goals set for it by the court and advisory group. For a minority of cases, however, judges' handling of motions continues to be a problem.

The remainder of section C discusses these and related findings and brings into the picture subtleties that cannot be captured in the brief summary above.

1. The Judges' Evaluation of DCM's Effects

The Benefits of DCM

The five active district judges and four magistrate judges in this district think the court's DCM program has been very successful and has achieved the goals for which it was established. Although one judge said he did not think the court's practices had changed greatly from the past, most said both the amount of change and its effects have been substantial. This finding is particularly

interesting in light of several judges' expectations in 1993 that the program would not affect the court's practices substantially.

Time and Cost

The judges do not see DCM's effects primarily in a reduction of litigation time or costs. Only two judges mentioned cost savings from DCM, with one saying the DCM system must be saving litigation costs, but the other saying he had "heard anecdotes both ways." Several judges mentioned a reduction in litigation time as one of the outcomes, but two pointed out that such savings would probably by difficult to see in the court's statistics because, as one said, "A certain amount of time is needed [to litigate a case] and can't be improved upon without drastic action. We didn't need drastic action because we were current, so we're nibbling at the edges." This judge also pointed out that because of the time permitted for service and responsive pleadings, as well as the time needed for filing, answering, hearing, and ruling on dispositive motions, the judge controls only about six months out of a fifteen month case.

Uniformity

More frequently mentioned than any other change under DCM was the standardization of practice that has resulted from adopting DCM. Standardization has had the immediate practical benefit of making practice in the court more predictable and thus the attorneys more satisfied, but it has also had the less tangible but significant benefit of "giving the process more integrity," said one judge. "We are more of a court now," he added. Another judge said, "The judges now understand that the docket is the *court's* responsibility. It's the business of all of us to move cases along. There's far more communication, and we all know why we do what we do."

One way in which greater uniformity emerges is through the court's periodic need to make decisions about the system's guidelines and performance. As one judge said, "The system requires judges to consider issues as a group and reach consensus." Because of this, he added, "It's easier to work together today than five years ago." For the judges who spoke of the greater uniformity and collegiality brought by DCM, there was a degree of surprise that it had happened at all, but appreciation that it had.

Attention to Cases

Among the other DCM benefits mentioned, several judges said they now have more information about each case, which permits them to develop more appropriate case schedules. Cases also receive earlier attention from the court, said one judge, while several noted that cases receive more in-depth attention. "We give cases much more attention now, we don't just set dates," said one judge. "The attorneys really appreciate that."

Discovery Disputes

Several judges thought as well that DCM had reduced the number of discovery disputes and motions filed, but about as many thought it had not had this effect. One judge said his practice of

resolving discovery disputes on the telephone has had more effect on the number of disputes and motions than DCM has had. Two judges commented on the timeliness of motions, both saying they decide them more quickly under DCM. As one noted, "The computer doesn't let motions slide by anymore." The other also pointed to the computerized reports, saying they enable him to keep track of motions and plan his law clerk's time more effectively. The court's own internal monitoring shows that 68% of motions are decided within sixty days of filing of the last brief, a number approaching the court's goal of 75% decided within that time frame.[45]

Setting Trial Dates

The judges were uncertain whether DCM has had an effect on setting trial dates. As in the past, most judges set trial dates at the initial Rule 16 conference and continue to use the trailing calendar (i.e., schedule a number of cases for trial during a specified time period of one to two months and then try the cases as they come up in turn). One or two judges said they thought DCM had permitted them to set earlier and firmer trial dates but another judge noted that with a level caseload and a full complement of judges, the trailing calendars are shorter today than in the past. DCM does, nonetheless, one judge noted, provide a target date for setting the trial.

Consents to Magistrate Judges

The judges agree that since adoption of DCM the number of consents had gone up, but one judge suggested this might be due to growing confidence in the magistrate judges. The pattern of increased consents suggests, however, that DCM bears some responsibility. In 1990 and 1991, just before DCM implementation, about twenty cases consented to magistrate judge jurisdiction. In 1992, after DCM implementation, forty-three cases consented, and the number has remained in the forties since.[46]

Judicial Time

The judges had divergent views as well on whether DCM has saved them time, with about half saying DCM had not had an impact on the amount of time they spend on cases. "It's just allocated my time differently," said one judge, adding, "It requires the judge to spend more time at the front end and in the middle." The judges who believed DCM decreases their time—the remaining half of the judges—agreed that DCM has shifted their effort to the front end of the cases, but they felt this reduced the time spent later in the case. "It reduces the number of issues that come to me later," said one judge, "because so much is dealt with at the Rule 16 conference."

ADR

Several judges mentioned the change in the use of ADR since the court adopted the DCM system. While they noted that dissatisfaction with the court's ADR programs had predated DCM

[45] *Supra* note 37, Table XV, p. 37.

[46] Information provided by the court.

and changes had already been underway, they credited DCM with making ADR use more rational and timely. Because it is now discussed at the initial case management conference, explained one judge, ADR is now considered within the overall needs and schedule of the case rather than being imposed automatically as in the past. As a result, the number of referrals to arbitration, which had been mandatory in the past, has diminished to almost none (from 86 in 1990 to 3 in 1995), while the number of referrals to other forms of ADR has gone up.[47]

Bar Reaction

Having weathered the outcry from the bar over discovery limits, the court is alert to the views of the bar, but generally, the judges said, attorneys appear to have accepted the DCM system. "They're always prepared to do business when they come in," said one judge. Two other judges noted the attorneys' appreciation for predictability in practice across the court, while another two mentioned the attorneys' approval of a more meaningful Rule 16 conference.

Altogether, the judges identified a number of benefits from the DCM system. While many benefits were named by only two or three judges, nearly all mentioned the greater degree of uniformity that has been achieved through DCM. Their comments suggest as well that DCM provides both judges and attorneys useful guidelines for managing each case according to its needs. The judges also feel that the system helps them give closer attention to each case, involve attorneys in case management decisions, use ADR more effectively, allocate their time more effectively, and decide motions more promptly.

Critical Features of DCM in Achieving its Benefits

There was wide agreement among the judges that four DCM elements are central to the benefits they have experienced under DCM.

The Early Rule 16 Conference

A majority of the judges cited the initial Rule 16 conference as the crucial element of the DCM system. It is in this conference, said one judge, that we "seize hold of the case and let attorneys know we're on top of it." Another judge pointed out the importance of the Rule 16 conference for providing the judge with "more information to schedule the case intelligently and to determine the right number of depositions and interrogatories." Several judges also pointed to the value of the Rule 16 conference for getting an early understanding of the issues in the case. "Every case has an issue that will decide it," said one judge, "and we use the conference to see what's at the bottom of it." Another judge said he uses the conference to "eliminate non-issues" and "force recognition of real issues" so the judge and attorneys can identify the steps needed to resolve only those issues.

[47] Information provided by the court. The overall percentage of cases referred to ADR was the same in 1996—30%—as the percentage referred in 1990 before the demonstration program began, but the percentage has fluctuated widely during the demonstration period.

The conference is also valuable, said one judge, for educating the attorneys. He requires them to discuss in detail the scheduling and merits of the case to make sure each understands what the other is claiming. "[It's] astounding," he said, "the number of cases where the attorneys, even after submitting the joint status report, say 'I didn't know that.'" This meeting also provides the attorneys, he noted, an opportunity to get a sense of the judge's reaction to the case. When the clients are present, said another judge, the Rule 16 conference also helps them understand there's "a 99% chance the case won't go to trial," so they turn their attention to steps that can settle the case.

The judges who think the number of motions has gone down attribute this benefit, too, to the Rule 16 conference. Because of the depth of discussion at the Rule 16 conference, said one, discovery practice is now more informal and less adversarial. Fewer motions are needed, he said, because the Rule 16 conference provides attorneys a way to speak with each other without losing face.

Although the judges did not identify the attorneys' joint status report as a critical element of DCM, several noted its usefulness in preparing for the Rule 16 conference. When the attorneys in the case are good, said one judge, they work out the dates through the joint status report, which "really lessens the work of the Rule 16 conference." Several judges spoke of the "snapshot" or "bird's eye view" of the case provided by the status report, which permits the judge, said one, to "hone in on the issues immediately."

Several judges noted that because of DCM all the judges have become active case managers. In the past, they said, some judges did not hold Rule 16 conferences or held them only for some cases and much later in the case. The initial agreement by these judges to hold early Rule 16 conferences in all cases was initially prompted, one judge explained, by the judges' agreement to comply fully with the instruction to be a demonstration district. But now, he said, "they're absolutely committed to doing this. We wouldn't go back to a non-DCM world."

Automation: Ticklers and Caseload Reports

The court's automated case docketing and reporting system was mentioned by over half the judges as another key element in achieving the court's goals. This system's effects are felt in two ways. First, it provides the judges information about the status of cases, which permits them to monitor whether deadlines are met, which motions are ready for decision, and what upcoming events need their attention. Second, it generates reports that show, for each judge, the number of cases meeting each of the court's deadlines—for example, the number of cases in which the case management conference was and was not held on time and the number of motions not decided within the CJRA's six-month limit—which creates considerable peer pressure.

The degree of change brought by the automated docketing and reporting system and its consequences for the court are captured by the comment below, which reflects the views of several judges:

> Compared to the old days, we're a slick, smoothly running, automated system. We used to be a pen and ink operation, but now the computer is integrated into everything.

> We get lots of information, almost too much, but the reports help us manage ourselves and see how we measure up to the courtwide standard. It also notifies the case manager when things are due in each case. It keeps everything on track and has permitted us to become as efficient as we are.

The System of Case Management Tracks

Several judges also identified DCM's system of case management tracks as a critical element in realizing the program's goals. The tracks, said one judge, "provide workable time frames" for scheduling cases. Another noted that the tracking system benefits both judges and attorneys because the judges "can fit cases into the time frames suggested by the track and attorneys learn the time frames the court works within. They come in ready to discuss the case and to be realistic."

While most of the judges acknowledged that a tracking system is in essence individualized case management and that tracks per se are not absolutely necessary, they pointed to a number of additional benefits from using tracks. For one judge, the tracks "make credible" the court's longstanding practice of setting limits on discovery. For another, the track guidelines provide "benchmarks" that help judges limit the amount of discovery granted. Attorneys, too, can use the guidelines to limit discovery, said another judge, because it permits them to set aside the adversary's reflexive request for as much discovery as possible.

And several judges recognized the role tracks play in administration of the court and chambers. They provide, said several judges, the standards for measuring performance. They are, said one judge, "a great management tool."

The Willingness of the Judges to Change

Though not technically an element of DCM, the judges' acceptance of the DCM system was noted by several judges as a critical factor in the system's success. Some judges, especially those who did not routinely hold Rule 16 conferences, had to make substantial changes in their practice. Others had strong commitments to their own practices, but they were able—through patient guidance of the chief judge, several said—to set aside their preferences, reach consensus on the DCM procedures, and make a commitment to implement them in good faith.

Reservations About DCM

While the judges are fully committed to DCM, one concern was widely shared. In this system, as one judge explained, "one can get carried away too much with statistics." Another warned that "the judge shouldn't make decisions on a party's request based on whether he'll look good in the statistics." Nonetheless, when asked whether they would change this system or whether there is a better alternative, the judges had few suggestions. In fact, the court has voted unanimously to continue the program for another year and is planning to incorporate it into the local rules as the district's permanent case management system.

Recommendations to Other Courts

All the judges but one said they would recommend DCM to other courts. The judge who declined to recommend DCM said he would want to know more about the court before recommending it. A court heavily burdened with criminal cases, he said, probably would not benefit from DCM because no amount of management would permit them to keep up with the civil cases. Another judge qualified his response by saying he would fully recommend the case management elements but was uncertain about tracks.

The judges who would recommend DCM to other courts offered a number of suggestions. The biggest hurdle, noted one, is getting the judges to agree on a common approach to case management. "The call for uniformity can only come from another judge," he said, and suggested a court consult with judges who have worked in courts with standardized procedures and forms. Another judge pointed out that it was relatively easy to overcome this hurdle in Michigan Western because the court had an obligation as a demonstration district to adopt DCM. In other courts, he said, strong leadership by judges respected in the court will be important.

Among other steps courts should take if they want to consider DCM, the judges mentioned the following: (1) The judges must be willing to work with court staff in planning a DCM system because their role in implementing it is critical. (2) Outside assistance will be necessary to learn what DCM is and how to set it up, but courts should call on other courts who have this experience, not outside consultants. (3) A court should plan thoroughly and undertake DCM only if committed because it is worse to start it and not carry through than not to start at all. And (4) a court considering DCM should involve the bar from the outset.

Despite the value the court has found in DCM, one of the judges said he is concerned that other courts will not try it because they will see it as either too complicated or as making litigation more difficult. This has not been the case in his court, he said, and the perception needs to be dispelled. "What we're doing is just common sense, " he said.

2. The Attorneys' Evaluation of DCM's Effects

Questionnaires sent to a sample of attorneys focused on the program's impact on time and cost in a particular case litigated by the attorney is this district, but also asked attorneys a number of additional questions about satisfaction with the court and the degree of change DCM had brought to litigation in the district.

In reporting on the attorneys' responses, we examine not only their assessment of the case management program but whether that assessment is related to any of a large number of party and case characteristics such as the number of cases the attorney has litigated in this court, the degree of complexity of the case that is the subject of the questionnaire, the nature of suit for that

case, and the amount of discovery in that case. The purpose of this inquiry is to determine whether DCM is more effective for some types of cases or attorneys than for others.

The discussion proceeds first to an examination of the attorneys' assessments of program effects on time and then its effects on cost. We next discuss the attorneys' satisfaction with the court's management of their cases and whether they have found DCM as a whole to be an effective case management system. We conclude with a summary of the analysis of the attorneys' responses. Those who are not interested in the technical discussion of the questionnaire results should turn to page 71 for that summary.

As before, keep in mind throughout this discussion that the findings are based on attorneys' estimates of DCM's effects on their cases.

The Effect of the DCM System on the Timeliness of Litigation

The great majority of attorneys who litigated cases in this district between 1992 and 1995 reported that the pace of their case was neither too fast nor too slow. As Table 18 shows, 80% of the attorneys said their case moved at an appropriate pace, with only 8% saying it moved too slowly.

This general rating of timeliness does not indicate, of course, whether the attorneys found DCM helpful in setting an appropriate pace for their case or whether, perhaps, DCM is responsible for the 14% of attorneys who reported that their case moved too slowly or too fast. Two other analyses permit direct examination of this question.

Table 18
Attorney Ratings of the Timeliness of Their Case
Western District of Michigan

Rating of Time from Filing to Disposition	% of Respondents Who Selected Each Response (N=616)[48]
Case was moved along too slowly	8.0
Case was moved along at appropriate pace	80.0
Case was moved along too fast	6.0
No opinion	6.0

[48] Unless otherwise noted, all percents presented in the tables in each chapter have been rounded to a whole percent and may total to slightly more or less than 100%.

Attorney Impressions of DCM's Overall Effect on Time

Table 19 shows the attorneys' rating of DCM's overall effect on the timeliness of their case. Just over half of the attorneys said DCM had no effect on the time it took to litigate their case. A very small percentage believed it hindered their case, leaving a substantial proportion who reported that DCM expedited their case.

Table 19
Attorney Views of the Effect of DCM on the Timeliness of Their Case
Western District of Michigan

Rating of the Overall Effective of DCM on Time to Disposition	% of Respondents Who Selected Response (N=573)
Expedited the case	43.0
Hindered the case	4.0
Had no effect on the time it took to litigate the case	54.0

Our interest is in whether different types of attorneys or cases are affected differently by DCM. We found that attorneys' responses did not differ by type of party (plaintiff/defendant), type of outcome, track to which the case was assigned, type of case, or the attorney's type of practice or number of years in practice.[49]

Attorneys' assessments of whether DCM expedited their case did differ, however, by a number of case characteristics,[50] by whether the case was referred to ADR, and by the attorneys' experience in the court. Those who were more likely to say DCM expedited their case were those who reported that:

- the factual complexity of their case was low to medium;
- the amount of formal discovery in their case was low to medium;
- the level of contentiousness between the attorneys was low to medium;
- the agreement on the factual issues in the case was high;
- the likelihood of trial was low to medium;
- the monetary stakes in the case were low to medium;

[49] Unless otherwise noted, all relationships discussed in section C.2 are statistically significant in a Chi-square analysis at the $p<.05$ level or better.

[50] Attorneys were asked to rate a number of case characteristics on a scale from "very high" to "none."

- the case had been referred to ADR; and
- the attorney had not litigated in the court before it adopted DCM.

Taken together, these findings suggest that DCM is most often perceived as a case expediter in cases that are more standard or "middle of the road," that have been referred to ADR, and where the attorney has not practiced under another case management system in this district.

Attorney Assessments of the Effect Specific Case Management Components Had on Case Time

To further assess DCM's impact on litigation time, we examined the attorneys' rating of the effects of specific DCM components. Table 20 (next page) shows how attorneys rated the impact of the principal elements of the DCM system—as well as several other case management practices—on the time it took to litigate their case. Program components are listed in descending order according to the percentage of respondents who said the component moved the case along. The analysis includes only the responses of those who said the component was used in their case.

Components Thought to Move the Case Along. Table 20 shows that there is a set of DCM components and case management practices that many attorney believed moved their case along, as well as a shorter set that few attorneys found helpful. Just about half to nearly three-quarters of the attorneys cited the following specific DCM components or other case management practices as moving their case along:

- use of the telephone for court conferences (73%),
- a scheduling order issued by a judge (72%),
- an early case management conference with the judge (67%),
- more contact with the judges (66%),
- judges' handling of motions (58%),
- attendance at settlement conferences of parties with authority to bind (56%)
- assignment of the case to a case management track (54%),
- judges' trial scheduling practices (53%),
- the attorneys' joint case management report (52%),
- time limits on discovery (50%),
- the court's ADR requirements (50%), and
- disclosure of discovery materials (49%).

This long list reveals that many of the DCM components, as well as other practices used by the court, were seen by the attorneys as helpful in moving their case along. For those components where a minority of attorneys reported it as useful, they generally reported that it had no effect—seldom that it had an adverse effect.

Table 20
Attorney Ratings of the Effects of Differentiated Case Management Components on Litigation Time (in Percents)
Western District of Michigan

Components of the DCM Program	N	Moved this case along	Slowed this case down	No effect
Scheduling order issued by judge	409	72.0	1.0	27.0
Early case management conference with judge	358	67.0	1.0	32.0
More contact with judge and/or magistrate judge	278	66.0	3.0	31.0
Judge's handling of motions	355	58.0	14.0	28.0
Attendance at settlement conferences of representatives with authority to bind parties	185	56.0	3.0	41.0
Assignment of case to one of the court's case management tracks	392	54.0	1.0	45.0
Judge's trial scheduling practices	318	53.0	4.0	44.0
Joint case management report, prepared and filed by counsel prior to case management conference	336	52.0	2.0	46.0
Time limits on discovery	356	50.0	3.0	47.0
Standardization of court forms and orders	281	27.4	3.0	69.0
Numerical limits on interrogatories	305	22.0	7.0	71.0
Numerical limits on depositions	272	21.0	4.0	75.0
Other Case Management Components				
Use of telephone, rather than in-person meeting for court conferences	203	73.0	2.0	25.0
Court or judge's ADR requirements	191	50.0	5.0	45.0
Parties ordered to disclose discovery material without waiting for formal request	178	49.0	6.0	44.0
Paperwork required by the court or judge	319	31.0	11.0	58.0

Table 20 reveals as well that the attorneys found many of the same case management practices useful that the judges identified as critical elements of DCM: assignment of the case to a case management track, the attorneys' joint case management report, and particularly the early case management conference with a judge.[51] One component that is very important to the judges, however, was clearly not seen by the attorneys as moving their cases along—standardization of court forms and orders.

Interestingly, the component found most helpful by the attorneys is not part of the DCM plan, and that is the use of the telephone for court conferences. The advisory group in its report to the court had urged greater use of the telephone, and it is clear that in those cases where it has been used the attorneys have found it beneficial.

Table 20 also shows that most attorneys had no problem with how the judges scheduled their trials, with 53% of the attorneys reporting that the judges' practices moved their case along and 44% reporting no effect. Although the question did not ask about specific trial scheduling practices, the very small percentage of attorneys who said trial scheduling practices slowed down their case suggests that unhappiness over the trailing calendar may be a problem of the past. Whether this might be due to changes in judges' practices or, as one judge suggested, to fewer cases awaiting trial cannot be determined from these data.

Finally, comparing the list of case management components rated effective by half or more of the attorneys to those that only a minority rated effective, there appears to be an identifiable cluster of case management practices that move cases along. After these, the percentage of attorneys finding any given component effective drops off sharply.

Components Thought to Have Little Effect on Time. Table 20 shows that for the case management and DCM components where the attorneys did not report a positive effect on litigation time they felt the component simply had no effect. These included:

- limits on the number of depositions (75%),
- limits on the number of interrogatories (71%), and
- standardized forms and orders (69%).

The attorneys' assessment of the limits on interrogatories and depositions is perhaps the most interesting of these findings, given the controversy the limits provoked when the DCM plan was implemented. The court did not originally consider adopting such limits and did so because they were urged to consider them by the Judicial Conference committee that reviewed their CJRA plan. In the attorneys' view at least, these limits have not been helpful. On the other hand, few see them as detrimental either. In most cases the impact seems to be benign.

[51] Because of the question wording, two items on the list are difficult to interpret. While we can see that more than half of the attorneys believe the judges' handling of motions moved their case along, we do not know which particular judge practices do so. Nor do we know which ADR requirements helped move the case along. Conceivably, some attorneys might have found the absence, rather than presence, of ADR requirements helpful.

For the minority of attorneys reporting that numerical limits and standardized forms had a positive effect on time, we examined what, if anything, distinguished them from the majority of attorneys who reported no effect. The attorneys who reported a positive effect differed in only a few—but noteworthy—ways. Those without pre-DCM experience were more likely than attorneys with pre-DCM experience to say limits on interrogatories and depositions moved their case along. Attorneys with pre-DCM experience were far more likely to say numerical limits had no effect (76% and 80%, respectively, compared to 63% for both interrogatories and depositions for attorneys without pre-DCM experience). It is not clear that attorneys with pre-DCM experience are better able to judge the effects of these limits than attorneys without such experience, but it is clear that attorneys with pre-DCM experience in the court find the numerical limits on discovery at best harmless.

Aside from this effect, several case characteristics distinguished the attorneys who reported a positive effect from limits on interrogatories. The cases these attorneys represented generally had higher levels of formal discovery, more disputes over discovery, lower levels of agreement on the value of the case, a higher likelihood of trial, and higher monetary stakes. In other words, cases marked by more discovery, higher stakes, and less agreement between the attorneys appeared to benefit the most from limits on interrogatories.

Components Thought to Slow the Case Down. Very few of the court's practices were identified by the attorneys as slowing the case down. For only one DCM component and one non-DCM component did more than 10% of the attorneys report an adverse effect: the judges' handling of motions, which 14% of the attorneys said slowed down their case, and paperwork requirements, which 11% of the attorneys said slowed down their case. The wording of these questions makes interpretation difficult, but attorneys' written comments suggest that the problem with motions is delays in rulings, particularly on dispositive motions.

We examined whether certain types of attorneys found paperwork requirements and the judges' handling of motions problematic and found that neither they nor their cases differed in any significant way from attorneys who reported that these practices either moved the case along or had no effect.

Components Viewed with Differences of Opinion as to Effect on Time. There were a large number of components where attorney opinion about their effectiveness was split roughly in half, between no effect and a positive effect on litigation time. These include assignment of the case to a track, the joint case management report, time limits on discovery, the judges' handling of motions, the judges' trial scheduling practices, requiring parties with settlement authority to attend settlement conferences, disclosure of discovery material without a formal request, and the court's ADR requirements. In examining whether certain kinds of attorneys or cases found these components particularly helpful, we found few significant relationships, except that those who had litigated in the court before DCM was implemented were somewhat more likely to say that time limits on discovery moved the case along (52% compared to 46% of attorneys without pre-DCM experience).

Program Effects on Litigation Cost

As with the pace of litigation, most attorneys rated the cost of their case as about right, although the 67% who said so is substantially less than the 80% who said the pace was appropriate (see Table 21). Likewise, the 15% of attorneys who said the cost was too high is somewhat higher than the 12% who said their case moved too slowly.

Table 21
Attorney Ratings of Cost of Case From Filing to Disposition
Western District of Michigan

Rating of the Cost From Filing to Disposition	% of Respondents Who Selected Response (N=615)
Cost was higher than it should have been	15.0
Cost was about right	67.0
Cost was lower than it should have been	7.0
No opinion	11.0

To determine to what extent DCM is responsible for the attorneys' rating of litigation cost, we examined their assessment of the DCM system as a whole and their ratings of the individual components' impact on litigation costs.

Attorney Impressions of DCM's Overall Effect on Litigation Costs

About a third of the attorneys who responded to the survey reported that DCM decreased the cost of litigating their case, but nearly two-thirds reported that it had no effect (see Table 22).

Table 22
Attorney Views of the Effect of DCM on the Cost of Their Case
Western District of Michigan

Rating of the Overall Effect of DCM on Cost	% of Respondents Who Selected Response (N=567)
Decreased the cost	30.0
Increased the cost	9.0
Had no effect on the cost of the case	61.0

As before, our interest is in whether certain types of attorneys or cases are more likely to find that DCM increases or decreases litigation costs. A number of case characteristics were related to

attorneys' ratings of DCM's impact on costs and, as is clear from the list below, the pattern is very similar to the one that emerged for DCM's impact on time—DCM is particularly effective in the everyday case. The attorneys who were more likely to report that DCM decreased litigation costs were those whose cases had:

- a medium amount of formal discovery;
- a low amount of unnecessary or abusive discovery and disputes over discovery;
- a low to medium amount of contentiousness between the attorneys;
- high agreement on the factual issues in the case;
- a low likelihood of going to trial; and
- low to medium monetary stakes.

The attorneys who reported that their case was at the other extreme on each of these dimensions—i.e., high amounts of formal discovery, a highly contentious relationship between the attorneys, and so on—were more likely to report that DCM increased costs, suggesting that DCM did not, in the attorneys' view, provide a mechanism for controlling costs in this type of case.

Unlike the relationships found when examining DCM's impact on litigation time, attorneys' assessments of DCM' effects on cost did not vary by whether the case had been referred to ADR. Overall, attorneys were much less likely to report that ADR decreased cost than they were to say it decreased time.

Attorney Assessments of the Effect Specific Case Management Components Had on Cost

To further assess DCM's impact on litigation cost, we examined the attorneys' rating of specific DCM components. Table 23 (next page) shows how attorneys rated the impact of the principal elements of the DCM system—as well as several other case management practices—on the time it took to litigate their case. It is clear that, in the attorneys' experience, DCM has much less impact on litigation costs that on litigation time. For most DCM components, a large majority of attorneys said the component had no effect on litigation costs. For those components most likely to reduce costs, less than a majority of attorneys reported this effect.

Components Thought to Reduce Litigation Costs. The five practices most likely to be reported as reducing litigation costs are listed below. Note that for only one did a majority of the attorneys find that the practice reduced litigation costs.

- use of the telephone for conferences with the court (78%),
- more contact with the judges (49%),
- an early case management conference with the judge (42%),
- judges' handling of motions (40%), and
- attendance at settlement conferences of parties with authority to bind (40%).

Table 23
Attorneys' Reports of the Effect of Selected Case Management Components on the Cost of Litigating Their Case to Termination
Western District of Michigan

Components of the DCM Program	N	Lowered cost	Increased cost	No effect
More contact with judge and/or magistrate judges	236	49.0	12.0	39.0
Early case management conference with judge	302	42.0	8.0	50.0
Judge's handling of motions	291	40.0	16.0	45.0
Attendance at settlement conferences of representatives with authority to bind parties	161	40.0	19.0	42.0
Scheduling order issued by judge	340	34.0	5.0	62.0
Assignment of case to one of the court's case management tracks	334	30.0	5.0	65.0
Judge's trial scheduling practices	267	29.0	8.0	63.0
Joint case management report, prepared and filed by counsel prior to case management conference	295	26.0	21.0	53.0
Time limits on discovery	299	23.0	6.0	70.0
Numerical limits on interrogatories	253	23.0	8.0	69.0
Numerical limits on depositions	230	16.0	4.0	80.0
Standardization of court forms and orders	226	15.0	2.0	83.0
Other Case Management Components				
Use of telephone, rather than in-person meeting for court conferences	162	78.0	1.0	22.0
Parties ordered to disclose discovery material without waiting for formal request	142	33.0	11.0	56.0
Court or judge's ADR requirements	161	29.0	12.0	58.0
Paperwork required by the court or judge	269	16.0	24.0	60.0

By far the most cost-effective procedure used by the court, according to the attorneys, was substitution of telephone conferences for in-person conferences. This procedure was also the one most likely to be reported as reducing time, making it clearly the most beneficial of the practices examined here.

The second most important practice for reducing costs, the attorneys reported, was more contact with the judges, followed by the early case management conference with the judge. It is not clear through what mechanism the court provides attorneys more contact with the judges, although the Rule 16 conference, which the judges committed to holding in every case under DCM, is very likely one avenue. The findings suggest that the court's emphasis on this conference—and whatever other avenues it offers—provide attorneys assistance they believe translates into lower costs

For several of the components rated by a majority of attorneys as moving their cases along, only about a third of the attorneys reported a reduction of litigation costs. These include assignment of the case to a case management track, a scheduling order, the judges' trial scheduling practices, disclosure, and ADR. Although the percentage reporting a cost benefit from these procedures is relatively small, few attorneys reported an adverse effect either, except for a notable minority of attorneys who reported increased costs due to the court's ADR requirements and to orders to disclose discovery material.

Components Thought to Increase Litigation Costs. Although over half of the attorneys—and in many instances well over half—believed that most DCM components had little effect on litigation costs in their case, they were more likely to report an adverse effect on litigation costs than on time. For four DCM components, over 10% of the attorneys reported increased costs:

- the joint case management report (21%),
- requiring attendance at settlement conferences of a person with authority to bind (19%),
- judges' handling of motions (16%), and
- more contact with the judges (12%).

Interestingly, three of these four components—the judges' handling of motions, more contact with the judges, and requiring someone with settlement authority to attend settlement conferences—were among the components identified as most likely to reduce litigation costs, signifying a split of opinion among attorneys about the value of these components.

A number of case characteristics are related to the attorneys' perception that these practices increase cost. Generally, attorneys in cases that might be characterized as either more complex or more contentious—higher likelihood of trial, more discovery disputes and unnecessary discovery, higher monetary stakes, low agreement on the issues in the case, and more contentiousness between the attorneys—were more likely to say one or more of these components increased cost.

This analysis, along with the examination above of attorneys' overall rating of DCM's cost effects, suggests there is an identifiable minority of attorneys—and it is a very small number of

attorneys—whose cases have higher costs than they would like and which they attribute to DCM. These cases are marked by contention and higher stakes, characteristics likely to be associated with higher litigation costs, and DCM apparently does not help keep the costs in these cases down.

Other court practices reported by a notable minority of attorneys as increasing costs were:

- paperwork requirements (24%),
- ADR requirements (12%), and
- an order to disclose discovery material (11%).

We found no case or attorney characteristics to identify those who find the court's paperwork requirements a factor in cost increases. This problem, the most frequently reported by the survey respondents, appears to cut across all types of cases. (Because the question is no more specific, we cannot identify the particular requirements the attorneys found burdensome.) For the small percentage of attorneys who reported that disclosure increased costs, however, those without pre-DCM experience were more likely to say disclosure increased costs. Regarding ADR, attorneys were more likely to say ADR requirements increased costs when the relationship between both the parties and the attorneys was highly contentious. However, the number of respondents for whom these relationships were found was very small. As with most of the case management components, by far the greatest number of attorneys reported no effect or a positive effect on litigation costs.

Satisfaction with Case Outcome and the Court's Case Management

While DCM's effects on litigation time and cost are important considerations, it is also important to know whether attorneys are satisfied with the outcome in their case and find it fair. Table 24 shows that by far the greatest percentage of attorneys were satisfied with the outcome and even more thought it was fair—74% and 78%, respectively. Those who were not satisfied with the outcome or its fairness were more likely to have reported as well that DCM increased costs.

Table 24
Attorney Satisfaction With Case Outcome
Western District of Michigan

Satisfaction With Outcome	Percent Selecting the Response (N=601)	Fairness of Outcome	Percent Selecting the Response (N=601)
Very satisfied	54.0	Very fair	57.0
Somewhat satisfied	20.0	Somewhat fair	21.0
Somewhat dissatisfied	13.0	Somewhat unfair	10.0
Very dissatisfied	14.0	Very unfair	12.0

Especially likely to be satisfied and to find the outcome fair were attorneys who had been in practice longer, who had litigated more cases in the district, and who had litigated in the district

before adoption of DCM. Given the advisory group's view that DCM simply formalized already-existing practices for most of the judges, this response is perhaps to be expected. However, as Table 25 shows, 75% of the attorneys who litigated cases in this district before DCM report that there is either some or a substantial difference from past practices. The findings may suggest indirectly, then, that the court's established federal bar has not found DCM to have a detrimental effect on case outcome.

Table 25
Attorney Views of Extent to Which the DCM System Differs From Pre-DCM Practices
Western District of Michigan

Extent to Which DCM Differs From Pre-DCM Case Management Practices	% of Respondents Who Selected Response (N=350)
No difference	4.0
Some difference	44.0
Substantial difference	31.0
Very great difference	3.0
Can't say	18.0

While some attorneys were not happy with their case outcome, as might be expected, this view did not necessarily control their perception of how well their case was managed. Table 26 shows that an even greater number of attorneys reported satisfaction with the court's management of their case and said it was fair—86% and 87%, respectively—than reported satisfaction with the case outcome and the fairness of the outcome, with nearly two-thirds of the attorneys alone saying they were very satisfied. Once again, attorneys who had litigated more cases in the district and who litigated cases before DCM implementation were more likely to be very satisfied with the court's management of their case and to find it fair. And once again, those who reported that DCM increased costs were more likely to be dissatisfied and to find the court's management of the case unfair.

Table 26
Attorney Satisfaction With the Court's Management of Their Case
Western District of Michigan

Satisfaction With Management	Percent Selecting the Response (N=597)	Fairness of Management	Percent Selecting the Response (N=595)
Very satisfied	64.0	Very fair	68.0
Somewhat satisfied	22.0	Somewhat fair	19.0
Somewhat dissatisfied	6.0	Somewhat unfair	5.0
Very dissatisfied	8.0	Very unfair	8.0

Given the preceding findings on satisfaction, it is not surprising that nearly 90% of the attorneys said they think the court's DCM system is an effective system for managing cases (see Table 27). Further analysis showed that those least likely to find DCM an effective system were those involved in cases distinguished by high amounts of formal discovery, more discovery disputes, less agreement between the attorneys on issues and case value, and greater likelihood of trial, suggesting once again that DCM is most effective for middle-of-the road cases.

Table 27
Attorney Ratings of DCM's Effectiveness as a Case Management System
Western District of Michigan

Rating of the Effectiveness of DCM as a Case Management System	% of Respondents Who Selected Response (N=494)
It is an effective system of case management	87.0
It is not an effective system of case management	13.0

To understand more fully why the attorneys find DCM beneficial—especially since only a little over half said the system as a whole expedited litigation in their case and only a third said it saved costs—we examined the comments they provided and found several reasons for the attorneys' approval of this system. While the respondents identified a number of additional benefits, such as the assistance DCM provided in planning their case, many of the comments focused on the role of DCM in expediting the case, particularly through the case management conference and the deadlines set for the case. The following examples illustrate some of the benefits identified by the attorneys:[52]

"It gives certainty to the process."

"It requires the parties and counsel to pay closer attention to the case as it progresses through discovery."

"Lays an excellent foundation for the parties to know deadlines and how quickly to complete discovery."

"The deadlines forced the parties to focus on the value of the case and thus caused settlement."

"Early contact with the court and delineation of the issues and the stakes helped move the case along. It usually does."

[52] The examples are taken from 269 comments made in response to a question regarding system effectiveness.

This last comment touches on an issue several attorneys addressed directly in their comments—the relative importance of the judge versus procedures. The following comment captures the view of these attorneys:

> "The system is far less important than the judicial officer and the lawyers. Competent counsel and a reasonably attentive judge can make most any system work. By the same ken, no system will help incompetent counsel and inattentive judges. We are blessed in our district with generally effective judges and generally competent counsel."

While many of the comments praised the DCM system, a number highlighted problems, some of which were apparent in the analyses above, some of which reveal other concerns. The most common problem cited by the attorneys was inflexible application of the DCM system, and a number also suggested the system is inappropriate or burdensome for certain types of cases, as illustrated below:

> "It can be effective when the court remains flexible in its application. For example, case classification categories and requirements don't always fit the factual/legal circumstances."

> "Needs more flexibility for modification of track assignment; case may prove to be more complicated after commencement."

> "For product liability cases, there is a lack of appreciation as to what can be done informally with less immediate deadlines and lower costs."

On the whole, however, the many different ways in which we have looked at the attorneys' assessment of the DCM system reveal widespread approval and show that the attorneys believe several specific DCM features are helpful in reducing litigation time and cost.

Summary of Attorney Evaluations

The preceding discussion has shown that, from the attorneys' perspective, the adoption of a differentiated case management system in the Western District of Michigan has generally had positive results for cases litigated there, as summarized below.

Findings Regarding DCM's Effects on Litigation Time

- While just over half the respondents said the DCM system *as a whole* expedites litigation (most of the rest saying it had no effect), two-thirds identified the following *specific* case management practices as effective in moving a case along: use of the telephone for conferences with the court, a scheduling order issued by a judge, an early case management conference, and more contact with the judge.

- Several additional DCM and case management components were seen by around half of the respondents as helpful in moving cases along (the rest saying they had little effect): assignment to a track, the attorneys' joint case management report, time limits on discovery, the judges' practices for handling motions, the judges' trial scheduling practices, attendance at settlement conferences of persons with authority to bind the parties, disclosure of discovery material, and the court's ADR requirements.

- The cases most likely to be moved along by the DCM procedures are those referred to ADR and those that may be characterized as more everyday cases: those with low to medium amounts of formal discovery and factual complexity, a lower likelihood of trial, low to medium monetary stakes, higher agreement among the attorneys about the issues in the case, and lower contentiousness between the attorneys.

- Only small percentages of attorneys reported that the DCM components and other case management practices had a detrimental effect on litigation timeliness. The most frequently cited causes of delay were the judges' handling of motions and the court's paperwork requirements.

- Most attorneys did not find limits on interrogatories and depositions helpful for moving their cases along. Of the minority who did, attorneys who had not litigated in the court before DCM was adopted were more likely to find numerical limits helpful than attorneys who had litigated cases before DCM (the latter saying these limits had no effect). Regarding limits on interrogatories only, attorneys in cases with high levels of discovery, high stakes, more discovery disputes, and low agreement about case value were more likely to see them as helping to move the case along.

- The discovery devices attorneys found most effective for expediting a case were time limits on discovery and orders to disclose discovery material without waiting for a formal request.

Findings Regarding DCM's Effects on Litigation Costs

- Fewer attorneys reported that DCM reduced costs than said it moved their case along (most saying it had little effect on cost). The components that are most helpful in reducing cost, reported by 42-49% of the respondents, were use of the telephone for court conferences, the early case management conference, and contact with the judge—three of the four components also reported as moving litigation along. Also reported as helpful—by 40%—were the judges' handling of motions and the requirement that a person with settlement authority attend settlement conferences.

- Larger percentages—though still minorities—of attorneys reported cost increases from specific DCM and case management components than reported such effects for timeliness. Components most likely to increase costs were the joint case management statement, the court's paperwork requirements, judges' handling of motions, and the

requirement that a person with binding settlement authority attend settlement conferences.

- Several of the components reported as increasing costs, including the judges' handling of motions and requiring someone with settlement authority to attend settlement conferences, were among the components identified as most likely to reduce litigation costs, signifying a split of opinion among attorneys about the value of these components.

- Attorneys who were most likely to report increased costs from DCM were those whose cases were more complex or more contentious. One problem cut across all types of cases, however—the court's paperwork requirements.

Other Findings

- The attorneys' assessment of the usefulness of the DCM components coincided in some instances with the judges' assessment. Both find the early case management conference particularly effective.

- The court appears to have solved one of the issues of concern to the advisory group—the problem of the trailing calendar. Over half the respondents said the judges' trial scheduling practices moved their case along (most of the rest reporting no effect on timeliness).

- A second concern of the advisory group has not yet been completely resolved—the handling of motions. Significant minorities reported that the judges' practices increased litigation time and cost (14% and 16%, respectively). Written comments indicate the problem is delayed rulings on motions.

- Attorneys in cases referred to ADR are more likely to report that DCM moved their case along than attorneys not referred to ADR.

- Attorneys attributed to DCM a number of benefits other than time and cost reduction, including the assistance it provides in planning their case, informing their client of the expected schedule, and staying on schedule, particularly with regard to discovery.

- Attorneys' assessments of the individual DCM components, other case management components, and DCM's overall effect on litigation time and costs did not differ by the track to which the case was assigned.

- A large majority of attorneys reported satisfaction with the outcome of their case and felt it was fair. An even greater number of attorneys said they were satisfied with the court's management of their case and said their treatment by the court was fair.

Two consistent findings have emerged regarding the kinds of attorneys and cases for which DCM is most and least effective. Attorneys who reported that DCM moved their case along were more likely to have been litigating a case in which there were low to medium amounts of formal discovery, the attorneys were able to agree on the issues, the stakes involved in the case were not high, and the case was unlikely to go to trial—cases that might have been litigated expeditiously under other circumstances as well.

In contrast, attorneys who reported that DCM increased the cost of their case were more likely to have been litigating cases in which there was more discovery, higher stakes, less agreement on the issues, and more disputes between counsel—cases that may have been more costly in any case but which DCM apparently did not aid. These findings do not suggest, however, that DCM is inappropriate for most cases. Indeed, many individual components were seen by large majorities of attorneys as helpful in moving their cases along, and few attorneys reported detrimental effects. This analysis suggests only that for certain types of cases DCM appears to be particularly helpful.

3. Performance of Cases on the DCM Tracks

A measure of the effectiveness of the DCM system is whether cases are terminated within the goals set for each track. Large numbers of cases unresolved beyond the track goals may signify that the judges are not maintaining the deadlines set for pretrial events or trial and therefore that the track structure is irrelevant or that the track guidelines are unrealistic. Table 28 (next page) shows the levels of adherence to the track goals.

One way of looking at adherence to track goals is to examine the median age at termination of cases assigned to each track. Column 3 shows that the median age of cases terminated on each track is well within the target termination time for the track. For example, the median age at termination for expedited cases is nine months, well within the nine to twelve month goal for that track. We must be cautious, however, in our interpretation of the medians, especially for tracks with longer time frames. Because the median is based on terminated cases and many of the cases not yet terminated are likely to be the longest cases, the median is very likely lower than it would be if the full range of cases were included in the calculation.

Another way to look at adherence to track goals is presented in columns 4-6. The percentages in these columns are based on all cases assigned to each track, both pending and terminated cases. The first of these columns, column 4, shows the percentage of cases on each track that have terminated within the track goal. Overall, 56% of the cases assigned to tracks have terminated within track goals. For each track except the highly complex track, over half of the terminated cases have met the track goal. Cases appear to fare best on the court's two fastest tracks, where two-thirds have terminated within the goal set for the track. At first glance, it appears that cases on the highly complex track do not do very well, but keep in mind that the track goal in this instance is a lower, not an upper, limit and is not a standard in the sense that the other track goals are.

Table 28
Age of Terminated Civil Cases Filed 9/1/92-7/31/96
and Percent Terminated Within and Beyond Track Goals
Western District of Michigan

Track Name and Goal	1 Number of Cases Assigned	2 % Terminated	3 Median Age at Termination (Months)	4 % Terminated Within Track Goal[53]	5 % Pending But Within Track Goal	6 % Terminated or Pending Beyond Track Goal
Total Cases Assigned	5065	81.0	7.0	56.0	14.0	31.0
Voluntary Expedited (<9 mos.)	36	89.0	7.0	67.0	11.0	22.0
Expedited (9-12 mos.)	382	86.0	9.0	69.0	11.0	20.0
Standard (12-15 mos.)	803	75.0	12.0	58.0	22.0	20.0
Complex (15-24 mos.)	175	59.0	15.0	52.0	32.0	16.0
Highly Complex (>24 mos.)	28	50.0	24.0	25.0	25.0	50.0
Administrative[54]	3361	83.0	4.0	54.0[55]	10.0	36.0
Non-DCM (12 mos.)	280	74.0	7.4	53.0	22.0	25.0
Unassigned	1625	83.0	3.0			
Total Cases Filed	6690	81.0	5.4			

Although column 4 suggests that overall only a little better than half of the cases have terminated within track goals, it is important to keep in mind that column 4 understates the

[53] The denominator for this column and the two to the right is the total number of cases, pending and terminated, assigned to each track. If, for this column, we used instead only the number of cases terminated on each track, the percent terminated within track goal would be higher: Vol. Exp., 75%; Exp., 81%; Std., 78%; Comp., 88%; Sup. Comp., 50%; Adm., 65%; and Non-DCM, 72%.

[54] The advisory group recommended that administrative track cases be decided within 180 days of being fully briefed. Allowing 60 days for a response, a reply, and oral argument results in 240 after the date the dispositive motion is filed.

[55] We are using eight months, or roughly 240 days from filing of the case. The actual track goal is 240 days from filing of the dispositive motion, which we cannot calculate. The measure we use is more stringent. If we were able to use the actual goal for cases on this track an even greater number would have been terminated within the track goal.

percentage of cases terminated within the goal because some portion of the cases still pending on each track will be terminated within that goal. The pending cases whose age is still within the track goal are shown in column 5. If all 14% of those assigned to a track and still pending are terminated within track goals, 70% instead of 56% of tracked cases will terminate within track guidelines.

Some of these pending cases, of course, will likely be terminated outside the track goal, in which case they will add to the number of cases terminated beyond track goal. The percentage of cases that have terminated or are pending outside track goals to date is shown in column 6. Overall, 31% of the cases have not terminated within track goals and will not because their age is already beyond the goal. Setting aside the highly complex track and administrative cases because their track goals cannot be stated precisely, the DCM track with the highest percentage of cases beyond the track goal is the voluntary expedited track, with 22% living to an age beyond the track goal. Although we cannot state precisely what proportion of the assigned cases ultimately will terminate beyond track goals, it is probably safe to say that overall about a quarter to a third of the cases (excluding the highly complex) terminate beyond track goals.

How far beyond the goal do cases terminate? In other words, how old do they get? In an analysis not shown here, we found that, on most tracks, within three months beyond the track goal 90% of the cases assigned to that track had terminated. Exceptions to this pattern were the administrative track and non-DCM cases, where an additional six months were needed to terminate 90% of the cases assigned to those tracks. (Again, keep in mind that the goal for the administrative track cannot be stated precisely; the estimate we are using is very conservative.)

One other point should be made about Table 28. It shows that the large number of cases not assigned to a DCM track terminate very quickly, confirming that most unassigned cases remain unassigned because they never reach the case management conference at which a track assignment would be made.

Altogether, what can we conclude from Table 28? At least half and perhaps as much as two-thirds to three-quarters of the cases assigned to tracks appear to be terminating within the track goals. In an additional three months beyond the track goals, 90% of all cases assigned to the track have terminated. Without a standard, however, for how many cases *should* be resolved within track guidelines, it is difficult to say whether adherence to track goals is high, low, or about what might be expected. At best we can say that in a majority of the cases assigned to tracks, the judges and attorneys are maintaining a schedule that meets the DCM program's guidelines.

Although this effect could be achieved by placing cases on tracks with sufficiently long deadlines to ensure completion within the track goal, two pieces of information suggest this is not the case here. First, the distribution of cases across tracks is heavily weighted toward the fastest tracks. Second, the overall median time to disposition is only seven months.

4. Caseload Indicators of DCM's Effect

Another way to look at the effectiveness of the DCM system is to look at what has happened to the state of the court's civil caseload since DCM was implemented. In doing so, we must keep in mind that many factors influence the rise and fall of case termination measures. During the period of the court's demonstration program, a factor particularly likely to affect how many cases are terminating and at what age is the reporting requirement imposed by the CJRA in 1991. It instructs each court to report publicly, by judge name and case name, each case pending for more than three years as well as motions and bench trials undecided for more than six months. Further, two new judges, one appointed to an additional temporary judgeship, joined the court just as the demonstration program began.

Because the administrative and non-administrative cases are handled differently by the court, these two caseloads are examined separately here. Figure 1 shows several key caseload trends for the non-administrative—or general civil—caseload for fiscal years 1988 to 1995. The vertical line shows the implementation date for the demonstration program. To place the rise and fall of these various measures in context, keep in mind that the median age of the court's civil caseload is seven months, and 70% of this caseload is disposed of in twelve months.

Figure 1 shows that the court was terminating far more cases than were being filed in FY88 and FY89, an effort noted by the advisory group in its analysis of the court and one that resulted in a large drop in the number of pending cases and the age of terminated and pending cases in the late 1980s and early 1990s. As the court entered the demonstration period, its caseload had stabilized, and filings, terminations, and pendings were roughly equivalent.

In the year following implementation of the DCM system—1992 to 1993—Figure 1 shows that the number of terminations rose sharply to a level well above filings. As a consequence, the number of pending cases dropped. The slight upturn in the mean age of terminated cases suggests the court was terminating older cases at this time. With more older cases out of the system, both the mean and median ages of terminated cases fell from 1993 to 1994. We found similar trends for several specific case types, including labor, personal injury, and contract cases.

The recent higher level of terminations without a history of rising filing rates seems to suggest that the demonstration program led to increased terminations and reduced the age of terminated cases. We cannot, however, be sure of this because of the two confounding factors mentioned above—the addition of a temporary judgeship and public reporting required by the CJRA.

Figure 2 shows similar trend lines for the court's administrative caseload. The graph shows that before the demonstration period began, filings of the administrative-type cases were falling. Because of a sustained period of more terminations than filings, the court's pending administrative caseload dropped. The slight rise in mean disposition time in 1991 suggests the cases being disposed of were the court's older cases. In the following year (1991-1992), both the mean and median ages at termination dropped because fewer older cases remained in the system.

At first glance Figure 2 suggests that implementation of the DCM system arrested a series of positive trends, but it is clear that when filings rose again in 1993 the court responded by once again pushing terminations over filings and sustaining it through 1994 and 1995. The rise in mean and median age at termination suggests that once again the court was disposing of older cases. Once these cases were disposed of, the mean and median ages fell. Whether the DCM system permitted it or something else provoked it, it is clear the court was able once again to push its terminations above its filings.

Because overall disposition trends may obscure shifts in the underlying distribution of case dispositions, Table 29 (next page) shows the percentage of pre-DCM and post-DCM cases terminated in certain time intervals.[56] The table reveals that since implementation of DCM a greater proportion of cases have been terminated during the very earliest time interval (zero-to-three months)—38% of DCM cases compared to 31% of non-DCM cases. Concomitantly smaller proportions of DCM cases have been terminated between four and nine months. At ten-to-fifteen months, the proportion of DCM cases disposed of is similar to the proportion of pre-DCM cases disposed of in that time frame, but beyond fifteen months we again find differences, with fewer DCM cases terminated in the longer time frames.

Although these data show that dispositions have accelerated since DCM was implemented, we have the same problem we had when examining the caseload trends—i.e., we cannot rule out other possible explanations for the shift, in this case the additional temporary judgeship and the court's tickler system, which closely monitors the answer period.[57] Explanations we probably can rule out include the criminal caseload and changes in case mix in the civil caseload. During the demonstration period the felony criminal caseload has risen, placing more not less demand on the court. At the same time, there has been little change in the civil case mix, with the only notable change being a slight decrease in the proportion of contracts cases and an increase in the proportion of non-prisoner civil rights cases, changes that would not necessarily produce a shift to earlier dispositions.[58] We also considered whether DCM might be prompting attorneys to voluntarily dismiss their case after encountering the court's requirements but found no evidence for this. Nonetheless, the possibility remains that factors other than DCM explain the shift to earlier dispositions.

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[56] The analysis includes all civil cases, both general civil and administrative cases. The pre-DCM period includes cases filed between 9/1/89 and 8/31/92 and terminated before 12/31/92. The post-DCM period includes cases filed between 9/1/92 and 8/31/95 and terminated before 12/31/95. We do not use in this analysis or any other the court's non-DCM track, which was set up to be a control or comparison track. For several reasons, it is not a useful control group. First, parties were permitted to remove their case from the track: second, the court found it could not completely abandon these cases and began issuing scheduling orders for them part-way through the demonstration period; and third, because of the CJRA reporting requirements judges gave these cases more attention than the original design permitted.

[57] Since the tickler was created under DCM, it could be argued that it is part of the DCM system. It is not, however, part of the tracking system per se.

[58] Contracts cases decreased from 12% of the caseload to 9%, while non-prisoner civil rights cases increased from 8% to 14%. All other case types remained within a percentage point of each other.

Table 29
Percent of Cases Terminated by Time Intervals, Pre-DCM and Post-DCM
Western District of Michigan

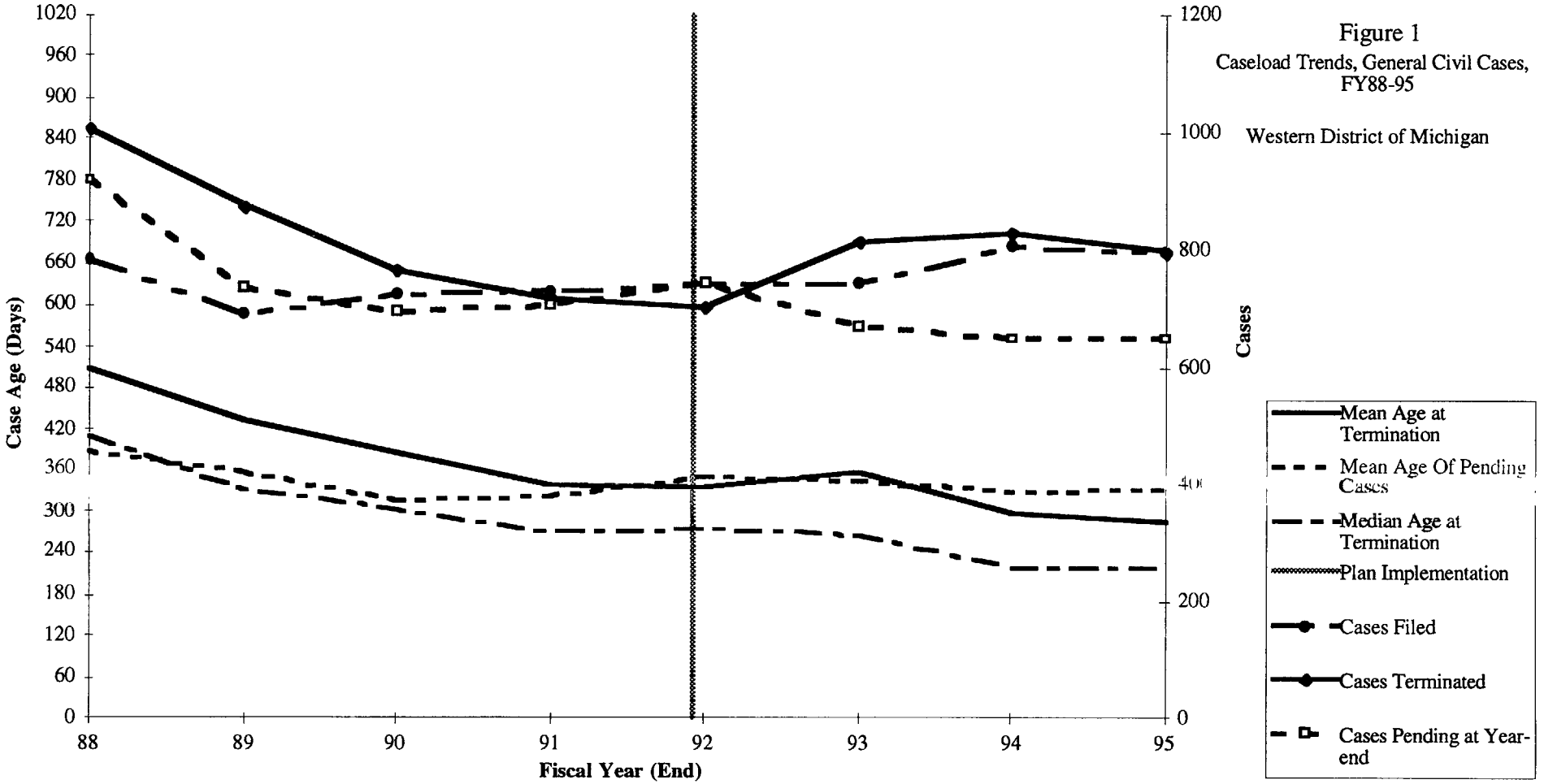
Months to Disposition	Pre-DCM	Post-DCM
0-3	31.0	38.0
4-6	20.0	18.0
7-9	18.0	15.0
10-12	12.0	13.0
13-15	8.0	9.0
16-18	5.0	4.0
19-24	5.0	3.0
25-36	2.0	1.0
37+	0.1	0.0
No. of Cases	4,095	4,158

From these analyses of caseload trends and disposition intervals, our conclusion must be a qualified one. While it is clear that the condition of the court's caseload has improved since implementation of DCM, we cannot say with certainty that the changes are due to DCM. The court's additional temporary judgeship, the CJRA reporting requirements, and the court's tickler system very likely also played important roles.

Figure 1

Caseload Trends, General Civil Cases, FY88-95

Western District of Michigan



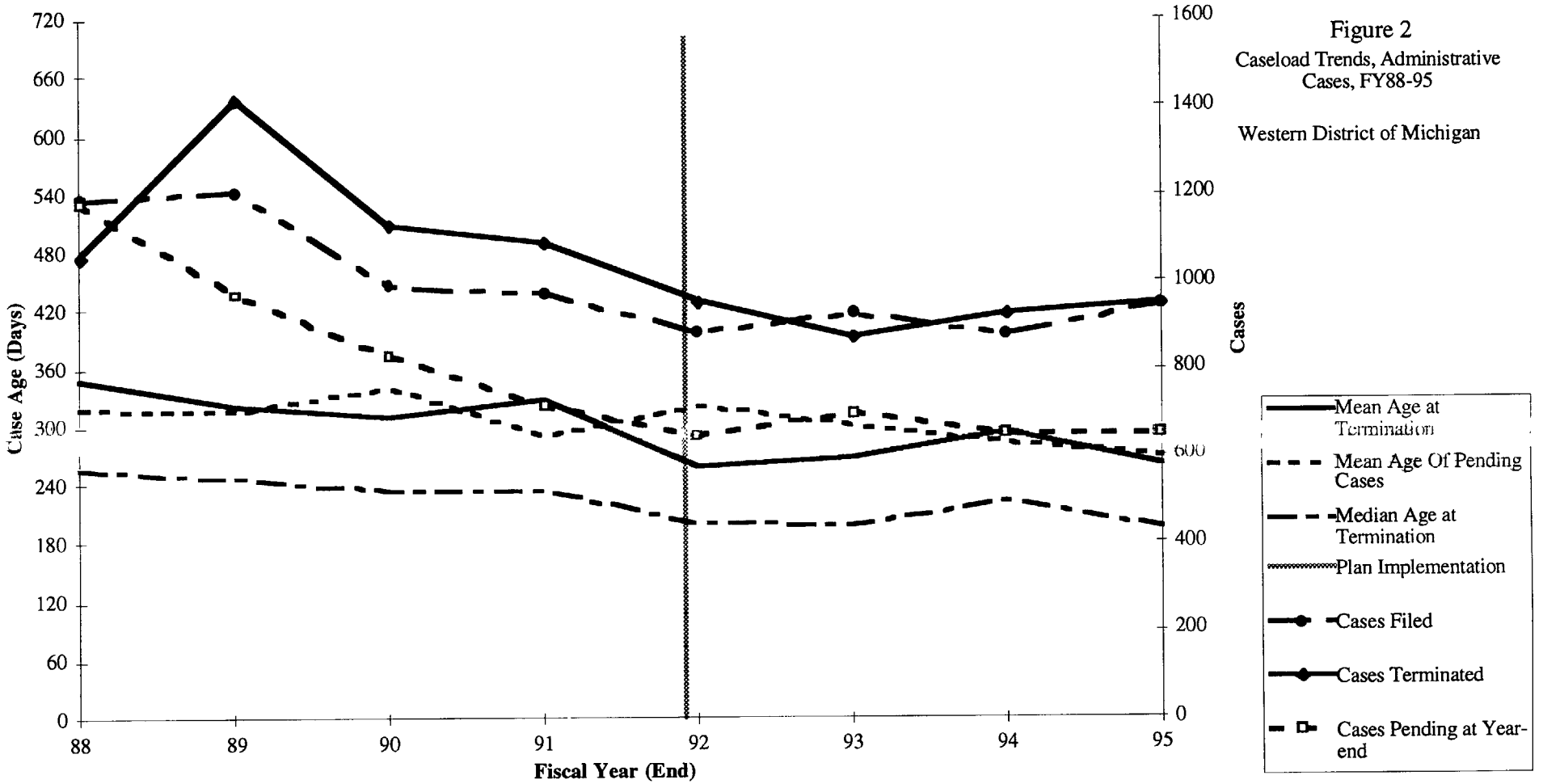


Figure 2

Caseload Trends, Administrative Cases, FY88-95

Western District of Michigan

5 G

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

October 2, 2000

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Case-Management Practices of the Eastern District of Missouri*

I have attached the following materials on case-management practices of the Eastern District of Missouri:

1. A copy of a brochure that describes its differentiated case-management plan.
2. The "civil track information statement."
3. The district's Civil Justice Reform Act Expense and Delay Reduction Plan.
4. "Using the ADRCM (Alternative Dispute Resolution Case Management) Forms Systems Desk Reference."

Copies of the "Alternative Dispute Resolution" manual prepared by the district and an article on *Expanded Utilization of Federal Magistrate Judges: Lessons from the Eastern District of Missouri*, Spring 1999, 43 St. Louis U.L.J. 543-590 are available on request.

John K. Rabiej

Attachments

"Our administration of justice is not decadent. It is simply behind the times...we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."

Dean Roscoe Pound
Address to the American Bar Association
1906

United States District Court
Eastern District of Missouri

DCM

DIFFERENTIATED CASE MANAGEMENT

INTRODUCTION

The United States District Court for the Eastern District of Missouri offers this pamphlet as an overview of the recently implemented Differentiated Case Management (DCM) System. The Court urges counsel to share this information with clients and staff so that they may better understand the new rules and procedures related to DCM that are currently being used to process civil cases in the Eastern District of Missouri.

The Court's Differentiated Case Management Plan was developed in 1993 as part of its Civil Justice Reform Act (CJRA) Expense and Delay Reduction Plan. A CJRA Advisory Group, composed of prominent local attorneys and lay people appointed by Chief Judge Edward L. Filippine, conducted a careful two year study of the current condition of the civil docket in the Eastern District of Missouri.

In its report of October of 1993, the CJRA Advisory Group concluded that an improved model of case management was required, one emphasizing active judicial involvement early in the pre-trial process and recognizing that the time and effort required for preparation and disposition vary from case to case. The new model is Differentiated Case Management.

A DCM Task Force of federal judges, court staff and local attorneys subsequently was assembled to develop and implement this improved model of case management. Those efforts led to an Administrative Order entered by the court in December, 1994 implementing the DCM plan effective January 1, 1995.

By offering this new design for civil justice to litigants in the Eastern District of Missouri, the United States District Court hopes to distinguish itself as "*...a swift and certain agent of justice...*"

WHAT IS DCM?

Differentiated Case Management (DCM) is a case processing system which recognizes that the amount of time, effort, and court involvement required for preparation and disposition of civil cases vary. Thus, DCM involves an early evaluation of each case shortly after filing, enabling the court to tailor a schedule for significant pre-trial events and processing times to the particular requirements of each case. The Eastern District of Missouri has incorporated the following techniques into its approach to case processing:

(1) Requiring all parties to file a Track Information Statement (TIS) for the purpose of collecting additional case information.

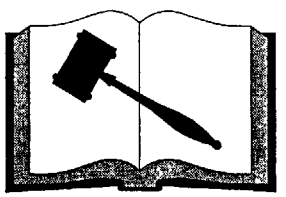
(2) Monitoring service of the complaint and defendant's entry of appearance.

(3) Preliminary case evaluation and track assignment consistent with disposition goals.

(4) Early communication between attorneys and the judge (by way of a Fed. Rule 16 conference) to develop a negotiated case management plan.

(5) Court monitoring of attorney compliance with negotiated pre-trial event deadlines.

(6) Realistic trial schedule set out in a comprehensive Case Management Order (CMO) along with all other pre-trial event deadlines.



QUESTIONS AND ANSWERS

Question: **What is a Track Information Statement (TIS)? When does it have to be filed? Must it be served on all other parties?**

Answer: The DCM Plan requires all plaintiffs (except pro se prisoners) to file and serve a Track Information Statement (TIS) with the complaint. Defendants must file and serve a TIS with the removal petition, first responsive pleading or motion.

Plaintiff's failure to file a TIS may impede the opening of the case. Defendant's failure to file a TIS may waive the right to influence the track selection.

Question: **How and when is a case first placed on a track? What factors are considered in requesting a specific track assignment? Can a case ever change tracks?**

Answer: Once all parties have entered, the DCM Coordinator in the Office of the Clerk will conduct a preliminary review of the case file to make the initial track assignment. The assignment will be based primarily upon the information provided in the complaint and answer as well as on the TIS. Factors to be considered in selecting an appropriate track include: (1) complexity of issues; (2) number of parties in the litigation; (3) estimated time needed for discovery and motions; (4) possible accelerated disposition requirements (TRO, injunctive relief, etc.); and (5) suitability of the case for alternative dispute resolution. If any party or the judge objects to the preliminary track selection, the judge has complete discretion to assign the case to another, more appropriate track.

Question: **What is a Rule 16 Conference? Is it mandatory for all civil cases?**

Answer: A Rule 16 conference is a pre-trial scheduling meeting with the assigned judge either in chambers or by telephone. Rule 16 conferences will be held in Track 2 and Track 3 cases and usually will be conducted within sixty (60) days of the last entry of appearance. Such conferences will not be routinely held in cases assigned to Tracks 1, 4, or 5, although they may occur at the request of the parties or at the discretion of the assigned judge. All counsel of record are required to participate. Topics generally discussed at this conference include: (1) final track assignment; (2) settlement possibilities, including suitability of the case for alternative dispute resolution; (3) filing deadlines for dispositive motions, motions for joinder, and motions to amend the pleadings; (4) manner in which discovery is to proceed (phased, voluntary disclosure); (5) discovery cutoff dates; (6) number of depositions and interrogatories; (7) deadlines for disclosure and availability of expert witnesses; and (8) trial date and length.

Question: **What is a Case Management Order?**

Answer: A Case Management Order (CMO) is a scheduling order issued by the judge reflecting all pretrial case management deadlines. In Tracks 2 and 3 the CMO is issued following the Rule 16 conference. In Tracks 1, 4 and 5 a standardized CMO will be issued early in the proceedings.

Question: **What type of case would ordinarily fall within the Expedited, Standard, Complex, Administrative, and Prisoner tracks?**

Answer: There are no rigid or absolute criteria for most tracks, but certain characteristics indicating different processing needs have been identified. The Track Information Statement (TIS) lists the characteristics (see next page) associated with cases appropriate for each track. Parties should consider which characteristics most closely match their own cases when making a track selection.

Question: **Who should be contacted regarding case management issues?**

Answer: Any questions or problems that arise regarding case management issues should be directed to either the DCM Coordinator or the case management team of the judicial officer assigned to the case. Both may be contacted at the Office of the Clerk of the Court.

TRACK CHARACTERISTICS

Pursuant to 28 U.S.C. 471 et seq., the United States District Court for the Eastern District of Missouri has developed a system of differentiated case management (DCM) which provides for the assignment of all civil cases to an appropriate processing track. Litigants are permitted to indicate their track preference on the front of this sheet although the judicial officer assigned to the case will make the final determination.

The following criteria are factors you may wish to consider prior to indicating your track preference.

TRACK 1: EXPEDITED *(approximately 25% of cases filed)**

- case disposition expected to occur within 12 months of filing
- few parties and/or few issues
- minimal judicial involvement; Rule 16 conference will not be routinely held, although may occur at the request of the parties or discretion of the Court
- few depositions, few interrogatories
- standard scheduling order to be issued by court
- discovery deadline 120 days from scheduling order

TRACK 2: STANDARD *(approximately 65% of cases filed)**

- case disposition expected to occur within 18 months of filing
- multiple legal and/or factual issues; may involve several parties
- discovery issues may require judicial involvement; Rule 16 conference will be held
- consideration of phased discovery or motion practice
- deadlines for discovery and dispositive motions to be set at Rule 16 conference; ordinarily 180-240 days from Rule 16 conference

TRACK 3: COMPLEX *(approximately 10% of cases filed)**

- case disposition expected to occur within 24 months of filing
- complicated legal and/or factual issues; may involve numerous parties or unique circumstances
- potential for extensive discovery approved and monitored by the court; Rule 16 conference will be held
- periodic management conferences may be held
- deadlines for discovery and dispositive motions to be set at Rule 16 conference; ordinarily 240-360 days from Rule 16 conference

**Percentages obtained from data provided by other DCM Courts*

TRACK 4: ADMINISTRATIVE

- case disposition to occur in accordance with the type of case, typically within 24 months of filing
- all administrative appeals, social security cases, habeas corpus petitions, and bankruptcy appeals will be included in this track; other cases not expected to result in trials may be included in this track
- discovery is non-existent or very limited; Rule 16 conference will not be ordinarily held
- standard scheduling order to be issued

TRACK 5: PRISONER

- special case management guidelines will govern matters assigned to this track
- all parties in prisoner cases are exempt from filing a Track Information Statement

UNITED STATES DISTRICT COURT for the EASTERN DISTRICT OF MISSOURI
CIVIL TRACK INFORMATION STATEMENT

The Civil Track Information Statement is for internal management purposes only. This form is not required for Prisoner cases (see reverse). Plaintiff(s) shall file and serve a TIS with the complaint. Defendant(s) shall file and serve a TIS with the removal petition, first responsive pleading or motion. Track assignment will be based upon information contained in the case file together with information provided below. The information below shall not be binding upon the party and shall not be admissible into evidence.

PLEASE PRINT AND ANSWER ALL ITEMS

CAPTION) Case No. (include judge's initials)
)
) _____
) Identification of Party(ies) Submitting this Form
) ☐ Plaintiff ☐ Defendant ☐ Other
) Name _____

Name of Primary Attorney Representing Party(ies) submitting this form

Name of Secondary Attorney (if any) _____

Track Assignment preferred:

Track 1 (Expedited) ☐ **Track 2** (Standard) ☐ **Track 3** (Complex) ☐ **Track 4** (Admin.) ☐

Please answer the following:

•Estimated time needed for discovery _____
•Estimated number of days needed for trial _____
•Does this case require accelerated disposition (TRO, Injunctive Relief)? _____
•Other factors or circumstances considered relevant to track assignment _____

ALTERNATIVE DISPUTE RESOLUTION (ADR):
The Court currently offers two alternative dispute resolution processes:

•MEDIATION - a process in which an impartial neutral (mediator) facilitates negotiations among the parties in litigation to help them reach a settlement.

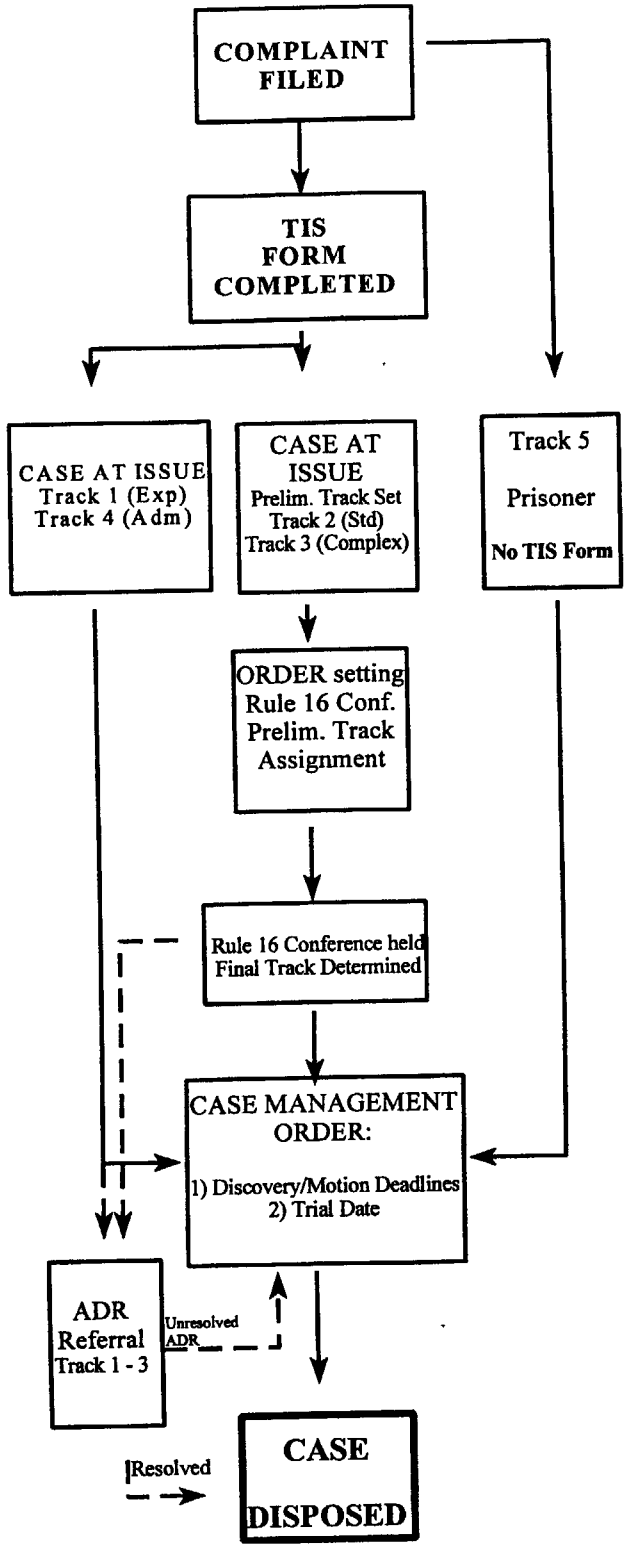
•EARLY NEUTRAL EVALUATION (ENE) - a process in which an experienced neutral evaluator offers pre-trial planning assistance to parties together with a reasoned, non-binding assessment of their case at an early stage of the litigation process.

Please answer the following:
Is this case suitable for ADR? ☐Yes ☐No

If no, why not? _____

If yes, indicate the type of ADR preferred - ☐Mediation ☐Early Neutral Evaluation

Signature of Litigant/Attorney of Record: _____



V. DIFFERENTIATED CASE MANAGEMENT

Rule 16 - 5.01. Case Management Tracks.

Differentiated Case Management (DCM) is a system for managing civil cases based on their relative complexity and the need for judicial involvement. All civil cases filed on or after January 1, 1995 will be assigned to one of the following five tracks:

Track 1 - Expedited. Track 1 cases are expected to be concluded within 12 months of filing, with minimal judicial involvement. Motion and discovery deadlines are established by a standardized Case Management Order.

Track 2 - Standard. Track 2 cases are expected to be concluded within 18 months of filing. Motion and discovery schedules are established by a Case Management Order issued after a Rule 16 Scheduling Conference.

Track 3 - Complex. Track 3 cases are expected to be concluded within 24 months of filing. Motion and discovery schedules are established by a Case Management Order issued after a Rule 16 Scheduling Conference, and the Court may require periodic case management conferences.

Track 4 - Administrative. Track 4 governs bankruptcy, Social Security, and Administrative Procedure Act appeals, petitions for writ of habeas corpus, and motions pursuant to 28 U.S.C. § 2255. Such cases are expected to be concluded in accordance with the requirements of each case, but typically within 24 months of filing. Event deadlines are established by a standardized Case Management Order unique to each type of case.

Track 5 - Prisoner. Track 5 cases are those in which the plaintiff is incarcerated in a penal institution and proceeding pro se at the time the complaint is filed. Special case management guidelines govern these cases.

Rule 3 - 5.02. Track Information Statement.

Except in prisoner cases to be assigned to Track 5, every party in a civil case shall indicate its track preference by filing a Track Information Statement (TIS) on a form provided by the Clerk. A plaintiff shall file a completed TIS with the complaint, or within ten (10) days of the filing of a notice of removal. A defendant shall file a completed TIS with the removal petition, first responsive pleading or motion. The party initiating a civil action, whether by complaint or notice of removal, shall serve its completed TIS and a blank TIS on each party.

Failure to file a TIS may waive a party's right to state a track preference to the Court. The TIS shall be used for internal management purposes, and for making an appropriate assignment to a case management track. Matters appearing on the TIS shall not be binding on a party.

Rule 16 - 5.03. Rule 16 Scheduling Conference.

Scheduling conferences pursuant to Fed.R.Civ.P. 16(a) will be held in cases assigned to Tracks 2 and 3. Rule 16 scheduling conferences may be held at the judge's discretion in actions assigned to other tracks. The Court will inform counsel of their obligation to participate in a conference by issuing an Order Setting Rule 16 Scheduling Conference.

Failure to comply with the order may result in the imposition of sanctions by the Court, including but not limited to dismissal of the action, entry of a default judgment, or restrictions on the admissibility of certain evidence.

Rule 16 - 5.04. Case Management Order.

The Court will issue a Case Management Order (CMO) in each civil case. A CMO is a comprehensive scheduling order issued by the judge reflecting all pretrial case management deadlines, and, if applicable, a trial setting and pretrial compliance requirements. In Tracks 2 and 3 the CMO is issued following the Rule 16 Scheduling Conference. In Tracks 1, 4 and 5 a standardized CMO will be issued early in the proceedings.

Failure to comply with the CMO may result in the imposition of sanctions by the Court, including but not limited to dismissal of the action, entry of a default judgment, or restrictions on the admissibility of certain evidence.

CIVIL JUSTICE REFORM ACT
EXPENSE AND DELAY REDUCTION PLAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Implementation

The clerk will randomly and equally assign cases among the district and magistrate judges and will monitor the distribution of cases according to five tracks. After receipt of the complaint and Track Information Statements from the parties, an experienced deputy clerk will assign each case to the appropriate case processing track. (See Section II - Differentiated Case Management.) Each judge may change the track of any case assigned to that judge.

If a case is randomly assigned to a district judge, the Clerk's Office will notify the attorneys or litigants. The Clerk's Office will also notify the parties that they may consent to trial before a magistrate judge and will provide consent forms. Cases initially assigned to a district judge will require the approval of the assigned district judge before reassignment to a magistrate judge. If the parties consent and the assigned district judge approves, the case will be randomly reassigned to a magistrate judge.

If at the time of filing a case is randomly assigned to a magistrate judge, the Clerk's Office will notify the attorneys or litigants. All parties will be required to return a signed form either consenting to trial before the magistrate judge or opting for reassignment to a district judge. The deadline for submission of these forms will be 20 days after the entry of appearance of the last served party. If a party does not consent and opts for a district judge, then the forms will be removed from the file and the clerk will randomly reassign the case to a district judge.

If a dispositive issue arises in a case assigned to a magistrate judge before all required consents are obtained, the Clerk's Office will temporarily assign the matter to a district judge on a rotating basis for resolution. When such resolution does not dispose of the entire case, the case will be returned to the case pool of the magistrate judge.

If upon filing the complaint, a party includes with the filing a motion which requires the immediate attention of a district judge, e.g., a TRO, the clerk will randomly assign the case to a district judge.

II DIFFERENTIATED CASE MANAGEMENT

The District Court shall implement a differentiated case management (DCM) system for managing each civil case according to its individual requirements. Each civil case filed in this district on or after January 1, 1994 will be assigned to one of five processing tracks that differentiate among civil cases based on objective factors such as the time required for scheduled pretrial events, the preparation required for discovery and disclosure, and the degree of court intervention required for a timely and just resolution of each case.

The following tracks are hereby established:

* **TRACK 1: EXPEDITED** - Case disposition is expected to occur within 12 months of the date of filing, with minimal judicial intervention prior to trial. These cases will usually involve few parties, limited disputed facts, simple discovery/disclosure requirements, and damages with relatively low monetary claims.

* **TRACK 2: STANDARD** - Case disposition is expected to occur within 18 months of the date of filing, with more judicial management than routinely available in expedited cases. There may be multiple parties, substantive factual and legal disputes requiring moderate discovery/disclosure, and significant monetary value in the damage claims. Scheduling conferences will ordinarily be conducted by telephone. Cases on this track which require further attention will be identified and monitored closely by the Court. Most standard cases will move routinely, according to a uniform scheduling order through pretrial stages toward final disposition.

* **TRACK 3: COMPLEX** - Case disposition is expected to occur within 24 months of the date of filing, requiring early and intensive judicial intervention through an individualized case management plan. This relatively small class of cases will be characterized by numerous parties with diverse interests, complicated factual and legal issues, and the potential for extensive discovery/disclosure approved and monitored by the Court. The parties under close supervision by the Court will be expected to design, within guidelines, a detailed plan for management of pretrial stages, including periodic management conferences with the Court. The trial date will be set only upon the Court's assessment of the parties' readiness.

* **TRACK 4: ADMINISTRATIVE** - Case disposition will occur in accordance with the Court's ability to issue reasonably prompt written orders and opinions. Discovery is nonexistent or very limited. Uniform scheduling orders will set deadlines for filing dispositive motions and responses because most cases require only the resolution of legal issues. Administrative appeals, social security cases, non death penalty habeas corpus petitions, and bankruptcy appeals are included in this track.

* **TRACK 5: PRO SE PRISONER CIVIL RIGHTS** - Special case management guidelines will govern matters assigned to this track, in recognition that the processing needs of these cases are unlike other litigation. Because the unique characteristics of these cases go beyond purely scheduling concerns, prisoner pro se cases are treated separately in section V.

DCM IMPLEMENTATION: All parties in civil actions shall complete and file a Track Information Statement (TIS) with their complaint or first responsive pleading. When all TIS documents have been filed, a DCM coordinator in the Clerk's Office will review the case, preliminarily assign a track, and notify the parties in writing of the assignment. In connection with the track assignment, the DCM coordinator may also recommend referral of appropriate cases to an alternative dispute resolution option.

For Track 2 (Standard) and Track 3 (Complex) cases, the assigned judge will usually conduct an initial scheduling conference in person or by telephone pursuant to Rule 16 of the Federal Rules of Civil Procedure. This conference will normally occur no later than 60 days after receipt of the last defendant's responsive pleading. The Court may in its discretion alter the track assignment of the case at this time. The Court will enter a case management scheduling order appropriate for the assigned track at the conclusion of the conference or within ten (10) days. The Court may order referral to an alternative depute resolution option. In Track 1 and Track 4 cases, the clerk will issue a scheduling order to the parties with notice of track assignment that will be binding on the parties unless modified by the judge assigned to the case.

Failure to comply with any of the terms and deadlines established by a scheduling order may result in the Court issuing a show cause order as to why the case

should not be dismissed. Automated case management reports will monitor DCM deadlines, enabling the Clerk's Office to notify the Court of cases failing to comply with the scheduling order.

III ALTERNATIVE DISPUTE RESOLUTION: EARLY NEUTRAL EVALUATION AND MEDIATION.

Procedures governing early neutral evaluation (ENE), and mediation will be developed in conjunction with the establishment of a pool of panel attorneys (both pro bono and compensated depending on the case) who will serve as evaluators and mediators.

A. **Early Neutral Evaluation.** Early neutral evaluation is an alternative dispute resolution process designed to bring the parties and their counsel together early in the pretrial period to present case summaries before and receive a nonbinding assessment from an experienced neutral attorney-evaluator. The objective is to promote early and meaningful communication about disputes, enabling parties to plan their cases effectively and assess realistically the relative strengths and weaknesses of their positions. While this confidential environment provides an opportunity to negotiate a resolution, immediate settlement is not a primary purpose of this process.

Referral of cases to ENE will occur when ordered by the Court either when the parties agree to participate, or the assigned judge orders referral to ENE after the first case management scheduling conference.

B. **Mediation.** Mediation is an informal non-binding dispute resolution process in which an impartial neutral facilitates negotiations among the parties to help them reach settlement. The goal of mediation is the fair, consensual resolution of a dispute in less time and at lower cost than formal court adjudication.

Either upon motion of one or more parties or after a case management conference the Court may by order refer a case to mediation. When an order of referral to mediation is entered, attendance of the parties (or representatives having authority to negotiate a settlement) and counsel is mandatory unless specifically excused by the judge.

IV PRETRIAL CASE MANAGEMENT

Disclosure, Discovery, Scheduling Orders, Case Management Conferences

After consideration of the unanimous position of the Advisory Group, the Court has decided not to implement the mandatory initial disclosure requirements of Fed. R. Civ. P. 26(a)(1) (effective December 1, 1993) in all civil cases. The Court retains the inherent authority to require disclosure by all parties in any civil case by order of a judge. The Advisory Group recommended that the amount of discovery and disclosure should be determined on a case by case basis through the use of an effective scheduling order and appropriate pre-trial conferences. Effective case management requires additional involvement from the Court and early, informed involvement and cooperation from attorneys and litigants.

Case management will depend on the track to which the case has been assigned. Parties shall file a Track Information Statement with the complaint or the initial pleading. Parties may indicate their preference for track assignment on the Track Information Statement. The track assignment will determine discovery and disclosure requirements.

Cases assigned to the expedited track will follow a prescribed written pre-trial schedule. Routine pre-trial conferences will not be scheduled. The judge may refer cases on the Expedited Track to early neutral evaluation or mediation. The judge will determine any deviation from the prescribed schedule. The clerk will issue the expedited scheduling order within 15 days after the entry of appearance of the defendant(s). The Court may defer setting the trial until a date subsequent to entry of the scheduling order. Trial settings are intended to be realistic and firm.

In all standard and complex track cases not governed by Fed. R. Civ. P. 26 (a)(1), the parties shall meet (either in person or by telephone) to prepare a joint proposed scheduling order within 30 days after all served defendants have entered an appearance. The parties shall submit a proposed scheduling order and any unresolved scheduling questions or differences (which must be clearly delineated) to the Court within 40 days after the entry of appearance by the last defendant(s). The plaintiff will be responsible for timely submitting the proposed joint scheduling order to the Court.

The judge will review the case and the proposed scheduling order. Within 14 days after submission of the proposed scheduling order the judge will set a time for a scheduling conference by telephone in most standard cases and in person in most complex cases. The judge will determine the appropriate type of conference.

At the scheduling conference or within ten (10) days after the conference, the judge will enter the Court's scheduling order. The order will: set dates for disclosure of information deemed appropriate by the court; set limits on the number of written interrogatories and depositions; establish a deadline for the filing of dispositive motions; establish additional pre-trial conferences to determine unresolved matters, if needed, or to resolve outstanding motions; and set a realistic and firm trial date. The judge may set forth a procedure to schedule telephone conferences to resolve discovery disputes or request additional conferences or the judge may order a mandatory disclosure/discovery schedule if the parties are unable to comply in a timely manner with a tailored, case-specific schedule.

Reference to Early Neutral Evaluation or Mediation

The judge may refer a case to early neutral evaluation or to mediation after the pre-trial conference. The judge will determine if the scheduling order should be stayed to encourage participation in any settlement effort. Throughout the pretrial process all cases will be given specific reporting or milestone dates for case monitoring purposes even when a case has been referred to early neutral evaluation or mediation.

Motions

To avoid delays caused by unresolved motions, the moving party shall notify the clerk of any motion which is not decided within 60 days after submission. Submission occurs on the date when the last response is filed or the date such response is due. The notice form shall state, "As required by the CJRA Plan, I hereby notify the Court that the referenced motion has been pending since submission for more than 60 days without a ruling."

V PRO SE PRISONER CIVIL RIGHTS DIFFERENTIATED CASE MANAGEMENT

The District Court, recognizing that prisoner civil rights cases comprise a substantial portion of this Court's civil docket and require special processing because of their unique nature, implements the following system of differentiated case management (DCM) for these cases, consistent with the recommendation of the Advisory Group (Report p. 32). A separate DCM system insures that the specific needs of prisoner cases are addressed given limited availability of prisoners for conferences, extra judicial proceedings, and their pro se status.

Pro se prisoner civil rights cases shall be assigned to one of three processing tracks:

* **TRACK 5A: EXPEDITED PRISONER ACTION** - Disposition is expected to occur within 12 months of the date of filing. These cases involve uncomplicated but contested factual disputes. The pleadings indicate that only limited discovery will be required.

* **TRACK 5B: STANDARD PRISONER ACTIONS** - Disposition is expected to occur within 18 months of the date of filing. In these cases a limited period of discovery and an early deadline for filing dispositive motions will be set in a scheduling order.

* **TRACK 5C: NON-STANDARD PRISONER ACTIONS** - Disposition is expected to occur within 24 months of the date of filing. This track includes cases that raise class-wide claims or systemic challenges, or cases which present complicated legal and/or factual issues. In these cases the Court may require the parties to propose a scheduling order including a schedule for completing discovery and filing dispositive motions.

PRISONER DCM IMPLEMENTATION: All parties in prisoner civil rights cases are exempt from the requirement that parties complete and file a Track Information Statement with the complaint, first responsive pleading or motion. The Court will make its track assignments based solely upon review of the complaint.

VI ADOPTION AND IMPLEMENTATION

The Court hereby unanimously adopts this CJRA Expense and Delay Reduction Plan. The initial implementation of the Plan shall begin immediately with the dissemination, explanation, and preparation for full implementation of all provisions as to civil cases filed on or after January 1, 1994.

In the event that local rules conflict with provisions of this Plan, the provisions of the Plan shall govern.

Consultation with the Advisory Group by the Court will continue and the Plan may be amended by the Court at any time. Comments or suggestions regarding the Plan should be sent to:

Clerk of Court
United States District Court
1114 Market Street, Room 260
St. Louis, Missouri 63101-2043

SO ORDERED this 30th **day of November, 1993.**

Edward L. Filippine

Edward L. Filippine, Chief Judge
United States District Court
Eastern District of Missouri

USING THE

ADR-DCM

FORMS SYSTEM

Desk Reference

U.S. DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Differentiated Case Management

To activate the forms macro menu...

1. Using WordPerfect click on the ADR-DCM button 

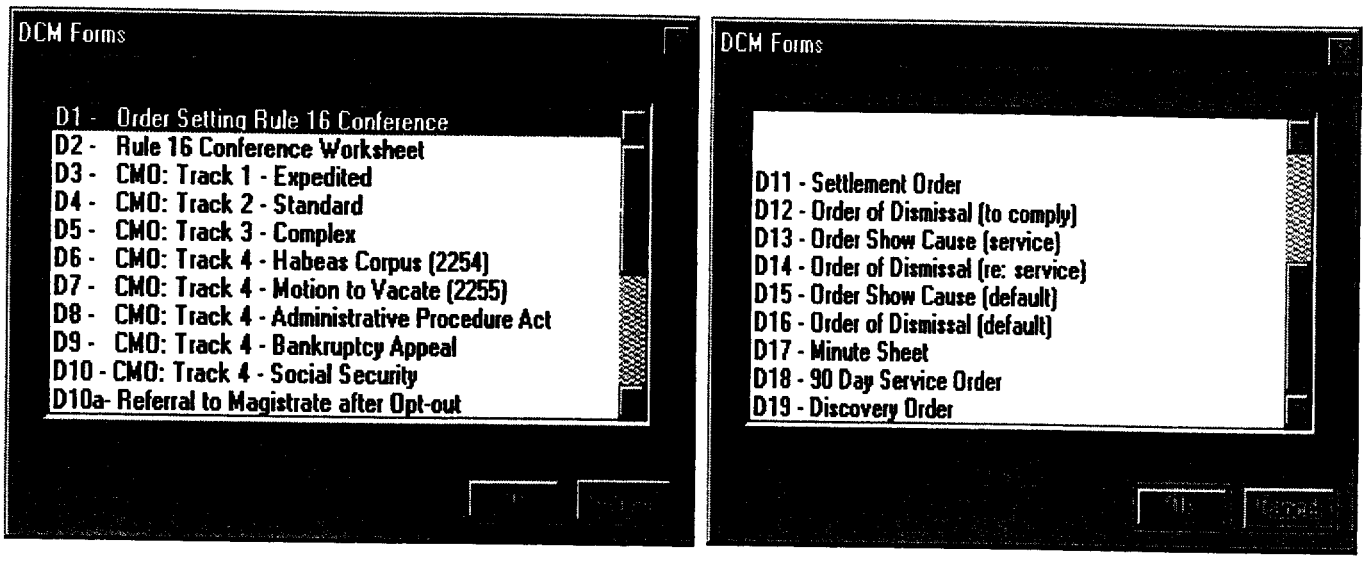


TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-1

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

ORDER SETTING RULE 16 CONFERENCE

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri,

IT IS HEREBY ORDERED that,

Consent: This case has been randomly assigned to a United States Magistrate Judge. Unless previously submitted, no later than **TYPE DATE (APPROX. 7 DAYS PRIOR TO CONF.)**, each party must submit to the Clerk's Office the consent/option form either consenting to the jurisdiction of a United States Magistrate Judge or opting to have the case assigned to a United States District Judge.

1. **Scheduling Conference:** A Scheduling Conference pursuant to Rule 16, Fed.R.Civ.P., is set for **TYPE CONFERENCE DATE**, at **TYPE CONF. TIME in the chambers of the undersigned. TYPE ADDITIONAL SPECIFIC INFORMATION REGARDING SCHEDULING CONFERENCE**Any counsel may participate in the conference by telephone, if counsel notifies the office of the undersigned of his or her intent to do so at least twenty-four (24) hours in advance of the scheduled conference. At the scheduling conference counsel will be expected to discuss in detail all matters covered by Rule 16,

Fed.R.Civ.P., as well as all matters set forth in their joint proposed scheduling plan described in paragraph 3, and a firm and realistic trial setting will be established at or shortly after the conference.

2. **Meeting of Counsel:** Prior to the date for submission of the joint proposed scheduling plan set forth in paragraph 3 below, counsel for the parties shall meet to discuss the following: the nature and basis of the parties' claims and defenses, the possibilities for a prompt settlement or resolution of the case, the formulation of a discovery plan, and other topics listed below or in Rule 16 and Rule 26(f), Fed.R.Civ.P. Counsel will be asked to report orally on the matters discussed at this meeting when they appear before the undersigned for the scheduling conference, and will specifically be asked to report on the potential for settlement; whether settlement demands or offers have been exchanged, without revealing the content of any offers or demands; and, suitability for Alternative Dispute Resolution. This meeting is expected to result in the parties reaching agreement on the form and content of a joint proposed scheduling plan as described in paragraph 3 below.

Only one proposed scheduling plan may be submitted in any case, and it must be signed by counsel for all parties. It will be the responsibility of counsel for the plaintiff to actually submit the joint proposed scheduling plan to the Court. If the parties cannot agree as to any matter required to be contained in the joint plan, the disagreement must be set out clearly in the joint proposal, and the Court will resolve the dispute at or shortly after the scheduling conference.

3. **Joint Proposed Scheduling Plan:** No later than **TYPE DATE (APPROX. 7 DAYS PRIOR TO CONF.)**, counsel shall file with the Clerk of the Court (and provide a courtesy copy to the chambers of the undersigned) a joint proposed scheduling plan. **All dates required to be set forth in the plan shall be within the ranges set forth below for the applicable track:**

Track 1: Expedited	Track 2: Standard	Track 3: Complex
*Disposition w/i 12 mos of filing	*Disposition w/i 18 mos of filing	*Disposition w/i 24 mos of filing
*120 days for discovery	*180-240 days from R16 Conf. for discovery/dispositive motions	*240-360 days from R16 Conf for discovery/dispositive motions

The parties' joint proposed scheduling plan shall include:

(a) whether the Track Assignment is appropriate; **NOTE: This case has been assigned to Track 2: (Standard).**

(b) dates for joinder of additional parties or amendment of pleadings;

(c) a discovery plan including:

(i) a date by which all discovery will be completed **(see applicable track range, Section 3. above)**;

(ii) a date or dates by which the parties will disclose information and exchange documents pursuant to Rule 26(a)(1), Fed.R.Civ.P.,

(iii) whether discovery should be conducted in phases or limited to certain issues,

(iv) whether the presumptive limits of ten (10) depositions per side as set forth in Rule 30(a)(2)(A), Fed.R.Civ.P., and twenty-five (25) interrogatories per party as set forth in Rule 33(a), Fed.R.Civ.P. should apply in this case, and if not, the reasons for the variance from the rules,

(v) whether any physical or mental examinations of parties will be requested pursuant to Rule 35, Fed.R.Civ.P., and if so, by what date that request will be made and the date the examination will be completed,

(vi) dates by which each party shall disclose its expert witnesses' identities and reports, and dates by which each party shall make its expert witnesses available for deposition, giving consideration to whether serial or simultaneous disclosure is appropriate in the case,

(vii) any other matters pertinent to the completion of discovery in this case,

(d) dates for the filing of any dispositive motions **(see applicable track range, Section 3. above)**;

(e) the earliest date by which this case should reasonably be expected to be ready for trial **(see applicable track range, Section 3. above)**;

(f) an estimate of the length of time expected to try the case to verdict; and

(g) any other matters counsel deem appropriate for inclusion in the Joint Scheduling Plan.

4. **Pro Se Parties:** If any party appears in this action pro se, such party shall meet with all other parties or counsel, participate in the preparation and filing of a joint proposed scheduling plan, and appear for the scheduling conference, all in the same manner as otherwise required by this order.

Dated this **TYPE DAY** day of **TYPE MONTH** ,1997.

TYPE JUDGE'S FULL NAME
UNITED STATES DISTRICT JUDGE

_____	)	D-2
	)	
Plaintiff,	)	
	)	
v.	)	**Cause No.** _____
	)	
_____	)	
	)	
Defendant.	)	

RULE 16 CONFERENCE--WORKSHEET

Date Rule 16 Conference Held:_____ Time:_____

Magistrate Consent: Yes / No / NA

Track Assignment Selected:

Track 1: Expedited ☐	**Track 2: Standard** ☐	**Track 3: Complex** ☐
***Disposition w/i 12 mos of filing**	***Disposition w/i 18 mos of filing**	***Disposition w/i 24 mos of filing**
***120 days for discovery**	***180-240 days from R16 Conf. for discovery/dispositive motions**	***240-360 days from R16 Conf for discovery/dispositive motions**

Plaintiff's Attorney: _____

Defendant's Attorney: _____

Additional Parties and Attorneys: _____

_____

_____

Joinder of Additional Parties/Amendment of Pleadings NLT: _____

Nature and Basis of Claim(s):

Nature and Basis of Defense(s):

Potential for Settlement: (demands/offers exchanged?)_____

Discovery: Disclosure [Add text for 26(a)(1) yes/no] NLT _____

Phased? NLT _____ Limited to certain issues? NLT_____

Experts: [26(a)(2)]

Pla's experts names and reports NLT:_____

Pla's experts available for depo NLT: _____

Pla's rebuttal experts: yes/no Disclose NLT:_____

Depose NLT:_____

Dft's experts names and reports NLT: _____

Dft's experts available for depo NLT: _____

Dft's rebuttal experts: yes/no? Disclose NLT_____

Depose NLT_____

Depositions: [presumptive 10]_____ Other:_____

Interrogs: [presumptive 25]_____ Other:_____

Physical/Mental Exam:

No _____

Yes _____ Must be made NLT _____

Completed NLT _____

COMPLETION OF ALL DISCOVERY BY: (date)_____

Refer to ADR: Yes / No Date Referred: _____

ADR Termination: _____

Lead Counsel: _____

DISPOSITIVE MOTIONS FILED NLT:_____

TRIAL SET: Jury: ☐ Non-Jury: ☐ Both: ☐

Date: _____ Time: _____

(60 days after disc/disp. mtn. deadline)

Length of trial: _____day(s)

_____week(s)

Findings and Conclusions of Law and Trial Brief: Before / After

Notes:_____

_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

CASE MANAGEMENT ORDER - TRACK 1: EXPEDITED

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri,

IT IS HEREBY ORDERED that, the following schedule shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

I. SCHEDULING PLAN

1. This case has been assigned to Track 1 (Expedited).

2. All motions for joinder of additional parties or amendment of pleadings shall be filed no later than **TYPE DATE (APPROX. 30 DAYS FROM ORDER)**.

3. Disclosure shall proceed in the following manner:

(a) The parties shall make all disclosures required by Rule 26(a)(1), Fed.R.Civ.P., no later than **TYPE DATE (10 DAYS FROM ORDER)**. Further discovery shall be conducted in accordance with the Federal Rules of Civil Procedure.

(b) Plaintiff and defendant shall disclose all expert witnesses and shall provide the reports required by Rule 26(a)(2), Fed.R.Civ.P., no later than **TYPE DATE (60 DAYS FROM ORDER)**. Plaintiff and defendant shall make expert witnesses available for deposition, and have deposition completed, no later than **TYPE DATE (90 DAYS FROM ORDER)**. Plaintiff and defendant shall disclose all rebuttal expert witnesses and shall provide the reports required by Rule 26(a)(2), Fed.R.Civ.P., no later than **TYPE DATE (75 DAYS FROM ORDER)**. Plaintiff and defendant shall

make rebuttal expert witnesses available for deposition, and have deposition completed, no later than **TYPE DATE (100 DAYS FROM THIS ORDER)**.

(c) The presumptive limits of ten (10) depositions per side as set forth in Rule 30(a)(2)(A), Fed.R.Civ.P., and twenty-five (25) interrogatories per party as set forth in Rule 33(a), Fed.R.Civ.P., shall apply.

(d) Requests for physical or mental examinations of parties pursuant to Rule 35, Fed.R.Civ.P., must be made no later than **TYPE REQUEST DATE**, and any exam must be completed by **TYPE COMPLETION DATE**.

(e) The parties shall complete all discovery in this case no later than **TYPE DATE (120 DAYS FROM ORDER).**

(f) Motions to compel shall be pursued in a diligent and timely manner, but in no event filed more than eleven (11) days following the discovery deadline set out above.

4. This case shall be referred to alternative dispute resolution on **TYPE DATE CASE TO BE REFERRED TO ADR**, and that reference shall terminate on **TYPE COMPLETION DATE OF ADR REFERRAL**.

5. Any motions to dismiss, for summary judgment or motions for judgment on the pleadings must be filed no later than **TYPE DATE (150 DAYS FROM ORDER)** , except that if one party files a motion for summary judgment, the opposing party may file a cross-motion for summary judgment twenty (20) days thereafter.

No later than twenty-one (21) days preceding the deadline for completion of discovery, any party may request **in a written motion** that the Court hold a supplemental conference to discuss issues of scheduling and management of the action. **WHETHER TO GRANT SUCH A REQUEST IS A MATTER FOR THE COURT'S DISCRETION.**

II. ORDER RELATING TO TRIAL

This action is set for a **JURY** trial on **TYPE DATE (NO LATER THAN 365 DAYS PAST FILING DATE OF CASE)**, at **TYPE TIME** This is a **TYPE DOCKET WEEK LENGTH** week docket.

Pursuant to Local Rule 8.04 the court may tax against one or all parties the per diem, mileage, and other expenses of providing a jury for the parties, when the case is terminated or settled by the parties at a time too late to use the summoned jurors in another trial, unless good cause for the delay termination or settlement is shown.

In this case, unless otherwise ordered by the Court, the attorneys shall, not less than twenty (20) days prior to the date set for trial:

1. **Stipulation**: Meet and jointly prepare and file with the Clerk a JOINT Stipulation of all uncontested facts, which may be read into evidence subject to any objections of any party set forth in said stipulation (including a brief summary of the case which may be used on Voir Dire).

2. **Witnesses**:

(a) Deliver to opposing counsel, and to the Clerk, a list of all proposed witnesses, identifying those witnesses who will be called to testify and those who may be called.

(b) Except for good cause shown, no party will be permitted to call any witnesses not listed in compliance with this Order.

3. **Exhibits**:

(a) Mark for identification all exhibits to be offered in evidence at the trial (Plaintiffs to use Arabic numerals and defendants to use letters, e.g., Pltf-1, Deft.-A, or Pltf Jones-1, Deft Smith-A, if there is more than one plaintiff or defendant), and deliver to opposing counsel and to the Clerk a list of such exhibits, identifying those that will be introduced into evidence and those that may be introduced.

(b) Submit said exhibits or true copies thereof to opposing counsel for examination. Prior to trial, the parties shall stipulate which exhibits may be introduced without objection or preliminary identification, and shall file written objections to all other exhibits.

(c) Except for good cause shown, no party will be permitted to offer any exhibits not identified or not submitted by said party for examination by opposing counsel in compliance with this Order. Any objections not made in writing at least ten (10) days prior to trial may be considered waived.

4. **Depositions, Interrogatory Answers, and Request for Admissions**:

(a) Deliver to opposing counsel and to the Clerk a list of all interrogatory answers or parts thereof and depositions or parts thereof (identified by page and line numbers), and answers to requests for admissions proposed to be offered in evidence. At least ten (10) days before trial, opposing counsel shall state in writing any objections to such testimony and shall identify any additional portions of such depositions not listed by the offering party which opposing counsel proposes to offer.

(b) Except for good cause shown, no party will be permitted to offer any interrogatory answer, or deposition or part thereof, or answer to a request for admissions not listed in compliance with this Order. Any objections not made as above required may be considered waived.

5. **Instructions**: Submit to the Court and to opposing counsel their written request for instructions and forms of verdicts reserving the right to submit requests for additional or modified instructions at least ten (10) days before trial in light of opposing party's requests for instructions. (Each request must be supported by at least one pertinent citation.)

6. **Trial Brief**: Submit to the Court and opposing counsel a trial brief stating the legal and factual issues and authorities relied on and discussing any anticipated substantive or procedural problems.

7. **Motions In Limine**: File all motions in limine to exclude evidence, and submit a courtesy copy directly to the Court's chambers, at least ten (10) days before trial.

Failure to comply with any part of this order may result in the imposition of sanctions.

AND

This action is set for a **NON-JURY** trial on **TYPE DATE (NO LATER THAN 365 DAYS FROM FILING OF CASE)**, at **TYPE TIME** This is a **TYPE DOCKET WEEK LENGTH** week docket.

In this case, unless otherwise ordered by the Court, the attorneys shall, not less than twenty (20) days prior to the date set for trial:

1. **Stipulation**: Meet and jointly prepare and file with the Clerk a JOINT Stipulation of all uncontested facts, which may be read into evidence subject to any objections of any party set forth in said stipulation.

2. **Witnesses**:

(a) Deliver to opposing counsel, and to the Clerk, a list of all proposed witnesses, identifying those witnesses who will be called to testify and those who may be called.

(b) Except for good cause shown, no party will be permitted to call any witnesses not listed in compliance with this Order.

3. **Exhibits**:

(a) Mark for identification all exhibits to be offered in evidence at the trial (Plaintiffs to use Arabic numerals and defendants to use letters, e.g., Pltf-1, Deft.-A, or Pltf Jones-1, Deft Smith-A, if there is more than one plaintiff or defendant), and deliver to opposing counsel and to the Clerk a list of such exhibits, identifying those that will be introduced into evidence and those that may be introduced.

(b) Submit said exhibits or true copies thereof to opposing counsel for examination. Prior to trial, the parties shall stipulate which exhibits may be introduced without objection or preliminary identification, and shall file written objections to all other exhibits.

(c) Except for good cause shown, no party will be permitted to offer any exhibits not identified or not submitted by said party for examination by opposing counsel in compliance with this Order. Any objections not made in writing at least ten (10) days prior to trial may be considered waived.

4. **Depositions, Interrogatory Answers, and Request for Admissions**:

(a) Deliver to opposing counsel and to the Clerk a list of all interrogatory answers or parts thereof and depositions or parts thereof (identified by page and line numbers), and answers to requests for admissions proposed to be offered in evidence. At least ten (10) days before trial, opposing counsel shall state in writing any objections to such testimony and shall identify any additional portions of such depositions not listed by the offering party which opposing counsel proposes to offer.

(b) Except for good cause shown, no party will be permitted to offer any interrogatory answer, or deposition or part thereof, or answer to a request for admissions not listed in compliance with this Order. Any objections not made as above required may be considered waived.

5. **Findings of Fact, Conclusions of Law and Trial Brief:** Submit to the Court and to opposing counsel full, complete, and specific findings of fact and conclusions of law, together with a trial brief, citing authorities, in support of said party's legal theories and discussing any anticipated substantive or procedural problems.

6. **Motions in Limine:** File all motions in limine to exclude evidence, and submit a courtesy copy directly to the Court's chambers, at least ten (10) days before trial.

Failure to comply with any part of this Order may result in the imposition of sanctions.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S FULL NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-4

TYPE PLAINTIFF'S NAME, Plaintiff(s),	)	
vs.	)	Case No. **TYPE CASE NUMBER**
TYPE DEFENDANT'S NAME , Defendant(s).	)	

CASE MANAGEMENT ORDER - TRACK 2: STANDARD

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri, and the Rule 16 Conference held on **TYPE RULE 16 CONFERENCE DATE**,

IT IS HEREBY ORDERED that, the following schedule shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

I. SCHEDULING PLAN

1. This case has been assigned to Track 2 (Standard).

2. All motions for joinder of additional parties or amendment of pleadings shall be filed no later than **TYPE DEADLINE DATE FOR FILING**.

3. Disclosure shall proceed in the following manner:

(a) The parties shall make all disclosures required by Rule 26(a)(1), Fed.R.Civ.P., no later than **TYPE DISCLOSURE DATE**.

(b) Plaintiff shall disclose all expert witnesses and shall provide the reports required by Rule 26(a)(2), Fed.R.Civ.P., no later than **TYPE REPORT DUE DATE**, and shall make expert witnesses available for depositions, and have depositions completed, no later than **TYPE WITNESS AVAILABILITY DATE**. Plaintiff shall disclose rebuttal experts and shall provide the reports required by Rule 26(a)(2), Fed.R.Civ.P., no later than **TYPE REPORT DUE DATE**, and shall make rebuttal

experts available for depositions, and have depositions completed, no later than **TYPE REBUTTAL EXPERTS DEPO. DATE**.

(c) Defendant shall disclose all expert witnesses and shall provide the reports required by Rule 26(a)(2), Fed.R.Civ.P., no later than **TYPE REPORT DUE DATE**, and shall make expert witnesses available for depositions, and have depositions completed, no later than **TYPE WITNESS AVAILABILITY DATE**. Defendant shall disclose rebuttal experts and shall provide the reports required by Rule 26(a)(2), Fed.R.Civ.P., no later than **TYPE REPORT DUE DATE**, and shall make rebuttal experts available for depositions, and have depositions completed, no later than **TYPE REBUTTAL EXPERTS DEPO. DATE**.

(d) Each party will be allowed to take **TYPE NUMBER OF DEPOSITIONS** depositions and will be allowed to propound **TYPE NUMBE OF INTERROGATORIES** interrogatories to the other.

(e) Requests for physical or mental examinations of parties pursuant to Rule 35, Fed.R.Civ.P., must be made no later than **TYPE REQUEST DATE**, and any exam must be completed by **TYPE COMPLETION DATE**.

(f) The parties shall complete all discovery in this case no later than **TYPE DATE (APPROX. 180-240 DAYS FROM ORDER**.

(g) Motions to compel shall be pursued in a diligent and timely manner, but in no event filed more than eleven (11) days following the discovery deadline set out above.

4. This case shall be referred to alternative dispute resolution on **TYPE DATE CASE TO BE REFERRED TO ADR**, and that reference shall terminate on **TYPE COMPLETION DATE OF ADR REFERRAL**.

5. Any motions to dismiss, for summary judgment or motions for judgment on the pleadings must be filed no later than **TYPE DATE (APPROX. 180-240 DAYS FROM ORDER)**, except that if one party files a motion for summary judgment, the opposing party may file a cross-motion for summary judgment twenty (20) days thereafter.

No later than twenty-one (21) days preceding the deadline for completion of discovery, any party may request **in a written motion or by telephone** that the Court hold a supplemental conference to discuss issues of scheduling and management of the action. **WHETHER TO GRANT SUCH A REQUEST IS A MATTER FOR THE COURT'S DISCRETION.**

II. ORDER RELATING TO TRIAL

This action is set for a **JURY** trial on **TYPE DATE (NO LATER THAN 18 MOS. PAST FILING OF CASE**, at **TYPE TIME** This is a **TYPE DOCKET WEEK LENGTH** week docket.

Pursuant to Local Rule 8.04 the court may tax against one or all parties the per diem, mileage, and other expenses of providing a jury for the parties, when the case is terminated or settled by the parties

at a time too late to cancel the jury attendance or to use the summoned jurors in another trial, unless good cause for the delayed termination or settlement is shown.

In this case, unless otherwise ordered by the Court, the attorneys shall, not less than twenty (20) days prior to the date set for trial:

1. **Stipulation:** Meet and jointly prepare and file with the Clerk a JOINT Stipulation of all uncontested facts, which may be read into evidence subject to any objections of any party set forth in said stipulation (including a brief summary of the case which may be used on Voir Dire).

2. **Witnesses:**

(a) Deliver to opposing counsel, and to the Clerk, a list of all proposed witnesses, identifying those witnesses who will be called to testify and those who may be called.

(b) Except for good cause shown, no party will be permitted to call any witnesses not listed in compliance with this Order.

3. **Exhibits:**

(a) Mark for identification all exhibits to be offered in evidence at the trial (Plaintiffs to use Arabic numerals and defendants to use letters, e.g., Pltf-1, Deft.-A, or Pltf Jones-1, Deft Smith-A, if there is more than one plaintiff or defendant), and deliver to opposing counsel and to the Clerk a list of such exhibits, identifying those that will be introduced into evidence and those that may be introduced.

(b) Submit said exhibits or true copies thereof to opposing counsel for examination. Prior to trial, the parties shall stipulate which exhibits may be introduced without objection or preliminary identification, and shall file written objections to all other exhibits.

(c) Except for good cause shown, no party will be permitted to offer any exhibits not identified or not submitted by said party for examination by opposing counsel in compliance with this Order. Any objections not made in writing at least ten (10) days prior to trial may be considered waived.

4. **Depositions, Interrogatory Answers, and Request for Admissions:**

(a) Deliver to opposing counsel and to the Clerk a list of all interrogatory answers or parts thereof and depositions or parts thereof (identified by page and line numbers), and answers to requests for admissions proposed to be offered in evidence. At least ten (10) days before trial, opposing counsel shall state in writing any objections to such testimony and shall identify any additional portions of such depositions not listed by the offering party which opposing counsel proposes to offer.

(b) Except for good cause shown, no party will be permitted to offer any interrogatory answer, or deposition or part thereof, or answer to a request for admissions not listed in compliance with this Order. Any objections not made as above required may be considered waived.

5. **Instructions:** Submit to the Court and to opposing counsel their written request for instructions and forms of verdicts reserving the right to submit requests for additional or modified instructions at least ten (10) days before trial in light of opposing party's requests for instructions. (Each request must be supported by at least one pertinent citation.)

6. **Trial Brief:** Submit to the Court and opposing counsel a trial brief stating the legal and factual issues and authorities relied on and discussing any anticipated substantive or procedural problems.

7. **Motions In Limine:** File all motions in limine to exclude evidence, and submit a courtesy copy directly to the Court's chambers, at least ten (10) days before trial.

Failure to comply with any part of this order may result in the imposition of sanctions.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S FULL NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-5

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

CASE MANAGEMENT ORDER - TRACK 3: COMPLEX

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri, and the Rule 16 Conference held on **TYPE DATE OF RULE 16 CONFERENCE**,

IT IS HEREBY ORDERED that, the following schedule shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

I. SCHEDULING PLAN

1. This case has been assigned to Track 3 (Complex).

2. Motions for Joinder of Additional Parties:
TYPE SPECIFIC INSTRUCTIONS FOR JOINDER OF ADDITIONAL PARTIES

3. Amendment of Pleadings:
TYPE SPECIFIC INSTRUCTIONS FOR AMENDMENT OF PLEADINGS

4. Disclosure shall proceed in the following manner:

(a) The parties shall make all disclosures required by Rule 26(a)(1), Fed.R.Civ.P., no later than **TYPE DISCLOSURE DATE**

(b) Expert witnesses:
TYPE SPECIFIC INSTRUCTIONS REGARDING EXPERT WITNESSES

(c) Depositions and interrogatories:
Each party will be allowed to take TYPE NUMBER OF DEPOSITIONS depositions and will be allowed to propound TYPE NUMBER OF INTERROGATORIES interrogatories to the other.

(d) Requests for physical or mental examinations of parties pursuant to Rule 35, Fed.R.Civ.P., must be made no later than TYPE REQUEST DATE, and any exam must be completed by TYPE COMPLETION DATE.

(e) The parties shall complete all discovery in this case no later than TYPE DISCOVERY COMPLETION DATE.

(f) Motions to compel shall be pursued in a diligent and timely manner, but in no event filed more than eleven (11) days following the discovery deadline set out above.

(4) This case shall be referred to alternative dispute resolution on TYPE DATE CASE TO BE REFERRED TO ADR, and that reference shall terminate on TYPE COMPLETION DATE OF ADR REFERRAL.

5. Any motions to dismiss, for summary judgment or motions for judgment on the pleadings must be filed no later than TYPE DATE (APPROX. 240-360 DAYS FROM ORDER, except that if one party files a motion for summary judgment, the opposing party may file a cross-motion for summary judgment twenty (20) days thereafter.

No later than twenty-one (21) days preceding the deadline for completion of discovery, any party may request **in a written motion or by telephone** that the Court hold a supplemental conference to discuss issues of scheduling and management of the action. **WHETHER TO GRANT SUCH A REQUEST IS A MATTER FOR THE COURT'S DISCRETION.**

II. ORDER RELATING TO TRIAL

This action is set for a JURY trial on TYPE DATE (NO LATER THAN 24 MOS. PAST FILING), at TYPE TIME This is a TYPE DOCKET WEEK LENGTH week docket.

Pursuant to Local Rule 8.04 the court may tax against one or all parties the per diem, mileage, and other expenses of providing a jury for the parties, when the case is terminated or settled by the parties at a time too late to cancel the jury attendance or to use the summoned jurors in another trial, unless good cause for the delayed termination or settlement is shown.

In this case, unless otherwise ordered by the Court, the attorneys shall, not less than twenty (20) days prior to the date set for trial:

1. **Stipulation:** Meet and jointly prepare and file with the Clerk a JOINT Stipulation of all uncontested facts, which may be read into evidence subject to any objections of any party set forth in said stipulation (including a brief summary of the case which may be used on Voir Dire).

2. **Witnesses:**

(a) Deliver to opposing counsel, and to the Clerk, a list of all proposed witnesses, identifying those witnesses who will be called to testify and those who may be called.

(b) Except for good cause shown, no party will be permitted to call any witnesses not listed in compliance with this Order.

3. **Exhibits:**

(a) Mark for identification all exhibits to be offered in evidence at the trial (Plaintiffs to use Arabic numerals and defendants to use letters, e.g., Pltf-1, Deft.-A, or Pltf Jones-1, Deft Smith-A, if there is more than one plaintiff or defendant), and deliver to opposing counsel and to the Clerk a list of such exhibits, identifying those that will be introduced into evidence and those that may be introduced.

(b) Submit said exhibits or true copies thereof to opposing counsel for examination. Prior to trial, the parties shall stipulate which exhibits may be introduced without objection or preliminary identification, and shall file written objections to all other exhibits.

(c) Except for good cause shown, no party will be permitted to offer any exhibits not identified or not submitted by said party for examination by opposing counsel in compliance with this Order. Any objections not made in writing at least ten (10) days prior to trial may be considered waived.

4. **Depositions, Interrogatory Answers, and Request for Admissions:**

(a) Deliver to opposing counsel and to the Clerk a list of all interrogatory answers or parts thereof and depositions or parts thereof (identified by page and line numbers), and answers to requests for admissions proposed to be offered in evidence. At least ten (10) days before trial, opposing counsel shall state in writing any objections to such testimony and shall identify any additional portions of such depositions not listed by the offering party which opposing counsel proposes to offer.

(b) Except for good cause shown, no party will be permitted to offer any interrogatory answer, or deposition or part thereof, or answer to a request for admissions not listed in compliance with this Order. Any objections not made as above required may be considered waived.

5. **Instructions:** Submit to the Court and to opposing counsel their written request for instructions and forms of verdicts reserving the right to submit requests for additional or modified instructions at least ten (10) days before trial in light of opposing party's requests for instructions. (Each request must be supported by at least one pertinent citation.)

6. **Trial Brief:** Submit to the Court and opposing counsel a trial brief stating the legal and factual issues and authorities relied on and discussing any anticipated substantive or procedural problems.

7. **Motions In Limine**: File all motions in limine to exclude evidence, and submit a courtesy copy directly to the Court's chambers, at least ten (10) days before trial.

Failure to comply with any part of this order may result in the imposition of sanctions.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-6

TYPE PETITIONER'S NAME,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
Jeremiah W. "Jay" Nixon, et al.,	)	
Respondents.	)	

CASE MANAGEMENT ORDER - TRACK 4: §2254 HABEAS CORPUS PETITION

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri,

IT IS HEREBY ORDERED that the following provisions shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

This case has been assigned to Track 4 (Administrative). Case disposition is expected to occur within 24 months of the date the petition was filed.

This case is referred to United States Magistrate Judge TYPE NAME OF MAGISTRATE JUDGE, pursuant to 28 U.S.C. §636(b)(1), for a report and recommendation on dispositive matters and for rulings on non-dispositive matters. All documents hereinafter filed in this case shall include the initials of the Magistrate Judge under the case number.

Along with the service copy of this order, the Clerk shall provide the Missouri Attorney General with a complete copy of the court file.

Respondent shall show cause, in writing and within forty-five (45) days of the date of this order, why the relief requested in the instant petition should not be granted.

Dated this _____ day of _____, 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-7

TYPE MOVANT'S NAME,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

CASE MANAGEMENT ORDER - TRACK 4: §2255 MOTION TO VACATE

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri,

IT IS HEREBY ORDERED that the following provisions shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

1. This case has been assigned to Track 4 (Administrative). Case disposition is expected to occur within 24 months of the date the petition was filed.

2. Along with the service copy of this order, the Clerk shall provide the United States Attorney with a complete copy of the court file.

3. Respondent shall show cause, in writing and within forty-five (45) days of the date of this order, why the relief requested in the instant motion to vacate should not be granted.

Dated this _____ day of _____, 1997.

_____

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-8

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

CASE MANAGEMENT ORDER - TRACK 4: ADMINISTRATIVE PROCEDURE ACT

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri,

IT IS HEREBY ORDERED that the following provisions shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

1. This case has been assigned to Track 4 (Administrative). Case disposition is expected to occur within 18 months of the date the complaint was filed.

2. Pursuant to Rule 12(a)(3) and (4), Fed.R.Civ.P., defendant shall file any motion to dismiss, motion to remand, and/or answer within sixty (60) days of service of plaintiff's complaint. Along with its answer defendant shall file the administrative record, compiled in accordance with 5 U.S.C. § 556(e) and 557(c).

3. Any motions for summary judgment or motions for judgment on the pleadings must be filed within sixty (60) days of the filing of the government's answer, except that if one party files a motion for summary judgment, the opposing party may file a cross-motion for summary judgment twenty (20) days thereafter.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	
	)	
TYPE DEBTOR NAME	)	
	)	
Debtor.	)	
	)	
TYPE APPELLANT NAME	)	
	)	
Appellant(s),	)	
	)	
v.	)	U.S. District Court
	)	Case No. **TYPE USDC CASE NUMBER**
TYPE APPELLEE NAME	)	
	)	
	)	
Appellee(s).	)	

CASE MANAGEMENT ORDER - TRACK 4: BANKRUPTCY APPEAL

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri,

IT IS HEREBY ORDERED that the following provisions shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

1. This case has been assigned to Track 4 (Administrative). Case disposition is expected to occur within 18 months of the docketing of the appeal in this Court.

2. The instant appeal has been entered on the docket of this District Court, pursuant to Fed.R.Bankr.P. 8007(b), on **TYPE DOCKET DATE**.

3. Pursuant to Fed.R.Bankr.P. 8009(a)(1), appellant shall serve and file a brief within fifteen (15) days of the docketing of the appeal.

4. Pursuant to Fed.R.Bankr.P. 8009(a)(2), appellee shall serve and file a brief within fifteen (15) days after service of the brief of appellant. If the appellee has filed a cross-appeal, the brief of the appellee shall contain the issues and argument pertinent to the brief of the appellant.

5. Pursuant to Fed.R.Bankr.P. 8009(a)(3), appellant may serve and file a reply brief within ten (10) days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross-appeal within ten (10) days after service of the reply brief of the appellant.

6. No further briefs may be filed except by leave of Court upon a showing of good cause. Briefs shall comply with the requirements of Fed.R.Bankr.P. 8010, except that the length of briefs shall be governed by Local Rule 4.01.

7. In each party's first-filed brief, the party shall, under a separate caption denominated "Oral Argument," state and briefly explain the party's position as to whether oral argument shall be allowed. See Fed.R.Bankr.P. 8012.

8. Any motion to dismiss a procedurally defective appeal shall be filed within ten (10) days of the date of this order.

TYPE ORDER DATE
Date

Robert D. St. Vrain
Clerk of the Court

By: _____
TYPE YOUR NAME
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-10

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. **TYPE CASE NUMBER**
	)	
JOHN J. CALLAHAN, Ph. D.,	)	
Acting Commissioner of Social Security,	)	
	)	
Defendant.	)	

CASE MANAGEMENT ORDER - TRACK 4: SOCIAL SECURITY APPEAL

Pursuant to the Civil Justice Reform Act Expense and Delay Reduction Plan and the Differentiated Case Management Program of the United States District Court of the Eastern District of Missouri,

IT IS HEREBY ORDERED that the following provisions shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

This case has been assigned to Track 4 (Administrative). Case disposition is expected to occur within 24 months of the date the petition was filed.

This case is referred to United States Magistrate Judge TYPE MAGISTRATE JUDGE NAME, pursuant to 28 U.S.C. §636(b)(1), for a report and recommendation on dispositive matters and for rulings on non-dispositive matters. All documents hereinafter filed in this case shall include the initials of the Magistrate Judge under the case number.

Pursuant to Rule 12(a)(3) and (4), Fed.R.Civ.P., defendant shall file any motion to dismiss, motion to remand, and/or answer within sixty (60) days of service of plaintiff's complaint. Along with its answer defendant shall file a transcript of the record, in accordance with 42 U.S.C. §405(g).

Pursuant to E.D.Mo. L.R. 9.02, plaintiff shall file a motion for summary judgment within thirty (30) days after defendant files an answer and transcript. If plaintiff fails timely to file a motion for summary judgment, his complaint may be dismissed.

Pursuant to E.D.Mo. L.R. 9.02, defendant shall file a cross motion for summary judgment within thirty (30) days after plaintiff files a motion for summary judgment.

Dated this _____ day of _____, 1997.

_____

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D10-a

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

ORDER

IT IS HEREBY ORDERED that this matter is referred to United States Magistrate Judge TYPE NAME OF REFERRED MAGISTRATE JUDGE, pursuant to 28 U.S.C. §636(b)(1), for a report and recommendation on dispositive matters and for rulings on non-dispositive matters. All documents hereinafter filed in this case shall include the initials of the Magistrate Judge under the case number.

IT IS FURTHER ORDERED that the Case Management Order issued on **TYPE CMO ISSUE DATE** remains in full force and effect.

Dated this _____ day of _____, 1997.

_____
TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-11

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME,	)	
	)	
Defendant(s).	)	

ORDER

The Court having been advised by counsel that this action has been settled,

IT IS HEREBY ORDERED that the **TYPE TRIAL DATE** trial setting is vacated and all pending motions are denied without prejudice.

IT IS HEREBY ORDERED that counsel shall file, within thirty (30) days of the date of this order, a stipulation for dismissal, a motion for leave to voluntarily dismiss, or a proposed consent judgment. Failure to timely comply with this order shall result in the dismissal of this action with prejudice.

Dated this **TYPE DAY** day of **TYPE MONTH** , 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-12

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

ORDER OF DISMISSAL

Pursuant to Fed.R.Civ.P. 41(b), and for the parties' failure to comply with the Court's order of **TYPE ORDER DATE**,

IT IS HEREBY ORDERED that this action is dismissed with prejudice, subject to any party's right, upon good cause shown within sixty (60) days of the date of this order, to reopen the action for the sole purpose of enforcing the settlement.

IT IS FURTHER ORDERED that the Court retains jurisdiction for sixty (60) days from the date of this order to enforce the settlement.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-13

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

ORDER

Upon review of the record, the Court notes that the file contains no proof of service upon nor entry of appearance on behalf of, defendant(s) **TYPE DEFENDANT'S NAME**. Because it appears that service of the complaint has not been timely made within 120 days after the filing of the complaint on **TYPE DATE FILED**,

IT IS HEREBY ORDERED, pursuant to Fed.R.Civ.P. 4(m), that plaintiffs shall show cause in writing, within fourteen (14) days of the date of this order, why this action should not be dismissed without prejudice as to defendant(s) for lack of timely service.

Dated this **TYPE DAY** day of **TYPE MONTH** , 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-14

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

ORDER OF DISMISSAL

On **TYPE SHOW CAUSE ORDER DATE**, this Court ordered plaintiff to show cause why the complaint against defendant **TYPE DEFENDANT'S NAME** should not be dismissed without prejudice for failure to serve process within 120 days. Plaintiff has not responded to that order.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's complaint against defendant is **DISMISSED** without prejudice pursuant to Rule 4(m), Fed.R.Civ.P.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TYPE PLAINTIFF'S NAME ,	)	
Plaintiff(s),	)	
vs.	)	Case No. **TYPE CASE NUMBER**
TYPE DEFENDANT'S NAME ,	)	
Defendant(s).	)	

ORDER

Upon review of the Court file, the Court notes that there has been no activity in this action since the filing of the return of proof of service upon defendant(s) **TYPE DEFENDANT'S NAME** on .

IT IS HEREBY ORDERED that plaintiff shall, within fourteen (14) days of the date of this order, file appropriate motions for entry of default and for default judgment, supported by all necessary affidavits and documentation, as well as proposed orders for the Court's consideration.

Failure to comply with this order may result in dismissal without prejudice.

Dated this **TYPE DAY** day of **TYPE MONTH** , 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-16

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

ORDER OF DISMISSAL

Upon review of the Court file, plaintiff has failed to comply with the Court's order dated **TYPE SHOW CAUSE ORDER DATE**, by filing motions for entry of default and for default judgment. Rule 41(b) of the Federal Rules of Civil Procedure permits the Court to dismiss a case for failure to prosecute or to comply with a Court order.

ACCORDINGLY,

IT IS HEREBY ORDERED, that plaintiff's complaint against defendant **TYPE DEFENDANT'S NAME** is **DISMISSED** without prejudice pursuant to Rule 41(b), Fed.R.Civ.P.

Dated this **TYPE DAY** day of **TYPE MONTH** , 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

RULE 16 CONFERENCE MINUTES

D-17

DATE: **TYPE CONFERENCE DATE**

CASE NO. **TYPE CASE NUMBER**

CASE SHORT NAME: **TYPE STYLE OF CASE**

JUDGE: **TYPE JUDGE'S NAME**

DEPUTY CLERK: **TYPE YOUR NAME**

PARTIES PRESENT: ☐ In Person ☐ By Telephone ☐ Both

SCHEDULING CONFERENCE HELD IN: ☐ Chambers ☐ Courtroom ☐ Other

CASE MANAGEMENT ORDER TO FOLLOW.

COURT REPORTER PRESENT? ☐ Yes ☐ No

PROCEEDINGS COMMENCED: _____ **CONCLUDED:** _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-18

TYPE PLAINTIFF'S NAME Plaintiff(s), vs. **TYPE DEFENDANT'S NAME ,** Defendant(s).	)	Case No. **TYPE CASE NUMBER**

ORDER

This matter is before the Court for examination pursuant to Rule 4(m), Federal Rules of Civil Procedure.

Plaintiff commenced this action on **TYPE DATE COMPLAINT FILED**, naming **TYPE DEFENDANT'S NAME** as defendant(s). A review of the Court file shows that defendant(s) **TYPE DEFENDANT'S NAME** have not been served in this matter nor has service been waived on its behalf. Under Rule 4(m), Federal Rules of Civil Procedure, the Court, after notice to the plaintiff, is directed to dismiss an action against a defendant upon whom service has not been made within 120 days after the filing of the complaint.

The Rule 4(m) period for service expires **TYPE DATE SERVICE EXPIRES**, 120 days after the filing of plaintiff's complaint.

Therefore,

IT IS HEREBY ORDERED that plaintiff shall cause service to be effected upon defendant(s) **TYPE DEFENDANT'S NAME** not later than **TYPE DATE SERVICE EXPIRES**. In the absence of good cause shown, failure to timely serve said defendant(s) shall result in the dismissal of plaintiff's claims as to said defendant(s) without prejudice.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

D-19

TYPE PLAINTIFF'S NAME ,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. **TYPE CASE NUMBER**
	)	
TYPE DEFENDANT'S NAME ,	)	
	)	
Defendant(s).	)	

ORDER

IT IS HEREBY ORDERED that plaintiff(s) shall forthwith serve process in this matter or mail request(s) for waiver of service.

IT IS FURTHER ORDERED that, notwithstanding Fed.R.Civ.P. 26(d) and (f), any party who has entered an appearance may, without leave of Court, serve interrogatories and requests for production or inspection upon the plaintiff at any time, and upon any other party after that party's entry of appearance. Parties shall respond to such discovery requests within 30 days of service of the discovery requests. No party may, without leave of Court, take oral depositions or serve requests for admission prior to the Court's issuance of a Case Management Order. As permitted by this order, discovery shall commence immediately.

IT IS FURTHER ORDERED that, in the event that plaintiff(s) serve discovery requests upon a party who had not entered an appearance as of the date of this order, plaintiff(s) shall serve a copy of this order along with the discovery requests.

Dated this **TYPE DAY** day of **TYPE MONTH**, 1997.

TYPE JUDGE'S NAME
UNITED STATES DISTRICT JUDGE

5 H

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 2, 2000

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Case-Management Practices of the Eastern District of Virginia*

I have attached the following materials on case-management practices of the Eastern District of Virginia:

1. A copy of an article on the *Rocket Docket*, 22 Litigation, 48, No. 2 (1996).
2. Background and description of the district's case-management practices, including caseload data.
3. Sample initial pretrial conference orders in jury and non-jury cases.

John K. Rabiej

Attachments

The Rocket Docket

by Terence P. Ross

In the 1994 box-office smash movie, *Speed*, a mad bomber has wired a Los Angeles City bus with explosives set to detonate if the bus reduces its speed below 50 m.p.h. In order to avoid being blown up, Sandra Bullock must maintain the bus's speed while Keanu Reeves tries to disarm the bomb. To keep the bus above 50 m.p.h., she ignores the rules of the road and all other traffic.

Litigation in "the Rocket Docket," the moniker the U.S. District Court for the Eastern District of Virginia has earned, is a lot like that bus ride. As any regular practitioner before that court will tell you, the normal rules of the road simply do not apply. A comparison of two very similar criminal prosecutions bears this out.

On June 30, 1987, perennial presidential candidate Lyndon H. LaRouche, Jr., along with various associates, was indicted in a Massachusetts federal court on charges of credit card fraud and conspiracy to obstruct justice. Trial began in December 1987, but, after five months and with no end in sight, a mistrial was declared in May 1988 due to the hardship imposed on the jury by the length of the proceedings. In what may have foreshadowed recent events in the O.J. Simpson trial, the defense buried the court with an avalanche of motions and consumed trial time with exhaustive cross-examinations of prosecution witnesses and lengthy evidentiary hearings.

On October 14, 1988, LaRouche again was indicted, this time in the U.S. District Court for the Eastern District of Virginia. He faced similar charges of mail fraud, conspiring to commit mail fraud, and conspiring to defraud the Internal Revenue Service. Notwithstanding the similarity of issues presented and a similar defense strategy, that case went to trial *a mere five weeks after indictment* and resulted in convictions after a trial lasting only four weeks.

How can this difference in both the process and the result in two such similar cases be explained? The answer is the commitment made by the Eastern District of Virginia to speed cases to and through trial.

The U.S. District Court for the Eastern District of Virginia is one of the fastest courts in the nation. This is not by accident or the result of any statistical anomaly. Rather, the court deliberately places an almost overarching emphasis on speed. For example, in the LaRouche trial in Massachusetts, the jury selection process consumed 12 days. In the Eastern District of Virginia, a jury was impaneled in less than two hours. This emphasis on speed—found in both the court's Local Rules and internal operating procedures—has earned the Eastern District of Virginia a nationwide reputation as the Rocket Docket, a term of endearment to some, derision to others.

A Varied Docket

Other than the velocity at which it disposes of cases, however, the court is fairly typical of federal district courts across the nation. The Eastern District of Virginia encompasses what has been referred to in Virginia as the "suburban crescent." It includes all of Northern Virginia (essentially, the Washington, D.C. suburbs), continues down the I-95 corridor to the Richmond metropolitan area, then on to the Tidewater cities (Norfolk, Hampton Roads, and Virginia Beach) in the southeastern corner of the state. Thus, the court's geographic scope and population size is neither large nor small. The district includes decaying urban centers such as the City of Richmond, suburban sprawl such as Virginia Beach, and rural areas in the state's Northern Neck. Its caseload over the past quarter century has been consistently above average, with the mix of civil and criminal filings typical of the federal court system nationwide.

The Eastern District of Virginia also has had to confront the same problems that have clogged other federal district courts. It has been plagued by a dramatically increasing drug-prosecution docket and burdened by a corresponding increase in *pro se* prisoner cases. The court also has had to cope with a number of mass-tort cases, including the A.H. Robins

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ATTACHMENT 5

"Dalkon Shield" litigation and thousands of asbestos-related cases arising out of the Newport News/Norfolk shipbuilding industry. Moreover, during the 1980's and early 1990's, the Eastern District of Virginia experienced the same judicial vacancy problem (actually, the judicial vacancy level in the district was greater than the national average) as many district courts. In short, the Eastern District of Virginia is very much a prototypical federal district court—except for the blinding speed with which it disposes of cases.

But litigation has not always raced through the Eastern District's docket. Indeed, there was a time when the Eastern District of Virginia did not enjoy its current reputation as the Rocket Docket.

When Judge Walter E. Hoffman was appointed to the Norfolk Division of the court in 1954, more than 1,300 civil cases were pending in the Eastern District—an extraordinary number in the 1950's, when there were only three judges on the court. By 1962, the backlog had increased so dramatically that the Norfolk Division of the court alone (with only one District Judge) had more than 750 civil pending cases. Judge Hoffman decided that something had to be done.

During his first few years on the court, Judge Hoffman served on a judicial committee chaired by Judge Alfred P. Murrah, then the Chief Judge of the 10th Circuit (the Federal Building in Oklahoma City, bombed on April 19, 1995, was named after Judge Murrah). Judge Murrah was a leading advocate of reforming judicial administration to expedite cases, and Judge Hoffman decided to adapt some of his ideas to the Eastern District of Virginia's practice, in an effort to gain control of that court's burgeoning docket.

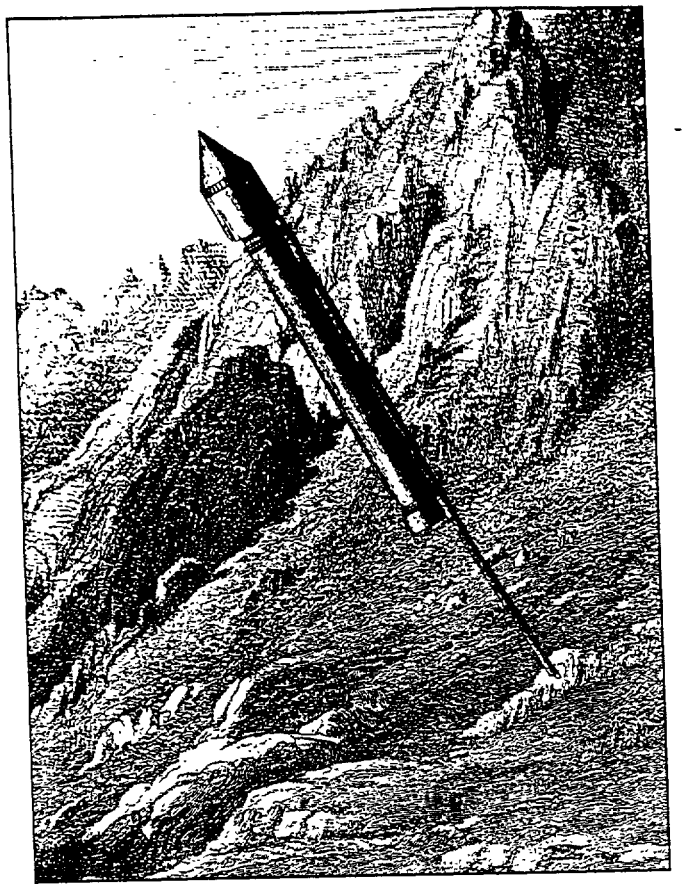
Folklore among long-time practitioners before the court holds that in 1962 Judge Hoffman met with Judge John D. Butzner, Jr., of the Richmond Division, and Judge Oren R. Lewis, of the Alexandria Division. The three jurists agreed to commit to the implementation of docket management practices that would accelerate cases to trial. On July 31, 1962, Judge Hoffman wrote the attorneys in practice in his division of the court:

> With an excess of 750 civil and admiralty cases pending on the dockets . . . it is apparent that there must be a dramatic change in procedure relating to the preparation of cases for trial in order to effect a saving in court time, jury expense, last-minute settlement, expenses of expert witnesses, and many other factors.

The next day, Judge Hoffman issued an order that implemented a series of reforms designed to move cases to trial more quickly. With that order, the Rocket Docket was born.

Since 1962, the rules and practices of the Eastern District of Virginia have evolved to accommodate changes in the Federal Rules and the increase in case filings, but their emphasis on moving cases to trial as quickly as possible has remained. The effect on the administration of justice, as revealed by records maintained at the Administrative Office of the U.S. Courts in Washington, D.C., has been dramatic. By 1972, the average backlog of cases for each judge in the District was reduced to just 288 total pending civil and criminal cases. By 1982, this average had been reduced further to 279 total pending cases. It has remained constant ever since, with the 1994 average being 276 total pending cases per judge.

Even more startling has been the reduction in time to trial. In 1965, the median time from issue to trial in a civil case in the Eastern District of Virginia was 10 months. By 1975, it



was reduced to 7 months, and by 1981, the median time had been cut just to 5 months (half of what it had been when Judge Hoffman first set out to quicken the court's pace). That figure has remained relatively constant ever since.

This means that half of all civil actions brought in the Eastern District of Virginia that go to trial are tried *less than 5 months after an answer* has been filed. By comparison, the national median time to trial for a civil case in 1994 was 18 months, more than three times as long. For the year ending September 30, 1994 (a year in which the District's median time to trial bloated up from 5 months to 7 months for the first time since 1980), the Eastern District of Virginia was the fastest district court in the country in getting civil cases to trial.

The Eastern District's speed is not limited to the conduct of civil trials. The median time from filing to disposition (termination of a case whether by trial, summary judgment, or other means) of a civil case was only 4 months (down from 10 months in 1965), the second fastest pace in the nation in 1994. And, the median time from filing to disposition of a criminal case was only 4.1 months, the fifth fastest pace in the nation in 1994.

These case management statistics are truly remarkable. They are attributable in substantial part to the evolution, since Judge Hoffman's time, of Local Rules, standing orders, and internal practices that have as their central tenet judicial control over the court's docket. As Ray Old, acting Clerk of the Court and a 30-year veteran of the Office of the Clerk of the Court for the Eastern District, noted: "Judicial control has been what's kept us moving." Indeed, any experienced litigator knows that when the attorneys handling a lawsuit are left in the driver's seat on case management, there is a very real chance they will ride the brakes, since delay usually benefits

one side (and sometimes both). In the Eastern District of Virginia, however, the court institutionally has decided that the judges will control the docket and scheduling—and will do so with a rigid efficiency and strict compliance with schedules that would make most bus companies envious.

Several of the Eastern District of Virginia's Local Rules, all of which are designed as a whole to reduce delay (with the ancillary benefit of minimizing expense), are singled out as particularly important at stemming the gridlock afflicting other district courts. For example, in recognition that pretrial discovery often is responsible for the most significant delays and greatest waste of resources in civil litigation, Local Rule 11.1 (A.1) limits each party to no more than 30 written interrogatories, including all parts and subparts. Local Rule 11.1(B) limits each party to no more than five depositions of nonparties. Neither of these limits may be waived by agreement of counsel.

Local Rule 11.1(D) also endeavors to discourage and quickly resolve discovery disputes by requiring that any objections to an interrogatory or document request be filed with the court 15 days after service—even though the Federal Rules of Civil Procedure provide 30 days to respond to such discovery requests. Once the court has ruled on a discovery dispute, Local Rule 11.1(H) requires that the answer or production must be made within 11 days. These innovations significantly reduce delays by forcing discovery disputes to the forefront earlier, leading to quick resolution. The Local Rules also reflect the court's distaste for discovery abuses by exposing parties to sanctions for unnecessary discovery motions and requests. The court routinely awards such fines. As Maria Hewitt, the Deputy Clerk-In-Charge of the Alexandria Division, noted: "The threat of sanctions motivates attorneys to comply with the discovery rules [of the court]."

Equally as important as the Local Rules are the internal operating procedures adopted by the court's divisions, of which the Eastern District of Virginia has four—Alexandria, Richmond, Newport News, and Norfolk. Each division has adopted individual operating procedures to supplement the Local Rules and to meet the court's commitment to keep cases in the fast lane.

A Rocket Docket requires the court's staff keeping the judge's pedal to the metal.

In the Alexandria Division, use of a standard scheduling order is the most significant device employed to clear the road to trial in civil cases. Once a case is at issue, the court enters such an order, which, among other things, sets a discovery cutoff approximately 75 days later and a pretrial conference within 90 days. A date certain for trial is set at the pretrial conference, which usually is only four to six weeks—and no more than eight weeks—later. Thus, the Alexandria Division's standard scheduling order contemplates that a civil case will go to trial only 5 months after it is at issue.

The Norfolk and Newport News Divisions are operated as one court with separate dockets under a combined administration. They employ a very detailed civil case management system derived from Judge Hoffman's 1962 order. A central feature is the use of a master calendar clerk who, under the direction of the Chief Judge, is responsible for the orderly scheduling of the calendar so that cases move expeditiously to trial.

According to Michael Gunn, who has been master calendar clerk since the late 1960's, two weeks after a civil case is at issue the court sets an initial pretrial conference. At this conference (which is usually conducted by a law clerk under the supervision of the master calendar clerk), a firm trial date is set for four to six months later, depending on the complexity of the issues. A pretrial schedule is then set working backwards from the trial date. A final pretrial conference is set for approximately three weeks before trial, at which all Rule 26(a)(3) disclosures are made, exhibits are marked, and a written stipulation as to uncontested facts is filed. An attorney conference to prepare stipulations and exchange information generally is held two weeks before the final pretrial conference. Unlike the single discovery deadline in the Alexandria Division, the Norfolk/Newport News Divisions use a rolling cutoff scheme, with plaintiff's discovery cutoff usually two months prior to the attorney conference, the defendant's discovery cutoff usually one month prior to the attorney conference, and the cutoff for *de bene esse* depositions one to two weeks prior to the attorney conference. The initial pretrial conference also yields briefing and hearing schedules for all pending or contemplated motions. Under this scheduling system, a civil case generally will reach trial five to six months after it is at issue.

Unlike the Alexandria and Norfolk/Newport News Divisions' master docket systems for case management, the Richmond Division uses an individual docket system. In that Division, each case is assigned at the outset to a particular judge who is responsible for everything that later arises. Notwithstanding this, the Richmond Division also is able to move civil cases quickly to trial, again, by each judge's practice of setting a firm schedule at the outset.

For example, Judge Robert R. Merhige, Jr., holds an initial pretrial conference within two weeks after a case is at issue, at which time he sets a discovery schedule, a final pretrial conference, and a trial date for not more than four months after the initial conference. Judge James R. Spencer sets an initial pretrial conference within 30 days after a case is at issue, at which time he also sets a firm discovery cutoff leading to a trial approximately four months after the initial conference.

Thus, the Local Rules and internal operating procedures in each division in the Eastern District rely on several fairly simple case management techniques to keep traffic moving:

- First and foremost, the judges control their dockets through the early setting of a discovery schedule and a firm trial date.
- Second, once the schedule is set, virtually no continuances—or even minor delays—are allowed. "Continuances are few and far between," according to the acting Clerk of the Court, Ray Old. "Our judges take pride in moving cases and aren't going to allow the lawyers to slow things up."
- Third, discovery is limited to the bare necessities, and little tolerance is shown for the type of petty discov-

ery disputes that have afflicted most federal civil litigation. Discovery disputes are resolved early, and sanctions for abuses are liberally doled out.

- Fourth, motions practice is also expedited. Although various techniques are used, the fundamental principle is that motions do not sit for very long *sub judice*. Decisions are made promptly, usually at the hearing on the motion.

These case management techniques dispose of actions at an unprecedented pace and prevent traffic jams. Why? Because since the time of Judge Hoffman, the Eastern District of Virginia has understood and followed the one immutable rule of civil litigation: The chance of settlement increases geometrically as a case approaches trial. Every litigator knows from experience that the best opportunity to settle a case is on the courthouse steps. The Eastern District of Virginia simply has tried to get the parties more quickly to the courthouse steps.

But these results cannot be achieved solely through adoption of appropriate Local Rules and operating procedures. Experience in the Eastern District of Virginia shows there must be a corresponding commitment on the part of the District Judges to keep their feet on the accelerator. For example, in 1994, the judges in the Eastern District of Virginia tried on average 48 cases (versus a national average of 27). This was the third highest average in the nation last year and is the direct result of the court's efforts to speed cases to trial. Although most cases settle as they approach trial, not all do. Any court adopting a "Rocket-Docket" strategy therefore has to be prepared for an increased number of trials each year.

Moreover, a trial must be a relatively short ride in any Rocket Docket, such as the Eastern District of Virginia, if a 48-trial-per-judge average is to be maintained. Indeed, Hewitt, who has worked in the Alexandria Division for 17½ years, could not recall a single trial during that time that had been allowed to run beyond one month. "It would have to be a really unique case for any of our judges to let it run more than a month," she added.

There also has to be recognition that a Rocket Docket requires the court's administrative staff help the judges keep the pedal to the metal. Indeed, much of the credit for the success of the Eastern District of Virginia's case management system must be attributed to the commitment of the deputy clerks and staff in the Clerk's Office. "When new people come on board [at the Clerk's Office], we train them in the importance the court places on speeding cases to trial," said Old, the acting Clerk of the Court. Without such a commitment from the staff, Old said, adoption of a rocket-docket system simply would be unthinkable.

The adage, "Justice delayed is justice denied," appears often to hold true in the views of many litigants and their lawyers in the Eastern District of Virginia. Indeed, the jurisdiction has become a forum of choice for some.

For example, in early 1994, the American Trucking Association, concerned about new federal regulations mandating alcohol tests for truck drivers—which would cost the industry millions of dollars—decided to mount a challenge in federal court. Because the new regulations applied nationwide and would impact companies and drivers in virtually every district in the nation, the Association could have brought the lawsuit in almost any federal district court. After a national search, however, the Association brought the action in the Eastern District of Virginia specifically because it had the fastest civil docket in the nation. For the American Trucking Association, it was critical to obtain legal review of these new regulations as quickly as possible, because each day's delay would cost its members thousands of dollars in compliance expenditures.

Speed can be important for criminal cases too. For example, when William Aramony, former head of the United Way of America, and two associates were indicted on conspiracy, fraud, and tax-evasion charges relating to the misuse of United Way's money, the umbrella charity group suffered a severe blow to its reputation and ability to raise money. United Way officials praised the speed with which the case was brought to trial and was tried in the Eastern District of Virginia (where United Way is headquartered). The quick pace of the proceedings brought to light that the charity was the real victim and allowed it to begin to restore its reputation much sooner than would have otherwise been possible if the proceedings against Aramony had been allowed to drag out.

Criminal Docket Speed

Not surprisingly, however, some criminal defense attorneys believe that the court's emphasis on speed is not always fair to defendants. They do not use the term Rocket Docket affectionately. William B. Moffit, a criminal defense attorney practicing in the Eastern District of Virginia for 20 years, has tried some of the more high-profile cases brought in that court and has been an outspoken critic of its rigid case management system. He defended a LaRouche associate in the 1988 Alexandria trial and represented Aramony at trial last year. "Although the LaRouche case has received the most publicity, it is not the most shocking case," Moffit said. "Most criminal justice [in the Eastern District of Virginia] is dispensed in less than an afternoon, with speed, not fairness, taking precedence." To Moffit, "When speed becomes the most important value in a [court] system, it works a real unfairness to most criminal defendants."

Whether it is popular or unpopular, many courts have taken note of the Eastern District of Virginia's serious commitment to speed cases to and through trial.

If the Eastern District of Virginia's Rocket Docket case management procedures do become the model for federal district courts across the country and a solution to the "litigation crisis," trial lawyers will face new demands to speed up every phase of litigation. Faced with this likely increase in the pace with which cases move to trial, what steps should a litigator take to meet the demands of a Rocket Docket case management system? Here are a few practice pointers that may help a trial attorney survive the rush-hour commute:

1. Prepare your case before it is filed. With the advent of computers, lawsuits relating to even the most complex commercial transactions can be filed on the very day that a lawyer is first retained. In the securities class action and mass tort fields, stories are legion of such one-day races to the courthouse. Experienced practitioners before the Eastern District of Virginia, however, seldom rush to file suit because the act of filing starts a very short countdown to trial. Before filing suit, they complete all factual investigations and thoroughly research every issue of law that might arise during the course of the case. (One might argue that Rule 11 requires this anyway, though in practice, in many civil cases, investigation and legal research prior to the filing of litigation is relatively limited.) If the case involves a complex or technical business or if scientific evidence will be important, you must master these intricacies before filing suit, not as discovery progresses. If there are third-party witnesses, interview them before filing. Anything you can do before the clock starts will save valuable time later.
2. Rule 1 not only applies to civil plaintiffs and prosecutors, but it also applies equally to civil defendants and criminal defendants. To criminal defense attorneys who learn a client may be indicted: Do not wait for the indictment to be handed down. Seek a preindictment meeting with the U.S. Attorney's Office to determine what the government's case will claim and what evidence it may already have. Then, roll up your sleeves and begin your own investigation to prepare for when the indictment is issued. In addition, it is critical to ask for discovery on the very first date that you are entitled to do so. Similarly, civil defendants frequently are aware that suit against them is imminent, usually because the plaintiff will make a settlement demand prior to filing. Seize upon such a warning to begin the factual and legal research you will need—and may not have time for—once litigation commences.
3. If during preparations you decide expert testimony will be useful or essential, interview and retain testifying or consulting experts prior to filing suit. Sometimes it will take months of interviews with dozens of potential experts before you find that one expert with the right blend of expertise in the field and jury appeal. In the Eastern District of Virginia, this is time you do not have after a suit is filed.
4. Based on your prefiling preparation, develop a discovery plan to be implemented as soon as the case is at issue. Keep it simple—there is no time to spend on marginal depositions or document requests. Litigation in a Rocket Docket requires trial attorneys to focus carefully their limited discovery requests and time on the development of factual evidence that really matters to the outcome of the litigation. In developing your plan, also build in sufficient leeway to allow time to pursue sources of evidence that you may only unearth during discovery.
5. Work with opposing counsel in a professional and cooperative manner. Like rush-hour commuters, the fast pace of a Rocket Docket subjects trial lawyers to intense pressures that may manifest (particularly for lawyers used to a more leisurely pace) in uncivil conduct. Resist the temptation. By working with opposing counsel to schedule depositions and hearings, you will find it possible to survive even the tight discovery deadlines imposed by the Eastern District of Virginia. For every instance in which opposing counsel needs a scheduling favor, be assured that you will need a reciprocal favor at some point during the litigation. Moreover, the Eastern District of Virginia takes seriously the obligation of attorneys to confer and endeavor to work out discovery disputes; turning to the court to decide such disputes truly is regarded by the bench as a last resort.
6. Hire a competent local counsel who regularly practices before the court, and listen to her advice. If you are from out-of-state and are asked to represent your client in the Eastern District of Virginia or another Rocket Docket, do not view the local counsel requirement merely as an employment guarantee for the local bar. Regardless of how you work with local counsel in other courts, in the Eastern District of Virginia it is critical that local counsel be more than a maildrop for your pleadings or an office at which you can conduct depositions. The District Judges and deputy clerks on the court repeat over and over that

(Please turn to page 70)

and that a lot of other districts are looking at and looking at with envy. In other districts it's very difficult to get lawyers to represent indigents in civil cases. Because of our trial bar, every lawyer who is a member of the trial bar is required to represent an indigent in a civil case when asked to do so. And that, because of the numbers of lawyers we have in our trial bar, may be as little as one representation in the attorney's lifetime. In addition, we use the monies that we get for the trial bar admission fees to reimburse attorneys for out-of-pocket expenses when they represent indigents as a member of the trial bar. So that when you're called to handle a case, you donate your time, but you don't have to worry about out-of-pocket expenses for investigators and other costs of representation. So, in many respects, I think our trial bar has been a success in the Northern District of Illinois.

Rocket Docket

(Continued from page 52)

the only lawyers who experience problems with the court's case management system are out-of-state attorneys handling their first matters in the Eastern District of Virginia. As soon as you have the first inkling that you will litigate in the Eastern District of Virginia, retain a trial lawyer with substantial experience in the court's practices, and make her a real part of your trial team. In particular, listen to her advice about how the court will react to your discovery plan, motions practice, and trial strategy. Above all else, when she tells you that you will be in trial six months after the suit is filed or that the court will deny even a joint request for a continuance, believe it!

7. Prepare your client for the hectic pace with which the case will progress. Many clients, particularly sophisticated consumers of legal services such as Fortune 500 companies, are used to the leisurely pace common in other federal and state courts. As a result, they assume that a continuance is always available if they simply cannot get around to gathering documents by the deadline. Such an attitude on the part of a client involved in Eastern District of Virginia litigation will be fatal to its case. Impress upon clients at the outset that the Eastern District of Virginia requires of them an unusual degree of responsiveness and cooperation. If your client is a corporation, it must designate a single internal liaison to assist counsel in gathering evidence and interviewing witnesses. And, because clients must be prepared to respond quickly to requests from counsel for strategic decisions, it is often useful to sit down with the client, immediately after the court enters its scheduling order, to anticipate the types of decisions that may have to be made or actions taken at various points in the schedule.

Is speed the answer to the "litigation crisis" that seems to be gripping the federal court system? In the Eastern District of Virginia, the answer clearly is "yes." The court not only has kept pace with an increased civil and criminal caseload, it has steadily improved its ability to process cases. Although some questions of fairness are raised with respect to criminal defendants, most constituencies using the federal courts in the District appear to be satisfied that justice is being fairly dispensed without undue delay or unnecessary expense.

Could speed be the answer for other courts? The case management techniques utilized by the Eastern District of Virginia theoretically should work in any federal district court. The Eastern District of Virginia is as typical as any federal district court in the nation could be; so no such court should be able to argue that it is more urban or more suburban or more rural or whatever because the Eastern District of Virginia is all of these. Indeed, within the four divisions of the court, both an individual and master calendar docket approach are used, demonstrating that either of the two most common docket administration systems in use in the federal courts could benefit from these case management techniques. Nor can the other courts argue that they cannot afford these case management techniques because the Eastern District of Virginia uses no automation to implement them; everything is handled manually by a small number of clerks. And, although the Eastern District of Virginia has been fortunate over the last few decades to be the regular recipient of judicial appointees of superb intellect and substantial trial experience, it is not these qualities that have been the linchpin of the District's success. Rather, the court's success at expediting cases reflects the willingness of new appointees to renew the commitment first made by Judge Hoffman in 1962 to maintain judicial control over the docket and to work hard to keep cases moving.

The experience of the Eastern District of Virginia over the past 30 years strongly suggests that the "litigation crisis" does not require a wholesale overhaul of the federal court system or the Federal Rules of Civil and Criminal Procedure; rather, the answer to the problems that do exist may be found in a few old-fashioned concepts that seem to have been lost over the years:

- Judicial control of the court docket;
- Early scheduling of trial;
- Zero tolerance of dilatory tactics;
- Strict attorney compliance with court rules and deadlines; and
- Prompt judicial decisions on motions or other issues presented to the court for resolution.

Following these simple principles in the Eastern District of Virginia has resulted in fair and expeditious resolution of cases filed in that court for several decades.

Therefore, it is likely that the pace of litigation in the Eastern District of Virginia will continue to be faster than the average federal district court. That

means that litigators will not be able to carry on business as usual in the Rocket Docket. Woe be the trial lawyer who takes her foot off the gas pedal while litigating in the Eastern District of Virginia. Chances are—just like the bus in *Speed*—she will find her case blowing up in front of her eyes.

Interlocutory Orders

(Continued from page 47)

motion to stay would not be subject to mandamus correction (because it is a discretionary order) nor appealable as a final collateral order. How come?

The answer, in my view, requires us to look again at the law of the case doctrine. The appellate judges do not want to disturb the law of the case any more than does the district judge. Thus, the appellate court will not intermeddle with discretionary rulings on mandamus; nor will it review orders by interlocutory appeal that may still be corrected by the district judge; but it will review and correct orders that have practical finality. That the grant of a stay is appealable but not subject to mandamus is not anomalous, therefore, when you take into account the law of the case as well as the traditional limitations on both interlocutory appeals and mandamus.

In counterpoint, discovery orders generally are not immediately appealable, but may be corrected by mandamus. *Schlagenhauf v. Holder, supra; Pacific Union v. Marshall, supra.* This apparent anomaly again is explained by consideration of the law of the case doctrine together with the traditional rules of judicial power. Discovery orders are not "final" in any sense, and so cannot be immediately appealed. There may be instances, however, when a district judge will have exceeded his power and ordered discovery for which there is no legal basis.

Thus, the instances in which mandamus would be appropriate to correct a discovery order are very rare. Most discovery orders are discretionary and arise in fact-dependent contexts; thus, they would not qualify. Even orders compelling compliance with a discovery request or a subpoena over claims of privilege would not always qualify. *See Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied*, 441 U.S. 907 (1979)(privilege issue is "appropriate" for mandamus, but writ not issued). Only if there has been a discovery order that is tantamount to a "usurpation of power," or a "clear abuse of discretion" will mandamus lie. *Schlagenhauf v. Holder, supra.* Accordingly, seeking mandamus to correct an order compelling your client's privileged documents may not be a viable option. And you probably want to avoid the contempt route to immediate appellate review—if you are wrong, then you get socked with fines. Your best options would be to move for reconsideration or to seek review under § 1292(b).

A transfer motion is committed to the district judge's discretion, and so, under *Will v. Calvert Fire Insurance*, orders granting or denying transfer generally should be outside the reach of mandamus. To be sure, there are numerous older decisions in which mandamus was issued to "correct"

transfer orders. Those decisions may no longer be good law. For an excellent recent analysis of the limitations on the use of mandamus to correct transfer orders, you should read *Washington Pub. Util. Group v. District Court*, 843 F.2d 319 (9th Cir. 1988)(writ denied). As analyzed by the Ninth Circuit panel, the error would have to be both plain and severely prejudicial to warrant mandamus. Thus, there is no certain path to immediate appellate correction of an erroneous transfer order. Moving for reconsideration or retransfer may be the best you can do.

The circuit court opinions are not consistent regarding the availability of mandamus to correct attorney disqualification orders. *Compare, e.g., In re Sandahl*, 980 F.2d 1118 (7th Cir. 1992)(writ granted) *with In re Mechem*, 880 F.2d 872 (6th Cir. 1988)(writ denied). The split may be best explained by the supposed metaphysical distinction between orders which are "clear[ly] and indisputabl[y]" erroneous and those which "may be erroneous." Circuit Judge Posner writing for the Seventh Circuit panel in *Sandahl* found the disqualification ruling to be "patently erroneous," and so the writ was issued. A difference in degree of error may be a difference in kind when it comes to disqualification orders.

Disqualification Orders

In practice, however, immediate correction of a disqualification order is hard to obtain. An interlocutory appeal is probably out of the question. And as between reconsideration and mandamus, reconsideration seems to be the better choice, even though neither option holds much hope. Mandamus should be the option of last resort.

Finally, an erroneous order denying summary judgment would involve an error in a ruling clearly within the jurisdiction of the district court. Generally, an error in a ruling within the district court's power would not be subject to correction by mandamus. *See Schlagenhauf v. Holder*, 379 U.S. at 112. Nonetheless, mandamus may be available in an extreme case. *See Edwards v. Cass County, Tex.*, 919 F.2d 273, 276 (5th Cir. 1990)(acknowledging jurisdiction but denying writ). Thus, an erroneous denial of summary judgment may be corrected by reconsideration, by an interlocutory appeal if inextricably linked with an injunction order or if a disputed issue of law is involved, and possibly by mandamus. Reconsideration seems to be the best option in most cases.

The problem of an erroneous interlocutory order, therefore, is not insurmountable. As the case studies have shown, you can obtain immediate correction if you act promptly, decisively, and wisely. Now that you know how to use the tools available, the task should not be daunting.

A final word on correction of interlocutory orders. W.C. Fields once said,

THE "ROCKET DOCKET"

Workshop for Magistrate Judges
of the 5th, 8th, 11th & D.C. Circuits
San Antonio, Texas
July 14, 1994

Prepared by
Tommy E. Miller
United States Magistrate Judge
Eastern District of Virginia
Norfolk, Virginia

I. The Rule - Set an early fixed trial date and grant continuances only when absolutely required in the interest of justice.

II. History

A. The August 1, 1962 Order - Launch of the Rocket Docket (Attachment 1)

1. The Order instituted Initial Pretrial and Final Pretrial Conferences.

2. Realistic and firm trial dates were set.

3. Lawyers were required to prepare earlier in the case.

B. Developments in 1967 - The Second Stage

1. Three more District Judges were added.

2. The case backlog was rapidly eliminated.

3. The new Judges cooperated to enforce and fine-tune the process.

C. 1967 to Present - Ballistic Flight

1. The number of cases has increased dramatically.

2. The number of District Judges has increased from six active Judges to ten active District Judges, six Senior

District Judges actively taking cases, one retired District Judge and seven full-time and one part-time Magistrate Judges.

3. The median time from when issue is joined to disposition of case remains at five months.

III. Statistics

A. These statistics are included only to demonstrate that the Eastern District of Virginia is a busy court with substantial civil and criminal caseloads, yet maintains an efficient civil docket.

B. I choose to take all statistics from the Report of the Civil Justice Reform Act Advisory Group (CJRAAG) for the Eastern District of Virginia issued on September 19, 1991, since the information was readily available and verified using Administrative Office statistics. All statistics are for statistical year 1990. The per-judgeship statistics are for active U.S. District Judgeships.

C. Per Judgeship Statistics

1. Civil filings per judgeship

   a. 513 - Eastern District of Virginia

   b. 379 - National average

2. Terminations per judgeship - (civil and criminal)

   a. 577 - Eastern District of Virginia

   b. 423 - National average

3. Weighted civil filings per judgeship

   a. 647 - Eastern District of Virginia (2nd

highest in nation)

b. 448 - National average

4. Civil and criminal trials completed per judgeship

a. 59 - Eastern District of Virginia

b. 36 - National average

5. Criminal felony filings per judgeship

a. 72 - Eastern District of Virginia

b. 58 - National average

6. Criminal felony defendants per judgeship

a. 96 - Eastern District of Virginia

b. 85 - National average

D. Disposition Statistics

1. Months from issue to trial - civil (median)

a. 5 - Eastern District of Virginia

b. 14 - National average

2. Months from filing to disposition - civil (median)

a. 4 - Eastern District of Virginia

b. 9 - National average

3. Months from filing to disposition - criminal (median)

a. 3.5 - Eastern District of Virginia

b. 5.4 - National average

E. CJRAAG Concluded from Statistics that:

1. The Eastern District of Virginia currently and historically has had a civil caseload that is more burdensome in terms of number and complexity of the cases

than the national average.

2. The Eastern District of Virginia currently has a criminal caseload that is more burdensome in terms of number of cases filed and number of defendants prosecuted and at least as burdensome in terms of complexity of the cases as the national average.

IV. Three Systems to Achieve Success

A. The Eastern District of Virginia has three distinct systems for achieving successful case management. The Norfolk/Newport News, Alexandria and Richmond Divisions vary in their case management practices but all combine to create a model of efficiency.

B. Norfolk/Newport News Divisions

1. These two divisions are treated as one for case management purposes.

2. The divisions have four active District Judges, three senior District Judges who still try cases, one retired District Judge and three U.S. Magistrate Judges assigned.

3. The key case management document is the initial pretrial order (IPTO).

a. An Initial Pretrial Conference (IPTC) is held within two weeks of the case being at issue.

b. Countdown to Trial

(1) The Trial Date is set 4-6 months from IPTC in consultation with counsel.

(2) Jury Instructions must be submitted 5 business days prior to trial.

(3) A Final Pretrial Conference (FPTC) is scheduled 2½ - 3 weeks prior to trial.

(4) An Attorneys' Conference is held 2 weeks prior to FPTC.

(5) De Bene Esse Deposition Cut-Off is 2 weeks before the Attorneys' Conference.

(6) Discovery Cut-Offs

(a) Defendant and Third-Party Defendant discovery cut-off is 2 weeks prior to de bene esse deposition cut-off.

(b) Plaintiff's discovery cut-off is one month prior to defendant's cut-off.

(7) A sample IPTO is included as Attachment 2

(8) When necessary a case is set for trial more than six months from the IPTC.

4. Motions and trials are assigned by the Chief Judge or most senior active Judge with the assistance of a very experienced docket clerk. District Judges and U.S. Magistrate Judges receive assignments on Fridays in order to prepare for the following week.

5. Benefits

a. Cases are not tied to a particular Judge's schedule. Any available Judge can be assigned at any time to a pending motion or the trial of a

case.

b. An exception to the above rule is made for very complex or special cases which are assigned from the beginning to a specific Judge.

c. Criminal cases are set at arraignment within speedy trial guidelines with consideration for the civil cases already set for trial.

d. Lawyers' schedules benefit by this procedure.

(1) Counsel know months in advance exactly when their case is to be tried.

(2) They know that a continuance is rarely granted and only with very good cause.

(3) They know that a Judge <u>will</u> be available to try the case.

(4) They can schedule all trial witnesses (particularly experts) months in advance.

(5) The local state courts do not often set their dockets 4-6 months in advance so lawyers' schedules are clear to set a federal case first, thereby avoiding conflicts with state dockets.

(6) The lawyer benefits under some billing systems because the sooner a case is concluded the sooner a lawyer gets paid.

(7) All hearings are scheduled by the docket clerk after consultation with counsel.

e. This system avoids the wasteful practice of the "trailing docket" which disrupts the schedules of lawyers, jurors and witnesses and is dependent on the schedule of one judge.

f. The "Rocket Docket" speeds the case from issue to trial but does not compel a rushed trial, since the trial judge will rarely have other matters set for the same time on his or her trial schedule.

g. One Judge can preside over a settlement conference knowing that another Judge will be available to try the case.

h. A random survey of Norfolk and Newport News cases reveals that 38% of the nonprisoner civil cases settle without any judicial time expended on the file other than a U.S. Magistrate Judge signing the Initial Pretrial Order.

i. Judges benefit because they do not have to micro manage cases. Judges can devote their time to the business of deciding serious legal issues and trying cases.

6. Requirements for the system to work.

a. The Judges must agree to treat the cases as the Court's cases and not the cases of individual judges.

b. The Judges must have a commitment to work hard to keep the caseload current.

c. The Judges must agree that one Judge may supervise the assignment of all hearings and trials.

7. The Civil Justice Reform Act Advisory Group addressed the complaint of some who suggest that due process is missing in the Eastern District of Virginia. The Advisory Group stated:

> Concern has been expressed in some quarters that the standard of justice administered in a district with a fast-moving docket may be less than that available when the docket moves slowly. We are unaware of any empirical study focusing on this hypothesis. After each district court has filed its CJRA Plan, the Federal Judicial Center, the Administrative Office, Congress, or the American Bar Association may wish to study this issue. Any model plan thereafter formulated pursuant to the CJRA should take the results of such a study into account.

Civil Justice Reform Act Advisory Group for the Eastern District of Virginia, p. 53, Sept. 19, 1991.

C. Alexandria Division

1. This division also uses a master calendar system.

2. This division has four active U.S. District Judges, one senior U.S. District Judge and three U.S. Magistrate Judges assigned.

3. Scheduling orders are issued by the Chief Judge without a pretrial conference after all the parties have appeared (see Attachment 3 for copy of the Order). Discovery generally must be concluded within 2½ months.

4. Final Pretrial Conference

a. A Final Pretrial Conference is held after discovery is concluded and motions decided in the chambers of the Chief Judge at the date and time announced in scheduling order.

b. A fixed trial date is assigned 3-8 weeks later.

c. Counsel bring a list of witnesses, a list of exhibits, and the exhibits themselves, to the final pretrial conference. Objections to the exhibits must be noted at the conference, otherwise they are waived.

d. Counsel have stipulations prepared.

D. Richmond Division

1. Uses the individual docket system.

2. The division has two active U.S. District Judges, two senior District Judges, one full-time U.S. Magistrate Judge and one part-time U.S. Magistrate Judge assigned.

3. Cases are assigned to a District Judge at the time of filing of the complaint. The Judge will schedule an Initial Pretrial Conference approximately 2-3 weeks after answer is filed. At the conference:

a. Trial date is set.

b. Discovery time limits are set.

4. An example of a scheduling order for the Richmond Division is included as Attachment 4.

V. Conclusion

The Advisory Group believes that the District Judges' firm commitment to fair and efficient case management and the bar's cooperation in this endeavor are the principal reasons that the Eastern District of Virginia has consistently maintained its status as the most efficient and effectively-managed federal district court in the nation. Both the master docket system used in Alexandria, Newport News, and Norfolk, and the individual docket system used in Richmond, entail significant judicial control over the litigation process to ensure that cases are disposed of in a timely manner. The clerks' offices in each division have worked to ensure that cases do not languish due to noncompliance with time deadlines imposed by statutes, court rules, and orders. Attorneys who practice in the district understand and comply with rule- and court-imposed deadlines and know that dilatory tactics will not be tolerated. Judges and Magistrate Judges generally rule promptly on nondispositive and dispositive motions the resolution of which is necessary to the fair and efficient disposition of civil cases. Because justice delayed is to a great extent justice denied, this efficiency has without a doubt contributed to the high quality of justice administered to litigants in the federal district court for the Eastern District of Virginia.

Civil Justice Reform Act Advisory Group for the Eastern District of Virginia, pp. 66-67, Sept. 19, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk and Newport News Divisions

Re: Amendment of Rules - Civil and Admiralty - Norfolk and Newport News Divisions.

ORDER

Effective August 1, 1962, and applicable at present only in the Norfolk and Newport News Divisions of the Eastern District of Virginia, the Local Rules are ORDERED amended to include:

Rule A - "Pre-Trial Conferences"

Rule B - "Motions and Interrogatories"

Copies of said Rules are attached hereto and made a part of this order.

Such portions of the Local Rules for the Eastern District of Virginia adopted June 17, 1954, as amended, which may be in conflict with Rule A and Rule B aforesaid are hereby declared to be ineffective in the Norfolk and Newport News Divisions.

Rule A and Rule B shall be operative to all cases now or hereafter scheduled for pre-trial conferences and, upon special order of the court, to cases already scheduled for trial.

This order shall not be operative in the Alexandria and Richmond Divisions of this court.

John D. Butzner, Jr.
United States District Judge

Oren R. Lewis
United States District Judge

Walter E. Hoffman
United States District Judge

July 30, 1962

RULE A

Pre-trial Conferences

1. There shall be at least one pre-trial conference in every civil and admiralty case where issue is joined, unless counsel for the parties stipulate in writing to the contrary and the court approves the stipulation.

2. The court may, in its discretion, direct that an initial pre-trial conference be held at the earliest practicable date following the joinder of issue. The initial pre-trial conference shall be attended by an attorney who is a member or associate of the firm representing the party or parties to the litigation. At the initial pre-trial conference the attorney appearing shall be prepared to give information with respect to the subjects referred to in Appendix A made a part hereof.

3. Attorneys are expected to make full use of all discovery procedures provided by the Rules, rather than to seek information or admissions at the meeting of attorneys or at the final pre-trial conference. No attorney may disregard the time limitations fixed by the Federal Rules of Civil Procedure or Admiralty Rules merely because of a scheduled meeting of attorneys or scheduled final pre-trial conference.

4. Reasonable extensions of time to answer the complaint or libel, or to answer interrogatories or produce documents, will be granted but the party seeking such extension must obtain court approval of same within the time permitted by the Rules, unless for good cause shown it has been impracticable to obtain an order extending the time

within the period specified by the Rules.

5. At least 15 days prior to the final pre-trial conference or, if no final pre-trial conference is scheduled, at least 15 days prior to the date of trial, and after discovery procedures have been completed, the attorneys who will participate in the trial shall meet and confer for the following purposes:

(a) Preparing and signing written stipulations with respect to all undisputed facts;

(b) Exchanging and preparing written stipulations with respect to all exhibits that will be offered at the trial;

(c) Exchanging a final list of witnesses each party will offer at the trial, together with a brief statement of the purpose of the testimony of each witness, i.e., (1) eye witness, (2) medical, (3) expert, etc.;

(d) Agreeing upon the triable issues and whether special interrogatories to the jury are appropriate;

(e) Consideration of objections to depositions and preparation of list of objections to court for determination at <u>final</u> pre-trial conference;

(f) Discussing settlement possibilities;

(g) Whether pre-trial briefs are to be submitted and, if so, the date of presentation.

For the foregoing purposes the attorneys are requested to examine Appendix B.

6. At any final pre-trial conference, or at any initial pre-trial conference if the parties are prepared, the attorneys actually participating in the trial of the case shall present to the court an order incorporating the following:

(a) All stipulations with respect to undisputed facts.

(b) All stipulations with respect to exhibits. If the parties do not agree as to the admissibility of one or more exhibits, an order shall be prepared stating the exhibit to be offered and its purpose, the objection of the party who opposes the introduction and the reasons for said objection.

(c) The names and addresses of witnesses who shall testify at the trial and the purpose of the testimony of each witness. Parties are expected to obtain the names and addresses of the witnesses in advance of the final pre-trial conference by the use of interrogatories. If the name and address of a witness is not submitted at the time of, or prior to, the final pre-trial conference, the witness shall not be permitted to testify, but this restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot reasonably be anticipated prior to trial. Counsel may designate whether a witness will be called, or whether there is only a possibility that the witness may be called.

(d) A brief statement of fact setting forth the factual contentions of the parties.

(e) A brief statement of the triable issues

as contended by the parties. (See Appendix C for suggested form of order.)

7. At any final pre-trial conference, or at any initial pre-trial conference if the parties are prepared, the court may, in addition to the matters to be incorporated in a formal order, consider and discuss with counsel and, if appropriate, enter an order with respect to:

(a) The prospects of settlement, but in non-jury matters the amount of any settlement generally should not be the subject of discussion.

(b) The objections to any depositions to be presented as evidence.

(c) The matter of presentation of written requests for any charge to the jury.

(d) The formulation of any special interrogatories for submission to the jury.

(e) The necessity for any pre-trial brief on triable issues.

(f) If a trial date has not been previously assigned, a date will be selected.

8. Should a party or his attorney fail to appear at any pre-trial conference (either initial or final) or should otherwise fail to meet and confer in good faith with opposing counsel as provided herein, an ex parte hearing may, in the discretion of the court, be held and judgment of dismissal or default or other appropriate judgment or sanctions imposed, including, but not limited to, sanctions by way of imposition of attorney's fees against the attorney and/or his client.

RULE 8

Motions and Interrogatories

1. In civil and admiralty cases all motions, including objections to interrogatories and requests for admission, shall be in writing, unless made during a hearing or trial. If time does not permit the filing of a written motion, the court may, in its discretion, waive this requirement.

2. All motions shall state with particularity the grounds therefor and shall set forth the relief or order sought.

3. Every motion shall be signed by at least one resident attorney of record in his individual name, and shall state the office address of said attorney. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief there are good grounds to support it; and that it is not interposed for delay.

4. Motions and interrogatories on printed forms, multigraphed, mimeographed, or in any manner reproduced by machine process, other than a typewriter, shall not be permitted unless the attorney filing same has deleted all extraneous matter and certifies that he has carefully reviewed the remaining portions and in good faith believes that the contents are pertinent to the case.

5. Unless otherwise provided by the Rules, all motions shall be made returnable to Mondays at 10 A. M., but counsel need not appear at that time. If arrangements are made for a hearing by the court, the motions shall be

made returnable to a particular date at the specified hour. Before endeavoring to secure an appointment for a hearing on any motion, or on objections relating to discovery, it shall be incumbent upon the party desiring such hearing to meet and confer with his adversary in a good faith effort to narrow the areas of disagreement. In the absence of any agreement such conference shall be held in the office of the attorney nearest the court in the division in which the action is pending.

6. Motions, other than such motions hereinafter enumerated, shall be accompanied by a brief which shall contain a concise factual statement of reasons in support thereof, together with a citation of authorities upon which the movant relies. No brief or citation of authorities need be filed, unless otherwise directed by the court, respecting motions for a more definite statement, motions to quash the service of process or to quash a subpoena, motions for an extension of time unless the time fixed by the Rules or by order of court has already expired, motions for the production of documents, specific objections to interrogatories, motions to compel answers or further answers to interrogatories, motions for default, or any other motions relating solely to the processes of discovery.

7. If a movant files a brief, accompanied by a citation of authorities, the opposing party shall file his response, including a like brief and such supporting documents as are then available, within ten days thereafter. For good cause the responding party may be given additional

time, or may be required to file his response, brief and supporting documents within such shorter period of time as the court may specify.

8. A party desiring to file a motion for summary judgment must act with reasonable dispatch. No motion for summary judgment will be considered unless filed within a reasonable time prior to the date of trial, allowing sufficient time for the opposing party to file counter-affidavits and brief in response thereto, and permitting a reasonable time for the court to hear arguments and consider the merits of any such motion.

9. Motions for a continuance of a trial date shall not be granted by the mere agreement of counsel. Any such motion, verbal or written, must be considered by the court in the presence of all counsel and no continuance will be granted other than for good cause and upon such terms as the court may impose.

10. Motions for the production of documents and for a physical or mental examination of a party must be supported by an affidavit showing good cause for same.

11. All objections to interrogatories or other processes of discovery shall be specific and the filing of any specific objection shall not extend the time within which the objecting party must otherwise answer or respond to requests for discovery with respect to such interrogatories or items to which no objection has been filed. The party seeking discovery is charged with the duty of endeavoring to narrow the areas of disagreement and, if

necessary, to arrange for a hearing before the court. As to all other proceedings, the movant shall be charged with a like responsibility. Depending upon the facts of the particular case, parties called upon to respond to discovery will be allowed a reasonable period, in excess of the time provided by the Federal Rules of Civil Procedure or Admiralty Rules, within which to make discovery but any agreement between counsel relating to any extension of time should be confirmed in writing or specified by order of court.

12. Should any party or his attorney fail to comply with the provisions of this rule relating to "Motions and Interrogatories", or otherwise fail or refuse to meet and confer in good faith in an effort to narrow the areas of disagreement, an ex parte hearing may, in the discretion of the court, be held and judgment of dismissal or default or other appropriate judgment or sanctions imposed, including, but not limited to, sanctions by way of imposition of attorney's fees against the attorney and/or his client.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

M/V MISS TOBY, INC.,
and
CHINCOTEAGUE SEAFOOD CO., INC.

Plaintiffs,

v. Civil Action No. 2:99cv2071

SHOFFLER AND SONS, INC.,

Defendant.

ORDER ON INITIAL PRETRIAL CONFERENCE

It is ORDERED that the provisions of Fed.R.Civ.P. 30(a)(2)(C) (oral depositions), 31(a)(2)(C) (depositions by written questions), 33(a) (written interrogatories), 34(b) (requests for production and entry) and 36(a) (requests for admission) that a party may not serve such discovery before the time specified in Fed.R.Civ.P. 26(d) will not apply in this case.

The provisions of Fed.R.Civ.P. 26(a)(1) (that a party shall provide certain initial disclosures without awaiting a discovery request), 26(d) (that a party may not seek discovery from any source before the parties have met and conferred as required by Fed.R.Civ.P. 26(f)), 26(f) (that the parties meet and plan for discovery prior to a scheduling conference), 30(a)(2)(A) (that a party must obtain leave of court to take more than ten depositions), 32(a)(3) (that a deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the depositions), and 33(a) (that limits the number of written interrogatories to 25 in number including all discrete subparts), will not apply in this case.

ATTACHMENT 1

Subject to any special appearance, questions of jurisdiction, or other motions now pending, the parties having advised the Court that certain processes of discovery are contemplated, it is

ORDERED that the parties do propound interrogatories (Rule 33) and/or written questions (Rule 31), file requests for production of documents and things (Rule 34) and/or admission (Rule 36) and/or physical and mental examination (Rule 35), issue subpoenae for discovery (Rule 45), and take discovery and/or **de bene esse** depositions of witnesses and/or parties (Rules 26, 28, 30) in accordance with the following schedule. Interrogatories to any party by any other party shall be limited to thirty (30) (Local Rule 33). Discovery depositions of nonparty, non-expert witnesses shall be limited to five (5) (Local Rule 30 (I)).

The Court reserves the right to permit discovery depositions of a party or witness who is a nonresident, or otherwise unavailable, at any time prior to trial but such permission must be granted by order of court either by agreement of counsel or upon hearing.

Trial shall commence on **March 5, 2001, at 10:00 a.m., at Norfolk**. Unless otherwise ordered by the Court, a party intending to offer exhibits at trial shall place them in a binder, properly tabbed, numbered and indexed. The original and one copy shall be delivered to the courtroom the morning of trial with copies in the same form to counsel for each party.

Trial by jury has not been demanded. Proposed findings of fact and conclusions of law shall be received by the Clerk on or before **February 28, 2001**.

A **final pretrial conference** shall be conducted on **February 9, 2001, at 2:00 p.m.**, at which time trial counsel shall appear prepared to present for entry an order setting forth (1) a stipulation of undisputed facts, (2) agreed upon exhibits and discovery material to be introduced, (3) exhibits and discovery material intended to be introduced by each party to which there are

objections, stating the particular grounds for each objection, (4) the names and addresses of all witnesses who will testify on behalf of each party, and the purpose of such testimony, (5) the factual contentions of each party, and (6) the triable issues as contended by each party. With the exception of rebuttal, any witness, exhibit or discovery material not included in the final pretrial conference order will not be permitted at trial.

An **attorneys' conference** is scheduled in the office of counsel for plaintiff on **February 2, 2001, at 2:00 p.m**. Counsel shall appear in person for the purpose of preparing stipulations and exchanging information to be included in the final pretrial order outlined above, and for undertaking the **Pretrial Disclosure** required by Rule 26(a)(3), Fed.R.Civ.P., and any objections to the matters disclosed and the grounds therefor shall be noted at this conference. The disclosures, objections and the grounds therefor shall be included in the proposed final pretrial order. While preparation of the final pretrial order shall be the responsibility of all counsel, counsel for plaintiff shall distribute a final draft to all other counsel at least two business days before the scheduled final pretrial conference. Disagreements concerning the content of the final draft shall be resolved before counsel's appearance at the final pretrial conference, at which time the Court will expect the presentation of a clean final draft. Failure to comply may result in the imposition of sanctions pursuant to Rule 16(f), Fed.R.Civ.P..

All **de bene esse** depositions shall be concluded on or before **January 19, 2001**.

If military personnel or out-of-state persons are involved as parties and/or witnesses, counsel shall proceed forthwith to take the discovery and/or de bene esse depositions of said parties and/or witnesses.

Discovery shall be commenced forthwith and shall be completed by **plaintiff(s)** on or before **December 5, 2000**; by **defendant(s)** on

or before **January 5, 2001**. **"Completed"** means that interrogatories, requests for production, and requests for admission must be served at least thirty (30) days prior to the established cut-off date so that responses thereto will be due on or before the cut-off date. All subpoenae issued for discovery must be returnable on or before the discovery cut-off date. Depositions upon oral examination and upon written questions, interrogatories, requests for documents, requests for admission, notices for depositions and production, requests for disclosure of expert information, expert information, disclosures, and answers and responses or objections to such discovery requests **shall not be filed** with the Court unless the Court, on its own initiative or upon motion of a party for good cause shown, requires the filing of all or part of the discovery material obtained during the course of this litigation. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

TIMES AND SEQUENCE FOR DISCLOSURE OF EXPERT TESTIMONY:

1. Any party may serve a Request For Disclosure Of Expert Testimony seeking the information specified by Rule 26(a)(2)(A) and (B) Fed.R.Civ.P. on or after the date when such party is authorized to initiate any other form of discovery under the Fed.R.Civ.P. as modified by the Local Rules of this Court, so long as the request is served more than thirty (30) days prior to the date of Mandatory Disclosure.

2. Upon receipt of a Request For Disclosure Of Expert Testimony, a party shall respond with the information specified in Rule 26(a)(2)(A) and (B) Fed.R.Civ.P. within thirty (30) days of the receipt of such request.

3. Mandatory Disclosure. In the event that disclosure is not sooner required, **plaintiff(s)** shall disclose the information specified in Rule 26(a)(2)(A) and (B) Fed.R.Civ.P. not later than

December 10, 2000, and **defendant(s)** shall disclose the information specified in Rule 26(a)(2)(A) and (B), Fed.R.Civ.P. not later than **January 10, 2001**.

4. If not previously disclosed, **plaintiff(s)** shall disclose contradictory or rebuttal evidence, specified in Rule 26(a)(2)(B) Fed.R.Civ.P., to defendant(s)' initial disclosure of expert testimony not later than **January 17, 2001**.

5. All parties shall complete all forms of discovery with respect to expert testimony and all de bene esse depositions of experts not later than **February 1, 2001**.

6. Answers to interrogatories directed at clarification of the written reports of expert witnesses specified by Rule 26(a)(2)(B) Fed.R.Civ.P. shall be due in fifteen (15) days.

FILING PLEADINGS AND DOCUMENTS:

All pleadings and documents hereafter presented for filing in this case shall be mailed or delivered to this division of the court.

MOTIONS FOR SUMMARY JUDGMENT:

Motions for summary judgment shall be **filed, fully briefed and argued, or referred to a judge for decision,** in advance of the final pretrial conference. Disposition of motions for summary judgment maturing immediately preceding the final pretrial conference, or later, is left to the discretion of the trial judge, and may not be addressed prior to trial.

The Court notes plaintiffs' pending motion to dismiss defendant's counterclaim, filed with supporting memorandum on September 21, 2000. Defendant's brief in opposition shall be received on or before **October 2, 2000**, with any reply to be received on or before **October 5, 2000**. If no hearing is arranged

by October 10, 2000, the clerk shall refer the file on October 13, 2000, to one of the judges for decision on the memoranda submitted.

Tommy E. Miller
UNITED STATES MAGISTRATE JUDGE

Date: September 26, 2000

Copies mailed 9/28/00 cof

Non-Jury
2000 Version

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

[Plaintiff],

Plaintiff,

v. Civil Action No. [Civil Action Number]

[Defendant],

Defendant.

ORDER ON INITIAL PRETRIAL CONFERENCE

It is ORDERED that the provisions of Fed.R.Civ.P. 30(a)(2)(C) (oral depositions), 31(a)(2)(C) (depositions by written questions), 33(a) (written interrogatories), 34(b) (requests for production and entry) and 36(a) (requests for admission) that a party may not serve such discovery before the time specified in Fed.R.Civ.P. 26(d) will not apply in this case.

The provisions of Fed.R.Civ.P. 26(a)(1) (that a party shall provide certain initial disclosures without awaiting a discovery request), 26(d) (that a party may not seek discovery from any source before the parties have met and conferred as required by Fed.R.Civ.P. 26(f)), 26(f) (that the parties meet and plan for discovery prior to a scheduling conference), 30(a)(2)(A) (that a party must obtain leave of court to take more than ten depositions), 32(a)(3) (that a deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the depositions), and 33(a) (that limits the number of written

interrogatories to 25 in number including all discrete subparts), will not apply in this case.

Subject to any special appearance, questions of jurisdiction, or other motions now pending, the parties having advised the Court that certain processes of discovery are contemplated, it is

ORDERED that the parties do propound interrogatories (Rule 33) and/or written questions (Rule 31), file requests for production of documents and things (Rule 34) and/or admission (Rule 36) and/or physical and mental examination (Rule 35), issue subpoenae for discovery (Rule 45), and take discovery and/or **de bene esse** depositions of witnesses and/or parties (Rules 26, 28, 30) in accordance with the following schedule. Interrogatories to any party by any other party shall be limited to thirty (30) (Local Rule 33). Discovery depositions of nonparty, non-expert witnesses shall be limited to five (5) (Local Rule 30 (I)).

The Court reserves the right to permit discovery depositions of a party or witness who is a nonresident, or otherwise unavailable, at any time prior to trial but such permission must be granted by order of court either by agreement of counsel or upon hearing.

Trial shall commence on **[Trial Date], at 10:00 a.m., at Norfolk**. Unless otherwise ordered by the Court, a party intending to offer exhibits at trial shall place them in a binder, properly tabbed, numbered and indexed. The original and one copy shall be delivered to the courtroom the morning of trial with copies in the same form to counsel for each party.

Trial by jury has not been demanded. Proposed findings of fact and conclusions of law shall be received by the Clerk on or before **[findings of fact date]**.

A **final pretrial conference** shall be conducted on **[final pretrial conference date]**, at which time trial counsel shall appear prepared to

present for entry an order setting forth (1) a stipulation of undisputed facts, (2) agreed upon exhibits and discovery material to be introduced, (3) exhibits and discovery material intended to be introduced by each party to which there are objections, stating the particular grounds for each objection, (4) the names and addresses of all witnesses who will testify on behalf of each party, and the purpose of such testimony, (5) the factual contentions of each party, and (6) the triable issues as contended by each party. With the exception of rebuttal, any witness, exhibit or discovery material not included in the final pretrial conference order will not be permitted at trial.

An **attorneys' conference** is scheduled in the office of counsel for plaintiff on **[attorneys' conference date]**. Counsel shall appear in person for the purpose of preparing stipulations and exchanging information to be included in the final pretrial order outlined above, and for undertaking the **Pretrial Disclosure** required by Rule 26(a)(3), Fed.R.Civ.P., and any objections to the matters disclosed and the grounds therefor shall be noted at this conference. The disclosures, objections and the grounds therefor shall be included in the proposed final pretrial order. While preparation of the final pretrial order shall be the responsibility of all counsel, counsel for plaintiff shall distribute a final draft to all other counsel at least two business days before the scheduled final pretrial conference. Disagreements concerning the content of the final draft shall be resolved before counsel's appearance at the final pretrial conference, at which time the Court will expect the presentation of a clean final draft. Failure to comply may result in the imposition of sanctions pursuant to Rule 16(f), Fed.R.Civ.P..

All **de bene esse** depositions shall be concluded on or before **[de bene esse date]**.

If military personnel or out-of-state persons are involved as parties and/or witnesses, counsel shall proceed forthwith to take the discovery and/or de bene esse depositions of said parties and/or witnesses.

Discovery shall be commenced forthwith and shall be completed by **plaintiff(s)** on or before **[plaintiff discovery date]**; by **defendant(s)** on or before **[defendant discovery date]**. **"Completed"** means that interrogatories, requests for production, and requests for admission must be served at least thirty (30) days prior to the established cut-off date so that responses thereto will be due on or before the cut-off date. All subpoenae issued for discovery must be returnable on or before the discovery cut-off date. Depositions upon oral examination and upon written questions, interrogatories, requests for documents, requests for admission, notices for depositions and production, requests for disclosure of expert information, expert information, disclosures, and answers and responses or objections to such discovery requests **shall not be filed** with the Court unless the Court, on its own initiative or upon motion of a party for good cause shown, requires the filing of all or part of the discovery material obtained during the course of this litigation. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

TIMES AND SEQUENCE FOR DISCLOSURE OF EXPERT TESTIMONY:

1. Any party may serve a Request For Disclosure Of Expert Testimony seeking the information specified by Rule 26(a)(2)(A) and (B) Fed.R.Civ.P. on or after the date when such party is authorized to initiate any other form of discovery under the Fed.R.Civ.P. as modified by the Local Rules of this Court, so long as the request is served more than thirty (30) days prior to the date of Mandatory Disclosure.

2. Upon receipt of a Request For Disclosure Of Expert Testimony, a party shall respond with the information specified in Rule 26(a)(2)(A) and (B) Fed.R.Civ.P. within thirty (30) days of the receipt of such request.

3. Mandatory Disclosure. In the event that disclosure is not sooner required, **plaintiff(s)** shall disclose the information specified in Rule 26(a)(2)(A) and (B) Fed.R.Civ.P. not later than **[plaintiff disclosure date]**, and **defendant(s)** shall disclose the information specified in Rule 26(a)(2)(A) and (B), Fed.R.Civ.P. not later than **[defendant disclosure date]**.

4. If not previously disclosed, **plaintiff(s)** shall disclose contradictory or rebuttal evidence, specified in Rule 26(a)(2)(B) Fed.R.Civ.P., to defendant(s)' initial disclosure of expert testimony not later than **[plaintiff rebuttal date]**.

5. All parties shall complete all forms of discovery with respect to expert testimony and all de bene esse depositions of experts not later than **[expert testimony date]**.

6. Answers to interrogatories directed at clarification of the written reports of expert witnesses specified by Rule 26(a)(2)(B) Fed.R.Civ.P. shall be due in fifteen (15) days.

FILING PLEADINGS AND DOCUMENTS:

All pleadings and documents hereafter presented for filing in this case shall be mailed or delivered to this division of the court.

MOTIONS FOR SUMMARY JUDGMENT:

Motions for summary judgment shall be **filed, fully briefed and argued, or referred to a judge for decision**, in advance of the final pretrial conference. Disposition of motions for summary judgment maturing immediately preceding the final pretrial conference, or later,

is left to the discretion of the trial judge, and may not be addressed prior to trial.

UNITED STATES MAGISTRATE JUDGE

Date: [Date]

Jury
2000 Version

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

[Plaintiff],

Plaintiff,

v. Civil Action No. [Civil Action Number]

[Defendant],

Defendant.

ORDER ON INITIAL PRETRIAL CONFERENCE

It is ORDERED that the provisions of Fed.R.Civ.P. 30(a)(2)(C) (oral depositions), 31(a)(2)(C) (depositions by written questions), 33(a) (written interrogatories), 34(b) (requests for production and entry) and 36(a) (requests for admission) that a party may not serve such discovery before the time specified in Fed.R.Civ.P. 26(d) will not apply in this case.

The provisions of Fed.R.Civ.P. 26(a)(1) (that a party shall provide certain initial disclosures without awaiting a discovery request), 26(d) (that a party may not seek discovery from any source before the parties have met and conferred as required by Fed.R.Civ.P. 26(f)), 26(f) (that the parties meet and plan for discovery prior to a scheduling conference), 30(a)(2)(A) (that a party must obtain leave of court to take more than ten depositions), 32(a)(3) (that a deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the depositions), and 33(a) (that limits the number of written

interrogatories to 25 in number including all discrete subparts), will not apply in this case.

Subject to any special appearance, questions of jurisdiction, or other motions now pending, the parties having advised the Court that certain processes of discovery are contemplated, it is

ORDERED that the parties do propound interrogatories (Rule 33) and/or written questions (Rule 31), file requests for production of documents and things (Rule 34) and/or admission (Rule 36) and/or physical and mental examination (Rule 35), issue subpoenae for discovery (Rule 45), and take discovery and/or **de bene esse** depositions of witnesses and/or parties (Rules 26, 28, 30) in accordance with the following schedule. Interrogatories to any party by any other party shall be limited to thirty (30) (Local Rule 33). Discovery depositions of nonparty, non-expert witnesses shall be limited to five (5) (Local Rule 30 (I)).

The Court reserves the right to permit discovery depositions of a party or witness who is a nonresident, or otherwise unavailable, at any time prior to trial but such permission must be granted by order of court either by agreement of counsel or upon hearing.

Trial shall commence on **[Trial Date], at 10:00 a.m., at Norfolk**. Unless otherwise ordered by the Court, a party intending to offer exhibits at trial shall place them in a binder, properly tabbed, numbered and indexed. The original and one copy shall be delivered to the courtroom the morning of trial with copies in the same form to counsel for each party.

Trial by jury has been demanded. Proposed voir dire and written jury instructions shall be received by the Clerk on or before **[Jury Demand Date]**.

A **final pretrial conference** shall be conducted on **[final pretrial conference date]**, at which time trial counsel shall appear prepared to

present for entry an order setting forth (1) a stipulation of undisputed facts, (2) agreed upon exhibits and discovery material to be introduced, (3) exhibits and discovery material intended to be introduced by each party to which there are objections, stating the particular grounds for each objection, (4) the names and addresses of all witnesses who will testify on behalf of each party, and the purpose of such testimony, (5) the factual contentions of each party, and (6) the triable issues as contended by each party. With the exception of rebuttal, any witness, exhibit or discovery material not included in the final pretrial conference order will not be permitted at trial.

An **attorneys' conference** is scheduled in the office of counsel for plaintiff on **[attorneys' conference date]**. Counsel shall appear in person for the purpose of preparing stipulations and exchanging information to be included in the final pretrial order outlined above, and for undertaking the **Pretrial Disclosure** required by Rule 26(a)(3), Fed.R.Civ.P., and any objections to the matters disclosed and the grounds therefor shall be noted at this conference. The disclosures, objections and the grounds therefor shall be included in the proposed final pretrial order. While preparation of the final pretrial order shall be the responsibility of all counsel, counsel for plaintiff shall distribute a final draft to all other counsel at least two business days before the scheduled final pretrial conference. Disagreements concerning the content of the final draft shall be resolved before counsel's appearance at the final pretrial conference, at which time the Court will expect the presentation of a clean final draft. Failure to comply may result in the imposition of sanctions pursuant to Rule 16(f), Fed.R.Civ.P..

All **de bene esse** depositions shall be concluded on or before **[de bene esse date]**.

If military personnel or out-of-state persons are involved as parties and/or witnesses, counsel shall proceed forthwith to take the discovery and/or de bene esse depositions of said parties and/or witnesses.

Discovery shall be commenced forthwith and shall be completed by **plaintiff(s)** on or before **[plaintiff discovery date]**; by **defendant(s)** on or before **[defendant discovery date]**. **"Completed"** means that interrogatories, requests for production, and requests for admission must be served at least thirty (30) days prior to the established cut-off date so that responses thereto will be due on or before the cut-off date. All subpoenae issued for discovery must be returnable on or before the discovery cut-off date. Depositions upon oral examination and upon written questions, interrogatories, requests for documents, requests for admission, notices for depositions and production, requests for disclosure of expert information, expert information, disclosures, and answers and responses or objections to such discovery requests **shall not be filed** with the Court unless the Court, on its own initiative or upon motion of a party for good cause shown, requires the filing of all or part of the discovery material obtained during the course of this litigation. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

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UNITED STATES MAGISTRATE JUDGE

Date: [Date]

6

Rule 51: Requests Before Trial and More

Rule 51 was considered briefly at the March, 1998 meeting, in response to a memorandum that was substantially the same as the version set out below. The immediate impetus was provided by the Ninth Circuit proposal to legitimate local rules that require that proposed instructions be filed before trial. The Committee agreed with the suggestion that the question should not be left to disposition by local rules — there should be a uniform national practice, whatever may prove to be the best practice. The Committee also concluded that if the rule is changed to allow a pretrial deadline for requests, there must be provision for supplemental requests to reflect new issues that first appear at trial. Finally, the Committee concluded that further thought should be given to other possible changes in Rule 51. There was no commitment to any change, but the topic was held for further study. The draft set out below has been on the agenda at each subsequent meeting, but has not commanded time for discussion.

The Criminal Rules Advisory Committee earlier took up the same issue and published for comment a revised Criminal Rule 30 that would provide for instruction requests "at the close of the evidence or at any earlier time that the court reasonably directs." The Committee Note said: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57." In an attempt at coordination, a copy of the Civil Rules memorandum was provided to the Criminal Rules Committee. At their October, 1998 meeting, they expressed an interest in the broader questions addressed to Civil Rule 51 and suggested that the Civil Rules Committee take the lead in considering these questions. It also was earnestly suggested by several members of the Criminal Rules Committee that it would be desirable to require that instructions always be given before final arguments. In August 2000 the Criminal Rules Committee again published its proposal, as an item separate from the comprehensive style revision of all the Criminal Rules. (The published version includes a new final sentence: "When the request is made, the requesting party must furnish a copy to every other party.")

The Criminal Rules Committee, having waited for a while to coordinate with the Civil Rules, has now gone ahead. That action may reduce any need to address Civil Rule 51 in conjunction with Criminal Rule 30, although it also may suggest that the time has come to face at least the time-of-requests issue. Anecdotal evidence suggests that many judges require that requests be submitted before trial, disregarding the apparent ban in Rule 51. If we are to face this issue, however, it may be helpful to decide whether to confront all of Rule 51 at any time in the proximate future. The most important question is whether the time has come to rewrite the rule so that it more nearly reflects current practices. The draft rule illustrates the kinds of issues that

would be considered if the task is attempted. Other issues almost certainly will arise, and of course the best resolutions of the issues remain to be identified.

The Ninth Circuit Beginning

In the wake of its review of local rules, the Ninth Circuit Judicial Council has recommended that Civil Rule 51 be amended "to authorize local rules requiring the filing of civil jury instructions before trial." This recommendation raises at least three distinct questions. The most obvious is whether it is good policy to require that requests for instructions be filed before trial in some cases or in all cases. If pretrial request deadlines are desirable, it must be decided whether this matter should be confided to local rules or instead should be approached in a national rule. On the face of it, there is no apparent reason to relegate this matter to local option. It is difficult to imagine variations in local circumstances that make this policy more desirable in some parts of the country but less desirable in other parts. No more will be said about this second question. The third and

least obvious question is whether a general change in the Rule 51 request deadline should be the only change proposed for Rule 51. Rule 51 notoriously "does not say what it means, and does not mean what it says." If some part of the request-objection-review question is to be addressed, perhaps the rule should be approached as an integrated whole.

Pretrial Instruction Requests

The first sentence of Rule 51 now reads:

> At the close of the evidence or at such earlier time during trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

This sentence seems to limit the court's authority to directing that requests filed before the close of the evidence be filed "during trial," not before trial. It is difficult to find anything in the generalities of Rule 16 that can be read as an implicit license to direct earlier requests. Local rules that require pretrial requests are at great risk of being held invalid as inconsistent with Rule 51.

Three principal advantages seem to underlie the interest in pretrial jury requests. Pretrial requests will help the court if it wishes to provide preliminary instructions at the beginning of the trial. All parties will have a better idea of the instructions likely to be given, and can shape trial presentations accordingly; this advantage would be enhanced if the court were required to make at least preliminary rulings on the requests before trial. The court will have more time to consider the requests, particularly if it is not required to make final rulings before trial. There may be incidental advantages as well. The competing requests may focus the dispute in ways that support renewed consideration of motions to dismiss or for summary judgment. The better focus may instead suggest that potentially dispositive issues be tried first, cf. Rules 16(c)(14) and 50(a), or be designated for separate trial. Advantages of this sort are most likely to be realized if the instruction requests are made part of the pretrial conference procedure.

The potential disadvantages of pretrial instruction requests arise from inability to predict just what the evidence will reveal. In smaller part, the problem is that wishful parties may request instructions on issues that will not be supported by trial evidence. In larger part, the problem is that even wishful parties may not anticipate all of the issues that will be supported by trial evidence. It will not do to prohibit requests as untimely when there was good reason to fail to anticipate the evidence that supports the request.

The simplest way to accommodate these conflicting concerns would be to strike the limiting language from Rule 51:

> At the close of the evidence or at such earlier time ~~during the trial~~ as the court reasonably directs, any party may file written requests * * * .

The Committee Note could point to the reasons that may justify a direction that requests be filed before trial, particularly in complex cases. The reasons for caution also should be pointed out. One of the cautions might be a reflection on the meaning of Rule 51's fourth sentence: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict * * *." This sentence does not mean that it is enough to make a request for the first time, couched as an "objection," before the jury retires. The objection

works only if there was a duty to request, and there is a duty to request only if a timely request is made.

The reason for considering Rule 51 in more general terms is suggested by the cautionary observation that might be written to explain the difference between a request and an objection. It is easy for the uninitiated to misread Rule 51. It can be revised to convey its messages more clearly.

General Rule 51 Revision

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions to the court after the request deadline fails because it is not an "objection" but an untimely request.

Reading the text of Rule 51 is difficult with respect to the request and objection requirements. It is not possible as to the "plain error" doctrine. Many circuits recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is not reflected at all in the text of Rule 51, but is explicit in the general "plain errors" provision of Criminal Rule 52. The contrast between this general provision and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will seduce the court into error, confuse the jury, or at least unduly emphasize one issue.

Present Rule 51 is set out as a prelude to a revised draft, adding only numbers to indicate the points at which distinct thoughts emerge in the text:

> [*1: Requests*] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [*2: Instructions*] The court, at its election, may instruct the jury before or after argument, or both. [*3: Objections*] No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The following drafts of Rule 51 provide only approximations that suggest many of the issues that might be addressed by a comprehensive attempt to adopt a rule that better guides parties and courts. The "Styled" version that comes first has been shaped by comments from the Style Committee, and should be the focus of consideration. The second version is included only because the form seems more familiar.

Rule 51: Styled

Rule 51. Instructions to Jury; Objection; Plain Error

(a) Requests.

(1) A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court.[50] Supplemental requests at the close of the evidence are timely as to issues raised by evidence that could not reasonably be [have been?] anticipated at the time the initial requests were due.

(2) The court must inform the parties of its proposed action on the requests before jury arguments.

(3) The court may[, in its discretion,] permit an untimely request to be made at any time before the jury retires to consider its verdict.

(b) Objections. A party may object out of the jury's hearing to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

(c) Instructions. The court:

(1) may instruct the jury at any time after [the] trial begins, and

(2) must give final instructions to the jury immediately before or after jury arguments, or both.

(d) Forfeiture; Plain Error.

(1) A party may not assign as error a mistake in an instruction actually given unless a [the?] party {made a proper objection}[properly objected] under Rule 51(b).

(2) A party may not assign as error a failure to give an instruction unless the party made a

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[50] An ambiguity could be removed by moving the "file written requests" clause: "A party may, at the close of the evidence or at an earlier reasonable time directed by the court, file written requests that the court instruct the jury on the law as set forth in the requests."

proper request under Rule 51(a), and — unless the court made it clear that the request had been considered and rejected — also made a proper objection under Rule 51(b).

[(2) **Alternative:** A party may assign as error a failure to give an instruction only if a party made a proper request under Rule 51(a), and — unless the court made it clear that the request had been considered and rejected — a party also made a proper objection under Rule 51(b).]

(3) A court may set aside a jury verdict for a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1) or (2)[, taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties.]

Rule 51. Instructions to Jury: Objection

(a) Requests. A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. [Permission must be granted to file supplemental requests at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due.] The court must inform the parties of its proposed action on the requests before jury arguments. {The court may, in its discretion, permit an untimely request [to be] made at any time before the jury retires to consider its verdict.}

(b) Objections. A party may object to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity must be given to make the objection out of the jury's hearing.

(c) Instructions. The court may instruct the jury at any time after trial begins. Final instructions must be given to the jury immediately before or after argument, or both.

(d) Forfeiture; plain error

(1) A party may not assign as error a mistake in an instruction actually given unless the party made a proper objection under subdivision (b).

(2) A party may not assign as error a failure to give an instruction unless the party made a proper request under subdivision (a), and — unless the court made it clear that the request had been considered and rejected — also made a proper objection under subdivision (b).

(3) A court may set aside a jury verdict for a plain error in the instructions affecting substantial rights that has not been preserved as required by paragraphs (1) or (2)[, taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties].

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The

revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. In addition, pretrial requests may focus the case in ways that invite reconsideration of motions to dismiss or for summary judgment. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). The rule permits the court to further support these purposes by informing the parties of its action on their requests before trial. It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. The need for a pretrial request deadline may not be great in an action that involves well-settled law that is familiar to the court. Courts should avoid a routine practice of directing pretrial requests.

Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. The revised rule expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising discretion is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction. And if the instructions were given after arguments, the parties may have framed the arguments in terms that did not anticipate the instructions that came to be given.

Objections. No change is intended in the requirements that an objection state distinctly the matter objected to and the grounds of the objection. The need to repeat a request by way of objection is mollified by new subdivision (d)(2).

Instructions. Subdivision (c) expressly authorizes preliminary instructions at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial.

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. An objection, on the other hand, is sufficient only as to matters actually stated in the instructions. Even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the

request has been granted in substance although in different words. This doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. The authority to act on an untimely request despite a failure to object is established in subdivision (a). Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has earlier made clear its consideration and rejection of the request.

Many circuits have recognized the power to review in exceptional cases errors not preserved under Rule 51. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. The language adopted to capture these decisions in subdivision (d)(3) is borrowed from Criminal Rule 52. The advantages of using familiar language should not disguise the phenomenon that plain error is more likely to be found in a criminal prosecution than in a civil action. The government may share a greater responsibility for correct jury instructions in a criminal prosecution than is fairly attributed to the winning party in a civil action.

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. Obviousness reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error. Obviousness also depends on the way the case was presented at trial and argued.

The importance of the error is a second major factor. Importance must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. A sufficiently important error may justify reversal even though it was not obvious. The most likely example involves an instruction that was correct under law that was clearly settled at the time of the instructions, so that request and objection would make sense only in hope of arguing for a change in the law. If the law is then changed in another case or by legislation that has retroactive effect, reversal may be warranted.

The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

Other Possible Revisions

The revisions set out above reflect issues frequently encountered in present practice. At least in large part, they reflect what most courts do. Other possible changes can also be noted:

Serve Requests: Rule 51 does not require that instruction requests be served on all parties. The

opaque reference to "similar paper" in Rule 5(a) offers little help. It seems likely that exchange is routine, and that courts will require exchange if the parties fail to do it. It might be helpful to adopt an express requirement that all requests be served on all parties, particularly if the requests are filed before trial. Rule 51(a)(1) could easily incorporate this requirement: "A party may file and serve on every other party written requests * * *." See Criminal Rule 30 as published in August 2000.

Make Objections on the Record: It has been held that specific objections made during "extensive discussions off the record in chambers concerning the jury instructions" are not sufficient — that "to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record." Dupre v. Fru-Con Engineering Inc., 8th Cir.1997, 112 F.3d 329, 333-334. Is this a trap for the unwary that should be set out on the face of Rule 51? So: "A party may object on the record and out of the jury's hearing * * *."

Who Must Object: Rule 51 says that a party may not assign as error the giving or the refusing to give an instruction "unless *that* party objects thereto * * *." This requirement is preserved, but also questioned, in the draft revision. Why should it not be enough that any party has complied with Rule 51? Particularly when there are coparties, should it not be enough that the matter urged on appeal was properly raised by any party? The style version, by repeatedly referring to "a party," would require only that some party request and some party object — It would suffice that Party 1 requests, Party 2 objects, and Party 3 raises the issue on appeal.

Direction to Request: Illinois Supreme Court Rule 239(b) provides: "At any time before or during the trial, the court may direct counsel to prepare designated instructions. * * * Counsel may object at the conference on instructions to any instruction prepared at the court's direction, regardless of who prepared it * * *." Is there any reason to adopt a similar provision for Rule 51? So: "A party may — and on order of the court must — file written requests that the court instruct the jury * * *."

Anything Else: ?

Preliminary Draft of

PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Request For Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 2001

August 2000

NOTE: PRELIMINARY DRAFT OF AMENDMENTS TO RULES 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, AND 43, AND NEW RULE 12.4 PROPOSED SEPARATE FROM "STYLE REVISION" PROJECT ARE PUBLISHED IN ANOTHER PAMPHLET

Rule 30. Instructions	Rule 30. Jury Instructions
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.	**(a) In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time during the trial that the court reasonably directs. When the request is made, the requesting party must furnish a copy to every other party. **(b) Ruling on a Request.** The court must inform the parties before closing arguments how it intends to rule on the requested instructions. **(c) Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times. **(d) Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence.

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted, below.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 527 U.S. 373, 388 (1999), read literally, current Rule 30 could be construed to bar any appellate review when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 is one of those rules. This proposed revision of Rule 30 includes only proposed style changes. Another version of Rule 30 includes a substantive amendment that would authorize a court to require the parties to file requests for instructions before trial. That version of Rule 30 is being published simultaneously in a separate pamphlet.

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NOTE: Civil Asset Forfeiture Reform Act of 2000:

Technical Conforming Changes to Admiralty Rules

Four suggestions have been made to conform the Admiralty Rules to the provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff.

All of these suggestions share a common twist. The Admiralty Rules involved, C(3) and C(6), have been amended and will take effect, absent action by Congress, on December 1, 2000. The Civil Asset Forfeiture Reform Act of 2000 was enacted on April 25, 2000. Under the supersession provision of 28 U.S.C. § 2072(b), the newer Rule C provisions will prevail unless they are amended to conform to the statute. The first of the changes easily qualifies for adoption, and almost as easily qualifies for adoption as a technical conforming amendment without publication. It is so simple that if there is a sense of real urgency, it could be recommended to the January 2001 Standing Committee meeting for forwarding to the March 2001 Judicial Conference, aiming for adoption by the Supreme Court and transmission to Congress to take effect on December 1, 2001. A more ordinary pace would lead to action by the Judicial Conference in September 2001, leading to an effective date of December 1, 2002. The other changes described as (3) and (4) are not as easy; one or both may deserve adoption without publication, but fast-track treatment seems doubtful. The final change — item (2) below — presents genuinely difficult problems.

(1) Time To Claim

Rule C(6)(a)(i)(A) provides that a statement of interest in the property involved in an in rem forfeiture action must be filed "within **20** days after the earlier of (a) **receiving actual notice of execution of process**, or (2) completed publication of notice under Rule C(4) * * *." New 18 U.S.C. § 983(a)(4)(A) provides:

> In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than **30** days **after the date of service of the Government's complaint** or, as applicable, not later than **30** days after the date of final publication of notice of the filing of the complaint.

Despite the many minor variations between the text of the statute and the text of Rule C(6), the statutory incorporation of the "manner set forth in" the Admiralty Rules seems to iron out several possible problems apart from two that arise from the "except" clause. The first of these two problems arises from the difference between the 20-day period provided by Rule C(6) and the 30-day period provided by the statute. The second, discussed separately below, arises from the "date of service" provision.

The 20-day period in Rule C(6) was adopted at a time when at least some versions of the legislation that ultimately became § 983 adopted a 20-day period. It was believed that the 10-day period retained for admiralty proceedings in Rule C(6)(b)(i)(A) was important, but the 20-day period was recommended for forfeiture proceedings in deference to the apparent preferences of Congress. Had the pending legislation then provided a 30-day period, the 30-day period would have been adopted in Rule C(6)(a)(i)(A). The Department of Justice would welcome amendment of Rule

C(6)(a)(i)(A) to conform to the new statute.

There is no reason to stick to the supersession provision to set aside a statute that was not even known when Rule C(6)(a)(i)(A) was drafted.

It is recommended that Admiralty Rule C(6)(a)(1)(A) be amended to conform to § 983(a)(4)(A):

> **(a) Civil Forfeiture.** In an rem forfeiture action for violation of a federal statute:
>
> > **(i)** a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:
> >
> > **(A)** within ~~20~~ 30 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or
> >
> > **(B)** within the time that the court allows; * * *

(2) "[S]ervice of the Government's Complaint"

The most difficult question presented by § 983(a)(4)(A) arises from designation of one of the alternative events that start the 30-day period for filing a claim[51] to property seized for forfeiture. Under the statute, the period starts to run on "the date of service of the Government's complaint." Under Rule C(6)(a)(i)(A) the period starts on "receiving actual notice of execution of process." The differences between these provisions are greater — and certainly more complicated — than may appear.

The difference between "service of the * * * complaint" and "execution of process" is a starting point. Civil forfeiture continues to be an in rem proceeding. The initial pleading is a complaint, see Rule C(2). The initial process under Rule C(3)(a) is a summons and warrant for arrest unless forfeiture is demanded of real property. The complaint should be served with the warrant; if that is done, "service of the complaint" is the same as "execution of process." There is a difference only if for some reason the complaint is not served with the summons and warrant. For real property, there is no arrest; under new 18 U.S.C. § 985(c), described in item (4) below, the complaint is filed with the court and served on the owner. Here "execution of process" even more clearly seems to mean the same thing as "service of the complaint." The prospect that some litigants will contend that a distinction exists may, however, suggest the usefulness of bringing the rule into line with the statute. The more important reason for adapting Rule C(6) to the statutory language,

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[51] The statute refers to a "claim." The term is used here to reflect the statute. "Claim" has a narrower meaning in maritime practice than it has in the new forfeiture statute. For that reason it was avoided in drafting new Rule C(6), where both for forfeiture and in rem admiralty proceedings the procedure is to file a statement of interest. For forfeiture it is "an interest in or right against the property"; for admiralty it is "an interest in the property." The admiralty provision is limited to a right of possession or ownership; other interests are advanced by intervention. There is no thought to amend Rule C(6) to reflect the statutory usage.

however, is the "actual notice" requirement that appears only in Rule C(6).

Rule C(6) provides a person making a claim greater protection than the statute whenever the actual notice required by Rule C(6) does not occur or occurs later than the "service" described in the statute. When the person claiming an interest is a person served, the difference is likely to be minor — by far the most obvious circumstance will be that service by mail is complete on mailing, while actual notice is likely to occur later. In rare cases service will go astray and the "actual notice" requirement of Rule C(6) will make a more significant difference. The "actual notice" requirement also makes a difference when service of the complaint is not made on the person claiming an interest. Since forfeiture is an in rem proceeding, initial process often is not served on the person claiming an interest. Some persons claiming an interest will actually learn of the execution of process, although not personally served, but the fact often will be disputed and difficult to resolve. Some persons claiming an interest will learn of published notice before publication is completed, but this fact too will be difficult to establish. And because different persons are likely to have actual notice at different times, the deadline for filing claims will be different for different persons.

Assuming that there is a significant difference between Rule C(6) and new § 983(a)(4)(A), it remains to ask which is better. Both Rule and statute provide an alternative deadline by requiring that a statement of interest be filed within 30 days of "completed" (or, in the statute, "final") publication of notice. This provision avoids the problem of proving actual notice and the prospect that different persons asserting an interest will have actual notice (if at all) at different times. It seems likely that most of the difficulties will be cured by the publication provision so long as notice is published in all civil forfeiture proceedings.[52] More importantly, reliance on published notice to

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[52] The Department of Justice believes that the requirement of publication is firmly established by new § 983(a)(3)(A). This statute provides that if a claim is filed for property seized in a nonjudicial forfeiture proceeding, the government "shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules * * * or return the property pending the filing of a complaint * * *." Supplemental Rule C(4) requires notice by publication in an in rem action unless the property is released under Rule E(5). The release provision does not seem to interfere with the publication of notice in forfeiture proceedings. Rule E(5)(a) provides for release of property on filing a "special bond," but forfeiture seizures are excepted. Rule E(5)(c) provides for release of property by stipulation and does not expressly except forfeiture property. It appears that the Department of Justice has at times agreed to release of forfeiture property, on posting bond. Seizure of foreign fishing vessels has at times been followed by such agreed release. And release may be allowed as to real property because the new scheme provided by § 985 relies on seizure only in special circumstances — release would be in keeping with the spirit of the statute that less drastic security measures are preferred. If Rule E(5)(c) does allow release by stipulation without publication, release probably does no harm to the interests of persons who might have stated an interest in the forfeiture property.

New § 983(e) sets out notice provisions that, when unraveled, appear to apply only to nonjudicial forfeitures. The Department of Justice view is that no other statute supersedes the invocation of Rule C(4) by § 983(a)(3)(A), and that publication is required even when real property is forfeited despite the provision of new § 985, discussed in item (4) below, dispensing with seizure.

begin the period for filing a statement of interest reflects a long tradition that in rem proceedings can cut off rights without providing actual notice. The function of setting an earlier deadline when service is accomplished before publication is completed is to shorten the effective limitations period. There is much to be said for the view that the shorter period is desirable only when there is actual notice, but that is not the choice made in the statute.

The Department of Justice believes that the Rule should be brought into line with the statute. This task is easily accomplished. The change will leave the Rule subject to whatever ambiguities inhere in the statute, but it will avoid the still greater ambiguities that arise from seemingly inconsistent statute and rule provisions. On balance, the change seems desirable:

The statement of interest must be filed:

(A) within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), * * *

The change would be "technical" in the sense that it is designed to avoid conflict with a statute enacted after the Rule was proposed but before the Rule is to take effect. The difference between requiring actual notice and not requiring actual notice, however, is significant. And there is a risk that unknown complications lurk in the shadows. Publication for comment seems important, particularly to provide an opportunity to hear from those whose practice involves defending against forfeitures.

If Rule C(6) is amended, the Committee Note might well be limited to a simple statement that the changes are made to bring the rule into agreement with the new statute.

(3) "Serve" or "File" an Answer

Another inconsistency is created by § 983(a)(4)(B). Admiralty Rule C(6)(a)(iii) provides that a person who files a statement of interest in a forfeiture proceeding "must **serve** an answer within 20 days after filing the statement." New § 983(a)(4)(B) provides that a person asserting an interest in seized property "shall **file** an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim."

The Department of Justice is concerned that this discrepancy will lead to litigation, and thinks it important to adapt the forfeiture portion of Rule C(6) to the statute.

The simplest adaptation would be to amend Rule C(6)(a)(iii) to require that the answer be filed within 20 days. This approach would be bolstered by the fact that the parallel time-to-answer provision for in rem admiralty proceedings, Rule C(6)(b)(iv), calls for an answer to be **filed** within 20 days after the statement of interest.

This question may not yield to such simple adaptation to the statute. Ordinarily an answer is served. See, e.g., Civil Rule 12(a). Before the current amendments, Admiralty Rule C(6), which applied interchangeably to civil forfeiture proceedings and to in rem admiralty actions without distinction, called for the answer to be served. Civil Rule 5(a), which applies in admiralty proceedings unless inconsistent with the Admiralty Rules, requires service of every pleading

subsequent to the original complaint. Service of an answer seems important; simply filing the answer, relying on the opposing party to find it in the court files, is a strange way to proceed. (Nothing on the face of Civil Rule 5 appears to require service of every document that must be filed; Rule 5(d) does require filing of every document that must be served "within a reasonable time after service.")

The better position may be that there is no inconsistency between § 983(a)(4)(B) and the forfeiture provision in Rule C(6)(a)(iii). Rule C(6)(a) requires that the answer be served; Rule 5(d) requires that it be filed. Section 983(a)(4)(B) does not speak directly to service, but tightens the filing requirement of Civil Rule 5(d). The only difference is that the statute requires filing within the 20-day time set by Rule C(6) for service, while Rule 5(d) requires filing within a reasonable time after service. This minor difference is regrettable, but it may be better to live with it than to dispense with any express requirement that the answer be served.

Whether or not there is an inconsistency between Rule C(6) and the statute, it is wise to require service of an answer. The provision for simply filing the answer in the admiralty portion of new Rule C(6) is an inadvertent oversight. Of the several possible approaches to the situation, the best is to conform the forfeiture provision to the statute and to amend the admiralty provision to require service — but only service — within 20 days. The result is that a 20-day filing requirement applies only to civil forfeiture proceedings, but that requirement derives from the new statute. The following amendments to Rule C(6) are recommended, with the support of the Department of Justice:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

If any of these changes is to be made in Rule C(6), there is a separate question whether the change should be accomplished on an expedited basis without publication and comment. The distinction between filing and service seems more important than the difference between a 20-day and 30-day time to file the initial statement of interest. Publication of a proposal for comment would at least begin the process of drawing attention to the question. On the other hand, the changes are intended primarily to bring Rule and statute together, reducing as far as possible the awkward consequences of unforeseen and unintended supersession. The decision whether to request adoption without publication deserves serious discussion.

(4) "Arrest" of Real Property

New Rule C(3)(a)(i), drawn from the final sentence of present Rule C(3), provides that

"[w]hen the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances."

New 18 U.S.C. § 985, 114 Stat. 214, provides that real property that is the subject of a civil forfeiture action "shall not be seized before entry of an order of forfeiture." In lieu of seizure, the government is to initiate a civil forfeiture action against real property by filing a complaint, posting notice on the property, and serving notice on the property owner along with a copy of the complaint.

The arrest provision in Rule C(3)(a)(i) now seems too broad. Actions to forfeit real property must somehow be excluded; there is no reason to resist the statute and insist on arrest. A variety of approaches could be taken. The simplest might be:

> When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under {applicable statutory procedures}[Title 18, U.S.C., § 985].[53]

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

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Again, it is important to consider whether this change can properly be adopted as a conforming amendment without publication and comment. It is difficult to imagine much need for comment, apart from drafting issues; the purpose of § 985 is to improve life for real property owners and occupants, the Department of Justice has no desire to quarrel with § 985, and it is desirable to bring the Rule into conformity with the statute.

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[53] The alternatives are included to permit discussion. The Department of Justice prefers "applicable statutory procedures." Reference to a specific statute today incurs the risk that the statute may be renumbered tomorrow, and that other statutes may be adopted. The Committee Note can provide adequate guidance to the provisions of 18 U.S.C. § 985.

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Sept. 26, 2000

John Rabiej
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Dear John:

I enclose the materials I would like to have included in the agenda book for the Tucson meeting of the full Committee. I hope shortly to have the names of the three bar group representatives I don't yet know, and then to be able to provide final documents for distribution to participants in the Brooklyn conference. For the present, however, these will have to do for the Tucson meeting.

I'd appreciate a call or e-mail message confirming that these arrived so that I can stop worrying about that.

Sincerely,

Rick

Richard L. Marcus
Horace O. Coil ('57)
Chair in Litigation

MEMORANDUM

To: Advisory Committee on Civil Rules
From: Rick Marcus, Special Reporter
Date: Sept. 26, 2000
Re: Mini-conference on electronic discovery at Brooklyn Law School on Oct. 27, 2000

Plans for the Oct. 27 mini-conference are almost complete. For the information of the full Committee, I attach the current drafts of the materials that will be supplied to conference participants. The participants have also received copies of the materials distributed for the San Francisco conference in March, which were included in the agenda materials for the April meeting of the full Committee.

As you will see, three of the bar groups have yet to designate representatives to participate at the conference. There may also be some further (probably minor) modifications of the attached materials. But these materials should nevertheless give all of you a good grasp of the current status of the Subcommittee's insights. As should be apparent, it is hoped that the Subcommittee will feel comfortable deciding how to proceed after receiving the further education that will be provided on Oct. 27.

to proceed, and to discuss any other matters needing attention. The attached address list should facilitate that contact.

Overall purpose: The focus of this conference is somewhat different from the one in San Francisco, which was more general. The main focus this time is on whether this committee, which drafts rules, should commence to work on doing so. Accordingly, consideration of alternative ways of addressing these challenges (e.g., a manual or judicial education) recede somewhat into the background. This is not meant to suggest that these methods are unimportant, but only to recognize that they are not within the purview of the Advisory Committee on Civil Rules. The alternatives bear on the current issues mainly in raising questions about whether the rule-amendment process should be pursued at this time.

Questions for resolution: At the end of the day, the questions for resolution by the Subcommittee are basically:

(1) Should the Subcommittee commence now to attempt to draft rule amendments? Obviously that question mainly focuses on whether different rules would make this form of discovery work significantly better than it does under the current rules. But a chronological note seems in order: Assuming that drafts suitable for presentation to the Committee on Rules of Practice and Procedure could be drafted and approved at the Spring meeting of the Advisory Committee, and that they were approved for publication by the Standing Committee at its June, 2001, meeting, the earliest they could go into effect would be Dec. 1, 2003. If the pace of change or the gravity of the problems make that time frame unworkable, it may be that rule amendments are not the way to go even if different rules would be likely to make things work better if we had them sooner.

(2) If the Subcommittee should now commence to draft rule amendments, what focus should it adopt? This is where the memorandum containing mock-ups of possible amendments comes into play. It attempts to narrow the range of ideas from those suggested before the San Francisco conference, and to indicate what general language might be a starting point in the drafting process. It should permit participants to be more concrete in their own minds in assessing whether amendments would likely help (the first question) and whether certain general approaches are likely to prove useful or harmful. For example, one could conclude at a general level that the "low impact" package of early consideration (item no. 1 on that list) is all that should be employed, or alternatively conclude that only some more vigorous amendments would make a significant helpful difference.

With these general objectives in mind, the plan for the conference is to approach the foregoing questions as follows:

Introductory background: 8:30 a.m. to 9:15 a.m.

General introduction of issues to be considered: Rick Marcus
Report on preliminary returns of research by Federal Judicial Center: Molly Treadway Johnson (FJC)
Introduction to technical issues: Ken Withers (FJC)

Panel I: 9:30 a.m. to 11:00 a.m.

This panel should be addressed mainly to the question whether this form of discovery is really different from other discovery so that distinctive treatment under the rules is in order.

Thomas Y. Allman
David Boies
James D. Esseks
Gregory Joseph
Anthony Tarricone
Anne L. Weismann
Moderator: Prof. Charles Yablon

Panel II: 11:15 a.m. to 12:30 a.m.

This panel consists of representatives designated by bar groups, and should continue the discussion of whether and how this form of discovery is distinctive, but also broaden the focus to include whether and how rule changes would produce improvement.

Lorna Schofield (ABA Section of Litigation)
Joseph Zammit (A.B.C.N.Y.)
_____ (American College of Trial Lawyers)
_____ (National Employment Lawyers Ass'n)
Gregory Arenson (New York St. Bar Ass'n)
_____ (Product Liability Advisory Council)
Moderator: Prof. Daniel Capra

Lunch: 12:30 a.m. to 1:30 p.m.

Panel III: 1:30 p.m. to 2:45 p.m.

This panel will focus primarily on whether rule changes should be pursued now to deal with these problems. This discussion could proceed at the general level (can rules provide suitable direction?) and the particular level (which approach should be pursued if drafting should now begin?).

Hon. Robert D. Collings (D. Mass.)
Hon. Jacob Hart (E.D. Pa.)
Hon. Lewis Kaplan (S.D.N.Y.)
Hon. John G. Koeltl (S.D.N.Y.)
Moderator: Prof. Margaret Berger

Concluding assessment: 2:45 p.m to 3:00 p.m.

Before disbanding, we hope to get some sense of the views of the participants to see whether there are areas of general agreement bearing on the rulemaking task. If there is general agreement on certain points, that would certainly be a useful thing for the Subcommittee to know, and if there is not that would also be helpful as it approaches the question whether to begin drafting rule amendment proposals. We therefore hope to have some suitable way of polling participants to get a handle on the questions before the Subcommittee.

* * * * *

As noted above, there should be an address list attached to this memorandum, and there should also be a memorandum containing mock-ups of possible rule amendments included in this same package. If you did not receive any of the materials, or if you have any questions, please don't hesitate to contact Rick Marcus.

Membership of Subcommittee: Finally, if it would be of interest, the members of the Discovery Subcommittee are Hon. John Carroll (M.D. Ala.) (chair), Hon. Lee Rosenthal (S.D. Tex.), Hon Shira Scheindlin (S.D.N.Y.), Mark Kasanin (San Francisco), Sheila Birnbaum (New York), and Andrew Scherffius (Atlanta). We also expect that Hon. Anthony Scirica (3d Cir.) (chair of the Standing Committee on Rules of Practice and Procedure), Hon. David Levi (E.D. Cal.) (chair of the Advisory Committee), and Prof. Edward Cooper (Reporter of the Advisory Committee) to attend the mini-conference.

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Oct. 27, 2000

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Memorandum to: Participants in Oct. 27, 2000, conference on computer-based discovery at Brooklyn Law School
From: Rick Marcus, Special Reporter, Advisory Committee on Civil Rules
Date: Sept. __, 2000
Re: Exemplars of possible rule changes for purposes of discussion

The above listing introduces the areas addressed by hypothetical rule language in this memorandum. The primary

objective of the Oct. 27 mini-conference at Brooklyn Law School is to assist the Discovery Subcommittee of the Advisory Committee in reaching conclusions on two basic questions: (1) Should the Committee undertake to draft proposed amendments to the Civil Rules to deal with the challenges presented by discovery of computer-based material? and (2) If so, what directions look most and least promising for such an effort?

In connection with either question, it may be helpful to have in mind what some rule amendments might look like; concreteness often helps the mind focus. This memorandum is designed to provide that concreteness. At the same time, it must be emphasized that the following are only mock-ups of possible rule changes devised by the Special Reporter for purposes of discussion, and that they have not been considered, or even commented upon, but any member of the Advisory Committee.

(1) The low impact revision: directing early consideration of discovery in this form

It seems widely agreed that issues of electronic discovery are best considered early in the litigation so that plans regarding discovery of this material can be made if needed. That seems to suggest changes to the provisions for the Rule 26(f) conference (and possibly Form 35) and to Rule 16.

(a) Directing discussion during Rule 26(f) conference

Rule 26(f) might be amended somewhat as follows:

> **(f) Conference of Parties; Planning for Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a

scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a)(1), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; ~~and~~

(4) whether discovery of information stored on a computer or in electronic form is anticipated in the action, and if so, the nature of any such information and of any computer software program or back-up medium from which such information might be obtained, and any arrangements that may be appropriate (i) for facilitating such discovery or (ii) for preserving such information until the termination of the action; and

(54) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that

have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Comment: The foregoing first effort no doubt is shot through with problems of language and description. For example, it may be that sensible arrangements for facilitating this discovery and preserving this material must await exchange of information about its contours. Moreover, the parties may not be able to discuss whether electronic material will be sought until they have first discussed the likely discovery.

The point for present purposes is to ensure that parties think through these matters and devise appropriate arrangements for them at the outset. That would then connect to provisions for Rule 16, which could be included in Rule 16(b) or 16(c) depending on the urgency one attaches to them. This may be a better way to go than adopting rule provisions purporting to regulate the things the parties are to address during their Rule 26(f) conference. Form 35 could be expanded to include a checklist entry to alert the parties to the need to consider various specific topics.

(b) Including in Rule 16 scheduling order

If one wants to ensure that the judge considers these questions, it may be that Rule 16(b) is the suitable place, and one that connects with the idea above that Rule 26(f) calls for a report to the court before the entry of the Rule 16(b) scheduling order:

> **(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
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> (1) to join other parties and to amend the pleadings
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> (2) to file motions; and
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> (3) to complete discovery.
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> The scheduling order may also include
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> (4) modifications of the times for disclosures under Rule 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
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> <u>(5) If discovery of information stored on a computer or in electronic form is anticipated in the action, a schedule for exchange of information about the nature of any such information, and about the nature of any computer software program or back-up medium from which such information may be obtained, and any arrangements</u>

that may be appropriate (i) for facilitating such discovery or (ii) for preserving such information until the termination of the action;

(65) the date or dates for conferences before trial, a final pretrial conference; and

(76) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant or within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge, or when authorized by local rule, by a magistrate judge.

Comment: A more demanding addition to Rule 16(b) could be to require such an order in a manner similar to the other mandatory features of Rule 16(b).[1] As a less demanding alternative, one might instead amend Rule 16(c) to include a new provision (7) after current provision (6) somewhat as follows:

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[1] This could be done by adding something like the following after current Rule 16(b)(3):

If discovery of information stored on a computer or in electronic form is anticipated in the action, the order must also

(4) provide a schedule for exchange of information about the nature of any such information and the nature of any computer software program or back-up medium from which such information may be obtained, and any arrangements that may be appropriate (i) for facilitating such discovery or (ii) for preserving such information until the termination of the action;

(7) the identification of any information stored on a computer or in electronic form that may be subject to discovery, and appropriate provisions for the exchange and preservation of such information;

If this approach meant that these questions would only be considered in connection with an event after the initial Rule 16(b) scheduling conference, or only if a "pretrial conference" were held, that could make it less desirable. But it would not mandate action about this topic in every case in which a prospect for this sort of discovery emerged from the Rule 26(f) process, thereby providing a possibly desirable element of flexibility.

(2) Expanding initial disclosure

As an alternative to the foregoing (or perhaps in addition to it), one might add provisions about computer-based information to initial disclosure under Rule 26(a)(1) by inserting a new (C) somewhat as follows:

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(~~E~~E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and

tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a description of any computer system or media maintained by the disclosing party from which discoverable information might be obtained, including the nature of such discoverable information, the software program used to store such information, the nature of any back-up medium, and the nature of any computer network or e-mail system maintained by the disclosing party;

[Renumber current (C), (D), and (E)]

Comment: This sort of approach might prompt earlier or more extensive attention to this sort of material than handling it under Rule 26(f). Even if a provision of this sort were included in Rule 26(a)(1), it would seem important to include the topic in Rule 26(f) (and probably Rule 16) as well. But if the disclosures occurred before the Rule 26(f) conference (which is not required), disclosure of this sort might facilitate the activity that the above suggested change to Rule 26(f) calls for at that conference. Overall, this might well overlap with the Rule 26(f) approach outlined in item no. 1 so as to be unhelpful or redundant.

(3) Addressing the need to unearth deleted information or information on back-up media

One major concern seems to be the potentially unwarranted burden of searching for materials that have been deleted or that are contained on back-up media. It may be that such a search should be undertaken only when a showing has been made to justify

it. Because it would seem that the issue arises in connection with interrogatories as well as requests for documents (unless it is per se improper to use an interrogatory to ask a party to "identify all documents that relate to the conference attended by plaintiff and defendant on Oct. 27, 2000"), this might appropriately be included in Rule 26, perhaps as a new subdivision (h):

> **(h) Computer-based or electronically stored information.** In making disclosures required under Rule 26(a) and in responding to discovery requests, a party must include computer-based or electronically stored information within its possession, custody, or control, except that it need not include information that (i) was deleted by the sender or recipient in the regular course of business prior to notice of the action, or (ii) is accessible only on a back-up medium not ordinarily accessed by the party for purposes of retrieving information. For good cause, the court may order a party to produce information that was deleted by the sender or recipient, or that is accessible only on a back-up medium.

Comment: One assumption here is that it would be desirable to make a clear statement that computer-based information is to be included in disclosure and discovery. Some lawyers have said that they have difficulty persuading the clients that this is true under the rules as currently written.[2] A second assumption

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[2] On this score, note that the Standard 29 a. ii. of the American Bar Association Civil Discovery Standards (1999) says that "[u]nless otherwise stated in a request, a request for 'documents' should be construed as also asking for information contained or stored in an electronic medium or format." Texas Rule of Civil Procedure 196.4, on the other hand, says that "the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced." Thus, the presumption could go either way.

is that it should not be routine that deleted material or back-up tapes must be searched in fashioning initial disclosure or in responding to discovery requests.[3] That should not put them beyond the scope of discovery, but seems best subject to an order of the court.[4] At the same time, there is a major problem defining what deletion is permitted. This problem recurs, of course, in connection with any effort to prescribe the retention duty by rule (item 5 below, which suggests starting the duty from the service of a discovery request). Needless to say, the assumptions here are debatable, but it seems worthwhile to get them out on the table. If these concerns only apply to document discovery, this sort of provision could be included in Rule 34 instead (although it might also be needed in Rule 45).

(4) Regulating the form of production of material stored on computers or in electronic form

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[3] Note that ABA Discovery Standard 29 a. iii. says:

> Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.

[4] A related but distinct problem that is not really addressed by this proposal is the presence of "cookies" or other materials on the hard disk of a computer, and the existence of "embedded" materials in electronic versions of items that also can be provided in hard copy versions. It is not clear to me that there is substantial reason to suspect that the rules have proved insufficient in handling such material, but it might be desirable to try to draft something that would say (1) that embedded material should be produced along with the electronic version of information, and (2) that "cookies" and the like on a hard disk should be subject to discovery only upon court order. It may be that providing direction in Rule 34 with regard to the form of production adequately addresses the embedded matter subject. Whether the above proposal adequately deals with the "cookie" problem is unclear to me.

(a) Revising Rule 34(b) to direct production in form in which information is stored

This question could be addressed by adding the following to the last paragraph of Rule 34(b):

> A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. Information stored on a computer or in electronic form must be produced in the same form in which it is stored unless the court orders otherwise, [and the party making the request may not release such information in that form to anyone other than its expert witnesses unless the producing party agrees to such release or the court so orders].

Comment: This suggestion borrows from Judge Scheindlin's recent article.[5] It does not include in the rule the cost-bearing proposal that she suggested, but contemplates that the Committee Note would mention that a court might wisely implement the provisions of Rule 26(b)(2) by making the cost of producing hard copies the responsibility of the party seeking the discovery

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[5] The specific amendment suggested in the article is the addition of the following to the last paragraph of Rule 34(b):

> All electronically-stored information shall be produced in the same form in which it is stored, presumptively subject to a protective order under Rule 26(c)(7) barring the release of such information to third parties other than the requesting party's expert witnesses. Any party represented by counsel requesting the production of electronically-stored information in printed form in addition to, or instead of, its electronic form shall bear all costs associated with the requested production.

Scheindlin & Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?, 41 Bos. Col. L. Rev. 327, 374 (2000).

in that form. The proposal attempts in bracketed material to deal with the proprietary information problem by precluding release of the information in electronic form to others absent agreement or court order. This may be somewhat easier than borrowing the protective order nomenclature, for that ordinarily depends on a prior court order based on a showing. Whether this sort of presumptive limitation should be required in all cases could be debated. Alternatively, the proprietary information problem could be left to the Note.

(b) Adding a new Rule 33(e) to provide for interrogatory answers in electronic form

Another approach that might be suitable on this subject would take account of the reality that interrogatories may seek information stored on computers. This reality could justify the addition of a new provision to Rule 33:

> **(e) Responsive information stored on a computer or in electronic form:** If information responsive to an interrogatory is stored on a computer or in electronic form, the party serving the interrogatory may demand that the responding party provide such information in electronic form, and the responding party must then provide the information in that form unless the court orders otherwise.

Comment: This seems a simple way to achieve a simple result that would often be useful to parties who don't want hard copy responses. It stops short of trying to regulate direct queries to the opposing side's computers, and builds on the existing interrogatory mechanism and the reality that responses often require retrieving information from a computer. It is not clear whether proprietary information problems are important in this regard as well as under Rule 34, and the above proposal does not address them.

(5) Addressing preservation of such material

An effort to deal with this problem might build on the foregoing change to Rule 34(b) and add something like the following:

> Whenever information stored on a computer or in electronic form is requested under this rule, the party upon whom the request is served must make reasonable efforts to preserve and prevent the loss or erasure of any requested information until the termination of the action unless the party that served the request agrees, or the court orders, otherwise.

Comment: This shows what reasonably strong preservation language could look like. It suggests a number of issues. The obvious initial one is that there presently is no explicit provision in the rules on preservation or spoliation of hard copy materials. One reason for that difference might be that there is a body of caselaw (or other regulations such as professional responsibility rules) that deal with preservation or spoliation of hard copy materials, but that leads to the question why that body of rules can't be adapted to cover this new form of information.[6]

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[6] The ABA Civil Discovery Standards provide for use of the same standard with regard to hard copy and electronic materials:

> A party's duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format,including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.

ABA Standard 19 a. i.

Standard 10, in turn, provides as follows:

The more basic problem is to determine what to say in a provision if one is added. The above suggestion could go farther than it does. It could say that the duty to preserve attaches before there is a discovery request, which probably accords with a general view under legal rules found outside the Civil Rules. Compare the suggested Rule 26(h) in item 3 above, which looks to "notice of the action." It might be odd for the rules themselves to purport to impose a preservation duty before the actual commencement of litigation, although other legal rules probably do. The proposal also fails to deal explicitly with the consequences of failure to comply. In the abstract, a rule could presumably say something about that, but it is hard to know how to be very helpful in that regard, so that the topic might best be left for the Note. In any event, such provisions might more appropriately be inserted in Rule 37.

As an alternative, a rule might say there is no obligation to preserve this material at all. This could be attractive to responding parties. But to the extent that such a provision would override existing rules from other sources that would call for retention, one is called upon to explain why this kind of information is exempted from the rules that apply to everything else. To make such a rule might raise questions about whether the rulemaking authority extends so far. There are many regulations that direct recordkeeping and retention, and all a rule could do is presumably to say whether the Civil rules impose additional requirements.

> When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so.

This sort of approach could lead to a Civil Rule dealing with the overall problem of evidence retention.

It might be useful to consider, in this connection, some exemplars. One is from the Private Securities Litigation Act, which imposes a stay of discovery during the pendency of a motion to dismiss, but couples that stay with a preservation of evidence directive:

> During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 77z-1(b)(2). This, of course, simply uses the default of whatever other legal rules would require, and there is no undertaking to prescribe preservation obligations.

In the alternative, we have been supplied with an exemplar of an internal memorandum sent by the general counsel of one company to its employees, which might be the sort of thing that would constitute "reasonable efforts" suggested above.[7]

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[7] The exemplar was in the form of a memorandum from the general counsel of the company (DDD) to relevant employees of the company:

> On [date] a company named PPP Corp. filed suit against DDD in federal district court in [location]. The complaint alleges that DDD infringes 2 PPP Corp. patents. The patents concern a system and method for [the patented system].
>
> Because there is a lawsuit, it is critical that you follow the below document retention guidelines:
>
> Retain all records, whether hard copy or electronic

Rather than try to regulate these matters through the Civil Rules, it might be better to prompt the parties to discuss these matters at the outset, leaving it to the judge to regulate the problem through order. That would seem in keeping with item no. 1 above, which does call for discussion and consideration by the court of preservation during the Rule 16(b) process.

(6) Addressing allocation of costs of retrieving such material

A general provision regarding cost allocation might be added to Rule 26(b)(2) as follows:

> form, concerning PPP Corp., YYY [the inventor] and ZZZ [another interested party]. The types of documents to be retained include but are not limited to:
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> (1) all documents concerning the testing, manufacture, use, sale or offer to sell of DDD products that use [the patented system] technology.
>
> (2) all documents concerning the planning, advertising, marketing or promotion of products with provision for [the patented system].
>
> (3) all documents describing the structure and operation of each product sold by or on behalf of DDD with provisions for [the patented system]
>
> (4) all patent applications and related documentation concerning products with provisions for [the patented system].
>
> (5) all documents concerning U.S. Patent _____ entitled "_____" and U.S. Patent _____ entitled "_____" [the patents in suit].
>
> (6) all documents concerning DDD's business license with PPP.
>
> (7) all licenses or other agreements between DDD and any other party concerning the use of PPP technology in other products.

Please do not destroy or erase any such documents.

(2) Limitations. (A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule 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; or (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 under subdivision (c).

(C) If discovery seeks information stored on a computer or in electronic form, the party seeking discovery must bear any special expenses incurred in producing responsive information, particularly the cost of acquiring or creating software needed to retrieve information to respond to discovery unless the court orders otherwise.

Comment: This proposal builds on an ABA Discovery

Standard.[8] It might be phrased in terms of "implementing the provisions of Rule 26(b)(2) (B)." The question is whether engrafting such special reference to computer-based materials and cost allocation is useful or consistent with the general thrust of Rule 26(b)(2). Of course, the question what "special expense" means is open to interpretation. Is it the same as the sort of undue expense that might ordinarily warrant protections due to the limitations of Rule 26(b)(2)? Alternatively, one could perhaps address these concerns under Rule 26(c) by adding a new provision after current Rule 26(c)(8).[9] In sum, the basic

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[8] ABA Discovery Standard 29 b. iii. says:

> The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.

Discovery Standard 29 b. goes on in iv. to add:

> When the parties are unable to agree on who bears the costs of producing electronic information, the court's resolution should consider, among other factors:
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> (a) whether the cost of producing it is disproportional to the anticipated benefit of requiring its production;
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> (b) the relative expense and burden on each side of producing it;
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> (c) the relative benefits to the parties of producing it; and
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> (d) whether the responding party has any special or customized system for storing or retrieving the information.

[9] This might read as follows:

> (9) that the party seeking information stored on a computer or in electronic form bear any special expenses incurred in producing responsive information, including particularly the cost of acquiring or creating software

question is whether to try to go beyond present Rule 26(b)(2) on these points.

(7) Addressing privilege waiver problems

We have heard that privilege waiver problems can become acute in connection with electronic materials. At the same time, there may be delicate issues about using the rules process to affect privilege issues. See 28 U.S.C. § 2074(b).[10] At its Fall 1999 meeting, the Committee discussed but took no action on a proposal to modify Rule 34(b) to address concerns about privilege waiver in discovery involving hard copy documents. Alternative versions of this approach, which involved adding a paragraph to Rule 34(b) were before the Committee and are reproduced below.

> **(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).
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> The party upon whom the request is served shall serve a

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needed to retrieve information to respond to discovery.

Current Rule 26(c)(2) might be said to include cost-bearing authority, but they are not very specifically spelled out. Whether this sort of response expense should be treated a "special" for cost-bearing purposes, and whether this provision would suitably fit in Rule 26(c), are open questions.

[10] 28 U.S.C. § 2074(b) provides: "Any such rule [promulgated under the Rules Enabling Act] creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."

written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

On agreement of the parties, a court may order that the party producing documents may preserve all privilege objections despite allowing initial examination of the documents, providing any such objection is interposed as required by Rule 26(b)(5) before copying. When such an order is entered, it may provide that such initial examination is not a waiver of any privilege.

On agreement of the parties, a court may order that a party may respond to a request to produce documents by providing the documents for initial examination. Providing documents for initial examination does not waive any privilege. The party requesting the documents may, after initial examination, designate the documents it wishes produced; this designation operates as the request under

this paragraph (b).

No action has been taken on these proposals, and there are at least doubts about whether they would suffice with regard to information provided in electronic form if that included items subject to a privilege because there might not be a process of designating materials for copying as ordinarily happens in hard copy discovery. As a consequence, effective rule provisions might have to be more aggressive. As a comparison to the foregoing, consider the provisions a district judge devised for a court-appointed computer specialist authorized to inspect the defendant's hard disk on motion of the plaintiff:

> To the extent that the computer specialist has direct or indirect access to information protected by the attorney-client privilege, such "disclosure" will *not* result in a waiver of the attorney-client privilege. Plaintiff herein, by requesting this discovery, is barred from asserting in this litigation that any such disclosure to the Court designated expert constitutes any waiver by Defendant of any attorney-client privilege.

Playboy Ent., Inc. v. Welles, 60 F.Supp.2d 1050, 1055 (S.D. Cal. 1999).

For present purposes, the focus should be on whether rule provisions along this line would provide significant help, and what they would need to say to provide such help if these provisions would not do the job. If a rule would be useful only if it provided much stronger protection against waiver, or protection in a much greater range of circumstances, it might be that it could be accomplished only by Act of Congress.

(8) Other possible rule revisions

In the course of this study, a number of other possible rule revisions have been suggested. Many of these were included in my March 8 background memorandum for the San Francisco mini-conference on March 27. Some of these overlap in content, if not in location in the rules, with the rule change illustrations outlined above.

Both to focus the discussion on a more limited listing of possible changes, and because the actual content of some of these rule proposals was very hard to imagine, this memorandum does not attempt to offer possible language to address these concerns. For purposes of reference, however, a listing may be helpful and it is provided below, along with occasional background material in footnotes.

- Rule 26(a)(2): The disclosures about expert testimony might be revised to require more extensive disclosure of any use of electronic data by an expert in connection with forming opinions to be expressed at trial.

- Rule 26(a)(3): The pretrial disclosures could be expanded to mandate early revelation of the intention to use computer-generated evidence at trial so that there would be time to investigate foundational questions.[11]

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[11] For an example of a rule dealing with such matters, consider Md. R. Civ. P. 2-504.3, which requires a party who intends to use such evidence at trial to provide written notice of that intention 90 days before trial. Thereafter there is an opportunity to probe the admissibility of the evidence through discovery, and objections must be made before trial. Arguably it would be preferable to move up the time for revelation of the existence of such evidence to the point when Rule 26(a)(2) disclosures are required, so that investigation of foundational matters can accompany the rest of discovery. That might be particularly appropriate given the likelihood that much such

- Rule 26(b)(1): The rule now says that discovery is authorized about "the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things . . ." This seems out of date and could be revised to include explicitly the electronic materials identified in Rules 26(a)(1) and 34(a).

- Rule 26(b)(1): The rule could be revised to address specifically the question whether electronic data not intentionally created by the drafter of a document -- such as "embedded data" and "cookies" -- should or should not be considered within the scope of discovery.[12]

- Rule 26(b)(5): This rule regarding claims of privilege might be modified to take account of the special problems raised in connection with voluminous electronically stored materials.

- Rule 26(c): The protective order rule might be revised to take explicit account of the proprietary information, privacy, and other issues raised by this form of discovery.

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evidence would be likely to require the sponsorship of an expert witness. But the cost of preparing such evidence at that stage in the litigation, and the possibility that it would need to be modified before trial, militate against including such a provision in Rule 26(a)(2).

[12] The American Bar Association Civil Discovery Standards say that a party may request "the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate (a) whether and when electronic mail was sent or opened by its recipient(s) or (b) whether and when information was created and/or edited." Standard 29 b. i. This might be a model for a Rule 26(b)(1) provision.

- Rule 26(d): This rule imposes the discovery moratorium pending the Rule 26(f) conference. It might be the place to provide rules about spoliation or preservation of electronic materials, if such things were susceptible to treatment in a rule.

- Rule 26(g): The signature requirement might be modified in instances in which discovery is served or responded to in electronic form.

- Rule 30(b)(2) and (3): As electronic media become more important in depositions one might ask whether the current authorization (added only in 1993) for alternative methods of recordation might be expanded or revised to take account of new methods.

- Rule 30(b)(5): The authorization for a deposition notice to require the witness to bring along "documents and tangible things" might be modified to include material stored electronically, although the invocation of Rule 34 probably does the job to the extent Rule 34 does the job.

- Rule 30(b)(6): One might develop a special procedure in the rules for depositions of information systems managers, etc., to provide useful and inexpensive information about how systems work. The rule might direct that this inquiry occur during a "first wave" of discovery activity.

- Rule 30(b)(7): This rule now allows the parties to stipulate, and the court to order, that a deposition "be taken by telephone or other remote electronic means." As the technology of video conferencing improves, perhaps the rules could more actively promote

use of that technique.

- Rule 32(a)(3): Presently this rule permits use of depositions (including videotaped depositions) at trial only when the witness is unavailable, except in "exceptional circumstances." This could be changed if there were a desire to facilitate presentation of videotaped evidence at trial.

- Rule 33(a) and (b): These rules might be changed to direct (or authorize parties to insist upon) service of questions and answers in electronic form. The signature requirements would have to be revised accordingly.

- Rule 33(d): The option to produce business records might be revised in some way to take account of the special problems of producing records that are in electronic form, or the methods by which access to that sort of records is to be given.

- Rule 33 or 34: Either here, or elsewhere, the rules might set forth criteria for permitting a party to insist on being able to direct queries to another party's electronic information, and the ground rules for such access.[13]

- Rule 34(a): The description of electronic materials

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[13] For an illustration of the kinds of detail a court may be called upon to regulate on these questions, see Alexander v. F.B.I., 194 F.R.D. 516 (D.D.C. 2000), in which the court was presented with a broad protocol for searching the White House e-mail system and made individual determinations about whether specific individuals or other search terms should be included. Whether this sort of highly particularized determination would be aided by rule provisions could be debated.

might be modified. The current description was written in 1970, when much less was known about computers. It might be that specifying what sorts of things fall within the term "data compilations" would be desirable because it would make clear that e-mails, etc. are included.[14]

- Rule 34(a): Alternatively, the rule might be changed to eliminate the duty to search electronic media unless specifically requested.[15]

- Rule 34(a): One could insert a provision on whether, or when, non-identical electronic copies must be produced.

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[14] Recently, Judge Scheindlin has summarized the situation as follows:

> Courts and commentators have generally interpreted Rule 34 and its accompanying Advisory Committee Note to allow the discovery of electronic evidence. As Magistrate Judge Andrew Peck concluded in an oft-quoted phrase several years ago, "[T]oday it is black letter law that computerized data is discoverable if relevant." And, one leading treatise on federal civil procedure states that "[t]he rule now clearly allows discovery of information even though the information is on computer." The absence of any recent decisional law or commentary taking a contrary position illustrates that if there were doubts as to whether Rule 34 permitted discovery of electronic documents such as e-mail when it was amended in 1970, those doubts now have been universally dispelled. As stated earlier, however, whether the Rules permit discovery of the newest forms of electronic evidence such as cookies, temporary files and residual data remains an open question.

Scheindlin & Rabkin, 41 Bos. Col. L. Rev. at 350-51.

[15] In Texas state courts, such a provision now exists: "To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced." Tex. R. Civ. P. 196.4.

- Rule 34(a): If an appropriate protocol or set of prerequisites for on-site inspection of computerized materials could be developed, it could be inserted here as a further specification of the circumstances when one may obtain inspection on designated property.[16] This might be coordinated with rule treatment of use of a special master.[17]

- Rule 37: Specifics could be added regarding criteria for resolving a motion to compel discovery of computerized information.[18]

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[16] On this point, consider Stasser v. Yalamanchi, 669 So.2d 1142 (Fla. Ct. App. 1996), in which the court said that plaintiff could search defendant's computer for purged information only if plaintiff showed that it was likely to retrieve some, and that there was no less intrusive way to obtain it.

[17] Note that the ABA Standards suggest that "[i]n complex cases and/or ones involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues." ABA Standard 29 b. ii.

[18] The ABA Standards suggest the following:

> In resolving a motion seeking to compel or protect against the production of electronic information or related software, the court should consider such factors as (a) the burden and expense of the discovery; (b) the need for the discovery; (c) the complexity of the case; (d) the need to protect the attorney-client or attorney work product privilege; (e) whether the information or the software needed to access it is proprietary or constitutes confidential business information; (f) the breadth of the discovery request; and (g) the resources of each party.

ABA Standard 29 b. ii.

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Rule 43: Written Testimony

Magistrate Judge Morton Denlow, N.D.Ill., has written to suggest addition of a new final sentence to Civil Rule 39(b):

> Upon consent of all parties, in nonjury cases, the court may conduct a trial on the papers and enter findings of fact and conclusions of law in accordance with Rule 52(a) based upon the paper record.

00-CV-F, August 4, 2000.

This suggestion is inspired by a particular variation on the common circumstance that all parties file cross-motions for summary judgment. The fact that all parties contend that there are no genuine issues of material fact to be tried does not mean that summary judgment must be given for some party. To the contrary, the summary-judgment materials commonly show that there are genuine issues that require trial, not summary judgment as a matter of law. But on occasion the parties also indicate that they do not wish to supplement the summary-judgment record by producing witnesses for trial. Decision on the papers is desired. In this situation the court may agree that it does not wish to hear live witnesses. A "paper *trial*" is proper if no one, party or court, wants more. In this situation the judge may evaluate the "credibility" of the documents, draw fact inferences, and apply the law. The process is a trial, not summary judgment. Civil Rule 52 applies, both to require findings of fact and separately stated conclusions of law and also to limit appellate review by the clear error standard.

The practice described by Judge Denlow is discussed at some length in his recent article, Trial on the Papers, The Federal Lawyer 30 (August 1999). It is sound practice. Express approval of this practice in a Civil Rule might encourage its use, and also might protect against misunderstandings that lead a judge to believe that a paper trial is appropriate while one or more parties believe that only summary judgment arguments and standards are involved.

If the Rules are to approve trial on written testimony, however, it may be desirable to go further and adopt a more general provision. Some courts have experimented with written testimony as part of living-witness trials, particularly by the hybrid practice of presenting direct expert testimony in writing with oral cross- and further examination. In some circumstances it even may be desirable to allow use of written testimony in jury trials outside the limits now set by the discovery rules.

This draft transfers the proposal to Rule 43(a) and generalizes it. But providing a draft does not reflect a judgment that the time has come to make a rule. It would be useful to know more about actual experience with written testimony, and to probe the social-science literature in a thorough way. And it seems fair to insist, in these times of active rulemaking, on a showing of real need before pursuing a rule change. This idea may deserve long-range consideration rather than immediate action.

RULE 43. TAKING OF TESTIMONY

(a) FORM.

(1) In every trial, the testimony of witnesses ~~shall~~ must be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise.

(2) The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

(3) Part or all of the testimony of a witness may be presented in written or recorded form under[54] Rule 43(a)(1) or with the consent of the parties.

Committee Note

Present Rule 43(a) is divided into two numbered paragraphs. Paragraph (3), which authorizes presentation of written or recorded testimony with the consent of the parties, is new. This new provision confirms the availability of several practices that can enhance the reliability and efficiency of trial.

A number of decisions have recognized that a motion for summary judgment can be converted into trial on a paper record if the parties consent. *E.g., Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 142-143 (2d Cir.1998); see Denlow, Trial on the Papers, The Federal Lawyer 30 (August 1999). Trial on a paper record is quite different from summary judgment. If the case is tried to a judge, the judge makes findings of fact and conclusions of law as required by Rule 52. Appellate review is controlled by the clear error standard of Rule 52. The parties may consent to this procedure because the basic facts are not disputed, because they believe that live testimony will not improve upon the showings that can be made in writing, because the expense of producing live testimony is out of proportion to the stakes of the litigation, because a paper trial can be had sooner than a live-witness trial, or for still different reasons.

Other practices authorized by Rule 43(a)(3) are less well established. One promising practice is to provide direct testimony by writing, leaving live-witness testimony to cross- and subsequent examination based on the written testimony. This practice is most likely to be used in bench trials, and with expert witnesses. As experience accumulates, however, the practice may be extended to other witnesses, particularly with testimony that relates to routine matters.

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[54] "Under" conforms to our style conventions. It means "when authorized under." It is not unusual to find readers who are confused by this usage. Should we add the extra two words?

The example of expert witnesses suggests the obvious possibility that a trial may combine testimony from witnesses who deliver all testimony orally with testimony from witnesses whose testimony is partly or entirely in writing.

Rule 43(a)(3) extends to jury trials as well as bench trials, but written testimony must be approached with great caution in jury trials. Although there is reason to believe — contrary to revered tradition — that individual evaluations of credibility based on written testimony are at least as reliable as evaluations based on the demeanor of a live witness, focus on a written record may change the dynamics of jury deliberation in unpredictable ways. Even if the parties consent to present part or all of the testimony to a jury in writing, the court may seek to protect the jury by requiring live testimony. The practical necessities of scheduling trial witnesses mean that an order for live witnesses must be made before trial and, in all but extraordinary circumstances, before a jury is selected. There is accordingly little risk that the order will be perceived as a reflection on the estimated capacities of a particular jury.

Party consent to present testimony in written or recorded form does not bind the court. The court may prefer to receive live testimony, or may prefer a written transcript over the burden of listening to a recording.