Civil Litigation Management Manual

Third Edition

2022

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The Judicial Conference of the United States
Committee on Court Administration and Case Management

2022

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

Committee on Court Administration and Case Management of the Judicial Conference of the United States

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This third edition of the *Civil Litigation Management Manual*, was approved by the Judicial Conference of the United States at its March 2022 session. This revised version was prepared under the direction of the Judicial Conference Committee on Court Administration and Case Management.

The original version, prepared in 2001, captured the most effective practices developed by courts in implementing the pilot programs and plans required under the Civil Justice Reform Act of 1990. Under the Act's mandate, the judiciary was required to develop, and periodically update, a manual to describe and analyze "litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective." 28 U.S.C. § 479(c). The second edition, prepared in 2010, retained the foundation of the original version and suggested additional litigation practices. This new edition addresses significant amendments to the Federal Rules of Civil Procedure and discusses more modern case management techniques. As with the second edition, it also encourages judges to engage in effective case management, and to tailor case management to the specific needs and complexity of the case to help achieve the goal of Rule 1 of the Federal Rules of Civil Procedure—"the just, speedy, and inexpensive determination of every action and proceeding."

As in the first two editions, this volume contains over two hundred pages of forms in the appendix. These forms were submitted by district and magistrate judges across the country as examples of methods to manage every stage of a civil case. The Committee thanks those judges for their time and contributions. The Committee is also grateful to both the Administrative Office and the Federal Judicial Center for supporting the Committee in this project and for their substantial contributions.

Finally, this version will be available primarily electronically on the judiciary's website, J-Net, and on the Federal Judicial Center's website. The appendix, containing the court forms, will be available electronically, not in print, so that the forms may be updated and supplemented more frequently. You should periodically check for changes to the manual or appendix, as they will occasionally be updated in between major substantive revisions to reflect changes in the Federal Rules of Civil Procedure or other minor edits. We also hope that those who review the manual and its forms will contribute forms and materials that they have developed, for inclusion in the appendix.

We hope that you will find this manual useful as one of the many tools available to assist you in your day-to-day work.

Audrey G. Fleissig
Chair, Court Administration
and Case Management Committee

Contents

Acknowledgments

This third edition of the *Civil Litigation Management Manual* was prepared under the direction of the Committee on Court Administration and Case Management of the Judicial Conference. Special recognition should be given to District Judge Audrey Fleissig, who chaired the subcommittee overseeing the revision and led the effort to update the hundreds of pages of sample forms contained in the appendix. The following current and former members of the Court Administration and Case Management Committee served on the subcommittee and contributed a great deal of time and effort in drafting and reviewing revisions to the manual: Circuit Judge Robin Rosenbaum, District Judge Marcia Crone, District Judge Kim Gibson, the late District Judge Philip Martinez, District Judge Susie Morgan, District Judge Rebecca Pallmeyer, the late District Judge Roger Titus, District Judge Reggie Walton, Magistrate Judge Charles Coody, and Magistrate Judge Patricia Sullivan. The Committee would also like to thank the many judges and Federal Judicial Center staff who authored publications that were heavily relied on to update several chapters of the manual. Many thanks also to the judges and court staff who assisted the Committee by providing updated forms for use in the appendix of the manual.

Staff from the Administrative Office of the U.S. Courts assisted substantially in these efforts: this revised version would not have been possible without Zachary Porianda and Stephanie O'Banion, who made substantial revisions to update the second edition of the manual, coordinated the revisions submitted by judges and other staff, and kept the project on track with their exceptional organizational, legal, editorial, and writing skills; Patrick Rodefeld worked with Stephanie in reviewing drafts of each chapter and assisted in creating the appendix; and Erin Conner made substantial contributions to the revision of Chapter 7. Federal Judicial Center staff also contributed significantly, particularly the dozen research and education staff who provided reviews of individual chapters; Tim Lau who helped consolidate those reviews; Donna Stienstra who coordinated the review process, reviewed every chapter, and revised chapter 5; and the editorial staff who prepared the manual for publication. Finally, the Committee gratefully acknowledges any others who helped in creating this manual but may have been inadvertently excluded above.

Introduction

After the passage of the Civil Justice Reform Act of 1990 (CJRA), and the judiciary's implementation of the requirements of that Act, the Judicial Conference stated that "[t]he federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation, and thus ensure the 'just, speedy, and inexpensive' determination of civil actions called for in the Federal Rules of Civil Procedure."[1] It has been shown that "[m]anaged cases will settle earlier and more efficiently, and will provide a greater sense of justice to all participants. Even in the absence of settlement, the result will be a more focused trial, increased jury comprehension, and a more efficient and efficacious use of our scarcest institutional resource, judge time."[2]

The first edition of this manual, published in 2001, was written after the judiciary's implementation of the CJRA[3] and its extensive study evaluating the impact of the Act in the federal courts.[4] In the ensuing years, several Federal Rules of Civil Procedure were amended in an effort to improve discovery processes and respond to the widespread use of technology and electronic records. Courts' CJRA plans also became part of their local rules,[5] and the Case Management/Electronic Case Files (CM/ECF) system was implemented in all federal district courts. These changes were reflected in the second edition of this manual. This third edition of the manual, among other things, addresses more recent amendments to the federal rules of procedure and discusses more modern case management techniques.

Certain case-management practices continue to result in decreased case length and costs: they include early judicial involvement, shortened discovery

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

2. *Id.*

3. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Act required courts to adopt "civil justice expense and delay reduction" to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" (former 28 U.S.C. § 471). The Act suggested a number of case-management techniques for courts to consider including in their CJRA plans.

4. James S. Kakalik et al., An Evaluation of Judicial Case Management Under the Civil Justice Reform Act, Executive Summary (RAND Inst. for Civil Justice 1996) [hereinafter *RAND CJRA Report*].

5. Most provisions of the CJRA have expired, including the requirement that courts maintain expense and delay reduction plans; however, the CJRA's reporting requirements remain in effect. The judiciary publishes a public, semiannual report on pending civil matters. 28 U.S.C. § 476.

periods, and the setting of an early, firm trial date.[6] Yet, the judiciary is handling cases of increasing complexity with voluminous electronic records and limited resources, raising case-management challenges. The judiciary continues to explore better practices in a time of widespread Internet use, a restrictive budget climate, and a greater demand for public access and accountability. The federal rules contain the authority for the judge to manage civil litigation and to take steps to enforce limits set by those rules.

To carry out these practices, and to gain greater efficiency for the bench and the bar, many courts have adopted standardized case-management procedures for all civil cases within a district. Such courts use their websites to post standing orders or guidelines for civil practice, and, with the agreement of the district and magistrate judges, adopt standard orders for judges to use in all civil cases. Courts are encouraged to take such steps to maximize efficiency in their case-management procedures, but courts should remain able to tailor those procedures, when necessary, to suit the needs of a particular case.

This manual presents both successful practices and suggested practices for use in the modern civil litigation landscape. The practices described here are derived from many sources, including judges' published writings, court orders, lectures, and Federal Judicial Center (FJC) materials. We have also drawn upon the many years of experience of the judges who have generously donated their time and expertise to this project.

The discussion in the manual's first six chapters generally follows the chronology of a civil case. Thus, we begin with techniques for monitoring service of process and conclude with management of trials. Chapters seven through nine turn to more specialized matters, such as the management of special types of cases, the use of CM/ECF and other information technology, and personnel resources.

One cautionary note seems appropriate at this juncture. The tools and practices outlined in the chapters that follow should not be employed without first making the conscious decision that the practice is appropriate in the case at hand. This manual is inspired by the belief that early, active case-management results in greater efficiency, reduced costs, and a shorter time from filing to disposition.

Experience and anecdotal information suggest that some case-management techniques invariably add to the cost of litigation, usually in the form of added time requirements for lawyers and staff. It is also widely known that litigation costs in federal courts are rising and can represent a real threat to some litigants' access to justice. Judges are urged to avoid time-consuming case-management practices in those cases that have low dollar value and are otherwise straight-forward factual

6. *RAND CJRA Report*, *supra* note 4, at 26–28.

disputes involving settled principles of law; in such cases, the corresponding cost benefit usually obtained in complex cases with the utilization of such techniques is unlikely to be realized.

This manual, as well as appendices with forms and examples identified throughout the manual, are available online. They can be found on the Federal Judicial Center's intranet site and on the Administrative Office's J-Net.

Management of criminal cases is not covered in this manual. The *Manual on Recurring Problems in Criminal Trials* (Federal Judicial Center, 6th ed. 2010) contains a wealth of material judges will find helpful in the management of criminal litigation.[7]

7. The FJC also has published the following criminal case-management manuals: *Criminal e-Discovery: A Pocket Guide for Judges* (2015); *National Security Case Studies: Case Management Challenges, Sixth Edition* (2015); *Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers* (2013); *National Security Case Management: An Annotated Guide* (2011); *Terrorism-Related Cases: Special Case-Management Challenges* (2008). The following FJC webcasts are also available: *What Judges Need to Know About Surveillance* (2017); *How Complex Systems are Used in Criminal Activity, Criminal Investigation, and Criminal Prosecution* (2015); and *Computers and Digital Forensics* (2015). For lectures and materials on search and surveillance warrants, see the FJC program *Search and Surveillance Warrants in the Digital Age* (2019). Also available are two podcasts from the FJC *Please Proceed* series: *Conducting a Change of Plea and Sentencing in the Same Appearance* (July 10, 2020) and *Conducting Revocations of Supervised Release Remotely* (October 1, 2020).

1

Early and Ongoing Management of the Pretrial Process

A. Early case management

1. In general

> *"Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation."*[8]

As presiding judge, you are responsible for overseeing the litigation process and ensuring the just, speedy, and inexpensive determination of civil cases assigned to you. Early and effective case management is fundamental to successfully accomplishing this objective. This entails using the Federal Rules of Civil Procedure,[9]

8. Chief Justice John G. Roberts, Jr., *2015 Year-End Report on the Federal Judiciary*, at 10, 1–16 (Dec. 31, 2015).

9. Unless otherwise indicated, any citation to a "rule" or the "federal rules" refers to the Federal Rules of Civil Procedure.

your court's local rules,[10] and your discretionary authority to establish your role in actively managing a case and engaging the parties and counsel in the process. As Chief Justice Roberts noted, "judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing."[11]

You can initiate early case management in two ways. First, on a broad level, you may develop standard practices and procedures, collectively referred to as "case management guidelines," that will apply to all civil cases assigned to you. These case management guidelines will provide the parties and counsel with an overview of your expectations and protocols and establish uniform approaches for handling cases across your civil docket. Second, once a case is assigned, you can begin the process of developing a case management plan tailored to the case. This will involve directing the parties in their Rule 26(f) "meet and confer" conference and using information they provide to prepare a schedule that includes benchmarks and deadlines for each phase of the case.

While these initial steps will set the general course for a case, it is important to keep in mind that case management is an ongoing, collaborative process for you, counsel, and the parties. The 2015 amendment to Rule 1 made clear that the parties and counsel share the court's responsibility to employ the rules to achieve fair and prompt resolution of cases. Using early case management techniques discussed in this chapter and impressing upon counsel their duty to cooperate and to avoid misuse of procedure helps control costs, conserve judicial time, and expedite the disposition of cases.

2. Specific techniques

a. Case management guidelines and initial scheduling orders

You can begin early case management even before a case is filed by developing standard practices and procedures that, in addition to your court's local rules and general orders, will govern civil cases assigned to you. These case management

10. Some district courts have adopted detailed local rules addressing case management issues. *See* Fed. R. Civ. P. 83 (authorizing district courts to adopt local rules consistent with the Federal Rules of Civil Procedure after providing public notice and an opportunity for comment and authorizing judges to "regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules.").

11. Chief Justice Roberts, *2015 Year-End Report on the Federal Judiciary*, at 10–11.

guidelines can include your instructions, rules, or requirements for litigating a civil case and are often issued in a standing order or posted on your court's website so that they are readily accessible. While the level of detail varies, case management guidelines typically give a general overview of how a judge conducts various proceedings and outline specific procedures for communicating with chambers about administrative matters. Additionally, case management guidelines may include information about the form, content, and deadlines for Rule 26(f) reports or case management statements. *See* online appendix for examples of case management guidelines.

Consider developing case management guidelines that include instructions on:

- when and how to contact chambers;
- your typical schedule (i.e., days and times) for motion hearings, Rule 16 pretrial conferences (including case management, status, and final pretrial conferences) and trial;
- how to request a continuance or a telephonic appearance;
- expectation for Rule 26(f) "meet and confer" conferences;
- how to prepare Rule 26(f) reports or joint case management statements;
- procedure for filing a motion (e.g., pre-motion conferences, noticing a hearing date, submitting courtesy copies, proposed orders);
- procedures for filing a motion for summary judgment;
- how to raise a discovery dispute;
- procedures for motions in limine;
- an overview of how trials are conducted (pretrial submissions, witness list, exhibits); and
- courtroom decorum and logistics (e.g., attorney and party conduct, how to address the court and witnesses, courtroom technology).

Your case management guidelines may also refer to other standing orders or rules (e.g., a standing discovery order), alternative dispute resolution (ADR) procedures, and the availability of magistrate judges. They may also provide information for pro se filers, such as where pro se resources can be found on the court's website. In addition, information about the Rule 26(f) conference should be included in your case management guidelines so the parties can approach the conference with a clear understanding of your requirements and expectations. You may also encourage counsel to meet in person, if feasible, and to consider whether any early request for production of documents should be served

pursuant to Rule 26(d)(2) to foster a more productive and informed discussion at the Rule 26(f) conference.

In some districts, the clerk's office issues an initial scheduling order when a case is assigned or shortly thereafter.[12] This order typically sets out important deadlines and conference dates, such as deadlines for filing proof or waiver of service, holding the Rule 26(f) "meet and confer" conference, filing a Rule 26(f) report or case management statement, and completing initial disclosures. The initial scheduling order may also set the date for the initial Rule 16 pretrial conference. The initial scheduling order should also advise litigants to review your case management guidelines. Many courts have local rules requiring the plaintiff to serve a copy of the initial scheduling order on each defendant and, in removal cases, requiring the defendant to serve it on any party that has previously appeared in the case.

Using these early case management tools, you can immediately set the tone for a newly assigned case and focus the parties and counsel on critical dates and tasks that must be completed in the weeks after a case is filed. In this way, the parties and counsel will be apprised of your expectations and their responsibilities from the moment the case is assigned to you.

b. Early case screening

Another early case management technique you can implement in chambers is a system to screen the initial pleadings to identify jurisdictional, procedural, or administrative issues that may delay progress or, in some circumstances, mandate dismissal or remand. You may delegate this task to your law clerks by setting up a schedule for review (e.g., once a week) and developing a method (e.g., brief weekly meeting, short memorandum, notation in the case file or case tracking spreadsheet) for flagging any issues that require your attention. You can then raise these issues with counsel at the initial pretrial conference or, if the issues require more immediate attention, you can send an order to show cause. The key is to identify and address jurisdictional, procedural, and administrative issues early, before you and the parties have invested significant time and resources in the case.

12. Depending on your district's case assignment procedures, when a case is filed, the clerk's office will assign it to a district judge and/or a magistrate judge. *See infra* Chapter 8, Section D.

Consider developing a checklist for you and your law clerks to use that includes the following issues:[13]

- What is the basis for subject matter jurisdiction? Has it been sufficiently alleged (e.g., for diversity jurisdiction, consider the amount in controversy, citizenship of the parties, including citizenship of corporations, business partners, and/or LLC members[14])?.
- Is a party seeking a temporary restraining order, requesting to file the case under seal, or seeking other immediate relief?
- Are there issues relating to exhaustion of administrative remedies (e.g., a right to sue letter in Title VII cases)?
- Are there service issues (e.g., foreign defendant)?
- Are there problems with personal jurisdiction?
- Is venue proper?
- If the district has multiple divisions, is the intra-district assignment correct?
- Is a related action pending in your district, a state court, or another district that may prompt a request for a stay, consolidation, or transfer?
- Is the case subject to a multidistrict litigation order?
- If the case was removed from state court, was removal proper?
- Are there obvious statute of limitations issues?
- Did the plaintiff file an application to proceed in forma pauperis?
- Is the plaintiff a prisoner? If so, has the plaintiff filed prior cases that raised the same claims or that were dismissed for failure to state a claim, as frivolous or malicious, or because they sought monetary relief from a defendant who was immune from such relief?[15]
- Does the case involve high-profile or sensitive issues of which the judge should be aware?
- Do you or any members of your chambers have readily apparent conflicts of interest?
- If relevant, have all parties consented to have a magistrate judge conduct all further proceedings?

13. For sample jurisdiction checklists, *see* Schwarzer et al., *Practice Guide: Federal Civil Procedure Before Trial* ¶ 2:299 & form 3A (Nat'l ed. 2016).

14. In diversity cases, a judge may require the parties to file a joint certification of the citizenship of the parties. *See* online appendix.

15. *See infra* Chapter 7, Section D.1.

c. Differentiated case management

In some districts, cases are assigned using a differentiated case management (DCM) system, which assigns each civil case to a "track" based on its relative complexity and need for judicial involvement. Tracks are typically designated as "expedited," "standard," and "complex," and each track carries with it a specific set of procedures and case-event timelines. Track designations can also reflect particular case types (e.g., Social Security or asbestos cases) or case characteristics (e.g., administrative or appeals cases).

A DCM system usually relies on a uniform case management order that assigns each case to a track. Depending on the court, initial assignment to a particular track can be made by the clerk's office based on information provided by the plaintiff in the civil case cover sheet or based on the parties' selection of a track. Regardless of how tracks are initially designed or selected, all DCM systems preserve the assigned judge's discretion to alter the previously chosen track or any of its predefined management controls as individual case needs evolve. *See* online appendix for examples of orders and local rules pertaining to differentiated case management.

B. Prompting counsel to give early attention to the case

1. In general

The presiding judge, counsel, and the parties each play a role in formulating a schedule for the case, including setting discovery and motions deadlines, as well as a trial date. The parties will be bound by the scheduling order; therefore, counsel should be encouraged to meaningfully prepare for, and participate in, the initial scheduling process. This will help you set a schedule that is realistic and achievable in light of the complexity of the case and will minimize the need for continuances as the case proceeds.

2. The parties' Rule 26(f) conference

Under Rule 26(f)(1), unless the case is exempt[16] or the court orders otherwise, the parties must confer as soon as practicable, and in any event at least 21 days before a Rule 16 case management conference is held or a scheduling order is issued by the court under Rule 16(b). If your clerk's office issues an initial scheduling order

16. Rule 26 does not apply to those limited actions specified under Rule 26(a)(1)(B).

when cases are assigned, that order may set a date for the initial case management conference, with the preceding deadline for the parties to hold their Rule 26(f) conference calculated from that date. In other districts, the judge issues an order setting the initial Rule 16 case management conference. *See* online appendix for examples of both approaches.

During their Rule 26(f) conference, the parties must: discuss the nature and basis of their claims and defenses; discuss the possibility of settlement; make or arrange for disclosures under Rule 26(a)(1); discuss issues about preserving discoverable information; and develop a proposed discovery plan. *See* Fed. R. Civ. P. 26(f)(2), (3). The parties must submit to the court a written report outlining the discovery plan within 14 days of the Rule 26(f) conference.

The Rule 26(f) conference presents an early opportunity for counsel to analyze their case and plan for its legal and factual development. Equally important are the relationships that can be fostered between the attorneys, which depend in part on how you convey your expectations regarding this meeting. The tone you establish can color subsequent interactions between the attorneys, as well as their interactions with the court.

3. The Rule 26(f) conference agenda and report

Rule 26(f)(2) lists the topics the parties must consider during the conference.[17] It also requires the parties to develop a proposed discovery plan that includes the information listed in Rule 26(f)(3), and to submit to the court a written report outlining the plan within 14 days after the conference.[18]

Some district courts, however, require the parties to file a case management statement that addresses additional topics and includes a proposed scheduling plan for the judge to consider during the initial Rule 16 case management conference.[19] These topics typically include the legal and factual issues in dispute, anticipated motions, anticipated discovery disputes, proposed dispositive motion

17. The rule requires each party to disclose the names, addresses, and telephone numbers of persons likely to have discoverable information and the subject of that information; to support its claims or defenses; to provide a copy or description of all documents, electronically stored information, and things that support its claims or defenses; to provide a computation of damages claimed, along with the documents and other materials on which the computation is based; and to provide for inspection and copying of any insurance agreement that may satisfy all or part of the judgment. *See* Fed. R. Civ. P. 26(a)(1).

18. Under Fed. R. Civ. P. 37(f), failure to participate in good faith in a Rule 26(f) conference to develop a discovery plan may result in court sanctions.

19. *See Benchbook for U.S. District Court Judges* § 6.01 (Fed. Judicial Ctr. 6th ed. 2013) [hereinafter *Benchbook*].

deadlines, a schedule for ADR, proposed trial dates, and the expected length of trial.

The court may require that the parties jointly prepare and file the case management statement. However, in cases where one or more of the parties is proceeding pro se, or if a party is unable to obtain the cooperation of another party in preparing a joint statement, the court may allow the parties to file separate statements.

To facilitate this process, some courts standardize the information required in the case management order for all judges in the district. These uniform requirements are issued by local rule or standing order. *See* online appendix. Additionally, many courts have developed case management statement templates that the parties can download, complete, and submit. *See* online appendix. Judges may also develop their own case management statement templates that require additional information, especially in specialized cases such as class actions or patent litigation. *See* online appendix for examples. Providing a template can ensure that each party provides the needed information and that the topics are addressed in logical order. Moreover, the topics outlined in the template can serve as an agenda for both the parties' Rule 26(f) conference and the subsequent initial Rule 16 case management conference, as well as for the initial scheduling order.

Consider requiring the parties to include the following information in their case management statement:

- the basis for the court's subject matter jurisdiction;
- any issues with personal jurisdiction;
- any issues concerning venue;
- whether any party remains to be served and proposed deadlines for service;
- a statement of facts and a list of factual issues in dispute;
- a statement of disputed points of law;
- prior and pending motions, status of motions, and anticipated motions;
- whether any party will seek to amend its pleadings and a proposed deadline for amendments;
- whether there has been full and timely compliance with the initial disclosure requirements of Rule 26 and a description of the disclosures made;
- discovery taken to date, the scope of anticipated discovery, whether expert discovery will be necessary, whether a Rule 30(b)(6) deposition will be taken, proposed limitations or modification of the discovery rules, a proposed discovery plan pursuant to Rule 26(f), how the parties

have considered proportionality in formulating their discovery plan, and any discovery disputes;

- the format and location of all discoverable electronic information, whether the information is readily available, and the reasonable and proportionate steps taken to preserve it;[20]
- whether any party will be seeking a protective order and whether there will be objections to its terms;
- whether the case is a class action and a proposal for how and when the class will be certified;
- any related cases or proceedings in the district or before another court or administrative body;
- the relief sought;
- prospects for settlement, settlement efforts to date, and an ADR plan for the case;
- whether all parties will consent to have a magistrate judge conduct all further proceedings;
- issues that can be narrowed by agreement or motion;
- proposed dates for designation of experts, deadlines for completing fact and expert discovery, dispositive motions, pretrial conference, and trial;
- whether the case will be tried by a jury or by a judge and the expected length of the trial;
- any other information that will facilitate the just, speedy, and inexpensive disposition of the case.

Requiring the attorneys to consider and address these topics early can help prevent problems from arising later in the case and speed its disposition.

20. Rule 37(e) authorizes specific measures a court may employ if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost and the party failed to take reasonable steps to preserve it. Accordingly, issues of electronic data preservation should be discussed and agreed upon as early as possible in the case. Some courts have adopted guidelines for the discovery of electronically stored information and checklists for the parties to use when discussing electronically stored information during the Rule 26(f) conference, which may be referenced in the case management statement template. *See* online appendix.

2

Establishing a Case Management Plan

A. Overview

Rule 16 establishes the tools at the core of civil case management: pretrial conferences and the scheduling order. It authorizes the judge to hold a pretrial conference at any point during the case to facilitate the just, speedy, and inexpensive disposition of a case. In most cases, setting an initial case management conference—often interchangeably referred to as the initial "scheduling conference," or "Rule 16 conference"—to discuss the parties' Rule 26(f) report or case management statement may give you a better understanding of the disputed issues, scope of discovery, anticipated motions, and settlement potential so that you can

tailor a scheduling order to the needs and complexity of the case. Generally, the initial Rule 16 case management conference is an opportunity for you to directly engage counsel and the parties in the case management process, reinforce your expectations for litigating the case, and ensure that the parties understand and are prepared to adhere to the deadlines in the scheduling order. Holding the initial Rule 16 case management conference requires time and preparation from you, your staff, and counsel. This investment, however, can help prevent costly, inefficient, and unnecessary discovery disputes and motion practice later in the case. In this way, the initial Rule 16 case management conference is a useful tool to expedite disposition and control costs.

A scheduling order is required in every case unless exempted by local rule. Fed. R. Civ. P. 16(b)(2). Under Rule 16(b)(2), the judge must issue the scheduling order "as soon as practicable" after receiving the parties' Rule 26(f) report or holding an initial pretrial conference, but absent good cause for delay, no later than the "earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared."[21] The scheduling order controls the course of the action unless modified by subsequent order. Fed. R. Civ. P. 16(d). Accordingly, your goal should be to set a schedule that ensures expeditious case progress and, to avoid later requests to extend the deadlines, is realistic for the parties.[22]

The following sections discuss strategies for holding an initial Rule 16 case management conference and preparing a scheduling order.

B. Approaches to the initial Rule 16 case management conference and preparing the scheduling order

Judges take varying approaches to the initial Rule 16 case management conference and preparing a scheduling order. Some judges elect not to hold a conference at all and instead issue an order after reviewing the parties' Rule 26(f) report or case management statement. Under this approach, the judge considers the parties' proposed schedule and modifies the discovery and motion deadlines, hearing dates, and trial date, as appropriate. The judge then sets the case schedule and provides other pertinent information in the scheduling order.

21. The 2015 amendment to Rule 16(b)(2) reduced the time the judge has to issue a scheduling order by 30 days, thereby encouraging judges to engage in earlier case management.

22. Even in cases exempted by local rule from Federal Rule of Civil Procedure 16(b), a minimal but firm schedule should be set. At the other end of the scale are cases, such as some class action and mass tort cases, which require extensive management, numerous rulings, and periodic adjustments to the schedule as the case unfolds. For guidance on handling the special needs of these cases *see* *Manual for Complex Litigation* §§ 11.1–11.23 (Fed. Judicial Ctr. 4th ed. 2004) [hereinafter *MCL 4th*].

In some courts, case schedules for certain categories of cases are set by local rule or standing order. *See* Chapter 1, Section A.2.c, for a discussion on Differentiated Case Management. For example, some courts have default schedules or "tracks" for cases seeking review of an administrative decision (e.g., social security appeals, immigration mandamus cases), habeas petitions, bankruptcy appeals, and Americans with Disabilities Act access cases. *See* online appendix for examples. The tracks establish pre-set time frames and uniform, presumptive deadlines for significant case events, such as filing the administrative record and dispositive motions. Even when one of these default schedules applies, some judges still hold an initial case management conference, if feasible, to review the schedule, determine whether any issues or discovery can be narrowed, and assess settlement potential.

Another common approach is for the judge to hold an initial Rule 16 case management conference in *each* case to provide an opportunity to consult with the parties before issuing the scheduling order. The conference date can be automatically generated and included in the initial scheduling order (*see* Chapter 1, Section A.2.a), or the judge may issue an order setting the conference after the first defendant has been served or appeared in the action. The key is getting a case management conference on the calendar so counsel can coordinate a Rule 26(f) conference and submit their report or case management statements by the deadline in Rule 26(f)(1). If it appears from the parties' submissions that an initial case management conference is unnecessary, either because the case is relatively straight-forward or because the proposed dates and deadlines are reasonable, you may vacate the conference and issue a scheduling order. However, even in cases where the parties agree on a schedule and have proposed a reasonable discovery plan, there are potential benefits to holding an initial conference that you should consider. As Rule 16(a) highlights, the conference can be used to:

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

In addition to furthering these objectives, an initial case management conference provides an opportunity for counsel to ask questions about your procedures and to raise issues that were not included in their submissions. In many instances, the conference is also the first opportunity for counsel to meet face-to-face to discuss the case.

C. Structuring the initial Rule 16 case management conference

You have broad discretion in structuring pretrial conferences to reflect your judicial style and to best achieve their objectives.

1. Conducting the conference

The initial Rule 16 case management conference is generally the first significant contact between the judge and counsel. It provides a prime opportunity for the judge to assess the attorneys, the merits of the case, and the interactions among the attorneys. It also allows the judge to have a frank discussion with counsel about the case and how each phase will be managed. For newer judges, initial pretrial conferences are also a way to get to know the local bar and to begin to assess the lawyers' reputations. For these reasons, the presiding judge should consider conducting the conference in person, when practicable, or via video conference.

In courts where magistrate judges handle all pretrial proceedings, the magistrate judge will typically conduct the initial case management conference and will set deadlines for the case up through a specified time (e.g., the deadline for filing motions for summary judgment or the final pretrial conference date), at which point the district judge assigned to the case will assume responsibility. Following the initial case management conference, the magistrate judge may prepare a brief report to the district judge assigned to the case summarizing the case management plan and any special actions taken. Because this arrangement requires the time and involvement of two judges, many district judges prefer to conduct the initial pretrial conferences in their cases.

2. Timing

The primary objective of the initial case management conference is to provide an opportunity for the judge and counsel to review the Rule 26(f) report or case management statements and discuss in greater detail issues that should be considered *before* the judge sets a schedule for the case. The conference, therefore, should precede the deadline for issuance of the scheduling order set by Rule 16(b).[23] Generally, the initial case management conference should be set within 60 to

23. In complex cases, a judge may find it beneficial to hold an initial case management conference to have a preliminary discussion about issues such as discovery and joinder of parties and hold a follow-up pretrial conference soon thereafter to hear any updated information from counsel before issuing the scheduling order. *See* MCL 4th, *supra* note 22, § 11.212.

90 days after the case is filed. This should allow counsel time to become familiar with the case and to hold a meaningful Rule 26(f) conference. If, however, counsel is unable to adequately prepare for the Rule 26(f) conference, you may continue the initial case management conference upon a finding of good cause.[24] Because the timing of the Rule 26(f) conference is tied to either the initial Rule 16 case management conference or the deadline for issuing the scheduling order, an order continuing either date will also continue the time for the Rule 26(f) conference. The initial scheduling order or case management guidelines (*see* Chapter 1, Section A.2.a) should encourage plaintiffs to complete service of process on all defendants. It should also encourage defendants to appear as soon as practicable so that they receive ample notice of, and have sufficient time to prepare for, the Rule 26(f) and the initial Rule 16 case management conferences.

In cases where a party files a Rule 12(b) motion *before* the initial case management conference, you may either continue the conference until after ruling on the motion or proceed with the conference. If it appears that the motion may dispose of the case (e.g., a well-taken motion to dismiss based on lack of subject matter jurisdiction), it may be more prudent and cost-efficient to continue the conference until you rule on the motion. On the other hand, proceeding with the conference allows you to have a discussion with the parties about whether the motion can be narrowed or informally resolved (e.g., by amending the complaint to correct pleading deficiencies). In such instances, the initial pretrial conference can help expedite the case and save the parties the expense of fully briefing the motion and appearing for oral argument.

In cases that have been removed from state court, transferred from another district, or reassigned from another judge, you may need to set an initial case management conference so that you can issue a new or amended scheduling order. If a scheduling order has already been issued in the case, you may want to order the parties to file a joint statement summarizing the status of the case before your conference with them.

Because initial Rule 16 case management conferences are a recurring—and sometimes substantial—part of a judge's calendar, many judges adopt a standard procedure for conducting these conferences, including requirements for who must attend and how they will be permitted to participate (i.e., in person or virtually). Some judges also designate a certain day, time, and location for initial

24. For example, the Advisory Committee Notes to the 2015 Amendment to Rule 16 recognize that litigation involving complex issues, multiple parties, and large organizations may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed for counsel to participate in the Rule 26(f) conference in a useful way.

case management conferences—for example, Tuesdays at 1:00 p.m. in the courtroom.[25] This approach has the advantage of providing predictability for your calendar and for attorneys who routinely appear before you. Further, because the deadline for filing a Rule 26(f) report or case management statement will be the same for all cases set for a particular date, your staff can easily check that submissions have been timely filed and prepare them for your review. The downside to this approach is that if the calendar is heavy, counsel will have to wait for their case to be called, which ultimately increases the client's costs.

3. Location

For initial case management conferences held in person, judges generally hold them in either the courtroom or chambers (e.g., in a conference room/library).

Consider the following factors when deciding where to hold the initial pretrial conference:

- the number of people attending;
- the public or media interest in the case;
- the purposes of the conference and the items on the agenda (e.g., whether you will make rulings or issue orders);
- the nature of the issues;
- the experience and temperament of counsel;
- whether any of the parties is proceeding pro se; and
- whether any party poses a potential security risk.

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

25. If more than one case is set for an initial Rule 16 case management conference on that date, you can determine the order to call the cases.

4. Remote participation

The initial pretrial conference is most effective when the judge and counsel are able to have a real-time discussion about the case.[26] While judges typically hold conferences in person, under certain circumstances a judge may allow counsel to appear telephonically or by video when an in-person conference is not necessary or feasible.[27] Many courts have a local rule setting a deadline for filing and serving a request to appear telephonically (e.g., seven days before the conference date). If your court does not have such a requirement, consider including such a deadline in your case management guidelines or initial scheduling order. When deciding whether to conduct an initial pretrial conference by phone or video, *consider*:

- telephone or video conferences, especially with out-of-town counsel, can save time and money, permit a conference on short notice, and adequately address routine management matters such as scheduling or discovery issues;
- travel to the courthouse for a conference could be particularly burdensome and costly for self-represented litigants;
- face-to-face conferences can facilitate the detailed discussion needed to clarify and narrow issues, analyze damages claims, explore settlement possibilities, and address contentious matters; and
- face-to-face conferences in the courtroom may be advisable in cases with non-incarcerated pro se litigants to address their concerns, to avoid misunderstandings, to enable you to emphasize the seriousness of the litigation, and to mitigate potential security concerns.

5. Making a record

You have the discretion to conduct the initial Rule 16 case management conference on or off the record. When deciding whether to record a conference, *consider*:

- counsel may speak more freely off the record, but certain cases may be so contentious that it is advisable to record the proceedings to avoid disputes later about what was said or agreed upon; and

26. *See* Advisory Committee Notes to 2015 Amendments to Rule 16.

27. Appearance by telephone or video requires the parties to coordinate with the courtroom deputy to get instructions for dialing in or logging on. The courtroom deputy should ensure that the equipment is operable before the conference to avoid any connectivity issues.

- if the case involves a pro se litigant, it may be helpful to record the conference, whether held in person or by phone or video, to avoid misunderstandings and to have a record if disputes arise later.

You should state at the outset of the conference whether you are having it recorded. If you decide the conference should be held off the record, stipulations or rulings can be dictated to the reporter or put on the record using audio recording technology at the end of the conference. If your courtroom is equipped with audio recording technology, you may make a record of the conference this way, rather than using a court reporter. This may allow you to capture details that may be helpful later in the case, but not included in the scheduling order.

6. Participants

a. Counsel

For represented parties, most judges, by standing order or pursuant to their district's local rule, require lead counsel for the case to attend the initial case management conference. Other judges do not require lead counsel to appear, as long as counsel who are present have full authority to make decisions about the topics to be addressed. In cases involving a pro se party, the initial scheduling order should be clear that the pro se party is required to attend all conferences.

When deciding who will be required to attend the initial pretrial conference, *consider*:

- if you plan to work with the lawyers to narrow issues, reduce the amount of discovery, or discuss settlement, a lawyer with full authority may be needed;
- in cases in which the United States is a party, individual U.S. attorneys have limited settlement authority; and
- limiting the attendance of attorneys at conferences can save fees and other costs; however, counsel involved in related pending litigation may be helpful.

b. The parties

In most cases, it is not necessary or useful for parties who are represented by counsel to attend the initial case management conference (i.e., counsel alone is sufficient). In certain types of cases, however, some judges find it helpful to have

the parties attend (e.g., insurance carriers bearing the major risk and exercising control in the litigation, parties asserting civil rights or personal injury claims). In cases in which strong emotions may be a factor, having the parties attend may help them understand what will be expected of them during the litigation process and the risks and costs involved with trial. Providing parties with the opportunity to express their position or reasons for pursuing a claim or defense to the judge also may help them feel they have been heard. Participation in the initial conference may also open them to early settlement.

In deciding whether to require the parties to attend the initial case management conference, you should *consider* that their attendance may:

- help them understand the key evidence and legal theories at issue;
- help them understand the potential costs and time involved in litigating the case;
- facilitate making stipulations;
- reveal potential disagreements between the parties and counsel; and
- assist them in reaching a settlement.

However, the parties' attendance may also:

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

If parties attend the conference, you can avoid problems by excusing them from time to time as needed.

7. Pre-conference submissions

As discussed in Chapter 1, a productive initial case management conference depends, in large part, on the time and effort counsel put into their Rule 26(f) conference and in preparing their Rule 26(f) report or case management statements. The objective of the submissions is to have counsel provide enough information about the case—including underlying facts, claims and defenses at issue, discovery, settlement potential, and anticipated motions—to enable you to assess its complexity, spot issues that may stall progress, and craft an appropriate case management plan and schedule.

Your case management guidelines should instruct counsel to file their submissions at least seven days before the initial pretrial conference. Consistent with your internal chambers procedures, it is helpful to have a member of your staff—whether the law clerk assigned to the case, your judicial assistant, or courtroom deputy—confirm that the submissions have been timely filed and contact counsel or issue an order to show cause if they were not. *See* Chapter 9, Section B for a discussion of using CM/ECF to monitor new filing.

Judges take various approaches to prepare for the initial case management conference. One option is to have the law clerk assigned to the case review the parties' submissions and highlight particular issues you may want to address in greater detail at the conference. Your law clerk may also prepare a draft scheduling order with tentative deadlines and hearing dates that you can discuss and finalize at the conference. Some judges, however, prepare by reviewing the submissions themselves before the conference.

Regardless of your approach, it is helpful to have your staff check your calendar to confirm that the proposed hearing dates for motions and trial dates are available on your calendar.

8. Agenda for the conference

Rule 16(c) contains a non-exhaustive list of subjects that can be discussed at pretrial conferences.

For the initial case management conference, your focus will be on getting a better feel for the case and engaging counsel in developing a case management plan, including, in most cases, setting a trial date. The parties' Rule 26(f) report or case management statement will generally provide a starting point for issues that you will want to discuss in greater detail, especially if the parties disagree on any points or if settlement seems likely. At the beginning of the conference, you can let counsel know what you intend to cover and ask whether there are other subjects they would like to discuss. You can also use your case management guidelines to provide a general overview of how you will conduct the conference, which can help counsel prepare and streamline the conference. Keep in mind that the initial case management conference is an opportunity for you to assist counsel in identifying—and potentially resolving—issues that could slow the progression of the case and increase litigation costs. For that reason, spending a few minutes to talk through an issue raised by counsel may obviate the need for a motion and unnecessary discovery.

Consider the following topics and areas for discussion at the initial case management conference:

- clarifying, narrowing, or eliminating legal or factual issues in dispute, *see* Fed. R. Civ. P. 16(c)(2)(A);
- setting proposed discovery and motion deadlines, hearing dates, pretrial filings deadlines, pretrial conference date, and trial schedule;
- agreeing on procedures to be followed for determining claims of privilege, including claims arising after production of privileged information, *see* Fed. R. Civ. P. 26(f)(3)(D);
- clearly identifying and agreeing on all electronic discovery issues, including issues of preservation, cost, location, and format, *see* Fed. R. Civ. P. 26(f)(3)(C);[28]
- specifying time limitations for the joinder of parties and amendment of pleadings, *see* Fed. R. Civ. P. 16(c)(2)(B);
- for district judges, whether the parties will consent to magistrate judge jurisdiction for all aspects of the case, *see* Fed. R. Civ. P. 16(c)(2)(H);
- discussing prospects for settlement and assessing the parties' present settlement posture;
- adopting special procedures for managing potentially difficult or protracted actions (e.g., complex or patent cases, or class actions), *see* Fed. R. Civ. P. 16(c)(2)(L);
- controlling, limiting, determining the proportionality of, and identifying potential problems with discovery, including the possibility of phased discovery and the need for a Rule of Evidence 502(d) order;
- exploring the suitability and appropriateness of the case for ADR; available ADR options (e.g., arbitration, mediation, judicial settlement conference); the parties' preferred ADR option; and the parties' justification if no ADR option is chosen; and
- whether a later pretrial conference will be needed.[29]

28. A thorough discussion of electronic discovery matters that should be considered early in the case is contained in *infra* Chapter 3, Section F. *See also* *Managing Discovery of Electronic Information* (Fed. Judicial Ctr. 3d ed. 2017); and *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial* (Fed. Judicial Ctr. 2001).

29. *See also* *MCL 4th*, *supra* note 22, § 11.21; *Benchbook*, *supra* note 19, § 6.01(B) (suggesting topics for the initial pretrial conference).

9. Managing the scope of the case

a. Identifying and narrowing the issues

As outlined in Rule 16(c)(2), one of the most important tasks at the initial pretrial conference is to simplify the legal and factual issues in dispute to avoid unnecessary proof or cumulative evidence.[30] Refining the issues and stipulating to uncontested facts can help make discovery more targeted and efficient, obviate unnecessary motions, and focus settlement discussions—all of which help control costs and expedite disposition of the case. Discussing the issues in dispute also encourages counsel and their clients to consider the scope and complexity of the litigation and the economics of litigating the case.

In some instances, counsel will contend that they lack appropriate information for early identification of legal and factual issues. You may remind counsel that Rule 11 requires inquiry prior to the filing of an action, and counsel should be held to their responsibilities. Moreover, identifying even formative information is helpful. You can make it clear that information should be as specific as currently possible, but that any information developed in this process is subject to later clarification.

In engaging counsel in the issue narrowing process, you will want to ask direct and leading questions, such as: "What do you expect to prove and how? How do you expect to defeat this claim? What are the damages?" If these questions reveal issues that are ripe for dismissal, counsel should be given adequate notice and an opportunity to be heard before you take any action on the merits.

Consider the following additional approaches:

- addressing and resolving early in the case questions concerning subject matter jurisdiction—a fatal and nonwaivable defect[31] (for a sample order to show cause regarding removal jurisdiction, *see* online appendix);
- urging attorneys to reach agreement on the issues in dispute or to clearly identify areas of disagreement and narrow those remaining issues;
- determining which issues are material and genuinely in dispute by pressing both sides to avoid wasteful litigation activity (e.g., unnecessary discovery and motions) and to encourage settlement;

30. *See also MCL 4th*, *supra* note 22, § 21.3.

31. *See Practice Guide: Federal Civil Procedure Before Trial* ¶ 2:299 & form 3A (jurisdictional checklist), *supra* note 13.

- determining how issues may be resolved, whether by motion (e.g., Rule 12(b)(6) motion or motion for partial summary judgment) or by special procedures (e.g., a bifurcated trial);
- determining what discovery is required to resolve a potentially dispositive issue and putting that limited activity on an expedited track;
- identifying with specificity the amount and computation of damages claimed and other relief sought, the supporting evidence, and the basis for establishing causation; and
- determining whether there are indispensable parties to be joined.

b. Limiting joinder of parties and amendment of pleadings

Changes in parties (by addition, substitution, or dismissal) and amendments to claims or defenses can affect the claims at issue and cause unnecessary or duplicative discovery and motion activity. For these reasons, it is important to set a reasonably early cutoff date for amendments of any kind (*see* Fed. R. Civ. P. 15; local rules may also apply). If counsel indicates in the case management statement or during the initial pretrial conference that the party may be filing a motion to amend, explore whether the opposing party will stipulate to the amendment, either at the conference or upon disclosure of additional information. Because judges are to liberally grant leave to amend under Rule 15(a)(2), it may not be worth the expense for the other party to oppose the motion when the amendment is minor or does not change the scope of the issues.[32] Engaging in this discussion may help avoid a round of motions on the amendment.

10. Sanctions

To further Rule 16's goal of active judicial management, Rule 16(f)(1) contains an enforcement mechanism, authorizing a judge on motion or sua sponte to issue an order sanctioning parties or counsel for failing to appear at pretrial conferences, being substantially unprepared to participate in the conferences, or failing to obey a scheduling or other pretrial order. Under Rule 16(f)(2), instead of or in addition to sanctions, the judge *must* order the party, its attorney, or both to pay reasonable expenses (including attorney's fees) incurred unless the violation was substantially justified or an award of expenses would be unjust.

32. For additional topics to consider discussing at the initial retrial conference, *see* *Benchbook*, *supra* note 19, § 6.01.

D. Issuing the scheduling order

In general, you have discretion to craft a scheduling order that best sets forth the deadlines, hearing dates, and other pertinent information you want to convey to the parties. But under Rule 16(b)(3), there is certain information that *must* be included in the scheduling order and a non-exhaustive list of information that you *may* consider including in the order.

Rule 16(b)(3)(a) requires that, *at a minimum*, the scheduling order set deadlines for joining other parties, amending the pleadings, completing discovery, and filing dispositive motions. These deadlines will ensure that at a specific point the pleadings and parties will be fixed, which will help deter delay tactics. In addition to this mandatory content, Rule 16(b)(3)(B) lists several other items that you *may* incorporate into the order, including:

- changes to the timing of disclosures under Rules 26(a) and 26(e)(1);
- limits on the extent of discovery;
- details about the disclosure, discovery, or preservation of ESI;
- agreements the parties have reached for asserting claims of privilege or for protection of trial-preparation material after information is produced, including agreements under Rule of Evidence 502;
- a requirement that parties request a conference with the court before filing a discovery motion;
- dates for pretrial conferences and trial; and
- other appropriate matters.[33]

Notably, the final item authorizes you to include any other information that will assist with management of the case. Some judges provide more specific details about the items listed in Rule 16(b)(3)(B), such as:

- deadlines for participating in a settlement conference or complying with ADR requirements;
- deadlines for completing particular phases of discovery (disclosure of expert witnesses, disclosure of rebuttal expert witnesses, noticing depositions, serving interrogatories and document requests, and filing discovery motions);

33. The 2015 amendments added preservation of ESI, agreements under Rule of Evidence 502, and pre-motion discovery conferences to the list of permitted items.

- limits on the number of depositions, requests for documents, interrogatories, and requests for admission;
- deadlines for supplementing and/or correcting previously-made disclosures and discovery responses;
- deadlines for filing pretrial materials (joint pretrial statement, motions in limine, trial briefs, proposed voir dire questions, proposed jury instructions, proposed verdict forms, trial exhibits) and for filing objections; and
- dates for further pretrial conferences, as needed.

For examples of scheduling orders, *see* online appendix.

Under Rule 16(b)(4), the schedule may be modified only for good cause shown and with the judge's consent. It is important to emphasize during the initial pretrial conference that you expect counsel to adhere to the schedule set in your scheduling order and that last-minute requests to continue deadlines will be disfavored.

Finally, bearing in mind the deadline set by Rule 16(b)(2), you should issue the scheduling order either at the end of the initial case management conference or soon thereafter so that counsel and the parties are on notice of the timeline for the case and their obligations to the court and the other parties. The law clerk assigned to the matter should also confirm that the deadlines and hearings are noted on your internal chambers case tracking system, as well as on your calendar.

3

Discovery Management

A. Overview

Pre-trial discovery is often the longest phase of a case and directly impacts the overall cost, speed, and perceived fairness of litigation. While the Federal Rules of Civil Procedure establish the basic scope and mechanisms for discovery, the

presiding judge plays a crucial role in ensuring that every party gets appropriate but proportional access to information needed to prosecute or defend against the claims at issue. This is not an easy task. To effectively manage discovery, you must use the Rule 26 and Rule 16 pretrial conferences to encourage counsel to develop a realistic and proportional discovery plan and to identify areas of disagreement that can be resolved early and informally. Disputes often arise that have the potential to sidetrack the case, escalate costs, and erode an otherwise cooperative relationship between counsel. You should therefore have procedures in place that promote prompt and cost-effective resolutions of discovery disputes. You should also remind counsel of their obligations under Rules 1 and 26(g) not to misuse the discovery process and that failure to comply with the Rules or your orders could result in sanctions under Rule 37. The following sections discuss techniques you may use to oversee the discovery phase of a case and ensure that it is efficient, expeditious, and fair.

B. Discovery rules and procedures

Federal Rules of Civil Procedure 26–37 set out the general framework, timing, and mechanisms for conducting discovery. Significant amendments to several of these rules came into effect in 2015.[34] The most important of these amendments is the change to the definition of the scope of discovery in Rule 26(b)(1), which provides that, unless otherwise limited by court order, parties may obtain discovery on any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering six factors that bear on proportionality.[35] The Advisory Committee Notes explain that this amendment reinforces the parties' obligation under Rule 26(g) to consider these factors in making discovery requests, responses, or objections. Consistent with

34. For example, Rule 34(b), dealing with requests for production, was amended in several respects in 2015. Rule 34(b)(2)(A) was amended to comport with Rule 26(d)(2), setting the time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference at 30 days after the first Rule 26(f) conference. Moreover, Rule 34(b)(2)(B) was amended to require that objections to Rule 34 requests be stated with specificity. This provision was also amended to reflect that the responding party may state that it will produce copies of documents or ESI instead of permitting inspection and that production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. Finally, Rule 34(b)(2)(C) was amended to state that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection.

35. The six factors bearing on proportionality listed in Rule 26(b)(1) are: the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

this amendment, Rule 26(b)(2)(c) requires the court to limit discovery if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (3) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

The mechanisms for conducting discovery, including depositions, interrogatories, requests for production, mental and physical examinations, and requests for admission are described with specificity in Rules 27–36. Rule 37 allows parties to move for an order to compel disclosure or discovery, authorizes sanctions for violations of discovery rules and orders, and specifies curative measures a court may employ if a party fails to preserve electronically stored information (ESI).

In addition to the Federal Rules, many districts have adopted local rules imposing more detailed procedures and requirements for discovery. For instance, some districts require specific formatting or numbering for interrogatories, requests for production, and requests for admission, or establish district-wide procedures for resolving discovery disputes. Some districts have also adopted local rules for specific categories of cases, such as pro se prisoner,[36] patent infringement,[37] and employment cases.[38]

C. Discovery management

1. Judge-specific discovery requirements and procedures

To start managing discovery at the very beginning of the case, you may include guidance or instructions in your case management guidelines or initial scheduling order. This may include topics the parties should consider during their Rule 26(f) conference, your procedures for resolving discovery disputes, specific requirements for various discovery mechanisms (e.g., requests for production), and procedures for requesting protective orders. *See* online appendix for examples. Even if your district's local rules already address discovery procedures, you may still consider adding a brief statement about discovery to reinforce the parties' obligations to cooperate and not to abuse discovery procedures and to encourage them to consider proportionality when developing their discovery plan. Including such information in your guidelines or scheduling order not only compels counsel to

36. *See, e.g.*, S.D.N.Y. Local Civil Rule 33.2.

37. *See, e.g.*, N.D. Cal. Patent Local Rules; N.D. Ill. Local Patent Rules.

38. *See Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action* (Fed. Judicial Ctr. 2015).

start thinking about discovery immediately after the case is filed, but allows you to reinforce key rules, implement procedures to make discovery more productive, and proactively address problems that have led to disputes in other cases.

2. Rule 26(f) conference and proposed discovery plan

As discussed in Chapter 1, a chief objective of the Rule 26(f) conference is for counsel to develop a proposed discovery plan that you can consider when preparing the scheduling order for the case. Rule 26(f)(2) sets forth the information that the parties *must* address in the discovery plan, including statements from the parties about initial disclosures, the subjects on which discovery may be sought, discovery completion dates, whether discovery should be phased, issues about claims of privilege, issues relating to ESI, proposed changes to the presumptive limits under the Federal Rules or the court's local rules, and whether the court should issue any other orders under Rule 26(c) or Rule 16(b) and (c). As detailed in Chapter 1, many courts and individual judges require parties to provide more specific details about discovery in the Rule 26(f) or case management statement, including proposed deadlines for expert testimony under Rule 26(a)(2) and deadlines for disclosure of witnesses, exhibits, and other matters under Rule 26(a)(3). If there are particular issues that you believe will assist the parties in formulating their discovery plan, you may instruct the parties to discuss those issues and include their responses in their Rule 26(f) report or case management statements.

3. Initial Rule 16 case management conference

At the initial Rule 16 pretrial conference, you should review the details of the parties' proposed discovery plan with counsel. The discussion will give you a general picture of the nature and extent of discovery in the case, including whether it will involve a high volume of documents, ESI, and expert testimony. It can also help you assess the proportionality of the initial discovery the parties are seeking and provide an opportunity to ask counsel how they can streamline the discovery process and control costs. Moreover, the discussion can help identify areas of potential disagreement before they devolve into costly and counterproductive disputes.

Consider discussing the following discovery-related topics at the initial pretrial conference:

- Do the parties agree on the scope of discovery in the case?
  - Are there issues about the relevant subject matter and time period?
- Have the parties made initial disclosures under Rule 26(a)?
  - If not, when are they due?
  - Are the parties seeking modification of that deadline?[39]
- Based on the parties' description of the claims and defenses at issue, what is the logical starting point for discovery and what are the most accessible and least expensive sources for that information?
- Should discovery be phased?
  - Is there a legal issue that is potentially dispositive?
  - What information is needed for a hearing on the dispositive issue?
- Can the parties streamline discovery on certain issues?
  - What are the top items that each party will be seeking?
  - Will the opposing party agree to voluntarily produce these items without a formal request for production?
- What discovery is necessary for the parties to meaningfully participate in ADR?
  - What information will help the parties assess litigation risk?
  - Will the parties agree to produce that information early in discovery so that they can assess settlement potential?
- Do the parties agree that the presumptive limits on discovery in the Federal Rules of Civil Procedure will apply, or are there proposed modifications?
- Are expert witnesses necessary?
- Is counsel aware of special circumstances that might affect the availability of key witnesses (e.g., a terminally ill witness)?
- Are there issues concerning confidentiality; is any party seeking a protective order?

39. A judge may require parties to exchange Rule 26(a) initial disclosures before the initial pretrial conference. *See* online appendix for an example of this approach.

- Do the parties understand their obligations relating to ESI?
  - Have the parties taken steps to preserve potentially discoverable ESI?
  - Have counsel talked to their clients about the location and custodians of ESI?
  - Have the parties discussed and agreed upon a format for producing ESI?
  - Have the parties discussed whether to agree that inadvertent production of privileged or protected ESI will not result in a waiver, and whether to ask the court to enter an order under Rule of Evidence 502(d)?
- Do the parties wish to be referred for mediation or other ADR?

4. Setting discovery deadlines

The amount of time needed for the parties to complete pretrial discovery will vary from case to case, depending on the type of case, the complexity of the issues, the ease of access to relevant documents and witnesses, the experience of counsel, and the parties' motivation to either get to or forestall trial.[40] There are several considerations when setting deadlines for specific phases of discovery and a discovery cut-off date.

First, the parties' proposed discovery schedule is often a fair indicator of the time needed to complete discovery.[41] Nevertheless, informed by the discussion with counsel at the initial pretrial conference, you should review and appropriately revise the proposed discovery schedule to ensure that it is efficient, realistic, and achievable. If the discovery schedule is too aggressive, it creates the risk that parties will need to file motions to extend the discovery cut-off date, which not only increases costs, but may require pushing back the dispositive motion deadline and the trial date. A discovery schedule that is unnecessarily long may discourage counsel from developing an organized and cost-efficient discovery strategy and ultimately delay resolution of the case.

40. A 2011 FJC study entitled, "The Timing of Scheduling Orders and Discovery Cut-Off Dates" found that in the 11 districts studied, the median time from entry of the first scheduling order to the first imposed discovery cut-off ranged from 143 days (or 4.7 months) to 240 days (or 7.9 months). The study also found that the nature-of-suit categories with the longest median time were contracts (6.6 months) and complex (7.1 months). The nature of suit with the shortest median time was the catch-all category, at 157 days (or 5.2) months.

41. For courts that assign cases to a particular track under a Differentiated Case Management system, *see supra* Chapter 1, Section A.2.c, there may be presumptive timeframes for discovery.

Second, while the discovery cut-off date should be firm, there may need to be adjustments to the deadlines for fact discovery, expert disclosures, expert depositions, and pretrial disclosures as the case evolves. It may be beneficial to build in buffers between these deadlines so that if one deadline needs to be extended, it will not throw off remaining deadlines.

Third, you should keep in mind the Civil Justice Reform Act (CJRA) reporting requirement for cases pending more than three years. Discovery should be completed far enough in advance to allow for motions for summary judgment to be briefed and ruled on and for the case to be tried before the three-year mark.[42]

In general, after the initial pretrial conference, you will not have further involvement with the case during the discovery phase unless a dispute arises. If there is a particular issue that needs to be discussed or reevaluated after the parties have produced some discovery, you may order the parties to file a joint statement briefly describing the issue and/or schedule a telephonic conference with counsel. Although less common, some judges schedule a telephonic status conference near the close of discovery in every case. While this may not be practical or necessary in most cases, you may consider setting a conference if discovery has been especially contentious and you anticipate last-minute disputes or motions to extend the discovery cut-off date.

D. Using magistrate judges and special masters

As discussed more fully in Chapter 8, Section D, magistrate judges play various roles in pretrial case management, including supervising discovery and resolving discovery disputes. In some districts, at the time the case is filed, a magistrate judge is automatically assigned to the case for pretrial case management or for purposes of discovery. In these districts, the assigned magistrate judge will be responsible for discovery issues that arise during the pretrial stage. In other districts, when a discovery dispute arises, the district judge presiding over the case may refer the dispute to a magistrate judge for resolution. Typically, the magistrate judge to whom that dispute is referred will handle subsequent discovery issues that arise in that case. If a magistrate judge has developed expertise in a particular area of law (e.g., patent infringement), you may consider directly referring a complex discovery dispute concerning that area to that magistrate judge. Keep in mind that magistrate judge orders on discovery disputes are appealable to the referring district judge under Rule 72(a) and must be set aside if clearly erroneous or contrary to law.

42. For more information on the CJRA reporting requirements, *see infra* Chapter 4, Section B.1, and the *Guide to Judiciary Policy*, vol. 18, § 540.

While some judges routinely refer all discovery disputes to magistrate judges, in certain instances it may be more efficient for the district judge presiding over the case to handle the dispute. For example, if the discovery dispute raises a single, well-defined issue, the district judge may be able to promptly rule on the matter. Similarly, if there was an extensive discussion about discovery during the initial pretrial conference, the district judge may be better suited to make discovery rulings consistent with the discovery plan adopted for the case. Further, if the dispute concerns discovery central to the viability of a claim or defense, the district judge should consider handling the dispute. On the other hand, a magistrate judge may be in a better position to dedicate time to disputes that require extensive legal analysis or written decisions, as well as to cases that have recurring discovery disputes or need periodic pretrial conferences to ensure that discovery is on track.

Although infrequent, in large-scale, complex cases, it may be appropriate to appoint a special master to supervise discovery if discovery issues cannot be effectively and efficiently addressed by an available district or magistrate judge.[43] Examples include cases involving a substantial amount of ESI or cases requiring technical expertise to resolve certain issues.[44] For a full discussion of the use of special masters for pretrial proceedings, *see* Chapter 8, Section F and the *MCL 4th*.

E. Resolving discovery disputes

While Rule 26(f) and Rule 16 pretrial conferences can help identify and defuse initial discovery disputes, most disputes arise after discovery is underway and concern specific items or categories of information that a party refuses to produce. Discovery disputes are problematic because they bring the exchange of discovery to a halt and spawn satellite litigation over whether the information is discoverable, which increases costs and demands your immediate attention. Although discovery disputes may sometimes be unavoidable, having clear procedures in place for resolving them can minimize unnecessary disruption to the case.

There are several approaches for handling discovery disputes, ranging from informal telephonic conferences to motions to compel. Some districts have adopted local rules establishing a uniform procedure for discovery disputes; in other districts, each judge decides what procedure parties should follow. Below are a range of options to consider.

43. *See* Fed. R. Civ. P. 53(a)(1)(C).

44. *See* *Managing Discovery of Electronic Information*, *supra* note 28, at 5–6; *MCL 4th*, *supra* note 22, §11.446.

1. Meet and confer requirement

Federal Rule of Civil Procedure 37(a)(1) requires counsel to meet and confer in good faith in an attempt to resolve discovery disputes informally before moving to compel. Consistent with this rule, many judges require counsel to meet and confer before submitting written materials or contacting chambers about a discovery dispute. The requirement makes it more likely that counsel are truly at an impasse before seeking intervention. Some judges have found that requiring lead trial counsel (rather than an associate) to participate may facilitate resolution of the dispute. If practical, requiring that the lawyers meet in person may also be useful.

2. Phone conference

When a discovery dispute arises, some judges—either on a case-by-case basis or in general—require the parties to submit a joint letter or jointly call the court (either chambers or the courtroom deputy) to request a telephonic conference with the judge. The judge may have a law clerk speak with counsel to take down a brief description of the dispute, the legal authorities each side is relying upon, and determine whether documents should be submitted (e.g., the interrogatories in dispute). After consulting with the judge, the law clerk can set up a time for the conference call and provide further instructions to counsel. The judge will then hold a conference call with counsel on the record, either with a court reporter or using the audio recording technology in the courtroom. During the conference call, the judge will hear counsels' positions on the dispute and announce a ruling, which will be summarized in the minutes prepared by the courtroom deputy. In some cases, the judge will also issue a brief written order or direct counsel to file a proposed order for signature.

This approach allows the parties to quickly bring their dispute before the judge and obtain a ruling before discovery is derailed. Because no formal briefing is required, it is cost-effective for the parties and does not generate additional materials for the court to review. Further, requiring counsel to present their positions to the judge over the phone rather than by letter or brief has a way of encouraging them to rethink unreasonable positions and come to an agreement.

While this approach may work well with routine discovery disputes, more complicated disputes—especially those requiring interpretation of case law or statutes—will likely require briefing. Nevertheless, even in those circumstances, the initial conference call is useful to give you an overview of the dispute and to narrow the issues. You may also use the conference call to convey your initial thoughts or

tentative ruling and direct counsel to meet and confer again to attempt to resolve the dispute on their own and to notify you of the outcome. *See* online appendix for examples of instructions for telephonic discovery dispute conferences.

3. Discovery dispute letter

Another option for efficiently addressing discovery disputes is to have counsel file either a joint letter or separate letters detailing the dispute. The letter should address the nature and status of the dispute, confirm that counsel have met and conferred, be of a reasonable page limit (e.g., 3–5 pages), and include as an attachment the disputed discovery request or response. If a joint letter is required, you may specify that the party seeking relief should prepare its portion of the letter first and then provide it to the opposing party so that it can include its response and file the letter. If separate letters are required, you may set a standard deadline for the response letter (e.g., 3 days after the initial letter is filed). After the joint or separate letters, you may resolve the dispute on the papers, set the matter for a telephonic conference or hearing, or if the matter is complicated, order the party seeking relief to file a motion to compel. *See* online appendix for examples of the letter approach.

4. Motion to compel discovery

Rule 37(a) provides that the motion to compel is the traditional method for presenting a discovery dispute to the court for decision. To narrow the scope of the dispute, some judges require the parties to participate in a preliminary phone conference. For the same purpose, many judges also require parties to file letters or a joint letter before allowing them to file a motion. *See* online appendix for examples. The judge's ability to award fees to the party that prevails on the motion to compel pursuant to Rule 37(a)(5)(A)-(B) may also deter ongoing and unnecessary discovery disputes.

5. Disputes arising during depositions

Disputes arising during a deposition often require your immediate attention because they can stop the deposition or, if not resolved before the deposition concludes, require a second deposition. Accordingly, some judges have adopted procedures that encourage the parties to contact chambers for a telephonic conference so the judge can rule on the dispute before the deposition ends. *See* online appendix for examples.

F. Electronically Stored Information (ESI)[45]

Digital technology now dominates how information is communicated and stored. As a result, ESI is a routine component of discovery in civil litigation.[46] ESI discovery may be burdensome and expensive, and may involve the court in thorny issues regarding preservation, form of production, and complex issues of waiver regarding attorney–client privilege and work–product protection.

A proactive management strategy that encourages the parties to discuss and develop a pragmatic approach for electronic discovery as part of their overall discovery plan will help control costs and avoid disputes once discovery is underway. Notably, your management of these issues may be more significant in smaller cases staffed by attorneys who are not comfortable with ESI and who cannot afford to engage ESI experts to assist them.

1. ESI and the Rule 26(f) conference

As discussed in Chapter 1, the starting point for effective discovery management is the Rule 26(f) conference. Under Rule 26(f)(3)(C), the parties are required to discuss issues relating to disclosure, discovery, or preservation of ESI, including the forms in which it should be produced, and to include this information in their Rule 26(f) report or case management statements. To facilitate this process, some courts have adopted local rules or developed guidance materials, such as Rule 26(f) preparation requirements, checklists of discussion topics, and model agreements, to give structure to the parties' discussion.[47] *See* online appendix for examples.

If your district has developed such materials, consider including a statement in your case management guidelines advising litigants to review the materials before the Rule 26(f) conference. If your district does not have uniform ESI guidance, you may adapt the sample materials in the online appendix to conform

45. For a comprehensive discussion of electronic discovery, including each of the topics discussed in this section, *see* *Managing Discovery of Electronic Information*, *supra* note 28.

46. ESI generally includes:

> e-mail messages, word processing files, web pages, and databases created and stored on computers, magnetic disks (such as computer hard drives), optical disks (such as DVDs and CDs), flash memory (such as "thumb" or "flash" drives), and on "cloud" based servers that are hosted by third parties and accessed through Internet connections.

Id., at 2.

47. *See also* *Managing Discovery of Electronic Information*, *supra* note 28, at 7–8; and *MCL 4th*, *supra* note 22, § 40.25(2).

to your district's local practices and include them as an attachment to your case management guidelines or initial scheduling order. At a minimum, you may want to consider adding an instruction to counsel in your case management guidelines advising that, if ESI discovery is expected, counsel should discuss their clients' obligation to preserve ESI and should become familiar with the critical aspects of their clients' ESI *before* the Rule 26(f) conference. Some courts also recommend that the parties each identify an e-discovery liaison who is knowledgeable about the party's ESI and will participate in the resolution of ESI discovery disputes.

2. ESI and the initial Rule 16 case management conference

After reviewing the parties' Rule 26(f) report and discovery plan, you may use the initial pretrial conference to ask targeted questions about the scope, cost, and time required for producing ESI, as well as the form of production and steps that have been taken to preserve potentially discoverable ESI. The conference also provides an opportunity for you to learn about the technology that will be involved in the ESI production. If the parties indicate that no ESI will be sought or exchanged and that there is no ESI preservation obligation to discuss, you should remind them that Rule 34(b)(2)(E)(iii) limits a party to producing ESI in one form so that they understand clearly that it may not be possible to shift from hard copy production to electronic production midway through the discovery phase.

In a case potentially involving a significant volume of ESI, the judge may use the initial pretrial conference to assess whether the ESI sought is reasonable and proportional to the needs of the case. Generally, the parties should stage discovery to begin with a search for readily accessible ESI that is associated with the key players and use the results to refine the scope of subsequent searches, especially if information is only available from less accessible sources. You should also ask counsel about the search methods and criteria they will be using to ensure they are using cost-effective means of locating the requested ESI. In cases involving voluminous or highly-technical ESI, additional pretrial conferences may be necessary after the parties have better assessed the scope of the ESI to ensure that the discovery plan is reasonably proportional to the needs of the case.

3. Accessibility of ESI sources

Under Rule 26(b)(2)(B), a party is not required to provide discovery or ESI from sources that the party identified as "not reasonably accessible" because of undue burden or cost. If a requesting party seeks to compel production of ESI from such a source, the resisting party bears the burden of proving the undue burden or

cost associated with accessing it. If, however, the requesting party shows good cause, you may order discovery from such sources, subject to the proportionality limitations in Rule 26(b)(2)(C) and other appropriate conditions, including cost-sharing or cost-shifting.[48] In resolving such a dispute, consider initially limiting discovery to ESI from accessible sources and deferring consideration of discovery from the not reasonably accessible sources until the parties can assess the need for it. You may also permit the parties to conduct limited and targeted discovery to better assess whether the source is not reasonably accessible.

You may consider allocating or shifting costs when a party seeks production of ESI that is not reasonably accessible, as well as in instances where a party seeks production of a volume of ESI that may exceed what is proportional to the case. Courts have articulated various standards and factors that must be considered before ordering such cost shifting.[49]

4. ESI, waiver, clawback, quick peek agreements, and Rule of Evidence 502

Cases involving production of ESI raise serious concerns for the parties about inadvertent disclosure of privileged or protected material. The sheer volume of ESI, coupled with the reality that privileged or protected commentary may be hidden in metadata or overlooked during pre-production review, have resulted in a significant increase in both the costs of screening ESI and in the inadvertent production of privileged or protected material.

In recognition of this increased risk, Rule 16(b)(3)(b)(iv) contemplates that parties may agree to binding non-waiver agreements, also referred to as "clawback" or "quick peek" agreements.[50] Under a clawback agreement, the party responding to an ESI request will still review responsive material for privilege or work product protection prior to production, but will agree with the requesting party to a procedure for the return of inadvertently produced information without waiver of the applicable privilege or protection. Under a quick peek agreement, the responding party produces the requested material without an extensive privilege review, but agrees with the requesting party that the production does not waive attorney–client privilege or work–product protection for anything included with the production. The details of these agreements are up to the parties to develop.

48. *See* *Managing Discovery of Electronic Information*, *supra* note 28, at 15–16.

49. *See* id., at 18–20.

50. For a more detailed discussion of non-waiver agreements, *see id.*, at 24–26.

Rule of Evidence 502(d) also allows parties to seek additional protection from the consequences of inadvertent production. It authorizes a federal court, on motion or sua sponte, to enter an order providing that disclosure connected with the litigation pending before it does not waive privilege or protection. Such an order is binding not only on the parties to the case but also as to third parties and will apply in any other federal or state proceeding. Without a Rule 502(d) order, a non-waiver agreement's applicability will generally be limited to the parties in the case.

Rule 26(f)(3)(D) requires the parties to focus on these issues early in the case, in that it mandates that the parties indicate in their proposed discovery plan whether they have agreed upon a procedure for asserting post-production privilege and work–product claims, and whether they are asking the court to include their agreement in a Rule 502(d) order. You should raise the topic at the initial pretrial conference and consider entering an order under Rule 502(d) if it appears that the parties will be producing a significant amount of ESI.

G. Protective orders

Rule 26(c) addresses the entry of protective orders to limit discovery or access to discovery—for example, to protect a party's trade secrets from public disclosure or from use other than prosecuting claims or defenses. At the Rule 26(f) conference, the parties should discuss whether a protective order will be required to prevent disclosure of confidential, proprietary, or private information that will be produced during discovery. In many cases, entry of a protective order is common practice, and the attorneys may be prepared to stipulate to an agreed order. Some courts have adopted model protective orders that set forth standard definitions as well as procedures for designating protected material, for challenging these designations, and for controlling the use of protected material. *See* online appendix for examples. If the case will involve confidentiality concerns, the most efficient way to resolve them is before discovery begins, by discussing the need for a protective order at the initial pretrial conference.[51]

H. Expert witnesses

Experts are routinely used in civil litigation to testify on a broad spectrum of disciplines and experience, including economic, scientific, technological, medical,

51. For additional information on protective orders, *see* *Confidential Discovery: A Pocket Guide on Protective Orders* (Fed. Judicial Ctr. 2012).

and legal subjects. In light of three well-known Supreme Court decisions,[52] management of expert evidence is an integral part of proper case management. Under those decisions, the district judge is the gatekeeper who must determine whether the proffered evidence is sufficient to meet the test under Rule of Evidence 702. Your performance of the gatekeeper function will be intertwined with your implementation of Rule of Civil Procedure 16.[53]

To further your own understanding of expert evidence, you can use several sources, beginning with the parties' experts. You may also appoint your own expert, as discussed below. Refer also to the *Reference Manual on Scientific Evidence* which, in addition to introductory essays on the admissibility of scientific evidence and how science works, offers a tutorial in each chapter on a different area such as DNA evidence, medical evidence, toxicology, mental health evidence, and estimations of economic loss in damages awards.[54]

1. Early pretrial management

Effective management of expert evidence begins at the pretrial stage. *Consider* the following approaches to facilitate early management of expert evidence:

- Requiring identification of expert witnesses, by area of expertise if not by name, at an early pretrial conference to further the process of defining and narrowing the issues, to focus discovery, and to facilitate settlement. In cases in which expert evidence is a necessary predicate of the claim (e.g., medical malpractice), identification of an expert qualified and willing to supply such evidence may be required before the case is permitted to proceed.
- Encouraging the parties to use experts who can convey information in terms that lay persons can understand.

52. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *General Elec. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

53. *See Joiner*, 522 U.S. at 149 (Breyer, J., concurring):

> [J]udges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, evidence. Among these techniques are an increased use of Rule 16's pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.

54. *Reference Manual on Scientific Evidence* (Fed. Judicial Ctr. 3d ed. 2011).

- Asking the parties to identify the issues that will be addressed by expert testimony and to ensure their experts address the same issues so that you (and later the jury) can clearly see where the differences and conflicts lie.
- Attempting to identify the specific bases for the differences in opinions of opposing experts. The utility of expert evidence can be enhanced, and issues can be more easily decided, if the *basis* for the difference between opposing expert evidence, not merely the difference itself, is identified as early as possible in the pretrial process. This may be done by determining whether the experts' disagreement is over data, interpretation of data, factual or other underlying assumptions, applicable theories, risk assessments, or policy choices.[55]
- Limiting the number of experts who will testify on a given issue. Some courts' local rules limit the number to one expert on any subject, for example.[56]
- Setting deadlines for mutual disclosure of expert reports or narrative statements of testimony, underlying data, and curricula vitae in appropriate sequence. Although Rule 26 provides for interrogatories to obtain the experts' facts and opinions,[57] pre-deposition exchanges of proposed testimony and of access to underlying data may be more efficient and can even make depositions unnecessary.
- Exploring the possibility of joint expert reports on background or minor matters (rather than each side preparing expert reports on those issues).
- Establishing a procedure for discovery, including ground rules for time, place, and payment of costs and fees.[58]
- Exploring the possibility of video depositions, including cross examination, to avoid the need for expert witnesses to appear at trial.
- Exploring the need for confidentiality orders to protect information produced from further dissemination.[59] Confidentiality orders can expedite and simplify discovery of sensitive matters, but they can also raise issues concerning future release of data. Some courts have developed model

55. *Id.*

56. *See, e.g.*, Western District of Washington Local Rule 43(j).

57. Rule 26(b)(4)(D) prohibits interrogatories or depositions of experts employed only for trial preparation without a showing of exceptional circumstances in which it is impracticable for the party to obtain the information by other means.

58. *See* *MCL 4th*, *supra* note 22, § 11.48, for a discussion of discovery and disclosure of expert opinions.

59. *See id.* § 40.27 for a sample confidentiality order (Form A).

protective orders that contain standard definitions, steps for designating protected material, and steps for challenging confidentiality designations.[60] For additional information on confidentiality orders, *see* *Confidential Discovery: A Pocket Guide on Protective Orders*.

2. Court-appointed experts

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

If you are considering appointment of an expert, make sure you consult with counsel and determine before making an appointment exactly what purpose the expert is to serve, how the expert is to function, and the extent to which the expert will be subject to discovery. You also need to address the potential for what may be considered ex parte communications. Arrangements for compensation of the expert should be made in advance and should define clearly the potential liability of the parties. Because of the time involved in identifying and appointing an expert, try to determine early in the case whether you will appoint an expert.[61] Academic departments and professional organizations can be a source for such experts.

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

Consider including in the order:

- the authority under which it is issued;
- the name, address, and affiliation of the expert;
- the specific tasks assigned to the expert (e.g., to submit a report, to provide background material for the court, and/or to advise the court);

60. *See, e.g.,* Northern District of California (model protective orders for civil and patent cases); Western District of Washington (model stipulated protected order); Northern District of Illinois (Local Rules Form LR 26.2).

61. *See generally* *MCL 4th*, *supra* note 22, §§ 11.51–11.54; *see also* Joe S. Cecil & Thomas E. Willging, *Accepting* Daubert's *Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity,* 43 Emory L.J. 995 (1994) for guidance on appointment of court-appointed experts. Rule of Civil Procedure 53 provides guidance on appointment of special masters. *See infra* Chapter 8, Section F on appointment of special masters.

- the subject on which the expert is to express opinions;
- the amount or rate of compensation and the source of funds;
- the terms for conducting discovery of the expert;
- whether the parties may have informal access to the expert; and
- whether the expert may have informal communications with the court and whether those communications must be disclosed to the parties.

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

4

Managing Pretrial Motions

A. In general

Motion practice has increasingly become the driving force behind civil litigation. The bulk of the work for judges and chambers staff is dedicated to monitoring, reviewing, and preparing orders on motions, which can number in the hundreds each year. By necessity, a key part of case management for judges involves motion management.

Under Federal Rule of Civil Procedure 7(b), any request for a court order must be made by motion. Rule 7(b) also requires that the motion be in writing

(unless made during a hearing or trial), state with particularity the grounds for seeking the court order, and state the relief sought. For some types of motions, the Rules may also prescribe the deadline for filing the motion, the procedural requirements, and the standard for granting relief. *See, e.g.,* Fed. R. Civ. P. 56. In many districts, local rules provide additional procedural and technical requirements for motion practice.

Some judges also include more specific requirements for motions in their case management guidelines or initial scheduling orders. For example, a judge may provide information about whether a pre-motion letter or phone conference is required, how and when motions are set for hearing, page limits, how motions and supporting materials should be organized, and whether chambers copies are required. Judge-specific requirements can be a useful tool to address recurring issues that are not covered by local rules and to establish approaches that can make motion practice more efficient. Some judges also provide guidance on how parties should approach specific types of motions, such as motions to dismiss and motions for summary judgment. For examples of judge-specific motion requirements and guidance, *see* online appendix.

B. Managing motions as part of your civil docket

Because motions are filed on a rolling basis, you and your chambers staff must stay apprised of newly-filed and pending motions and have a system in place to screen, track, assign, and expeditiously rule on motions. There are several resources to help you prioritize and monitor the status of pending motions.

1. CJRA pending motions report

For many judges, the CJRA reporting requirements are a key consideration when prioritizing pending motions. Under the CJRA, on March 31 and September 30 each year, district and magistrate judges must report all motions that have been "pending" for more than six months to the Director of the Administrative Office (often referred to as the "six-month report").[62] A motion before a district judge

62. 28 U.S.C. § 476. *See also Guide to Judiciary Policy*, vol. 18, § 540. After the close of each reporting period, the Administrative Office generates a master CJRA report showing, by district judge and magistrate judge, all motions pending more than six months, all civil cases pending more than three years, all bench trials submitted more than six months, all bankruptcy appeals pending more than six months, and all social security appeals pending more than six months. The semiannual consolidated national report is published on the uscourts.gov website. The Administrative Office also prepares a supplemental report ("CJRA Table 8") that provides detailed information about each judge's individual pending motions, including the nature of suit, case name, title of the motion, and the CJRA report status code and status description. This supplemental report is also available on the uscourts.gov website.

or a magistrate judge in a consent case is considered "pending" 30 days after it was filed, or if the motion papers are not filed until the motion is fully briefed, then 30 days after the date the motion is first served.[63] A motion referred to a magistrate judge is considered "pending" 30 days after the filing date, or, if the motions papers are not filed until the motion is fully briefed, 30 days after the motion is first served, or the referral date, whichever is later.[64] If the motion has not been disposed of within six months after the pending date, the presiding judge must list the motion at the close of the next CJRA reporting period (i.e., March 31 or September 30). If the motion was referred to a magistrate judge, the magistrate judge must file a report and recommendation for the motion or dispose of the motion within six months after the pending date, or the motion will appear on *both* the district judge's *and* the magistrate judge's six-month reports.[65] For motions that are listed on the six-month report, the judge should include one of the "status codes" indicating the cause of the delay in terminating the motion where applicable (e.g., "settlement pending" or "opinion/decision in draft").[66]

Note that the "pending" date—not the date a motion is fully briefed or argued—starts the clock for CJRA reporting purposes.[67] You should therefore be cautious of granting lengthy extensions of the briefing schedule and should set any hearing on a motion far enough in advance of the close of the reporting period to allow time to issue your written decision. A list of motions that will appear on the upcoming six-month report, if not terminated, can be generated on the Case Management/Electronic Case Files (CM/ECF) system, which provides a useful starting point for prioritizing motions on your docket.[68] Because the six-month pending motions report along with other CJRA reports is made available to the public and is used to examine court congestion and performance, many districts and chief judges emphasize the importance of minimizing the number of pending motions reported.

63. *Guide to Judiciary Policy*, vol. 18, § 540.50(c)(2)(A).

64. *Id.* at § 540.50(c)(2)(B).

65. *Id.* at § 540.50(c)(2)(D).

66. A list of status codes is available on JNet.

67. For example, a motion filed on February 28 will become pending in 30 days (assuming it is not referred to a magistrate judge) and will be pending more than six months on September 28 of that year. If the judge does not rule on the motion before September 30 (the close of the April 1–September 30 reporting period), the judge must include the motion on the CJRA report for that period.

68. *See* Chapter 9, Section B for a description of how to generate in CM/ECF a list of cases and motions that will appear on the next CJRA report if not disposed of by the close of the reporting period.

2. CM/ECF motions reports

There are several features on CM/ECF that can assist with tracking newly-filed and fully-briefed motions.

The Motions Report in CM/ECF can generate a list of all pending civil motions. The report also can be customized to display only those motions that are fully briefed, or "ripe," for ruling and can be scheduled to run automatically at a set time (e.g., weekly).

For a summary of case activity, you can run a "Daily Activity Report" (DAR). The DAR lists new filings in each of your assigned cases during a selected time period. You can also configure the DAR settings so that it runs at a specific interval (e.g., daily, weekly) and is emailed to you at the close of that period. Judges use the DAR differently. For example, some judges review the DAR each morning to get a quick rundown of the previous day's filings. You may also ask your law clerks to run the DAR at the end of the day and highlight new docket entries that require attention.

Additionally, CM/ECF may be configured to email you or your staff a "Notice of Electronic Filing" (NEF) each time a docket entry has been added or a document has been filed in one of your cases. This will provide you with a real-time update on all case filings, but also may generate a substantial amount of email for you depending on the volume of your caseload and case activity.

The Motions Report, DAR, and NEFs are discussed in greater detail in Chapter 9. Step-by-step guides for configuring these functions are included in the online appendix.

3. Tracking motions in chambers

Some chambers have developed their own internal motion-tracking spreadsheets and reports. These materials can be customized to highlight briefing deadlines and hearing dates, and can include a section for the judge and law clerks to make notes or flag issues relating to the motion or case. *See* online appendix for examples.

C. Managing motions in a case

Your approach for managing motions likely will vary from case to case depending on the type and number of motions filed, as well as their complexity. There are, however, steps you can take to streamline the motions and decision process across all of your cases.

1. Initial management

As discussed in Chapters 1 and 2, the Rule 26(f) meet and confer conference and the initial Rule 16 pretrial conference can be effective tools to encourage the parties to think pragmatically about how they will litigate the case, including their motion strategy. To facilitate this process, many judges require the parties to list in their Rule 26(f) report any prior, pending, and anticipated motions and to also include a statement of issues to be decided in pending and anticipated motions. *See* online appendix for examples. While this initial list may change as the case develops, having each party identify motions it intends to file puts the other parties on notice and can help frame a discussion for the initial pretrial conference about which issues are in play and whether motion practice will be necessary.

At the initial pretrial conference, you may review the list of motions with the parties and try to determine whether the pending and anticipated motions can be narrowed or avoided by stipulation. This discussion may be especially useful if a defendant has filed or intends to file a motion to dismiss that would be mooted by an amended complaint or that may raise an issue more appropriate for summary judgment. Knowing the motions that are anticipated can also assist in setting deadlines for the case and assessing whether there is a potentially dispositive issue that should be raised by motion early.

As a way to prevent frivolous motions and to encourage the parties to narrow issues that may be raised in motions, some judges require that, before filing a motion, the movant must meet and confer with the opposing party or parties about the substance of the motion and any potential resolution.[69] In some districts, judges require a pre-motion letter from the movant setting forth the grounds for the anticipated motion and a brief response from opposing parties. After the letter is filed, the presiding judge either holds a conference (usually telephonic) with counsel, or issues a short order directing the parties as to how they should proceed (e.g., the movant shall file the motion by a certain date). In courts with a high volume of civil motions, holding pre-motion conferences may not be feasible. Nevertheless, you may want to consider using the pre-motion submission process in certain cases or as a prerequisite to filing a certain type of motion. For examples of this process, *see* online appendix.

2. Screening motions

For judges presiding over hundreds of civil cases, the number of motions filed on any given day can be substantial. To ensure that motions are triaged appropriately,

69. *See* C.D. Cal. Local Civ. R. 7-3.

it is helpful to have a process in place to screen newly-filed motions. The process may be formal or informal, and can be as simple as having your law clerks quickly review motions to assess their urgency and to flag issues that require your immediate attention. For instance, if your law clerks receive NEFs, they can forward a particular NEF (which contains a link to the motion in CM/ECF) along with their comments. You may also ask your clerks to run the DAR periodically throughout the day or at the end of the day and to highlight noteworthy motions that you may want to review early. You may establish guidelines or a checklist to help the clerks in this process.

Consider having your law clerks screen new motions for the following:

- Is the motion timely?
- Does the motion conform to the format requirements and page limits in the local rules and your case management guidelines?
- Does the motion conform to procedural prerequisites, such as meet and confer?
- Does the motion seek expedited or emergency relief?
- Does the motion need to be set for hearing or can it be decided without oral argument?
- Does the motion appear to be dilatory or filed in bad faith?
- Is the motion premature (e.g., is it more appropriate after discovery or does it raise arguments more appropriate for summary judgment)?
- Does the motion raise complicated or novel legal issues (i.e., is the motion going to require a significant amount of time and research)?
- Does the motion raise newsworthy or high-profile issues such that media coverage is likely?

3. Scheduling motions

Under Rule 16(b)(3)(A), you must include a time limit for filing motions in the scheduling order. In most cases, it is sufficient to set a dispositive motion deadline, usually at the close of discovery and far enough in advance of the trial date to allow you to decide the motion. In cases where deciding a threshold issue such as class certification or qualified immunity may result in early resolution, you may wish to set deadlines for motions for such an issue. Cases in which the parties intend to file cross-motions for summary judgment may also need to be

coordinated so that you can consider all arguments and evidence relating to an issue at the same time. In these instances, you should discuss the motions schedule with the parties during the initial pretrial conference to avoid later requests to amend the deadlines.

4. Oral argument

The practice and standard for holding oral argument on motions vary considerably among courts and even among judges of a court. In some districts, the parties may request oral argument when filing a motion or response, and the court decides whether and when to set the matter for hearing.[70] In other districts, parties must notice a motion for hearing on the judge's calendar when the motion or response is filed or by a specified deadline.[71] Under either approach, the judge retains the discretion to hold oral argument and to determine how any arguments should be structured.

Because motion hearings take up your and your staff's time, as well as increase costs for the parties, you should carefully consider whether holding a hearing will meaningfully assist you in making a decision.[72] Routine motions that are not case dispositive can generally be decided on the papers (e.g., motions to dismiss where leave to amend will be granted). Alternatively, if there is a specific question you would like addressed or clarified, you may order supplemental briefing from the parties on that issue. The supplemental briefing order should expressly warn the parties that briefs must be strictly limited to that issue and that any other argument will be deemed stricken.

There are circumstances when holding a hearing can greatly assist you in understanding the parties' arguments and in reaching a decision on the motion. If a motion raises novel or complicated legal issues, or if you are undecided after reviewing the briefs, it may be helpful to hold a hearing to ask counsel questions, pose hypotheticals, or explore nuances not addressed in the briefs. Oral argument can also help narrow the issues in dispute. If a motion will likely dispose of a case, it may be prudent to hold a hearing—even if short—to give the parties an opportunity for final arguments. A hearing also creates a record that may be helpful for appellate review. In cases involving a non-prisoner pro se litigant, a hearing may

70. *See, e.g.*, D. Ariz. Local Civ. R. 7.2(f); W.D. Wash. Local Civ. R. 7; D. Or. Local Civ. R. 7(d).

71. *See, e.g.*, N.D. Cal. Local Civ. R. 7-2; E.D. Va. Local Civ. R. 7(E).

72. If you decide not to hold oral argument, you should consider including language in your written order indicating that after reviewing the parties' written submissions, the court determined that oral argument would not materially aid in the decision-making process.

clarify and identify colorable issues and allow you to explain the consequences of any ruling to the pro se litigant.[73]

In evaluating whether to hold oral argument on a motion, *consider* whether oral argument will:

- help you understand the law or facts;
- help you narrow the issues;
- provide a party an opportunity to clarify a complicated issue;
- open opportunities for settlement discussions; or
- help you craft your ruling.

If there are specific questions you would like counsel to address at the hearing, you may issue a notice before the hearing listing those questions. Many judges also set a time limit for oral argument and state it either within the order setting the hearing or at the beginning of the hearing. Some judges issue a tentative ruling before the hearing and set a deadline for the parties to indicate whether they want to keep the hearing on calendar or withdraw their request for oral argument.

As the hearing date approaches, a party may request a continuance. Some districts have local rules that address the timing and procedure for continuing a hearing.[74] Before granting a continuance you should ensure that it will not adversely impact other important deadlines or dates, such as the discovery deadline or trial date. Further, for motions that will appear on the upcoming CJRA six-month motions report, you should ensure that continuing the hearing date will still allow you sufficient time to issue a ruling before the close of the reporting period (i.e., March 31 or September 30).

5. Motions in complex cases

Because complex cases, such as multidistrict litigation cases, can generate numerous motions by multiple parties, it may be helpful to schedule status conferences on a regular basis (e.g., every 60 days) to get updates from the parties and to address new issues. *See* online appendix for a sample case management order. You should direct lead counsel to file a joint status report before each conference that briefly summarizes the issues and the efforts to resolve them. This approach

73. For a thorough discussion of managing pro se cases, *see Pro Se Case Management for Nonprisoner Civil Litigation* (Fed. Judicial Ctr. 2016). Managing pro se cases is also discussed in Chapter 7, Section D.

74. *See, e.g.*, N.D. Cal. Local Civ. R. 7-7; E.D. Va. Local Civ. R. 7(G); D.D.C. Local Civ. R. 16.1.

allows you to address issues at regular intervals with all parties participating and may help forestall the filing of more motions. For a detailed discussion of managing motions in complex cases, *see* Chapter 7, Section B.1, and the *MCL 4th*.

6. Orders on motions

Once a motion is fully briefed or the briefing deadline has passed, you should aim to issue an order on the motion as soon as possible. The ripe motions report on CM/ECF and internal motions tracking systems described above can help you stay apprised of motions that are ready for a ruling. To expedite drafting of orders on routine motions (e.g., motions to amend, motions to dismiss, and motions for a more definite statement), some chambers have created templates that include the title of the order, headings, standard introductory language, and applicable legal standards. *See* online appendix for examples.[75]

Routine procedural motions, especially if uncontested, can be ruled upon by minute entry order (MEO) or by a text-only entry order using the gavel icon on CM/ECF.[76] For instructions on how to use these features, *see* Chapter 9, Section B.4 and online appendix. In some districts, local rules require the movant to file a proposed order along with a motion in a civil case. The proposed order should be submitted electronically in a file format that you can modify.

If you hold a hearing on the motion, at the end of the hearing, you may:

- Announce that you are taking the motion under submission and will issue a written order.
- Announce your ruling from the bench and state that a written order will follow. While not always practical, especially on substantive or case dispositive motions, announcing your ruling from the bench lets the parties know how the case will be proceeding and allows you to terminate the motion immediately and eliminate it from the pending motions list.[77]

75. Some courts have developed programs that allow chambers and court staff to auto-populate case information (such as case number, party names, and docket number being ruled on) from CM/ECF into a Microsoft Word document, obviating the need to manually enter that information. For example, the Northern District of California uses the Automated Document Tool (ADOT) utility program.

76. Text-only entry orders on CM/ECF should not be used in cases involving a pro se party unless the party has been granted permission to e-file on CM/ECF and will receive notification of the docket entry. In some districts, the courtroom deputy will mail a copy of a text-only order or a MEO to a pro se litigant.

77. *See The Elements of Case Management: A Pocket Guide for Judges* (Fed. Judicial Ctr. 3d ed. 2017) at 12 (noting that most disputes do not become easier to resolve once taken back to chambers and that litigants generally prefer a prompt decision to a perfect, albeit belated, one).

- Announce your ruling from the bench and instruct a party (usually the prevailing party) to submit a proposed order consistent with your ruling, which you may be able to modify, as necessary, and sign.

D. Strategies for particular types of motions

1. Motion for emergency injunctive relief

Motions for emergency injunctive relief require special attention because they demand prompt decisions on a limited record and have an immediate impact on the parties (*see* Federal Rule of Civil Procedure 65). The motion hearing presents opportunities to achieve a number of important objectives, including deciding whether a temporary restraining order should be issued; setting dates for associated motions, depositions, and requested actions; and examining and resolving matters relating to the issuance of surety bonds. Some judges include special instructions about emergency applications in their case management guidelines. *See* online appendix for examples.

Consider the following approaches:

- Insisting that a party seeking a restraining order notify the opposing counsel or party in advance, unless doing so would cause prejudice (*see* Fed. R. Civ. P. 65(b)).[78]
- Including instructions in your case management guidelines requiring counsel to inform your courtroom deputy by phone or by email of an application for a temporary restraining order or other emergency request and to state whether the opposing party has been notified.
- Issuing a prompt order setting a briefing schedule, deadlines to file proposed findings and conclusions and any other filings, and setting a hearing.
- Instead of issuing a conventional order to show cause, calling an early conference with counsel to identify issues (e.g., whether irreparable harm can be shown), address bond-posting requirements, schedule written submissions and a hearing date (*see* Fed. R. Civ. P. 65(b)(2) regarding time limits for show cause orders), and consider other procedural issues.
- Determining if live testimony is necessary at any injunction proceeding. Many matters can be adequately presented in writing, so long as the declarant can be deposed on his or her declaration in advance of the hearing.

78. *See Benchbook*, *supra* note 19, § 7.03.

- Requiring counsel to submit proposed findings of fact, conclusions of law, and a proposed order in an electronic format that can be edited by chambers (*see* Fed. R. Civ. P. 65(d)).
- Combining preliminary and permanent injunction proceedings when possible (*see* Fed. R. Civ. P. 65(a)(2)). Separate hearings and proceedings can result in duplication and wasted time, whereas an expedited trial can resolve all issues in a single proceeding.

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

2. Motion for default judgment

Although relatively infrequent, motions for default judgment are one of the first motions that may be filed in a case. Default judgment is meant to ensure that a party's unresponsiveness does not obstruct resolution of a case. However, because default judgment does not resolve the case on the merits, it is generally disfavored and left to the judge's discretion to determine whether it is appropriate in light of the facts and procedural history of the case.

Under Rule 55, the default process occurs in two steps. First, if a defendant fails to plead or otherwise timely defend the action, the plaintiff may request that the clerk of court enter the defendant's default. Second, once the clerk enters default, the plaintiff may apply for default judgment against the defendant. If the plaintiff's claims are for a sum certain (or one that can be made certain by computation), Rule 55(b) authorizes the clerk of court to enter default judgment for that amount (plus costs) without a hearing. In all other cases, the plaintiff must move for default judgment. Some districts have local rules setting procedural requirements that the movant must satisfy when seeking default judgment.[79] When a motion for default judgment is filed, your staff should review the motion to ensure that default has been entered and that the movant has complied with any requirements under your district's local rules. In cases where the defaulting

79. For instance, in the Central District of California, the movant must file a declaration addressing issues about the entry of default, whether the defaulting defendant has been given notice, and how damages were calculated. *See* C.D. Cal. Civ. R. 55-1.

defendant has appeared in the case, the movant-plaintiff must serve written notice of the application (or motion) at least seven days before the hearing.[80]

Some judges provide additional guidance to movants for default judgment by including requirements in their case management guidelines or issuing orders after the entry of default specifying issues movants must address. *See* online appendix for examples.[81]

In a multi-defendant case, you may want to defer ruling on a motion for default judgment against a single defendant when the defendants are sued under a theory of joint or several liability, when related legal questions are still outstanding with respect to other defendants who have appeared, or when default judgment against one of several similarly-situated defendants could lead to an incongruous result.

3. Motion to dismiss

Often the first motion you will encounter in a case is a defendant's motion to dismiss pursuant to Rule 12(b). While Rule 12(b) allows a party to assert seven defenses by motion, the most common grounds are lack of subject matter jurisdiction (*see* Fed. R. Civ. P. 12(b)(1)), lack of personal jurisdiction (*see* Fed. R. Civ. P. 12(b)(2)), or failure to state a claim upon which relief can be granted (*see* Fed. R. Civ. P. 12(b)(6)). Because a Rule 12(b) motion raises threshold issues about whether a claim or the case as a whole may proceed, your ruling will determine the course and scope of the case. When considering a motion to dismiss, pay particular attention to which party bears the burden of proof, whether you may consider materials outside of the pleadings, and in whose favor you must construe facts, as these factors vary depending on the grounds asserted. For example, except in limited circumstances, considering facts or materials outside the scope of a complaint on a Rule 12(b)(6) motion will convert the motion for dismissal into a motion for summary judgment, which requires giving a reasonable opportunity for the parties to present all the material pertinent to the motion. *See* Fed. R. Civ. P. 12(d). For this reason, a Rule 12(b)(6) motion that raises a fact-intensive defense, such as a statute of limitations, may be better suited for summary judgment after the parties have had an opportunity to conduct discovery and present their arguments on a fully-developed record.

80. Fed. R. Civ. P. 55(b)(2).

81. For a discussion of issues to consider when default judgment is sought against a pro se defendant, see *Pro Se Case Management for Nonprisoner Civil Litigation*, *supra* note 73, ch. III(C).

A motion to dismiss can unnecessarily delay a case and increase litigation costs if the alleged defect can easily be cured by amending the pleadings. For this reason, the parties should state in their Rule 26(f) report or case management statements whether they anticipate filing a motion to dismiss, if they have not done so already; the grounds on which the motion will be based; and whether such grounds are curable. You can then discuss the anticipated motion with the parties at the initial pretrial conference and inquire as to whether amending the complaint will resolve the issues and obviate the need for a motion.[82] To avoid unnecessary briefing, some judges have adopted special procedures for motions to dismiss. For example, upon the filing of a motion to dismiss, the judge may issue an order requiring the non-moving party to notify the court by a certain deadline if it intends to file an amended pleading or if it will instead defend the pleading at issue. *See* online appendix for examples.

A final caution: Because Rule 12(b) motions come early in the case, before the answer is filed and often before the initial pretrial conference, they may not be as easy to manage as later motions for which time frames have been established by the scheduling order. For this reason, if a motion to dismiss is filed early in the case, some judges wait to schedule the Rule 16 conference until after the motion has been ruled upon. Of course, prompt resolution of Rule 12(b) motions will help keep the litigation on track.

4. Motion for remand

A motion for remand is appropriate when a case removed from state court to federal court: (1) fails to invoke federal jurisdiction, *see, e.g.,* 28 U.S.C. §§ 1331 (federal-question jurisdiction), 1332 (diversity jurisdiction), 1441(c)(1) (1-year time limit for removal based on diversity jurisdiction); (2) is subject to abstention under the inherent powers doctrine with regard to claims of equitable relief, discretionary relief, or other prudential actions; (3) is barred by statute; or (4) fails to comply with procedural requirements. The more common remand actions, for lack of federal jurisdiction or procedural defects, fall under 28 U.S.C. § 1447(c). You or the parties may raise subject matter jurisdiction or you may entertain motions for remand on this basis at any time. However, motions based upon procedural defects related to the removal action itself (e.g., timeliness issues, failure to join all necessary defendants, or defects in the notice of removal) must be made within thirty days after the filing of the notice of removal, *see* 28 U.S.C. § 1447(c).

82. *See Benchbook*, *supra* note 19, § 6.01 (discussing tips for handling motions to dismiss).

The two most common motions for remand are motions alleging lack of federal question jurisdiction (asserting the absence of a substantial federal issue arising under the Constitution or federal law) and motions alleging the absence of diversity of citizenship between the parties accompanied by a monetary claim in excess of $75,000.00. These elements must appear on the face of the "well-pleaded complaint" to withstand a motion to remand. Disputes often center on diversity of the parties (including claims of the improper joinder of parties to create or destroy diversity), or whether the amount in controversy is in fact satisfied. Remember that the citizenship of each member of an unincorporated association or partnership must be considered when analyzing whether diversity exists. Some courts require non-governmental organizational parties, such as limited liability companies and partnerships, to file a disclosure of organizational interests certificate, identifying each member of the organization and the member's state of citizenship. *See* online appendix for an example. In support of a motion to remand, a plaintiff may submit an affidavit or binding stipulation stating that, following remand to state court, it will not seek more than $75,000. You may consider such post-removal materials, provided they clarify—rather than amend—the allegations in the complaint.

In addressing motions for remand, *consider that*:

- these issues generally require little or no discovery effort;
- procedural defects are waivable or curable at the discretion of the court;
- if other non-merits matters, such as personal jurisdiction and forum non conveniens, are more straight-forward than the subject matter jurisdiction issues raised in the motion to remand, the court has the discretion to consider those issues first;
- when all the federal claims fall out of an otherwise properly removed case, the court has discretion to retain, remand, or dismiss pendent state law claims over which the court has supplemental jurisdiction only (*see* 28 U.S.C. § 1367(c)).

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

5. Motion raising qualified immunity

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

It is also important to note that the denial of a defense of qualified immunity is subject to an immediate interlocutory appeal. In this situation, only the qualified immunity issue will go to the court of appeals, leaving the remaining issues in the case on your docket. It may be appropriate in some cases to stay proceedings pending the appeal on qualified immunity.

6. Motion for summary judgment

Motions for summary judgment are typically the most time-intensive motion for judges and law clerks to review and the most expensive for the parties to litigate. When properly timed and briefed, however, motions for summary judgment are effective for disposing of claims and defenses that should not proceed to trial, or to resolve the case altogether.[83] At the same time, parties often move for summary judgment on claims and defenses that cannot be resolved on the papers (and therefore must be tried) or before adequate discovery on the issues. To ensure that the timing and subject of a summary judgment motion are appropriate, some judges require the parties to file pre-motion letters and/or participate in a conference with the judge before moving for summary judgment. *See supra* Section C.1. If the movant seeks summary judgment on a claim or defense that clearly involves triable issues of fact (e.g., when a claim turns on competing witness testimony that requires a credibility determination), you may encourage the movant to consider going straight to trial to avoid the unnecessary expense of filing a motion that will be denied.[84] Cases involving a pro se party may also require your intervention once a motion for summary judgment is filed. Several

83. *See* *MCL 4th*, supra note 22, § 11.34 (discussing procedures for effective use of summary judgment).

84. *See* Hon. Jack Zouhary, *Ten Commandments for Effective Case Management*, The Federal Lawyer (Mar. 2013).

circuits require the court to notify pro se litigants of the procedures for opposing summary judgment and the consequences of failing to respond.[85]

Because summary judgment motions can raise complicated issues and involve voluminous documents, judges often develop specific procedural and formatting requirements for the briefs and exhibits to ensure they are well organized and presented in a way that expedites review. As a starting point, you may limit parties to one summary judgment motion per side, so that a party must raise all issues at one time rather than in separate motions. To help parties focus on the material facts in dispute, some judges require the parties to submit either joint or separate statements of facts.[86] In some courts, the parties must file an appendix that compiles the materials the party has cited in support of its argument (e.g., pages, paragraphs, or parts of the pleadings, depositions, answers to interrogatories, admissions, exhibits, and affidavits). Only those portions of materials necessary for the judge to rule on the motion should be included. The appendix should also include a table of contents and each document should be tabbed for easy access. You may also require that the chambers copy of the appendix be the CM/ECF-filed copy, so that it has the CM/ECF stamp on top, which includes the case number, docket number, date, and CM/ECF page number and makes for easier citation.

Cross motions for summary judgment may require coordination to avoid duplicating work and the risk of inconsistent rulings. One approach you may take is to require a cross-motion to be made as part of the response to the initial summary judgment motion. Another approach is to set a briefing schedule whereby the parties file four briefs sequentially, rather than three pairs of simultaneous briefs. Under this approach, the opening brief is filed by the plaintiff(s), the opening/opposition brief is filed by the defendant(s), the opposition/reply is filed by the plaintiff(s), and the reply is filed by the defendant(s). In either case, the judge may consider a reasonable increase in page limits to allow the parties to fully present their arguments.

85. For a discussion of this requirement and sample language, *see* *Pro Se Case Management for Nonprisoner Civil Litigation*, *supra* note 73, at 62–67, 111–114.

86. For example, a judge may require the movant to submit a statement, broken down into numbered paragraphs, of the material facts as to which the movant contends there is no genuine issue to be tried. The statement should include only those facts necessary for the judge to decide the motion (other background facts can be included in the memorandum of law), and must include citations to the record supporting each factual assertion (e.g., to an affidavit, deposition, discovery response, etc.). When filing a response brief, the opposing party must file a controverting statement of facts that responds to each of the movant's numbered paragraphs by indicating whether the party disputes the factual assertion and citing to a specific portion of the record in support of the existence of a genuine dispute, and including any additional facts that create a triable issue of fact or otherwise preclude judgment for the movant. For examples of this approach, *see* online appendix.

7. Motion affecting the case schedule

When you grant a motion that removes a case from its schedule—for example, a motion to stay or a motion to compel arbitration—you run the risk that the case will sit on your docket because of inactivity. In orders granting such motions, you should consider adding a statement requiring counsel to update you on the status of the case at a set interval (e.g., every 90 days) by filing a status statement or joint letter. You also may want to consider entering an order administratively closing the case without prejudice and allow for reopening of the case on motion upon a triggering event (e.g., resolution of arbitration or the proceeding that prompted the stay).

8. Motion for sanctions

At the Rule 16 conference, you should convey your expectation that counsel will cooperate, adhere to their duty under Rule 1 to employ the Federal Rules to expeditiously and efficiently resolve their action, and abide by your orders in the case. In some cases, however, repeated violations of the rules or your orders, or bad faith conduct by counsel or a party, will warrant some form of sanctions (e.g., striking a filing, award of costs or attorneys' fees, or dismissal). Keep in mind that sanctions are not a basis for effective case management or a substitute for it. On the contrary, the need for sanctions often arises when case management has received insufficient attention, has been ineffective, or has broken down. It is equally true, however, that good case management cannot anticipate or control all problematic conduct of attorneys or parties. Sanctions may therefore be necessary, but you should maintain close control over the process to prevent collateral litigation.

It may be necessary, throughout your career, as well as in each case, to act firmly in the area of rule administration, in order to set a clear expectation that counsel and parties will comply with all applicable rules. In complex or multiparty cases (especially those involving out-of-state counsel), this is a small price to pay, early on, to establish and maintain order. Once developed, a reputation for fairness, responsiveness, and certainty in rule administration and motions management can be among your most lasting professional assets.

Consider the following approaches:

- Setting the guidelines for acceptable conduct at your earliest opportunity—for example, in your case management guidelines or at the Rule 16 conference.

- Reminding counsel of their obligations with respect to preserving and producing electronically stored information—a common source of sanctions or spoliation motions.
- Making a clear record of notice. For example, consider warning the parties in orders compelling conduct that the failure to comply can result in the imposition of specified sanctions.
- Dealing swiftly and firmly with the transgressors, even if imposition of sanctions is to be delayed until the end of the case (i.e., do not avoid or postpone challenges).
- Avoiding empty threats of sanctions.
- Avoiding being used by one side in tactical contests about technical violations.

When, despite your careful shaping of motions practice before your court, legitimate disputes and sanctionable conduct arise, consider the relevant threshold and give the parties an opportunity to show cause or to have a fair hearing. Remember that different statutes and rules authorize different sanctions for different kinds of conduct under different legal standards; they are not interchangeable. The source of authority for imposing sanctions should generally correspond to the offending conduct, and you should make a record that clearly identifies the authority you relied on and the factual basis for your action. During the pretrial stage of litigation, your authority to impose sanctions against a party or counsel includes:

- Rule 11: pleadings unreasonably lacking support in rule, law, evidence, precedent, fact, or theory; or filed with frivolous or improper purposes.[87]
- Rule 16(f): noncompliance with a pretrial order.
- Rules 26 and 37: violations, abuses, or impropriety in relation to discovery orders or processes.
- Rule 41(b): dismissal for failure to prosecute an action or comply with a rule or court order.
- 28 U.S.C. § 1927: vexatious or unreasonable multiplying of proceedings in any case.
- the doctrine of inherent judicial powers: contempt citations for any kind of sanctionable conduct.

87. Remember that Rule 11 includes a safe harbor provision. *See* Fed. R. Civ. P. 11(c)(2).

Sanctions can serve several purposes: to protect a party, to remedy prejudice caused, to deter future misconduct, to punish the offender, and to protect the efficiency and integrity of the court's process. You should select the least severe sanction adequate to accomplish the intended purpose.

Consider the specific conduct to be sanctioned, asking:

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

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

Consider:

- letting counsel know you are considering sanctions and the legal basis for sanctions; and
- giving counsel an opportunity to show cause why any or all of the possible sanctions are unwarranted.

In short, give attorneys an opportunity to be heard. The process itself will insulate you from the danger of a precipitous response; provide time for the transgressors to reflect; and ultimately force them to help shape the remedy you adopt, ensuring a more memorable, larger sense of justice for all concerned.[88]

88. For further discussion, *see* *MCL 4th*, *supra* note 22, § 10.15.

Consider the following conduct-specific sanctions:

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

The discretion vested in the judge, as well as the many specific remedies enumerated in the rules of procedure, provide the wide latitude you need to get your point across. But do remember your purpose—to secure just, speedy, and inexpensive dispositions; to stop rules transgressions; and to deter future violators. Moreover, you should be aware that sanctions can have collateral effects, including the creation of a permanent shadow on a sanctioned attorney's record with state regulatory and bar authorities.

9. *Daubert* Motion

When expert evidence is anticipated at trial, a party may file a motion to exclude testimony that is not scientifically valid or that is offered by an unqualified expert. A *Daubert* hearing should address issues and potential problems related to the admissibility of such evidence, particularly under Rules of Evidence 104(a) and 702. (*See also infra* Chapter 7, Section C for a discussion of managing expert evidence generally and Chapter 6, Section C.3.b, for a discussion of expert evidence in the context of the final pretrial conference.)[89]

You should distinguish rulings on admissibility of evidence from motions for summary judgment under Rule 56. Ordinarily, an evidentiary ruling should not be regarded as the vehicle for adjudicating a claim or defense, unless it is clear that the proponent of the expert testimony absolutely needs the evidence to prevail. However, an early *Daubert* hearing can be helpful for distinguishing admissibility issues from dispositive issues and may in some cases lead to a summary judgment motion.

89. *See also* the *Reference Manual on Scientific Evidence*, *supra* note 54, which provides tutorials on specific types of scientific evidence and has extended discussions of the use of *Daubert* hearings.

Also *consider:*

- having counsel identify specific portions of the opposing experts' reports and testimony with which they disagree and portions that are undisputed;
- directing the parties, when the expense is warranted, to have the experts submit a joint statement specifying the matters on which they disagree and the basis for the disagreement;
- directing the parties, when the expense is warranted, to have their experts present at the final pretrial conference to facilitate identification of the issues remaining in dispute;
- clearing in advance all exhibits and demonstrations to be offered by the experts at trial and giving opposing parties an opportunity to review exhibits and raise objections;
- encouraging joint use of courtroom electronics, models, charts, and other displays;
- encouraging stipulations on relevant background facts and other uncontroverted issues; and
- having the experts and lawyers prepare a glossary of technical terms to be used at trial with definitions in understandable language.

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

5

Alternative Dispute Resolution and Judicial Settlement

A. Overview

Alternative dispute resolution (ADR) refers collectively to procedures for resolving disputes that include mediation, arbitration, early neutral evaluation (ENE), summary jury trial, and judge-hosted settlement conferences. Some ADR procedures, such as mediation and ENE can be less formal, less adversarial, and

less expensive than standard litigation.[90] ADR procedures can be effective tools for resolving cases without the expense, delay, and uncertainty often associated with motion practice and trial. The following sections discuss various ADR procedures typically available to courts as well as techniques and approaches for judge-hosted settlement conferences.

B. Authority to use ADR

Under the Alternative Dispute Resolution Act of 1998 (the ADR Act), all district courts must provide at least one form of ADR to litigants in civil cases and must, by local rule, require that litigants in all civil cases consider using an ADR process at an appropriate stage in the litigation.[91] Further, the ADR Act authorizes courts to require litigants to use mediation, ENE, and—if all parties consent—arbitration.[92] The Judicial Conference has also endorsed use of ADR in civil cases.[93] For a more in-depth discussion of the history of ADR in federal courts, *see* the ADR in the Federal District Courts: An Initial Report.[94]

A district's ADR procedures may be governed by local rules, an ADR plan, or ADR-related general orders. Typically, a district's authorizing documents will identify the types of cases that are eligible for ADR; indicate whether participation in ADR is mandatory or voluntary; establish procedures by which cases are referred to ADR, including whether the judge has authority to order a case to ADR; establish certain guidelines for the ADR process, such as confidentiality and conflicts of interest; and set deadlines for parties to select and complete an ADR process.

C. Types of ADR

1. Mediation[95]

Mediation is a process designed to help parties clarify their understanding of underlying interests and concerns, probe strengths and weaknesses of legal positions, explore the consequences of not settling, narrow the issues, and generate

90. *Guide to Judiciary Policy*, vol. 4, § 510.50.
91. 28 U.S.C. §§ 651–658.
92. *Id.* at § 652(a).
93. *See JCUS CJRA Report*, *supra* note 1, at 37–38.
94. Donna Stienstra, ADR in the Federal District Courts: An Initial Report (Fed. Judicial Ctr. 2011).
95. *See also Guide to Judiciary Policy*, vol. 4, § 530.10.10.

settlement options. A trained neutral mediator assists the parties in resolving their dispute consensually through a negotiated settlement. The mediator, who may meet jointly or separately with the parties, serves solely as a facilitator and does not issue a decision or make any findings of fact. The process is non-binding unless settlement is reached.

Mediation sessions are confidential. The judge presiding over the case is provided no substantive information about the mediation sessions and is notified only whether the case has settled. Mediation is considered appropriate for most kinds of civil cases, and in some district courts referral to mediation is routine in nearly all civil cases.

In many district courts that authorize mediation, the court has established a panel of trained mediators to provide services for the court. The mediators selected for these panels are usually attorneys, although a few districts also include non-attorney professionals on their panels. In some districts, the judges—typically the magistrate judges—also serve as mediators. Approximately ten district courts have full-time ADR directors for their ADR programs and some of these directors also mediate cases.

All district courts are authorized to use mediation,[96] and it is the most frequently used form of ADR in the district courts. Over three-quarters of the ninety-four U.S. district courts exercise this authorization to permit mediation in civil cases.

2. Early neutral evaluation (ENE)[97]

ENE is a nonbinding ADR process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely outcome of the case in court. As originally designed by the Northern District of California, the ENE session is generally held before much discovery has taken place. Some courts have adapted the process for use later in a case and have dropped the word "early" while retaining the goal of providing a neutral evaluation of the case.

In ENE, a neutral evaluator, usually a private attorney with expertise in the subject matter of the dispute, holds a confidential joint session with the parties and counsel early in the litigation to hear both sides of the case. The evaluator then helps the parties clarify arguments and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a nonbinding assessment of

96. 28 U.S.C. § 652(a).

97. *See* *Guide to Judiciary Policy*, vol. 4 § 530.30.

the merits of the case. Depending on the goals of the program, the evaluator may also offer case planning assistance or meet in private sessions with each party to facilitate settlement discussions. Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes.[98]

All district courts are authorized to use ENE,[99] and it is the second-most used form of ADR in the district courts. About a third of U.S. district courts authorize referral of cases to ENE. Some of these courts have established panels of evaluators to serve as neutrals in cases referred to ENE. Judges typically do not serve as early neutral evaluators in court ADR programs with that name, although when mediating a case using a more evaluative approach, a judge may look very much like a neutral evaluator.

3. Court-annexed arbitration[100]

In arbitration, one or more arbitrators listen to presentations by each party to the litigation, and then issue a nonbinding judgment on the merits. The arbitration services are always provided by a neutral other than the court's judges. Witnesses may or may not be called, and exhibits are generally submitted. The arbitrator's decision addresses the disputed facts and legal issues in the case and applies applicable legal standards. After the hearing, the arbitrator issues a decision on the merits of the case, which, along with proof of service of such decision on the other party by the prevailing party or by the plaintiff, is filed with the clerk of the court. If a timely request for a trial de novo is not made, the award is entered as the judgment of the court.[101] The judgment has the same effect as a judgment of the court in a civil action, except that it cannot be appealed.[102] The outcome of the hearing is not to be disclosed to the assigned judge until the final judgment has been entered or the case has otherwise terminated.[103] Within 30 days after the award has been filed, any party to the case may file a written demand for a trial de novo.[104] When such a demand is made, the action is restored to the court's docket and treated as if it had not been referred to arbitration.[105]

98. For more information about the ENE process, *see* the Northern District of California's ADR Handbook, available at: http://www.cand.uscourts.gov/adrhandbook.

99. 28 U.S.C. § 652(a).

100. *See Guide to Judiciary Policy*, vol. 4 § 530.20.

101. 28 U.S.C. § 657(a).

102. *Id.*

103. *Id.* at § 657(b).

104. *Id* at § 657(c)(1).

105. *Id.* at § 657(c)(2).

As an adversarial, rights-based process, arbitration may be particularly helpful when a decision on the merits is important but the dollar value of the case makes trial uneconomical. Arbitration is believed to be particularly well suited to contract and tort cases involving modest amounts of money for which litigation costs are often disproportionate to the amount at stake.

All district courts are authorized to refer cases to arbitration[106] but only about a quarter of them have authorized its use. The ADR Act expressly requires consent of the parties for a referral to arbitration, excepting ten courts that were authorized in 1988 to compel arbitration in certain kinds of cases.[107] Of those ten courts, only three continue to require use of arbitration for cases that meet the statutory requirements. To provide arbitrators in cases referred to the process, a number of districts have established panels of trained arbitrators. Others refer parties to other arbitration providers.

4. Summary jury trial, summary bench trial, and mini-trial[108]

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

Some recommend this resource-intensive process only for protracted cases, others for routine civil litigation in which litigants differ significantly about the likely jury outcome. Although the format of the summary jury trial is determined by the presiding judge more than in most ADR procedures, summary jury trials are thought to be most useful after discovery is complete. Opinions are divided on the propriety of using jurors without telling them their decision is only advisory, although telling them could alter the way in which they hear evidence and reach a verdict.

A variant of the summary jury trial is the summary bench trial, in which the presiding district or magistrate judge issues an advisory opinion.

106. 28 U.S.C. § 654(a).

107. *Id.* at § 654. For more information on limits on these arbitrators' fees, *see* *Guide to Judiciary Policy*, vol. 4 § 530.20.70.

108. *See also* *Guide to Judiciary Policy*, vol. 4 §§ 530.50, 530.60.

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

A little more than a quarter of district courts authorize summary jury trials. Most courts simply authorize use of the process; few set out procedures for using it. Historically, courts have rarely used these ADR procedures.

5. Settlement week[109]

In a typical settlement week, a court suspends normal trial activity and, aided by volunteer mediators, sends numerous trial-ready cases to mediation sessions held at the courthouse. The mediation sessions may last several hours or days, with additional sessions scheduled as needed. Cases unresolved during settlement week return to the court's regular docket for further pretrial or trial proceedings, as appropriate. If settlement weeks are held infrequently and are a court's only form of ADR, parties who want to use ADR may need to look outside the court or to the court's judges for assistance while awaiting referral to the next settlement week. Few district courts authorize use of the settlement week process, although some districts have used the process on occasion.

D. ADR Procedures

1. Referring cases to ADR

District courts have generally authorized three methods for referring cases to ADR.[110] In some districts, participation in ADR is mandatory and all civil cases, unless otherwise excepted, are automatically referred to ADR at filing or at some point thereafter.[111] In other districts, a case may be referred to ADR only if all

109. *Id.* § 530.70.

110. *Id*. at 9–10.

111. Most federal district courts do not refer to ADR cases that are typically decided on the papers, such as Social Security appeals and government collection cases, nor do they generally refer pro se cases, though a number of courts have developed procedures and specially-trained mediators for pro se cases.

parties consent. Under the third and predominant method, the district court gives the presiding judge discretion to refer a case to ADR. In many of these districts, the presiding judge is authorized to order a case to ADR even if a party does not consent. Accordingly, in most districts, judges play a critical role in the ADR process, either by directly referring cases to ADR or encouraging the parties to consider participating in an ADR process.

Whether you refer a case to ADR will depend on a number of factors, including the nature and complexity of the case, the potential litigation costs, and the willingness of counsel and the litigants to participate in ADR. As a starting point, as discussed in Chapters 1 and 2, the parties should include a statement in their Rule 26(f) report or case management statement addressing issues such as their compliance with your district's ADR requirements, their ADR efforts to date, and any discovery or resolution of motions they believe are necessary for them to meaningfully participate in settlement negotiations. *See* online appendix. At the initial Rule 16 conference, you should discuss ADR options with counsel, which can help you better assess whether the case would benefit from ADR (through settlement or by narrowing the issues) and determine which procedure would be most effective.[112]

When deciding whether to refer a case to ADR, you should also consider what you want to accomplish through the referral. For an in-depth discussion of strategies for selecting an appropriate ADR process, consult the *Guide to Judicial Management of Cases in ADR*.[113] Your referral decision will depend not only on the unique characteristics of the case but also on the types of ADR that are available to you. As discussed in *supra* Section B, each of the principal types of ADR presently used in the federal courts (mediation, ENE, and arbitration) serves a different purpose. One or more types of ADR may be suitable in a particular case or even at different stages within the same case.

The timing of the ADR referral is variable and generally left to the judge. For a process like arbitration, where the neutral makes a decision on the merits of the case, referral is likely to be most appropriate later in the case after most of the evidence has been developed. On the other hand, ENE is, by definition, a process that should occur early in a case. For mediation, conventional wisdom has held that the process is most productive after considerable discovery has been completed. Some courts have found, however, that some parties can benefit from earlier mediation. For example, mediation may be more likely to result in settlement if it occurs before summary judgment motions are filed and parties

112. *See* Fed. R. Civ. P. 16(c)(2)(I); *see also The Elements of Case Management*, *supra* note 77, at 8–9.

113. Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* §§ III, IV (Fed. Judicial Ctr. 2001) [hereinafter *ADR Guide*].

have "dug in" to their positions, suggesting that an earlier referral may be more productive in some cases. Some judges order parties to conduct discovery in stages so that only the discovery needed for the anticipated ADR process is obtained during the first stage, with additional discovery undertaken only if the ADR process is not successful.

You should refer a case to ADR at the earliest possible point that productive negotiations can occur in order to help parties avoid higher litigation costs and "digging in." Keep in mind, however, that while many cases can benefit from ADR, it may not be appropriate in cases that can be disposed of earlier and more efficiently by motion. For example, if there is a potentially dispositive legal issue, such as lack of jurisdiction resolvable by a motion to dismiss, ADR may not be the best use of time and resources, at least until the issue has been resolved.

2. Selecting and compensating an ADR neutral

You may have several options for ADR services.[114] Your court may, for example, maintain an outside panel of neutrals who are trained in specific ADR procedures.[115] Your court may also use its district or magistrate judges as settlement judges. A small number of district courts have a trained mediator on staff. Another option is to refer cases to outside ADR providers who are not on a court panel.

Before deciding whether an outside neutral, instead of an internal settlement judge, is the best choice, you should first confirm whether your local rules give you discretion in how the neutral is selected. If they do, you should *consider* the following factors:

- *Cost*. Some districts promote cost savings to litigants by agreeing to use district or magistrate judges to lead mediation efforts. This approach often targets cases in which relatively low damages are at stake. Other districts rely on outside neutrals, to make sure in-court personnel remain available for their other duties.
- *Objectivity*. If you are concerned about potentially losing your objectivity—or that there might even be an appearance that you have lost your objectivity—referring the case to an individual not connected with the court can help maintain your objectivity.

114. *See* ADR in the Federal District Courts: An Initial Report, *supra* note 94, at 9–11.

115. Some courts have established such panels, which are usually made up of attorneys from the local bar who have met the qualifications requirements set by the court. Some courts also include neutrals with training in other professions, such as finance or engineering. The ADR Act requires that a court make neutrals available and ensure that they are qualified in the type of ADR procedures offered by the court. 28 U.S.C. § 653.

- *Expertise*. Outside neutrals may be able to provide subject matter expertise not available within your court. Outside neutrals also are more likely to be trained in the specific ADR techniques that you or the parties wish to use for the case.[116]
- *Availability*. In courts with crowded dockets, outside neutrals may be able to give more individual attention to a case, or get to it sooner, than would court personnel.
- *Time*. Some ADR procedures, mediation in particular, can take several hours for a straightforward case, one or more days for a more difficult case, and many days for large or complex cases. Outside neutrals may have more time to give unless ADR is a routine part of the responsibilities of in-court personnel.

The method of selecting a neutral differs among the districts. As noted above, some districts maintain a panel of court-approved neutrals, generally possessing a minimum of formal training and experience, as required by the court's local rules. Panel members may state their preferences as to the subject matter of the cases referred to them (employment law, intellectual property, securities, etc.). Some judges prefer, after considering the pertinent characteristics of the case and the participants, to select a neutral from the panel and to issue an order appointing the neutral and fixing a schedule for the ADR process (subject to the parties' objections based on a latent conflict, scheduling problems, special subject matter expertise, or other sound reason). Some judges prefer initially to solicit the parties' choice of a qualified and capable neutral from the panel (although some judges reserve the right, in the event that the parties' neutral is unsuccessful, to require a later mediation before a neutral selected by the judge) and permit the parties to fix a schedule. In any event, you can have considerable influence on selection of the neutral and thus on neutrals' access to cases referred by the court. Distributing the court's cases across many neutrals, rather than assigning them to those most well-known, can preclude appearances of favoritism in the appointment of neutrals. For one view of the issues accompanying appointment of the neutral, *see* the *ADR Guide*.[117]

When an outside neutral is used for dispute resolution, the neutral and the parties will have a keen interest in whether the neutral will receive a fee for his or her services.[118] The ADR Act leaves to the district courts the decision whether to compensate neutrals, but requires the courts to establish the amount of

116. *See, e.g.*, *ADR Guide*, *supra* note 113, § VI.

117. *Id.* § VI.

118. *See* ADR in the Federal District Courts: An Initial Report, *supra* note 94, at 11–14.

compensation, if any, in conformity with Judicial Conference regulation.[119] The Judicial Conference policy requires all district courts to establish a local rule or policy on compensation, whether neutrals serve pro bono or for a fee.[120] You should, therefore, look to your local rules for guidance.

Parties will also have an interest in the qualifications of, as well as the standards of conduct expected of, outside ADR neutrals. For useful information about designing a sound court ADR program and establishing standards for outside neutrals, *see* the guidelines approved by the Court Administration and Case Management Committee of the Judicial Conference.[121]

3. Issuing a referral order

In districts with mandatory ADR programs, the clerk's office may automatically generate an ADR referral order after the case is filed, or the judges may include language in their initial scheduling order referring the case to ADR. *See* online appendix. In other districts, the judge must issue an ADR referral order or include the ADR referral in their case management order for the cases they have selected for ADR referral.

If you need to prepare your own referral order, *consider* including the following items, or where appropriate, citing to the local rule or other ADR authorizing documents where these items are set forth:

- identification of the type of ADR to be used;
- identification of the neutral or a description of the process the parties should use to select a neutral;
- a statement on whether the neutral serves pro bono or for a fee and guidelines for compensation of the neutral;
- instructions on whether the parties must submit materials, such as a statement of positions and settlement status, to the neutral and whether those statements are to be confidential or to be shared with the other party;
- guidelines on who must attend the ADR session and whether someone with settlement authority must be present on behalf of each interested party;

119. 28 U.S.C. § 658(a).

120. *See Guide to Judiciary Policy*, vol. 4 § 520.40.

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

- a statement that good faith participation is required;
- guidelines on whether participation must be in-person or may be by virtual technology;
- deadlines that must be met for initiating and completing the ADR process, as well as instructions on whether other case events, such as discovery, must go forward as scheduled or are stayed;
- instructions regarding confidentiality of the proceedings and communications between the judge and the neutral;
- instructions about how to end the ADR process—e.g., where to submit a status report, if any, and what papers to submit if the case settles;
- instructions about whom to contact if problems arise during the ADR process; and
- a statement about whether and under what circumstances sanctions might be imposed.[122]

For an example order referring cases to ADR, *see* online appendix.

It is particularly important that all persons involved in an ADR process, including the referring judge, have a clear understanding of two matters: (1) any ADR deadlines and how the ADR process will fit into the regular litigation schedule as set out in the case management order; and (2) the limits of any confidentiality provisions, including who may speak with the judge and on what matters. The first is, for the most part, a matter of clarity about deadlines and whether other pretrial events will go forward during the ADR process. The second is a very important matter for the parties, the neutral, and the judge. Your local rules, in compliance with the ADR Act, should provide for confidentiality in ADR proceedings.[123] For a sample form setting out a confidentiality agreement between parties, *see* online appendix.

4. Managing cases referred to ADR

After you have referred a case to ADR, you may need to make decisions about a number of issues, such as whether discovery will be stayed or go forward; what your role should be in monitoring the ADR process; whether you will engage in ex parte communications with the neutral; and how the ADR process should be

122. For a more extended discussion of the referral order and how it can help forestall problems in cases referred to ADR, *see* *ADR Guide*, *supra* note 113, § X.

123. 28 U.S.C. § 652(d).

concluded. You may also have to resolve issues, such as a party who refuses to attend or to participate in good faith in the ADR session; a neutral who has failed to disclose a conflict of interest; a request for public access to ADR sessions; or a motion to admit at trial information disclosed during ADR. These kinds of problems arise infrequently in cases referred to ADR, but when they do, they can be difficult and time-consuming. For a comprehensive discussion of techniques used to prevent and handle such problems, *see* the *ADR Guide*.[124] You should also consult your local rules, which may, pursuant to the ADR Act, have well-established procedures for handling some of these issues.

E. Judicial settlement

Judge-hosted settlement negotiations can be an effective and cost-efficient method for litigants to resolve their cases.[125] Settlement potential may be explored early in the case by having the parties indicate in their Rule 26(f) report or Rule 16 case management conference statement whether there have been any prior settlement negotiations and whether they are amenable to a settlement conference with a judge. You can follow-up on the parties' responses at the Rule 16 conference. *See* Fed. R. Civ. P. 16(c)(2)(I).

Nearly all judges host settlement conferences at least occasionally, and some judges (especially magistrate judges) do so frequently, if not routinely. In some districts, a settlement judge is assigned at the same time the presiding judge is assigned to a case. In other districts, the case is assigned to a judge for settlement purposes upon the request of the presiding judge. In many districts, magistrate judges serve as the court's primary settlement neutrals. Magistrate judges are highly effective as settlement judges because they can offer the litigants a perspective of how the presiding judge might view a party's argument or position. Having magistrate judges serve as neutrals also helps avoid the cost of compensating a private neutral, and magistrate judges can often accommodate emergency settlement conferences sooner than outside mediators. Magistrate judges, however, may have fewer hours to devote to a settlement conference than an outside neutral would, and the court, as a matter of policy, may want to use its judicial resources for work that only judges can do.[126]

124. *See ADR Guide*, *supra* note 113, at § X.

125. For additional information about approaching settlement discussions, *see The Elements of Case Management*, *supra* note 77, at 8–9.

126. In a substantial number of districts, magistrate judges are on the case assignment wheel. Because they have their own caseload, their availability for settlement work may be more limited. Some districts have decided, as a matter of policy, to use outside neutrals for most, if not all, settlement work, leaving judges free to concentrate on other matters.

1. The judge's role

The traditional view of judicially-hosted settlement conferences is that the judge assists the parties in exchanging settlement offers and very likely gives his or her own view of the strengths and weaknesses of each side's case in an effort to find a monetary value that will settle the dispute. The understanding of what judges do when conducting settlement negotiations has shifted as more judges learn, or bring with them into their judicial role, the theory and skills of mediation.[127] Use of these skills typically means a commitment of more time to an individual case's negotiations, a smaller role for the judge's view of the case, and more emphasis on a settlement that meets the parties' needs beyond a monetary settlement.

The extent to which you become involved in settlement discussions will depend on several factors, including whether you have time, whether other alternatives are available, whether you feel your involvement could help the parties and the case, whether your involvement could risk perceptions of settlement coercion or perceptions that your impartiality might be compromised, and, if you are a magistrate judge, whether the court or individual judges refer such matters to you.

Serving as a settlement facilitator in your own cases may raise questions about your impartiality and may result in recusal motions.[128] While local custom and practice may provide guidance, generally you should be cautious about doing so. Judges should serve as the settlement judge in their own cases only at the request of the parties and preferably when recusal is waived.[129] The better practice may be not to host settlement discussions in your own cases at all.

Expert commentators differ on whether, and when, it is appropriate for judges to participate in settlement negotiations in their assigned cases. Some judges believe their familiarity with their cases makes them the most effective neutrals and places them in the best position to focus on the issues and evaluate the parties' positions. Others draw a distinction between bench and jury trials, feeling freer to participate in settlement negotiations when the facts in the case will be determined by a jury. Many judges will not participate in settlement negotiations in their own cases unless the parties specifically request it and waive recusal.

127. The Federal Judicial Center offers workshops in basic mediation skills to magistrate judges, district judges, and bankruptcy judges. Materials from these workshops and information about upcoming workshops are available on the FJC's website: fjc.dcn.

128. *See* Canon 3(A)(4)(d) & commentary, Code of Conduct for United States Judges.

129. *See id.; see also Guide to Judiciary Policy*, vol. 2, Ethics Advisory Opinions, Advisory Opinion No. 95 (June 2009) ("Judges must be mindful of the effect settlement discussions can have not only on their own objectivity and impartiality but also on the appearance of their objectivity and impartiality.").

If you do host settlement discussions in your own cases, the safest stance is to limit your participation to cases that will be tried to a jury and only after case-dispositive motions have already been decided. This advice is even more pertinent if you are likely to become deeply involved in the case through the settlement discussions. Helping the parties explore their underlying interests is an essential element of the mediation process. The more you learn about the parties—their positions, concerns, strategies, views of their opponents, and so on—the more difficult it will be for you to remain impartial or to maintain the appearance that you are impartial. This may be problematic if you must rule on motions or decide the outcome of the case after participating in settlement discussions.

In any event, you can always serve as a catalyst, by opening the door to negotiations and helping the parties evaluate the case. Because many attorneys and their clients are reluctant to make the first settlement move, fearing their overture may signal a weak case, you can be especially important in breaking down barriers to negotiation by suggesting that they seek the assistance of a third-party neutral, whether from another judge or through your court's ADR program. You will be most effective if you maintain credibility and a reputation for candor and fairness, giving counsel and litigants confidence that they will be fairly treated in the negotiation process.

2. The timing of settlement discussions

There are three logical points in a lawsuit where settlement efforts are optimal: (a) no discovery has yet occurred, and litigation cost savings are significant; (b) discovery has been completed, but dispositive motions have not yet been filed; and (c) after discovery and after dispositive motions have been ruled upon. You should evaluate whether, in the case at hand, the apparent purposes of the parties favor one of these points over the others for holding settlement talks.

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

You should raise the settlement question not only early but regularly, first in your guidelines for the parties' Rule 26(f) report or case management statement,

then at the initial Rule 16 scheduling conference, at subsequent pretrial conferences, after dispositive motions (which tend to change how parties view their case), and before attorneys begin preparing for the final pretrial conference. You generally should not wait until just before trial to raise settlement for the first time, but you should raise the issue of settlement again just before trial. In addition, some cases do settle during trial. Generally, you should not permit the attorneys to ask for delays of the trial date to settle the case, but if you have encouraged and assisted settlement discussions all along, you should rarely, if ever, find yourself in this position.

To help parties enter into serious settlement discussions, you might do a number of things in connection with the Rule 16 conference. *Consider*:

- asking counsel for an oral or written report on whether settlement negotiations have occurred, are in progress, or are contemplated; what the prospects for settlement are; and how settlement may be facilitated;
- having counsel identify, and then complete, only targeted discovery necessary to evaluate the case for settlement, leaving until later discovery needed for other purposes;
- requiring counsel to discuss with their clients the anticipated costs of litigation;
- requiring counsel in fee-shifting cases to disclose to you and opposing counsel anticipated fees and costs;
- referring the case to a mediator, special master, settlement judge, magistrate judge, or, if all counsel request it, to yourself to conduct negotiations (preferably someone other than yourself if you are the fact finder); and
- referring the case to ADR procedures as provided by your court's local rules or general orders or as agreed to by the parties.

You should not consider delaying the progress of the case for the sake of settlement discussions, as the momentum of the pretrial process can in itself be an important impetus to settle.

3. Successful settlement techniques

When you are presiding over a settlement conference, you need to decide how to conduct the discussions and how to lower barriers to settlement. Your choice of settlement techniques will be influenced by the nature of the case, the history of the litigation, the personalities and needs of the participants, and your own

personality. There is no single best way to assist settlement negotiations, but whatever techniques you use, two things are fundamental: being prepared and listening carefully. Relevant information can be communicated by the participants in very subtle ways. Understanding the parties' thinking and feelings is as important as analyzing the issues; the parties' real objectives in the litigation may not always be what they seem based on their pleadings. The parties may also take a long time to reach settlement. You can help expedite this process by asking the plaintiff to state simply what he or she wants from the defendant. Assisting in settlement discussions can require great patience. Reaching a settlement, however, may lead to a far better outcome for all parties and may take less time than trying the case.

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

In setting up the settlement process, *consider*:

- at the first opportunity, asking counsel what information they need to evaluate the case and to reach supportable damages estimates, ordering the parties to produce the necessary items (e.g., personnel files in a discrimination case or the medical file in a personal injury case), and asking them to write you about the results of subsequent settlement talks;
- directing attorneys participating in any settlement conference to be prepared regarding the factual and legal issues and their clients' positions;
- ensuring that attorneys and other party representatives have adequate authority to settle the case or at least have immediate access to someone who has final authority, including insurers, senior government officials, and top management, when necessary;
- requiring the attendance of parties or party representatives (particularly in cases such as discrimination and personal injury where parties may value an opportunity to "tell their story");[130]
- suggesting, if the attorneys in the case are antagonistic or unskilled in negotiation, that one or more parties employ special counsel for the purpose of conducting settlement discussions;
- setting a firm and credible trial date to keep pressure on the parties; and
- having counsel submit to you confidential memoranda, outlining the pivotal issues, the critical evidence, and their settlement positions.

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

After a matter is referred for settlement purposes, many judges issue an order with information about the date, time, and location of the settlement conference, as well as a description of how the settlement conference will be conducted (e.g., who is required to attend and whether they must attend in person or may attend by virtual technology) and what materials the parties must submit before the conference (e.g., a settlement conference statement). For examples, *see* online appendix. The order gives you a chance to convey your expectations for the settlement conference and ensure that the parties are prepared to engage in meaningful negotiations.

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

- discussing with the participants the issues and the probable risks each party faces, without taking a position on the merits;
- asking the attorneys, in front of their clients, how much it will cost to litigate the case through trial and then suggesting to their clients that they put this sum toward settlement;
- helping parties focus on their underlying interests (e.g., resuming a profitable business relationship) rather than on disputed facts or legal principles;
- meeting separately with each side (parties and counsel) for candid evaluations of the parties' prospects and the costs of continuing the litigation—but keep in mind, if conducting a settlement conference in your own case, that while these meetings often become essential to the successful conclusion of settlement negotiations, you should have the parties' consent or risk being precluded from presiding at trial;[131]
- suggesting that the corporate principals meet without counsel to reach an agreement as business people;
- delaying having parties state their "bottom lines" so as to keep the negotiating positions flexible;
- in appropriate cases, directing attention to damages, instead of emphasizing liability issues;[132]

131. This point illustrates why you should be cautious about holding settlement conferences in your own cases. Private caucuses with the parties are often pivotal for settling a case, but they can also put your impartiality at risk.

132. In some cases, it is money, rather than principle, that ultimately matters. If it becomes clear to the parties that a settlement on financially acceptable terms is possible, there is little point in continuing to debate liability.

- severing one or more issues for a separate trial if doing so will provide the basis for settlement of other issues;
- looking for imaginative and innovative solutions, such as structured payouts, payment in kind, future commercial relations, concessions, apologies, admissions, establishment of a training or recruiting program, or correction of a defect;
- discussing settlement in the parties' language (e.g., with two business litigants, ask "How many widgets will the litigation costs buy? What are your daily profits against the costs of this case?");
- providing a structure, when the parties are dug in, to help them exchange offers (e.g., asking the plaintiff to "come up with the next offer," asking the defendant to make a counteroffer, and asking them to continue exchanging offers until a settlement or impasse is reached), which can force movement but takes the burden off the parties to make the first move;
- injecting realities, such as the risk of bankruptcy or the difficulties of collecting a judgment from a financially strapped defendant;
- recommending or encouraging the parties to exclude punitive damages as an element of the claim for settlement purposes;
- encouraging the defendant to make a Federal Rule of Civil Procedure 68 offer of judgment, carefully drafted to avoid later disputes;[133]
- deferring any judicial recommendation of potential settlement figures until the outlines of a probable settlement become apparent;
- settling only some issues in the case or the claims of some but not all parties;[134] and
- keeping the negotiations going despite lack of agreement.

Some judges find they are most effective if they try to move the parties within range of settlement (i.e., if they establish a "ballpark"). To do that, you may need to remain noncommittal on the merits for some time. If you are careful to not make a recommendation too soon, you may also find that your credibility and effectiveness are enhanced, and you may avoid having to backtrack later if discussions move in an unanticipated direction. However, many attorneys prefer a judge who is actively involved in settlement discussions, who knows the facts and

133. Such an offer can be helpful in cases in which attorneys' fees can be awarded by the court, since the offer can cover all liability, but it must be unambiguous to enable the parties to determine whether the final judgment is more favorable.

134. *But see* MCL 4th, *supra* note 22, § 13.21, for a discussion of the risks of partial settlements.

law in the particular case, who offers explicit assessments of party positions, and who makes specific suggestions for resolution, provided the judge is not going to be the fact finder in the case.[135] Because these preferences seem to vary by geography, an understanding of your local culture may be helpful in deciding the approach you will use.

4. Recording the settlement

In the end, it is not the judge who settles the case, but the parties. Their decision does not ordinarily require your review or approval. To forestall future disputes over the settlement, it is generally wise nonetheless to record the settlement in writing. If you think there is a chance that the settlement may fall apart, you might consider, if appropriate, entering the complete terms of the settlement into the record in the presence of counsel. If your courtroom is equipped with audio recording technology, you may have counsel recite on the record the key terms of the settlement and affirm that they understand the terms and agree to be bound by them. If the agreement requires ratification or approval by a board of directors, the Attorney General, or some other higher authority, set a date certain by which counsel must file a written agreement with the court. If the agreement is to be filed later, it is wise to get at least an outline of the settlement terms on paper on the spot, particularly if individuals rather than corporations are involved. Ask both counsel and all parties to affirm the terms of the agreement by signature or on the record. You should also indicate which party will be drafting the agreement and the date by which they will transmit it to the other parties for signature.

If you have given counsel leeway to file the agreement by a specified later date, you may find that some parties are tardy in meeting that date. When you set a date certain and put it on the record, reinforce with counsel that you expect them to keep that date. When they do, you can dismiss the case. *See* online appendix for examples of orders dismissing a settled case. If they do not, you can ask the parties to show cause why you should not dismiss the case.

In some cases, such as class actions and some antitrust cases, you are required to review and approve the settlement.[136] Also note that, once the case is dismissed,

135. W. D. Brazil, Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges (American Bar Association 1985) at 1–2, 5–6. In this study of litigating attorneys in four districts, Brazil found that 85% agreed that involvement of a federal judge in settlement discussions was likely to improve prospects for settlement and that a majority thought judges should involve themselves in settlement even when the attorneys did not ask for help. However, a substantial majority also preferred that the settlement judge not be the judge who will try the case, especially if the case is a bench trial.

136. *See* *MCL 4th*, *supra* note 22, § 13.14, for a helpful discussion of this responsibility.

the court does not retain jurisdiction to enforce a settlement agreement simply based on its prior authority over the underlying dispute.[137]

5. Settlement in cases involving pro se litigants

Cases involving a pro se litigant seem to be obvious candidates for disposition by settlement, but you should be cautious about assisting settlement negotiations in pro se cases. Pro se litigants will likely turn to you for advice, and you may be tempted to help them. Within bounds, it is your responsibility to ensure that these litigants are provided fair access to justice, while also protecting your impartiality. Because this is a difficult line to walk, the better approach is simply to forego any involvement in settlement discussions in pro se cases over which you are presiding, and refer these cases to another district or magistrate judge in your court for a settlement conference. Your court might also consider establishing, if it has not done so already, a special panel of attorneys who agree to assist pro se litigants solely for the settlement process (referred to as "limited scope counsel").[138] For more information on conducting pro se settlement conferences, *see* *Pro Se Case Management for Nonprisoner Civil Litigation*.[139] Additionally, the FJC has training videos and materials on mediating pro se cases available on its website.[140]

6. Ethical and other considerations in judge-hosted settlement negotiation

Whatever your approach to settlement discussions, you should ensure at all times that your impartiality and the court's credibility are not compromised. To preserve the integrity of the process, you may also need to monitor the conduct

137. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381–82 (1994); *see also Massi v. 198 Chelsea Corp*, 217 F. Supp. 3d 731, 732–33 (S.D.N.Y. 2016); *Amer. Cntr. for Civil Justice v. Ambush*, 49 F. Supp. 3d 24, 26 (D.D.C. 1994).

138. For example, in 2014, the Central District of California implemented a pro bono limited-scope representation pilot program. See https://www.cacd.uscourts.gov/attorneys/pro-bono/pro-bono-limited-scope-representation-pilot-program. The District of Colorado, by local rule, also authorizes attorneys to assist a pro se litigant with discrete issues or phases of litigation, including representing the litigant in settlement or ADR proceedings. *See* D. Colo. L. Atty. R. 2(b)(1), 5(a)-(b); *see also* http://www.cod.uscourts.gov/AttorneyInformation/LimitedRepresentation.aspx.

139. *Pro Se Case Management for Nonprisoner Civil Litigation*, *supra*, note 73, at 45–49.

140. *See, e.g.*, National Workshop for U.S. Magistrate Judges II – Breakout Session – Pro Se Settlement Conferences. For mediation of prisoner pro se cases, *see* Court to Court: Inmate Early Mediation (FJC Dec. 2017; video program).

of counsel and their clients. Efforts by parties to seal documents as part of the settlement agreement, for example, will require your close attention, especially in cases that involve public safety. Counsel may also try to enter into side agreements that are not disclosed to other parties in the case. Negotiations regarding attorneys' fees may require your attention, as well, especially in civil rights cases, in which the losing side is liable for the fees of the prevailing side. These and other problems are given careful attention in the *MCL 4th*.[141]

141. *MCL 4th*, *supra* note 22, §§ 13.22–13.24.

6

The Final Pretrial Conference and Trial

A. Overview

The need for active case management continues through trial. Having trial guidelines in place and holding a final pretrial conference can help ensure that counsel are prepared and that the trial proceeds fairly and efficiently. The following discussion focuses on case management techniques for the final pretrial conference as well as for jury and bench trials.

B. Trial guidelines

As discussed in Chapter 1, developing and posting case management guidelines can help convey your expectations and procedures for each phase of litigation. Some judges include basic information about trial procedures in their case management guidelines. Others have separate guidelines for jury and bench trials that they either post on the court's website or provide to counsel before the final pretrial conference. Judges typically include information about how trials are scheduled, courtroom protocol, how exhibits should be submitted and marked, and how voir dire is conducted. *See* online appendix for examples. Having an early understanding of how you conduct trials can help counsel plan and prepare their case should it advance to that stage.

C. The final pretrial conference

Under Rule 16(e), the court may hold a final pretrial conference "to formulate a trial plan, including a plan to facilitate the admission of evidence."[142] Although the final pretrial conference is not mandatory, you should consider holding a conference in every case that advances to trial unless it is clear that the time and expense would outweigh its benefits. Generally, the final pretrial conference provides a valuable opportunity for you to:

- explore settlement potential;
- review with counsel the claims and defenses that remain to be tried;
- discuss your trial procedures and expectations with counsel;
- set deadlines for further written submissions;
- rule on motions in limine;
- obtain admissions or stipulations to avoid unnecessary proof at trial;
- discuss your voir dire process; and
- address questions from counsel before trial begins.

Rule 16(e) further provides that, if a final pretrial conference is held, it must be held as close to the start of trial as is reasonable and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. Aside from these basic requirements, the timing, structure, and

142. For further discussion of the final pretrial conference, *see* *The Elements of Case Management*, *supra* note 77, at 13–15; *Benchbook*, *supra* note 19, at 199–204; *MCL 4th*, *supra* note 22, at 118–129; and *Practice Guide: Federal Civil Procedure Before Trial*, *supra* note 13, §§ 15.1–15.77.

content of the final pretrial conference are up to you and can be tailored to fit a case's specific needs and complexity. The following sections offer factors to consider when setting and holding a final pretrial conference.

1. Timing and structure

There are various approaches for scheduling a final pretrial conference. Some judges set a date for the final pretrial conference as part of the scheduling order. Other judges do not schedule a final pretrial conference until trial is imminent (e.g., after denying summary judgment, or, if no dispositive motions were filed, after the dispositive motion deadline has passed or discovery has closed). Under the latter approach, to ensure that the conference is promptly set, the judge may require the parties to file a Notice of Readiness for Final Pretrial Conference within a certain period of time (e.g., 10 days after the dispositive motion deadline has passed if no motions are filed or after the court rules on the last dispositive motion). If the final pretrial conference date is set early in the case, keep in mind that continuances of certain deadlines (e.g., discovery cutoff or dispositive motion deadline) may also require resetting the final pretrial conference date.

As indicated above, Rule 16(e) directs that the final pretrial conference must be held as close to the start of trial as is reasonable. What is "reasonable" will largely depend on your calendar availability, as well as the complexity of the pretrial matters that must be addressed, such as motions in limine. In complex cases, you may need to schedule the final pretrial conference sufficiently in advance of trial to allow for an additional, follow-up conference to address any issues that could not be resolved during the first conference.[143]

When scheduling a final pretrial conference, you should also *consider*:

- requiring the parties and/or a representative with final settlement authority to be present (or if unable to be present, to be available by phone);
- holding the conference where it is likely to be most productive (either in chambers or in open court); and
- having a transcript made of the conference for future reference in guiding the course of the trial.

143. *See* MCL 4th, *supra* note 22, §§ 11.6, 11.23.

2. Preparing for the final pretrial conference

To ensure that counsel is prepared for the final pretrial conference, many judges require parties to submit materials in advance, typically in the form of a pretrial statement or proposed final pretrial order. To facilitate this process, some districts have adopted either a local rule listing the information and materials that should be submitted or a standardized final pretrial order template for the parties to download and complete. In other districts, judges use their case management guidelines, a standing pretrial order, or the order setting the final pretrial conference to specify the materials to be submitted. Some judges also require that the parties meet, confer, and jointly submit the materials. For examples of orders and local rules addressing written submissions for the final pretrial conference, *see* online appendix.

If not already required by your district, *consider* requiring the parties to include the following in a preconference submission:

- A statement of the case, including:
  - a concise description of the nature of the case;
  - the identity of the parties;
  - the basis for the court's jurisdiction; and
  - a statement of all relief sought.
- A statement of the claims and defenses that remain to be decided (including whether any issues are for the judge rather than the jury to decide).
- A statement of material facts that are admitted, stipulated, or uncontested.
- A list of all witnesses (other than for impeachment or rebuttal) that each party will call or may call at trial (either in person or through deposition), including a brief description of the substance of each witness's testimony and the estimated amount of time the testimony will take (direct and cross). *See* Fed. R. Civ. P. 26(a)(3)(A)(i), (ii).
- A list of exhibits, including a brief description of each exhibit and a statement of stipulation or objections, if any, to each exhibit.[144] *See* Fed. R. Civ. P. 26(a)(3)(A)(iii).
- A brief description of the motions in limine that have been filed and any opposition thereto.

144. For more information about trial exhibits, *see infra* Chapter 6, Section C.3.c.

- Whether a jury trial was requested and whether the parties stipulate that the request was timely and properly made.
- An estimate of the total length of the trial.
- A description of the efforts the parties have made to settle the case and a statement as to whether the parties believe a settlement conference could be worthwhile.

If a jury trial was requested, the parties should also include:

- A joint statement of the case (to be read to the jury during voir dire).
- Proposed voir dire questions (both agreed-upon and disputed).
- Proposed jury instructions (including a notation as to whether each instruction is agreed to or disputed and a statement of the grounds for objection for each instruction).
- Proposed verdict forms, including special verdict forms or juror interrogatories if requested (*see* Fed. R. Civ. P. 49).

If a jury trial was not requested, the parties should also include proposed findings of fact and conclusions of law.[145]

If not already set by local rule, you should set a filing deadline that will allow you sufficient time to review all of the materials and prepare for the final pretrial conference (e.g., some judges set the deadline at 7 days before the conference; others at 14 days before the conference).[146] Further, if you or your district requires the parties to jointly submit final pretrial conference materials, you should also set a timeline for the parties to initially confer, exchange drafts, and file their preconference statement or proposed final pretrial order.

Many judges also have special requirements for motions in limine. For example, to keep the motions succinct, you may consider capping the number of motions in limine that each party may file; imposing a more restrictive page limit on the motion and response (e.g., 5 pages); and disallowing reply briefs.

Finally, keep in mind that if any of the information or materials described above is unnecessary in a particular case, you may excuse the parties from completing those parts of the preconference filings to avoid unnecessary costs.

145. For additional discussion of preconference submissions, *see* *Benchbook*, *supra* note 19, § 6.01(C).

146. Note that if the parties are required to include all of the Rule 26(a)(3) disclosures in their preconference filing, the filing deadline for the preconference statement may supersede the "30 days before trial" disclosure deadline set by Rule 26(a)(3).

3. Conducting the final pretrial conference

a. In general

The format and agenda for a final pretrial conference are up to you and can be adapted to fit the particular needs of a case. Generally, you will want to go over your rules and procedures for trial, set a trial schedule, explore settlement potential, define the issues to be tried, and narrow the evidence that will be presented through stipulation and by ruling on motions in limine. If the parties filed a final pretrial conference statement or a proposed final pretrial order, that filing can serve as the basic outline for the topics to be addressed at the conference.

Consider addressing the following topics during the final pretrial conference:[147]

- Confirming that the party requesting a jury trial still wants a jury trial.
- If a trial date has not previously been set, informing counsel of the trial date and days allotted for trial.
- Discussing the prospects of settlement and gauging whether a settlement conference would be worthwhile.
- Reviewing how you conduct trials, including the typical trial schedule, your expectations of counsel, how you conduct voir dire and jury selection (including how many jurors will be called and empaneled), your practices regarding the jury (e.g., whether they may take notes or ask questions), and other matters relating to courtroom decorum.
- When discussing jury selection, reminding counsel of their obligations to comply with *Batson*.[148]
- Reviewing with counsel the factual and legal issues that remain to be tried and confirming that there is no disagreement on the scope of those issues.
- Determining if there are issues that may be narrowed through stipulation.
- If the parties have filed motions in limine, hearing argument on the motions (if necessary), and ruling on the motions, or informing the parties that you will issue a ruling before trial starts.
- Addressing issues relating to the witness lists, including witness-scheduling issues and elimination of witnesses whose anticipated testimony does not go to matters in dispute.

147. For additional suggestions on how to structure the conference, *see* Benchbook *supra* note 19, § 6.01(D).

148. *Batson v. Kentucky*, 476 U.S. 79 (1986).

- Pre-admitting exhibits into the record to which there are no objections or which you are able to rule as admissible under Rule of Evidence 104.
- Addressing issues concerning the mode or order of proof (*see* Fed. R. Evid. 611(a)).
- Requiring agreement by counsel (to be included in your final order) that all documents are considered authentic if produced by the parties, unless a specific document is objected to, in order to avoid unnecessary custodial witnesses or certification of authentication.
- Requiring narrative written statements for presenting, subject to cross-examination, the direct testimony of expert witnesses to avoid the use of depositions at trial (*see* Fed. R. Civ. P. 43 and Fed. R. Evid. 611(a)).
- Having counsel list, by page and line for review, depositions to be used (i.e., those that are not amenable to the above procedure).
- Discussing with counsel limits you will impose on time or on the number of witnesses or exhibits.
- Instructing counsel that they should contact court staff (either your courtroom deputy or a member of the IT staff) to coordinate use of courtroom technology and equipment and resolve issues before trial starts.[149]
- Asking counsel whether there are other issues that need to be addressed or whether they have any other questions about how the trial will be conducted.

b. Expert witnesses

Managing expert witnesses can help avoid the parties' reliance on redundant or duplicative expert testimony, which not only wastes trial time but increases the parties' litigation costs. As the trial judge, you are in a unique position to question counsel's justification for an expert witness; the parties may lack the technical background to do so.

At the final pretrial conference, *consider*:

- ruling on the qualifications of expert witnesses, the admissibility of particular expert evidence, the use of hypothetical questions, and the requisite evidentiary foundations (*see* Fed. R. Evid. 104(a));

149. In some districts, the U.S. Marshal requires a court order allowing the parties to bring in additional equipment.

- including language in the final pretrial order barring experts not previously identified and expert testimony at variance with an identified expert's prior deposition testimony, written report, or statement, unless preceded by proper notice and prior court approval;
- establishing procedures to enhance jury comprehension (*see infra* Chapter 6, Section C.3.e);
- determining whether to appoint an expert witness (*see* Fed. R. Evid. 706); and
- limiting the number of experts permitted to testify.

While it may appear easier to defer to the judgment of counsel regarding experts, it is important to emphasize your responsibility to ensure economy and efficiency in the use of public trial resources. Consider whether more than one expert per side is needed and should be permitted to testify with respect to any single scientific discipline. Trials involving different disciplines may require different qualifications and call for different experts.

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

Consider the following approaches:

- having a tutorial for the jury or the judge before the trial begins, conducted by a neutral expert or experts chosen by the parties, to explain fundamentals of complex scientific or technical matters, and to do so in lay terms, if possible;
- excluding undisclosed experts and evidence from the trial: few things are more disruptive at trial than the appearance of undisclosed experts or the offer of expert evidence that varies from prior testimony or reports;
- having experts testify back-to-back to facilitate clarification of the extent and basis of their disagreement;
- giving the jury preliminary and interim instructions, allowing jurors to take notes, and permitting them to ask questions (*see infra* Chapter 6, Section D.1.b, for a brief discussion of the issues involved in permitting juror questions); and
- using narrative written statements or reports for presentation of experts' direct testimony.

c. *Exhibits*

To facilitate the organization and presentation of exhibits, many judges provide detailed instructions on how exhibits should be marked, organized, and provided to the court (including how many copies to submit, whether an electronic copy of all exhibits is required, and when the exhibits should be delivered to the court). *See* online appendix for examples.

Duplicative, redundant, or unclear exhibits not only waste limited trial time, but may also prejudice the case of the presenter, who is often the last to recognize this.

Consider:

- controlling the volume of exhibits by limiting their number;
- forcing counsel to justify the independent utility of exhibits with regard to specific issues or proofs (*see* Fed. R. Evid. 403, 611(a));
- encouraging stipulations to foundation;
- having counsel redact voluminous exhibits;
- asking counsel to pre-mark exhibits and provide copies to the court;
- insisting that counsel are familiar with the courtroom technology and equipment and have tested the equipment to ensure compatibility prior to trial; and
- identifying disputed or potentially prejudicial exhibits and developing protocols for their presentation.

d. *Depositions*

Presenting deposition testimony by reading depositions can save litigation costs, but it can bore jurors. Accordingly, you should consider limiting the reading of depositions by use of a stipulated summary or agreed-upon statement of the substance of a witness's testimony,[150] reserving readings for key testimony. This practice should also be balanced against the reasonable desire on the part of counsel to allow a key witness to "speak the case" to a jury (at least in part through deposition testimony). Requiring that counsel, in advance of trial, designate or stipulate to summaries or depositions to be offered at trial can promote the effective and efficient use of these materials at trial. Should you permit deposition testimony to be offered at trial, you should require counsel to organize and redact deposition testimony in preparation.

150. *See* *MCL 4th*, *supra* note 22, § 12.331.

e. *Jury issues*

Jurors are generally less familiar than anyone else in the case about what is happening in the courtroom and why it is happening. While no one consciously wishes to offend or mistreat jurors, they are often subjected to seemingly arbitrary and unexplained delays, excluded from private sidebar discussions, and presented with confusing or arcane instructions over the course of trial. You are their only constant champion and defender. You should highlight for trial counsel the risks they face in not considering juror needs, from their first contact with a trial panel at voir dire through the end of trial, when fatigue and impatience can set in. You should also remind counsel that the jury's eyes are on them at all times; they should therefore conduct themselves professionally—whether questioning a witness or sitting at counsel's table.

Consider the following techniques to improve the jury's experience and function:

- streamlining voir dire procedures generally;[151]
- screening prospective jurors by having them complete questionnaires in advance in cases in which a large jury pool is necessary and voir dire could be lengthy (*see* online appendix); [152]
- establishing a procedure for voir dire and discussing that procedure with counsel at the final pretrial conference (*see* Fed. R. Civ. P. 47; *see, for example*, online appendix);[153]
- having counsel submit proposed voir dire questions;
- preparing for the voir dire examination to ensure that all important points will be covered;
- establishing procedures for jury selection, including the number of jurors to be seated, the number of alternates to be selected, and the number of peremptory challenges per side, as well as the procedure for their exercise (*see* Fed. R. Civ. P. 48; *see, for example*, online appendix);
- establishing a procedure for selecting and excusing alternate jurors;
- clarifying that all jurors remaining at the end of the presentation of evidence, except alternate jurors, will deliberate (*see* Fed. R. Civ. P. 48);

151. *See* *MCL 4th*, *supra* note 22, § 12.412.

152. Note that written questionnaires may disadvantage jurors without much formal education because they are sometimes less effective at articulating themselves in writing. As a result, some judges only use written questionnaires to screen for juror availability when a trial may be lengthy.

153. *See* *MCL 4th*, *supra* note 22, § 12.412.

- determining how complex evidence will be presented to enhance jury comprehension;
- developing a process for submitting proposed jury instructions and settling on final jury instructions (*see, for example,* online appendix);
- drafting brief, well-organized instructions using clear and plain language to maximize jury comprehension (for guidelines, *see* online appendix); and
- preparing special verdict forms and considering whether to use seriatim verdicts (where the jury decides one issue at a time), general verdicts with interrogatories, or special verdicts (*see* Fed. R. Civ. P. 49).

When discussing juror-related issues during the final pretrial conference, you can probe to determine if larger juror panels must be summoned for voir dire owing to the nature of the case or its complexity. Special precautions may be necessary to qualify a larger number of expected panelists. If many prospective jurors are likely to be ineligible or lengthy voir dire may be necessary, juror questionnaires can be mailed to the venire in advance with the assistance of the clerk's office.[154] Whether the questionnaires are completed and returned in advance or completed at the courthouse, sufficient time needs to be allowed for their review and screening by counsel before voir dire.[155]

Special verdicts and interrogatories can be useful devices to reduce the risk of having to retry the entire case. You can, with counsel, make the initial determination that complex issues raised and addressed in the proposed instructions lend themselves to special verdicts. Such verdicts also make possible alternative outcomes in cases in which the law is not settled or the law has changed but its retroactive application is in doubt. Because the preparation of special verdicts and interrogatories requires care to avoid inconsistencies or conflicts, however, you should obtain the attorneys' approval as to form.[156]

f. Scheduling and limiting trial events

During the final pretrial conference, you should discuss the trial schedule, any time limits on particular trial events (such as opening statements), and the total trial time. Scheduling trial events and limiting trial time through consultation

154. For concerns about the prejudicial effect of written questionnaires, *see supra* footnote 152.

155. The juror questionnaire form has become automated and is submitted in advance of trial in many courts using the Juror Management System software.

156. *See* *MCL 4th*, *supra* note 22, § 11.633.

with counsel are exercises of authority well within the traditional discretion of the trial judge.[157] Counsel should be allowed to estimate, and you can subsequently hone and accede to, the time necessary for each major trial event from opening statements through closing arguments. In addition, the scheduling and timing of many other subevents can come into play.

Consider the following for discussion:

- the overall schedule for the trial and for each trial day;
- the length, scope, and content of opening statements;
- the number of hours each side may have for examination and cross-examination;
- the order of cross-examination and designation of cross-examiners in multi-party cases;
- the length, scope, and content of closing arguments; and
- the order of final arguments and jury instructions (*see* Fed. R. Civ. P. 51).

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

As part of the final preconference filings, or at the conference, you may ask counsel to estimate the total time they need for trial. Taking that figure into consideration, some judges allocate a total amount of time to each side (e.g., 6 hours) for witness examination (whether direct, cross, re-direct, or re-cross). Other judges set time limits for specific parts of the trial process (e.g., opening statements, direct examination, etc.).

157. Fed. R. Civ. P. 16(c)(2)(O) (trial time limits are a proper topic for pretrial conferences); Fed. R. Evid. 403, 611; *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002); *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001) (citing *Gen. Signal v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1508–9 (9th Cir. 1995)); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994), *cert. denied*, 513 U.S. 1014 (1994); *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1408 (7th Cir. 1991).

4. The final pretrial order

After the final pretrial conference, you should issue a final pretrial order setting forth the actions and rulings made during the conference.[158] Particularly, the order should include:

- the trial dates and schedule;
- the contested issues of fact and law;
- a list of witnesses who will or may be called;
- exhibits that are admitted;
- rulings on motions in limine; and
- objections or pending motions held over for trial.

After you issue the final pretrial order, no deviation or modification will be permitted except "to prevent manifest injustice."[159]

If the parties submitted a joint proposed final pretrial order, you may modify it to reflect the actions taken during the conference. Alternatively, you may dictate the order on the record at the end of the conference, or you may direct counsel to prepare it on the basis of the record of the conference. For sample final pretrial orders, *see* online appendix.

D. Trial

1. Jury trials

a. Techniques for trial management

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

Consider:

- conducting short daily conferences with counsel to identify upcoming witnesses and exhibits, to anticipate problems (e.g., objections to evidence, witness unavailability, or other potential causes of interruption or delay), and to assess the general progress of the case;[160]

158. *See Benchbook*, *supra* note 19, § 6.01(E).

159. Fed. R. Civ. P. 16(e). *See also MCL 4th*, *supra* note 22, § 11.67.

160. *See id.*, §§ 12.13, 12.23.

- avoiding unnecessary proofs by narrowing disputes and encouraging stipulations to matters;
- minimizing or avoiding sidebar conferences, arguments, and other proceedings that disrupt the flow of the trial;
- before trial starts, requiring the parties to provide the court reporter with a joint list of names, places, and uncommon terms or acronyms that are likely to come up during testimony;
- discussing with counsel how requests from the jury to replay video or audio evidence will be handled (i.e., if the evidence will be replayed and how); and
- having a tutorial for the jury or the judge before the trial begins, conducted by a neutral expert or experts chosen by the parties, to explain fundamentals of complex scientific or technical matters, and to do so in lay terms, if possible.

You should let counsel know in advance the procedures you use for conducting voir dire and exercising challenges. Because lawyers tend to attach more importance to voir dire than judges, you should consider allowing counsel a reasonable but limited time to supplement judge-conducted voir dire. You should also consider whether to refer to prospective jurors during the voir dire process by name or by assigning numbers. The Judicial Conference has advised that judges should inform jurors that they may approach the bench to share personal information in an on-the-record, in camera conference with the attorneys. Furthermore, it has recommended that judges make efforts to limit references to names of potential jurors on the record by assigning and using numbers.[161]

Over time, you may develop standard language or a "script" for key parts of a jury trial, such as administering jury admonitions, explaining the voir dire process, announcing the rule of exclusion of witnesses and the return of verdict, and instructing a deadlocked jury. *See* online appendix for an example.

b. Assisting the jury during trial

Sound trial management will improve jurors' performance, promote juror satisfaction with their service, and enhance the court's public image. In conducting

161. *Guide to Judiciary Policy*, vol. 10, § 330.20(c)(2).

the trial, you should ensure that jurors are treated as important participants in the trial and assist them in carrying out their functions.[162]

Consider:

- giving preliminary instructions identifying the sequential stages of a trial and providing a neutral statement of the issues (*see* online appendix);[163]
- instructing jurors on the use of social media during trial (*see* online appendix);[164]
- permitting jurors to take notes;[165]
- permitting jurors to ask questions (in writing, submitted through the judge) when appropriate, under adequate safeguards;[166]
- discouraging or delaying sidebars until the next recess whenever possible;
- encouraging parties to stipulate to the use of techniques to enhance jury comprehension,[167] such as:
  - jury notebooks listing witnesses and containing critical exhibits, glossaries, etc.;
  - courtroom technology (e.g., using computers and video to display evidence to the jury);[168]
  - pictures of witnesses or evidence;
  - back-to-back expert testimony to facilitate clarification of the extent and basis of their disagreement;

162. The Federal Judicial Center has developed a petit jury orientation video, Called to Serve, available on the FJC website, which explains to potential jurors why their service is important and what they should anticipate. The video also includes guidance on the use of social media by jurors.

163. The Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have developed model or pattern civil jury instructions for district courts, including preliminary instructions on the trial process. *See also MCL 4th*, *supra* note 22, § 12.43.

164. *See Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management* (Fed. Judicial Ctr. 2011); Social Media and Jury Duty (Fed. Judicial Ctr. 2015).

165. For a discussion about juror note taking, *see MCL 4th*, *supra* note 22, § 12.421. *See also* S. Arthur, Federal Trial Handbook Civil § 20:14 (4th ed. 2018).

166. *See, e.g., U.S. v. Brown*, 857 F.3d 334, 340–41 (6th Cir. 2017) (noting that judges have discretion to permit juror questions if they take certain precautionary measures); *U.S. v. Rawlings*, 522 F.3d 403, 407–09 (D.C. Cir. 2008) (same). *See also MCL 4th*, *supra* note 22, § 12.423.

167. *See MCL 4th*, *supra* note 22, § 12.31.

168. *See* Natl. Inst. for Trial Advocacy, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial* (edited by Fed. Judicial Ctr., 2001). *See also* Technology in the Courtroom (Fed. Judicial Ctr. 2012).

    - narrative written statements or reports for presentation of experts' direct testimony;
    - summaries of exhibits;
    - the use of plain English by lawyers and witnesses;
    - in more lengthy or complex cases, interim summations (or supplemental opening statements) by counsel and interim explanations of legal principles (with counsel comment or objection) to prepare jurors for closing instructions;[169]
- giving jurors a written copy of the jury instructions;[170]
- determining whether to instruct jurors before or after closing arguments (*see* Fed. R. Civ. P. 51(b));[171] and
- permitting reasonable read-backs of trial testimony when requested by the jury during deliberations.

The comfort of sitting jurors affects their performance, and there are ways you can easily enhance their comfort. You should, for example, avoid calling jurors prior to the time they are to sit, explain any delays, and observe break times, recesses, and adjournments. You can also reinforce the importance of jurors' service by thanking them for their time and sacrifice at the end of each trial day and when you dismiss them at the end of trial. And you can gain valuable insights from exit questionnaires completed by jurors, enabling you to improve your trial management techniques.

In trials with especially troubling testimony and evidence, you may want to make counseling services available to jurors through the Federal Occupational Health Employee Assistance Program (EAP). The services are free of charge and a juror's participation is voluntary and confidential. Information about this service and handouts that can be given to jurors are available on the "Jury Operations - Counseling Services" page on JNet. Note that counseling services through the EAP can be provided only for *as long as the jurors are serving*; these services are not available once the jurors have been dismissed from service. Accordingly, in cases where you want to authorize counseling services at the conclusion of trial, you should enter an order near the end of the trial extending the jurors' term

169. *See MCL 4th*, *supra* note 22, § 12.43.

170. When giving the charge to the jury, some judges make an audio recording and provide it to the jury, along with a written copy of the instructions so that jurors can review the instructions in writing or aurally.

171. Many judges believe that the jury can make better use of closing arguments after having first heard the judge's instructions.

of service "for administrative purposes" for a period long enough to allow individual jurors to obtain counseling. A sample order and a sample letter to jurors informing them that the trial judge has authorized counseling services are also available on the Counseling Services JNet page.

In high-profile trials, especially when partial sequestration is necessary, special arrangements may be necessary to protect jurors from media interference. For a discussion of such considerations, *see infra* Chapter 7, Section C.4.

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

2. Bench trials

a. Techniques for trial management

The absence of a jury obviates some of the requirements and pretrial filings discussed above. Nonetheless, ensuring that counsel is adequately prepared and that the trial is fair and efficient remain as priorities. Holding a brief final pretrial conference may still be helpful to discuss your requirements and procedures for bench trials with counsel and to address evidentiary issues. Your case management guidelines or order setting the final pretrial conference should instruct the parties how to prepare for the conference and provide the requirements and deadlines for pre-conference submissions. *See* online appendix for examples of guidelines for bench trials.

In addition, *consider* the following approaches:

- Having the parties exchange and submit the direct testimony of witnesses under their control in advance and in narrative statement form (*see* Fed. R. Civ. P. 43; for examples of instructions regarding submission of direct testimony in writing, *see* online appendix.[172]
- Imposing limits on testimonies and exhibits to avoid creating an excessively long record that will make deciding more difficult.
- Adopting trial procedures to ensure that you understand the evidence as it comes in rather than leaving it to be studied after the case is submitted.

172. *See MCL 4th*, *supra* note 22, § 12.333 (citing Fed. R. Civ. P. 26(a)(3)(B), 32(c)).

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

Although exclusionary rulings are of less importance in bench trials than in jury trials, receiving evidence into the record indiscriminately may result in a record that is difficult for you to manage and digest in the decision-making process.

b. Deciding the case

Judges may have trouble finding time to decide the case once it is submitted, but cases become more difficult to decide as they grow cold with the passage of time.[173] If you do take a case under submission, you should try to issue a written decision as soon as practicable. Keep in mind that as part of the March 31 and September 30 CJRA Reports (discussed in *supra* Chapter 4, Section B.1), you must list any civil bench trial that has been submitted for more than six months and any civil case pending more than three years after filing.[174] A prompt decision saves resources, increases satisfaction with the court, and helps avoid listing the case on your CJRA Report.

Consider:

- having counsel submit proposed findings of fact and conclusions of law before trial begins, enabling you to accept or reject findings as the trial progresses (*see* Fed. R. Civ. P. 52);[175]
- having counsel argue the case immediately following the close of the evidence, as in a jury trial, instead of using post-trial briefings;
- if briefing is needed, having briefs submitted before rather than after trial;
- deciding the case, whenever possible, promptly after the closing arguments by dictating findings of fact and conclusions of law into the record; and
- adopting your own time standards for reaching decisions as soon as is practical.

173. *See id.*, § 12.52.

174. *See* 28 U.S.C. § 476(a)(2), (3); *see also Guide to Judiciary Policy*, vol. 18, § 540.

175. The proposed findings of fact and conclusions of law should also be submitted electronically in a format that allows you to edit them during and after trial. You should, however, avoid wholesale adoption of a party's proposed findings of fact and ensure, to the extent you adopt certain proposed findings, that the language sufficiently articulates your independent, decision-making process. *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 9C, § 2578 (3d ed. 2019) (discussing rulings among circuits on use of proposed findings).

Your fact-finding can be greatly aided by using counsel-prepared materials, such as proposed findings of fact and conclusions of law, as well as through trial briefs. Regarding the former, you may find it helpful to require that each finding of fact and conclusion of law be brief, noncontentious, limited to a single assertion, and supported by appropriate citation to either the record or legal authority. Some judges also require that counsel mark the opponent's proposals to indicate which ones are contested and which are not (for an example of this approach, *see* online appendix). At the end of trial, you may consider allowing the parties a brief period to submit revised findings of fact and conclusions of law to conform to the evidence presented during the trial.

7

Special Considerations by Case Type

A. Overview

Although most of your cases will be of the routine sort that are the subject of this manual, you will undoubtedly be assigned cases that involve areas of law you are less familiar with or that demand more time and resources than the typical civil case. In this chapter we discuss some of these types of cases, including class actions, high-profile cases, pro se cases, bankruptcy appeals, patent cases, and international child abduction cases under the Hague Convention. This section offers some basic case management guidance, with the assumption that you will turn to other readily-available sources such as the *MCL 4th* for more information.[176]

B. Mass tort, class action, and other complex cases

Management of complex cases often requires additional procedures and special techniques to ensure that the case proceeds efficiently toward a just resolution without causing undue disruption to your docket and court operations generally.

1. Complex cases generally

Given that factors other than subject matter may determine a case's complexity, how can you distinguish ordinary cases from complex cases?

Consider some of the signs that a case may require more intensive case management:

- *Number of parties*. A complaint naming numerous plaintiffs or defendants, or numerous notices of appearances filed by counsel, may be early indicators that the case is complex and may require some of the case management techniques discussed in the *MCL 4th*, such as designating lead/liaison

176. *See* *MCL 4th*, *supra* note 22.

counsel, coordinating motions and responses, coordinating discovery, and establishing special trial procedures for multi-party cases.[177]

- *Number of similar or related cases*. The parties' Rule 26(f) report or case management statement may reveal other cases involving the same or similar transactions and legal claims that are pending in your court or other federal or state courts.[178] While judges may not be aware that a number of similar cases have been filed in a district, the clerk of court and clerk's office staff are often attuned to sudden trends or upticks in case filings (e.g., a large number of cases filed against a certain defendant). Sometimes, as with mass tort litigation, different attorneys may represent individual plaintiffs in different lawsuits and may not initially be aware of the full scope of the litigation. The same defendants, though, will be named in most related cases, and the defendants' attorneys can often give precise information about the number and location of similar cases. Some judges routinely ask counsel to identify all similar cases, even though such cases may not be technically "related to" each other as that term is used in local rules.
- *Mass-produced or mass-marketed products*. A claim alleging harm from a mass-produced product or a widely-marketed pharmaceutical product or medical device should alert you that similar cases could be or may have already been filed.
- *Competing experts*. A leading indicator of case complexity is that the parties have opposing experts who propose to testify about a central issue in the case, such as the capacity of a chemical or pharmaceutical product to cause the alleged injuries.[179]
- *Complex subject matter*. The subject matter of a claim may be inherently difficult. Patent law cases, for example, often involve disputes about highly technical and complex matters.
- *"Maturity" of the litigation*. If the dangers of the product in a product liability suit are clear from prior litigation (as with asbestos), past decisional history may diminish much of the case's complexity. If, however, a case involves liability for a product that has not been found in court to cause the type of alleged injury, you can assume that litigation over the scientific basis for causation will increase the case complexity.

177. *Id*., §§ 10.22 (coordinating counsel), 11.32 (motions), 11.4 (managing discovery), 12.22 (trial procedures).

178. For a discussion of Rule 26 reports and case management statements, *see supra* Chapter 2, Section C.7.

179. Management of cases with opposing experts is discussed *supra* Chapter 3, Section H and Chapter 6, Section C.3.b.

- *Class action allegations*. Managing a putative class action imposes additional responsibilities on a judge. You may need to control the parties' and their attorneys' communications with the putative class, designate counsel, rule on class certification, rule on the fairness of any proposed settlement or dismissal, and provide for the administration of an approved settlement.[180]
- *Volume of discovery and evidence*. Cases that revolve around standard transactions, such as the use of a form contract or a public forecast of corporate earnings, will generally involve less evidence and management than cases arising from a host of individualized transactions, such as claims of product liability and personal injury arising from the manufacture of an automobile. Cases involving extensive electronic discovery may also signal a need for greater judicial management.[181]

If you conclude that the case before you is complex, consult the appropriate section of the *MCL 4th* for the specific type of case. Additional resources on specific topics include guidance for judges and court clerks handling multi-district litigation;[182] a pocket guide on managing patent litigation and several other resources on management of intellectual property cases;[183] a report on two judges' use of expert science panels in complex cases involving scientific evidence;[184] and a pocket guide on the use of science tutorials to help judges understand relevant science and technology central to a case.[185] For cases involving complex scientific evidence, consult the *Reference Manual on Scientific Evidence, Third*.[186]

180. *See MCL 4th*, *supra* note 22, § 21.0.

181. *See Managing Discovery of Electronic Information*, *supra* note 28.

182. *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges* (Judicial Panel on Multidistrict Litig. (JPML) & Fed. Judicial Ctr. 2d ed. 2014) and *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks* (JPML & Fed. Judicial Ctr. 2d ed. 2014).

183. *See* Complex Litigation Committee, American College of Trial Lawyers, *Anatomy of a Patent Case* (Fed. Judicial Ctr. 3d ed. 2016); Peter S. Menell, et al., *Patent Case Management Judicial Guide* (Fed. Judicial Ctr., 3d ed. 2016); Peter S. Mennell, et al., *Patent Mediation Guide* (Fed. Judicial Ctr. 2019); *and* Jane C. Ginsburg & Robert A. Gorman, Copyright Law (Thomson Reuters 2012). The FJC also maintains a Patent Law Resources website, which compiles materials and resources on the topic.

184. Laural L. Hooper, Joe S. Cecil, and Thomas E. Willging, Neutral Science Panels: Two Examples of Panels of Court-Appointed Experts in the Breast Implants Product Liability Litigation (Fed. Judicial Ctr. 2001).

185. *Tutorials on Science and Technology* (Fed. Judicial Ctr. 2018).

186. *Reference Manual on Scientific Evidence*, *supra* note 54.

2. Mass tort cases

Mass tort claims will call for you to make a number of discretionary decisions at the outset of the litigation about whether to aggregate the individual claims for pretrial or trial purposes. These decisions will affect the direction of the litigation and may increase its complexity. You should consult the *MCL 4th* and look for the characteristics described above, even for the seemingly simple and straightforward act of consolidating cases within your district. As an alternative to aggregating similar claims, you should consider whether pursuing one or more test cases—or a sample of cases—would be the most efficient way to proceed.[187]

3. Class actions

Management of class actions should be governed by principles discussed in the *MCL 4th*. Prompt consultation of the *MCL 4th* will aid you in making the critical decision about when to rule on the certification issues and in identifying actions that might be considered before ruling on a motion to certify a class, such as whether to allow preliminary discovery on class issues. Chapter 10-C of the *Rutter Group Practice Guide: Federal Civil Procedure Before Trial* (National Edition)[188] also provides a useful overview of the procedural and substantive issues that arise in a class action. The pocket guide *Managing Class Action Litigation* offers an additional resource for managing these cases.[189]

C. High-profile cases

When you are presiding over a case that has attracted heightened public or media interest, you may face a number of management problems that will require you to take early action and be in constant communication and coordination with the clerk's office. Anticipating these management issues and having a plan in place to address them can help ensure that the case proceeds smoothly, with minimal external disruptions. The Administrative Office has developed a high-profile cases webpage on JNet with information and resources, including tips for developing a media plan, sample courtroom decorum orders, and sample media guidelines

187. For a discussion of whether, when, and how to aggregate mass tort cases, *see* Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 348–377 (1999).

188. *Rutter Group Practice Guide: Federal Civil Procedure Before Trial* (Nat'l ed.), ch. 10-C (Thompson 2019).

189. Barbara J. Rothstein and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (Fed. Judicial Ctr. 3d ed. 2010).

used in recent high-profile trials. You and your clerk of court should review these materials and discuss how to best handle media and security issues throughout the case. The Office of Public Affairs at the Administrative Office is also available to assist or answer questions about media-related issues.[190] In addition to these resources, the National Center for State Courts has developed a webpage entitled, "High-Profile Cases in the 21st Century," that offers best practices, checklists, and other resources to assist both judges and court staff with media, security, and public access issues.

The following discussion aims to capture the central issues you may face when presiding over a high-profile case. You should note that the issues and approaches are applicable to both high-profile civil and criminal cases.

1. Making a plan and assigning responsibilities

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

- protect yourself, the jurors, and court staff from improper influences;
- ensure the security of parties, witnesses, jurors, and other trial participants;
- give the public reasonable access to the trial as well as events and materials that would be available to the public in other cases;
- maintain efficiency of the pretrial and trial processes;
- provide for the jurors' comfort, especially if they are sequestered; and
- minimize disruption of other court functions.

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

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

190. The Office of Public Affairs can be reached at (202) 502–2600.

Consider including the following requirements in the plan:

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

In preparing the plan, *consider*:

- identifying who will be responsible for each of the requirements listed above;
- preparing a description of the duties and responsibilities of each person;
- clarifying where responsibilities overlap and how the staff involved should proceed if conflict or uncertainty arises; and
- meeting with staff at the outset to go over their responsibilities and meeting as needed for updates.

Your goal in taking these steps is not only to ensure there are no gaps in managing the events that swirl around a high-profile case, but also to foster cooperation and minimize conflict and confusion. If possible, you should build your list of tasks and responsibilities using the court's existing organizational structure rather than disrupting its normal procedures and staff assignments.

You should ensure that the court's planning involves everyone who may have an interest in the case or whose help you may need in managing the case. For example, the court is in control of the physical space in the courthouse and a certain boundary outside of it. The U.S. Marshals and contract court security officers will be part of your planning for security in those areas. Beyond that, other authorities will have responsibility and your planning may need to include local entities as well.

Perhaps your most valuable resources for guidance about managing a high-profile case are the judges and staff who have already handled such cases. For guidance on how to handle various aspects of planning for a high-profile case, contact the Administrative Office's Office of Public Affairs at (202) 502-2600.

2. Planning for the presence of the media

As soon as you are assigned a high-profile case, you should make plans for managing the media. The most intense visibility and scrutiny will occur if the case goes to trial, but interest can spike at other times, too, such as when you issue important rulings and hold key hearings. You and your clerk of court should discuss designating a primary media liaison to serve as point of contact for communicating with the media. If your court does not already have a clerk's office media policy in place, you and your clerk should discuss how the media will be provided information about key proceedings and accommodated in the courtroom or courthouse during proceedings.[191]

Consider the following in your planning:

- Which member of the court's staff will handle inquiries from the media? What instructions should that person, and other staff, be given for interactions with the media?
- How will the court determine who is a legitimate member of the media (e.g., through applications, background checks, passes)? *See* the "District Court High-Profile Case Resources" link on the high-profile cases JNet page for sample media credential application and registration forms.
- What arrangements must be made for routine updates of schedules and case status (e.g., postings on court website under "cases of interest,"[192] recorded phone message, or written notice posted at designated location in the courthouse)?
- What arrangements must be made for providing the media with copies of case documents, exhibits, and rulings (e.g., ask parties to file two sets of papers so that one can be provided to the media; post all written documents, including rulings, on a case-specific site on the court's website)?
- What will the media be permitted to know about the jury?
- Is the courtroom large enough, or will you need an overflow room with closed-circuit television?
- Is the courtroom located in a place where the presence of the media will interfere with other court business as little as possible?

191. For a list of topics to consider during the planning process, *see* "25 Questions: How to Deal with the Media in a High Profile Case," available on JNet.

192. *See* online appendix for examples.

- How many seats in the courtroom will be allocated to the media and by what procedure will they be allocated (e.g., one pass per media organization, permanent or daily passes, forfeiture of a seat if it is not occupied within ten minutes before trial starts)?
- Where will sketch artists be seated to provide an unobstructed view? Will they be permitted to sketch victims, children, or the jury?
- Does your court have a policy on portable communication devices (e.g., smart phones, laptops, tablets, etc.) in the courthouse or courtroom? If not, consider whether you need to restrict use of portable electronic devices during hearings or trial.[193]
- Keep in mind that Judicial Conference policy does not permit the use of television cameras or other recording devices in the courtroom.[194]

3. Interacting with the media

a. Court interactions with the media

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

Consider:

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

193. *Guide to Judiciary Policy*, vol. 10, ch. 5.
194. *Guide to Judiciary Policy*, vol. 10, ch. 4.

The Administrative Office has developed a Journalist's Guide to the Federal Courts, available on the uscourts.gov webpage, which provides general information on media access to court proceedings, obtaining court documents on PACER, and the key events in criminal and civil proceedings. You should direct media to that webpage for basic information.

b. Attorney interactions with the media

One unfortunate but real possibility in a high-profile case is that the attorneys will use the media to influence the public (and potential jurors) of their view of the case. If at all possible, you should avoid imposing gag orders on the attorneys, as such orders can heighten animosity and be difficult and time-consuming to enforce. A much better approach is to meet with the attorneys early in the case and communicate your expectations for their conduct. You can ask for their agreement to observe limits on what is said to the media, and you should remind them of any disciplinary rules you intend to apply. If the attorneys are unwilling to agree or are likely to violate the agreement, it may be appropriate to impose a gag order.

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

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

Consider:

- withholding jurors' addresses from the public and media;
- during voir dire, asking prospective jurors whether the presence of the media makes them uncomfortable, will distract them, or will prevent them from deciding the case impartially;
- inquiring at voir dire and periodically thereafter whether any juror has been approached by the media or publishers with offers to purchase his or her story and, if so, determining whether this may bias the juror or affect how the juror listens to the evidence;

- ensuring that jurors can enter and leave the courthouse safely and without interaction with the media or public;
- if the jurors must walk through or eat in public spaces, cordoning off space for them and making sure they are accompanied by a member of the court staff;
- instructing the jurors daily not to watch television coverage of the trial, read press accounts or social media posts, or talk with anyone about the trial;
- providing the jurors daily newspapers with articles about the trial removed and directing them not to read unredacted versions;
- keeping the jurors well informed about the daily schedule (e.g., when breaks will be taken) and about the overall trial schedule (e.g., approximately how much longer the case will continue);
- permitting the jurors to use such aids as note taking and notebooks (prepared by the court or parties under your supervision and containing, for example, lists and pictures of witnesses and copies of key documents or evidence);[195]
- instructing the media that they are strictly forbidden from interviewing jurors during the trial;
- advising the jurors that the decision whether to be interviewed at the end of the trial is theirs alone and asking them to be sensitive to the privacy of fellow jurors if they do choose to speak with the media;
- determining how the jurors will be dismissed when the trial ends so that they are not mobbed by the parties, public, or media and determining whether and how they will meet the media and the parties' attorneys;
- meeting informally with the jurors after the trial to thank them, answer their questions, and explore whether they have any remaining needs; and
- determining what post-trial arrangements can be made, if needed, to deal with any psychological trauma experienced by the jurors.

Your planning and thoughtful consideration of the jurors should be evident from voir dire through post-trial events. The more rapport you can develop with the jurors, the more likely they will be to alert you to any problems or interference

195. As noted in Chapter 6, Section D.1.b, if the parties stipulate to the use of jury notebooks, you may wish to preadmit any exhibits to be included therein.

they experience. Make sure, however, that you plan for the extra time it will take to select the jurors and ensure their comfort and security in a high-profile case.

5. Planning for security

Like all other aspects of managing a high-profile case, you should make plans early in the case for meeting its security requirements. The U.S. Marshals may come to you with a plan already worked out, which you should review and approve when you are satisfied with it. Any entities likely to be involved in security, such as the U.S. Marshals and local authorities, should be consulted, and each entity's responsibilities should be clearly outlined.

When reviewing the U.S. Marshals plan, *consider* asking the following questions:

- Is security needed only to control crowds, or could there be threats to the safety of participants in the case, including yourself, court staff, and witnesses?
- Is the case of local or national interest?
- Is security needed both inside and outside the courthouse?
- Are demonstrations or protests likely?
- To what extent might certain proposed security measures unduly prejudice a party to the case?

Answers to these questions will help your security coordinator determine the number, type, and allocation of security personnel needed.

Some additional steps you should *consider* are:

- ensuring the courtroom is large enough to accommodate additional security personnel if higher levels of security are needed for the jurors, witnesses, or yourself;
- ensuring security is provided for exhibits during trial and when court is not in session;
- conferring with the media to ensure that media equipment will not compromise security, safety, or Judicial Conference policy;
- determining what kind of security, if any, is needed outside the courthouse (e.g., roadblocks, a ban on parking, outside guards, or surveillance) and conferring with local authorities as needed;

- determining who should be permitted access to the courthouse, when (e.g., evenings), and to what parts of the courthouse;
- if access is restricted to certain parts of the courthouse, making arrangements for barriers, signs, and so forth;
- determining how the media, the public, the parties, witnesses, jurors, and court staff will enter the courthouse and how they will be screened for entry;
- providing security (e.g., escorts) for the jurors if they must walk through public areas or must otherwise be protected; and
- trying to anticipate whether additional security will be needed (in the courtroom and/or outside the courthouse) when the verdict is announced.

6. Managing the courtroom

A high-profile trial will bring the media and the public to your court along with attitudes or agendas that you may not have encountered in other cases. You should communicate your expectations for their conduct clearly. You might want to set out your rules and expectations in a decorum order.

Consider including the following in your decorum order:

- how persons will be screened for entry into the courtroom (e.g., color-coded, photo-ID passes);
- the time seating will begin each morning and afternoon;
- seating arrangements in the courtroom for the media, the public, and those involved in the case who need reserved seating;
- entry and reentry rules while court is in session;
- restrictions on portable electronic devices, including smart phones (if your court has a portable communication devices policy, consider whether you need to impose more stringent procedures for high-profile cases);
- the appropriate location for interviews (never in the courtroom);
- media equipment permitted in the courtroom (as noted earlier, cameras and recording devices are prohibited in district courts by Judicial Conference policy[196]);
- how questions from the media and public will be handled;

196. *Guide to Judiciary Policy*, vol. 10, ch. 4.

- how the media and public can obtain copies of exhibits and other case documents; and
- a clear prohibition against communicating with jurors during the trial.

7. Managing the case and the rest of your docket

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

Whether you will need assistance with the rest of your docket will depend on the nature of the high-profile case. If it is not a complex case and the media and public interest focus mainly on the trial, you may be able to manage your other cases as well. But if the high-profile case is both complex and intensely followed even in its earliest stages, you may find you need help keeping your other cases—particularly your criminal cases—on schedule. You should speak with your chief judge about your needs, and if necessary, request authorization for a temporary emergency law clerk from your circuit's judicial council.[197]

8. Social media manipulation and cyberattacks

A high-profile case may attract the attention of foreign state actors or others who, seizing on the heightened public interest, can use targeted advertising, fake social media accounts, or software-based bots to post content aimed at manipulating public opinion or undermining trust in the judiciary. While your ability to respond to these sorts of coordinated efforts may be limited, you should be mindful of the possible impact on potential or sitting jurors. The Court Administration and Case Management Committee has developed model jury instructions directing jurors that they cannot use social media to communicate or learn about their case during the trial. The instructions include language to be used during voir dire, at the start of trial, at the close of each trial day, at the next day's restarting of the trial, and as part of your final jury instructions.

Keep in mind that any social media post that threatens you, court staff, witnesses, or parties to the case should be reported to the U.S. Marshals or its Judiciary Security Inspector.

197. *Guide to Judiciary Policy*, vol. 12, §§ 560.60.30, 615.50.20.

There have also been incidents of cyberattacks on courts where high-profile cases are pending. If you are presiding over a case that could make your court the target of a cyberattack, your clerk of court should contact the Administrative Office for possible assistance with heightened security services. In particular, the Administrative Office may be able to provide your court with an "enhanced watch list" service, which evaluates existing court security protocols and provides enhanced monitoring services for internet traffic in and out of the court.

D. Pro se cases

In many districts, lawsuits with unrepresented, or "pro se," litigants comprise a significant portion of the court's civil caseload. Most pro se litigants are plaintiffs; many, but not all, are also prisoners.[198] Cases involving pro se litigants present special challenges for several reasons, not the least of which is your obligation to ensure equal justice for litigants who may have little understanding of legal procedures or the law. At each stage in the case, you may need to take actions not required in cases in which all parties are represented by counsel.

The burden for managing pro se cases falls heavily on court staff, as well as on the judge. Pro se litigants tend to have many needs and questions and are likely to press court staff for assistance. Court staff are usually acutely aware that they should be helpful but must not give legal advice to any litigant. At the same time, there are many actions court staff, especially pro se law clerks, can and must do.

Techniques for managing pro se litigation vary from case to case and may be affected by special procedures in your district. Your approach to managing pro se cases will further turn on two key considerations: (1) whether the case involves a pro se plaintiff who is also a prisoner, as that term is defined in the Prison Litigation Reform Act (PLRA);[199] and (2) whether a pro se plaintiff is seeking to proceed in forma pauperis (IFP). "Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges" can be a valuable resource for courts in this regard, as it sets forth the various differences between nonprisoner and prisoner pro se litigants and highlights the many issues courts face in managing cases involving pro se litigants.

198. The types of actions filed by pro se prisoners typically include habeas corpus actions under 28 U.S.C. §§ 2241, 2254, or 2255, civil rights complaints under § 1983, *Bivens* actions, and actions under the Federal Tort Claims Act.

199. Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, April 26, 1996, 110 Stat. 1321, Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996.

1. Early Screening

You and the parties may save considerable time later if you take a few minutes early in the case to start it down an orderly path. *Consider* generally the following approaches for early management of all pro se cases:

- Reviewing the pleadings as soon as they are filed; if pleadings fail to meet technical requirements, informing the parties and giving them an opportunity to cure defects. Actions brought by pro se litigants must be liberally construed, and if the litigant has paid the filing fee, generally may not be dismissed before service unless legally frivolous.
- Checking whether the pro se litigant has previously filed cases in your district.
- Consolidating related cases, such as cases involving similar claims arising in the same institution.
- Checking promptly for threshold issues, such as subject matter jurisdiction, personal jurisdiction, venue, and proper parties.
- Evaluating whether the case is appropriate for appointment of counsel (*see infra* Section D.2).
- Using routine show cause orders to trigger dismissals under the Rules of Civil Procedure if service of the complaint is not effectuated by the prescribed deadline.[200]

a. Prisoner cases[201]

The PLRA governs many aspects of cases brought by incarcerated parties. In fact, you have a special obligation under the PLRA to screen, before docketing, if feasible, or as soon as practicable after docketing, a civil complaint filed by a prisoner seeking redress from a government entity or officer thereof, or bringing suit with respect to prison conditions under 42 U.S.C. § 1983 or other federal law.[202] On review, you must identify cognizable claims or dismiss all or part of the complaint, if the complaint:

200. Remember, however, that if the plaintiff is proceeding in forma pauperis, the court has an obligation to issue and serve all process in the case. *See* 28 U.S.C. § 1915(d).

201. A very helpful manual for staff, as well as for judges, is the *Resource Guide for Managing Prisoner Civil Rights Litigation*, prepared in response to passage of the PLRA. Although the resource guide was published in the mid-1990s, the PLRA has not changed, and the basic advice provided by the *Resource Guide* remains useful.

202. 28 U.S.C. § 1915A(a).

- is "frivolous, malicious, or fails to state a claim upon which relief may be granted;" or
- "seeks monetary relief from a defendant who is immune from such relief."[203]

Dismissal may also be appropriate if:

- it is apparent from the face of the complaint that the prisoner has not exhausted available administrative remedies (42 U.S.C. § 1997e(a));[204]
- the prisoner is alleging "mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act" (42 U.S.C. § 1997e(e)); or
- the prisoner is proceeding in forma pauperis (IFP) and has had three or more actions or appeals in federal courts previously dismissed as frivolous, malicious, or for failing to state a claim upon which relief can be granted, unless the prisoner is in imminent danger of physical injury (28 U.S.C. § 1915(g)).[205]

In prisoner cases, the screening process should also include consideration of whether the claims are really challenges to the prisoner's conviction or sentence, which must be asserted in a habeas corpus petition. In many courts, pro se law clerks conduct an initial screening of prisoner cases and prepare a draft order for the district judge assigned to the case if there is any basis warranting dismissal prior to service or if further action is required by the pro se litigant. Most, but not all, prisoner pro se parties move to proceed IFP. Early screening is often done at the same time the court considers the prisoner's IFP motion, discussed *infra* Section D.1.b.

203. *See* 28 U.S.C. § 1915A(a)-(b); 42 U.S.C. § 1997e(c).

204. It is important to note, however, that failure to exhaust administrative remedies is an affirmative defense that defendants must plead and prove, and that a prisoner-plaintiff is not required to specifically plead or demonstrate exhaustion in the complaint. *See Jones v. Bock*, 549 U.S. 199, 204, 216 (2007).

205. *See Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020) (holding that regardless of whether the dismissal is with prejudice or without prejudice, the dismissal of a prisoner's civil lawsuit, for failure to state a claim, counts as a strike under the PLRA's three-strikes rule); *see also Coleman v. Tollefson*, 135 S. Ct. 1759 (2015) (holding that, at least as to a prisoner's first two dismissals, § 1915(g) does not require an "affirmed dismissal," but focuses on dismissal at the trial court level).

b. In forma pauperis cases

i. Prisoner IFP cases

Most, but not all, prisoner plaintiffs also seek to proceed IFP, as they are typically unable to pay the full filing fee upfront. A grant of IFP to a prisoner plaintiff does not relieve them of their obligation to pay the full filing fee. Rather, it relieves them of their obligation to pay the full fee upfront and allows them to make payments toward the balance of the fee over time. Under the PLRA, the court must:

- require a prisoner seeking IFP status to include in an affidavit "a statement of all assets [the] prisoner possesses" and "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint . . ." (28 U.S.C. § 1915(a));
- require prisoners who are granted IFP status to pay the filing fee, by a partial initial payment from funds available and through monthly payments forwarded by the institution based on the balance in the prisoner's account (28 U.S.C. § 1915(b));
- permit prisoners with no assets and no means to pay the filing fee to proceed without prepayment of the initial partial filing fee (28 U.S.C. § 1915(b)(4)); and
- require prisoners against whom judgment is entered to make full payment of any costs ordered (28 U.S.C. § 1915(f)(2)).

Note that a fee collection order is required whether the prisoner has monetary assets or not.

ii. Nonprisoner IFP cases[206]

A grant of IFP status allows nonprisoner plaintiffs to proceed without paying the filing fee. Nearly all courts require that nonprisoners support their IFP motions with a financial affidavit or sworn statement attesting to their inability to afford the filing fee. You will need to decide how deeply to probe into a nonprisoner's assertion of indigency, and if you have doubts as to its veracity, you may consider asking for supporting documentation, such as paystubs or tax documents. You

206. You may also wish to consult the *Pro Se Case Management for Nonprisoner Civil Litigation*, *supra* note 73, for steps you can take to manage pro se litigation more efficiently and ways to help pro se litigants better navigate the complexities of litigation.

may also wish to consider warning pro se plaintiffs of the potential for fee shifting and other possible costs should they be unsuccessful in their suit.

Much like the prescreening required of prisoner complaints under the PLRA, the complaints of plaintiffs seeking to proceed IFP must be dismissed if, at any time, you determine that:

- the complaint or any portion thereof is "frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief" (28 U.S.C. § 1915(e)(2)(B)); or
- the IFP plaintiff's allegation of poverty is untrue (28 U.S.C. §1915(e)(2)(A)).

2. Securing counsel for pro se litigants

Pro se litigants in civil cases have no constitutional right to counsel. The decision whether to appoint counsel in these cases is within your discretion and should be made on a case-by-case basis. The exercise of your discretion should, however, be guided by both statute and case law. Under 28 U.S.C. § 1915(e)(1), the "court may request an attorney to represent any person unable to afford counsel."

Because no public funds are available (except under the Criminal Justice Act, 18 U.S.C. § 3006A, for representation of habeas corpus petitioners), appointment of counsel can present substantial difficulty. Many judges, however, attempt to find counsel for nonfrivolous cases because the need to protect the rights of an unrepresented party places additional burdens on a judge and generally will be better met by counsel. Even if attorneys are unwilling to take full responsibility for litigating a case, they may be willing to advise the plaintiff, or they may be willing to be appointed for a specific limited role, such as to assist the pro se litigant during trial. Sometimes, consolidating related pro se cases can make the litigation of sufficient public interest to attract counsel.

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

When you decide that appointing counsel is warranted, you should call on resources available locally. Some courts, by local rule, require pro bono service as a condition of admission to the bar. A number of districts have civil pro bono panels of attorneys who have volunteered to represent indigent litigants; some

local and federal bar associations may also assist in securing counsel.[207] Some volunteer programs include a screening process to identify meritorious cases. You should be aware of the options available in your district.

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

In some cases filed pursuant to specific statutes (e.g., 42 U.S.C. § 1983 and other civil rights statutes), there is a possibility that attorneys' fees could be awarded. Attorneys' fees might also be recovered in cases in which there is a contingency fee arrangement and the plaintiff prevails. In prisoner cases filed under 42 U.S.C. § 1988, however, the PLRA prescribes that fees may not be awarded unless: (1) they were directly and reasonably incurred in proving an actual violation of the plaintiff's rights that are protected by a statute pursuant to which a fee may be awarded under 42 U.S.C. § 1988; and (2) the fees are proportionately related to court-ordered relief for the violation or were directly and reasonably incurred in enforcing relief ordered for the violation (42 U.S.C. § 1997e(d)). The PLRA also limits the hourly rate and provides that when a prisoner is awarded monetary damages, a portion of the judgment must satisfy the award of attorneys' fees.[208]

3. Scheduling and monitoring the pro se case

A conference with the judge can send a powerful message to pro se litigants that their cases are receiving the court's attention. Pretrial conferences involving a pro se litigant should be held in the courtroom (rather than in chambers) and on the record. Other considerations for how you approach scheduling and monitoring pro se cases will also be influenced by whether the litigant is in custody.

207. A list of districts with pro bono programs and attorney panels is available on the District Court Pro Se Litigation page on the Federal Judicial Center website.

208. *See Murphy v. Smith*, 138 S. Ct. 784, 790 (2018) (holding that in cases governed by § 1997e(d), the district court must apply as much of the judgment as necessary, up to 25 percent, to satisfy an award of fees).

a. Prisoner cases

Many judges do not believe that pretrial conferences are appropriate in most pro se cases involving an incarcerated pro se litigant. Thus, most courts, by local rule, exempt such cases from the requirements of Federal Rule of Civil Procedure 16. Most courts instead have a standing practice order tailored to prisoner cases. The standing practice order may include instructions, contain pertinent portions of federal and local rules, and provide various notices, such as requiring the prisoner to keep the court apprised of a current address.

Many cases involving prisoner pro se litigants can be decided on the papers, after the prisoner is required to respond to an order for a more definite statement or after the defendant has filed a motion for summary judgment. A few cases, however, may involve allegations that appear to warrant the time and effort of a pretrial hearing. In some districts, magistrate judges have been assigned this responsibility.[209]

If a hearing in a prisoner pro se case is warranted, *consider* the following approaches:

- conferring by telephone conference; or
- using, if available in your courthouse, videoconferencing technology to conduct hearings in prisoner cases.

Many courts use a *Spears* hearing for cases involving a prisoner pro se litigant.[210] The purpose of the hearing, which is "in the manner of a motion for a more definite statement" and is usually conducted by a magistrate judge, is to bring into focus the factual and legal basis of the plaintiff's claim. Hearings can be held at the prison, by telephone, or by videoconference. Many cases can be resolved through a *Spears* hearing, either by dismissal or by agreement of prison officials to solve a problem. Other cases may proceed to discovery with the issues, claims, and legal theories narrowed or clarified.

Some courts use a *Martinez* report,[211] which requires prison officials to investigate the prisoner's complaint, to report the findings of the investigation, and to supply certain standard information. A *Martinez* report can help you and

209. *See* 28 U.S.C. § 636(b)(1)(B) (magistrate judge may issue report and recommendation following hearing on "prisoner petitions challenging conditions of confinement").

210. *See Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

211. *See Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978); *see also Gee v. Estes*, 829 F.2d 1005 (10th Cir. 1987).

the institution determine whether a case is frivolous and can be disposed of by motion,[212] or whether there are problems the institution can address informally.

b. Nonprisoner cases

An initial case management conference can be useful when the pro se litigant is not in custody, particularly for identifying and narrowing issues and for establishing your control over the case.

Consider holding an early case management conference in cases with nonprisoner pro se litigants for the purpose of:

- explaining the applicable procedural requirements in straightforward terms;
- reinforcing to the litigants the need to comply with the Federal Rules of Civil Procedure and local rules;
- pointing out available resources such as court-developed forms or pro se help centers;
- discussing a schedule for the case;
- entering a scheduling order to ensure that the case moves to prompt resolution and including deadlines for discovery, for submission by the defendant of all relevant records and documents, and, in appropriate cases, for the filing of a motion for summary judgment and the response (because the relevant facts usually are in the defendant's control, early disclosure will facilitate resolution of the action);
- establishing the least disruptive discovery method adequate to complete the task (a deposition with written questions may be preferable, for example, to a live deposition conducted by an unrepresented party);
- informing the pro se litigant that the case will be closely monitored and identifying a person to contact should problems arise;
- explicitly requiring the pro se litigant to maintain a current address and telephone number on record with the court; and
- making clear to the pro se litigant the requirement that all communications with the court be served on all opposing parties.

212. Note, however, that, with few exceptions, *Martinez* reports do not fall within any exception to the general rule that the sufficiency of a complaint must rest on its contents alone. *See Gee v. Pacheco*, 627 F.3d 1178, 1186–87 (10th Cir. 2010).

4. Holding settlement discussions and conducting the trial

Many cases involving a pro se litigant are appropriate for resolution by settlement rather than by judgment or trial. At the same time, anyone who assists the parties in such cases with settlement negotiations runs the risk of being pressed by the pro se party to give legal advice. This is one reason why most federal courts exempt pro se cases from their ADR programs. Likewise, you as the judge should be cautious about assisting with settlement since your assistance will very likely be misunderstood by the pro se litigant. Many commentators worry, nonetheless, that it is unfair to the pro se litigant for courts not to provide settlement assistance. To address this problem, you might consider appointing counsel for the limited purpose of representing the pro se litigant during settlement discussions (*see supra* Chapter 5, Section E.5).[213] Some courts also have programs where volunteer attorneys represent pro se plaintiffs for purposes of mediation in certain types of cases (e.g., employment discrimination).[214] In addition, some courts offer mediation programs specific to prisoner cases.

If the case proceeds to trial, you should give serious consideration to appointing counsel. Should you be unable to find volunteer counsel, or should the pro se litigant refuse counsel, you will need to provide guidance as the pro se party attempts to handle the trial alone. You can also provide sample documents and forms (e.g., forms for witnesses and exhibits) before trial to help the pro se litigant complete the necessary preparations.[215] You will undoubtedly need to personally instruct the pro se litigant as well, while carefully maintaining your impartiality.

Before the trial begins and then again on the record, you may want to tell the pro se litigant, with the other party present, what the trial will entail. For a detailed discussion of issues to address with pro se litigants at the pretrial conference, *see* *Pro Se Case Management for Nonprisoner Civil Litigation*.

Consider the following in conducting a pretrial conference in nonprisoner and prisoner pro se cases:

- verifying that the party is not an attorney and chooses to proceed pro se;

213. For further discussion of providing settlement assistance to pro se litigants, *see* *Pro Se Case Management for Nonprisoner Civil Litigation*, *supra* note 73, ch. II(C). *See, e.g.,* Northern District of Illinois, Settlement Assistance Program for Pro Se Litigants.

214. *See* the Southern District of New York's mediation program for pro se employment discrimination cases.

215. The Southern District of New York has a detailed trial manual for pro se litigants, entitled "Representing Yourself at Trial," that discusses how to prepare for trial and each phase of trial, including jury selection, opening statements, questioning witnesses, and closing arguments.

- warning the pro se litigant of the risks of proceeding to trial pro se and explaining the benefits of representation;
- explaining the trial process (e.g., that you will hear the plaintiff first, then the defendant; that interruptions will not be permitted; that a record will be made);
- explaining the elements of the case (e.g., that the plaintiff is asking for _____; that this can be granted if the plaintiff shows _____);
- explaining that the party bringing the action has the burden to present evidence in support of the relief sought;
- explaining the kind of evidence that may be presented (e.g., testimony from witnesses and exhibits) and that everyone who testifies will do so under oath;
- explaining the limits on the kind of evidence that may be considered (e.g., describe hearsay evidence and explain that it may not be admitted at trial);
- asking both parties whether they understand the process and the procedure; and
- permitting a non-attorney advocate to sit at the pro se party's counsel table and explaining that this advocate may provide support but will not be permitted to argue on behalf of a party or to question witnesses.[216]

If you need to question the pro se litigant during the trial (or at any other time), make sure you use questions that seek to obtain general information to avoid the appearance of advocacy on behalf of (or against) the pro se litigant.

Prior to trial in a pro se case, you should *consider*:

- ensuring that any prisoner plaintiffs and witnesses will be transported to and from the courthouse by issuing a subpoena ad testificandum to their custodians well in advance of the trial;
- planning for the security and custody of any prisoner litigants and witnesses while at the courthouse; and
- anticipating whether additional security will be needed in the courthouse or courtroom.

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

If the case proceeds to a **bench trial**, you should decide the matter as promptly as possible. You may also wish to *consider* requiring the parties to submit proposed findings of fact and conclusions of law in advance of your decision. If the case proceeds to a **jury trial**, you should *consider* advising the jury that a party's prisoner or pro se status does not mean that their claims or defenses lack merit.

5. Resources for pro se litigants

For the benefit of pro se litigants, some districts have developed manuals or booklets explaining the litigation process in simple terms or have tabs with information and resource materials on their websites. A few districts also have pro se clinics and pro se mediation programs. The FJC has created a central repository, entitled "District Court Pro Se Litigation: Resources for Litigants, Court Staff, Attorneys, and Judges," that collects pro se resource materials from district court websites throughout the country. The repository provides links to district courts' pro se webpages, prisoner and non-prisoner pro se manuals (including foreign-language versions), pro se clinics, and pro se mediation programs, as well as a list of publications on pro se litigation. You should be aware of the information and resources your district has available for pro se litigants and consider mentioning them in your case management guidelines or in your scheduling order to ensure that pro se litigants know of and access these resources early in the case.[217] Some courts also provide standard forms through the clerk's office and on the court's website.[218]

E. Bankruptcy appeals

You may be assigned an appeal from a decision by a bankruptcy judge in your district. Bankruptcy appeals are governed by 28 U.S.C. § 158, Federal Rules of Bankruptcy Procedure 8001 et seq, and applicable local rules.[219]

217. The Federal Bar Association also offers "Representing Yourself in Federal District Court: A Handbook for Pro Se Litigants."

218. *See, e.g.*, Legal Help Center Templates & Packets available on the U.S. District Court for the Northern District of California's webpage (compiling forms for pro se litigants).

219. For additional information, see Bankruptcy Appeals outline by Judge Barry Russell (available on FJC website). The Bankruptcy Bar Association for the District of Maryland has also prepared a Bankruptcy Appeals Manual, available on the District of Maryland's website, that provides a useful overview of the procedures and substantive law for bankruptcy appeals.

Appeals may arise out of a main bankruptcy case or an adversary proceeding. Main bankruptcy cases[220] are commenced by the filing of a petition under a chapter of Title 11 of the U.S. Code:

- Chapter 7 cases are liquidation cases for either companies or individuals.
- Chapter 9 cases are filed to adjust the debts of a municipality.
- Chapter 11 cases are reorganization (or liquidation) cases for individuals or companies.
- Chapter 12 cases are filed to adjust the debts of family farmers or fishermen.
- Chapter 13 cases are filed to adjust the debts of individuals.
- Chapter 15 cases are international cross-border insolvency cases.

Within each type of case, lawsuits may be commenced. These lawsuits are filed as "Adversary Proceedings" under Fed. R. Bankr. P. 7001.

1. District court jurisdiction

Under 28 U.S.C. § 158(a), a district court has the jurisdiction to review final judgments, orders, and decrees from the bankruptcy court in its district. A circuit, however, may establish a bankruptcy appellate panel (BAP) composed of bankruptcy judges in the circuit that may hear and determine bankruptcy appeals with the parties' consent. 28 U.S.C. at § 158(b)(1). The First, Sixth, Eighth, Ninth, and Tenth Circuits have established BAPs. In those circuits, an appeal from the bankruptcy court automatically goes to the BAP unless the appellant (at the time of filing the notice of appeal) or any other party (within 30 days after service of the notice of appeal) elects to have the district court hear the case. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8005(a).

In limited circumstances, a bankruptcy court ruling may be appealed directly to the court of appeals under 28 U.S.C. § 158(d)(2). Direct appeals, however, are at the discretion of the appellate court. The procedures for certifying a direct appeal are set forth in Fed. R. Bankr. P. 8006. The Fifth Circuit Court of Appeals has adopted its own procedure for the certification of a direct appeal under 28 U.S.C. § 158(d).

220. For a basic overview of each type of case and a glossary of bankruptcy terminology, consult the Bankruptcy page on uscourts.gov.

District courts and BAPs also have jurisdiction to review interlocutory orders and decrees issued by the bankruptcy court under 11 U.S.C. § 1121(d) increasing or reducing exclusivity time periods for the filing of a Chapter 11 plan, and other interlocutory orders with leave of court. 28 U.S.C. § 158(a)(2), (3).

2. Appeal procedure

To appeal a bankruptcy court's judgment, order, or decree, a party must file a notice of appeal with the bankruptcy court within 14 days after entry of the decision. Fed. R. Bankr. P. 8002(a). To appeal an interlocutory order of the bankruptcy court, a party must file a notice of appeal and a motion for leave to appeal in that court. Fed. R. Bankr. P. 8004.

In civil cases, orders ordinarily remain interlocutory until "an order resolves the entire case."[221] In contrast, orders in bankruptcy cases qualify as "final" when they definitively dispose of discrete disputes within the overarching bankruptcy case.[222] For example, an order denying relief from the automatic stay is final because it resolves the discrete dispute of whether the stay should be modified.[223] An appeal filed after the 14-day period will be dismissed as untimely.[224]

Within 14 days after filing the notice of appeal or, in the case of an interlocutory appeal, after entry of an order granting leave to appeal, the appellant must file with the bankruptcy clerk and serve on appellees: (1) a designation of items to be included in the record on appeal; and (2) a statement of issues on appeal. Fed. R. Bankr. P. 8009(a)(1). Within 14 days of service of the appellant's designation of record, an appellee may file a designation of additional items to be included in the record. Fed. R. Bankr. P. 8009(a)(2). Note that an appellee does not file a statement of issues on appeal unless the appellee has filed a cross-appeal.

The bankruptcy court clerk will transmit the notice of appeal, designation of record, and statement of issues to either the district court or the BAP, as appropriate. If the appeal is sent to the district court, the clerk will docket the appeal and notify the parties of the assigned judge. Bankruptcy Rules 8014–8018 set forth the requirements and timeline for briefing an appeal to the district court. Your district may have adopted local bankruptcy rules that supplement these rules. You may, by order in a particular case, modify the briefing schedule for good cause. A party may request that oral argument be held or not be held. Fed.

221. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020).

222. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015).

223. *Ritzen Grp.*, 140 S. Ct. at 592.

224. *Id.*

R. Bankr. P. 8019(a). There is a presumption that the matter will be set for oral argument, unless after examining the briefs, the district court determines that: (1) the appeal is frivolous; (2) the dipositive issue or issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and oral argument would not significantly assist you in reaching a decision. Fed. R. Bankr. P. 8019(b).

3. Initial jurisdictional issues to examine

As with other civil cases, there are certain preliminary issues you should examine in each bankruptcy appeal. Even if not raised by the parties, you are required to raise jurisdictional issues sua sponte and dismiss the appeal if no valid basis for jurisdiction exists. The 14-day time limit prescribed by Rule of Bankruptcy Procedure 8002(a) is mandatory, and in the absence of a timely notice of appeal, the district court lacks jurisdiction to hear the appeal.[225] However, there are multiple ways in which the 14-day time limit may be extended. These include motions (which under Rule of Bankruptcy Procedure 8002(b) must be filed in the bankruptcy court within 14 days of entry of the order): (i) a motion to make additional findings filed under Rule of Bankruptcy Procedure Rule 7052; (ii) a motion to alter or amend the judgment filed under Rule of Bankruptcy Procedure 9023; or (iii) a motion for relief filed under Rule of Bankruptcy Procedure 9024. In addition, the bankruptcy court may order an extension of the 14-day period under Rule of Bankruptcy Procedure 8002(d).

You should also ensure that the appellant has standing to raise the issues on appeal. Note that, to appeal a bankruptcy court order, an appellant must be a "person aggrieved" by that order.[226]

Be aware that a bankruptcy appeal may be "equitably moot." This concept, which is different from traditional mootness rooted in Article III's live case or controversy requirement, recognizes the existence of a point beyond which the reviewing court cannot order fundamental changes in reorganization actions.[227]

225. *See, e.g., In re Sobczak-Slomczewski*, 826 F.3d 429, 431–32 (7th Cir. 2016).

226. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 248–49 (3d Cir. 2000); *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983) (stating that to have standing to appeal, the appellant bore the burden of showing she was directly and adversely affected by the bankruptcy court's order).

227. *See, e.g., In re Sneed Shipbuilding, Inc.*, 916 F.3d 405, 408 (5th Cir. 2019); *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (Equitable mootness authorizes an appellate court to decline review of an otherwise viable appeal of a Chapter 11 reorganization plan, but only when the reorganization has progressed too far for the requested relief practicably to be granted.); *The Nancy Sue Davis Trust v. Davis Petrol. Corp.*, 402 B.R. 203, 207–08 (S.D. Tex. 2009).

However, at least one court of appeals has held that the concept should be treated as a "scalpel rather than an axe" and should not be used expansively.[228]

4. Standards of review

Under Federal Rule of Bankruptcy Procedure 8014(a)(5), the appellant must state the appropriate standard of review in the opening brief. Generally, in a bankruptcy appeal, the district court reviews the bankruptcy court's decisions under the same standards employed by the courts of appeals. Accordingly, conclusions of law are reviewed de novo, findings of fact are reviewed for clear error, and mixed questions of fact and law are reviewed de novo.

5. Withdrawal of the reference

Bankruptcy appeals should not be confused with the withdrawal of the reference in bankruptcy cases. Jurisdiction over all bankruptcy cases and adversary proceedings is established under 28 U.S.C. § 1334. With a few rare historical exceptions, every judicial district automatically refers all bankruptcy cases and adversary proceedings for consideration by the bankruptcy judges pursuant to authority granted by 28 U.S.C. § 157(a). This automatic referral of bankruptcy cases is revocable by the district court on a case-by-case (or even a portion of a case) basis.[229]

If the reference is withdrawn under § 157(d), the matter becomes pending before the district judge and the district judge becomes the trial judge for all purposes. Appeals of the district court rulings following the withdrawal of the reference are made to the courts of appeals.

The district court—having withdrawn the reference from the bankruptcy court—may subsequently determine to again refer the matter to the bankruptcy court. In that event, the bankruptcy court again becomes the trial court, and appeals of the decisions of the bankruptcy court are taken in the manner described above.

228. *In re Sneed Shipbuilding, Inc.*, 916 F.3d at 409.

229. 28 U.S.C. § 157(d) ("The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.").

F. Patent Cases

While the case management practices discussed throughout this manual also apply to patent cases, these cases often require special attention at the outset to address early discovery relating to claim construction, the timing and procedures for claim construction, and the need for a tutorial to educate you on the technology at issue. As a starting point, the FJC has developed a Patent Law Resources webpage, which compiles and provides links to numerous manuals and resource materials on both patent law and managing patent cases. In particular, *Anatomy of a Patent Case, Third Edition* offers a concise overview of each stage of patent litigation and highlights aspects that may differ from a standard civil case. The introductory chapter also explains the components of a patent and defines key terms used in patent litigation.

The *MCL 4th* also has a chapter on managing patent cases, including discussions of the statutory framework for patent law, setting and structuring claims construction (or "*Markman*"[230]) hearings, defining the issues in dispute, discovery, experts, and trial. For a more in-depth discussion on managing patent cases, you should consult *Patent Case Management Judicial Guide, Third Edition*. This resource also includes checklists for the initial Rule 16 case management conference and *Markman* hearings, as well as draft orders, model rules, and model patent jury instructions.

It is important to note that many districts have adopted local rules for patent cases prescribing specific timelines and procedures for discovery and *Markman* hearings.[231] If your district has not adopted such local rules, it may be helpful to consult another district's local rules for possible options for discovery schedules and structuring *Markman* hearings.

G. International child abduction cases under the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction "was adopted in 1980 in response to the problem of international child abductions during domestic disputes [and] . . . seeks to secure the prompt return of children wrongfully removed or retained in any Contracting State and to ensure that rights of custody and access under the law of one Contracting State are

230. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

231. Appendix D to the *Patent Case Management Judicial Guide*, *supra* note 183, lists courts that, as of 2016, have adopted patent local rules.

effectively respected in other Contracting States."[232] "The [C]onvention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must order the return of the child forthwith, unless certain exceptions apply."[233] The substantive law and elements of a cause of action for return of a child are set forth in the Convention. The procedural framework for a case, including the applicable burdens of proof, scope of provisional remedies to protect the child's well-being, and assignment of costs and fees, is set forth in the International Child Abduction Remedies Act (ICARA).[234] These cases can require you to make difficult judgments in a very condensed period.

One of the challenges of managing a Hague Convention case is the expectation—expressed in Article 11 of the Convention—that the court shall handle the case "expeditiously." Under Article 11, if the court has not reached a decision within six weeks from the date of commencement of proceedings, the applicant or the designated Central Authority of the signatory country has the right to request a statement of the reasons for the delay. Accordingly, after you are assigned a Hague Convention case, you should promptly schedule a Rule 16 case management conference to both assess the child's current situation and set discovery deadlines, a briefing schedule, and a trial date.

The FJC has published a detailed monograph, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges, Second Edition*, which provides background on the adoption of the Convention, discusses relevant federal and state law, and offers practical suggestions for managing cases under the Convention. The FJC has also developed a special topic webpage compiling resource materials, including outlines addressing frequently asked questions arising in Hague Convention cases, a checklist of issues to consider during each phase of the case, sample orders, and recently decided cases.

Among the resources available on the webpage are succinct video tutorials on the following topics:

- Your First Hague Convention Case: covers the basic elements of a Hague Convention case, including the specific requirements of the Convention, the most common defenses and their applicable standards of proof, available sources of law, and the Central Authority.
- The Case in Chief: discusses the elements of a prima facie case for the return of a child under the Convention.

232. *Abbott v. Abbott*, 560 U.S. 1, 8 (2010) (internal quotation marks omitted).

233. *Id.* (citation and internal quotation marks omitted).

234. 22 U.S.C. §§ 9001–9011.

- Defenses to a Hague Convention Petition: discusses the five defenses to an action for return of a child under the Convention.
- Case Management Considerations: covers some of the unique challenges of Hague Convention litigation and case management strategies, including preliminary considerations relating to the safety of the child and the circumstances of the parties.
- The Central Authority: discusses the Central Authority, which is an entity that each signatory country must designate to assist in the administration of the Convention.[235]

You may also contact the FJC directly with Hague Convention questions via email at: 1980HagueConvention@fjc.gov.

In addition to these resources, the U.S. State Department has a webpage with resources for judges handling a Hague Convention child abduction case. One of the resources offered is the "International Network of Judges," which is comprised of judges from various countries who are experts in the Convention and other international family law issues. The Network Judges serve as a resource for judges in their home country and can facilitate communications between judges domestically and Network Judges internationally. To speak with a Network Judge, you may contact the U.S. State Department at: JudgesNetwork@state.gov.

235. In the United States, the Central Authority is the Office of Children's Issues within the U.S. State Department. The agency has a webpage providing information about key provisions of the Hague Convention, forms, and resources for parents.

8

Personnel Resources in Litigation Management

A. Overview

District judges work with numerous individuals within their court who play crucial roles in processing and managing civil cases, including chambers staff, clerk's

office staff, and pro se law clerks. Further, magistrate judges not only function as judicial officers who may preside over their own cases but also assist district judges with their civil and criminal cases. Understanding the roles of magistrate judges and court staff can help you determine when to use their services—and how to effectively engage them when you do—as part of your general case management approach and in specific phases of cases where more focused assistance may be helpful.

The following sections describe the general duties of these individuals. Generally, district and magistrate judges should consider delegating those tasks that may be performed by others consistent with federal law, federal rules, and their court's local rules and operating procedures, while retaining tasks that only a judge may perform. In deciding what to delegate and to whom, analyze each task, asking how it can be done most effectively, and whether it can be done by someone other than you subject to your review.

B. Chambers staff

Judges hire their own chambers staff, which may include a combination of law clerks and a judicial assistant. Information and policies concerning chambers staff are available on the Chambers Staff page on JNet, and in Chapter 18 of the Judges Administrative Manual. Your court's human resources specialists, as well as the human resources specialists at the Administrative Office, can answer questions about judiciary hiring and employment policies. The FJC also regularly posts material on its website with tips on recruiting, interviewing, and training chambers staff.

Chambers staff serve at the pleasure of the hiring judge and their tenure depends on that of the judge. The number of chambers staff authorized for a judge depends on the office the judge holds.[236] An active district judge may hire three staff members, either two law clerks and a judicial assistant or three law clerks. A full-time magistrate judge may hire two staff members, either a law clerk and a judicial assistant or two law clerks. A judge may fill a single full-time staff position with multiple part-time staff members (e.g., a part-time law clerk and a part-time judicial assistant). Keep in mind that the composition of your staff is an important decision that can impact the division of duties and workload in chambers.

Historically, district judges hired two law clerks who focused on legal research and writing and a judicial assistant who handled administrative duties such as answering phone calls, maintaining the judge's calendar, and preparing

236. *See* *Guide to Judiciary Policy*, vol. 12, § 615.50; *Judges Administrative Manual*, ch. 18, § 1.

the judge's travel vouchers and financial reports. Many judges now opt to hire an additional law clerk in lieu of a judicial assistant. In those chambers, one law clerk may be designated as an administrative law clerk and is responsible for the administrative duties, as well as a share of the substantive legal duties. In other chambers, the law clerks rotate responsibility for administrative duties.

Under another approach to chambers staffing, two judges partner together to share a judicial assistant and an additional law clerk. In these arrangements, each judge employs one of the two shared staff members for administrative purposes, and the shared staff divide their time between the two chambers. While these arrangements can work to the benefit of both judges, allowing each judge to gain the benefits of a part-time judicial assistant and the help of a part-time law clerk on substantive case work, they can operate successfully only if the partnering judges are able to coordinate and communicate effectively with each other and set reasonable expectations for their shared staff.

In evaluating which approach will work best for you, consider your overall administrative needs (e.g., the ratio of your criminal and civil caseloads, as well as your committee or judicial council work), and the demands of your caseload (i.e., can two law clerks keep up with your pending caseload, or is a third law clerk necessary?).[237] Whether you designate one law clerk as an administrative law clerk or have law clerks rotate or divide administrative responsibilities, it is important to discuss this topic with prospective law clerks so they understand the administrative duties they will perform as part of your staff.

1. Law clerks

The scope of duties assigned to law clerks varies by judge, depending on the number of law clerks on staff, the law clerk's appointment classification, and the law clerk's level of legal experience. For most district and magistrate judges, law clerks perform the bulk of the day-to-day civil case management responsibilities, including reviewing the CM/ECF docket activity report (DAR) for new filings; flagging matters that require immediate attention; monitoring deadlines in pending cases; reviewing Rule 26(f) reports or case management statements to identify issues that should be addressed at the initial Rule 16 scheduling conference; and tracking motions and cases that will need to be included on an upcoming CJRA report if not resolved. Law clerks typically are also responsible for conducting legal research, preparing draft orders and opinions, and assisting with bench and jury trials. Some judges have a law clerk assist with aspects

237. For policies applicable to chambers staff, including appointment authority and procedures, salaries, leave policies, and types of personnel actions, *see* *Judges Administrative Manual*, ch. 18.

of criminal cases, such as monitoring the docket, researching issues raised in motions or by objection, reviewing proposed jury instructions, and assisting with trials. In addition, many judges task law clerks with supervising judicial externs.

There are three appointment classifications for law clerks: career, term, or temporary.[238] Under Judicial Conference policy, judges are limited to one full-time equivalent career law clerk per chambers.[239] A term law clerk may serve for up to four years in the judiciary as a term law clerk. Note that this is an aggregate lifetime limit and is not pro-rated for part-time service.[240] It applies to all term clerkships even if the clerkships were completed for different judges and regardless of whether the term clerkship is in the chambers of a magistrate, district, or circuit judge. In limited situations, you may be authorized to appoint a temporary law clerk. For chambers law clerks, temporary positions are limited to temporary medical, maternity, and military leave replacements as well as temporary emergency fund appointments authorized by circuit judicial councils (e.g., to assist with a complex case or trial).[241]

There are several resources available to assist with hiring and training law clerks. For recruiting, the Online System for Clerkship Application and Review (OSCAR) allows you to create a profile with your hiring practices (e.g., number of law clerks on staff, length of terms), upcoming law clerk vacancies, and application materials you would like candidates to submit.[242] Some judges also post vacancy announcements on their court's website, under the "careers" tab on the judiciary's website (uscourts.gov), or on the federal government's official job site (usajobs.gov). The Federal Law Clerk Hiring Best Practices provide voluntary guidelines for judges when recruiting and hiring clerkship applicants. If you use OSCAR to announce openings and manage application materials, be sure to update or delete your postings as each position is filled.

When a law clerk begins employment, you should set aside time to discuss the goals of the clerkship and your general expectations of law clerks. In particular, you should emphasize the importance of keeping discussions relating to pending matters confidential. You should instruct them to conduct themselves

238. For more detail about the types of appointments for law clerks, including term limits and benefits eligibility, *see* *Guide to Judiciary Policy*, vol. 12, § 510.

239. *See* *Judges Administrative Manual*, ch. 18, § 6.4.

240. The 4-year term clerkship limit does not apply to clerkships with state judges or federal administrative law judges, and while term circuit staff attorney positions also do not count against the 4-year term clerkship cap, they are subject to their own 4-year term limit.

241. *See* *Guide to Judiciary Policy*, vol. 12, §§ 615.50.10, 615.50.20.

242. In 2017, the judiciary implemented a two-year pilot Law Clerk Hiring Plan, pursuant to which participating judges agreed to adhere to certain timeframes for hiring law student candidates. Information about the Law Clerk Hiring Plan is available on the OSCAR website.

professionally in chambers and the courtroom, as well as when interacting with other court staff, attorneys, and members of the public at the courthouse and in all other settings. You should also discuss the extent to which law clerks may communicate with counsel, and your chambers protocol for communicating with counsel on scheduling and administrative issues.

Some chambers have developed an internal "chambers manual" with basic information such as work schedule, dress code, and answers to recurring questions (e.g., how to handle calls from litigants or the media). Additionally, the Administrative Office and the FJC have developed materials to help new law clerks understand their role in chambers and their responsibilities as judicial employees. The FJC offers a two-part interactive orientation program for law clerks, which clerks can access via a secure online portal before their clerkship begins. The orientation program covers ethics, legal writing, and certain recurring legal issues, such as jurisdiction. The Law Clerk Handbook[243] discusses a law clerk's role in chambers, provides an overview of the various proceedings held in federal courts, and explains court governance and administration within the federal judiciary. You might also encourage your district to host an annual training session for new law clerks to orient them to the clerk's office operations and other procedures unique to your district, to introduce them to other chambers' staff, and to familiarize them with the other offices that work with your district and the court system. The Administrative Office also hosts an annual Chambers Staff Administrative Workshop (CSAW), which provides training on administrative, operational, and procedural matters that chambers staff typically encounter. Information and materials from the CSAW are available on the Chambers Staff webpage on JNet.

You should ensure that orientation for new law clerks includes a description of workplace conduct rules, available under the Policy & Guidance tab on JNet, and the protocol in your district for law clerks to bring up complaints or concerns. It is critical that law clerks understand the ethical obligations associated with their position. The FJC publishes an ethics pamphlet[244] for law clerks with a companion e-learning program available on its website. The pamphlet discusses the Code of Conduct for Judicial Employees, and other issues relating to confidentiality, conflicts of interest, outside professional and social activities (including the use of social media), and future employment.

243. *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges* (Fed. Judicial Ctr. 4th ed. 2020).

244. *Maintaining the Public Trust – Ethics for Federal Judicial Law Clerks* (Fed. Judicial Ctr. Rev. 4th ed. 2019).

Generally, the amount of time you spend supervising your law clerks will depend on how long they have been part of your staff, their experience with federal civil litigation, and their familiarity with your court's local rules and practices. Law clerks who have recently graduated from law school or who have not previously served as a judicial clerk or extern generally will have little or no relevant experience with CM/ECF, case management, discovery disputes, or drafting orders and opinions. At the beginning of their term, you will want to give them specific instructions about the tasks they are to perform, provide examples of how you would like work product presented (e.g., copies of recent orders or memoranda), set clear deadlines, and discuss how and when they should confer with you if they have questions or need direction. Law clerks who have practiced law or previously completed a clerkship may be familiar with litigation and your court's local rules but will need to familiarize themselves with your chambers procedures and writing style. Many law clerks must also become familiar with CM/ECF and the various reports available to assist them with case monitoring and management, including the CJRA report feature.[245]

While you should always be involved in overseeing their work, your law clerks should require less supervision as they become increasingly familiar with your judicial style and your chambers operating procedures. Chambers with a career law clerk or term law clerks with staggered terms can often assist with orientating new clerks and initially reviewing their work product. This may be something you wish to consider when setting the length and start dates of clerkships in your chambers.

2. Judicial assistant

Some judges prefer to have a judicial assistant, rather than law clerks, handle administrative duties. Examples of administrative duties include answering phone calls; responding to routine email messages; maintaining the judge's calendar; running the DAR on CM/ECF; maintaining chambers electronic records and physical files; making travel arrangements for the judge and submitting travel vouchers; and preparing required annual reports (e.g., non-case-related travel, financial disclosure report). In deciding whether to staff your chambers with a judicial assistant, you should consider the nature and volume of your caseload and the amount of administrative work that will generally need to be performed. Judges who regularly serve on judicial committees or councils or travel between court divisions may benefit from having a staff member who

245. For a detailed discussion about CM/ECF's report features, *see* Chapter 4, Section B.2, and Chapter 9, Section B.

can focus on administrative tasks and chambers management. Judges who have heavy caseloads, however, may benefit from hiring an additional law clerk in lieu of a judicial assistant, but should be mindful that the law clerks will also need to perform administrative duties.

C. Court staff

1. Courtroom deputies

Courtroom deputies (sometimes referred to as case managers or case administrators) are members of the clerk's office who perform an array of case management functions, including scheduling and coordinating conferences, hearings, and trials; attending and logging court proceedings; monitoring filings in CM/ECF; drafting docket text orders, judgments, and minutes of court proceedings; and entering orders, minutes, judgments, and other court documents into CM/ECF. Depending on the court, courtroom deputies may be organized as a team that supports multiple judges, or each courtroom deputy may be assigned to an individual judge. A courtroom deputy's specific duties will also vary by court, with some courts emphasizing responsibility to chambers, and others placing greater emphasis on the work done in the clerk's office. Keep in mind that although a courtroom deputy may be assigned to you, the clerk of court is the courtroom deputy's supervisor.

Consider:

- Having the courtroom deputy monitor docket activity, as well as the status of pending cases, and notifying you when important deadlines are approaching or have elapsed, such as a dispositive motion deadline or deadline to request a pretrial conference. Your courtroom deputy may also monitor docket activity to ensure that parties have timely filed pre-conference statements (e.g., the parties' Rule 26(f) report or case management statement). They can also notify your law clerks when a motion has been fully briefed or the response deadline has passed, and they can provide you with regular copies of your CJRA report.
- Having the courtroom deputy manage your court and conference calendar. You should meet regularly with the courtroom deputy to go over the status of cases and to plan for upcoming conferences, hearings, and trials. Your instructions and preferences (e.g., on the length of a motions hearing or pretrial conferences) will guide the courtroom deputy in setting events on the calendar.

- Having the courtroom deputy prepare or supervise preparation of routine notices, docket text orders, and routine minute entry orders.
- As a jury trial approaches, having the courtroom deputy communicate with the jury administrator to ensure the orderly and efficient summonsing and use of prospective jurors.
- Designating the courtroom deputy as the exclusive communication channel between you and parties or members of the public on routine case-related matters such as upcoming hearing dates or filing deadlines. While some judges prefer to use their judicial assistant for this purpose, others use the courtroom deputy, who is not so close to the judge as to imply an improper ex parte communication. Using a single channel for communicating with the judge should also help avoid confusion.
- Encouraging the courtroom deputy to stay current on the latest courtroom technology, developments in CM/ECF, and other electronic organizational tools to facilitate document and exhibit handling and presentation, electronic calendaring, and electronic organization of case files and other documents. (*See* Chapter 9 for a discussion of using technology for case management.)

2. Court reporters

The Court Reporters Act[246] requires that each session of the court and every other proceeding designated by rule or order of the court be recorded verbatim by a court reporter or electronic sound recording. The statute also establishes the duties and conditions of employment of court reporters in the federal courts.

Court reporters and electronic court recorder operators (ECRO) are members of the clerk's office staff. They are neither employed by, nor are they part of, the personal staff of an individual judge. Under Judicial Conference policy, the court en banc appoints its court reporters and controls their assignments.[247] Accordingly, a court reporter is required to serve all judges, and the selection and retention of reporting staff should be addressed by the court as a whole. Each district court also has a designated court reporter supervisor and a Court Reporter Management Plan to carry out the requirements of the Judicial Conference and provide for the day-to-day management and supervision of court reporting services in the court For guidance on the use of court reporting and an

246. 28 U.S.C. § 753.

247. *Guide to Judiciary Policy*, vol. 6, § 220(b).

outline of court reporters' tasks and responsibilities, *see* Volume 6 of the *Guide to Judiciary Policy*.[248]

When preparing a written order after a hearing, it may be helpful to review statements made during oral argument. Keep in mind that you have options when requesting a hearing transcript. When requested, the court reporter who took the official record must provide a certified transcript of all or part of a proceeding without charge to the requesting judge.[249] You may, however, request that the court reporter produce a non-certified or unedited transcript for your use, which does not have to be filed with the clerk as part of the court record.[250]

3. Pro se and death penalty law clerks

Although they are not part of chambers staff, pro se and death penalty law clerks play important roles in assisting judges with pro se prisoner and pro se non-prisoner litigation, including habeas corpus cases under 28 U.S.C. §§ 2241 and 2254, post-judgment motions filed under 28 U.S.C. § 2255, and pro se civil rights cases under 42 U.S.C. § 1983 and *Bivens*.[251] The allocation of pro se law clerks varies among the district courts and is determined based on a Judicial Conference-approved staffing formula that is tied to the number of prisoner cases (federal habeas corpus and civil rights) filed in a court. Similarly, death penalty law clerks are allocated based on a staffing formula that is tied to the number of pending, unstayed death penalty cases in a district.

The authority to appoint and supervise pro se and death penalty law clerks is vested in the chief district judge.[252] The chief judge, however, may delegate appointment authority to another judge or to the clerk of court, as appropriate. The chief judge may also delegate supervisory responsibilities for the district's pro se law clerk program and/or death penalty law clerk program to another judge, the clerk of court, or to a single pro se/death penalty law clerk, who then reports to the chief judge or to the chief judge's designee.[253]

The organization of and duties assigned to pro se and death penalty law clerks vary by district. In some districts, each pro se law clerk is assigned to one or more judges; in other districts, the pro se law clerks are pooled and handle

248. For additional information or questions about court reporters, contact the Administrative Office's Court Services Office at (202) 502–1500.

249. 28 U.S.C. § 753(b); *Guide to Judiciary Policy*, vol. 6, § 510.20(a).

250. *Guide to Judiciary Policy*, vol. 6, § 510.20(c).

251. *See Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388 (1971).

252. JCUS-SEP 94, p. 48; JCUS-SEP 95, p. 90.

253. JCUS-MAR 19, p. 15.

specific cases or particular filings for all judges. In many districts, pro se litigation—especially pro se prisoner litigation—comprises a significant portion of the civil docket. You therefore should be familiar with how your court utilizes its pro se and death penalty law clerks and communicate with the judge or lead pro se law clerk who supervises them if questions or issues arise.[254]

D. Magistrate judges

The jurisdiction and powers of a magistrate judge are defined in 28 U.S.C. § 636 and 18 U.S.C. § 3401.[255] In addition to those statutory authorities, the district court may assign magistrate judges "such additional duties as are not inconsistent with the Constitution and laws of the United States."[256] To that end, the district court must "establish rules pursuant to which the magistrate judges shall discharge their duties."[257] Thus, a district judge's use of magistrate judges will be guided not only by statute, Federal Rules of Civil Procedure, and the district judge's own preferences, but also by the district court's decisions about their role. In making such decisions, a court may wish to consider advice from the Judicial Conference Committee on the Administration of the Magistrate Judges System, contained in the committee's *Suggestions for Utilization of Magistrate Judges*, available on the Magistrate Judges System JNet page.[258] An *Inventory of United States Magistrate Judge Duties* is also available, and provides a detailed list and description of duties that may be referred to magistrate judges.[259]

1. Referral of nondispositive matters

Any nondispositive pretrial matter may be referred to a magistrate judge for hearing and determination.[260] These matters include conducting Rule 16 case

254. For additional information about the pro se law clerk program, contact the Administrative Office's Court Services Office at (202) 502–1500.

255. *See also* Fed. R. Civ. P. 72, 73; Fed. R. Crim. P. 58, 59.

256. 28 U.S.C. § 636(b)(3).

257. 28 U.S.C. § 636(b)(4).

258. Additional materials on the authority of magistrate judges; magistrate judge utilization; magistrate judges' roles in court governance; policies and guidance relating to magistrate judges; and magistrate judge statistics are also available on the Magistrate Judges System JNet page. For additional assistance or questions, you may contact the Administrative Office's Judicial Services Office at (202) 502–1800.

259. For additional information about referrals to magistrate judges, *see MCL 4th*, *supra* note 22, § 11.53.

260. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Fed. R. Crim. P. 59(a).

management conferences, supervising discovery, resolving discovery disputes, and ruling on motions that do not dispose of claims or defenses (for examples of referral orders, *see* online appendix). Keep in mind, however, that a magistrate judge's decision on these matters is appealable to the district judge who referred the matter, which could result in delay and potentially give the parties two bites of the apple. Moreover, some district judges prefer to decide nondispositive matters themselves so that they can exercise greater oversight and better familiarize themselves with the parties, attorneys, and issues in the case.

The magistrate judge to whom a matter is referred is to conduct required proceedings promptly, and, when appropriate, issue a written order stating the decision.[261] Within 14 days after being served with a copy of the magistrate judge's order, the parties may serve and file objections to the order. The district judge who referred the matter "must consider timely objections" filed by a party and "modify or set aside any part of the [magistrate judge's] order that is clearly erroneous or is contrary to law."[262] If a district judge delegates such nondispositive pretrial matters, the judge should adhere strictly to this narrow standard of review. Routinely second-guessing the magistrate judges will reduce the time savings you might have gained and very likely will encourage future objections.

2. Referral of dispositive matters

District judges "may also designate a magistrate judge to conduct hearings, including evidentiary hearings," on dispositive matters.[263] These matters may include motions for injunctions, for judgment on the pleadings, for summary judgment, or for class certification, as well as social security appeals, petitions for habeas corpus, and civil rights cases. Unless the parties have consented to full jurisdiction by the magistrate judge, the magistrate judge is limited to making recommendations, including findings of fact when appropriate, after a hearing on the record or a review of the case file and motions.[264]

A party may file written objections within 14 days after service of the recommended disposition, and the opponent may respond within 14 days.[265] If you are the district judge receiving the objections, you must review de novo any part of the magistrate judge's disposition to which a proper objection has been made.[266]

261. Fed. R. Civ. P. 72(a); Fed. R. Crim. P. 59(a).

262. *Id*.

263. 28 U.S.C. § 636(b)(1)(B); *see also* Fed. R. Civ. P. 72(b)(1); Fed. R. Crim. P. 59(b).

264. 28 U.S.C. § 636(b)(1)(B), (C).

265. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2). *See also* Fed. R. Crim. P. 59(b)(2).

266. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). *See also* Fed. R. Crim. P. 59(b)(3).

The district judge may accept, reject, or modify the recommended disposition; receive additional evidence; or return the matter to the magistrate judge with instructions.[267]

Keep in mind that the list of dispositive matters in § 636(b)(1)(A) and (B) is not considered exhaustive and that other matters may be treated as dispositive or nondispositive based on the case law of your district and circuit.[268] You should exercise care in deciding which dispositive motions to assign to magistrate judges because the referral of dispositive motions can lead to wasteful duplication of judicial and attorney time and effort (given the parties' right to seek your review of the magistrate judge's recommendations), especially when the motions involve primarily questions of law.

3. Referral of case for mediation

In many districts, magistrate judges regularly conduct settlement conferences or serve as mediators in court-based ADR programs. In districts where magistrate judges conduct settlement conferences, they have become true experts, and you should consider referring cases to magistrate judges for settlement purposes as a matter of course. *See* Chapter 5, Section E for a detailed discussion of settlement conferences conducted by judges. Once a matter is referred to a magistrate judge for mediation, the substance of the mediation and the nature of negotiations are confidential between the magistrate judge and the parties and should not be discussed between the magistrate judge and the assigning judge.

4. Consent to magistrate judge disposition or case responsibility

With the parties' consent, a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" when "specially designated" to do so by the district court.[269] If the parties

267. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

268. *See, e.g., Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 946 (D.C. Cir. 2017); *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1068 (9th Cir. 2004); *Massey v. City of Ferndale*, 7 F.3d 506, 508 (6th Cir. 1993). *See also Inventory of United States Magistrate Judge Duties*, § 4 Non-Case-Dispositive Matters Under 28 U.S.C. § 636(b)(1)(A), and § 5 Case-Dispositive Matters Under 28 U.S.C. § 636(b)(1)(B), available on the Magistrate Judges System JNet page.

269. 28 U.S.C. § 636(c)(1); Fed. R. Civ. P. 73(a). Every United States district court has designated its full-time magistrate judges to exercise this authority. Assignments of consent cases to part-time magistrate judges are subject to certain limitations. For additional guidance, contact the Administrative Office's Judicial Services Office at (202) 502–1800.

consent to the magistrate judge handling all aspects of the case, the magistrate judge may conduct all proceedings, including a jury or non-jury trial, if necessary. Alternatively, parties may consent to have a magistrate judge rule on a specific case-dispositive motion. Consent should be given in writing and can be recorded in several ways, including in the attorneys' Rule 26(f) report or case management statement, or on a specialized consent form. *See* online appendix for examples in the context of the Rule 26(f) report and for specialized consent forms. The parties' decisions on consent should be communicated to the clerk of court, and a district judge or magistrate judge should only be informed of a party's decision if all parties have consented to the referral.[270]

The clerk of court must notify parties, on the filing of a civil case, of the availability of magistrate judges to try cases by consent.[271] The district judge or magistrate judge handling the case may thereafter again advise the parties of this availability as well as of their right to withhold consent without adverse substantive consequences.[272] For example, at the initial Rule 16 conference you may ask the parties whether they are willing to consent to a final disposition, including trial, before a magistrate judge.

A number of districts place magistrate judges on the assignment wheel so that they are directly assigned as presiding judge to a portion of newly filed civil cases. In these districts, the parties are informed that their case will remain assigned to a magistrate judge for all proceedings if the parties consent. The parties usually are given a specified amount of time to consent to this assignment; if consent is not given, the case is reassigned to a district judge.[273]

5. Other referrals

Section 636(b)(3) of Title 28 of the U.S. Code grants the courts broad authority to assign "additional duties" to magistrate judges not inconsistent with the Constitution and laws of the United States. For instance, magistrate judges may preside while a jury deliberates, receive jury verdicts, and conduct post-judgment proceedings. You also should consult district and circuit case law on the limits of the authority granted under § 636(b)(3).[274]

270. Fed. R. Civ. P. 73(b)(1).

271. 28 U.S.C. § 636(c)(2); Fed. R. Civ. P. 73(b)(1).

272. 28 U.S.C. § 636(c)(2); Fed. R. Civ. P. 73(b)(2).

273. For additional information about courts' direct assignment practices, contact the Administrative Office's Judicial Services Office at (202) 502–1800.

274. *See also* *Inventory of United States Magistrate Judge Duties*, *supra* note 269.

6. Method for assigning matters to magistrate judges

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

- *Referral pursuant to standing order or local rule*. A district's standing order or local rule may direct that certain pretrial matters or all pretrial matters (except dispositive motions) be handled by magistrate judges. The clerk's office will then direct all such matters to the court's magistrate judges, subject to adjustment from time to time.
- *Inclusion on the assignment wheel*. Some districts include magistrate judges on the case assignment wheel so that a portion of newly-filed cases is initially assigned to each magistrate judge. If the parties in an individual case do not consent to the magistrate judge conducting all proceedings—including final disposition—the case is reassigned to a district judge, although the magistrate judge may continue to handle some or all pretrial matters.
- *Referral by case*. District judges may refer individual cases to magistrate judges for some or all pretrial proceedings. Unless the referral is withdrawn, the magistrate judge conducts all matters up to a specified point, such as the final pretrial conference.
- *Pairing*. A magistrate judge may be paired with one or more district judges and will automatically conduct those judges' pretrial matters as designated.
- *Issue-by-issue assignment*. District judges may assign particular motions or matters to magistrate judges, but otherwise retain complete control over cases for all other matters.
- *Referral at the parties' request*. Parties may be given the opportunity, on a case-by-case basis, to consent to have the case heard by a magistrate judge. For example, in some districts with heavy criminal caseloads, parties in civil cases are given the opportunity to have their case heard by a magistrate judge to get more expeditious handling and an earlier or more certain trial date.

E. Workplace conduct and employee dispute resolution

In September 2019, the Judicial Conference adopted an updated Model Employee Dispute Resolution (EDR) Plan. The Plan is built on the principles that:

> The Federal Judiciary is committed to a workplace of respect, civility, fairness, tolerance, and dignity, free of discrimination and harassment. These values are essential to the Judiciary, which holds its Judges and Employees to the highest standards. All Judges and Employees are expected to treat each other accordingly.

The Plan applies to all judges, current and former employees (including all law clerks; chambers employees; paid and unpaid interns, externs, and other volunteers; federal public defender employees; and probation and pretrial services employees), and applicants for employment who have been interviewed. It provides options for the reporting and resolution of allegations of wrongful conduct (discrimination; sexual, racial, or other discriminatory harassment; abusive conduct; and retaliation) in the workplace. Information about the Plan and other EDR resources are available on the Office of Judicial Integrity: Workplace Conduct page on JNet.

F. Special masters

Special masters can be a critical asset in some cases. Appointment of masters is generally limited to large, complex cases and is therefore infrequent.[275] Because the use of masters is well covered in the *MCL 4th*, this section is limited to highlighting some basic issues, drawing from that publication.[276]

1. Authority to appoint a special master

Appointment of special masters is governed primarily by Federal Rule of Civil Procedure 53.[277] Unless provided otherwise by statute, a judge may appoint a special master only to: (1) perform duties by party consent; (2) conduct a non-jury trial in the event of an "exceptional condition," or a "need to perform an accounting or resolve a difficult computation of damages;" or (3) "address pretrial and

275. Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan & John Shapard, *Special Masters' Incidence and Activity*, 15–21 (Fed. Judicial Ctr. 2000) [hereinafter *Special Masters Study*].

276. *See MCL 4th*, *supra* note 22, § 11.52. *See also Appointing Masters and Other Judicial Adjuncts, A Benchbook for Judges and Lawyers* (Academy of Court-Appointed Masters, 2020 ed.).

277. Inherent authority may also support appointment of special masters, and a number of statutes and rules touch on the subject. *See Special Masters Study*, *supra* note 276, at 31–35.

posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(A)-(C).

Pursuant to 42 U.S.C. § 2000e-5(f)(5), a judge may also appoint a master under Rule 53 to hear Title VII cases, without a showing of exceptional circumstances, if the case has not been set for trial within 120 days after issue has been joined (subject to the parties' right to a jury trial under the Civil Rights Act of 1991).

In the absence of consent by the parties, a district judge may designate a magistrate judge as special master pursuant to Rule 53 and 28 U.S.C. § 636(b)(2). When the parties consent to it, the district judge has authority to designate a magistrate judge as special master under 28 U.S.C. § 636(b)(2), bypassing the limitations of Rule 53(b).

Although judges have authority under Rule 53 to make an appointment sua sponte, most judges do so only after issuing a show cause order and prefer to act only with the parties' consent.[278]

2. Reasons for appointing a special master

Special masters can be useful adjuncts for a variety of tasks in the management of complex or large-scale litigation: supervising discovery, finding facts in complicated controversies, performing accountings, organizing and coordinating mass tort litigation, mediating settlements, and monitoring compliance with complex remedial orders. The decision whether to appoint a special master involves weighing the potential benefits against the extra expense imposed on the parties. A master may be useful where "the financial stakes justify imposing the expense on the parties and where the amount of activity required would impose undue burdens on a [district or magistrate] judge."[279] Special masters are also relied upon if they have special expertise in a particular field such as patents or cases involving science, business, or technology.[280]

Judges have at times delegated extensive duties to masters, which, though subject to the court's de novo review, has generated controversy and raised questions about the extent of judicial referral authority. Unless the parties affirmatively seek

278. *See id.* at 28–30.

279. *MCL 4th*, *supra* note 22, at § 11.52.

280. *Id.*; *see also Reference Manual on Scientific Evidence*, *supra* note 54, at 35, 489; Jay P. Kesan & Gwendolyn G. Ball, *A Study of the Role and Impact of Special Masters in Patent Cases* (Fed. Judicial Ctr. 2009).

an appointment and explicitly waive the limits of Rule 53, you should limit your appointments to exceptional cases or conditions.

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

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

3. Selecting and appointing a special master

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

Consider the following:

- asking the parties to nominate candidates, either individually or jointly;
- ordering the parties to submit a list of at least 3 agreed-upon candidates;
- appointing a magistrate judge;[281]
- appointing someone because of his or her service in another case; or
- asking someone else, such as another master or an outside agency, to recommend suitable candidates.

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

The method most frequently used by federal judges is to ask the parties to nominate candidates for appointment.[282] If you use this method, you may want to ask the parties to provide information about the candidates' qualifications and, if appropriate, to discuss the candidates with you or to participate in your interviews with the candidates. To avoid later problems, you and the parties should make certain the master has no conflicts of interest.

An order appointing a master should specify what the master is to do and what the master's authority is. Under Rule 53(c), unless you direct otherwise, a master may "regulate all proceedings" and "take all appropriate measures to perform the assigned duties fairly and efficiently," including "conducting an evidentiary hearing" and "compel[ling], tak[ing], and record[ing] evidence." A master may also recommend contempt sanctions or impose non-contempt sanctions on a party under Rules 37 (discovery sanctions) or 45 (sanctions for issuing or serving a subpoena without taking reasonable steps to avoid imposing an undue burden or expense on person subject to subpoena).

Rule 53(b)(2) requires that the referral order "direct the master to proceed with all reasonable diligence," and to include several matters:

- the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
- the circumstances, if any, in which the master may communicate ex parte with the court or a party;[283]
- the nature of the materials to be preserved and filed as the record of the master's activities;
- the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
- the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

It is recommended that you also include the following in the referral order:

- procedures for the special master to obtain information from the parties;
- disclosure of conflicts of interest;
- periodic reporting and the timing and method of delivering reports of activity;

282. *See* Special Masters Study, *supra* note 276, at 35–40.

283. For a discussion of federal court experiences relating to ex parte communications between special masters and the parties or the judge, *see* Special Masters Study, *supra* note 276, at 46–52.

- duration of the appointment;
- allocation of costs among the parties; and
- liability and immunity of the special master.[284]

You may consider appointing a special master as early as the initial case management conference.[285]

4. The special master's report

Rule 53(e) requires special masters to prepare a report and, if required by the appointing judge, make findings of fact and conclusions of law. The master may submit a draft of the report to counsel for suggestions. In all cases, a party may serve objections to the report no later than 21 days after a copy is served, unless you set a different time. You review "de novo all objections to findings of fact" by the master, unless the parties stipulate, with your approval, that "the findings will be reviewed for clear error; or . . . will be final."[286] You may "adopt or affirm, modify, wholly or partly reject or reverse, or resubmit" the matter to the master with instructions.[287] In jury cases, the master's findings are admissible in evidence.[288]

5. Compensating the special master

Under Rule 53(g), compensation of special masters is to be set by the court. In practice, most judges rely on the parties and the master to negotiate the rate (usually an hourly rate) and determine whether and how the costs will be shared.[289] You will want to keep watch on the compensation paid to masters, as the costs can be quite high in some cases. Your referral order can set a timetable for periodic submission of bills (at least quarterly) and specify what information you would need to monitor the master's costs.

284. *See* Fed. R. Civ. P. 53(b)(2); *MCL 4th*, *supra* note 22, at § 11.52. For a summary of the contents of special master referral orders, *see* *Special Masters Study*, *supra* note 276, at 44–45.

285. Fed. R. Civ. P. 16(c)(2)(H).

286. Fed. R. Civ. P. 53(f)(2), (3).

287. Fed. R. Civ. P. 53(f)(1).

288. *See, e.g., Jackson v. Local Union 542, Int'l Union of Operating Engineers*, 155 F. Supp. 2d 332, 337–38 (E.D. Pa. 2001).

289. *See* *Special Masters Study*, *supra* note 276, at 42. If a special master is appointed in a case subject to the Prison Litigation Reform Act of 1995, compensation and costs are to be paid from funds appropriated to the judiciary. 18 U.S.C. § 3626(f)(4).

9

Using Information Technology for Litigation Management

A. Overview

Understanding and maximizing the use of available technology are essential to successful case management. This chapter reviews functions in CM/ECF that can assist with monitoring and managing case activity, technology for working remotely, and IT training and resources available to judges.[290]

B. Using CM/ECF to manage cases

The primary case management tool for federal judges is the CM/ECF system. It is used in every court by judges, court staff, attorneys, and the public to view information about cases and to file and download case-related documents. Significant features include:

290. The judiciary has been developing a newer version of the CM/ECF application, known as "Next Generation of CM/ECF," or "NextGen." The functionality discussed in this chapter applies to both legacy and NextGen CM/ECF.

- notices of electronic filings (NEFs), which alert judges, chambers staff, court staff, and case participants that a docket entry has been added or a document has been filed in a case (discussed in detail in Section B.1, below);
- up-to-the-minute reports, queries, and docket sheets for individual cases;
- electronic retrieval of case documents and dockets by the public and court users;[291] and
- electronic document management, storage, and security.

The CM/ECF system is updated regularly, largely based on suggestions from judges and court staff. The courts are provided regular software releases and informed about the modifications. Your court's CM/ECF administrator and clerk of court are your best resources for questions about CM/ECF. For more complex questions, you may also contact the Administrative Office's National Support Desk at (202) 536-5000 or online.

The following section provides an overview of functions in CM/ECF that can assist with managing cases and prioritizing your workload.

1. Notice of Electronic Filing

Notices of Electronic Filing (NEFs) are email notifications generated by docket activity in a case. Each NEF includes the case name, case number, a description of the docket activity event, its date and time of entry, and a list of recipients who received the electronic notification. If the docket activity event relates to a document being filed, the NEF will also include a link to that document. You can configure your CM/ECF settings to receive an NEF each time there is docket activity in one of your assigned cases, or as a daily summary email that lists all the filings for that day. You may also configure your settings so that you receive NEFs each time there is activity in certain cases but receive a summary notice for activity in all of your other cases. NEFs can be a helpful tool for monitoring case activity.[292] For example, you may review the summary notice at the end of the day and annotate filings that need immediate attention.

For assistance turning on and configuring your NEF settings, contact your court's CM/ECF administrator or the National Support Desk.

291. The Public Access to Electronic Court Records (PACER) system provides electronic access to case filings and docket sheets in CM/ECF, except those that are sealed or otherwise restricted.

292. For a discussion of using NEFs to manage pretrial motions, *see* Chapter 4, Section C.2.

2. Case management reports

The CM/ECF system enables you to generate various case management reports, described below, that can be customized to display selected case information. An example of each report is included in the online appendix.

- *Docket Report:* The Docket Report allows you to view party information and all docket entries for a case. You may also limit the report to filings within a certain time or docket number range.
- *Abridged Docket Report:* This feature allows you to run the docket report, select certain docket entries, and save the selections so you can retrieve them later. When preparing for a pretrial conference, motion hearing, or trial, it may be helpful to generate an abridged docket report that includes only key filings and events in the case. To create an abridged docket report, select the "abridged docket report" box in the docket report selection criteria screen. The docket report output will contain checkboxes next to each docket entry. You may then select specific docket entries for inclusion on the abridged docket report. At the bottom of the docket report output, there are options to either save the abridged docket report (you may name it and set an expiration date), or to view it without saving it. To view and update an existing abridged docket report, enter the case number on the docket sheet screen, click "show case list," and select the previously-saved abridged docket report.
- *Docket Activity Report:* The Docket Activity Report (DAR) displays a list of all docketing events that occurred in your cases within a specified time range. You can configure your CM/ECF settings to run the DAR at a specific interval (e.g., daily, weekly) and have it emailed to you at the close of that period. Judges use the DAR in various ways to monitor motions and case activity. For example, some judges will review the DAR each morning to get a quick rundown of the previous day's filings and to discuss high-priority matters with their law clerks.[293]
- *Motions Report:* The Motions Report lists selected motions (pending, terminated, or both) by case number, office, presiding or referral judge, type of motion, filing date, or trial date. You can sort the report by motions that are ripe for ruling, or other criteria, such as the dates by which all pending motions should be fully briefed.
- *Case Management Report:* The Case Management Report feature allows you to communicate with your staff about a case or event (e.g., a pending

293. For a discussion on using the DAR to manage motions, *see* Chapter 4, Section C.2.

motion) by creating electronic "sticky notes" and tasks. You and your staff also can add attachments in any format to the notes and tasks. The notes and tasks are saved privately within the CM/ECF system and are not available to the public. You can determine who is able to view your case and docket entry notes on a per-note basis. Whoever has access to view a note can also modify it, and a modification history appears on the bottom of the notes editing window.

- *Service and Answer Report:* The Service and Answer Report lists cases in which at least one defendant has not filed an answer, and those cases in which all defendants have answered, but no scheduling or pretrial order has been entered. Additionally, a 90-day rule report can be generated that lists cases in which one or more defendants have not been served a summons within 90 days of the filing of the case. This report can be helpful to identify cases for which you may need to issue an order to show cause for failure to complete service of process.
- *Trial Settings Report:* The Trial Settings Report shows all cases for which a jury or non-jury trial has been requested and can be sorted by whether a trial has been set.
- *Unscheduled Cases Report:* The Unscheduled Cases Report shows open cases in which a breakdown has occurred in scheduling and nothing is scheduled for the future.
- *Calendar:*
    - *Daily Report:* The Daily Report displays your calendar for a single day by location, case, and event (e.g., appointment, deadline, or hearing), and may contain links to related docket entries and filings.
    - *Monthly Report:* The Monthly Report displays your calendar for the selected month, listing scheduling information for each case.
- *Deadlines/Hearings Report:* The Deadlines/Hearings Report lists scheduled items for a single case, sorted according to your preference.
- *Civil Justice Reform Act (CJRA) Report:* To identify cases and motions that will need to be reported at the close of the next CJRA reporting period (either March 31 or September 30) if not disposed of, there is a "Run CJRA Report" option under the National Statistical Reports menu. You, your law clerks, or your courtroom deputy should periodically run the CJRA report to help prioritize motions, ensure that cases are not stalled on your docket, and maintain balance of the workload among

your chambers staff and law clerks. For a more detailed discussion of the CJRA report, *see infra* Section 3.[294]

3. Statistical and conflict checking reports

The CM/ECF system also generates statistical reports that allow you to view the status of your case activities collected by the Administrative Office. Some data on your workload, described below, is also used in statistical tables published in *Judicial Business of the United States Courts*, which is publicly available on the uscourts.gov website.

- *Monthly Trials and Other Court Activity Report (former JS-10 Form):* The Monthly Trials and Other Court Activity Report collects information about time spent by all district judges and visiting district and circuit judges in trials, hearings, and other proceedings in which all parties participate. The information is used in a number of important ways, including to evaluate judgeship needs, develop new case weights, and determine the court's overall staffing allocation. Additional information on the report is available on JNet.
- *MJSTAR Reporting:* The District CM/ECF system includes a function, known as "MJSTAR" (Magistrate Judge Statistics Through Automated Records), for reporting magistrate judge workload statistics. MJSTAR extracts magistrate judge workload statistics directly from each court's case management system, and the data is submitted to the Administrative Office monthly. For more information, *see* The Guide to MJSTAR on JNet.
- *CJRA Reporting:* Under the CJRA and Judicial Conference reporting requirements, on March 31 and September 30 each year, courts must provide the Administrative Office with data by individual judge on motions that have been pending over six months, bench trials that have been submitted more than six months, bankruptcy appeals that have been pending over six months, social security appeals that have been pending over six months, and civil cases that have been pending more than three years.[295] The CM/ECF system allows judges to enter status codes explaining any causes for delay in the reportable motions or cases, then automatically sends the data to the Administrative Office for

294. For a discussion of the CJRA reporting requirements and using the CJRA report to prioritize motions, *see* Chapter 4, Section B.1.

295. *See Guide to Judiciary Policy*, vol. 18, § 540.

inclusion in the final report. The CJRA Report is available to the public under the Statistics & Reports menu on the uscourts.gov website. Note that the CJRA Report does not include sealed cases, sealed motions, or sealed bench trials.[296]

- *Conflict Checking Reports:* The Judicial Conference requires that judges use automated conflict-screening for each case they are assigned, and judges use the conflict checking software that has been added to the CM/ECF system to meet this requirement. The software is not a fail-safe, however, and should be used to supplement your regular review of cases to ensure that no conflicts of interest exist. More detailed information on this function is available on JNet.

4. Docket text entry orders and orders on motions using the gavel icon

While most motions will require a written order, for simple procedural motions that do not require analysis (such as motions for extensions of time), consider ruling on the motion by clicking on the gavel icon and creating a text entry order, or direct a member of your staff to do so. When you run a docket report for a case, pending motions will have a gavel icon to the left of the docket number. To rule on a pending motion, click on the gavel icon and follow the prompts to create a text entry order ruling on the motion. For detailed instructions on this process, *see* online appendix.

5. Next Generation CM/ECF

The judiciary has developed a new version of CM/ECF, known as the "Next Generation of CM/ECF" or "NextGen," that introduces new functionality for judges and chambers staff, including a feature that allows judges to create a virtual folder with all filings relating to any type of docket entry (e.g., a motion). Information on NextGen, including descriptions of its enhanced functionality and updates on its implementation, is available on the NextGen page on JNet.

296. For further discussion of the CJRA's "six-month report" on pending motions, *see* Chapter 4, Section B.1.

C. Working remotely and cybersecurity[297]

Technology and mobile devices allow you to work remotely and communicate with your staff while outside of the courthouse. Your court's IT department can assist with configuring your mobile devices, including your smartphone, tablet, and laptop so that you can use the judiciary's remote networking applications to access your email and documents saved on your court's server. A Telework Preparedness resource page with step-by-step instructions on how to launch the judiciary's various remote networking applications is available on JNet, as are brochures on securing your home network and teleworking securely. The Telework FAQs page, created during the disruptions caused by the COVID-19 pandemic, also provides information on remote access. The FJC also has manuals on using an iPad for judicial work, including instructions on downloading motions and briefs from CM/ECF, working with documents in various file formats (e.g., Word files and PDFs), and applying electronic signatures.

When working remotely and using mobile devices, you should be mindful of security risks. You should consult with your court's IT professionals to ensure that the appropriate security software and authentication applications are installed on your mobile devices. The Administrative Office has prepared brochures on how to manage risks related to laptop use, smartphone use, and public hotspots, as well as a comprehensive Compendium of Security Awareness Training Resources, that address a host of additional cybersecurity topics specific to remote work and otherwise. If you must work while outside of the country, you should review the International Travel Guidance page on JNet. Because this information changes rapidly, it is recommended that you also call the IT Security Office (ITSO) at (202) 502-2350 for the most current information and guidance.

D. Civil case and criminal defendant disposition dashboard

To help courts better understand how quickly they are disposing of civil cases and criminal defendants, as well as the composition of their civil and criminal caseloads, the FJC, in conjunction with the Judicial Conference's Court Administration and Case Management Committee, developed an interactive case disposition dashboard tool that is distributed annually to the chief judge of each district court. The dashboard compiles a court's civil and criminal termination statistics for the prior three calendar years and allows a court to see its overall disposition

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time on each nature of suit and offense category relative to the national average. The dashboard also allows the court to drill down to the underlying case information for each nature of suit and offense category. The dashboard tool is an easy way to get a comprehensive view of the types of cases your court is handling and which types of cases are taking longer than others to resolve. It also can be a great tool to facilitate discussions among judges in your district about case management practices, especially with cases that comprise a large portion of your filings or are taking longer to dispose of than the national average. Chief judges should consider distributing the dashboard to all judges in their district after it is transmitted from the FJC each year. Judges interested in seeing how their district is managing its civil and criminal dockets should ask their chief judge for access to the dashboard. Additional information on the case management dashboard is available on the FJC's website.

E. IT training and information

As an introduction to the software used in courts, the FJC has developed the Chambers Online Automation Training series, which is comprised of 13 courses covering fundamentals such as using CM/ECF, drafting orders and creating templates in Word, creating and editing PDFs using Adobe, and cybersecurity. The Administrative Office and the FJC also provide advanced training focused on using technology to improve case management and chambers operations. Information on upcoming FJC-hosted seminars, and video/audio recordings and handouts from past seminars, are available on the Educational Programs and Resources page on the FJC's website. The FJC also regularly incorporates discussions on technology into its orientations for new district and magistrate judges, and as part of its national workshops for district and magistrate judges. Materials from these sessions are available on the FJC's webpage.

For email, instant messaging, and collaboration platforms, the judiciary utilizes Microsoft's Government Community Cloud and related Microsoft Office 365 products, including Word, Excel, Teams, and Outlook. This cloud-based platform is available to court employees anytime and anywhere and provides reliable access to Microsoft applications currently used in the judiciary along with new capabilities, patches, and updates to enhance productivity and keep data secure.

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