The Elements of Case Management

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Introduction

Rule 1 of the Federal Rules of Civil Procedure describes the goal of the judicial system: "to secure the just, speedy, and inexpensive determination of every action." If judges are to achieve this goal in the face of scarce judicial resources and the rising cost of litigation, they must manage the litigation process.

Case management means different things to different people, and there is no single correct method. In fact, there are substantial differences of opinion about many of the subjects we discuss here. But there is agreement that case management, in essence, involves trial judges using the tools at their disposal with fairness and common sense (and in a way that fits their personalities and styles) in order to achieve the goal described in Rule 1. These tools include the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, local rules, some provisions in Title 28, and the inherent authority of the court. Although judges operate in an environment largely shaped by local practice and custom, innovation and adaptation to circumstances also contribute to effective case management.

Faced with crowded dockets, federal judges may worry that they cannot keep up except by working oppressive hours. In fact, the heavy burdens of the job make it imperative that they pace themselves and keep reasonable hours to prevent burnout. This places all the more emphasis on handling cases with the maximum efficiency consistent with justice. A small amount of a judge's time devoted to case management early in a case can save vast amounts of time later on. Judges who think they are too busy to manage cases are really too busy not to. Indeed, the busiest judges with the heaviest dockets are often the ones most in need of sound case management practices.

This manual describes techniques that judges have found effective in managing their cases at various stages of the

litigation process. It begins with a discussion of the Rule 16 conference, outlining how proper use of this conference enables courts to establish control of cases at the outset. It then provides separate discussions of several items on the Rule 16 agenda—settlement, discovery, and motions—that continue to play an important role in case management after the conference and are, in any event, important enough to warrant discrete consideration. Discussion of these items will also shed further light on the conduct of the Rule 16 conference. The manual next turns to case management during the final pretrial conference, and then the trial itself. Finally, it discusses how the court can utilize its human and material resources and concludes with a case management reading list.

The manual is not intended to suggest that there is one preferred approach to case management. Its suggestions are offered as food for thought—a foundation for thinking about techniques and methods that will best suit the individual judge. Finally, a word of caution: local rules and the law of the circuit may affect some of what is said here.

The Rule 16 Conference

A judge's initial contact with the lawyers normally comes at the Rule 16 conference, sometimes called a preliminary pretrial conference, scheduling conference, or status conference. The purpose of the conference is to launch the case management process.

The Civil Justice Reform Act of 1990 requires each district court to implement an expense and delay reduction plan, and that plan and the specific rules or practices in each district will influence the precise nature and scope of the preliminary conference. Regardless of variations, however, each court should further the central principle underlying Rule 16: that a judicial officer take charge of the case early on and together with the lawyers establish a program appropriate for its just, speedy, and inexpensive resolution.

Preferably, that judicial officer will be the judge to whom the case is assigned. Becoming familiar with the case early helps the judge manage it effectively and, if necessary, try it more efficiently. In some courts, however, magistrate judges supervise the pretrial process. For this to work well, the magistrate judge needs the assigned judge's backing. The judge and magistrate judge should reach a general understanding about the management of the case at the outset and coordinate periodically. Lawyers should not get the impression that appealing the magistrate judge's case management rulings is likely to be profitable.

Timing and procedural matters

Rule 16 requires the court to issue a scheduling order within 120 days of the filing of the complaint. It is advantageous to schedule the first conference as early as possible, before the lawyers become bogged down in discovery or motions. Though some cases obviously require less attention than others, it is well to schedule conferences in all cases with potential discovery and motion activity. Some types of cases,

such as government collection cases or Social Security appeals, are so routine that no conference is needed.

Conferences should not be perfunctory scheduling exercises. Judges who use Rule 16 in that way miss out on its substantial benefits. The conference should be a moment of truth for the pleader and a thoughtful confrontation for all parties. The lawyers responsible for the case—not junior associates—should be there and should be prepared to justify their claims and defenses and to discuss future proceedings.

Although Rule 16(c) provides an agenda for the conference, judges may think of additional items appropriate for a particular case. Many judges issue a standard status conference order in advance, notifying the lawyers of what is expected of them. The lawyers should be asked to submit a conference statement in advance, summarizing the essentials of the case in simple terms, stating their position on the various agenda items, and proposing a litigation plan. In addition to laying the groundwork for a complete and specific conference agenda, this procedure forces lawyers to prepare for the conference, to think about the case, and to reach agreements. Meritless claims or defenses are sometimes pursued because they were not subjected to this kind of analysis. A judge's reputation for insisting that lawyers be on top of a case from the beginning works wonders in reducing dockets and moving them along. Of course, the judge too should be prepared for the conference, having read the pertinent pleadings and the lawyers' statements.

In some cases, it can be advantageous to have clients present. This gives them an opportunity to hear opposing counsel and to learn firsthand what may be involved in the litigation, including the likely cost. Such knowledge can engender a more receptive attitude toward settlement. On the other hand, there is a risk that clients' presence will discourage candor on the part of the attorneys, or that some clients will attach too much significance to casual remarks. In some cases, it may be advantageous to have the clients

available at the courthouse though not necessarily present during all of the conference.

While some judges hold Rule 16 conferences in open court with a court reporter present, most hold them in chambers and off the record, encouraging greater informality and a more searching and productive discussion. A court reporter can stand by prepared to memorialize any order or stipulation that comes out of the conference.

Some conferences (and even motion hearings) can be conducted by telephone, saving time and money. But there is much to be said for having the first case conference in person, bringing the lawyers and the judge face to face. Quite often, lawyers will not have talked to each other about the case before they appear in chambers. Bringing them together to confront the litigation early on is one of the most useful aspects of case management.

Establishing jurisdiction and identifying pivotal issues

The primary objective of the Rule 16 conference is for the judge and the lawyers to discern what the case is really about. Pleadings often do more to obscure the real issues than to identify them. Before getting to the issues, however, the court should always explore subject-matter jurisdiction. This, of course, is a non-waivable defect. It sometimes happens that the absence of jurisdiction is first recognized well into a case—occasionally not until the appeal. The pretrial conference can prevent proceedings that will later prove fruitless.

Once federal jurisdiction has been established, the most important function of the conference is the identification of pivotal issues. This process reduces many seemingly complex cases to simple, clearly defined issues that can be resolved more easily than appeared at first. For example, the Rule 16 conference may reveal that the plaintiff's right to recover ultimately turns on whether a legal defense bars the claim. Resolving that defense by motion or perhaps a separate trial can save time and expense.

Detecting the underlying issues in dispute sometimes requires aggressive questioning of the attorneys by the court to get beyond the pleadings. Parties may raise assorted causes of action or defenses that create the impression of a complex lawsuit when, upon probing, it turns out that the entire case hinges on a straightforward factual or legal dispute—or no triable issue at all. A penetrating inquiry can make cases shrink and even vanish.

An important function of the conference is to disclose the relief plaintiff seeks—what damages it expects to prove and on what basis, and what other relief is sought. This helps to define what is at stake in the litigation. Undertaking this process at the outset can substantially reduce discovery. A commercial dispute, for example, may turn on an ordinary business record that has never been shown to the opponent. No discovery is needed. The court can direct that the record be made available promptly and that the lawyers report back by telephone on a specified date. Similarly, if a defendant pleads all of the boilerplate defenses, the plaintiff may be in the position of having to conduct costly and unnecessary discovery; by using the conference to clarify which issues are genuinely in dispute, the court can prevent such waste.

The Rule 16 conference should also be used to screen out cases or claims that lack any factual basis. While notice pleading means that parties need not allege all the evidentiary detail, it does not entitle them to litigate issues for which they have no evidence. Parties may not look wholly to discovery to make a case or defense. The implication of Rule 11 is that a judge can require some showing of a factual basis, or at least a strong likelihood of one, as a condition for permitting a party to go forward (although claims and defenses should not be dismissed without notice and hearing).

Careful definition of issues at the outset may also disclose issues susceptible to resolution by summary or partial summary judgment. Discussion can reveal some threshold legal issue that may not have appeared clearly to the lawyers or perhaps was swept under the rug by one of them. Judges who familiarize themselves with a case can usually deter-

mine whether there are disputed evidentiary facts requiring trial or whether the issue can be resolved on motion.

The conference not only lays the groundwork for motions, it also serves to identify the discovery needed before motions can be made, thereby avoiding premature motions and building the foundation for proper ones. The conference can head off the filing of summary judgment motions that involve disputed factual issues and would only waste the parties' money and the court's time. In addition, the conference provides an opportunity to lay down the ground rules for motions, such as timing, page limits, and whether and when there will be a hearing.

Attorneys' fees

The Rule 16 conference can also reduce future litigation over attorneys' fees. After disputes on the merits are resolved, and an award of attorneys' fees is indicated, parties often bitterly dispute the proper amount of such fees. They contest the amount of time that should have been or was in fact spent on the case and argue about what is a reasonable billing rate. Such disputes can be prevented or at least reduced if the court, at the outset, lays down ground rules and establishes appropriate record-keeping requirements.

Setting dates for future proceedings

Rule 16 directs the judge to set dates for completion of discovery, a final pretrial conference, and trial. It is important that these dates be set at the outset if feasible. Sometimes not enough is known about a case to set meaningful dates, and another conference may be necessary. Some judges set firm discovery cutoff and trial dates at the first conference and never depart from those dates. Such rigidity can be effective for disposing of civil cases rapidly, but is not practical for courts whose heavy criminal dockets preclude giving a credible trial date. Even if a firm specific date cannot be set, the court may designate the month in which trial is to occur or set a presumptive date.

Courts should always set a firm date for the next event in the case, be it another conference, the filing of a motion, or any date requiring action by the lawyers. Every case in a judge's inventory should have a specific date calendared that will bring it to the court's attention.

Setting a firm schedule at the conference is no substitute for defining and narrowing issues. Focusing lawyers' attention on the issues from the outset avoids unnecessary discovery, promotes early settlement, prevents pointless trials, and, where a trial is needed, furthers efficiency and economy.

Settlement

The Rule 16 conference should explore the possibility of settlement. Most cases will eventually settle anyway, but often only after unnecessary cost, delay, and judicial effort. The traditional settlement on the courthouse steps, after much discovery and motion activity, is wasteful. Judges should try to facilitate early settlement where practical.

Lawyers are generally not in a good position to evaluate settlement possibilities at the first conference, knowing too little of the case. Once the issues have been identified and narrowed, however, relatively little discovery may enable them to make a reasonable evaluation. The deposition of the plaintiff and perhaps the defendant or a key witness, and the exchange of a few documents, may be all that is necessary. This can be readily arranged, and the lawyers can be directed to return at a specified date if they have not settled. Such "phased discovery" frequently leads to an early settlement.

At the outset of a case, lawyers have rarely thought much about damages. Attention should be focused on this subject early because it is crucial to a realistic evaluation. Many lawyers give insufficient consideration to the economics of their case, plunging into litigation without making a cost–benefit calculation. A client may have a meritorious claim, but the time and money necessary to establish it may be out of proportion to the potential reward. The Rule 16 conference should provide lawyers with a "reality check," and discussion about settlement should focus their attention on what would be an acceptable outcome for the client.

The judge's role

It is useful for judges to inquire about settlement whenever they see the lawyers. Lawyers are often interested in settling (particularly in view of the rising cost of litigation) but may consider raising the subject an admission of weakness. A judge's questions offer a graceful opening.

Different judges take different approaches to settlement. Some judges become actively involved in settlement negotiations in their own cases, thinking that another judge would lack the necessary familiarity. Others choose not to, believing it may compromise them if the case goes to trial. This is a legitimate concern, because participation in the negotiations will sooner or later require the judge to evaluate and express a view on the strength of a claim or defense. Doing so will jeopardize the appearance of impartiality in future proceedings, and may cause both the judge and the parties to feel uncomfortable. This is less of a problem in a jury trial than in a bench trial. Nevertheless, in all cases, unless both parties urge the judge to act as settlement judge and waive disqualification, there is much to be said for recruiting a colleague on the court—another judge or a magistrate judge—as a settlement judge. The assigned judge will have opportunities to reciprocate, and an effective system for settling cases in that district may develop.

Of course, settlement is not desirable in every case. The dispute may involve a principle of importance to the parties, or an issue whose resolution on the merits will help guide the conduct of other parties. Moreover, a party with a meritless claim should not be assisted in extracting a nuisance settlement by threatening protracted and costly litigation. Judges who are actively involved in settlement negotiations should be sensitive to such considerations, and should avoid using their position of authority to apply undue pressure on parties to settle. Though settlement is generally favored, and courts can contribute substantially to bringing it about, judges should facilitate, not coerce it.

Settlement negotiations require flexibility and adaptability. More is involved than splitting the difference. Sometimes a face-saving device will satisfy a party. Sometimes mediation or another type of alternative dispute resolution procedure should be encouraged. And, on occasion, parties can be persuaded to agree on a settlement figure while leaving the fixing of attorneys' fees to the court.

Discovery

Discovery is probably the single greatest source of cost and delay in civil litigation, but judges can do much to mitigate this problem. Rule 26(b) gives judges great power and discretion to control discovery. This power ought to be used to prevent duplication, to require lawyers to use the least expensive way to get necessary information, and to keep discovery costs from becoming disproportionate to what is at stake in the lawsuit.

At the initial and subsequent conferences, the judge should review the lawyers' discovery plans with these considerations in mind and keep the discovery program in line with the objectives of Rule 26(b). Judges generally should not use valuable conference time to develop a detailed discovery plan with the lawyers. The lawyers should be asked to propose an agreed-upon plan, and the court can then inquire about specifics, such as the need for particular depositions, time limitations on depositions, alternatives for getting information less expensively, and limitations on document discovery and interrogatories. Simply asking these questions may lead the lawyers to streamline their program. Abuse of the discovery process is a ground for sanctions, but sanctions will rarely be needed when sound case management is applied.

Special care is required to manage expert discovery. It is helpful for the parties to exchange experts' reports before their depositions are taken—the reports can focus the deposition, and may even obviate the need for it. An expert should not be permitted to testify at trial unless he or she has been made available for deposition before the trial. Therefore, in some cases it makes sense to defer expert discovery until other discovery is completed, giving the parties a clearer sense of what expert testimony may be needed.

Some judges assign supervision of discovery matters to magistrate judges. A potential drawback is that some mag-

istrate judges may not assert the authority needed to limit discovery and keep disputes from getting out of hand. Whoever handles discovery disputes should have a program for keeping them under control. The most effective method may be having the judicial officer available to resolve any discovery dispute by telephone. This is particularly effective when a dispute develops during the taking of a deposition. Knowing that the judge is only a phone call away has a wonderful tendency to make lawyers more reasonable.

Many judges preclude filing of a discovery motion unless there has been a prior telephone conference with the judge. It is surprising how quickly disagreements are resolved when they must be presented to the judge in a succinct statement. Telephone conferences eliminate the opportunity to use discovery disputes to obstruct the litigation. Establishing this procedure at the outset of a case greatly reduces the number of discovery disputes.

Motions

Motions play an important role in litigation. They can prevent unnecessary trials or at least narrow issues so as to expedite trials. Pointless motions, however, waste time and money; whenever possible, the judge should discourage them. The classic example is the Rule 12(b)(6) motion for failure to state a claim. More often than not, the asserted defect is readily cured by an amendment. At the Rule 16 conference, the judge can ask the parties to specify any grounds they might have for such a motion and can determine in advance whether a defect is curable. Curable defects should generally be brought to the opponent's attention before a motion is filed. Similarly, lawyers should be discouraged from filing Rule 11 motions. There is a tendency to misuse this rule, which generally should be directed only at abusive conduct.

A hearing is unnecessary if a motion is routine and the outcome obvious. If the motion presents a difficult or close issue, the lawyers should come to court to answer questions and address the judge's concerns. Local rules will provide a schedule for filing motions and oppositions. The time limits should be observed so that the court has sufficient time to prepare for a hearing, if there is to be one.

If at all possible, the court should be prepared to decide the motion from the bench. Most disputes do not become easier to resolve once taken back to chambers. In fact, as time passes, the matter becomes cold, and the judge will need more time to refresh his or her recollection. While the litigants are entitled to the court's best effort, they will generally prefer a prompt decision to a perfect but belated one.

Trial courts should write no more than necessary. The moving party should be asked to submit a proposed form of order that the court can use, with modifications if needed. When there is a hearing, the judge will often be able to state

the reasons for the decision orally on the record. Where the ruling is dispositive or decides an important point, a written ruling may be called for, particularly if the issue is novel. But it is well to bear in mind that trial court rulings generally lack significance beyond the particular case in which they are issued.

The Final Pretrial Conference

The final pretrial conference can be valuable in two respects. First, it is the last good shot at settlement. Second, it is a dress rehearsal for the trial. Delay and expense in civil litigation result not only from unnecessary trials but also from trials lasting too long and involving too many witnesses and exhibits. At the final pretrial conference, the court and the lawyers can ascertain in advance what issues have to be tried and what evidence is necessary. This will also help ensure that the lawyers are prepared for trial.

Despite its potential, some judges treat the final pretrial conference as little more than a scheduling conference to set the final trial date. Others go to the opposite extreme and require preparation of elaborate statements, summaries, and stipulations, expecting that the resulting burdens will induce settlement. There is much to be said for a middle course: doing whatever is necessary, given the circumstances of the case, to lay the groundwork for a fair and efficient trial. Here are some of the agenda items the court should consider.

Defining and narrowing the issues

The court should have undertaken this at the initial conference, but by the time of the final pretrial conference everyone will have a clearer understanding of the case. This conference presents the last and best opportunity to prevent waste of valuable trial time on pointless or undisputed matters. A good way to focus the issues is to require the parties to submit proposed jury instructions (or proposed findings of fact and conclusions of law in bench trials) that set forth clearly the governing rules of law and the factors controlling their application.

Previewing the evidence

The court and the lawyers should briefly review all proposed testimony before trial. By hearing and ruling on motions in

limine, or by sua sponte orders, the court can prevent much confusion at trial about the admissibility of evidence. The final pretrial conference provides an opportunity to hold a hearing under Rule 104 of the Federal Rules of Evidence to determine the admissibility of expert testimony, and to exercise the authority conferred by Rules 403 and 611. The court can bar duplicative testimony (by limiting each side's expert or character witnesses, for example). So, too, the court can eliminate testimony about matters not in dispute. For example, there is no point in having a handwriting expert if there is no dispute over who was the writer. Many foreseeable objections to testimony—such as hearsay objections—can be resolved before trial, as can issues concerning the permissible scope of opening statements.

Proposed exhibits should be previewed with a view to holding down their number and volume. There is little point in inundating jurors with a mass of exhibits beyond their capacity to read and absorb. (In post-trial interviews, jurors often complain that the lawyers presented too much evidence.) The court may suggest that voluminous exhibits be redacted to eliminate unnecessary portions and cumulative exhibits be eliminated. Sometimes information from numerous exhibits can be presented in a summary exhibit (as authorized by Federal Rule of Evidence 1006). Previewing proposed exhibits can also save valuable trial time since the court can rule on evidentiary objections and receive into evidence unobjectionable exhibits.

Considering limits on the length of the trial

Trials that last too long are costly, exhaust jurors, and hinder comprehension. When trials threaten to become protracted, some judges find it useful to limit the number of witnesses or exhibits each side may offer. Other judges sometimes limit the amount of time allowed each side for direct and cross-examination. Such limits can be helpful to the court and the parties but should be imposed with care and only after consultation with counsel.

Establishing the ground rules for the trial

The final conference can fix the procedures for trial, including the conduct of voir dire and method of jury selection, the order of witnesses, and daily trial schedules.

Considering use of special procedures

The court can discuss with counsel and determine the propriety of bifurcation, the return of sequential verdicts by the jury, use of special verdicts or interrogatories, and any other phasing arrangements or special procedures that may be appropriate.

Exploring once more the opportunities for settlement

Now that the parties are completely familiar with the case, they may be ready to settle if the court provides the opening.

* * *

The results of the final pretrial conference should be memorialized in a pretrial order. To save time, the court can dictate the order to the court reporter at the end of the conference with counsel present.

Trial

At trial, the court's management power transcends the authority specifically conferred by rules, statutes, and decisions. The court has broad inherent power over the management of the cases, attorneys, and parties before it. That inherent power, employed judiciously, enables the court to do what is necessary to produce just, speedy, and economical trials.

Although case management brings judges into areas that were once entirely controlled by lawyers, the judge should be careful not to take the case away from the lawyers. While the court can and should set limits, define issues, and establish ground rules, it should leave the case to be tried by the lawyers. The judge needs to appreciate that the lawyers have obligations to their clients which at times will be in tension with the court's objectives. The judge's task is to bring about a reasonable accommodation by formulating a framework within which the adversary process will function constructively. What follow are suggestions for managing the various stages of trial.

Starting the trial

The process of selecting jurors varies somewhat from court to court. With the repeal of Rule 47(b), alternate jurors will no longer be selected in civil trials. The court may seat from six to twelve jurors, depending on the expected length of the trial, and all jurors remaining when the case goes to the jury will participate in the deliberations.

Rule 47 gives the judge the choice of personally conducting the voir dire or leaving it to the lawyers. Most judges conduct the voir dire themselves in order to expedite jury selection. Doing it oneself, however, obligates one to do a reasonably thorough job. The judge may have members of the venire complete questionnaires before voir dire, which can facilitate more focused questioning. It is not enough for

the court to ask perfunctory or conclusory questions. Prospective jurors should be questioned individually and invited to give narrative answers about their work, interests, and attitudes on critical matters. This can be done without taking undue time. In addition, Rule 47 requires that the attorneys be allowed to supplement the examination directly or by submitting questions to the court. Attorneys will appreciate the opportunity to ask the jurors supplemental questions directly. Permitting them to do so need not take much time, and the extra time will be well spent if it helps avoid mistrials by ferreting out potential problem jurors.

More and more judges have come to recognize the value of giving instructions to the jury before the trial begins. (Some even give instructions before the voir dire, on the theory that prospective jurors will then be better able to respond to questioning.) Pre-instructions inform jurors about how the trial will be run, how they are to conduct themselves, how to treat the evidence received, and other ground rules. Pre-instructions also educate jurors about the case—the elements of the claims and defenses, and the questions they will have to decide. Not telling the jury such things at the start of the case is akin to asking the referee to decide who won a prizefight without telling him the rules until the fight is over.

Helping the jury

Because jurors have a passive role during the trial, their importance is sometimes overlooked. Since they are the people expected to decide the case, judges ought to make every effort to help them in this often difficult task. Assisting jurors has become increasingly important in an era of complex litigation. Judges cannot afford to be passive or permissive. They should take various steps to help the jury perform its function well.

Judges should see to it that jurors are treated with respect and consideration. They are entitled to no less, having made a substantial sacrifice to perform a taxing public service. Trials should always start on time. Lengthy recesses should be avoided. The jurors should not be sent out to wait while

the lawyers argue; matters the jury should not hear can generally be taken up before the start or after the end of the trial day or during the lunch recess. Bench conferences and other trial interruptions should be minimized. Sentencings, pleas, and other matters should be scheduled so as not to disrupt the trial.

The trial should move smoothly, without interruptions or surprises. It is helpful to confer with counsel at the end of each day to preview the next day's witnesses and exhibits, to anticipate evidentiary and other problems, and to make sure the lawyers will not run out of witnesses.

The lawyers should be encouraged to speak (and have their witnesses speak) clearly and in plain English. As witnesses testify about exhibits, lawyers should help jurors follow by using an overhead projector or other visual aids. The court should not hesitate to explain to the jurors any procedures that might be confusing and to recap the progress of the case.

Other aids to jury understanding are also worth considering. Most judges, for example, permit jurors to take notes (subject to appropriate instructions). Some judges prepare notebooks for the jurors containing the names and identification of witnesses and other helpful information.

Instructions, summations, and deliberations

If the lawyers submit their requested jury instructions or charges at a pretrial conference, the judge will have time to organize and simplify them as the case progresses, and to supplement or modify them in response to developments during the trial and the lawyers' supplemental requests. This procedure enables judges to settle instructions quickly at the close of the evidence and move promptly to final arguments.

Obviously, it is important to make sure the jury understands the case. The instructions should be written in plain English, not legalese. Judges should not hesitate to rewrite the lawyers' requested instructions in simple, well-organized prose. Rather than being thrown together and read in random order, instructions should be carefully organized in a sequence

that reflects the logic of the case. Instructions should be kept brief; a juror's attention span is not unlimited. The court should not give an instruction, even if requested, unless it is needed—too many instructions, given out of habit, merely cause confusion.

Rule 51 permits the judge to instruct the jury before or after closing arguments. Many judges find that instructing before the arguments saves time by making it unnecessary for the lawyers to preview the instructions in their arguments; this, in turn, reduces the likelihood of objections. Having heard the instructions first, the jury may get more out of the attorneys' arguments. The lawyers should be encouraged to keep their closing arguments brief—rarely should they exceed one hour per side.

It is difficult for a jury to understand and remember the judge's instructions after having heard them only once. Accordingly, most judges now give the jury a copy of the charge to take into the jury room. Experience suggests that doing so does not increase the difficulty of reaching a verdict. Storing common jury instructions on computer disks and adapting them as necessary to the particular case allows a judge to produce a set of instructions conveniently.

The court should make sure that before any exhibits are sent to the jury room, they have been carefully checked by the courtroom deputy and all counsel. It is critical that no extraneous documents, such as excluded exhibits, are seen by the jury.

Reasonable people differ about the desirability of special verdicts or general verdicts combined with special interrogatories. These devices may reduce the risk of having to retry the entire case following a partially successful appeal, but they increase the risk of inconsistent verdicts. Special verdicts must, therefore, be drafted with great care and the aid of counsel.

During deliberations, the jury may send questions to the court or ask for further instructions. The court should always consult with counsel before responding and respond only on the record. Where possible the jury ought to be given

the help it needs to arrive at a verdict, but within limits—for example, the court should avoid getting involved in lengthy read-backs of testimony. When one is requested, the jury may be asked to narrow its request to specific testimony.

When the jury advises that it is deadlocked, the court faces a difficult choice. A mistrial should not be declared until it is clear that the deadlock is hopeless. While it is appropriate to encourage the jury to try a bit longer—the longer the trial, the longer the jury should be given—the court must not exert undue pressure. The court may wish to consult instructions to deadlocked juries ("Allen charge") that have been approved in its circuit.

Bench trials

Although a bench trial is subject to fewer formalities, it should not be allowed to proceed in a careless and disorganized fashion. Since the judge will be the one to decide the case, he or she has an interest in keeping it under control, limiting the testimony and exhibits to what is essential, and having the evidence presented in an orderly and comprehensible manner. Judges should not receive evidence on the assumption that it can be sorted out back in chambers. Once the trial is over, the judge will be occupied by other things, and by the time he or she gets back to it, the case will be cold.

Several steps can be taken at the trial to help the court maintain control of the case. As noted, the court can conduct a thorough final pretrial conference where the lawyers submit proposed findings of fact and conclusions of law, marked if possible to indicate which matters are in dispute. The court will then be able to follow along on the findings as the trial progresses, making its own findings and preparing to rule at the end of the trial.

Except when there are serious issues of credibility, the court can have the parties submit much of the direct testimony of their own witnesses in the form of narrative written statements. These can be received at trial in lieu of direct testimony, subject to objections, supplementation, and cross-examination. This will improve the quality of the record on

both the direct and the cross-examination, save time, and help the court reach its decision.

As soon as the evidence has been received, the court can have the lawyers argue the case as they would in a jury trial. Post-trial briefs should be avoided except in cases involving complex legal issues. If at all possible, the court should be prepared to dictate its findings and conclusions to the court reporter at the end of the closing arguments.

Using the Court's Resources

Effective use of the human and material resources available to the judge underlies every stage of case management. While the precise use of secretaries, deputy clerks, and law clerks depends on each judge's style, a few considerations apply universally.

The position of courtroom clerk has enormous (and often unrealized) potential. Courtroom clerks should not simply receive and file papers. They can be administrative assistants, managing the judge's calendar and communications with lawyers. Some judges assign this duty to their secretaries. In either case, it is important that lawyers understand the proper channel of communication, and that someone on the court staff be prepared to manage it. That person should let the lawyers know what is expected of them and should keep the judge apprised of developments in the case, such as whether it appears likely to settle, whether the lawyers are prepared, etc.

Law clerks, generally heavily burdened by the motion calendar and other research demands, must be used efficiently. Unless properly instructed and supervised, they may invest vast amounts of time on research that is common for law reviews but of little use to the court. Judges should always define the specific problems on which they need help, making sure the clerks understand the practical context in which the problems arise. They should touch base with law clerks to ensure that they are on the right track and discourage the generation of unnecessary memos and other papers. Many judges instruct law clerks not to speak with lawyers on a case, believing it improper or a waste of the clerk's time.

Personal computers are now available to all judges, and those who use them find them invaluable. Those who do not should give serious consideration to learning how (which is generally far less difficult than non-users fear). The judges who have taken the trouble to learn have found themselves richly rewarded. The PC increases productivity in many ways—

helping judges turn out more work, revise their clerks' work, and keep track of their docket and calendar.

Reading About Case Management

There is a growing literature on case management. Judges are likely to find some of the following materials (listed in reverse chronological order within each category) especially valuable.

General

Judges' J., vol. 29, no. 4 (1990) (entire issue on case management)

Zeliff, *Hurry Up and Wait: A Nuts and Bolts Approach to Avoiding Wasted Time in Trial,* Judges' J., vol. 28, no. 3, at 18 (1989)

M. Solomon & D. Somerlot, Caseflow Management in the Trial Court, Now and for the Future (American Bar Association 1987)

Peckham, *A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution,* 37 Rutgers L. Rev. 253 (1985)

Panel Discussion, *Judicial Views on Controlling the Antitrust Case—Discovery, Trial, Jury Problems,* 51 Antitrust L.J. 261 (1982)

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By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference. The Board appoints the Center's director and deputy director, who supervise the Center's operations. The Center is organized into five divisions.

The Court Education Division provides educational programs and services for non-judicial court personnel, including clerk's office personnel and probation officers.

The Judicial Education Division provides educational programs and services for judges. These include orientation seminars and special continuing education workshops.

The Publications & Media Division is responsible for the development and production of educational audio and video media as well as editing and coordinating the production of all Center publications, including research reports and studies, educational and training publications, reference manuals, and periodicals. The Center's Information Services Office, which maintains a specialized collection of materials on judicial administration, is located within this division.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

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