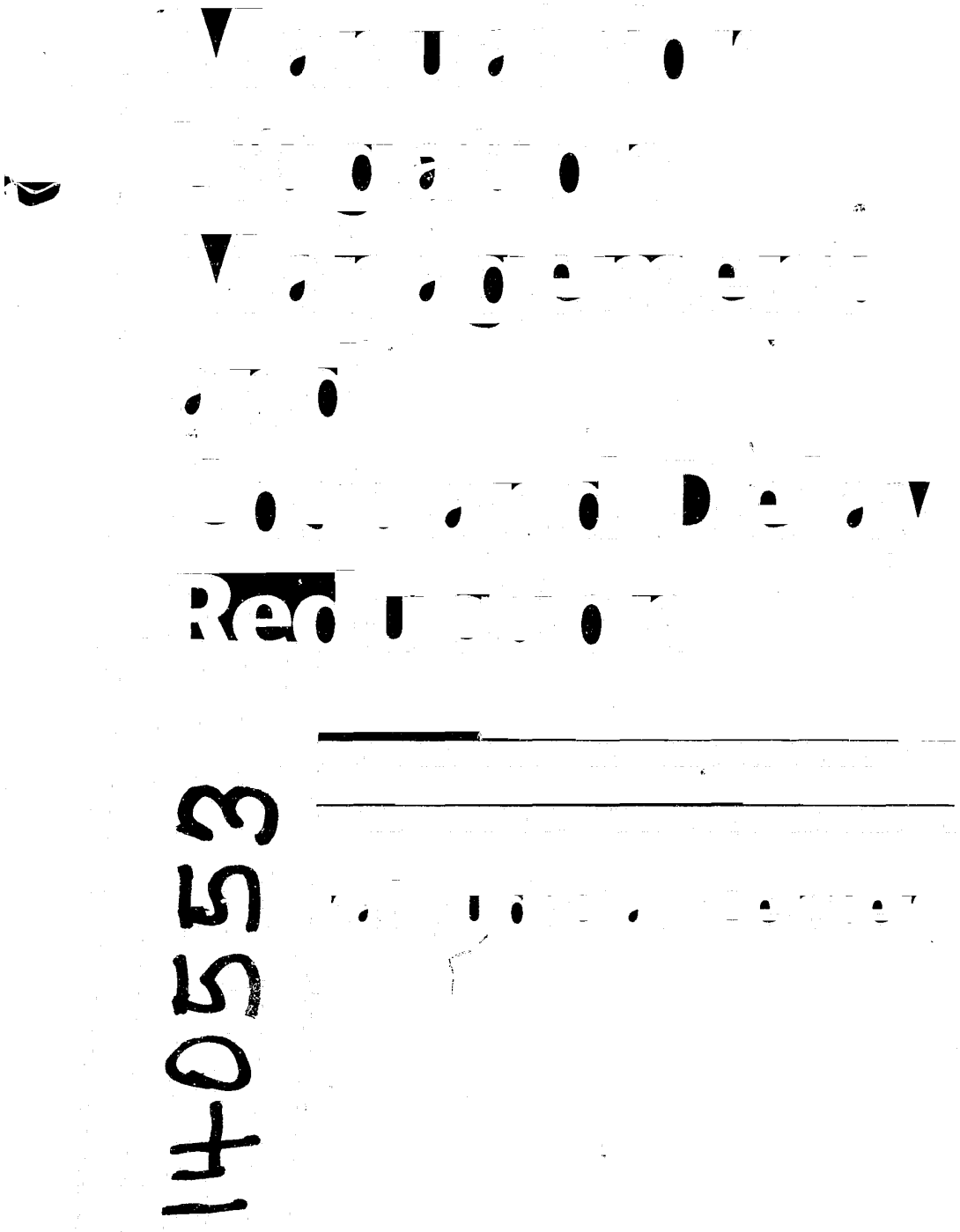


Federal Judicial Center • One Columbus Circle, N.E. • Washington, DC 20002

Manual for Litigation Management and Cost and Delay Reduction

Federal Judicial Center
1992

This manual was produced in accordance with the Center's mandate under the Civil Justice Reform Act of 1990 (28 U.S.C. §§ 471 ff.) and in furtherance of its statutory mission to conduct and stimulate development in matters of judicial administration. Publication signifies that the statements, conclusions, and points of view contained herein are regarded as responsible and valuable. It should be noted, however, that on matters of policy the Center speaks only through its Board.

Cite as Litigation Management Manual (Federal Judicial Center 1992).

Contents

Introduction

The purpose of the manual

This manual has been prepared to carry out the mandate of section 479(c)(1)–(3) of the Civil Justice Reform Act of 1990. 28 U.S.C. §§ 471 ff. That act was adopted in response to strong and persistent demand for reform of the civil litigation process to reduce cost and delay. In enacting it, Congress found:

> Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—
>
> (A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;
>
> (B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events;
>
> (C) regular communication between a judicial officer and attorneys during the pretrial process . . . .

28 U.S.C. following § 471.

The purpose of this manual is to assist judges in conducting effective civil case management.* It offers judges an arsenal of management techniques for every phase of litigation. The manual reflects the early results of the analyses mandated by the Civil Justice Reform Act as well as the general experience of many judges, but the suggestions and interpretations it offers are not official recommendations of the Judicial Conference of the United States, the Federal Judicial Center, or the Administrative Office of the U.S. Courts.

This manual is limited to measures that a judge can implement individually without action by the court; it complements the Center's Bench Book for United States District Court Judges, which covers principally the conduct of courtroom proceedings. It is a guide to essentially generic litigation management techniques applicable to the entire spectrum of civil cases. The techniques discussed may be useful

* That this manual is addressed to civil litigation should not obscure the fact that case management is equally important in criminal litigation. Notwithstanding the differences between civil and criminal litigation, some of the material included in this manual may also be found helpful in the management of criminal cases, in particular the discussion of final pretrial conferences and the conduct of trials.

in implementing the principles in the Manual for Complex Litigation, Second, but this manual does not supplant it; specifically, problems unique to managing large-scale litigation, such as mass tort cases, are beyond the scope of this manual. However, useful guidance on that and other discrete management areas may be found in the references contained in the bibliography.

The essentials of case management

The purpose of case management is to further the just, speedy, and inexpensive resolution of civil disputes. While it will help cases move to resolution more expeditiously, it should not be viewed as simply a docket-clearing device. Its primary purpose is to improve the quality of civil justice; to help parties to civil disputes obtain a fair resolution (often by other than adversary procedures) at a cost commensurate with what is at stake. Seeking perfect justice at a cost litigants and the judicial system cannot afford is self-defeating. Case management must be directed at tailoring dispute resolution procedures and techniques to the available resources and the needs of the case.

Case management should not be permitted to become an end in itself or lead to unnecessary activity, costs, and delay. Although this manual offers a wide range of techniques, it should not be taken to suggest that management must necessarily be labor-intensive or paper-intensive. Management should be limited to what is necessary and appropriate for the case at hand. It should be directed at reducing rather than increasing the investment of resources in litigation.

Those resources include not only the those of the parties but also those of the judicial system. Judicial time is the scarcest of them, and it may seem to some district judges that the pressures of their docket do not permit them to devote time to civil case management. The premise of this manual, however, is that case management, often with the assistance of magistrate judges and, on occasion, persons outside the district court, will lead to economies of judicial time and lighten rather than increase judicial burdens. Moreover, by bringing about the expeditious resolution of civil disputes, judges can maintain public access to civil justice even in courts with heavy criminal dockets.

Accomplishing this goal calls for different approaches from one case to the next. Some cases need little, if any management; others need more. The techniques suitable for a case, and the best way to apply

them, will depend on the needs and circumstances of that case; imposing a standard format across the board is likely to be counterproductive. Choices will be influenced by such factors as the case's magnitude, complexity, and novelty and the ability, tactics, and attitude of the attorneys, and they will be guided by local rules, orders and practice, the district's expense and delay reduction plan, circuit law, and the judge's informed discretion. Decisions about the kind and degree of management to apply in a particular case are most effective when made early in the case (retaining, however, sufficient flexibility to accommodate future developments). This manual offers judges a menu of approaches and techniques from which to choose (and to modify and adapt) those that appear most suitable at various stages of a civil case. It is not intended to prescribe or even suggest a particular management regime, but it does suggest that judges make choices in order to further effective case management.

Case management and the bar

Taking management seriously as a judicial responsibility does not mean taking the case away from the attorneys. What it means is giving direction to the litigating activity of attorneys, fixing bounds, and applying means of control as necessary. Many lawyers conduct their cases skillfully and effectively in a manner consistent with good case management; judges should enlist them as active participants in the case management process. But all lawyers are not equally amenable to working with the court to implement management of their cases. Some, animated by a narrow view of the adversary process, see case management as an intrusion into their function as their client's advocate. Judges will need to control excess zeal, resistance, and occasional manipulation of the litigation process, but there should be no contradiction between directing attorneys' efforts toward early issue identification and the fair and efficient disposition of litigation on the one hand and the purposes of the adversary process on the other.

The techniques set out in this manual should be helpful to this end. But manuals such as this can only identify and explain such techniques. Their application is an art as much as a science. Like carpenters using hammers, saws, and chisels, judges can be creative and constructive or misguided and destructive. Litigation is about dispute resolution, and dispute resolution is a people process. Managing that process

calls on a range of qualities and skills—intelligence, patience, diligence, firmness, and common sense, to mention a few. The judge may question, encourage, persuade, direct, but in the end the judge's role in management is leadership to help guide the parties and their attorneys to achieving a reasonably satisfactory outcome. The judge will be most effective in this role if he or she gains the respect and confidence of the bar and the public—by maintaining integrity and credibility and being reasonable, consistent, and willing to learn.

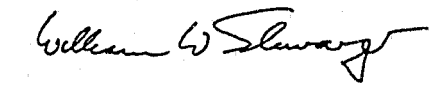
Content of the manual

The first section of this manual covers the management of the pretrial phase of litigation, the second the management of the trial phase. Special matters that bear on litigation management are discussed in the third section. The fourth section contains sample orders and forms drawn from different courts; they are included here simply as a reference to alternative approaches judges have used and as a source of ideas to assist in the implementation of some of the techniques discussed in the text. For judges wishing to go into subjects covered in the manual in greater depth, the bibliography supplies a wide range of useful references.

As of the time of publication, extensive revisions of the Federal Rules of Civil Procedure were under consideration. If adopted they will go into effect in December 1993. They will require technical changes in the manual's text and references but will not affect its substance.

Valuable contributions to this manual have been made by staff of the Federal Judicial Center and the Administrative Office, by members of the Judicial Conference Committee on Court Administration and Case Management, and by members of the bar who cared sufficiently about the subject to have read and commented on drafts of the manual.

The Center invites your comments and suggestions for future revisions.



William W Schwarzer
September 1992

I. The Pretrial Phase

A. Rule 16 Conferences

1. General

The Rule 16 conference is the most important pretrial case management tool. Effective use of that conference lays the foundation for effective management of the case. See generally Notes of Advisory Committee on Civil Rules; Schwarzer & Hirsch, The Elements of Case Management (Federal Judicial Center 1991).

The variety of labels attached to Rule 16 conferences—scheduling, case management, discovery-case management, status, preliminary pretrial, and final pretrial—reflects the versatility of the conference as a case management device. It is adaptable to meet a wide range of management needs at the different stages of litigation.

A court may by local rule exempt categories of actions that do not lend themselves to pretrial management or will not benefit from it. For example, many courts exempt Social Security, government collection, and prisoner cases and have adopted discrete management tracks appropriate for such cases in their courts. Even in the absence of a specific rule, a district judge has broad discretion, guided by the stated purposes of Rule 16, to tailor the conference (and the extent of the judge's involvement) to the needs and circumstances of the case. That discretion offers opportunities for innovation and creativity, but also tends to introduce a large element of unpredictability from the lawyers' perspective. Lawyers can play their part in litigation management more effectively if they know what the judge expects. For that reason, many judges issue written guidelines or instructions covering the pretrial process—including discovery and motion practice—as well as trial. (For illustrative guidelines, see Forms 16–20.) Their purpose is to improve the practice in the court rather than create an additional set of mandatory rules.

The following sections suggest a variety of techniques for judges' consideration in implementing Rule 16. Choices among them—i.e., decisions about how to implement it—should be made as early in the case as possible. See Manual for Complex Litigation 2d § 20.1.

2. Purpose

The purposes of Rule 16 conferences are stated in subdivision (a) of the rule:

> (1) expediting the disposition of the action;
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
> (3) discouraging wasteful pretrial activities;
> (4) improving the quality of the trial through more thorough preparation, and;
> (5) facilitating the settlement of the case.

These purposes are amplified by the intent of the Civil Justice Reform Act to bring about reduction in the cost of litigating civil cases and the time consumed in bringing them to resolution. In conducting Rule 16 conferences, judges should have these objectives in mind. Conferences should be held to advance them, not simply as a perfunctory exercise. For that reason, a judge, not a law clerk, should conduct them.

3. Timing of the Conference

Rule 16 requires that a scheduling order shall issue as soon as practicable but in no event more than 120 days after the filing of the complaint. Many judges believe that the conference should be held as early as 30 to 60 days after the filing of the complaint. Even though counsel may argue that not all parties have been served and that their knowledge of the case is still limited, an early conference is nevertheless desirable to establish control of the case and to prevent the parties from becoming locked into potentially wasteful discovery and motion activity before the critical case management issues discussed in this part are addressed. The Rule 16 conference should therefore precede issuance of the scheduling order so that the order may be informed by the discussion at the conference (see ¶ 6 on p. 9). Whether and when subsequent Rule 16 conferences should be scheduled will depend on the circumstances of the case. See Manual for Complex Litigation 2d §§ 21.12, 21.21.

4. Arrangements for the Conference

Judges make different arrangements for holding Rule 16 conferences. Following are some of the relevant considerations. See generally Manual for Complex Litigation 2d § 21.1.

a. Using the courtroom or chambers

In deciding whether to hold the conference in chambers or the courtroom, consider:

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

Holding a conference in the informal setting of chambers can be more conducive to achieving the cooperation needed for narrowing issues, making stipulations, and discussing possible settlement. The formality of the courtroom setting, on the other hand, promotes orderly proceedings and leads to a better record. In cases of public interest, members of the public and media representatives may want to attend.

b. Using the telephone

In deciding whether to hold the conference by telephone or in person, consider:

- telephone conferences, especially with out-of-town counsel, will save time and money, facilitate holding a conference on short notice, and they are adequate to address routine management matters, such as scheduling or discovery matters;
- face-to-face conferences facilitate detailed discussion needed to clarify and narrow issues, analyze damage claims, explore settlement possibilities, and address contentious matters.

c. Reporting the proceedings

The parties are entitled to have all proceedings reported on request, but absent such a request, the judge may exercise discretion on whether to have the conference reported. Counsel may speak more freely off

the record, but in certain cases the nature of the participants or the controversy may make it advisable to have a transcript of the entire proceeding. When the conference is held off the record, stipulations or rulings can be dictated to the reporter at the end of the conference.

d. Attorney participation

The utility of the conference depends on the participating attorneys' understanding their case, having adequate authority to enter into binding scheduling arrangements and stipulations (see Rule 16(c)), and being prepared to address the subjects the court will consider (see ¶ 7 on p. 12).

How much familiarity with the case and how extensive authority to expect of the participating attorneys depends on the agenda for the conference. While lead trial counsel should be expected to attend the final pretrial conference, the attorney in charge of preparing the case during the pretrial phases (who may be more familiar with it at that point than ultimate trial counsel) might be more useful at earlier Rule 16 conferences. If the judge conducts routine scheduling conferences, the participation of relatively junior attorneys may be sufficient.

e. Presence of clients

In deciding whether clients, or their representatives, should attend the conference several factors should be considered. On the one hand, attendance may give clients a better understanding of the problems of the case and the cost and time involved in litigating it, facilitate making stipulations, bring to the surface potential disagreements between client and counsel, and assist in reaching a settlement. On the other hand, the presence of clients, whether permitted or required, may cause attorneys to posture and maintain positions on which they might otherwise yield. The court could avoid this by excusing clients from the conference from time to time as needed. The presence of other interested parties (such as insurance carriers bearing the major risk and exercising control) is sometimes useful. Whether the court has inherent power to compel attendance of represented parties or others with an interest may depend on the law of the circuit. See Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar,* 139 F.R.D. 525 (1992).

5. Preparation for the Conference

To save time at the initial conference and maximize its utility, many judges prepare one or more standard forms of Rule 16 conference orders and send the appropriate form to counsel in advance of the conference. This informs counsel of what the judge expects and enables them to prepare. Such an order may direct the attorneys to

- meet and confer on all subjects to be covered at the conference and reach agreement to the extent possible (see ¶ 7 on p. 12);

> The desirability of having counsel talk to each other about the case at the earliest moment cannot be overstated; too often lawyers will not have discussed the case with the opponent, will have little understanding of the controverted issues, and may end up passing like two ships in the night, resulting in much wasted time and effort.

- attempt to define and narrow issues;
- prepare, exchange, and submit brief, non-argumentative statements, joint to the extent feasible, that
  - summarize background of the action and the principal factual and legal issues to assist the judge in understanding the case;
  - propose an appropriate management plan, including a schedule setting discovery cutoff and trial dates (see *infra*);
  - outline a discovery plan or program (see ¶ 7.f on p. 18);
  - address other appropriate subjects for the conference.

(For illustrative pretrial preparation orders, see Forms 2, 12–15; for helpful checklists for the management of cases, see Manual for Complex Litigation 2d § 40.)

6. Scheduling Orders

Scheduling is critical to effective litigation management for two reasons: (1) deadlines help ensure that attorneys will complete the work required to bring the case to timely resolution, and (2) unless every case on a judge's docket is scheduled for an event (e.g., a conference or filing of a motion), it may drop from sight. Rule 16(b) therefore directs that

a scheduling order be issued following the initial conference in every case (except those exempted by local rule) and that it "shall control the subsequent course of the action unless modified by a subsequent order" (Rule 16(e); see generally Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar,* 139 F.R.D. 525 (1992)). Even in cases exempted by local rule from this provision of Rule 16, a schedule should be set.

a. Consulting with attorneys and unrepresented parties

The rule provides that the order shall be entered by the judge "after consulting with attorneys . . . and unrepresented parties." Consultation is important for two reasons: (1) consideration of the subjects listed in Rule 16(c) may be necessary or helpful in arriving at an appropriate scheduling order (see ¶ 7 on p. 12), and (2) the rule provides that the schedule "shall not be modified except by leave of the judge . . . upon a showing of good cause"; orders therefore need to be realistic, taking into account the needs of the case and the judge's and the attorneys' calendars and commitments. When the order is entered by a magistrate judge, the district judge who will ultimately try the case should be consulted to ensure that the order conforms to that judge's schedule.

> "The most effectively managed cases often are those in which a relatively early scheduling conference is convened by the judge, and . . . a case-specific order is worked out with substantial input from the parties. Experience demonstrates that scheduling orders can not be expected to work well if one or both litigants do not seriously believe that the order will be enforced. If a routine form order is issued, without . . . participation by the parties, it is quite likely that it will have to be modified later to suit the . . . [needs] of the case . . . ." (Expense and Delay Reduction Plan, D. Mass., p. 24.)

b. Provisions for scheduling orders

Firm and unambiguous scheduling orders are critical to effective case management. Word processing makes it feasible to maintain several formats for different management tracks, which can be readily adapted to meet the needs of the particular case after consultation with counsel. Counsel can also be asked to submit proposed forms of order in advance of the conference.

Consider

- limiting the time to join parties and amend pleadings (Rule 16(b)(1));

  The seriatim addition of parties as the case progresses can result in redundant discovery and motion activity and in prejudice to later parties; it should be avoided.

- limiting the time to complete all or particular phases or parts of discovery (Rule 16(b)(3)) by specifying cut-off dates for noticing deposition, for serving interrogatories and document requests, and for filing discovery-related motions;
- limiting the time to file motions (Rule 16(b)(2)) (see ¶ 7.g on p. 18);
- setting dates for the identification of trial experts and exchange of experts' materials (see ¶ D.5 on p. 33; § III, ¶ D, on p. 59);
- setting dates for further conferences as needed (Rule 16(b)(4));

  Conferences should be scheduled only as needed—perfunctory court appearances should be avoided and the telephone used whenever feasible.

- setting a date for a final pretrial conference (Rule 16(b)(4)) (see ¶ D on p. 29);
- setting a date for a settlement conference (see ¶ F on p. 36);
- setting a trial date (Rule 16(b)(4));

  Firm and credible trial dates compel attorneys to prosecute the case effectively and promote settlement. When heavy criminal dockets preclude setting a firm date, it may still be possible to specify the week or month for commencement of trial. In cases where an early settlement seems possible, setting a trial date may be deferred to permit the parties to concentrate on negotiations instead of engaging in costly trial preparation.

- establishing ground rules for continuances;

  Counsel should understand the judge's position with respect to requests for continuances; false expectations can interfere with the progress of the case. Generally, requests for continuances should be discouraged. As a further control, the court may require clients to join in applications for continuances.

- reconciling calendar conflicts with proceedings in state or other federal courts (see ¶ III, ¶ G, on p. 68);
- accommodating, where possible, needs for expedited resolution, e.g., in bankruptcy appeals, where delay can have extremely costly consequences.

(For illustrative scheduling orders, see Forms 2–8, 21, 31; for complex cases, see Form 9.)

c. Calendar management considerations

The effectiveness and usefulness of scheduling orders depends to a large degree on the state of the judge's calendar. A judge's time is limited and good case management depends on good time management.

Consider that

- over-scheduling will be counterproductive; the judge should keep in mind his or her own needs, limitations, and convenience;
- multiple settings are often necessary to avoid loss of productive time but should be made in ways that will minimize the resulting burdens on the parties and attorneys;
- attorneys should learn to expect that deadlines will be firmly adhered to;
- familiarity with the case and good communications with attorneys will enable the judge to arrive at reasonably accurate time estimates for hearings and trials;
- matters, such as hearings, conferences, or trials, should not be permitted to run on; the participants should understand that time is limited and that the business at hand should be done with dispatch;
- time management is advanced by trying whenever possible not to handle a paper more than once.

7. Subjects for Discussion at the Conference

Rule 16(c) lists subjects for discussion, but that list is not exhaustive. As Rule 16 conferences are held not only at the start when they serve also as the scheduling conference (see ¶ 6 on p. 9), but also later in the

litigation, different subjects will be appropriate depending on the stage of the case. The judge can ask counsel to suggest subjects and then determine which to cover at the conference. This section discusses the following subjects for a conference held early in the case (for the final pretrial conference, see ¶ D on p. 29; see also Manual for Complex Litigation 2d § 21.24 and checklist at § 40.1):

- identification and narrowing of issues;
- limiting time to join parties and amend pleadings;
- reference to magistrate judge;
- settlement;
- adoption of special procedures;
- control of discovery;
- motion management;
- attorneys' fees;
- conference order.

a. Identification and narrowing of issues (Rule 16(c)(1)–(3))

In addition to scheduling (see ¶ 6 on p. 9), early identification of the issues in controversy is critical (see Manual for Complex Litigation 2d § 21.3). It forces the attorneys and their clients to analyze their claims and defenses, to focus on the economics of the case, and to define the scope of the litigation and the amount of time and money they are willing to expend. Issue identification is nothing less than an education process; the judge, to be effective, should approach the case with a willingness to learn the important facts and the material legal principles. It is helpful to be willing to admit ignorance and ask whatever questions are necessary—often the most basic questions—in order to understand the case. In the process, not only the judge but also the lawyers will be educated. Unless the case is understood by them, management is an empty exercise. Opposing attorneys will often know little about each other's case. Having them confront each other at the Rule 16 conference may reveal that the dispute is narrower than supposed, which may permit issues to be narrowed and stipulations to be made.

Although the attorneys should be urged to reach agreement on the issues, in most cases judicial intervention is needed to clearly identify and narrow the issues. If the process discloses issues apparently ripe for

dismissal, counsel should be given adequate notice and an opportunity to be heard before action is taken on the merits.

Consider

- addressing and resolving early any questions concerning lack of subject-matter jurisdiction, a fatal and non-waivable defect (for a jurisdictional checklist, see Form 10; for an order to show cause re removal jurisdiction, see Form 10A);
- having the attorneys state clearly the claims and defenses asserted, describe as specifically as possible their factual and legal bases, and identify critical contentions and the particular matters in dispute to the extent possible at this stage (for an order to facilitate issue definition in RICO cases, see Form 11);

  > Although counsel may feel that early in the case they lack information needed for meaningful issue identification, such an objection should not be permitted to stall the process. Issue identification should proceed, always subject to later clarification or modification. Effective issue identification requires specificity, not merely resort to generalizations ("was *D* negligent?"). The judge will often need to ask direct questions and seek specific answers: What do you expect to prove and how? How do you expect to defeat this claim?

- determining which issues are material and genuinely in dispute, thereby avoiding wasteful litigation activity (such as unnecessary discovery and motions) and facilitating settlement;
- determining how issues may be resolved, whether by motion or by special procedures (e.g., a bifurcated trial, or consolidation with other cases);
- determining what discovery is required for resolution of particular issues (see ¶ B on p. 21 and ¶ C on p. 25);
- identifying with specificity the amount and computation of damages claimed and of other relief sought, the supporting evidence, and the basis for establishing causation.

  > Establishing what is at stake in the litigation—i.e., plaintiff's likely gains and defendant's likely exposure—facilitates settlement and provides both the parties and the court with a sense of the resources the case warrants.

b. Limiting time to join parties and amend pleadings (Rule 16(b)(1))

Changes in parties and amendments to claims or defenses can affect the issues in the case and cause unnecessary or duplicative discovery and motion activity. This can be avoided by a reasonably early cut-off date, based on the discussion at the conference, for amendments adding or dropping claims, defenses, or parties. (See Rule 15; local rules may apply.) Rule 16(b) contemplates that such a date not be modified other than on a showing of good cause.

c. Reference to a magistrate judge (Rule 16(c)(6))

The advisability of referring matters to a magistrate judge is a subject for the conference. Magistrate judges can provide substantial assistance to case management. Many judges and districts refer all or substantially all civil case management, including non-dispositive motions as well as dispositive ones, to magistrate judges. Increasingly, magistrate judges have acquired the skill and experience to be effective case managers, and have gained the trial bar's confidence. This enables them to render valuable assistance to the assigned district judge, thus freeing that judge for other duties. However, judges' views differ on the advisability of referring pretrial management to a magistrate judge (absent the parties' consent to a reference for all purposes). Some judges believe that while reference can relieve them of certain burdens, it also deprives them of the opportunity to learn about the case—which can be helpful in later proceedings—and to develop creative approaches to its management and resolution. Reference of dispositive motions, moreover, can result in duplication of effort. In addition, some judges believe that magistrate judges lack, or are perceived by attorneys to lack, the authority to effectively narrow issues and control discovery. (See generally Manual for Complex Litigation 2d § 20.14.) In any event, reference of certain judicial functions does not equate to a delegation of the assigned judge's responsibility for the case.

Magistrate judges are authorized to rule on non-dispositive motions and to decide dispositive matters subject to de novo review. They may try cases and enter judgment with the parties' written consent; in view of the state of the criminal docket in many courts, consensual reference of a case to a magistrate judge can materially expedite its disposition.

For discussion of the authority of magistrate judges, see § III, ¶ B, on p. 51.
(For illustrative orders of reference, see Forms 42, 43.)

d. Settlement (Rule 16(c)(7))

By causing the parties to analyze, understand, and evaluate their cases, the Rule 16 conference facilitates settlement. And the judge's opening of the subject will help attorneys overcome the common reluctance to do so out of fear of appearing weak. (For discussion of settlement techniques, see ¶ F on p. 36.)

In connection with the Rule 16 conference, consider

- asking counsel at every appearance for a report on whether settlement negotiations are in progress or contemplated, what the prospects are, and how settlement may be facilitated (for a form of settlement certificate, see Form 22);
- having counsel identify, and then complete, targeted discovery necessary to evaluate the case for settlement (see discussion at ¶ 7f on p. 18);
- assisting counsel, without participating in merits discussions, in developing a format or procedure for or approach to negotiations, including arranging for
  - exchange of demand and offer,
  - reference to a mediator, master, or settlement judge or, if all counsel request, to the assigned judge to conduct negotiations;
- referring the case to extrajudicial procedures (ADR) provided for by local rules or general orders or agreed to by the parties (e.g., arbitration) (see discussion at § III, ¶ E, on p. 62).

> Judges disagree about the value of alternative dispute resolution procedures. ADR has the potential in some cases to produce an earlier and more economical disposition than trial, but in some circumstances it generates an extra layer of litigation with resulting dis-economies. Good case management aims toward directing the case into the most cost-effective disposition channel. (See generally the references to various ADR alternatives in the bibliography.)

e. Adoption of special procedures (Rule 16(c)(10))

Special procedures may facilitate management of the litigation. Consider

- bifurcating the trial, separating a claim, issue, or defense that may be dispositive (Rule 42(b));

> Bifurcation can shorten trial time where liability and damages are not closely intertwined, and it may encourage settlements (e.g., in routine personal injury cases). In cases of strong liability but questionable damages, reverse bifurcation is sometimes useful. Bifurcation is not invariably efficient, however; it could delay settlement until after the first trial. Its advantages and disadvantages should therefore be carefully weighed before it is ordered. Bifurcated issues should be tried by the same jury unless the evidence offered with respect to one phase of the trial is entirely different from that offered at the other.

- severing the trial of counter-claims, cross-claims, or third-party claims;
- structuring the trial, utilizing Rules 50 or 52;
- consolidating hearings on common issues of law or fact in separate pending actions (Rule 42(a));
- appointing a master to supervise discovery or fact finding in complex or technical matters such as accountings (Rule 53) (see discussion at § III, ¶ B, on p. 51);
- appointing a court expert in cases involving complex subject matter under Fed. R. Evid. 706. This should be done as early as the need appears in order to avoid surprising the parties and complicating proceedings late in the litigation (see discussion at ¶ III, ¶ D, on p. 59; T. Willging, Court-Appointed Experts (Federal Judicial Center 1986));
- coordinating with parallel litigation pending in other courts (see discussion at § III, ¶ G, on p. 68);
- expediting class action certification motions (Rule 23) (see Manual for Complex Litigation 2d § 30.1).

f. Control of discovery

Control of discovery is an effective method for reducing cost and delay and can facilitate settlement, since runaway discovery absorbs resources otherwise available to fund a settlement. Establishing control early and setting appropriate (even if only tentative) limits on the scope, volume, and methods of discovery can help prevent excessive activity and forestall disputes. (See Manual for Complex Litigation 2d § 21.4.) In particular, setting an early and firm discovery cut-off date—to the extent feasible under the circumstances of the case—tends to encourage the efficient prosecution of the case and to reduce the need for judicial involvement.

The judge may begin to exert control at the conference by questioning the attorney's assumption that discovery is essential to litigating a civil case. Counsel may be asked to make a case for the discovery they expect to conduct. In assessing their proposed discovery programs, the judge can apply the principle of proportionality underlying Rule 26(b), i.e., that there should be a reasonable relationship between the costs and burdens of discovery and what is at stake in the litigation (see ¶ B on p. 21). As discussed at ¶ B, control may be asserted by various means, including time limits incorporated in the scheduling order (see ¶ 6 on p. 9), limiting the "frequency or extent of use of the discovery methods" under Rule 26(b)(1), and a clear definition of the substantive scope of permitted discovery based on issue identification. A district's expense and delay reduction plan under the Civil Justice Reform Act may call for a discovery-case management conference in complex and other appropriate cases (28 U.S.C. § 473(a)(3)). All of these are appropriate subjects for the Rule 16 conference.

For illustrative orders and procedures implementing discovery management, see Forms 16–20, 23, and 29.

g. Control of motion practice (Rule 16(c)(9))

The Rule 16 conference enables the court to assert early control over the timing and subject matter of motions. Rule 16(b)(2) specifically directs the judge to limit the time within which motions may be filed. The conference can also serve to identify issues appropriate for resolution by motion, prevent the filing of pointless or premature motions, and establish an appropriate and efficient procedure for filing and

hearing motions in the case. Control of motion practice may be assisted by the scheduling order (see ¶ 6 on p. 9; Manual for Complex Litigation 2d § 21.32). Local rules and general orders usually provide additional means for regulating motion practice. (See the discussion at ¶ C on p. 25.) For illustrative management procedures and orders, see Forms 2, 16, 17, 19, 20.

In connection with the Rule 16 conference, consider

- discussing contemplated motions with attorneys before they are filed and exploring the possibility of resolution of the issue without resort to motions;
- discouraging filing of motions asserting defects readily cured by amendment of the pleadings (e.g., Rule 12 motions);
- expediting filing of motions ripe for early disposition, such as those directed at personal and subject-matter jurisdiction;
- planning requisite discovery for summary judgment motions;
- scheduling dispositive motions as early as feasible, but not before a sufficient record for decision has been made.

h. Attorneys' fees

Proceedings to award statutory attorneys' fees at the end of the litigation can be time-consuming, costly, and unnecessarily contentious if the attorneys did not keep proper records and were not adequately advised of the court's approach to awarding fees. Problems can be avoided by establishing ground rules at the outset of the litigation. See generally Manual for Complex Litigation 2d § 24. For an illustrative order, see Form 9.

Consider addressing the following:

- how compensation will be computed (whether on the basis of time or results) and whether it will be subject to limits;
- the form and detail of requisite time records;
- the nature of services for which fees will be awarded;
- the range of reasonable hourly rates for different personnel;
- limits on permissible staffing (e.g., for attendance at depositions);
- limits on allowable costs (such as computer time, clerical time, and other operating expenses), disbursements, and fees (such as expert fees);

- in cases in which the parties may incur substantial costs for litigation support or other services, requiring prior clearance of expenditures likely to exceed a specified minimum; where necessary to preserve work product, this could be done ex parte.

The magnitude of attorney fees is a concern to many judges (particularly in light of the purposes of the Civil Justice Reform Act)—not only in fee award cases but also in litigation generally where parties bear their own costs. The reduction in litigation activity through firm scheduling orders and control of discovery, motions, and trial tends to reduce the amount of attorney time expended and thereby reduce fees. It does not, however, necessarily affect the level of contingent fees. Judges may wish to consider whether they should direct attention to this matter—particularly in multiple party cases where lead cases generate fees in follow-on cases requiring relatively little effort.

i. Recusal

Although recusal will not be a matter routinely raised by either the judge or the parties, if a potential ground for recusal may exist, it should be addressed earlier rather than later. Recusal of the judge at a later point in the litigation can be costly and burdensome. Two statutory provisions apply:

> Non-judicial bias (28 U.S.C. § 144): on the filing of a timely and sufficient affidavit, the judge may take no further action until another judge has ruled on the recusal motion. Where the judge's impartiality might reasonably be questioned or a statutorily prohibited financial interest exists (28 U.S.C. § 455); the judge may act sua sponte or in response to a motion which the judge should hear and consider like any other motion.
>
> Several issues, all of which entail potential consequences, should be considered:
>
> - to what extent should the judge volunteer information to counsel (should the judge make a threshold determination that the information is such that the judge's impartiality might *reasonably* be questioned)? Note that relevant financial information is now publicly available in the judge's financial disclosure report.

- should the judge first consult the Judicial Conference Committee on the Codes of Conduct, colleagues, or others?
- should the judge ask for the views of counsel (the Committee on the Codes of Conduct has advised against doing so)?
- should the judge request a waiver from counsel (failure to obtain it will require recusal)?

j. Conference order (Rule 16(e))

After any conference, the court should enter an order reciting the action taken, including scheduling (see ¶ 6 on p. 9), and any stipulations and admissions by counsel. The order may be dictated into the record at the end of the conference or prepared by counsel or the court (see also discussion of pretrial conferences, ¶ D on p. 29).

B. Discovery Management

1. General

Discovery is a major cause of avoidable cost and delay in litigation. Limiting discovery to what is appropriate for the case at hand promotes efficiency and economy, avoids disputes by anticipating problems, and expedites the resolution of unavoidable disputes. A number of techniques can be implemented, both at the Rule 16 conference (see ¶ 7f on p. 18) and subsequently, to advance discovery management (for illustrative procedures, see Manual for Complex Litigation 2d § 21.4; Forms 9, 16, 17, 20, 21).

Discovery management should be guided by an awareness that the judge knows less about the case than the lawyers. This, however, should not deter the judge from management. Lawyers generally respond favorably to judges' imposing reasonable limits after consultation with counsel.

2. Techniques to Promote Efficiency and Economy

a. Guidelines for discovery control

Rule 26(b)(1) provides:

> The frequency or extent of use of the discovery methods set forth . . . *shall be limited by the court* if it determines that: (i) the discovery

sought is *unreasonably cumulative or duplicative,* or is *obtainable from some other source* that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has *had ample opportunity* by discovery in the action to obtain the information sought; (iii) the discovery is *unduly burdensome or expensive,* taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. *The court may act upon its own initiative* after reasonable notice or pursuant to a motion . . . (emphasis added).

b. Available techniques

Various techniques for management and control are available to the court and the attorneys. Many districts now have Civil Justice Reform Act expense and delay reduction plans that impose detailed restrictions and requirements on discovery. In addition, issues of timing cut across the discovery area; consideration needs to be given whether particular discovery is likely to be productive earlier or later and in what sequence. Consider

- directing attorneys to make prediscovery exchanges of relevant documents (not merely those that support a party's case) and of other relevant information, such as identity of knowledgeable persons and damage computations (for illustrative orders requiring disclosure, see Forms 23–26);
- arriving at an early definition (at least tentative) of the scope of discovery (subject matter, time period, geographical range, etc.) based on identification of issues at the Rule 16 conference;

  While discovery provides information helpful to refining the issues, the definition of issues in turn provides a basis for establishing discovery control.

- using contention interrogatories and requests for admission to help define controverted issues, and hence the limits of needed discovery;

  Use of these discovery methods should be controlled to avoid excessive demands.

- calling on attorneys early to prepare and present a proposed discovery program, agreed upon by both sides to the extent feasible;

- setting a discovery cut-off date as soon as the needs for discovery can be assessed;
- using phased discovery to target particular witnesses and documents for the purpose of obtaining information needed for settlement negotiations or to lay a foundation for a dispositive motion, deferring and possibly thereby obviating other discovery;

  > Particular discovery may help in the early evaluation of the case (e.g., early disclosure of the details of the damage claim will indicate the economic stakes of the law suit). It may also help determine whether other discovery is needed (e.g., an issue may drop out of the case or needed information may become available); thus careful sequencing of discovery may avoid unnecessary activity.

- evaluating the appropriateness of proposed discovery in light of the amounts and the issues at stake and the availability of less expensive and more efficient alternatives to conventional discovery (e.g., telephone depositions or interviews) (see Rule 26(b)(1));
- clarifying the extent of parties' obligations to supplement and update prior discovery responses;
- requiring exchange of signed reports or statements of proposed testimony of experts in advance of their depositions (see § III, ¶ D, on p. 59);
- establishing procedures for resolving discovery disputes (see ¶ d on p. 24);
- imposing quantitative limits, e.g., on the number of interrogatories, the scope of document requests, or the number and length of depositions (court rules may contain such limits);
- restricting the use of form interrogatories;
- arranging depositions so as to avoid unnecessary travel.

c. Additional techniques to anticipate problems and reduce incidence of disputes

Discovery disputes sometimes mushroom into satellite litigation that takes on a life of its own. Case management should anticipate problems that may grow into disputes and deal with disputes so as to contain them rather than letting them expand.

Consider

- establishing ground rules for depositions, e.g., where they are taken, who may attend, how they are to be taken, who pays for what expenses, how to comply with Rule 30(b)(6) notices, how to handle documents, objections, claims of privilege, and instructions not to answer. (See Manual for Complex Litigation § 21.45; for expert discovery, see § III, ¶ D, on p. 59);

> Discovery problems can be reduced if attorneys know what the judge expects of them, what the judge regards as the limits of acceptable conduct, and how the judge deals with objections and other discovery disputes. It is therefore useful for the judge to establish a clear modus operandi with which the bar can become familiar and comply. (See Forms 16, 29.)

- allocating costs of compliance with costly discovery demands, e.g., issuing a protective order under Rule 26(c) specifying who bears the cost of certain expensive discovery, or conditioning certain discovery on the payment of expenses by the opponent (such as paying for computer runs or copying costs) (see Form 9);
- establishing procedures for claiming privilege, such as use of a *Vaughn* index (see *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); see also Manual for Complex Litigation 2d § 21.432 and § 41.37);
- establishing informal procedures for protecting privilege and other confidential information against inadvertent disclosure or other unintended waiver;
- establishing procedures for issuing protective orders under Rule 26(c) and for the release of protected information (see Form 9; Manual for Complex Litigation 2d § 21.431 and § 41.36);
- assigning, particularly in complex or disputatious cases, a magistrate judge to supervise discovery; or in large litigation, where the economics justify, appointing a special master.

d. Techniques for expediting resolution of discovery disputes

To avoid unnecessary litigation over discovery disputes, consider

- requiring a pre-motion conference of counsel and a certification

of good-faith efforts to resolve the disputes (see 28 U.S.C. § 473(a)(5));
- requiring initial presentation of disputes by telephone conference with the assigned judicial officer;
- setting page limits on motion papers and time limits for filing;
- awarding costs to the party prevailing on a motion.

(For forms of order, see Forms 27, 28; Manual for Complex Litigation 2d § 21.423.)

C. Motion Management

1. General

Motion practice is also a common source of avoidable cost, delay, and burden on the court. The Rule 16 conference provides an opportunity to control and direct motion practice. In addition to the subjects listed in Rule 16(c), the judge should take into account the court's local rules, general orders, and Civil Justice Reform Act expense and delay reduction plan. In addition, local custom and practice in the court have a bearing; the bar's expectations and the benefits of consistency of practice within the court should be considered to the extent that they can be accommodated to the needs of effective case management. (For illustrative management procedures, see Forms 16, 17.)

2. Techniques to Promote Economy and Efficiency

In managing motion proceedings, consider

- requiring counsel to meet and confer before filing a motion to identify the issue to be addressed, determine whether it can be resolved without judicial involvement, define precisely the issue to be submitted for decision by motion, and, where appropriate, consult with the judge in advance of filing;

> The filing of motions for orders covering routine matters that should be susceptible of resolution without judicial intervention, such as for leave to amend, for a continuance, or to attack a technical pleading defect, should be discouraged. Requiring counsel to advise the opponent by a brief letter of any intended motion can be helpful.

For substantive motions, the issue to be decided should be defined with precision, before filing if possible, to avoid obviously inappropriate motions and to focus the motion papers on the issue for decision. (See Schwarzer, Hirsch & Barrans, The Analysis and Decision of Summary Judgment Motions (Federal Judicial Center 1991), *reprinted at* 139 F.R.D. 441 (1992).)

- screening motions when filed to identify those that can be decided without hearing, and promptly disposing of them so that they will not clutter the judge's calendar, impose unnecessary costs, and delay the progress of the case;
- imposing page limits on briefs, memoranda, and other submissions, with departures only for good cause;
- modifying the order of filing supporting and opposing papers to reflect the reality of the burden of persuasion on the motion;

  In some cases, the basis for the motion will be so obvious that no opening memorandum by the moving party is needed and the resolution will turn on the opposition and reply; in other cases, where the issues are clearly defined, concurrent memoranda may be preferable.

- tailoring supporting documentation to the needs of the case, omitting affidavits on undisputed propositions, or limiting briefing to core issues;
- where argument is necessary, advising counsel of the particular issues on which the court wants argument;
- barring live testimony except where clearly necessary to resolve issues of credibility;

  Rule 43(e) permits the court to hear a motion partially on oral testimony; i.e., the court may call for or permit limited testimony to supplement written materials to clarify complex facts. But in lieu of live testimony, the court may permit declarants to be deposed and relevant excerpts from their depositions to be submitted (see ¶ 4 on p. 28).

- issuing a tentative ruling (proposed or draft order) before the scheduled hearing;

  This practice, used in many state courts, expedites the

motion calendar. It may obviate the hearing if parties accept the ruling; if they do not, it can help focus oral argument and disclose errors in the tentative ruling.

- preparing when possible to rule from the bench at the close of a hearing, and, where this is not possible, minimizing the time under submission.

  Many judges believe that they should write no more than necessary. A ruling and supporting reasons can often be stated orally on the record following the hearing. Delays in issuing rulings are a major cause of public dissatisfaction with the courts, and most litigants would prefer a timely decision to a perfect one. Moreover, the judge's workload can become oppressive, and increasingly difficult to dispose of, when submitted matters accumulate. Once a matter is taken under submission, it may be difficult in the press of business for a judge to get around to making a ruling, as well as time-consuming to become reacquainted with the matter.

3. Motions for Summary Judgment

Motions for summary judgment should not be filed unless they raise an issue that may reasonably be expected to be susceptible of summary resolution. They should be filed at the optimum time. Motions filed prematurely can be a waste of time and effort, yet motions deferred until shortly before trial can result in much avoidable litigation effort. Summary judgment motions are best filed as soon as the requisite discovery has been completed and the issue is ripe. (Fed. R. Civ. P. 56; see Schwarzer, Hirsch & Barrans, The Analysis and Decision of Summary Judgment Motions (Federal Judicial Center 1991), *reprinted at* 139 F.R.D. 441 (1992); Manual for Complex Litigation 2d § 21.34).

Consider

- requiring a pre-filing conference (see ¶ 2 on p. 25);
- scheduling the filing of summary judgment motions for the appropriate time in the litigation;
- limiting the length and volume of supporting and opposing papers;

- determining whether cross-motions are appropriate.

  Cross-motions can convert a summary judgment motion into a bench trial on submitted papers, but only if the parties consent; in that event, the papers could be supplemented with live testimony as needed, e.g., where credibility becomes an issue. See Schwarzer, Hirsch & Barrans, The Analysis and Decision of Summary Judgment Motions (Federal Judicial Center 1991), *reprinted at* 139 F.R.D. 441 (1992).

4. Motions for Injunctive Relief

Motions for injunctive relief require special attention because they demand prompt decisions (on a limited record) having an immediate impact on the parties. (See Rule 65.)

Consider

- insisting that a party seeking a restraining order notify opposing counsel or party in advance, unless doing so would cause prejudice (Rule 65(b); see also Bench Book for United States District Court Judges, § 3.08-1 re temporary restraining orders);
- requiring written submissions instead of oral testimony, and permitting declarants to be deposed and excerpts from their depositions to be submitted;
- instead of issuing a conventional order to show cause, calling an early conference with counsel to identify issues (for example, whether irreparable harm can be shown), address bond-posting requirements, schedule written submissions and a hearing date (see Rule 65(b) re time limits for show cause orders), and consider other procedural issues;

  Such a conference may resolve the dispute without need for an injunction proceeding. If one is required, avoid live testimony unless necessary; most matters can be adequately presented in writing, so long as the declarant can be deposed on his or her declaration in advance of the hearing.

- combining the preliminary and permanent injunction proceedings where possible (see Rule 65(a)(2));

Separate hearings and proceedings can result in duplication and wasted time; sometimes an expedited trial can resolve all issues in a single proceeding.

- requiring counsel to submit proposed findings of fact, conclusions of law, and forms of order (Rule 65(d)).

  The wording of an injunction order can be critical to its enforcement and to its fate on appeal; it is well to have counsel agree so far as possible on the form and state any objections clearly on the record.

D. Final Pretrial Conference

1. General

The final pretrial conference is intended to "improv[e] the quality of the trial through more thorough preparation" (Rule 16(a)(4)), and to "facilitat[e] the settlement of the case" (Rule 16(a)(5)). To that end, Rule 16(d) provides that

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

  If the purposes of the conference are to be achieved, it is critical that trial counsel, and preferably lead trial counsel, attend and participate.

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

The Rule 16 subjects previously discussed provide a general frame of reference for the final pretrial conference. Its scope will depend on the nature, number, and complexity of the issues, the number of witnesses and volume of documentary evidence, and the experience and com-

petence of the attorneys—in short, on what is needed under the circumstances to ensure a fair and efficient trial.

The final pretrial conference can help improve the quality of the trial by informing counsel of the judge's procedures and expectations, stimulating counsel to prepare, reducing the length of the trial by eliminating unnecessary proof, avoiding surprise, ensuring the orderly and comprehensible presentation of the case, and anticipating and resolving trial problems. Moreover, full disclosure of trial evidence at the pretrial conference promotes settlement.

2. Timing and Arrangements

In planning the final pretrial conference, consider

- holding it when discovery is substantially completed and a firm trial date has been set and is near;
- having a transcript made of the conference for future reference in guiding the course of the trial; and
- holding it where it is likely to be most productive (for discussion of the choice between chambers and courtroom, see ¶ A.4.a on p. 7).

3. Preparation for the Conference

Adequate preparation is necessary for the conference to be productive. Pretrial preparation requirements should be adapted to the needs of particular cases to ensure full exchange of relevant information and improve the quality of the trial without imposing undue burdens, and the requirements should be made known to counsel. Local rules should be consulted for applicable provisions but modifications may be desirable to meet the particular needs of a case. (For forms of orders, see Forms 31, 35, 36.)

Consider

- requiring preconference meeting of counsel to prepare a joint pretrial statement to assist the judge in conducting the conference;
- having counsel exchange and submit
  - requested jury voir dire questions,

- a list identifying each witness and the subject matter of the witness's testimony, separately identifying those witnesses the party will definitely call, and those it may call only if needed;
- a list separately identifying each exhibit the party will definitely offer and those exhibits it may offer only if needed;
- copies of all proposed exhibits;
- brief memoranda on critical legal issues, as needed;
- statements of facts believed to be undisputed;
- proposed jury instructions to define the issues, i.e., stating the elements of each claim and defense;
- proposed verdict forms, including special verdicts or jury interrogatories if requested (Rule 49);

  Preparing jury instructions and verdict forms is useful discipline for attorneys, requiring them to analyze their case and the sufficiency of the available proof.

- proposed findings of fact and conclusions of law in non-jury cases (see Form 34).

4. Subjects for the Conference

The participants at the final pretrial conference should "formulate a plan for trial, including a program for facilitating the admission of evidence" (Rule 16(d)). Rule 16 offers a checklist of relevant subjects appropriate for consideration at the final pretrial conference. (See generally § I, ¶ A.7, on p. 12; and Manual for Complex Litigation 2d § 40.3.) Others may be suggested by counsel or raised by the judge. For illustrative procedures and orders, see Forms 6, 16, 18, 20.

Consider

- arriving at a final and binding statement of the factual and legal issues to be tried and encouraging stipulations (see discussion at § I, ¶ A.7.a, on p. 13);
- excluding evidence bearing on uncontested matters and evidence that is cumulative or unnecessary;
- inquiring whether the parties still want a jury trial;

Some jury demands are filed perfunctorily early in the case; the parties may in the meantime have changed their minds without having advised the court.

- hearing motions in limine and making rulings, where possible, on the admissibility of evidence, the qualification of expert witnesses, claims of privilege, and other threshold matters (Fed. R. Evid. 104(a); see § III, ¶ D.2, on p. 59);
- receiving exhibits into the record;
- ruling on matters concerning the mode or order of proof (see Fed. R. Evid. 611(a));
- receiving and ruling on offers of proof;
- determining how complex evidence will be presented to enhance jury comprehension;
- bifurcating potentially dispositive issues (see ¶ A.7.e, on p. 17);
- imposing limits
  - on the number of witnesses each side may offer, or
  - on the number of hours each side may have to conduct examination and cross-examination; and
  - on the length of opening statements and closing arguments.
- controlling the volume of exhibits by
  - limiting the number,
  - having voluminous exhibits redacted;
- requiring narrative written statements to present the direct testimony of certain witnesses in bench trials and of expert witnesses in jury trials, subject to cross-examination (Rule 43; see discussion at § II, ¶ B, on p. 45);
- clarifying procedural matters such as
  - scheduling of the trial and of each trial day;
  - establishing procedures for jury selection, including the number of jurors to be seated, the number of peremptories per side, and the procedure for their exercise (Rule 48);
  - voir dire procedures (Rule 47; see § II, ¶ A.2 on p. 41);
  - scope and content of opening statements;
  - premarking and providing copies of exhibits;
  - handling visual and other jury aids;
  - handling special or dangerous exhibits;

- use of video depositions (edited to limit playing time) and deposition summaries (in lieu of reading the transcript) at trial;
- use of advanced technology in presentation of evidence (see § III, ¶ F, on p. 65);
- order of cross-examination and designation of cross-examiners in multi-party cases;
- pre-instructing the jury;
- fixing order of final arguments and jury instructions (Rule 51);
- approving forms and procedure for return of verdicts (see § II, ¶ A, on p. 41);
- clarifying that all jurors remaining at the end of the evidence will deliberate (Rule 48, no alternates);
- stipulating that a non-unanimous verdict may be returned by a specified number of jurors (see Rule 48; re taking verdict, see Bench Book for United States District Court Judges, § 2.06-1).

- exploring once more the possibility of settlement.

  Many cases settle at the last moment; the parties are now in the best position to evaluate their respective cases and should be encouraged to do so (see ¶ F, on p. 36).

5. Expert Witnesses

Management of expert evidence is discussed at § III, ¶ D, on p. 59. In connection with the final pretrial conference, consider

- ruling on the qualifications of expert witnesses, the admissibility of particular expert evidence, the use of hypothetical questions, and requisite evidentiary foundation (Fed. R. Evid. 104(a));
- limiting the number of experts permitted to testify;

  Consider whether more than one expert per side is needed and should be permitted to testify with respect to any single scientific discipline; different disciplines calling for different qualifications may require different experts.

- entering a final pretrial order barring experts not previously identified and testimony at variance with a witness's prior

deposition testimony or written report or statement (see ¶ 6, *infra*);

- establishing procedures to enhance jury comprehension (see § II, ¶ A.3, on p. 43);
- determining whether to appoint a court expert (see § III, ¶ D, on p. 59).

6. Final Pretrial Order

Rule 16(e) requires entry of an order reciting all action taken at the conference; that order "shall control the subsequent course of the action" and may be modified only "to prevent manifest injustice." The purpose of the order is to memorialize the actions and rulings at the final pretrial conference; it should be clear and comprehensive, covering all important matters such as those discussed in the preceding ¶¶ 4 and 5. The lawyers should understand that no deviation or modification will be permitted except "to prevent manifest injustice" (Rule 16(e); see Manual for Complex Litigation 2d § 41.7).

The order can be dictated by the judge on the record at the end of the conference or counsel may be directed to prepare it on the basis of the record of the conference.

For illustrative forms of orders, see Forms 1, 6–8, 30–33, 36.

E. Sanctions

1. General

Rules 11, 16, 26, 37, and 41, as well as 28 U.S.C. § 1927, authorize the imposition of sanctions in connection with pretrial proceedings. But 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. In some circumstances, however, case management cannot anticipate problematic conduct of attorneys or parties or control it when it occurs. Sanctions may therefore be at times necessary, but close judicial control should be maintained over the process to prevent the spawning of satellite litigation and the degradation of professional standards in the conduct of the litigation.

Sanctions can serve several purposes: to protect a party or the court's

docket, to remedy prejudice caused, to deter future misconduct, and to punish the offender. Courts should select the least severe sanction adequate to accomplish the intended purpose. Moreover, courts should be aware that sanctions can have collateral effects, such as a black mark on an attorney's permanent record maintained by the state regulatory authority.

2. Imposing Sanctions

Different statutes and rules authorize sanctions for different kinds of conduct and on different predicates; they are not interchangeable. A judge should make a record indicating clearly the authority relied on and the factual basis for the action. Consider addressing the following issues:

- the specific conduct or omission to be sanctioned, and the effect, asking:
  - what prejudice was caused to the opponent;
  - was the act deliberate or inadvertent;
  - were there extenuating circumstances;
  - what was the impact on the court and the public;
- whether the offending party has had notice and an opportunity to respond;
- the purpose to be served by sanctions—protection, remedy, deterrence or punishment—and what is the least severe sanction adequate for the purpose (see Manual for Complex Litigation § 42);
- whether sanctions should be imposed promptly or delayed until the end of trial;
- on whom the sanctions should be imposed—attorney, client, or both;
- the legal authority under which they are being imposed:
  - Rule 11—frivolous filings;
  - Rule 16—noncompliance with pretrial order;
  - Rule 26—frivolous discovery or response;
  - Rule 37—noncompliance with discovery order;
  - Rule 41—failure to prosecute;
  - 28 U.S.C. § 1927—vexatiously extending proceedings;

- court's inherent authority or local rules (distinguish civil and criminal contempt, see Bench Book for United States District Court Judges, § 2.08-1) (note that substantial revisions of Rule 11 are under consideration);

• the specific sanction imposed.

F. Settlement

1. General

Most civil cases are resolved by settlement. Most would settle even without judicial intervention, but some undoubtedly would not. Moreover, the longer a case is litigated before it settles, the more resources it absorbs. Early settlement is therefore one objective of effective litigation management. How to assist the parties in reaching an early settlement depends on the circumstances of each case and the personalities involved. Judges need to keep in mind, however, that settlement is not invariably the preferred disposition for every case; for a variety of reasons, some cases should be resolved through adjudication.

2. The Judge's Role

Opinions differ on whether, and when, it is appropriate for judges to participate in settlement negotiations in their assigned cases. Because doing so may jeopardize the appearance of impartiality and create a risk of recusal, many judges will not do so unless the parties specifically request it and waive recusal. (Some draw a distinction here between bench and jury trials, feeling freer to participate in settlement negotiations where the case will be decided by a jury.) Other judges, however, believe that their familiarity with the case makes them more effective mediators, best able to focus on the issues and evaluate the parties' positions. Local custom and practice may provide guidance. In any event, the judge can always serve as a catalyst, open the door to negotiations, and help the parties evaluate the case. Judges will be most effective if they develop credibility and a reputation for candor and fairness, giving counsel and litigants confidence that they will be fairly

treated in the negotiation process. (See generally Manual for Complex Litigation 2d § 23.1.)

3. Elements of Successful Techniques

The choice of settlement techniques is influenced by the setting of the negotiations, the character of the participants, and the nature of the case. (See Manual for Complex Litigation 2d § 23.12.) Whatever techniques may be employed, two things are fundamental: to be prepared and to listen carefully. Much relevant information is communicated by the participants in subtle ways. Understanding the parties' thinking and feelings may be as important as analyzing the issues; the parties' real objectives in the litigation may not always be what they seem to be on the face of the pleadings. To assist settlement negotiations, consider

- directing attorneys participating in any settlement conference to be prepared on the factual and legal issues and their clients' positions;
- ensuring that the attorneys and parties' representatives have adequate authority to settle the case, or at least have immediate access to final authority (see 28 U.S.C. § 473(b)(5));
- having counsel submit confidential memoranda to the judge conducting the conference, outlining the pivotal issues, the critical evidence, and their settlement posture;
- discussing with the participants the issues and the probable risks each party faces, without necessarily taking an early position on the merits;
- directing counsel to obtain additional information when needed for proper evaluation of the case;
- deferring recommending figures until the outlines of a probable settlement become apparent;

> The settling judge may be most effective by attempting to move the parties within range of settlement, i.e., establishing a "ball park." To do that, the judge may need to remain noncommittal on the merits for some time. Judges' credibility and effectiveness are undermined if, as a result of having made a recommendation too soon, they

are later forced to backtrack. Judges should be guarded in speaking during the conference; the attorneys will be listening closely and a casual comment may be given undue weight.

- delaying having parties state their "bottom lines" or final figures so as to keep the negotiating positions flexible;
- directing attention to damages, including possible tax consequences, instead of emphasizing liability issues;

  In most settlements, it is money rather than principle that ultimately matters; if it becomes clear to the parties that a settlement on financially acceptable terms is possible, there is little point in continuing to debate liability.

- looking for imaginative and innovative solutions, such as structured pay-outs, payment in kind, future commercial relations, concessions, apologies or admissions, establishing a training or recruiting program, correcting a defect, etc.;
- injecting realities, such as the difficulties of collecting a judgment from a financially strapped defendant and the risk of bankruptcy;
- excluding punitive damages as an element of the claim for settlement purposes;
- encouraging defendant to make a Rule 68 offer, carefully drafted to avoid later disputes;

  An offer of judgment can be helpful in cases where attorneys' fees can be awarded by the court, since such an offer can cover all liability. The offer must be clear and unambiguous to permit a determination whether the final judgment is more favorable.

- meeting separately with each side for candid evaluation of the parties' prospects and the costs of continuing the litigation;

  This often becomes essential to the successful conclusion of settlement negotiations, but the parties' consent should be obtained first.

- bringing the clients into the negotiations when that appears

productive, taking care that it will not inhibit the attorneys' flexibility and freedom to negotiate;

> Clients should be made aware of the judge's case evaluation, but their presence should not be permitted to hamper the attorneys' ability to speak frankly and make concessions. Requiring or requesting the presence of the person who will pay (e.g., the insurer) or a subrogee may be useful, but is not always worth the cost and delay.

- keeping the negotiations going despite lack of agreement;

> Reaching agreement usually takes time—more than one conference will often be necessary—or the parties would have settled without judicial assistance; however, negotiating a settlement generally still takes less time than trying the case.

- considering carefully whether to stay proceedings such as discovery or continuing the trial pending negotiations in the expectation of an agreement;

> The benefits of having the parties under pressure of a deadline must be weighed against the waste of resources in taking depositions or preparing for trial if settlement appears likely.

- using alternative dispute resolution techniques such as minitrial, summary jury trial, mediation, or arbitration (see § III, ¶ E, on p. 62);
- dictating the complete terms of the settlement into the record in the presence of counsel as soon as agreement is reached.

II. The Trial Phase

A. Jury Trials

1. General

While case management tends to focus on the pretrial phase of litigation (because most cases terminate during that phase), management of the trial is equally important. Excessively lengthy and costly trials can deny parties access to civil justice and clog the court system. They can impose undue burdens on jurors and diminish public respect for and confidence in the justice system. The final pretrial conference is one method by which the judge and counsel can establish a trial management program appropriate for the particular case to control the length and cost of the trial (see discussion of pretrial conferences, § I, ¶ D, on p. 29; Bench Book for United States District Court Judges, § 2.01-1; for a trial check list and orders, see Forms 38–40). The need for case management does not end there, however. Judges have broad inherent discretion to manage the trial of the cases assigned to them. The following sections address management techniques at trial. Not all of them will be appropriate for any given trial, but all are worthy of consideration in the process of arriving at a suitable plan.

2. Techniques for Trial Management

The lawyers, not the judge, must try the case. But there is much a judge can do to improve the quality of the trial and reduce its length and cost. (See generally Form 1.)

Consider

- Streamlining voir dire procedures (see Manual for Complex Litigation 2d § 22.41):
  - having prospective jurors complete questionnaires in advance in cases where a large jury pool is necessary and voir dire could be lengthy (see Form 37);

    Where many prospective jurors are likely to be ineligible or lengthy voir dire may be necessary, jury questionnaires can be mailed to the venire in advance with the assistance

of the clerk's office. Whether completed and returned in advance or at the courthouse, sufficient time needs to be allowed for review and screening by counsel before voir dire.

- having counsel submit proposed voir dire questions for use by the judge and preparing the examination in advance to ensure all important points will be covered (see Bench Book for United States District Court Judges, § 2.03-1; Form 40);

  Because lawyers tend to attach more importance to voir dire than judges, judges should consider allowing counsel a reasonable but limited time to supplement judge-conducted voir dire.

- establishing the procedure for voir dire, the exercise of peremptory challenges, and opening statements (see Forms 38, 39);

  A judge should let counsel know in advance which of the several procedures in use for conducting voir dire and exercising challenges to expect and be prepared for.

  Evolving rules against discriminatory challenges under *Batson* and *Edmondson* may require adjustment of customary procedures.

- conducting daily conferences with counsel to identify upcoming witnesses and exhibits, to anticipate problems such as objections to evidence, witness unavailability, or other potential causes of interruption or delay of the trial, and to assess the progress of the case generally (see Manual for Complex Litigation 2d § 22.15);
- controlling the volume of exhibits, e.g., by using summaries or redacted documents or imposing limits on the number of exhibits (see Manual for Complex Litigation 2d § 22.13);
- limiting the reading of depositions by use of a stipulated summary or agreed statement of the substance of a witness's testimony (see Manual for Complex Litigation 2d § 22.33);

  Presenting testimony by reading depositions can save the witnesses' time and speed up the trial, but it can bore jurors. Readings should be limited to key testimony.

- avoiding unnecessary proof by narrowing disputes or by stipulating, such as to foundation for exhibits;
- controlling the length of the trial by limiting the time each side has for the presentation of its case and cross-examination of the opposing side's witnesses (see Form 1);

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

- minimizing or avoiding bench conferences, arguments, and other proceedings that disrupt the trial day;
- setting time limits for closing arguments.

3. Assisting the Jury

Sound trial management will improve jurors' performance, promote juror satisfaction with their service, and enhance the courts' public image. In conducting the trial, judges should treat jurors as important participants in the trial and respected decision makers and assist them in carrying out their functions. (See generally Schwarzer, *Reforming Jury Trials,* 132 F.R.D. 575 (1991).)

Consider

- pre-instructing the jury on trial procedure and the issues to be decided (see Bench Book for United States District Court Judges, § 2.04-1; Manual for Complex Litigation 2d § 22.431.);
- permitting jurors to take notes (see Form 1);
- permitting jurors to ask questions where appropriate under adequate safeguards (see Manual for Complex Litigation 2d § 22.42);

  Judges' views on this differ. If questions are permitted, they should normally be in writing and reviewed by the judge and counsel before being addressed to the witness.

- encouraging use of techniques to enhance jury comprehension (see Manual for Complex Litigation 2d § 22.3), such as

- jury notebooks listing witnesses and containing critical exhibits, glossaries, etc.;
- overhead projectors to display an exhibit to the jury as a witness testifies about it;
- charts with pictures of witnesses;
- summaries of exhibits;
- plain English by lawyers and witnesses;
- interim summations (or supplemental opening statements) by counsel.

- preparing for closing instructions (see Manual for Complex Litigation 2d § 22.433):
  - scheduling the final submission and settlement of instructions (see Bench Book for United States District Court Judges, § 3.07-1);
  - drafting brief, well-organized instructions using clear and plain language to maximize jury comprehension, (see Bench Book for United States District Court Judges, § 2.05-1; Form 35);
  - giving jurors a copy of the judge's charge;
  - determining whether to instruct before or after closing argument (see Rule 51);

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

- preparing verdict forms, and considering whether to use
  - seriatim verdicts (jury decides one issue at a time),
  - general verdicts with interrogatories (see Rule 49),
  - special verdicts (see Rule 49);

    Special verdicts and interrogatories can be useful devices to reduce the risk of having to retry the entire case. They also make possible alternate outcomes in cases in which the law is not settled, e.g., where the law has changed but its retroactive application is in doubt (as under the Civil Rights Act of 1991). But their preparation requires care to avoid inconsistencies or conflicts between different verdicts or interrogatories; obtain the attorneys' approval as to form. (See Manual for Complex Litigation § 22.45.)

- permitting reasonable read-backs of trial testimony when requested by the jury during deliberations.

> Note generally that some judges have gained valuable insights from exit questionnaires completed by jurors, enabling them to improve their trial management techniques.

B. Bench Trials

1. General

Avoiding cost and delay is no less important in bench trials, even though the absence of a jury eliminates some formalities. The lack of formality of bench trials, however, should not be allowed to lead to casual proceedings and a cluttered record, making the case more difficult to decide in the first instance and more difficult to review on appeal.

2. Techniques for Trial Management

Many of the techniques applicable to jury trials are relevant to bench trials as well. In addition, consider

- having direct testimony of witnesses under the parties' control submitted and exchanged in advance of trial in narrative written statement form (Rule 43) (see discussion at § I, ¶ D, on p. 30; for form of instructions, see Form 41);

> Where credibility is not a significant factor and substantial factual or technical material needs to be presented, the receipt of direct testimony into the record by written statements exchanged in advance and subject to cross-examination of the witness at trial can reduce costs and expedite the trial as well as the decision of the case provided the judge will read the testimony in advance of trial. Opinions differ whether it may be done without the parties' consent. (See Richey, *Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial,* 72 Geo. L.J. 73 (1983); Manual for Complex Litigation 2d § 22.51.)

- imposing limits on testimony and exhibits to avoid creating an excessively long record that will make the case more difficult to decide;

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

- adopting trial procedures that will ensure that the judge understands the case as the evidence comes in rather than leaving it to be studied after the case is submitted. Such procedures include asking questions of witnesses to enhance understanding, having opposing witnesses appear in court at the same time for concurrent (or back-to-back) questioning, or having opposing experts confront each other to identify and explain the basis of their differences of opinion (see discussion re experts at § III, ¶ D, on p. 59).

3. Decision of Cases

Bench trials can be more burdensome than jury trials because judges may have trouble finding time to decide the case once it is submitted. And cases become more difficult to decide as they grow cold with the passage of time. Many judges follow the practice of not taking a case under submission unless it cannot be decided from the bench, and then setting a deadline on their calendar for its decision. A prompt decision saves resources, increases the parties' and public's satisfaction with the court, and eases the judge's burden. (See generally Manual for Complex Litigation 2d § 22.52.)

Consider

- having counsel submit proposed findings of fact and conclusions of law before trial begins, enabling the judge to accept or reject findings as the trial progresses (Fed. R. Civ. P. 52);

  > Some judges require that each finding be brief, noncontentious, and limited to one fact. Some require that

counsel mark the opponent's proposals indicating which are contested and which are not. (See Bench Book for United States District Court Judges, § 2.07-1; Form 34.)

- having counsel argue the case immediately following the close of the evidence (as in a jury trial) instead of post-trial briefing;
- if briefing is needed, having briefs submitted before trial rather than after;
- deciding the case, whenever possible, promptly after the closing arguments by dictating findings of fact and conclusions of law into the record.

III. Special Matters

A. Using Staff

1. General

The judge's staff (and the personnel in the clerk's office) play an important role in case management. The following discussion is intended to supplement information on staff and chambers management that judges may have previously received by directing particular attention to the case management aspects.

2. Courtroom Deputy

The duties and responsibilities performed by courtroom deputy clerks vary, but the deputy can (and in most courts does) play a vital role in case management as the judge's calendar manager, administrative assistant, and contact with the attorneys. Appropriately trained and instructed, and given the necessary authority, the deputy can become a key player on the judge's case management team.

Consider

- designating the deputy as the exclusive communication channel between the judge and the attorneys;

  While some judges prefer using their secretary or law clerks for this purpose, others use the deputy, who is not so close to the judge as to imply an ex parte communication. Using a single channel for communicating with the judge should help the attorneys avoid confusion.

- encouraging the deputy to adopt improved methods of calendar management, including full use of available automation;

  Though much automation is standardized, there is room for initiative and creativity in developing forms and procedures. (Information is available from court staff and the Administrative Office; see also ¶ F on p. 65.)

- freeing the deputy from non-essential courtroom duties;

  While the presence of the deputy during trial will often be useful, there may be occasions when the deputy's time

could be better spent performing administrative duties. The judge, by having exhibits pre-marked, for example, and by administering oaths and keeping the minutes of the trial, could free the deputy for other work.

- having the deputy monitor the status of all cases and ensure that the judge receives current information;
- having the deputy participate in regular meetings with the judge's staff to review the status of cases and plan the judge's calendar;
- having the deputy maintain liaison with the jury administrator to ensure the orderly and efficient utilization of prospective jurors.

3. Law Clerks

Effective use of law clerks is an important part of case management. Law clerks can provide significant assistance, though it is not advisable to have them perform judges' duties such as conducting Rule 16 conferences. Without a judge, who is able to make orders and exercise control over the case, the conference tends to become a perfunctory exercise.

It is well to remember that (except in the case of career clerks) they come with little or no relevant experience. It is therefore necessary to provide them with specific instructions, to plan their work, and to oversee them sufficiently to ensure that their time will be used most productively. The judge needs to take care that law clerks do not become buried in marginal research projects, spending undue amounts of time and pursuing unhelpful avenues. Because a large part of most clerks' work concerns motions, their attendance at the motion calendar will be useful. Having them sit in on trials has certain benefits, but the resulting cost in chambers work must in each case be weighed against those benefits.

Consider having law clerks

- prepare the judge for Rule 16 conferences by reviewing and summarizing the case file and researching key issues;
- screen pro se and other pleadings for jurisdictional and other defects;

- review and annotate proposed jury instructions and findings of fact and conclusions of law;
- research motions and evidentiary issues and prepare proposed rulings;
- maintain a watch on current court of appeals decisions on points bearing on pending matters.

B. Using Magistrate Judges and Masters

1. General

Congress has substantially enlarged the powers of magistrate judges to enable them to give effective assistance to district judges. References to magistrate judges are governed by 28 U.S.C. § 636 and Federal Rules of Civil Procedure 72 and 73. Magistrate judges exercise such powers of the district court as are delegated by local rule or order. By enacting subsection 636(b)(3), permitting assignment of any duties not inconsistent with the Constitution or laws of the United States, Congress granted judges wide discretion to make innovative use of magistrate judges. In fact, unless local rules provide otherwise, the judge has authority to assign all or any part of pretrial management, including conducting Rule 16 conferences, to a magistrate judge. Consequently, references to magistrate judges of case management duties have become increasingly common.

References to masters are governed by Rule 53. Magistrate judges as well as other persons may be appointed to serve as masters, but only duly appointed magistrate judges may perform the functions set forth in section 636.

2. Referral of Duties to Magistrate Judges Generally

In making referrals, the judge should take into account the procedures in effect in the judge's district. Those procedures vary across districts. (see 28 U.S.C. § 636(b)(4)), and include the following:

- automatic referral of specific categories of cases by rule or order;
- automatic assignment of pretrial management to a named magistrate judge on filing of a case;

- pairing of a magistrate judge and a district judge for all referred proceedings;
- standing referral of certain duties to a magistrate judge at a particular locality;
- referral by individual judges, or by the chief magistrate judge on request from a judge, on an ad hoc basis.

3. Referral of Non-Dispositive Matters

a. Authority

A judge may refer any non-dispositive pretrial matter to a magistrate judge for hearing and determination, pursuant to 28 U.S.C. § 636(b)(1)(A) and Rule 72. This includes conducting Rule 16 conferences, supervising discovery and resolving disputes, and ruling on motions that do not dispose of claims or defenses (see ¶ 4 *infra*; for form of order, see Form 43). The magistrate judge to whom a matter is referred is to enter a written order promptly.

b. Review

The parties may serve and file objections within ten days of service of the order. The district judge may reconsider any order found clearly erroneous or contrary to law (28 U.S.C. § 636(b)(1)(A); Rule 72(a)).

> Taking appeals from magistrate judge orders in non-dispositive matters tends to defeat the purpose of reducing cost and delay, and may be discouraged by strict adherence to the narrow standard of review.

4. Referral of Dispositive Matters

a. Authority

A judge may also designate a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Rule 72(b) to hear and determine dispositive matters. This may include conducting evidentiary hearings on motions for injunctions, for judgment on the pleadings, for summary judgment, or to dismiss or permit maintenance of a class action, as well as on petitions for habeas corpus and petitions challenging conditions of

confinement. A magistrate judge assigned without consent of the parties shall hear and determine the matter promptly on the record and make written recommendations, including findings where appropriate (for form of order, see Form 43; see generally Manual for Complex Litigation 2d § 21.53).

b. Review

A party may file written objections within ten days of service of the recommended disposition, and the opponent may respond within ten days. The judge must then perform a de novo review, which may be on the record below, and enter an appropriate order (28 U.S.C. § 636(b)(1); Rule 72(b)).

> Although 28 U.S.C. § 636(b)(1)(B) applies specifically to the dispositive matters enumerated in § 636(b)(1)(A), it is not necessarily so limited. Courts have held the section to govern review of other matters whose practical effect may be dispositive. For example, the imposition of sanctions or attorneys' fees, though not technically dispositive, can have a profound impact on a party's case. Similarly, motions to remand or to enforce a settlement can be regarded as dispositive, though not specifically enumerated as such. (See Inventory of United States Magistrate Judges Duties, Administrative Office, 1991).

5. Referral of Trials

a. Authority

With the consent of the parties, magistrate judges may conduct all phases of a civil case including trial (both jury and non-jury) and ordering entry of judgment (28 U.S.C. § 636(c)(1)). To exercise this authority, the magistrate judge must be "specially designated to exercise such jurisdiction by the district court." The consent must be in writing on the appropriate form (Rule 73(b); see form of consent, Form 42). By consenting to a trial before a magistrate judge, parties may be able to obtain an earlier and firmer trial date.

b. Notification of parties

The statute directs the clerk of court to notify the parties on filing of the action of the availability of a magistrate judge to exercise this jurisdiction. The judge or magistrate judge may thereafter again advise the parties of this availability, as well as of their right to withhold consent (Rule 73(b)). The Rule 16 conference is an appropriate occasion to inquire of the parties whether they are willing to consent to a trial—jury or non-jury—before a magistrate judge.

6. Other References

Section 636(b)(3) of Title 28 grants the judge catchall, non-consensual referral authority, the extent of which is not clearly established but the limits of which at least are set by Article III; circuit law should be consulted. There is authority permitting magistrate judges to decide Social Security appeals and prisoner cases subject to de novo review, to hold pretrial evidentiary hearings, to receive jury verdicts and preside while a jury deliberates, and to conduct post-judgment proceedings. Jury selection by a magistrate judge may require the parties' consent. (See generally Inventory of United States Magistrate Judges Duties, *supra* p. 53.)

7. Appeals

The parties may at the time of the reference consent to take any appeal on the record to a judge of the district court and thereafter to the court of appeals by petition only. (28 U.S.C. § 636(c)(4); Rules 73(d), 74.) In the absence of such consent, upon entry of judgment by order of the magistrate judge, appeal is to the court of appeals as in any other case (28 U.S.C. § 636(c)(3)).

> Appealing a judgment to the district court could add another layer of appeal, nullifying some of the savings in cost, time, and judicial burden of a consensual trial. It is therefore advisable to suggest to the parties that any appeal be directly to the court of appeals.

8. Use of Special Masters

a. General

Masters can be useful adjuncts of the court, performing a variety of tasks in the management of complex or large-scale litigation: supervising discovery, finding facts in complicated controversies, performing accountings, and mediating settlements. (See generally Manual for Complex Litigation 2d § 21.52.) 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 as to the judge's referral authority. An order appointing a master should specify exactly what the master is to do, the scope and limits of the master's authority (e.g., whether the master is to have subpoena power), and the result or work product expected. It should also set limits on the costs to be paid by the parties.

b. Authority

Appointment of special masters is governed by Rule 53. Unless such appointments are made with the parties' consent, the limitations on references under Rule 53 apply: a reference shall be the exception and not the rule; it is permitted in jury cases only when the issues are complicated and in other cases, except for accountings or difficult damage computations, only where "some exceptional condition" requires. In the absence of the consent of the parties, the judge may designate a magistrate judge as special master pursuant to Rule 53 and the catchall provision of 28 U.S.C. § 636(b)(2). Where the parties consent, the 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. Pursuant to 42 U.S.C. § 2000e-5(f)(5), the judge may also appoint a master under Rule 53 to hear Title VII cases (presumably without a showing of exceptional circumstances) if the case has not been set for trial within 120 days (subject to the parties' right to a jury trial under the Civil Rights Act of 1991).

c. Master's report

A master must prepare a report and, if required, make findings of fact and conclusions of law. The master may submit a draft of the report

to counsel for suggestions. In non-jury cases, a party may serve objections within ten days of service of the report; the court must accept fact findings unless clearly erroneous but may accept, reject, or modify the report. In jury cases, the master's findings are admissible in evidence. The parties may stipulate that a master's findings of fact shall be final, in which case only questions of law remain open for consideration by the court.

d. Compensation

The judge fixes the compensation to be paid the master (other than a magistrate judge) and charges the parties.

C. Procedures for Prisoner/Pro Se Cases

1. General

Parties in the federal courts may plead and conduct their cases personally or by counsel. 28 U.S.C. § 1654. In addition, indigent plaintiffs are entitled to commence an action without prepayment of fees. 28 U.S.C. § 1915(a). Pro se litigation represents a large proportion of the dockets of many federal courts and creates particular management difficulties. Not all pro se litigants are plaintiffs; in some civil cases, defendants will appear without counsel and present similar problems for the court.

2. Securing Counsel for Pro Se Plaintiffs

Certain provisions of law (28 U.S.C. § 1915(d) and Title VII, 42 U.S.C. § 2000e-5(f)(1)) have been construed to impose an obligation on the court to attempt to find counsel for an indigent pro se plaintiff. Note that section 1915(d) authorizes the court to dismiss the action "if satisfied that [it] is frivolous or malicious." Because no public funds are available (except under the Criminal Justice Act, 18 U.S.C. § 3006A for representation of habeas corpus petitioners), this can present substantial difficulty. Regardless of the lack of funds, however, and whether appointment is technically required, many judges attempt to find counsel because the need to protect the rights of an unrepresented

party not only places additional burdens on a judge but generally will also be better met by counsel. Even if attorneys are unwilling to take full responsibility for litigating a case, they may be willing to counsel the plaintiff, and such advice not infrequently leads to settlement. Such plaintiffs will often be satisfied simply with an opportunity to tell their grievance to a judge, even without a trial, and to know that the judge has considered it, even if no relief is granted. The court should call on resources locally available. Some courts and some bar associations have pro bono panels, and certain cases may be accepted by attorneys interested in pro bono work. Sometimes, consolidating related pro se cases can make the litigation of sufficient public interest to attract counsel.

3. Management of Pro Se Litigation

Techniques appropriate for the management of pro se litigation vary from case to case and may be affected by special procedures in place in a district court for such cases. Many courts, for example, have pro se law clerks to screen these cases; some have special rules governing the assignment of successive cases brought by a pro se litigant.

Consider

- reviewing the pleadings with care as soon as they are filed; if pleadings fail to meet technical requirements, the plaintiff must be informed and given an opportunity to cure defects;

  > Actions brought by pro se litigants must be liberally construed and generally may not be dismissed before service unless legally frivolous. However, sanctions may be imposed on vexatious litigants, including an order directing the clerk to file no further documents without prior court order.

- checking promptly for threshold issues, such as subject matter and personal jurisdiction, venue, and exhaustion of administrative remedies where applicable (see 42 U.S.C. § 1997e(a)(2); 28 C.F.R. §§ 542.0–542.16);
- consolidating related cases, such as cases involving similar claims arising in the same institution;

- intervening early in the case to determine the facts in dispute and explore the possibilities of an agreed resolution; calling in representatives of the defendants, such as the plaintiff's supervisor or a prison official, to sort out the dispute (where the plaintiff is incarcerated, conferences can be conducted by telephone);
- entering a procedural order to assure that the case moves to prompt resolution: setting dates for cut off of discovery, for submission by the defendant of all relevant records and documents, and, in appropriate cases, for the filing of a motion for summary judgment and the response;

  Because the relevant facts usually are in the defendant's control, early disclosure will facilitate resolution of the action. Since many of these cases will be defended by the same office of the state's attorney, consider establishing a standard procedure to let that office know what is expected.

- using a mediator to make a prompt informal investigation of the facts with a view to identifying the problem and finding a resolution;

  Such cases are often the result of misunderstanding, e.g., an unexplained employment decision or a temporary prison condition, which can be clarified, explained, and resolved outside of conventional litigation channels.

- using a magistrate judge to conduct in-prison hearings on prisoner petitions, where security considerations permit and it is otherwise appropriate, and submit recommended findings of fact and a disposition. (See 28 U.S.C. § 636(b)(1)(B): authority to hear "prisoner petitions challenging conditions of confinement.")

  Holding in-prison hearings demonstrates the court's commitment to providing a forum for colorable cases while informing inmates that filing a petition will not automatically give them an outing.

D. Management of Expert Evidence

1. General

Experts are used in civil litigation with increasing frequency to testify on a variety of subjects: economic, scientific, technological, medical, and legal. Persons with qualifications across a broad spectrum of disciplines and experience may qualify as experts. So qualified, their forensic purpose is to "assist the trier of fact to understand the evidence or to determine a fact in issue" (Fed. R. Evid. 702). Because the subject matter of expert evidence is frequently unfamiliar to judges and jurors, management is more difficult and complex than usual, but also more important to ensure that only admissible expert evidence will be received and that it will be properly used at trial. (This section supplements the discussion concerning expert evidence in § I, ¶ D, on p. 29, and § II, ¶ A, on p. 41.)

2. Pretrial Stage

Effective management of expert evidence begins at the pretrial stage. Rules 16(c)(4), (c)(5), (c)(10), and (c)(11) authorize requiring identification of witnesses and documents, avoiding unnecessary or cumulative evidence, adopting special procedures for cases presenting difficulties or complexity, and taking other action to aid in the disposition of the case. (See Manual for Complex Litigation 2d § 21.481 for a discussion of discovery into expert opinions.)

Consider

- requiring identification of expert witnesses at an early Rule 16 conference to further the process of defining and narrowing issues, focus discovery, and facilitate settlement;

  > In cases where expert evidence is the predicate of the claim (e.g., medical malpractice), identification of an expert qualified to supply such evidence may be required before the case is permitted to proceed.

- setting deadlines for mutual disclosure of expert reports or narrative statements of testimony, underlying data, and curricula vitae in appropriate sequence;

While Rule 26(b)(4) now provides for interrogatories to obtain the expert's facts and opinions, pre-deposition exchanges of the proposed testimony and access to underlying data may be more efficient and can even make the deposition unnecessary.

- 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 at variance with prior testimony or reports.

- establishing a procedure for discovery (including ground rules for time, place, and payment of costs and fees) to avoid the cumbersome procedure under Rule 26(b)(4);
- providing for video depositions, including cross-examination, to avoid the need for expert witnesses to appear at trial;
- having counsel identify specifically those parts of the opposing experts' reports and testimony with which they disagree and those parts that are not disputed;
- exploring the possibility of joint expert reports;
- attempting to identify the specific bases for the differences between opposing experts.

  The utility of expert evidence can be enhanced, and issues can be more easily decided, if the *basis* for the difference between opposing expert evidence, not merely the difference, is identified as early in the pretrial process as possible. This may be done by determining whether the experts' disagreement is over data, interpretation of data, factual or other underlying assumptions, applicable theories, risk assessments, or policy choices.

- using confidentiality orders to protect information produced from further dissemination (see Manual for Complex Litigation 2d § 41.36 for sample confidentiality order; Form 9).

  Confidentiality orders can expedite and simplify discovery of sensitive matters, but they can also raise issues concerning future release of data from protection.

3. Final Pretrial

Where expert evidence is anticipated at the trial, the final pretrial conference should address issues and potential problems related to such evidence, particularly rulings under Fed. R. Evid. 104(a) on expert qualifications and the admissibility of expert evidence. (See discussion of pretrial conferences at § I, ¶ D, on p. 29.)

> The admissibility of expert evidence is much litigated, and a substantial body of appellate law is evolving with variations from circuit to circuit. Though admissibility is a question of law for the judge, where the line is drawn between questions going to admissibility and questions going to weight and credibility is in flux, and circuit decisions should be consulted.
>
> Distinguish rulings on admissibility under Fed. R. Evid. 104(a) from motions for summary judgment under Rule 56; ordinarily an evidentiary ruling should not be regarded as the vehicle for adjudicating a claim or defense, unless it is clear that no admissible evidence can be offered.

4. Trial

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

Consider

- 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;
- having experts testify back to back to facilitate clarification of the extent and basis for their disagreement (if not previously established, see ¶ 3, *supra*);
- using narrative written statements or reports for presentation of experts' direct testimony (see § II, ¶ B, on p. 45).

5. Court-Appointed Experts

Fed. R. Evid. 706 provides a detailed procedure for selection, appointment, assignment of duties, discovery, report submission, and compensation of court-appointed experts. That procedure, however, does not preclude other approaches to the use of a court-appointed expert, either by stipulation of the parties or in the exercise of the judge's inherent management power. Court-appointed experts may be used in various ways and for various purposes; they may be witnesses, consultants, examiners, fact finders, or researchers, among other things. It is essential that the judge, after hearing counsel, determine in advance of any appointment exactly what purpose the expert is to serve, how the expert is to function, and the extent to which the expert will be subject to discovery. The potential for what may be considered ex parte communications needs to be addressed. Arrangements for compensation of the expert should be made in advance and should define clearly the potential liability of the parties. (See generally Manual for Complex Litigation 2d §§ 21.51, 21.52; T. Willging, Court-Appointed Experts (Federal Judicial Center 1986); and § III, ¶ B, on p. 51, re appointment of masters).

E. Using Outside Neutrals for Dispute Resolution

1. General

a. Reference to ADR generally

Utilizing methods for the resolution of cases other than conventional adjudication is an important aspect of litigation management. These methods are sometimes collectively referred to as Alternative Dispute Resolution (ADR), but no single label adequately describes the full range of alternatives. One is settlement generally, discussed at § I, ¶ F, on p. 36. Another is reference by the judge to outside neutrals to help litigants evaluate the case and narrow issues, to initiate the settlement process, or to provide an advisory opinion on the merits of the case or on its settlement value. A judge may make such a referral under a formal program based on rules or general orders of the court, if it has such a program, or on the judge's initiative under ad hoc arrangements. Such programs include:

- Minitrials, at which representatives of the parties or a third party hear an abbreviated version of the parties' position and arrive at an evaluation;
- Summary jury trials, at which mock jurors, after hearing an abbreviated version of the case, render a mock verdict;
- Mediation, in which a neutral person attempts to identify the material elements of the dispute between the parties and recommends a basis for settlement. (See Forms 1, 2.)

b. Using court-based programs

Where court-based programs exist, the judge may select appropriate cases or, if the program involves mandatory referral, rule on petitions for exemption from participation. In making these determinations, the judge needs to consider whether submission of the case would serve the purpose of the program, primarily to reduce cost and delay. Once a case is on the program track, the operation of the program is defined by the local rule or general court order.

c. Using neutrals outside of court-based programs

The judge has various options in referring cases to outside neutrals. Whether a referral requires the parties' consent will depend on how extensive and burdensome the resulting proceedings are likely to be. Referrals for evaluation, mediation, or settlement negotiations generally do not require consent, although consent is likely to increase the chances of success. Consent is desirable for referral to a more elaborate and structured procedure such as arbitration (even non-binding) or minitrial. Binding arbitration clearly cannot take place without consent. Circuit law should be consulted on these issues. Since no established program parameters control these referrals, the role of the outside neutral should be clearly defined by the judge to avoid misunderstanding and later disputes.

2. Purposes

Referral to an outside neutral can facilitate a just resolution where litigants are unlikely to reach a settlement on their own. Determining whether referral is advisable depends on whether it is likely to be cost-

effective and whether an outside neutral is the best choice.

With respect to cost-effectiveness, consider

- each party's incentives for delay;
- the ability of the court to set firm dates to keep the litigation moving without delay;
- the relationship between the attorneys, e.g., whether they are antagonistic, inexperienced, or unevenly matched in terms of resources;
- the relationship between the parties, e.g., whether they have an ongoing business or personal association;
- whether the attorneys or their clients have unrealistic expectations.

With respect to whether an outside neutral is the best choice, consider

- cost: unless the outside neutral serves pro bono, use of in-court personnel will reduce the cost to the litigants; use of an outside neutral, however, frees in-court personnel to attend to other duties;
- credibility: input from judicial personnel will be taken seriously by the litigants; individuals not connected with the court may, however, be in a better position to give input without an appearance of coercion;
- expertise: outside neutrals may be able to provide subject-matter expertise not available in-court;
- availability: in courts with crowded dockets, outside neutrals may be able to give more individual attention to a case, or get to it sooner, than court personnel.

3. Specific Approaches

The types of services an outside neutral can provide vary and may be tailored to the needs of the particular case. The judge may find among the options listed below useful techniques for cases in which intervention by a neutral is likely to be beneficial.

Consider:

- referral early in the litigation for an "early neutral evaluation" by a subject-matter expert to enhance communication, identify

and narrow issues, structure the discovery process, and promote settlement;

- referral for in-depth settlement discussions with a mediator to facilitate communications and help identify the underlying issues, evaluate the case, and develop a creative settlement package;
- referral for an assessment of the dollar settlement value of the case;

  This is used primarily in relatively straightforward money-damage cases, and it may be particularly useful where parties have unrealistic expectations.

- referral for an assessment of the judgment value of the case;

  Providing the opportunity for an advisory adjudication may be particularly helpful where vindication appears to be important but the dollar value of the case makes trial uneconomical.

- referral of commercial litigation for a minitrial at which counsel present their best case to high-level officers of the party companies and perhaps a neutral, who then meet to discuss settlement;

  The procedures for minitrials are usually fashioned by mutual agreement of the litigants. Neutrals may, but need not, participate in this process.

- referral of trial-ready cases to a summary jury trial for an advisory jury verdict.

  This is likely to result in savings only where the trial is expected to last more than a few days.

F. Automation in Case Management

1. General

a. Computers

The capacity of computers to provide support to case management is constantly increasing. That support is provided to the clerk's office

and to other court functions, but it can also be utilized by individual judges. The nature and extent of support will vary depending on what automation is available in the particular court. It is advisable for judges to become aware of what their court has available, to consider how automation can further case management, and to prepare themselves to use it.

b. Computer training

To use available computer support, some familiarity with operating personal computers (PCs) is necessary. Training is available to judges from various sources, both within the judiciary and without. Judges should inquire of the court's automation support personnel or training specialist. Most judges have found that using a PC can be easily learned without a major expenditure of time and offers substantial rewards.

2. Case Management Programs

A variety of computer-based case management programs is becoming available for use by individual judicial officers.

a. CHASER

CHASER (chamber access to electronic records) is an automated case management information retrieval system for chambers. It is now running in pilot courts and is intended to help judicial officers and chambers staff access docket sheets, calendars, and motions information, as well as a variety of statistical and inventory reports. It provides access to data stored in the ICMS (integrated case management system) Civil database in the clerk's office. Some courts have PACER (public access to electronic records), which can now be made to perform many of the functions promised by CHASER. Using these systems, the trial judge is able to determine, among other things, the status of

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

b. Variations

Using an appropriately programmed PC in chambers, the judge and staff will be able to access data in form useful for case management enabling them, among other things, to

- track all assigned cases;
- provide a check list for Rule 16 conferences;
- record scheduled dates for compliance;
- receive reports from the ICMS Civil database on the status of cases and upcoming scheduled events;
- prepare reports required by the Civil Justice Reform Act on matters submitted for six months and on three-year-old cases.

c. Word processing programs

Word processing programs permit the judge to store materials for ready access and modification from case to case as needed. Examples include jury instructions and forms as well as "macros," simple program instructions that automate repetitive tasks and facilitate preparation of orders and standard documents such as sentencing reports. Software programs are available that allow text search and retrievals using strategies employed with LEXIS and WESTLAW. Using such software, the judge can archive jury instructions, orders, and memoranda for future retrieval and use.

3. Trial and Post-Trial Support

Computer technology has the potential to provide substantial support in the management of discrete cases. Some support can be derived from equipment available within the court, primarily PCs. In addition, attorneys in large cases will often employ advanced technology for the handling of documents and presentation of evidence, and the judge can derive additional management support from the use of this equipment. The following are illustrations:

- Where the courtroom is equipped with consoles, computer-stored documents can be accessed during trial;
- Computer-aided transcription of trial proceedings facilitates preparation of and access to the transcript; when used in a

computer-integrated courtroom, it provides instant access to the transcript to all trial participants;
- Optical scanning devices permit the copying of large volumes of documents onto computer discs;
- In cases involving voluminous papers, counsel may provide the judge with discs containing depositions and exhibits for convenient storage and access.

G. Coordination with Other Courts

1. General

Coordination with other courts—both state and federal—to accommodate conflicting calendar obligations of attorneys and minimize duplication and inconsistent actions where parallel litigation is pending in another court can help prevent a disruption of case management.

2. Calendar Conflicts

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

3. Coordination of Parallel Litigation

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

federal claims. Coordinating such litigation to avoid duplicate effort and inconsistent outcomes should be seriously considered. In such situations, the judge may consult with counsel to consider the possibility of coordinating calendaring, providing for common discovery, coordinating motion practice, identifying common issues that may be susceptible to resolution in a common proceeding, and undertaking coordinated or joint settlement and mediation efforts. It is important to be alert to and prevent efforts by attorneys to manipulate multiforum litigation and obstruct effective litigation management. (See Manual for Complex Litigation 2d §§ 20.123, 20.225, 21.455, 31.)

IV. FORMS

SAMPLE FORM 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Plaintiff	)	
v.	)	CIVIL ACTION NO.
Defendant	)	

Tentative Draft 2/26/91
Order Regulating Jury Trial
_____, 19____

I.

1. This case is set for trial commencing at 9:00 a.m. on _____, 19____ (the trial date).

Other Important Dates:

[Two] weeks before the trial date/ _____, 19_____
See III-7, III-9
[One] week before the trial date/ _____, 19_____
See III-8
Two court days before the trial date/ _____, 19_____
See I-4, III-8, V-1, VI-A-2, VI-B-1-(b), VII-A-2
Two court days before each day of trial
See VII-B-1
Before trial commences
See VII-D-1-(b)
First Tuesday after trial date/ _____, 19_____
See I-3
Daily during trial
See VII-B-5, VII-E-1

2. Unless otherwise ordered after the date this **order** is entered, Parts II-VII of this **order** will apply to the trial of this case.

3. If the case cannot be tried commencing on the **trial date** (because of other matters on the court's docket with priority over this case), a jury will nevertheless be selected on the **trial date** and will be used for a summary jury trial on an afternoon in that week (usually Tuesday), unless good cause is shown that a summary jury trial would not be useful in this case. Parts II-III of this order do not apply to a summary jury trial. Instead, the summary jury trial will be conducted on the terms and conditions stated in Exhibit C1, unless the parties (with approval of the court) have agreed to other terms and conditions. The parties are encouraged to stipulate to a summary jury trial under Exhibit C2, or to propose any other form that they consider better for this case than Exhibit C1.

4. The court does not press parties to settle a case that they genuinely prefer to try. If, however, this is a case destined for settlement, it is in the mutual interest of the parties, as well as in the public interest, that it be settled before the parties incur the expenses of final preparations for trial. Under this **order**, intensified preparations commence, at the latest, about three weeks before the **trial date**. If the case is not settled by that time, the parties and counsel are expected to make good faith efforts to determine finally whether the case can be settled **not later than two court days before the trial date**. These instructions do **not** mean that the court discourages continued efforts to settle a case **after the jury has been selected**. The court recognizes that developments in trial, beginning with party assessments of the composition of the jury, may affect demands and offers. The point the court emphasizes is that a settlement that occurs in the brief period of two court days before jury selection is to commence is clear evidence that the parties and their attorneys have deferred serious efforts to settle, with insensitivity to the waste of public and private resources and to the delay and inconvenience that their deferring serious negotiations has caused to the parties, witnesses, and attorneys in other cases, as well as to the court.

II. Aims, Incentives, and Stipulations

1. The central aim of this order is to create a set of procedures tailored to fit the distinctive characteristics of this case and "to secure the just, speedy, and inexpensive determination of [this] action," Fed. R. Civ. P. 1.

2. Absent planning and an explicit understanding among counsel and the court about methods of proof, interrogation, and argument that will or will not be used, each advocate has an incentive toward extremely adversary strategies and tactics. Of course, lawyers as well as judges know that extreme adversariness has its own downside risks. We also know, however, that pressures to respond in kind to contentious techniques used against you are hard to resist. Thus, when counsel expect that the court will allow excessive adversariness, the length and cost of the trial tend to increase. Distracting disputes over tangential matters interfere with the court's and the jury's understanding of material issues. The quality of the trial deteriorates.

3. When counsel and the court plan in advance to adapt trial procedures to the needs of the particular case, the trial is likely to be shorter and less expensive to the parties and to the public than it otherwise would be. Of even greater significance, the trial is likely to be better in quality. A crisp, well-focused trial helps the court and jury understand fully the material disputes of fact and law. The result is more likely to be a wise and fair decision on the merits.

4. The court encourages stipulations that will serve the aim that

> "the mode and order of interrogating witnesses and presenting evidence" be such as will "(1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment,"

Fed. R. Evid. 611(a). The kinds of agreements worthy of consideration include stipulations that direct testimony of some or all witnesses will be taken in narrative or affidavit form (with rights of cross-examination reserved) rather than "orally in open court" (as is the right of each party under Fed. R. Civ. P. 43(a), absent stipulation), and that evidence in affidavit form will be read to the jury

by the witness, or by counsel or another reader with court approval. The court encourages counsel and the parties to consider also a stipulation for shorter time limits than those the court is likely to impose pursuant to Part III of this order.

5. By entering this order regulating trial, the court gives notice regarding rules of proof and procedure it expects to apply in the absence of stipulation and invites the parties to suggest modifications and additions to Parts V-VII of this order that may more effectively tailor this trial to the needs of this case.

III. Time Limits[1]

1. Time limits provide an incentive to make the best possible use of the limited time allowed. If the parties are not able to agree upon time limits for the trial of this case, the court will, after inviting submissions from the parties, order presumptive limits, which will be subject to modification for good cause shown. Plainly, however, the limits that the court may order will not be as stringent as those the parties might agree would serve their mutual interests in achieving a shorter, less expensive, and better quality trial.

2. Absent agreement of the parties to time limits approved by the court, the court will order a presumptive limit of a specified number of hours for this trial, to be allocated equally between opposing parties (or groups of aligned parties) unless otherwise ordered for good cause.

3. A request for added time will be allowed only for good cause. An explicit purpose of this provision is to create an incentive for using time exclusively on issues material to disposition on the merits.

4. In determining whether to allow a motion of any party for an increased allotment of time, the court will take into account (a) whether or not that party has used the time from commencement of trial forward in a reasonable and proper way, in compliance with all orders regulating the trial, (b) the party's proffer with respect to the way in which the added time requested would be used and why it is essential to fair trial, and (c) any other facts the party may wish to present in support of the motion, if determined by the court to be material. The court will be receptive to

motions for reducing or increasing allotted time to assure that allotments are fair among the parties and adequate for developing the evidence. Any party that makes only proper use of its time throughout the trial is assured that an extension will be allowed if more time is needed to present all its material and admissible evidence adequately.

5. Presumptive allotments of time to a party will be stated as a total number of hours available to that party, rather than allocations of times for particular witnesses or proceedings. Thus, each party will be free, without a showing of good cause, to allocate time as that party chooses among different uses—opening statement, direct and cross-examination of various witnesses, closing argument, objections, and motions—as long as the party's total allotment is not exceeded.

6. Time taken to argue objections will be charged against the time allocation of the party against whom the court rules, and will be allocated between parties if the court rules partly for and partly against the objecting party.

7. Not less than [two] **weeks before the trial date**, each party (or group of aligned parties) shall serve on the opposing party (or group of aligned parties) and file its **notice of direct examination** (a) listing its witnesses and an estimate of the time to be used in direct examination of each witness, (b) listing the precise pages and lines of any deposition testimony to be offered during the case in chief, with time estimates for reading that testimony into evidence, (c) affidavits of any expert witnesses whose depositions have not been taken, fairly summarizing the substance of their expected testimony, fully disclosing every opinion to be expressed, and estimating the time of direct examination, and (d) listing all the exhibits it intends to offer and an estimate of time, if any, to be used in publishing each exhibit to the jury. If the expected content of direct examination and exhibits has not previously been disclosed, the **notice** shall include a fair summary of the content of each direct examination and each exhibit.

8. **Not less than** [one] **week before the trial date**, each party (or group of parties) shall serve and file its **notice of cross-examination** estimating time to be used in cross-examination of each of the opposing party's listed witnesses. If either party, after

seeing the opposing party's notice of direct examination, proposes to call additional witnesses or offer additional exhibits, it shall, when serving and filing its notice of cross-examination, also serve and file a supplemental notice of direct examination, including time estimates. An opposing party's supplemental notice of cross-examination shall be filed not later than two court days before the trial date.

9. The parties are encouraged to confer and agree upon witness and exhibit lists and time limits for direct and cross-examination, and to file a stipulation not less than two weeks before the trial date in lieu of the separate submissions otherwise required by paragraphs 7 and 8.

IV.

A final pretrial conference is scheduled for _____ _____, 19_____, at _____m. (If no date and hour are specified here, the clerk will advise the parties when the time is set.)

V. Jury Selection

1. Not later than two court days before the trial date, the parties shall file a list of any other persons, not appearing on witness lists, who should be identified in voir dire questions to the jury. The list should be over-inclusive rather than under-inclusive in case of any doubt, in order to avoid risks of loss of jurors during trial because of acquaintance with a person whose possible relationship to the case was not made known during voir dire.

2. A jury of six and two alternates will be selected unless the parties stipulate otherwise, with court approval.

3. It is the regular practice in this court to call a jury pool on Monday, or on Tuesday when Monday is a holiday. Jury selection in one or more other cases may be scheduled for the same trial date. See Part VII-A-1, *infra*.

VI. Proposed Jury Instructions

A. Preliminary and Interim Instructions

1. Before testimony begins, the court will instruct the jury on the functions and roles of the jury and of counsel in the case and on the jury's obligations to decide the case solely on the evidence presented, to refrain from discussing the case (with each other or anyone else), and to avoid contact with the parties and with published or broadcast accounts of the trial.

2. The court may also give preliminary instructions **on the law applicable to the claims and defenses in this case.** The court will offer the parties an opportunity to be heard before giving preliminary instructions of this kind. Any requests of the parties for preliminary instructions shall be filed with the court **not later than two court days before the trial date.**

3. If the trial lasts longer than a week and the circumstances warrant, the court may give interim instructions from time to time to help the jury understand proceedings.

B. Final Jury Instructions

1. The court will give the final charge orally and ordinarily will also deliver a copy to the jury in writing. The charge will consist of four components:

a. General Instructions: General instructions serve as a guide to the jury throughout its deliberations. A draft of the court's proposed general instructions will be distributed in advance. Any objections or proposed amendments must have been filed on or before a date to be specified during trial. (_____, 19_____.)

b. Special Interrogatories: The court does not expect to ask the jury to return a general verdict. Special interrogatories request the jury's findings on specific questions of fact. Initial requests for questions to be included in the verdict form shall be served and filed **not later than two court days before the trial date.**

c. Explanatory Instructions on the Law: Most of the explanatory instructions on the law bear directly upon an identified question or questions submitted in the special interrogatories on the verdict form. Ordinarily the court explains only those rules of law the jury needs to understand to answer the interrogatories.

The court does not give, along with interrogatories, the type of instructions that are needed when the jury is to return a general verdict.

d. Limiting Instructions: Limiting instructions may include instructions as to evidence received for a limited purpose or purposes, or against less than all the parties in the action. If the occasion for a limiting instruction can be anticipated, parties will be expected to have their requests prepared in advance in writing. If any evidence is received for a limited purpose, a party seeking the benefit of a limiting instruction in the court's final instructions will have the burden of assuring that a copy of the court's oral instruction is delivered to the clerk for inclusion in the final charge, and in the case of documentary evidence, for attachment to the exhibit. A form that may be used with exhibits is attached to this order as "Exhibit A."

C. Jury Deliberation

Unless a stipulation to the contrary is filed, the verdict must be unanimous and only the first six jurors selected will deliberate. (The court encourages the parties to stipulate before jury selection that if excuses reduce the jury to five in number, they will deliberate.)

VII. Procedure at Trial

A. Opening Statements

1. Opening statement by plaintiff will occur promptly after jury selection, on the **trial date**, unless proceedings in another case have priority on that date.

2. Opening statement by the defendant will occur immediately after plaintiff's opening statement, unless defendant has elected otherwise by notice filed and served not later than **two days** before the **trial date.**

3. In a lengthy trial, the court may allow interim statements from time to time to enable counsel to clarify issues for the jury.

B. Evidence

1. Each party shall give advance notice to the court and the other parties, before jury selection, of the identity of all witnesses

whose testimony (by affidavit, by deposition, or by oral testimony in trial) it may offer during trial. **Not later than two court days before** it seeks to use the testimony of any witness, or on shorter notice for good cause shown, it shall advise the court and all other parties of its intent to use the testimony of the witness on the specified day. Except for good cause shown, no party shall be allowed to use the testimony of a witness other than the witnesses already listed on the filings with the court before trial commences. Except for good cause shown, no party shall introduce during direct examination documentary evidence other than those exhibits already listed with the court and furnished to the other parties before trial commences. These provisions with regard to documentary evidence shall not apply to cross-examination.

2. Absent a showing of good cause, the court will not exercise its discretion under Fed. R. Evid. 611(b) to allow the subject matter of the cross-examination to extend beyond the subject matter of the direct examination and matters affecting the credibility of the witness. A showing of good cause will also be required if the subject matter of the redirect is to be allowed to extend beyond matters covered on cross-examination. That a witness has come from a distance or will be unavailable later in the trial may be found to constitute good cause to allow a party to treat him or her as its witness during what would otherwise be cross-examination, and to extend the examination beyond the scope of direct. **Absent a showing of special cause, examination of a witness shall not proceed beyond one redirect and one re-cross.**

3. Use of Depositions at Trial: Except for good cause shown no deposition testimony shall be introduced as direct examination, or during oral direct examination, other than those pages or portions thereof noted in previous filings with the court. This limitation shall not apply to the use of deposition testimony in cross-examination.

4. Stipulations may be read at any time, unless otherwise ordered in a particular instance upon a showing of good cause.

5. At least one-half hour before commencement of trial each day, counsel shall furnish the court reporter with a copy of any document from which counsel intends to read that day, except depositions to be read by two people in question and answer

form. Documents to be used during cross-examination are excepted.

6. Whenever a single person is reading deposition testimony, in order to enable jurors and the reporter to understand clearly, the reader will say "question" before each question is read and "answer" before each answer is read.

7. All documents or other non-testimonial evidence that will be admitted against at least one party without objection will be pre-marked as **numbered** exhibits. To effect the pre-marking and to avoid duplicative numbering, each of the parties will assign consecutive numbers to these documents, as follows: plaintiff, 1-500; defendant 501-999. **The term "Exhibits" shall be used only** for documents or objects that are to be received without objection or have been received in evidence over objection.

8. The term "marked items" will be used for documents and other items, referred to in the proceedings, that are not exhibits. A lettering system will be used by each of the parties to pre-mark as "marked items," for identification purposes, each piece of non-testimonial evidence it will offer to which objection has been made by the party against whom the document is sought to be admitted. The clerk will supply the parties with stickers to be used in pre-marking documents and other non-testimonial evidence, either as agreed exhibits or, for identification purposes, as marked items.

9. Counsel have the court's permission at all times to interrupt proceedings merely to object or move to strike. Counsel need not state the ground(s) of objection unless the court asks for the ground(s), but counsel may without invitation by the court state the ground(s) merely by reference to a rule designated by number, among the Federal Rules of Evidence. Also, unless otherwise ordered (as may be done, for example, when the court interrupts to sustain an objection because there are obvious, valid grounds), counsel may state the grounds in customary legal jargon (e.g., "hearsay," "irrelevant," "lack of essential foundation"). Counsel are not to go beyond a bare statement of the ground(s); supporting or opposing arguments will not be stated in the hearing of the jury without the court's permission.

10. Offers of proof will ordinarily be received only after the jury has been excused for a recess or for the day.

11. Conferences out of the hearing of the jury will be held to a minimum. **They will never occur at the beginning of a court day unless that timing is unavoidable.** When the court has directed jurors to be present at a designated hour, counsel asking for a conference out of the hearing of the jury at that hour will be required to show good cause why the need should not have been anticipated so the jury could have been released early the preceding day and why the conference cannot be deferred until the end of the current day, or at least until the next recess.

12. Short conferences out of the hearing of the jury may be held at the side bar farthest from the jury box. The jury will be sent to the jury room if a more extended conference out of their hearing is required.

13. The objection of interrogating counsel to an answer that is non-responsive will usually be sustained. Objections by other counsel solely on the ground that an answer is non-responsive will usually be overruled. Sustaining such an objection is likely to lead to a new question that elicits exactly the same information as was stated in the stricken answer, and time is wasted. Of course, if some other valid ground of objection is added, a statement that the answer was non-responsive may be needed and appropriate to explain why no objection was made to the question.

14. The court will not instruct a witness to "answer yes or no" to (a) a multiple question, (b) a question that requires the witness to make or accept an inference or characterization rather than merely acknowledging or denying an observable fact, or (c) a question that is argumentative in form or in substance.

15. Questions framed to have more impact as arguments than as requests for testimony that the witness is competent to give are out of bounds. They will be excluded on objection and may be excluded on the court's initiative, without objection.

16. Ordinarily, questions asking one witness to comment on the credibility of another are out of bounds. A lawyer who wishes to ask such a question shall make a request out of the presence of the jury for leave to do so.

C. Schedule

1. The court will aim for conducting this trial 9:00 a.m. to 4:00 p.m. Monday-Friday.

2. There will be no trial of this case on the following days: [holidays and other days specially committed].

D. Sequestration of Witnesses

If any party so requests, the following rules regarding sequestration will be enforced:

1. No person who is expected to testify as a witness in this civil action shall be present in the courtroom during the presentation of evidence except as follows:

a. Professional persons engaged by a party or its counsel for the purpose of offering testimony as witnesses having specialized knowledge or experience may be present whenever evidence is being received, unless otherwise ordered.

b. One representative of each party, designated by counsel to the court in advance of the trial as that party's representative, may be present throughout the trial.

2. A person who has testified and who is not expected to be called again by any party may be present in the courtroom after his or her testimony has been completed, but that person shall not state or summarize his or her own testimony or the testimony of others to prospective witnesses.

3. Counsel shall not state or summarize the testimony of others to prospective witnesses (other than professional persons within the group described in paragraph VII-D-1(a) above) and shall not permit a prospective witness (other than a VII-D-1(a) witness) to read transcripts of prior testimony of other witnesses.

E. Miscellaneous Matters

1. Documents filed in court during trial: A party filing a document in court rather than in the clerk's office must file, with the original, a copy of the first page. All documents will be given a docket number by the clerk.

2. Jurors may be permitted to take notes. If note taking is allowed, instructions will be given in the form of Exhibit B.

_____

United States District Judge

EXHIBIT A

Exhibit Marking Slip

The attached document or object is Exhibit No._____.
Instructions to the Jury:

You may consider this document or object as evidence only with respect to any party whose name is checked below. You may not consider this document or object as evidence with respect to any party whose name is not checked. If any limited purpose is set forth below then you may only consider this document or object for that limited purpose. If no limited purpose is set forth below, then you may consider this document or object for all purposes as between the parties whose names are checked.

Party	Limited Purpose
___ Plaintiff(s)_____	_____
	_____
	_____
___ Defendant(s)_____	_____
	_____
	_____

EXHIBIT B

Instructions to Jurors on Note Taking

Ladies and Gentlemen of the Jury:

You have the permission of the court to take notes during the evidence, the summations of attorneys at the conclusion of the evidence, and during my instructions to you on the law.

In many courts—probably in most—jurors are not permitted to take notes. The reasons are concerned with fear that taking notes may cause the jury, as a whole, to be less effective in serving as a completely fair and impartial factfinder. Because of the potential usefulness of taking notes, you will be permitted to take notes in this trial. However, for the purpose of protecting against the possible disadvantages that have led many courts to order that notes not be taken, I will instruct you to observe the following limitations:

1. **Note taking is permitted, not required.** Each of you may take notes. No one is required to take notes.

2. **Take notes sparingly.** Don't try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.

3. **Be brief.** Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.

4. **Your notes are for your own private use only. Do not use your notes, or any other juror's notes, as authority to persuade fellow jurors.** In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the

notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing, and you might make a mistake in recording what you have seen or heard. You are not, therefore, to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

5. **Do not take your notes away from court.** At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened. At the conclusion of the case, after you have used your notes in deliberations, they will be collected and destroyed, to protect the secrecy of your deliberations.

_____

United States District Judge

EXHIBIT C1
6/90

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Plaintiff(s)	)	
v.	)	CIVIL ACTION NO.
Defendant(s)	)	

Stipulation and Order for Summary Jury Trial

I. Statement of Aim

The aim of this stipulation and order is to facilitate settlement of this controversy before trial and at reduced cost to the parties and the court in both time and other resources.

II. Stipulations

1. A Summary Jury Trial (SJT) will be held if the case is not reached for trial on the date set.

2. Unless excused by order of court, each party (or a representative having **full settlement authority**) shall attend the SJT, and may but is not required to attend the jury selection.

III. Procedures

1. For a two-party case, 10 jurors will be called. If none or only one is disqualified for cause after brief voir dire, each party will be allowed two peremptory challenges. Otherwise, each party will be allowed one peremptory challenge. The jury will consist of not less than five and not more than six persons. (If a case involves more parties, and additional peremptories are warranted, additional jurors will be called.)

2. Unless excused by order of court, no later than one hour before the SJT, counsel shall submit (jointly if they can agree, otherwise separately) proposed verdict form(s) and instructions to the jury (not more than 800 words, unless for good cause shown the court has authorized longer instructions). Counsel may obtain from the clerk copies of illustrative verdict form(s) and instructions prepared for use in other cases.

3. Before trial, counsel shall pre-mark all exhibits that are to be offered and advise each other in detail of any objections to admissibility of any of the proposed exhibits. All proposed exhibits to which no objections are made will be received at once immediately after the jury is selected and may be used or referred to at any time during the SJT.

4. All evidence and arguments shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence, and sworn statements of potential witnesses. However, no witness's testimony may be referred to unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavit of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness's proposed testimony by the witness.

5. Plaintiff's counsel will proceed first, for 50 minutes. Defense counsel will then proceed, for one hour. Plaintiff's counsel will then have 10 minutes for rebuttal. The verdict form(s) and the court's instructions to the jury will be given to the jury in writing, immediately after jury selection (before the presentations of counsel) unless the court orders otherwise.

6. The jury will be encouraged to return a unanimous verdict but will be instructed to return two or more separate verdicts, according to the views of different jurors if they have not reached consensus after 60 minutes of deliberation. With the consent of all parties and approval of the court, immediately after the verdict is received, the attorneys and parties may discuss the case in the courtroom with any jurors who are willing to participate in such a discussion.

7. The proceedings will not be officially recorded. The parties may, by agreement, arrange for a court reporter.

8. The verdict(s) of the jury are advisory, being intended as an aid to the parties in their evaluation of the case for settlement, and will not have any binding effect unless the parties so agree.

9. The parties shall confer after verdict with the aim of reaching a settlement, and of course may confer for that purpose at any earlier time. The court will participate in the conference if the parties jointly request court participation.

10. This procedure is adapted from that described by Honorable Thomas D. Lambros, United States District Court, Northern District of Ohio, in *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984). The parties are invited to propose any modifications that might make this procedure more useful in any way to the parties in this case.

_____ _____

Attorney(s) for Plaintiff(s) Attorney(s) for Defendant(s)

Approved and so ordered:

_____

United States District Judge

EXHIBIT C2
6/90

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Plaintiff(s)	)	
V.	)	CIVIL ACTION NO.
Defendant(s)	)	

Stipulation and Order for Binding Summary Jury Trial

1. A binding summary jury trial will be held if this case is not reached for trial on the date set.

2. After voir dire, each party shall be allowed a total of two peremptory challenges. The jury shall consist of eight persons, two of whom shall be alternates. The parties stipulate that a verdict of five out of six jurors shall be binding.

3. Unless excused by order of the court, the parties shall submit a joint proposed general verdict form and instructions to the jury, jointly if they can agree, otherwise separately.

4. Before trial, counsel shall pre-mark all exhibits that are to be offered and advise each other in detail of any objections to admissibility of any of the proposed exhibits. All proposed exhibits to which no objections are made will be received at once immediately after the jury is selected and may be used or referred to at any time during the trial.

5. All evidence and arguments shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence and sworn statements under oath of expert witnesses. However, no witness' testimony may be referred to un-

less the reference is based upon one of the products of the various discovery procedures, or upon a sworn affidavit under oath of an expert witness.

6. Plaintiff's counsel will proceed first, for one hour and 15 minutes. Defendants' counsel will then proceed, for one hour and 30 minutes. Plaintiffs' counsel will then have 15 minutes for rebuttal.

7. The jury shall conduct its deliberations and reach a verdict in the ordinary course, as if this were a full, non-summary jury trial. The jury shall be provided a general verdict form, allowing for a judgment against defendants in an amount to be completed by the jury, or judgment for defendants. The jurors shall not be apprised of the parties' agreement concerning the use of their verdict as set forth in paragraph 9 below.

8. The proceedings shall be officially recorded.

9. The verdict of the jury, and the court's judgment entered pursuant thereto in accordance with the parties' agreement stated in paragraph 10 below, shall not be appealable.

10. The parties stipulate to a "lower figure" of $_____ and a "higher figure" of $_____. The parties further agree that:

a. if the verdict is for defendants, plaintiffs recover [strike one] **nothing/the lower figure stated above;**

b. if the verdict is for plaintiffs but in an amount closer to the lower figure than to the higher figure, the case will be settled at the lower figure;

c. if the verdict is for plaintiffs in an amount closer to the higher figure than to the lower figure, the case will be settled at the higher figure; and

d. if the verdict is for plaintiffs in an amount exactly halfway between the two figures, the case will be settled at the amount of the verdict.

_____ _____

Attorney(s) for Plaintiff(s) Attorney(s) for Defendant(s)

Approved and so ordered:

_____

United States District Judge

[1] Fed. R. Evid. 102 authorizes the trial judge to act to eliminate "unjustifiable expense and delay." Fed. R. Evid. 403 recognizes the power and duty of the court to exclude cumulative evidence or other evidence that takes more time than its probative value justifies. Fed. R. Evid. 611 directs the court to "exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence" to "avoid needless consumption of time." Fed. R. Civ. P. 1 expresses the aim of "just, speedy, and inexpensive determination of every action." The court invites the help of counsel in causing this trial to measure up to the spirit as well as the letter of these rules and the many precedents implementing and underscoring them.

SAMPLE FORM 2

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

_____ Plaintiff,	)	
vs.	)	Case No._____
	)	TRACK:_____
_____ Defendant.	)	

Scheduling Order

Date_____ Time_____ To_____
Judge_____ Clerk_____ Total_____
JURY TRIAL DEMANDED___NON-JURY TRIAL___Trial Docket___
Appearing for Plaintiff:_____
Appearing for Defendant:_____

The Following Deadlines Are Set by the Court

1. Motions to join additional parties to be filed by _____.

2. Motions to amend pleadings to be filed by _____.

3. Plaintiff to submit to defendant final list of witnesses in chief, together with addresses and brief summary of expected testimony where witness has not already been deposed* _____
Submission of expert witness(es)_____

4. Defendant to submit to plaintiff final list of witnesses in chief, together with addresses and brief summary of expected testimony where witness has not already been deposed*_____
Submission of expert witness(es)_____

5. Plaintiff to submit to defendant final exhibit list (if exhibit is non-documentary, a photograph or brief description thereof sufficient to advise defendant of what is intended will suffice)* _____

6. Defendant to submit parties' final exhibit list (if exhibit is non-documentary, a photograph or brief description thereof sufficient to advise plaintiff of what is intended will suffice)* _____

7. Discovery to be completed by _____. (May not be extended except by court order pursuant to Local Court Rule 14.)

8. Plaintiff's final contentions to be submitted to defendant's counsel by _____.

9. Defendant's final contentions to be submitted to plaintiff's counsel by _____.

10. All dispositive motions to be filed by _____.

11. All stipulations to be filed by _____.

12. Motions in limine to be filed by _____.

13. Requested jury instructions to be submitted on or before _____.

14. Joint statement of case to be submitted on or before _____.

15. Requested voir dire to be submitted by _____.

16. Trial briefs to be filed by _____.

17. NON-JURY CASES ONLY: Proposed findings and conclusions of law to be submitted no later than _____.

18. Any objections to the above trial submissions to be filed five days thereafter.

19. Final pretrial order approved by all counsel to be submitted to the court by _____.

20. Plaintiff's counsel is directed to initiate settlement discussions with defendant _____ and report status of such discussions to the court no later than _____.

21. Supplemental status conference to be set _____.

22. Final pretrial to be set _____.

23. This case is hereby assigned to the special management track ☐.

A joint specialized case management plan shall be filed by _____ and include the following topics: (a) identification of lead and liaison counsel and the responsibilities of each; (b) suggestions for maintaining confidentiality; (c) a description of, and the sequence of, discovery to be had under relevant provisions of the Federal Rules of Civil Procedure; (d) in class action cases, a proposed timetable for class issue discovery,

briefing, and hearing; (e) a timetable for the filing and service of dispositive motions under Fed. R. Civ. P. 12 and/or Fed. R. Civ. P. 56; (f) proposals relating to the addition of parties, bifurcation, and special needs concerning service of process; and (g) subjects bearing upon the administration of the case, including consideration of the appointment of a special master to administer discovery, resolving initial discovery disputes, identifying a custodian of exhibits, and serving notices and court orders to multiple parties when necessary.

24. This case is referred to mandatory arbitration under Local Rule 43 ☐.

This case is referred to consensual arbitration under Local Rule 43 ☐.

The proposed arbitration hearing date is _____.

The court exempts the case from arbitration ☐.

25. This case is referred to mediation under Local Rule 46 ☐.

A mediation session will be held between _____ and _____.

26. The parties consent to trial by a magistrate judge ☐.

27. IT IS ORDERED that all exhibits intended to be offered herein be pre-marked at least _____ days before the commencement of the trial. The clerk will supply labels for this purpose.

28. Other: _____

_____

BY ORDER OF THE COURT.

_____, CLERK

By: _____

Deputy Clerk

* The exchange of witnesses required by numbers 3 and 4 above shall be by letter with two copies of the letter of transmittal to be submitted to the clerk of this court for filing. Except for good cause shown, no witness shall be permitted to testify in chief for any party unless such witness' name was listed in the letter of transmittal. The exchange of exhibits required by numbers 5 and 6 above shall also be accomplished via a letter of transmittal with a copy thereof to be furnished to the clerk for filing. If upon receipt of such final exhibit list a party does not make written ob-

jection thereto within five days, he is deemed to have waived all objection to said exhibit or exhibits. If written objection is so filed, the basis of same shall be spelled out in detail by way of brief. Further, in the event of objection both sides shall, in the pretrial order, state the rule or rules upon which they rely.

Rule 14
Motions, Applications and Objections

A. **Briefs.** Each motion, application or objection shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Each party opposing the motion, application or objection shall, within 15 days after the same is filed, file with the clerk and serve upon all other parties a response which shall be supported by a concise brief. Any motion, application or objection which is not opposed within 15 days, as set out above, shall be deemed confessed. The court may, in its discretion, shorten or lengthen the time in which to respond. The original and one copy of each motion, application or objection shall be deposited with the clerk. No brief shall be submitted which is longer than 25 typewritten pages without special permission of the court. Reply and supplemental briefs are not encouraged and may be filed only upon application and leave of court. They shall be limited to 10 pages in length unless otherwise authorized by the court. Oral arguments on motions, applications or objections will not be conducted unless ordered by the court.

B. **Summary Judgment Motions.** The brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies. The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

C. **Motions Not Requiring Briefs.** No brief is required by either movant or respondent unless otherwise directed by the court, with respect to the following motions:

1. for extension of time for the performance of an act required or allowed to be done, provided request therefor is made before the expiration of the period originally prescribed, or as extended by previous orders;

2. to continue a pretrial conference, hearing or motion, or the trial of an action;

3. to amend pleadings;

4. to file supplemental pleadings;

5. to appoint next friend or guardian ad litem;

6. for substitution of parties; and

7. motions to compel answers to interrogatories.

Any of the above motions not requiring briefs shall be accompanied by a proposed order stating the relief requested by said motion.

D. **Brief with Motion, Application or Objection.** The clerk shall not accept for filing any motion, application or objection requiring a brief, unless accompanied by such brief, without permission of the court.

E. **Conference of Attorneys with Respect to Motions or Objections Relating to Discovery; Sanctions.** With respect to all motions or objections relating to discovery pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, this court shall refuse to hear any such motion or objection unless counsel for movant first advises the court in writing that he has personally met and conferred in good faith with opposing counsel, but that, after a sincere attempt to resolve differences has been made, they have been unable to reach an accord. However, no personal conference shall be required where the movant's counsel represents to the court in writing that he has conferred with opposing counsel by telephone and (1) the motion or objection arises from failure to timely make a discovery response, or (2) distance between counsels' offices renders a personal conference infeasible. When the locations of counsels' offices, which will be stated with particularity by movant, are in Oklahoma only, a personal conference is always deemed feasible as to distance. After the presentation of a discovery dispute to the court following compliance with this rule, an award of expenses may be made or sanctions may be imposed in accordance with Rule 37, Federal Rules of Civil Procedure.

F. **Motions in Criminal Cases.** Motions in criminal cases, and particularly motions made pursuant to Rules 7(f), 12, 16, 21 and 41(e), Federal Rules of Criminal Procedure, shall be in writing and state with particularity the grounds therefor and the relief or order sought. All such motions shall be filed with the clerk within 11 calendar days after arraignment, and a copy served upon the United States Attorney, who shall respond within five days after filing, unless a different time is fixed by statute or the Federal Rules of Criminal Procedure for such motions or responses thereto. All motions and responses thereto must be accompanied by a concise brief citing all authorities upon which the movant or respondent relies. The court may, however, in its discretion, order or allow such motions or responses thereto to be filed at a time earlier than or later than that fixed by this rule.

G. **Motions to Reconsider or Overrule Orders Issued by Judges of this District.** Once a motion or application has been presented and an order entered by a judge sitting in this district, a motion to reconsider or overrule said order shall be presented only to the judge entering the order or to the other active judges sitting en banc. A unanimous vote of the other active judges sitting en banc will be required to overrule such order previously entered. The movant or applicant shall make known the action taken by the judge to whom it was previously submitted. This provision is intended to apply to such things as applications for search warrants, wiretaps, pen registers and other such applications or motions which are made to a judge without a case having been filed. It is not a means to appeal an order entered in a case, nor is it intended to apply where a case is transferred from one judge to another and a motion to reconsider a prior ruling is made.

H. **Applications for Extensions of Time.** All applications for extension of time for the performance of an act required or allowed to be done shall state:

1. the date the act is due to occur without the requested extension;

2. whether previous applications for extensions have been made to include the number, length of extension, or other disposition of them;

3. specific reasons for such requested extension to include an explanation why the act was not done within the originally

allotted time;

4. whether the opposing counsel or party agrees or objects to the requested extension; and

5. the impact, if any, on scheduled trials or other deadlines.

Such requirements shall apply to all applications to extend the date for discovery cutoff, to file dispositive or other motions, to amend the pleadings, to bring in new parties, and/or to continue a trial or hearing date or to extend any other schedule established by the court or by law. All applications shall be accompanied by a proposed order for the court's use if such relief is granted.

Rule 17
Civil Status Conferences; Criminal Pretrial Conferences; Management

A. **Scheduling.** A scheduling order shall issue in civil cases (excepting administrative reviews and prisoner cases) within 120 days from the date of filing the complaint, in accordance with Rule 16, Federal Rules of Civil Procedure.

B. **Preparation by Counsel for Status Conference Scheduled by the Court.** Prior to the first status conference scheduled by the court, trial counsel for each of the parties shall confer and prepare a status report. Said report shall include, to the extent then known, the contentions of each party and the issues of fact and law. It will also contain a list of all exhibits, witnesses, and discovery materials to the extent then known, together with estimates of time needed to complete discovery and trial time. It shall be the duty of counsel for the plaintiff to arrange this conference and the duty of *all* counsel to jointly participate in and facilitate it. The information exchanged shall be incorporated into the status report. This status report will be prepared and signed jointly and filed as a single document with the clerk of the court no later than five days prior to the status conference scheduled by the court. (The status report shall conform to the form required for final pretrial order, attached to these rules as Appendix IV, but shall be entitled "Status Report.")

C. Exchange of Discovery Materials.

1. Prior to the first status conference scheduled by the court, each party shall, without awaiting a discovery request, disclose to all other parties:

a. the identity of any expert witness whom the party intends to call, together with the expert's qualifications, a statement of the substance of the expert's expected testimony, and a summary of the grounds for the expert's opinion;

b. a general description, including the location, of all books, documents, data, compilations, and tangible things in the possession, custody or control of the party that are likely to bear significantly on any claim or defense;

c. the existence and content of any insurance agreement under which any person or entity carrying on an insurance busi-

ness may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

d. exchange a privilege log separately listing each document for which a privilege is asserted, including the date, author(s), addressee(s), general description of the subject matter, and the *specific* authority for assertion of the privilege.

2. Each party is under a continuing obligation to supplement or correct its disclosure if the party obtains additional information which makes previously disclosed information incorrect or incomplete.

3. Every disclosure or supplementation by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes the certification under, and is consequently governed by, the provisions of the Federal Rules of Civil Procedure. In addition, signing constitutes certification that the signer has read the disclosure, and that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.

4. Failure to comply with the requirements of this rule may result in the imposition of sanctions by the court.

D. **Agenda at Conference.**

1. Counsel who will conduct the trial and *pro se* litigants shall attend any conference required by the court. When justified by the circumstances, the court may allow counsel to participate in such conference by telephone. *Pro se* litigants and counsel shall be prepared to discuss:

a. the streamlining of claims and/or defenses;

b. the possibility of obtaining admissions of fact and of documents;

c. the avoidance of unnecessary proof and of cumulative evidence;

d. the identification of witnesses and documents;

e. the possibility of settlement or use of extra-judicial procedures;

f. the disposition of any pending matters;

g. the need for adopting special procedures for managing

of difficult or protracted litigation that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

h. all other appropriate matters.

2. The court at the status conference will establish insofar as feasible the time:

a. to join other parties and to amend the pleadings;

b. to serve and hear motions;

c. to conduct and complete discovery; and

d. to file the submissions required by the final pretrial order entered by the court, said submissions including proposed voir dire, requested jury instructions or proposed findings of fact and conclusions of law, witness lists, exhibit lists, trial briefs, joint preliminary statements, stipulations, and hypothetical questions.

3. The court will also set if necessary or feasible the dates of any supplemental status conferences, the date of the final pretrial conference, if any, and the date of trial.

E. **Preparation of Status Reports, Final Pretrial Orders, and Other Orders.**

1. Unless otherwise ordered by the court, counsel for the plaintiff, with full and timely cooperation of other counsel and *pro se* parties, is responsible for preparing, obtaining approval of all parties, and furnishing the court any status reports, pretrial orders or other orders required by the court or these rules.

2. The clerk who keeps the minutes of the status conference shall have forms available substantially conforming to that attached to these rules as Appendix V whereby the time and/or date fixed by the court for the performance of specified duties may be inserted. Upon request therefor, counsel will be supplied with a copy of such form so that they may make their own notations of deadlines and of other orders prescribed by the judge presiding over the conference. Such executed form, when approved by the court and filed, shall constitute the order of the court as to such schedules without the necessity of filing of any other order to the same effect. Unless otherwise directed by the assigned judge, the form and content of a final pretrial order, conforming to the sample form shown at Appendix IV, attached hereto, shall be filed by plaintiff's counsel on or before the first day of the month that the case is scheduled for trial.

F. **Default.** Failure to prepare and file a required status report, failure to comply with the final pretrial order, failure to appear at a conference, appearance at a conference substantially unprepared, or failure to participate in good faith may result in any of the following sanctions: the striking of a pleading, a preclusion order, staying the proceeding, default judgment, assessment of expenses and fees (either against a party or the attorney individually), or such other order as the court may deem just and appropriate.

G. **Criminal Case—Pretrial Conference.** A pretrial conference may be held in criminal cases for the purpose of considering such matters as will promote a fair and expeditious trial. Such conference may, at the discretion of the court, be conducted by a magistrate judge, as provided in Rule 39(B)(2) hereof.

H. **Criminal Case—Stipulations—Exhibits.** Consistent with the applicable Federal Rules of Criminal Procedure, and whenever it can be done without violating or jeopardizing the constitutional rights of the defendant in any criminal case, stipulations should be made at or prior to the pretrial conference with respect to the undisputed facts and the authenticity of documents. Each instrument which it is anticipated may be offered in evidence by either side (or photostatic copy of such instrument, if agreeable), should be marked with an exhibit number prior to the trial.

I. **Settlement Conferences.** The court may upon its own motion or at the request of any of the parties order a settlement conference at a time and place to be fixed by the court. A magistrate or a district judge other than the judge assigned to the case, to be known as the settlement conference judge, shall conduct it. The lead attorney who will try the case for each party shall appear, and shall be accompanied by one with full settlement authority. The latter will be the parties if natural persons, or representatives of parties which are not natural persons, but may not be counsel (except in-house counsel) or a person who is not directly and actively associated with the party or parties. Other interested parties such as insurers or indemnitor shall attend and are subject to the provisions of this rule. Only the settlement conference judge may excuse attendance by any attorney, party or party's representative. The parties, their representatives and attorneys are required to be completely candid with the settlement

conference judge so that he may properly guide settlement discussions, and the failure to attend a settlement conference or the refusal to cooperate fully may result in imposition of sanctions mentioned in paragraph E of this rule. The settlement conference judge may issue such other and additional requirements of the parties or persons having an interest in the outcome as to him shall seem proper in order to expedite an amicable resolution of the case. The settlement judge will not discuss the merits of the case with the assigned judge but may discuss the status of motions and other procedural matters and shall have the right to meet jointly or individually with parties or persons or representatives interested in the outcome of the case without the presence of counsel. No statements, admissions, or conversations will, in any form, be used in the event of subsequent trial.

J. **Summary Jury Trial; Alternative Methods of Dispute Resolution.** The court may, in its discretion, set any civil case for summary jury trial, mandatory (non-binding) arbitration (in accordance with Rule 43), mediation (in accordance with Rule 46) or other alternative method of dispute resolution as the court may deem proper.

Rule 18
Setting Cases for Trial

A. **Trial on Merits.** All civil cases which have been pretried shall be set for trial on the merits, upon reasonable notice to counsel of record, at times to be designated by the court.

B. **En Banc.** In non-jury cases of great public interest or of first impression the court may sit and consider same en banc.

C. **Notice of Requirement of Three-Judge Court.** Whenever any action or proceeding is required by Title 28 U.S.C. § 2284 to be heard and determined by a district court of three judges, the plaintiff shall simultaneously file with the complaint a separate notice to the court to this effect. If the plaintiff fails to do so, every other party shall file such notice, provided that as soon as a notice is filed by any party, all other parties are relieved of this obligation. The clerk shall notify the court promptly of such notice.

D. **Notice of Request for Class Action Determination.** Whenever any action or proceeding is commenced which includes a request that the court certify the case or proceeding as a class action, the plaintiff shall immediately notify the judge to whom said action is assigned of the request for class action determination. If the plaintiff fails to do so, every other party receiving notice of such suit shall so notify the judge to whom the case is assigned, provided, however, that as soon as a notice is given by any party the other parties are relieved of this obligation. The notice herein required shall be in writing and the clerk shall promptly notify the judge tc whom the case is assigned of such notice.

E. **Notice of Bankruptcy Filing.** Whenever any civil case is interrupted by one of the parties filing bankruptcy or being filed against as an involuntary bankrupt, counsel for the party filed against shall notify the court within five days of the filing of said bankruptcy by filing a formal notice in the civil case, with proof of service to all parties.

Rule 43
Court-Annexed Arbitration

A. **Scope and Purpose of Rule.** This rule governs the consensual and mandatory referral of certain actions to non-binding arbitration in accordance with 28 U.S.C. §§ 651, *et seq.* This rule shall not affect Title 9 of the United States Code. The purpose of this rule is to provide an alternative mechanism for the early disposition of many civil cases and an incentive for the just, efficient, and economical resolution of controversies by informal procedures while preserving the right to a full trial on demand.

B. **Actions Subject to this Rule.** Notwithstanding any provision of law to the contrary and except as otherwise provided herein, the following actions are subject to this rule:

1. **Consensual Reference to Non-Binding Arbitration.** Any civil action, including any adversary proceeding in bankruptcy, may be referred to non-binding arbitration under this rule, upon consent of the parties. The following is the procedure for consent to arbitration under this rule:

a. **Notice.** The clerk of court shall notify the parties in all civil cases not otherwise required to proceed to arbitration under this rule that they may voluntarily consent to non-binding arbitration under this rule. Such notice shall be furnished the parties at pretrial/scheduling conferences or may be included with pretrial conference notices and instructions. Consent to arbitration under this rule may be discussed at the pretrial/scheduling conference. (See Appendix IV) No party or attorney shall be prejudiced for refusing to participate in arbitration.

b. **Execution of Consent.** The clerk shall not accept a consent form unless it has been signed by all the parties in the case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court within 10 days after receipt of such form. No judge, magistrate judge, or other court official shall attempt to persuade or induce any party to consent to reference of a civil case not otherwise required to participate in the arbitration program. Such consent shall be freely and knowingly obtained.

2. **Mandatory Reference to Non-Binding Arbitration.** Any of the following civil actions (excepting administrative reviews

and prisoner cases, or any action based on an alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on 28 U.S.C. § 1343) shall be referred to mandatory non-binding arbitration:

a. Actions in which the United States is not a party and seek relief limited to money damages not exceeding $100,000.00, exclusive of interest and costs, and in which any claim for non-monetary relief is determined by the assigned judge or magistrate judge to be insubstantial.

b. Actions in which the United States is a party which

i. seek relief limited to money damages not exceeding $100,000.00, exclusive of interest and costs, and which arise under the Federal Tort Claims Act (28 U.S.C. §§ 2671, *et seq.*), the Longshoremen's and Harbor Workers Act (33 U.S.C. §§ 901, *et seq.*), or under the Admiralty Act (46 U.S.C. §§ 741, *et seq.*) and involve no general average, or

ii. arise under the Miller Act (40 U.S.C. § 270b), with the United States having non-monetary interest in the claim, and seek relief limited to money damages not exceeding $100,000.00, exclusive of interest and costs, and in which any claim of non-monetary relief is determined by the assigned judge or magistrate judge to be insubstantial.

c. For purpose of this section only, and in order to make a determination as to whether the damages are in excess of $100,000.00, damages shall be presumed not to exceed $100,000.00, exclusive of interest and costs, unless counsel asserting such claims certify in writing before the case is referred to arbitration that to the best of his or her knowledge and belief, in good faith, the damages which may be recoverable exceed such amount. Such certification shall be included on the status report form. (See Appendix IV)

d. Actions which are subject to this rule except that they include a claim for non-monetary relief shall be referred to the assigned judge or designated magistrate judge at the initial pretrial/scheduling conference or at any appropriate time thereafter for determination of whether, for purposes of this rule the non-monetary claim is insubstantial. That determination may be made, in the judge's discretion, either *ex parte* or following consultation with the parties.

e. At the initial pretrial/status conference or at any appropriate time thereafter in any action subject to this section, the assigned judge or designated magistrate judge may determine, on a motion by any party or sua sponte, that for purposes of this section no genuine claim for damages in excess of $100,000.00 exists and that the action is subject to mandatory arbitration. The determination may be made at any hearing or conference at which the parties are represented. In the event of such a determination, the action shall be referred to arbitration as herein provided.

C. **Time for Referral.**

1. Every action subject to this rule under (B)(1) shall be referred to arbitration in accordance with the procedures under this rule after the consent form has been executed and filed.

2. Every action subject to this rule under (B)(2) shall be referred to arbitration in accordance with the procedures under this rule at the initial pretrial/scheduling conference, except as otherwise provided.

3. Prior to the initial pretrial/scheduling conference, if any party files a motion to dismiss the complaint, motion for judgment on the pleadings, or motion for summary judgment, the motion shall be heard by the assigned judge and further proceedings under this rule shall be deferred pending resolution of the motion unless the parties agree otherwise, and provided, however, that the filing of such a motion on or after the referral shall not stay the proceedings unless the court so orders. If the action is not dismissed or otherwise terminated as the result of the decision on the motion, it shall be referred to arbitration. Counsel shall promptly notify the clerk of court (arbitration deputy) and receive scheduling information.

D. **Authority of Assigned Judge.** Notwithstanding any provision of this rule, every action subject to this rule shall be assigned to a judge upon filing in the normal course in accordance with Rule 8 and the assigned judge shall have authority, in his discretion, to conduct status/pretrial conferences, to refer the case for settlement conference, to hear motions, and to supervise the action in all other respects in accordance with these rules and the Federal Rules of Civil Procedure notwithstanding the referral of the action to arbitration.

E. **Relief from Referral.** Any party may request relief from

the operation of this rule by filing with the court a motion for such relief within 20 days after entry of the initial pretrial/scheduling order or any other order which refers the case for arbitration unless modified by the court. Such motion shall conform to Rule 14(A). The assigned judge may, sua sponte or on motion, in his discretion, exempt an action from the application of this rule where the objectives of arbitration would not be realized because (1) the case involves complex or novel legal issues, (2) because legal issues predominate over factual issues, or (3) for other good cause.

F. **Certification, Compensation, and Selection of Arbitrators.**

1. **Certification.**

a. The clerk of court shall maintain a roster of arbitrators who shall hear and determine actions under this rule. Arbitrators shall be selected by the court from applications submitted by or on behalf of attorneys willing to serve. Any attorney who has been admitted to practice for not less than five years, who has been admitted to practice in this court, and who is determined by the court en banc to be competent to perform the duties of an arbitrator shall be eligible for selection. Each person shall upon selection take the oath or affirmation prescribed in 28 U.S.C. § 453.

b. No person shall serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist.

c. Any person whose name appears on the roster maintained by the clerk of court may ask at any time to have his or her name removed or, if selected to serve on a panel, decline to serve but remain on the roster.

d. An arbitrator is an independent contractor and is subject to the provisions of 18 U.S.C. §§ 201-211 to the same extent as such provisions apply to a special government employee of the executive branch. A person may not be barred from the practice of law because such person is an arbitrator.

2. **Compensation.**

a. Subject to limits set by the Judicial Conference of the United States, arbitrators shall be paid $150.00 per day or portion of each day of hearing in which they participate as a single arbitrator or as a member of a panel of three arbitrators. At the time

when the decision of the arbitrator(s) is filed, each arbitrator shall submit a voucher on the form prescribed by the clerk of court for payment by the Administrative Office of the United States Courts for compensation and transportation expenses necessarily incurred in the performance of their duties under this rule. Only transportation expenses (including mileage and parking) which have been itemized on said voucher and can be reasonably documented are reimbursable.

b. Those attorneys who are eligible for selection as arbitrators and whose names appear on the roster maintained by the clerk of court shall be exempted from the list of attorneys from which counsel are appointed to represent indigent criminal defendants pursuant to the Criminal Justice Act, 18 U.S.C. § 3006(A), unless they request to remain eligible for such appointment or otherwise agree to accept such appointment.

3. **Selection.** Whenever an action eligible for arbitration is set for pretrial/scheduling conference or referred to arbitration pursuant to this rule, the clerk of court shall furnish to each party a list of 10 arbitrators whose names have been drawn at random from the roster of arbitrators maintained in the clerk's office. The parties shall confer for the purpose of selecting a single arbitrator or, if all parties so request in writing, a panel of three arbitrators.

a. The process to be utilized for selecting a single arbitrator or a panel of three in cases involving one plaintiff and one defendant and in cases involving multiple plaintiffs and/or multiple defendants when all plaintiffs and all defendants can agree among themselves as to the selection of the arbitrators is as follows:

i. Each side shall be entitled to strike two names from the list, plaintiff(s) to strike the first name, defendant(s) the next, then plaintiff(s), and then defendant(s);

ii. The parties shall then select the panel from the remaining six names by alternately selecting one name, defendant(s) to make the first choice, plaintiff(s) the second, and continuing in this fashion.

b. In cases involving multiple plaintiffs and/or multiple defendants when all plaintiffs or all defendants cannot agree among themselves as to the selection of the arbitrator(s) , then each defendant and each plaintiff shall propose one name from the list of 10 arbitrators furnished by the clerk of court until a list of at

least six arbitrators has been selected. In instances of third-party action, if parties cannot agree, selection shall proceed as above between primary defendants and plaintiffs and then third-party defendants until a list of at least six arbitrators has been selected. If the number of plaintiffs and/or defendants is greater than 10, then the clerk of court shall furnish a list of arbitrators which is one greater in number than the total number of plaintiffs and/or defendants who are to participate in the selection process;

c. At the conclusion of these processes, the parties shall list the six names in the order selected and submit them to the clerk of court at the time of the initial pretrial/scheduling conference or no later than 10 days from receipt by them of the original list of 10 names if received at or after the scheduling conference. In the event the parties fail to submit such a list within the time provided, the clerk of the court shall make the selection of arbitrators at random from the original list of ten names;

d. The clerk of court shall promptly notify the person or persons whose name or names appear as the first choice or choices of the parties of the selection, or if no choices have been made, the persons the clerk has selected. If any person so selected is unable or unwilling to serve, the clerk shall notify the person whose name appears next on the list. If the clerk is unable to select an arbitrator or constitute a panel of arbitrators from the six selections, the process of selection under this rule shall be completed by the parties in conjunction with instructions from the office of the clerk (arbitration deputy).

G. **Hearing Date.**

1. **Determination.** The assigned judge or designated magistrate shall assist counsel of record at the initial scheduling conference (pursuant to Local Rule 17) to see that a mutually convenient date for hearing is set. Normally this date shall be set prior to the discovery cut-off date scheduled for the trial case; however, in the discretion of the assigned judge or designated magistrate judge, such hearing date may be set after the discovery cut-off date. If the case is later referred to arbitration, the clerk shall communicate with the parties to ascertain a mutually agreeable date within the same time frame. In no event should an arbitration hearing date be within 30 days of the scheduled trial date. No arbitration hearing under this rule shall begin later than 180

days after the filing of an answer and no arbitration proceedings shall, in the absence of the consent of the parties, commence until 30 days after the disposition by the court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, if such motion was filed in accordance with these local rules or other orders of the court. Both the 180 and 30-day periods may be modified by the court for good cause shown.

2. **Notification.** When the requisite number of arbitrators has agreed to serve, the assigned judge shall direct the clerk to enter an order setting forth the date and time of the arbitration hearing and the name(s) of the arbitrator(s) designated to hear the case, and the clerk shall promptly send said order to each arbitrator, counsel of record, and *pro se* parties, if any.

3. **Continuance.** This date shall not be continued except for extreme and unanticipated emergencies as established in writing and approved by the assigned judge. The clerk of court (arbitration deputy) must be notified immediately of any request for or order granting continuance or other pleading, situation or settlement of the case that would affect the hearing date. Any continuance must be to a date certain and cleared with the clerk of court (arbitration deputy).

4. **Discovery.** Critical discovery necessary for purposes of meeting the goals of an arbitration hearing shall be completed prior to the hearing.

5. **Default of Party.** Subject to the provisions of this rule, the hearing shall proceed on the noticed date. Absence of a party shall not be grounds for a continuance but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrator(s). Failure to appear by a person required to be present or other failure to participate in good faith may constitute a default in accordance with Local Rule 17(E). In such instances, the hearing shall proceed and the arbitrator(s) shall enter an award. Upon a report of absence or other noncompliance with this rule, or, on the motion of opposing counsel, appropriate action may be taken by the court.

H. **Joint Stipulations Arbitration Summary.** Ten days prior to the hearing, the parties shall submit to the arbitrator(s) assigned to a particular action and to the clerk of court (arbitration

deputy) a joint statement containing all facts and legal issues that (a) are not in dispute and (b) are in dispute. In addition, each party shall submit to the arbitrator(s), to opposing counsel, and to the clerk of court (arbitration deputy), a summary of the position of that party which includes any remaining factual issues or legal issues in dispute and any damages requested or defenses asserted. Each arbitration summary should not exceed five pages in length and neither it nor the joint stipulations will be made a part of the case file.

I. **Attendance at and Conduct of Hearing.**

1. In addition to lead counsel who will try the case for each party, a person with actual settlement authority must likewise be present for the hearing. This will be the parties if natural persons, or representatives of parties which are not natural persons, but may not be counsel (except in-house counsel) or a person who is not directly or actively associated with the party or parties. Other interested parties such as insurers or indemnifiers shall attend and are subject to the provisions of this rule. Only the assigned judge may excuse attendance by any attorney, party, or party's representative.

2. Hearings are intended to last approximately two to two and one-half hours. Counsel for each party shall have up to one hour to communicate the highlights of his or her case. Plaintiff(s) will be permitted to reserve a limited time for rebuttal. In the case of multiple parties and multiple claims, adjustments are made at the discretion of the arbitrator.

3. The hearing shall be conducted informally. All evidence shall be presented through counsel who may incorporate argument on such evidence in his or her presentation. The Federal Rules of Evidence shall be a guide, but shall not be binding. Counsel may present factual representations supportable by reference to discovery materials, including depositions, stipulations, signed statements of witnesses, or other documents or by a professional representation that counsel personally spoke with the witness and is repeating what the witness stated. Statements, reports, and depositions may be read from, but not at undue length. Physical evidence, including documents, may be exhibited during a presentation.

4. The hearing supplements the arbitration summary submitted to each arbitrator and allows the arbitrator(s) to pursue during the hearing those points which appeared particularly pertinent in the summaries.

J. **Transcript or Recording.** A party may cause a transcript or recording to be made of the hearing at its expense but shall, at the request and expense of opposing party, make a copy available to that party. In the absence of agreement of the parties, and except as provided in this rule, no transcript of the hearing shall be admissible in evidence at any subsequent de novo trial of the action.

K. **Place and Time of Hearing.**

1. Hearings shall be held in any courtroom, hearing room, or other room in the U.S. Courthouse or Federal Complex made available by the clerk of court. When no such room is available, the hearing shall be held in any location within this judicial district assigned by the clerk in consultation with the arbitrator(s) with consideration to the convenience of the arbitrator(s) and the parties.

2. Unless the parties agree otherwise, hearing shall be held during normal business hours.

L. **Optional Waiver of Trial De Novo; Voluntary Arbitration.** At any time prior to the commencement of the hearing, the parties may by written stipulation approved by order of the assigned judge waive the right to a trial de novo following the award and proceed as in voluntary arbitration. In the event of such a stipulation, the provision of state and federal law governing review of awards rendered in voluntary arbitration shall govern.

M. **Authority of Arbitrator.** The arbitrator to whom an action is referred shall have the following powers: to conduct arbitration hearings and make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing; to administer oaths and affirmations if necessary; and to make awards. Any two members of a panel shall constitute a quorum, but (unless the parties stipulate otherwise) the concurrence of a majority of the entire panel shall be required for any action or decision by the panel.

N. **Ex Parte Communication.** There shall be no *ex parte* communication between an arbitrator and any counsel or any

party on any matter concerning the action except for purposes of scheduling or continuing the hearing.

O. **Arbitration Award and Judgment.**

1. **Filing of Arbitration Award.** The arbitrator shall file the award with the clerk of court promptly following the close of the hearing and in any event not more than 10 days following the close of the hearing. The clerk shall promptly serve copies on the parties.

2. **Contents of the Award.** The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered and the precise amount of money and other relief, if any, awarded. It shall be in writing and signed by the arbitrator or by at least two members of a panel. No member of a panel shall participate in the award without having attended the hearing. Arbitrators are not required to issue an opinion explaining the award. All awards shall be in keeping with the evidence presented and the applicable law.

3. **Sealing of the Award.** Promptly upon the filing of the award with the clerk, after the clerk has served copies on the parties, the award shall be sealed and filed under seal. The contents of any arbitration award made under this rule shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise been terminated, except for purposes of preparing the report required by section 903(b) of the Judicial Improvements and Access to Justice Act.

4. **Effect of the Award.** If no party files a demand for trial de novo within 30 days of the filing of the sealed award in accordance with section P, the award will be unsealed and the clerk shall enter judgment thereon in accordance with Rule 58 Fed. R. Civ. P., and the judgment shall have the same force and effect as any judgment of the court in a civil action, except that no appeal shall lie from such judgment (any notice of appeal shall be treated as a demand for a trial de novo if filed within 30 days of the filing of the sealed award). Any applications for attorney's fees and costs following the entry of judgment should be in conformity with Local Rule 6.

P. **Trial De Novo.**

1. **Time for Demand and Restoration to Court Docket.**

Within 30 days after the filing of the arbitration award with the court, any party may file with the court and serve on all the parties a written demand for a trial de novo. In such cases, the sealed award shall not be unsealed, become or be filed as a judgment in the case, and the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration. In such a case, any right of trial by jury that a party otherwise would have had, as well as any place on the court calendar which is no later than that which a party otherwise would have had, are preserved and the action shall proceed in the normal manner before the assigned judge.

2. **Limitation on Admission of Evidence.** At a trial de novo, the court shall not admit any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding unless the evidence would otherwise be admissible in the court under the Federal Rules of Evidence, or the parties have otherwise stipulated.

3. **Fees Required for Demanding Trial De Novo.** Upon making a timely demand for a trial de novo, the moving party, other than the United States or its agencies or officers, shall, unless permitted to proceed *in forma pauperis*, deposit with the clerk of court an amount equal to the fees for each arbitrator ($150.00) as provided in Rule 43(F)(2).

4. **Return of Deposited Fees.** Upon application within 15 days of the entry of a final judgment, the sum so deposited shall be returned to the party demanding the trial de novo, if

a. the party demanding the trial de novo obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award, or

b. the court determines that the demand for trial de novo was made for good cause.

In the event that the moving party does not obtain a more favorable result and the sum so deposited is not returned to the moving party, such sum shall be paid to the Treasury of the United States.

5. In mandatory arbitration cases only, no penalty for demanding a trial de novo, other than that provided in sections (P)(3) and (4), shall be assessed by the court.

Q. **Evaluation.** Ongoing evaluation may be conducted by the clerk of court in conjunction with the court's alternative dispute resolution committee, if established, to monitor this and other programs to assure conformity with the stated purpose(s).

Rule 46
Mediation

A. **General Provisions.**

1. **Purpose.** The purpose of this rule is to provide a supplementary procedure to the court's existing alternative dispute resolution procedures. It provides for an earlier resolution of civil disputes with resultant savings in time and costs to the litigants and to the court without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial on all issues not resolved through mediation.

2. **Definitions.** Mediation is a process in which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation and settlement.

The mediator is an advocate for settlement and uses the mediation process to help the parties fully explore any potential area of agreement. The mediator does not serve as a judge or arbitrator and has no authority to render any decision on any disputed issue or to force a settlement. The parties themselves are responsible for negotiating any resolution(s) to their dispute.

B. **Certification, Qualifications and Compensation of Mediators.**

1. **Certification of Mediators.** The judges of this court shall certify those persons who are eligible and qualified to serve as mediators under this rule in such numbers as the court shall deem appropriate. The court may withdraw certification of any mediator at any time.

2. **Lists of Certified Mediators.** The clerk of court shall appoint a mediation clerk who shall maintain a list of certified mediators which shall be made available to counsel and the public upon request.

3. **Qualifications of Mediators.**

a. An individual may be certified as a mediator if he or she:

i. has been admitted to the practice of law for at least five years, and is a member in good standing of the bar of this court; or

ii. is a professional mediator who would otherwise qualify as a special master, and

iii. is determined by the court to be competent to perform the duties of the mediator and has completed appropriate training in the process as the court may from time to time determine and direct.

b. Every mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 upon qualifying as a mediator.

c. No person shall serve as a mediator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist and any mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144. The mediator has a continuing obligation of disclosure.

d. Any member of the bar who is certified and designated as a mediator pursuant to this rule shall not for that reason be disqualified from appearing or acting as counsel in any other case pending before this court.

4. **Compensation of Mediators.** Unless provided pro bono, mediators shall be compensated at the rate provided by standing order of the court. Unless otherwise agreed to by counsel, the cost of the mediator's services shall be born equally by all the parties, payable immediately upon the conclusion of the mediation session. If settlement is not accomplished by mediation, and the case is later concluded by trial or otherwise, the prevailing party, upon motion, may recover as costs in the instant action fees paid to the mediator.

C. **Actions Subject to Mediation.**

1. The court in its discretion, on its own motion, on the motion of any party, or by stipulation and agreement of the parties may refer any civil action, or any portion thereof, to mediation under this rule, except administrative reviews and prisoner cases. The court may excuse from mediation any case arbitrated or to be arbitrated in order to avoid unnecessary compounding of expenses.

2. Any civil action or claim referred to mediation pursuant to this rule may be withdrawn from mediation by application to the assigned judge at least 10 days prior to the scheduled mediation session upon a determination that the case is not suitable for mediation.

D. **Procedures for Referral, Selecting the Mediator, and Scheduling the Mediation Session.**

1. The possibility and appropriateness of mediation under this rule shall be discussed at the initial status/scheduling conference of the case in accordance with Local Rule 17.

2. In every case in which the court determines that referral to mediation is appropriate pursuant to section C(l) of this rule, the court shall enter an order of referral which shall define the window of time in which the mediation session shall be conducted. The court intends that mediation under this rule occur at the earliest practical time in an effort to encourage earlier, less costly resolution. Referral to mediation under this rule shall not delay or stay other proceedings unless so ordered by the court.

3. Within 10 days of the order of referral, parties are to select a mediator of their choice from a list of mediators available from the court and submit the selection to the mediation clerk in the court clerk's office. If no such selection is timely made or if the parties cannot agree upon the mediator, the mediation clerk shall make the selection. The mediation clerk shall work with the selected mediator and counsel of record to set a mutually agreeable date within the time prescribed by the order of referral and an order appointing the mediator and setting the time and place of the session shall issue.

4. Mediation sessions under this rule may be held in any available court space or in any other suitable location agreeable to the mediator and the parties. Consideration shall be given to the convenience of the parties and the cost and time of travel involved.

5. There shall be no continuance of a mediation session beyond the time set in the order of referral except by order of this court upon a showing of good cause. If any rescheduling occurs within the prescribed time, the mediation clerk must be notified and availability of the place of the hearing considered. Any settlement prior to the scheduled mediation shall promptly be reported to the mediator and the court.

E. **The Mediation Session.**

1. **Memorandum for Mediation.** At least two days prior to the mediation session, each party shall provide to the mediator and all other parties a memorandum for mediation stating the

name and role of each person expected to attend, identity of each person with full settlement authority, and including a concise summary of the parties' claims/defenses/counterclaims, etc., relief sought and contentions concerning liability and damages. The summary shall not exceed five pages and shall not be filed in the case or made part of the court file.

2. **Attendance Required.** The lead attorney who will try the case for each party shall appear, and shall be accompanied by one with full settlement authority. The latter will be the parties if natural persons, or representatives of parties which are not natural persons, but may not be counsel (except in-house counsel) or a person who is not directly or actively associated with the party or parties. Other interested parties such as insurers or indemnitors shall attend and are subject to the provisions of this rule. Only the assigned judge may excuse attendance of any attorney, party or party's representative.

3. **Default.** Subject to the approval of the mediator, the mediation session may proceed in the absence of a party, who, after due notice, fails to be present. Sanctions may be imposed by the court on any party who, absent good cause shown, fails to attend or participate in the mediation session in good faith in accordance with Local Rule 17(E).

4. **Good Faith Participation and the Process.** Parties and counsel commit to participate in good faith, without any time constraints and to put forth their best efforts toward settlement. Typically, the mediator meets initially with all parties to the dispute and their counsel in joint session and then separately in caucus. The process permits the mediator and the parties to explore the needs and interests underlying the stated positions, generate and evaluate alternative settlement proposals or potential solutions as well as interests that may be outside the scope of the stated controversy or which could not be addressed by judicial actions. The parties participate in crafting a resolution of the dispute.

5. **Confidentiality.** Mediation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without consent, any confidential information acquired during mediation. There shall be no stenographic or electronic record, e.g., audio or video, of the mediation process.

The mediator may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

6. **Conclusion of the Mediation Session.** The mediation shall be concluded:

a. by resolution and settlement of the dispute by the parties, or

b. by adjournment for future mediation by agreement of the parties and the mediator, or

c. upon declaration of impasse by the mediator that future efforts to resolve the dispute are no longer worthwhile.

If the mediation is adjourned by agreement for further mediation, the additional session shall be concluded within the time ordered by the court.

F. **Mediation Report; Notice of Settlement or Trial.**

1. Immediately upon conclusion of the mediation, the mediator shall file a mediation report with the clerk of court indicating only whether the case settled, settled in part, or that the case did not settle.

2. In the event the parties reach an agreement to settle the case, each lead counsel shall promptly notify the court and promptly prepare and file the appropriate dismissal or closing papers.

3. If the mediation session does not conclude in settlement of all the issues in the case, the case will proceed toward trial pursuant to the scheduling orders entered in the case.

SAMPLE FORM 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

_____

v. CIVIL ACTION NO. _____

_____

Scheduling Order

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule CV-16, the court orders that the parties adhere to the following deadlines:

1. A report on alternative dispute resolution in compliance with Local Rule CV-88 shall be filed by _____.

2. Motions to join other parties shall be filed by _____.

3. Motions to amend or supplement pleadings shall be filed by _____.

4. Parties shall designate testifying expert witnesses in accordance with the following schedule. Parties asserting claims for relief shall designate testifying experts by _____. Parties resisting claims for relief shall designate their testifying experts by _____. Parties asserting claims for relief shall designate any rebuttal experts by _____.

5. Discovery shall be completed by the parties on or before _____. Counsel may by agreement continue discovery beyond this deadline but there will be no intervention by the court, except in extraordinary circumstances, after this date. No trial setting will be vacated because of information acquired in post-deadline discovery.

6. Dispositive motions shall be filed by _____.

7. The parties shall file a joint notification of trial readiness by _____. The notification shall include a report on any pending motions, an estimate of the length of time needed for

trial, and an estimate of the number of witnesses that each party will likely call.

8. This case is set for trial on _____ at 9:00 a.m. The parties shall file a pretrial order that conforms with the requirements of Form PT-1 contained in Appendix B to the local rules at least 14 days before the scheduled date for trial.

Some judges in the Western District include in their scheduling orders a number of explanations concerning the deadlines and practice in that particular judge's court. The uniform format that we propose should in no way interfere with each judge's decision whether to include such additional information in their orders. Moreover, we recognize that some cases will require modification of the recommended format to meet particular needs that exist in those cases. Nonetheless, we believe that the recommended format would be appropriate in the vast majority of cases.

Having assessed the current level of judicial involvement in the pretrial process, we reject the act's assumption that more judicial involvement in the pretrial process than already exists is necessarily better. Indiscriminate involvement of judicial officers in planning the progress of cases is neither a necessary nor a desirable means of reducing cost and delay in civil litigation. Planning litigation strategy is the lawyer's responsibility. Lawyers who best understand the case and their client's needs should have ample freedom to plan and try their own cases. The current level of judicial involvement in the pretrial process under Rule 16, with the changes we have proposed, is all that is necessary and appropriate.

SAMPLE FORM 4

Setting for Status

(rev. 4/87) **Setting for Status**

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DISTRICT

Name of Assigned Judge or Magistrate Judge		Sitting Judge/Mag. Judge If Other Than Assigned	
Case number		Date	
Case Title			

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

At the status hearing, parties to report on the following: 1. Possibility of settlement in the case; 2. If no possibility of settlement exists, the nature and length of discovery necessary to get case ready for trial. Plaintiff is to advise all other parties of the court's action herein and forward a copy of the court's procedure guide forthwith.

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due _____.
(5) ☐ Answer brief to motion due _____. Reply to answer brief due _____.
(6) ☐ ☐ Hearing ☐ Ruling on _____ set for _____ at _____.
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(9) ☐ Trial ☐ set for ☐ reset for _____ at _____.
(10) ☐ ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____.
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41 (a)(2).
(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

☐	No notices required.		number of notices	
☐	Notices mailed by judge's staff.		date docketed	Document #
☐	Notified counsel by telephone.		docketing dpty. initials	
☐	Docketing to mail notices.		date mld. notices	
☐	Mail AO 450 form.		mailing dpty. initials	
☐	Copy to judge magistrate.			
	courtroom deputy's initials	Date/time received in central Clerk's Office		

SAMPLE FORM 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Plaintiffs,	)	
vs.	)	CIVIL ACTION NO.
Defendants.	)	

Order on Fed. R. Civ. P. 16 Scheduling Conference

Attorneys for all the parties were present on this the _____ day of _____, 1991.

After consultation with them and pursuant to Fed. R. Civ. P. Rule 16(b), the following scheduling order is issued:

1. Amendments to the pleadings of plaintiff(s) and defendant(s), et al., and the joinder of other parties are to be done on or before _____.

2. This case is set for jury selection to take place in _____ and the case will be tried sometime during the month of _____.

3. This case is set for pretrial on _____.

4. A. Discovery, including depositions, interrogatories filed and answered, requests for production of documents for inspection and copying, and examination for physical or mental condition shall be completed on or before _____.

B. Naming of witnesses, including experts who are to be designated by name and subject matter, must be accomplished on or before _____.

5. **Discovery Limits.** After consideration of the nature and size of the case, in order to reduce expense, and pursuant to Rules 26(a), 26(c)(1-3), and 26(d) of the Federal Rules of Civil Procedure, it is ORDERED that, absent leave of court upon motion for good cause, discovery is ORDERED to be, and the same is hereby LIMITED as follows:

A. Not more than _____ interrogatories may be served by each party;

B. Not more than _____ depositions in this case may be taken by each party;

C. Not more than _____ set of requests for admissions may be served by each party;

D. A request for production of documents under Rule 34 may be served by each party only two times. Subpoenas *duces tecum* to a party ordering such party to produce documents or things at trial shall not be used to circumvent the limitations placed on discovery hereinabove.

In applying these limits, (i) any separable part or subpart of an interrogatory, request for production, or request for admission will be treated as a separate request, and (ii) all parties represented by the same counsel will be treated as a single party.

6. **Discovery Conference Required.** Unless a shorter time is permitted, at least 14 days before filing a motion pursuant to Fed. R. Civ. P. 35, a motion to determine sufficiency pursuant to Fed. R. Civ. P. 36(a), a motion to compel pursuant to Fed. R. Civ. P. 37 (a)(2) or a motion for protective order pursuant to Fed. R. Civ. P. 26(c), counsel for the moving party shall confer with counsel for the opposing party in a good-faith effort to resolve by agreement the issues in dispute. Unless the motion contains (1) a certification by the moving party that such a conference has taken place but counsel have been unable to resolve the discovery dispute, or (2) if a conference has not been held, a certification listing what reasonable efforts have been made to hold such a conference with the opposing party, the motion *shall be struck* for failure to comply with this order.

7. **Discovery Motions.** Motions for protective order pursuant to Fed. R. Civ. P. 26(c), motions to determine sufficiency pursuant to Fed. R. Civ. P. 36(a), and motions to compel discovery pursuant to Fed. R. Civ. P. 37(a)(2) shall be brought in a timely manner so as to allow sufficient time for the completion of discovery according to any schedule set for the court. Such motions shall quote *in full* (1) each interrogatory question, request for admission or request for production to which the motion is addressed, or otherwise identify specifically and succinctly the discovery to which objection is taken or from which a protective order is sought, and

(2) the response or the objection and grounds therefor, if any, as stated by the opposing party. Unless otherwise ordered, the complete transcripts or discovery papers need not be filed with the court unless the motion cannot be fairly decided without reference to the complete original.

Unless within 11 days after the filing of a discovery motion the opposing party files a written objection thereto, he shall be deemed to have waived objection and the motion may be ruled on. Every party filing an objection shall file with the objection a separate memorandum of law, including citations of supporting authorities and any affidavits and other documents setting forth or evidencing facts on which the objection is based.

Motions relating to discovery which are filed prior to the pretrial conference will be referred to a magistrate judge. Such motions filed after the pretrial conference will be referred to the judge.

8. **Summary Judgment.** Motions for summary judgment should be filed as early as possible after completion of discovery.

9. **Settlement.** Early settlement negotiations are encouraged. Compensatory damages claimed should be itemized immediately. Ninety percent of the cases filed are settled. Why not this one?

10. **Local Rules.** All parties are reminded that the local rules of this district contain important requirements concerning motions to dismiss and for summary judgment, class actions, and other matters. They are reprinted in Alabama Rules of Court (West Publishing Co.) and Alabama Rules Annotated (The Michie Company), but are amended from time to time, a current version being available through the clerk. Local Rule 17 proscribes the filing of most discovery materials.

11. **Other.** Counsel are reminded that the case is to be ready for trial at the time of the pretrial conference.

DONE at Mobile, Alabama, this the ___ day of _____, 1991.

_____

UNITED STATES DISTRICT JUDGE

Order

It is ORDERED that the following special requirements shall prevail for pretrials before Judge _____:

1. Counsel shall confer and shall prepare a *single* proposed pretrial order in the form attached, which must be in the court's hands *at least one full week* before the pretrial hearing.

2. Counsel shall consider and make a genuine effort to stipulate as to the following:

A. Jurisdiction.

B. Propriety of parties, correctness of identity of legal entities, necessity for appointment of guardian *ad litem*, guardian, administrator, etc., and validity of appointment if already made, correctness of designation of party as partnership, corporation or individual d/b/a trade name.

C. If the above be not agreed to, counsel shall certify the question to the court for resolution at the conference.

3. Settlement. Prior to the conference, counsel must advise their respective clients of counsel's opinion with respect to the settlement value of the case, must then discuss the settlement possibilities with each other and at the conference be prepared to discuss settlement potential with the court.

4. The proposed pretrial order shall contain:

A. In the caption of the joint pretrial document, a *complete* listing of all parties, both plaintiff and defendant, who remain in the case as of the date the joint pretrial document is filed. Do not use "et al."

B. A *comprehensive* written statement of uncontested facts to be read to the jury.

C. A written statement of contested facts that will explain to the court the nature of the parties' disputes, and

i. Whenever an alleged breach of contractual obligation is in issue, a statement of the act(s) or omission(s) relied upon by the party or parties asserting such breach.

ii. Whenever negligence is an issue, a statement of the act(s) or omission(s) relied upon by the party or parties asserting same.

iii. Whenever the meaning or interpretation of a contract or other writing is in issue, each party shall separately state all

facts and circumstances relied upon which serve to aid in the interpretation.

iv. Whenever duress, fraud or mistake is an issue, the facts and circumstances relied upon by the parties as constituting the claimed duress or fraud or mistake (see Federal Rule of Civil Procedure 9(b)) shall be specified with particularity.

v. Whenever a conspiracy is charged the party contending same shall set forth the facts and circumstances relied upon as constituting the conspiracy, listing the names of all conspirators making up the conspiracy, together with a narrative of the testimony of such witnesses in regard to the facts of the conspiracy.

D. The agreed triable issue or issues.

E. An estimate of the number of trial days required, exclusive of jury selection time.

F. A statement indicating whether the case is a jury or nonjury case. If a jury case, whether the jury trial is applicable to all aspects of the case or only to certain issues, which shall be specified.

(In jury cases, counsel shall file with the court, *not later than one week prior to the beginning of trial, copies of all proposed jury instructions and any special questions for voir dire examination of the jury venire,* and shall furnish opposing counsel a copy of same. In addition, all motions in limine must be filed with the court not later than one week prior to the beginning of trial, except with respect to matters which could not have been anticipated by counsel by such time.)

G. A list and description of any law or motion matters pending or contemplated.

H. If a party desires to offer deposition testimony into evidence at the trial, he shall designate only those relevant portions of same which he wishes read at trial and advise opposing counsel of same. Opposing counsel shall then designate those relevant portions of such deposition which he wishes to offer in evidence. All objections to any such testimony shall be made in writing and submitted with the joint pretrial document so that the court may rule on such objections prior to trial.

I. Counsel shall list the names and addresses of all witnesses who shall or who probably will be called to testify at the trial. It is the desire of the court that such witness lists be kept to a reason-

able minimum and additional witnesses may be added only for good cause shown and on written motion. With respect to expert witnesses, counsel shall furnish the court and opposing counsel with a curriculum vitae of such experts. In addition, counsel shall furnish the court and opposing counsel with a brief statement of the opinion or opinions which counsel expects to elicit from such expert. Any objections to an expert's qualifications shall be separately set forth in the joint pretrial document.

(When an expert witness is called to the stand, counsel will read to such expert all his qualifications and inquire as to whether same are correct. If correct, the next question will be relative to the merits of the case.)

J. Whenever damages are claimed and are ascertainable, the parties shall agree as to the amount of the ascertainable damages and shall so state them. No further testimony will be required to substantiate the amount thereof. The listing of such damages shall not constitute an agreement as to the recoverability of same unless so stated.

K. Each party shall list and furnish counsel or all parties, for copying and inspection, all exhibits which are to be offered in evidence. All exhibits to which there are objections, shall be noted and by whom the objection is made, setting forth the nature of the objection, and the authority supporting same. *Failure to comply shall constitute a waiver of any such objection.* All exhibits to which there is no objection shall be deemed admitted. Except for good cause shown, the court will not permit the introduction of any exhibits unless they have been listed in the pretrial order, with the exception of exhibits to be used solely for the purpose of impeachment. Markers obtained from the clerk shall be attached to all exhibits, and such exhibits delivered to the clerk immediately prior to the commencement of trial.

CAVEAT: Should a party or his counsel fail to appear at the pretrial conference and such failure is not otherwise satisfactorily explained to the court, the cause shall: (a) stand dismissed for failure to prosecute, if such failure occurs on the part of the plaintiff; or (b) default judgment shall be entered if such failure occurs on the part of the defendant.

Failure to strictly comply with this order in the form and under the terms contained herein, unless previously excused, may

result in the offending party being found in civil contempt, and such civil contempt shall continue from day to day until compliance with the order. Failure to comply within a period of five days thereafter, and explanation satisfactory to the court not having been given and accepted, may result in the cause being dismissed or default judgment being entered, whichever is appropriate.

5. The pretrial order shall constitute the final statement of the issues involved, govern the conduct of the trial, and shall constitute the basis for any relief afforded by the court. However, the pretrial order may be amended at any time by the court or on motion of a party for good cause to avoid manifest injustice.

_____

UNITED STATES DISTRICT JUDGE

SAMPLE FORM 6

FOR THE PURPOSES OF YOUR PREPARATION OF SUGGESTED PRETRIAL ORDERS, IT IS RECOMMENDED THAT YOU FOLLOW THE FOLLOWING FORMAT:

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Style of Case (Complete)

Pretrial Order

There is no contest as to the jurisdiction of this court or as to the correctness of the named defendant(s) or the named plaintiff(s).

I. Agreed Facts

(See paragraph 4A of pretrial order)

1.
2.
3.

II. Disputed Facts

(See paragraph 4B of pretrial order)

1.
2.
3.

IIA.

In contract, fraud, negligence or conspiracy cases, set forth the requirements of paragraphs 4B(1)(2)(3), and/or (4).

III. Triable Issues

1. (Not to be a restatement of the disputed facts but a catalogue of the legal issues such as negligence, contributory negligence, assumption of risk, etc.)
2.
3.

(This is the most important part of the joint pretrial document as these issues, and not the pleadings, are to govern the trial of the case. The court wants an agreed list of triable issues, not separate lists for each party. If any party insists on a triable issue, it is a triable issue until and unless the court decides otherwise at the pretrial conference.)

IV. Trial Time

It is estimated that this case will take _____ days to try, exclusive of jury selection time.

V. Type of Trial

JURY NON-JURY

VI. Motions

State any outstanding motions, etc., as per paragraph F of the pretrial order.

VII. Depositions

List those portions of depositions to be used at trial. State any objections. (See paragraph G of the pretrial order.)

VIII. Witnesses

1. The plaintiff expects to call the following witnesses:
   A.
   B.
   C.

Of the named witnesses, the following will be called as experts:

A. (listing qualifications)

B. (listing qualifications)

Defendant contests the qualifications of _____. (State reasons)

2. The defendant expects to call the following witnesses:

A.

B.

C.

Of the above-named witnesses, the following will be called as experts:

A. (listing qualifications)

B. (listing qualifications)

The plaintiff contests the qualifications of _____. (State reasons)

IX.

(See paragraph 4.1. of pretrial order)

X. Exhibits

Attorneys are to list their exhibits numerically on the attached list with a brief description of each exhibit. Please mark your exhibits to correspond with the exhibit list.

XI.

List names of all attorneys interested in the case and attach copies of letterheads of all interested law firms.

Trial Date

This case is set for trial on _____.

DONE this _____ day of _____, 1990.

_____
UNITED STATES DISTRICT JUDGE

APPROVED:

(Signature)_____
(Typed Name)
Attorney for Plaintiff

(Signature)_____
(Typed Name)
Attorney for Defendant

SAMPLE FORM 7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO.

Federal Rule of Civil Procedure 16 Pretrial Scheduling Order

AND NOW, TO WIT, this _____ day of _____, 1991, IT IS ORDERED as follows:

1. All discovery shall proceed forthwith and continue in such manner as will assure that all requests for and responses to discovery will be served, noticed, and completed by _____.[1]

2. All parties shall prepare and file with the clerk of court and a copy to chambers, their pretrial memoranda in accordance with this order and Local Rule of Civil Procedure 21(c), plus a stipulation and statement of facts as described in Local Rule 21(d)2(b)(2)(A) through (E) on or before _____.

3. On or before _____ counsel for each party shall serve upon counsel for every other party:

a. the original or a copy of each exhibit they expect to offer at trial in furtherance of their respective contentions. Each party shall mark its trial exhibits *in advance of* trial with consecutive numbers appropriately prefixed with an identifying letter of counsel's choice (e.g., P-1, P-2; D-1, D-2); (b) curriculum vitae for each expert witness expected to testify; and, (c) a specific identification of each discovery item to be offered into evidence.

4. This case will go on the court's trial list _____. COUNSEL PLEASE NOTE: This scheduling order will be the *only* written notice counsel receive of the date this case will appear on the court's trial list. Counsel and all parties shall be prepared to commence trial following the date and as soon thereafter as counsel receive telephone notice that trial is to commence. Cases on

the trial list are disposed of in a variety of unpredictable methods (trial, dismissal, settlement, stay, etc.). For this reason it is very likely that your case may be called for trial out of its sequence on the list.

5. Any party having an objection to: (a) the admissibility of any exhibit based on authenticity; (b) the adequacy of the qualifications of an expert witness expected to testify; or (d) the admissibility for any reason (except relevancy) of any item of evidence expected to be offered; shall set forth separately each such objection, clearly and concisely, in their pretrial memorandum. Such objection shall describe *with particularity* the ground and the authority for the objection. Unless the court concludes at trial that manifest injustice will result, the court can be expected to *overrule* any objection offered *at trial* in respect to any matter covered by (a), (b), and/or (c) above, if the court concludes that the objection should have been made as required by this order.

6. If any party desires an "offer of proof" as to any witness or exhibit expected to be offered, that party shall inquire of counsel *prior to trial* for such information. If the inquiring party is dissatisfied with any offer provided, such party shall file a motion seeking relief from the court prior to trial. *The court will not interrupt trial proceedings on the application of any party for an "offer of proof."*

7. Only those exhibits, discovery items, and expert witnesses whose qualifications have been furnished in the manner set forth in this order, shall be considered by the court for admission into evidence at trial, unless stipulated to by all affected parties and approved by the court, *or* by order of court so as to avoid manifest injustice.

8. Presentation of testimony by all witnesses in person in the courtroom is preferred and expected by the court. A stipulation of counsel that deposition testimony may be used at trial is not binding on the court. If any party expects to contend that a witness is unavailable at the time of trial as defined in Federal Rule of Civil Procedure 32(a)(3), and if the court rules that deposition testimony may be used, the court expects use of oral or videotape depositions at trial of *any such witness* whose testimony a party believes essential to the presentation of that party's case, whether that witness is a party, a non-party or an expert. The unavailabil-

ity of any such witness *will not be a ground to delay* the commencement or progress of an ongoing trial. In the event leave of court is secured and a deposition is to be offered, the offering party shall file with the court, prior to the commencement of the trial, a copy of the deposition transcript, but only after all efforts have been made to resolve objections with other counsel. Unresolved objections shall be noted in the margin of the deposition page(s) where a court ruling is necessary and a covering list of such objections supplied therewith.

9. At least two days before the trial date, each party shall submit proposed jury instructions *in duplicate (one point per page)* and proposed jury interrogatories *in duplicate* to the court (Chambers, Room 11614). The original shall be filed with the clerk of the court. On the first day of trial, each party shall respond in writing to the other's proposed jury instructions and jury interrogatories, *in duplicate (one point per page).* Supplemental proposed jury instructions may be submitted only for good cause and with the permission of the court. Two copies of all submissions shall be made to chambers (Room 11614). The original shall be filed with the clerk.

10. At the commencement of trial, the court should be supplied with *two copies* of each exhibit, and *two copies* of a schedule of exhibits which shall briefly describe each exhibit. Counsel will be responsible for the originals of all exhibits until the case is submitted to the jury, at which time counsel will place all exhibits on the lectern. At the conclusion of the trial, counsel shall retrieve all original exhibits and preserve them for possible appeal.

11. At least two days before the trial date, each party shall submit any special proposed voir dire questions they deem required by the circumstances of this particular case. The court will conduct a general voir dire and consider the proposed special questions of counsel at that time.

_____

UNITED STATES DISTRICT JUDGE

(10/04/90)

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[1] Joint discovery schedule shall be filed with the clerk, with a copy to chambers on or before _____.

SAMPLE FORM 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

_____

vs. CIVIL ACTION NO._____

_____

Pretrial Order - Jury Case

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, it is hereby ORDERED:

1. **Closure Date.** Discovery in this case shall be closed as of _____ unless otherwise ordered by the court. Said date, or such other date as the court may subsequently specify, shall be referred to as the "closure date."

2. **Time for Discovery.** On or before the closure date, all interrogatories and requests for production must be served, and all depositions and other discovery must be completed. No discovery may be conducted after the closure date except by agreement of all counsel or by order of the court. A motion for such an order shall identify the particular discovery sought, the reasons it is necessary, and the reasons why it was not done prior to the closure date. Nothing contained in this order shall excuse a party from its continuing obligation, under the rules, to update responses to discovery or to respond to discovery requests made before the closure date.

3. **Expert Witnesses.** Any party intending to utilize the testimony of an expert witness shall, upon request, disclose the identity of such witness promptly. If the expert is retained subsequent to such request, disclosure shall be made immediately after retention *and before closure date.* Any such witness not so disclosed may be barred from testifying unless the court otherwise directs for good cause shown.

4. **Time for Motions.** All motions, including motions to amend pleadings, motions for leave to file counterclaims, cross claims or third-party complaints, motions to add parties, motions

for summary judgment, motions for judgment on the pleadings, and motions to dismiss, shall be filed promptly after counsel discovers, or should have discovered, the bases for such motions. No motion, other than a motion to modify this order or a motion to compel compliance with a discovery request made prior to the closure date, may be filed after the closure date.

5. **Format for Motions.** Every motion and every objection to a motion shall be accompanied by a supporting memorandum bearing a title identifying the motion in support of or in opposition to which it is filed and setting forth the basis for the motion or objection; the statute, rule or other provision of law pursuant to which relief is requested and the cases and authorities relied upon. In the case of *dispositive motions* (e.g., motions to dismiss or for summary judgment) such memorandum shall include in the following order:

a. A table of contents page;

b. A section entitled "Pleadings" that summarizes the pertinent allegations and contentions of both parties as set forth in their respective pleadings and cites the paragraph numbers of the pleadings in which said allegations or contentions are made;

c. A section entitled "Description of Motion" that identifies the movant(s) and the party against whom the motion is directed and that describes the motion and the precise nature of the order or relief sought;

d. A section entitled "Facts" that contains a clear and concise recitation of those facts necessary to enable the reader to understand the basis for the motion or objection without reviewing other documents (whether those documents are appended to the motion or not);

e. A section entitled "Issues" that contains a numerical listing of the *specific* issues that the court will be required to address in ruling on the motion;

f. A section entitled "Points and Authorities" that states and discusses, under separately labeled headings, each argument or contention advanced in support of or in opposition to the motion together with citations to any authorities relied upon;

g. A table of authorities cited that includes the page numbers on which reference is made to each authority listed; and

h. A separate appendix consisting of photocopies of those cases and authorities cited in the memorandum.

In addition to the aforesaid memorandum, a motion for summary judgment shall also be accompanied by a statement of undisputed facts that concisely sets forth, in separate numbered paragraphs, all material facts which the movant contends present no genuine issue to be litigated and an objection to such a motion shall be accompanied by a concise statement of all material facts that the objecting party contends do present genuine issues to be litigated. In either case, each paragraph shall cite the title, page and/or paragraph number of the document supporting the statement contained in that paragraph.

No other memoranda, supplemental memoranda or reply memoranda shall be filed in support of or in opposition to a motion nor shall any memorandum exceed 20 pages in length without leave of court.

No memoranda or other documents relating to a motion may be filed after a hearing date has been set for the motion unless the court otherwise orders for good cause shown. The purpose of this provision is to prevent the court from being deluged with voluminous last minute filings that it cannot review prior to argument and to prevent the unfairness to opposing counsel of being placed in the same position. This prohibition will be *strictly enforced.*

Documents shall be submitted with a motion and/or memorandum only if the contents of the document are disputed and necessary to decide the motion and, then, only to the extent that references to specific portions of said documents are made in the accompanying memorandum.

Motions shall also comply with any additional requirements set forth in the local rules.

6. **Addition of Parties.** If any party is added to the case after the date of this order, it shall be the duty of counsel responsible for adding such party to serve a copy of this order upon such party or its counsel. This order shall be binding upon such party unless subsequently modified by the court, at the request of such party, or otherwise.

7. **Duty to Confer.** Within 20 days after the closure date, counsel for all parties shall confer and make a diligent, good faith

effort to settle the case. Such effort shall include the presentation of a demand by each claimant of the terms it would accept in satisfaction of its claim *and* the presentation of an offer by each party against whom a claim is made of what it is willing to tender to resolve such claim. If such effort is unsuccessful, counsel shall, at that time, make a diligent, good faith effort to:

a. Identify those facts that are disputed;

b. Identify those documents that they intend to offer as evidence at trial and stipulate as to the admissibility and/or authenticity of such documents; and

c. Take whatever action is appropriate to narrow and simplify the issues, avoid unnecessary proof, and expedite trial of the case.

It shall be the duty of plaintiff's counsel to initiate this conference, and it shall be the duty of other counsel to respond promptly. If any counsel is unable to obtain the cooperation of any other counsel, it shall be his or her duty to immediately communicate that fact, in writing, to the court.

8. **Pretrial.** Within 30 days after the closure date, each party shall file a pretrial memorandum, a *separate* supplement to the pretrial memorandum, and a certificate of counsel as described in paragraphs 8-10.

Failure to submit the pretrial memorandum, supplement, and certificate of counsel on or before the due date may result in the imposition of sanctions and/or the exclusion of any evidence that should have been disclosed in the timely filing of the pretrial memorandum.

9. **Pretrial Memorandum.** The pretrial memorandum shall not exceed 25 pages in length and shall consist of the following sections:

a. Parties - a list of all parties and their *trial* counsel.

b. Facts - a concise recitation of the relevant facts that the party filing the memorandum is relying upon and/or intends to prove at trial.

c. Claims and Defenses - a brief statement of each claim for relief and/or defense asserted by the party filing the memorandum.

d. Damages - a brief and specific description of the nature, extent and amount of all damages claimed by the party filing the

memorandum together with a description of the manner in which such amount was calculated.

e. Issues - a numbered list of the factual and legal issues (including any anticipated evidentiary questions) that must be resolved in order to adjudicate the case.

f. Contentions and Arguments - a concise statement of the contentions and arguments of the party filing the memorandum together with citations to supporting authorities. Copies of any statutes, opinions, or other authorities cited shall be affixed to the memorandum.

g. Pending Matters - a list and description of any motions pending or contemplated, any special issues appropriate for determination in advance of trial, and any other matters that counsel believe ought to be considered by the court prior to trial.

h. Estimated Time of Trial - counsel's estimate of the time required to present his or her evidence and the time required to litigate the entire case.

10. **Supplement to Pretrial Memorandum.** The supplement to the pretrial memorandum shall consist of the following sections:

a. Expert Witnesses - a list of each expert witness that the party filing the supplement intends to present at trial, the subject of that expert's testimony, and a summary of the expert's qualifications in a form suitable for submission as an exhibit. The court may require that such summary be used as evidence in lieu of oral testimony as to the witnesses' qualifications.

b. Other Witnesses - a list of all other witnesses whose testimony the party filing the supplement intends to present at trial (indicating whether such testimony will be live or by way of deposition) and concise statements of the subjects of their testimony.

c. Exhibits - two lists of all exhibits that the party filing the Supplement intends to offer at trial. The first list shall set forth the exhibits in *sequential* order (e.g., 1, 2, 3, etc. or A, B, C, etc.). The second list shall set forth the exhibits in *chronological* order. Before submitting their respective lists, counsel should confer to eliminate duplication (i.e., exhibits that appear on both lists) to the maximum extent possible. Plaintiff's exhibits shall be marked numerically; and, in the case of groupings of related exhibits, they

shall be marked with a number and a letter (e.g., 1A, 1B, 1C). Defendant's exhibits shall be marked alphabetically; and groupings of related exhibits shall be marked with a letter and a number (e.g., A1, A2, A3). After the letters of the alphabet have been exhausted, Defendant's exhibits shall be marked with double letter designations (e.g., AA, BB, CC). On or before the date fixed for impaneling a jury, counsel for each party shall deliver to the court a loose-leaf notebook containing all of the exhibits to be offered by that party, marked as previously stated, and shall deliver copies of the proposed exhibits to trial counsel for each adverse party.

d. Voir Dire Questions - a list of all questions that counsel requests the court ask of prospective jurors during voir dire examination, and a list of *specific* topics that counsel wishes to question prospective jurors about, directly, together with a statement of the reasons why such inquire is necessary and why examination by the court would be inadequate.

e. Jury Instructions - any instructions that counsel request be included in the court's charge to the jury. No such request will be considered unless accompanied by citations to any authorities supporting such proposed instructions.

11. **Certificate of Counsel.** The certificate of counsel shall consist of a signed statement that counsel has fully complied with the requirements of paragraph 6 of this order; and, it shall include a representation that counsel has made a diligent, good faith effort to settle this action but has been unsuccessful.

12. **Trial.** This case shall be in order for trial at any time after the date fixed for filing pretrial memoranda. Once the case is placed on the court's trial calendar, counsel should be prepared to proceed upon 24 hours notice after the calendar call. It is the duty of counsel to maintain contact with the calendar clerk to ascertain the status of the case from time to time.

13. **Use of Recorded Testimony at Trial.** Any party proposing to read or play during trial evidence that has been previously recorded (e.g., depositions, interrogatory answers, admissions, tape recordings) shall:

a. Identify those portions of testimony that may be eliminated as irrelevant, redundant or otherwise inadmissible in order that the proceedings may be expedited by presenting only those portions that are necessary.

b. Furnish all opposing counsel with a specification of those portions that are to be played no later than the time of the calendar call.

c. Confer with all opposing counsel in an effort to reach agreement as to what portions should be read or played so that unnecessary objections may be eliminated.

d. On the date trial commences, furnish the court with a transcript of such evidence indicating the portions that will be offered.

14. **Jury Costs.** In cases that are settled after a jury has been summoned, jury costs and/or attorneys' fees may be assessed against one or more of the parties and/or their counsel if the court determines the tardiness of the settlement was due to unreasonable or vexatious conduct. Therefore, every effort should be made to settle cases before that time.

BY ORDER:

_____

Deputy Clerk

ENTER:

_____

United States District Judge

Date: _____

SAMPLE FORM 9

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

IN RE:	Civ. No. _____
_____ SECURITIES LITIGATION	MDL DOCKET NO. __
_____	HON. _____
THIS DOCUMENT RELATES TO: ALL CASES	
_____	

[Proposed]
Case Management Order No. 1

Having considered the comments and proposals of the parties presented at the initial conference held _____, 1991, the court ORDERS:

1. **Pretrial Consolidation.** The cases listed on Attachment A are, until further order, consolidated for pretrial purposes. This order does not constitute a determination that these actions should be consolidated for trial, nor does it have the effect of making any entity a party to an action in which it has not been joined and served in accordance with the Federal Rules of Civil Procedure.

a. **Master Docket and File.** The clerk will maintain a master docket and case file under the style "In re Granada Partnership Securities Litigation," Master File Number C.A. No. H-90-0214. All orders, pleadings, motions, and other documents will, when filed and docketed in the master case file, be deemed filed and docketed in each individual case to the extent applicable.

b. **Captions; Separate Filing.** Orders, pleadings, motions and other documents will bear a caption similar to that of this order. If generally applicable to all consolidated actions, they shall include in their caption the notation that they relate to "ALL CASES" and be filed and docketed only in the master file.

Documents intended to apply only to particular cases will indicate in their caption the case number of the case(s) to which they apply, and extra copies shall be provided to the clerk to facilitate filing and docketing both in the master file and the specified individual case files.

c. **Discovery Requests and Responses.** Pursuant to Fed. R. Civ. P. 5(d), discovery requests and responses will not be filed with the court except to the extent offered in connection with a motion under Rule 11, 12, or 56 or a motion seeking a ruling by the court on a discovery dispute.

2. **Organization of Plaintiffs' Counsel.**

a. **Plaintiffs.** To act on behalf of class plaintiffs the court designates—

i. as class co-lead counsel:

ii. as an additional member of an executive committee to act together with class co-lead counsel with respect to issues common to the class and individual actions:

b. **Time Records.** Counsel who anticipate seeking an award of attorneys' fees from the court shall comply with the directives contained in Attachment B regarding the maintenance and filing of contemporaneous records reflecting the services performed and expenses incurred.

3. **Service of Documents.** All counsel of record in any of the cases listed on Attachment A shall be served with a copy of each pleading, motion, or other document filed by a party, and with a copy of each order entered by the court.

4. **Refinement of Issues.**

a. **Consolidated Complaint.** The class action plaintiffs shall file a single consolidated amended complaint which shall replace the underlying complaint in each of the three class actions listed on Attachment A by _____.

b. **Responsive Pleadings and Rule 12 Motions.** Each defendant shall have until _____ to serve and file an answer to the class plaintiffs' consolidated amended complaint and the complaint(s) in the individual action(s), and, if they desire, to serve and file, together with all other defendants desiring to do so, a joint motion to dismiss (with all supporting papers and briefs)

addressed to the class plaintiffs' consolidated amended complaint and the complaint(s) in the individual action(s). The class and individual plaintiffs shall have until _____ to serve and file a joint opposition brief (with all supporting papers). The moving defendants shall have until _____ to serve and file a joint reply brief (with all supporting papers) limited to discussions of points raised in plaintiffs' joint opposition brief which were not fully covered in the defendants' joint opening brief and supporting papers.

c. **Class Action.** The class action plaintiffs will file by _____ their motion seeking class certification, identifying the class(es) for which certification is sought, detailing the facts on which satisfaction of the requirements of Fed. R. Civ. P. 23 is asserted, and describing what and how notice will be given to class members. Defendants will file by _____ any objections to class certification, specifying with particularity the factual and legal basis of their objection and identifying any facts on which an evidentiary dispute exists. The class action plaintiffs will file by _____ any reply to defendants' objections. A hearing will thereafter be conducted by the court under Rule 23(c), at which time the parties may present extracts of depositions, interrogatories, and documentary evidence relevant to any factual disputes. Only on a showing of good cause will a party be permitted to call a witness to testify in person at the hearing.

d. **Summary Judgment.** [The calendaring of any summary judgment motion shall be done at the first status conference held after the determination of class certification issues.] Each defendant shall have until _____ [or ___ days] to serve and file, together with all other defendants desiring to do so, a joint motion for summary judgment (with all supporting papers and briefs) addressed to the class plaintiffs' consolidated amended complaint and the complaint(s) in the individual action(s). The class and individual plaintiffs shall have until _____ [or ___ days] to serve and file a joint opposition brief (with all supporting papers). The moving defendants shall have until _____ [or ___ days] to serve and file a joint reply brief (with all supporting papers) limited to discussions of points raised in plaintiffs' joint opposition brief which were not fully covered in defendants' joint opening brief and supporting papers.

5. **Discovery.**

a. **Schedule.** Discovery shall be conducted according to the schedule set forth on Attachment C. All discovery on the issue of class certification shall be completed by _____.

b. **General Limitations.** All discovery requests and responses are subject to the requirements of Fed. R. Civ. P. 26(b)(1) and (g). Discovery shall not, without prior approval of the court: (1) be taken of absent class members or of persons in countries outside the United States; (2) include inquiries regarding the income, assets or finances of the plaintiffs; or (3) require the plaintiffs to produce or answer inquiries about their income tax returns. Any request for approval of such otherwise prohibited discovery shall indicate why the discovery is needed and the specific information or documents sought.

c. **Confidentiality Order.** See Attachment D.

d. **Documents.**

i. **Preservation.** See Attachment D.

ii. **Numbering System.** Counsel shall develop and use a system for identifying by a unique number or symbol each document produced or referred to during the course of this litigation. All copies of the same document should ordinarily be assigned the same identification number.

iii. **Document Depositories.** See Attachment E.

iv. **Avoidance of Multiple Requests.** Counsel shall, to the extent possible, coordinate and consolidate their requests for production and examination of documents to eliminate duplicative requests from the same party.

e. **Interrogatories.** Counsel shall, to the extent possible, combine their interrogatories to any party into a single set of questions. No question shall be asked that has already been answered in response to interrogatories filed by another party unless there is reason to believe that a different answer will be given. No contention-type interrogatories may be propounded without prior court order upon a showing of good cause.

f. **Depositions.** See Attachment F.

g. **Experts.** All parties shall exchange lists of expert witnesses expected to be called by them not later than _____. No party shall, in the absence of good cause shown, be permitted

to call as an expert witness at trial any person not appearing on such party's expert witness list.

h. **Special Agreements.** All parties shall be under a continuing duty to make prompt disclosure to the court (and, unless excused by the court for good cause shown, to other parties) of the existence and terms of all agreements and understandings, formal or informal, absolute or conditional, setting or limiting their rights or liabilities in this litigation. This obligation includes not only settlements, but also such matters as "loan receipt" and "Mary Carter" arrangements, and insurance, indemnification, contribution, and damage-sharing agreements.

i. **Discovery Previously Taken.** Discovery conducted prior to consolidation in any of the actions listed on Attachment A shall be deemed to have been taken in all of the consolidated actions.

j. **Early Mutual Disclosure.** Within 30 days of the date of this order, all parties shall disclose to each other:

i. the identification of all persons reasonably likely to have information that bears significantly on any of the claims and defenses in this litigation, including damages;

ii. a general description of documents and other matters within a party's possession, custody or control that are reasonably likely to bear significantly on the claims and defenses;

iii. computation of damages claimed; and

iv. the existence and contents of liability insurance policies.

6. **Trial.** Subject to further order of the court, the parties are directed to be ready for trial on all issues by _____. Counsel are cautioned that the court may require a listing in advance of trial of the factual contentions each party expects to prove at the trial, identifying the witnesses and documents to be presented in support of each such contention, and may preclude the presentation of any contention, witness, or document not so identified.

7. **Next Conference.** The next pretrial conference is scheduled for _____.

8. **Later Filed Cases.** The terms of this order, including pretrial consolidation, shall apply automatically to actions later instituted in, removed to, or transferred to this court (including cases transferred for pretrial purposes under 28 U.S.C. § 1407) that in-

volve related claims. Objections to such consolidation or other terms of this order shall promptly be filed, with a copy served on counsel for plaintiffs and defendants.

DATED: _____, 1990.

_____

United States District Judge

[Proposed]
Attachment A
To Case Management Order No. 1

List of Cases Consolidated

[Proposed]
Attachment B
To Case Management Order No. 1

Attorneys' Time and Expense Records

It is ORDERED:

1. **Maintenance of Contemporaneous Records.** All counsel shall keep a daily record of their time spent and expenses incurred in connection with this litigation, indicating with specificity the hours, locations, and particular activity (such as "conduct of deposition of A.B.").

2. **Filing.** By the 15th day of each month, each firm which may seek an award (or approval) of a fee by the court shall file with co-lead counsel a report summarizing according to each separate activity the time and expenses spent by its personnel during the preceding month, and the accumulated total of the firm's time and expenses to date: Co-lead counsel shall file under seal with the clerk by the last day of the month a report summarizing for all participating counsel such time and expenses reports, arranged according to the particular activities.

Dated: _____, 1991.

_____
United States District Judge

[Proposed]
Attachment C
To Case Management Order No. 1

Discovery Scheduling Order

It is ORDERED:

1. Discovery shall be conducted according to the following schedule:

a. Document discovery by all parties shall resume immediately. Deposition discovery shall commence on _____, 1991, and all discovery (document and deposition) shall thereafter proceed according to the following schedule:

Discovery Initiated By	Duration
Plaintiffs	_____ through _____
Defendants	_____ through _____
Plaintiffs	_____ through _____
Defendants	_____ through _____
Plaintiffs	_____ through _____
Defendants	_____ through _____
Plaintiffs	_____ through _____

b. **Experts.** Document and deposition discovery of expert witnesses for all parties shall commence on _____, 1991, and continue through _____, 1991.

2. Except for good cause shown,

a. Relief from the above schedule shall not be granted, and all non-expert discovery shall be completed by _____, and

all discovery shall be completed by _____;

b. non-expert discovery shall be limited to matters occurring after _____, and before _____;

c. no more than 30 interrogatories (including subparts) may be propounded to any party (exclusive of interrogatories seeking the identity and location of witnesses and documents) and interrogatories shall be limited to the identification of persons with relevant information, insurance information and other informational requests that can most easily be obtained through interrogatories; and

d. no deposition of a class representative plaintiff may take more than two days (except that any class representative plaintiff who has already been deposed for two days may be deposed for one additional day).

3. The parties are expected to be prepared for trial on all issues by _____, 199__.

DATED: _____, 1991.

_____

United States District Judge

[Proposed]
Attachment D
To Case Management Order No. 1

Confidentiality and Records Preservation Order

IT IS ORDERED:

The _____ Securities Litigation may involve the production of voluminous documents. Some of the documents and other discovery materials of each of the parties are confidential or privileged within the meaning of Rule 26 of the Federal Rules of Civil Procedure.

1. Confidential Documents Defined.

a. Confidential documents (hereafter the "confidential documents" or "confidential information") means those documents that are (i) identified by a party as responsive to a request for production of documents propounded by any other party and (ii) that are designated in accordance with paragraph 3 below as confidential documents.

b. As to those documents that are produced for examination for the purpose of allowing counsel to determine which of those documents he desires copied, those documents shall be subject to this protective order, whether or not designated, until copies of the documents are requested and supplied, and thereafter only if the copies supplied are designated as provided in paragraph 3 or otherwise designated as confidential.

2. Contents of Confidential Documents.

a. Confidential documents contain trade secrets, proprietary information, and other information that is confidential to the producing party or other party who designates documents pursuant to paragraph 3 ("designating party").

b. _____ contends that disclosure of confidential documents or information to the competitors of a producing party could impair the producing party's ability to compete. Further, _____ contends that disclosure of sensitive investor information could subject _____ or other defendants to liability from investors. Good cause, therefore, ex-

ists to enter this protective order, which shall govern the disclosure and use of documents designated as "confidential."

3. **Designation.**

a. Confidential documents shall be so designated with a legend: "CONFIDENTIAL—SUBJECT TO PROTECTION PURSUANT TO COURT ORDER," along with an identification of the designating party, to signify that they contain information believed to be subject to protection. Designation shall be made no later than 10 days after the documents identified by the requesting party have been copied and Bates labeled. After a document is designated as confidential, the original copy and all subsequent copies shall be so marked. For purposes of this protective order, the term "document" means all written, recorded, or graphic material. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as confidential documents. However, to the extent feasible, such materials shall be prepared in a manner that the confidential information is bound separately from that not entitled to protection.

b. The parties may designate confidential only those documents that they in good faith believe are entitled to protection. A party may object to the designation of a document as "confidential" and apply to the court for a ruling that the document should not be so treated. Until the court enters an order changing the designation, the document and the information contained therein shall be protected in accordance with this protective order.

4. **Non-Disclosure of Confidential Documents.**

Except with the prior written consent of the producing party or other person originally designating a document as a confidential document, or as hereinafter provided under this protective order, no confidential document may be disclosed to any person or entity.

5. **Permissible Disclosures and Maintenance of Confidential Documents.**

Notwithstanding paragraph 4 above, confidential documents may be disclosed only to the following qualified persons:

a. Plaintiffs in the litigation;

b. Defendants in the litigation;

c. Counsel for the parties in the litigation and their regular employees (secretarial, paralegal, clerical, and those regularly involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions);

d. Employees of third-party contractors performing one or more of the functions described in paragraph 5(c);

e. Present or former employees or directors of any party to the litigation or other persons with prior actual knowledge of the documents or the confidential information contained therein, and their counsel;

f. Court personnel involved in this litigation (including court reporters and persons operating video recording equipment at depositions);

g. Consultants or experts, and their employees and subcontractors, retained solely for the purpose of assisting counsel in the litigation; and

h. Any person designated by the court in the interest of justice, upon such terms as the court may deem proper.

Qualified persons shall be required to keep confidential documents or information separate and inaccessible to all persons other than those identified in this paragraph 5.

6. **Procedure for Permissible Disclosures.**

a. Each individual to whom disclosure is made pursuant to sections 5(a), (d), (e), (g) or (h) above shall, prior to disclosure, sign an acknowledgment form, a sample of which is attached hereto as Exhibit A, containing:

i. a recital that the signatory has read, understands, and agrees to be bound by this protective order;

ii. a recital that the signatory understands that unauthorized disclosures of the confidential documents constitute contempt of court; and

iii. a statement that the signatory consents to the exercise of personal jurisdiction of the transferee forum, the United States District Court for the Southern District of Texas.

A copy of the acknowledgment shall be retained by the party obtaining execution. If any qualified person refuses to sign an acknowledgment form, a party may apply to the court for permis-

sion to show that person confidential documents, notwithstanding the provisions of paragraph 6 of this protective order. A qualified person who is deposed may be shown confidential documents at his deposition, whether or not he has signed an acknowledgment form.

b. Before disclosing a confidential document to any person who is a competitor (or an employee of a competitor) of a party that so designated the document (as defined in the attached Exhibit B), the party wishing to make such disclosure shall give at least 10 days' advance written notice to the counsel who designated such information as confidential, stating the names, addresses, and business activity of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the 10-day period, a motion is filed by any party objecting to the proposed disclosure, disclosure is not permissible until the court has denied such a motion. The court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted.

7. **Declassification.**

A party (or aggrieved entity permitted by the court to intervene for such purpose) may apply to the court for a ruling that a document (or category of documents) designated as confidential is not entitled to such status and protection or for an order permitting disclosure beyond the terms of this protective order. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. The proponent of confidentiality has the burden of proof in demonstrating that there is good cause for the documents to have such status.

8. **Confidential Information in Depositions.**

a. Qualified persons who are deposed shall not retain or copy portions of the transcript of their depositions that contain confidential information unless they sign the acknowledgment prescribed in paragraph 6.

b. Parties may, within 20 days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. confidential information within the deposition transcript may be designated by underlining the portions of the pages

that are confidential and marking such pages with the following legend: "CONFIDENTIAL—SUBJECT TO PROTECTION PURSUANT TO COURT ORDER." Until expiration of the 20-day period, the entire deposition will be treated as subject to protection against disclosure under this protective order. If no party timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall, unless prohibited by the court, be filed under seal apart from the portions and exhibits not so marked.

9. **Subpoena by Other Courts or Agencies.**

If another court or an administrative agency subpoenas or orders production of confidential documents that a party has obtained under the terms of this protective order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

10. **Filing.**

Confidential documents need not be filed with the court except when required by the court. If filed, they shall be filed under seal, unless prohibited by the court, and shall remain sealed while in court so long as they retain their status as confidential documents.

11. **Client Consultation.**

Nothing in this protective order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make any specific disclosure of any item so designated except pursuant to the procedures of paragraphs 5 and 6, as applicable.

12. **Use.**

Persons obtaining access to confidential documents under this protective order shall use the documents and information only for preparation and trial of the litigation (including appeals and retrials).

13. **Scope of Protective Order.**

This protective order shall govern all documents and other discovery materials produced in response to any method of discovery employed by any party in the litigation.

14. **Non-Termination.**

The provisions of this protective order shall not terminate at the conclusion of the litigation. At the conclusion of this litigation, confidential documents and all copies thereof (other than exhibits of record) shall, at the request of the producing party, be re-tendered to the producing party, person, or entity, or destroyed.

15. **Preservation of Documents.**

During the pendency of this litigation, and for 120 days after the final order closing all cases, each of the parties herein and their respective officers, employees, agents, and all persons in active concert or participation with them are restrained and enjoined from altering, interlining, destroying, permitting the destruction of, or otherwise changing any document in the actual or constructive care, custody or control of such person, wherever such document is physically located; or from irrevocably changing the manner and sequence of the files in which the documents were originally compiled or kept.

16. **Modification Permitted.**

Nothing in this protective order shall prevent any party or other person, for good cause shown, from seeking modification of this protective order or from objecting to discovery that it believes to be otherwise improper.

17. **Non-Exclusive Order.**

Nothing in this protective order shall prevent the parties from entering into other confidentiality agreements or obtaining other protective orders by stipulation or otherwise. Nothing in this protective order shall preclude any party from seeking additional protection with respect to the confidential documents and information.

18. **Responsibility of Attorneys.**

The attorneys of record are responsible for providing a copy of this protective order to all persons entitled by paragraph 5 to confidential documents, and for employing reasonable measures, including those set forth in paragraph 6, to control, consistent

with this protective order, duplication of, access to, and distribution of copies of confidential documents. No one shall duplicate any confidential document except for the creation of working copies, exhibits to depositions, and, as necessary, a copy to be filed in court under seal.

19. No Waiver.

a. Review of the confidential documents and information by counsel, experts or consultants for the litigants in the litigation shall not waive the confidentiality of the documents or objections to production.

b. The inadvertent, unintentional, or in camera disclosure of confidential documents and information shall not, under any circumstances, be deemed a waiver, in whole or in part, of any party's claims of confidentiality.

20. Nothing contained in this protective order and no action taken pursuant to it, shall prejudice the right of any party to contest the alleged relevancy, admissibility, or discoverability of the confidential documents and information sought.

DATED: _____, 199___.

_____

United States District Judge

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

IN RE:) Civil No. _____
)
) MDL DOCKET NO. _____
_____)
SECURITIES LITIGATION)
_____)

Acknowledgment of Protective Order and Agreement to Be Bound

_____ states as follows:

1. That he resides at _____ in the city and county of _____, and state of _____.

2. That he has read and understands the protective order dated _____, 199__ entered in the Granada Partnerships Securities Litigation.

3. That he is either (a) engaged as a consultant or expert or (b) has been interviewed by _____ on behalf of _____ in the preparation and conduct of one or more of the cases consolidated under the Transfer Order in MDL No. ___ ; In re _____Securities Litigation.

4. That he agrees to comply with and be bound by the provisions of the protective order;

5. That counsel who has retained or consulted with him has explained to him the terms thereof;

6. That he will not divulge to persons other than those specifically authorized by paragraph 5 of the protective order, and will not copy or use, except solely for the purposes of the Granada Partnerships Litigation, any confidential document or information as defined by the protective order, except as provided therein.

_____
(name of individual to whom disclosure will be made)

[Proposed]
Attachment E
To Case Management Order No. 1

Order for Establishment of Document Depositories

IT IS ORDERED:

1. **Establishment of Depositories.** Document depositories shall be established in Houston, Texas, at such locations as the parties may agree upon. In the absence of agreement, the court upon motion shall designate such locations. Documents produced by plaintiffs pursuant to formal or informal request shall be placed in a plaintiffs' depository maintained at the expense of plaintiffs; those produced by defendants pursuant to formal or informal request shall be placed in a defendants' depository maintained at the expense of defendants. Each depository will contain (or have available) a copying machine with an appropriate mechanism for separately counting the copies that are made by each party.

2. **Filing System.** The filing party shall place the documents in the depository in sequential order according to the document numbers, and the documents shall be organized in groups in accordance with the document identification prefixes. Documents without identification numbers shall be organized in an orderly and logical fashion. Existing English translations of all foreign-language documents shall be filed with the documents.

3. **Access; Copying; Log.** Counsel appearing for any party in this litigation and the staffs of their respective law firms working on these cases shall have reasonable access during business hours to each party's documents in any such depository and may copy or obtain copies at the inspecting parties' expense. Such inspection shall not be subject to monitoring by any party. A log will be kept of all persons who enter and leave the depository, and only duplicate copies of documents may be removed from the depository except by leave of court. Access to, and copying of, confidential documents is subject to the limitations and requirements of the order protecting against unauthorized disclosure of such documents.

4. **Subsequent Filings.** After the initial deposit of documents in the depository, notice shall be given to all counsel of all subsequent deposits.

DATED: _____, 199___.

_____

United States District Judge

[Proposed]
Attachment F
To Case Management Order No. 1

Deposition Guidelines

IT IS ORDERED that depositions be conducted in accordance with the following rules:

1. **Cooperation.** Counsel are expected to cooperate with, and be courteous to, each other and deponents.

2. **Stipulations.** Unless contrary to an order of the court, the parties (and, when appropriate, a non-party witness) may stipulate in any suitable writing to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for the extension of discovery cut-offs set by the court are not, however, valid until approved by the court.

3. **Scheduling.** Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at mutually convenient times and places. That some counsel may be unavailable shall not, however, in view of the number of attorneys involved in this litigation, be grounds for postponing a deposition if another attorney from the same firm or who represents a party with similar interests is able to attend.

4. **Attendance.** Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purpose of the deposition, the parties or the representative of a party, counsel for the deponent, and potential witnesses. While a deponent is being examined about any designated confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the confidentiality order shall be excluded.

5. **Conduct.**

a. **Examination.** Each side should ordinarily designate one attorney to conduct the principal examination of the deponent, and examination by other attorneys should be limited to matters not previously covered. Counsel for each side shall cooperate

with each other in the apportionment of time, such that the time limits set in this court's orders with respect to length of individual depositions will be complied with.

b. **Objections.** The only objections that should be raised at the deposition are those involved in a privilege against disclosure or some matter that may be remedied if presented at the time, such as to the form of the question or the responsiveness of the answer, or objections to the scope of discovery based upon orders of this court. Objections on other grounds are unnecessary and should generally be avoided. All objections should be concise and must not suggest answers to (or otherwise coach) the deponent. Argumentative interruptions will not be permitted.

c. **Directions Not to Answer.** Directions to the deponent not to answer are improper except on the ground of privilege, violation of an order of this court governing the permissible scope of discovery, or to enable a party or deponent to present a motion to the court for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the party or the deponent. When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

d. **Private Consultation.** Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may, however, be held during normal recesses and adjournments.

6. **Documents.**

a. **Production of Documents.** Witnesses subpoenaed to produce numerous documents should ordinarily be served at least 30 days before the scheduled deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the interrogation commences.

b. **Confidentiality Order.** A copy of the confidentiality order shall be provided to the deponent before the deposition commences if the deponent is to produce or may be asked about documents which may contain confidential information.

c. **Copies.** Extra copies of documents about which counsel expect to examine the deponent should ordinarily be provided to opposing counsel and the deponent. Deponents should be shown a document before being examined about it except when counsel seek to impeach or test the deponent's recollection.

7. **Depositions of Witnesses Who Have No Knowledge of the Facts.** An officer, director, or managing agent of a corporation or governmental official served with a notice of a deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party a reasonable time before the date noticed an affidavit so stating and identifying a person within the corporation or government entity believed to have such knowledge. Notwithstanding such affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order.

8. **Expert Witnesses.** Leave is granted to depose expert witnesses in addition to or in lieu of discovery through interrogatories. Objection to such depositions may be made by motion.

9. **Tape-Recorded Depositions.** By indicating in its notice of a deposition that it wishes to record the deposition by tape recording in lieu of stenographic recording (and identifying the person before whom the deposition will be taken), a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(4). Unless an objection is filed and served within 15 days after such notice is received, the court shall be deemed to have granted the motion pursuant to the following terms and conditions:

a. **Transcript; Filing.** Subject to the provisions of paragraph 12, the party noticing the deposition shall be responsible for preparing a transcript of the tape recording and for filing within applicable time limits this transcript together with the original tape.

b. **Rights of Other Parties.** Other parties may at their own expense arrange for a stenographic recording of the deposition, may obtain a copy of the tape and transcript upon payment of a

pro-rata share of the noticing party's actual costs, and may prepare and file their own version of the transcript of the tape recording.

10. **Videotaped Depositions.** By indicating in its notice of a deposition that it wishes to record the deposition by videotape (and identifying the proposed videotape operator), a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(4). Unless an objection is filed and served within 15 days after such notice is received, the court shall be deemed to have granted the motion pursuant to the following terms and conditions:

a. **Stenographic Recording.** The videotaped deposition shall be simultaneously recorded stenographically by a qualified court reporter. The court reporter shall on camera administer oath or affirmation to the deponents. The written transcript by the court reporter shall constitute the official record of the transcription for purposes of Fed. R. Civ. P. 30(e) (submission to witness) and 30(f) (filing exhibits).

b. **Cost.** The noticing party shall bear the expense of both the videotaping and the stenographic recording. Any party may at its own expense obtain a copy of the videotape and the stenographic transcript. Requests for taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

c. **Video Operator.** The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

d. **Attendance.** Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped.

e. **Standards.** The depositions will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position

is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition will not be permitted.

f. **Interruptions.** Videotape recording will be suspended during all "off the record" discussions.

g. **Examination; Exhibits; Rereading.** The provisions of paragraphs 5 and 6 of this order apply to videotaped depositions. Rereading of questions or answers, when needed, will be done on camera by the stenographic court reporter.

h. **Index.** The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions of the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which any interruption of continuous tape recording occurs, whether for recesses, "off the record" discussions, mechanical failure, or otherwise.

i. **Filing.** The operator shall preserve custody of the original videotape in its original condition until further order of the court. No part of a videotaped deposition shall be released or made available to any member of the public unless authorized by the court.

j. **Objections.** Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If the objection involves matters peculiar to the videotaping, a copy of the videotape and equipment for viewing the tape shall also be provided to the court.

k. **Use at Trial; Purged Tapes.** A party desiring to offer a videotape deposition at trial shall be responsible for having available appropriate playback equipment and a trained operator.

After the designation by all parties of the portions of a videotape to be used at trial, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), may be prepared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other parties at least 30 days before it is used, and the unedited original of the tape shall also be available at the trial.

11. **Telephonic Depositions.** By indicating in its notice of a deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(7). Unless an objection is filed and served within 15 days after such notice is received, the court shall be deemed to have granted the motion. Other parties may examine the deponent telephonically or in person. However, all persons present with the deponent shall be identified in the deposition and shall not by word, sign, or otherwise coach or suggest answers to the deponent.

12. **Waiver of Transcription and Filing.** The parties and deponents are authorized and encouraged to waive transcription and filing of depositions that prove to be of little or no usefulness in the litigation or to agree to defer transcription and filing until the need for using the deposition arises.

13. **Use.** Depositions may, under the conditions prescribed in Fed. R. Civ. P. 32(a)(1)-(4) or as otherwise permitted by the Federal Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this court as part of this litigation)—

a. who was present or represented at the deposition,

b. who, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this court in any action which is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.

14. **Rulings.**

a. **Immediate Presentation.** Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition may be presented by telephone to the court. If the judge is not available during the period while the deposition is being conducted, the dispute may

be addressed to a magistrate judge of this court. The presentation of the issue and the court's ruling will be recorded as part of the deposition.

b. **Extraterritorial Jurisdiction.** The undersigned will exercise by telephone the authority granted under 28 U.S.C. § 1407(b) to act as district judge in the district in which the deposition is taken.

DATED: _____, 199___.

_____
United States District Judge

SAMPLE FORM 10

Jurisdictional Checklist

1. **Jurisdiction Properly Alleged?**
2. **Federal Question?**

a. "Arising under" jurisdiction (not defensive or referential use of federal law)

b. Private right of action

c. Wholly insubstantial federal claim

3. **Diversity Jurisdiction?**

a. Complete diversity

b. Dual citizenship of corporations

c. Citizenship of all partners, association members, etc.

d. Supplemental parties joined by plaintiff disallowed

e. Amount in controversy ($50,000)

f. Indispensable parties

4. **Removal Jurisdiction?**

a. Federal question; diversity or "separate and independent" to federal question claim

b. Non-removable claims (e.g., FELA)

c. Waiver by conduct or agreement

d. Removal limited to defendants

e. Artful pleading/complete preemption

f. Special removal statutes (e.g., federal officers)

g. Procedural defects:

i. Removal within 30 days of receipt by first defendant

ii. Joinder by all served defendants

iii. Other procedural requirements (attach papers, notices, etc.)

iv. Resident defendant removal (diversity)

v. Removal more than one year after commencement (diversity)

vi. Post-removal destruction of jurisdiction

5. **Supplemental (Pendent) Jurisdiction**

a. Do state claims derive from "common nucleus of operative fact"

b. Is supplemental party added to action commenced before December 1, 1990 (*Finley v. U.S.*)

c. Does joinder of supplemental party destroy complete diversity (e.g., added by plaintiff, intervenor as plaintiff, indispensable party)

d. Are there reasons to decline supplemental jurisdiction (e.g., novel/complex state claims, federal claims dismissed, or other compelling reasons for dismissal/remand)

6. **Other Limitations?**

a. Venue

b. Timely and proper service—Fed. R. Civ. P. 4(j)

c. Personal jurisdiction

d. Jurisprudential limitations (standing, abstention, mootness, ripeness, etc.)

e. Eleventh Amendment

f. Failure to exhaust administrative remedies (e.g., EEOC), notice requirements, etc.

SAMPLE FORM 10A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

_____	)	
Plaintiff(s)	)	
	)	
v.	)	No. _____
	)	ORDER CONCERNING
_____	)	REMOVAL
Defendant(s)	)	
	)	

IT IS HEREBY ORDERED that all parties removing actions to the court shall, no later than five (5) days after filing a notice of removal, file and serve a signed statement under the case and caption that sets forth the following information:

1. The date(s) on which defendant(s) or their representative(s) first received a copy of the summons and complaint in the removed state court action.

2. The date(s) on which each defendant was served with a copy of the summons and complaint, if any of those dates are different from the date(s) set forth in item number 1.

3. In actions predicated on diversity jurisdiction, whether any defendants who have been served are citizens of the state in which this court sits.

4. If removal takes place more than thirty (30) days after any defendant first received a copy of the summons and complaint, the reasons why removal has taken place at this time and the date on which the defendant(s) first received a paper identifying the basis for such removal.

5. In actions removed on the basis of the court's jurisdiction in which the action in state court was commenced more than one year before the date of removal, the reasons why this action should not summarily be remanded to state court.

6. Identify any defendant who had been served prior to the time of removal who did not formally join in the notice of removal and the reasons therefor.

IT IS FURTHER ORDERED that all defendants to the action who joined in the notice of removal shall file such a statement within the time period set forth herein, although the parties may file a joint statement as long as such statement is signed by counsel for each party.

IT IS FURTHER ORDERED that the removing defendant(s) shall serve a copy of this order on all other parties to the action no later than the time they file and serve a copy of the statement required by this order. Any party who learns at any time that any of the information provided in the statement(s) filed pursuant to this order contains information that is not correct shall immediately notify the court in writing thereof.

IT IS SO ORDERED.

_____

United States District Court Judge

SAMPLE FORM 11

U.S. District Court Southern District
New Statement Required of
RICO Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil RICO Actions Filed in the United States District Court for the Southern District of California Pursuant to 18 U.S.C. §§ 1961, *et seq.*	)	General Order No. 386

The court has observed a number of actions filed in this court based in whole or in part on the Racketeer Influenced and Corrupt Organizations Act ("RICO") codified at 18 U.S.C. §§ 1961 *et. seq.* Such claims tend to expand the scope of a given case, increase discovery, lead to numerous tine-consuming and costly motions to dismiss, and prevent possible settlement of litigation. This order is not intended to minimize valid claims or to render their prosecution more difficult. Rather, it is intended to assist the parties and the court in separating those claims which are arguably meritorious from those which are patently not.

Therefore, it is hereby ordered as follows:

Plaintiffs shall file, within 30 days of the filing of a complaint which states a RICO cause of action, a RICO case statement. This statement shall include facts upon which plaintiffs rely to initiate their RICO claims, as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form using the numbers and letters set forth in the form entitled "RICO Case Statement," available for inspection and copying in the office of the clerk of the United States District Court for the Southern District of California, and shall state in detail and with specificity the information requested in that form. The court shall construe the RICO case statement as an amendment to the pleadings. Failure to comply subjects the case to dismissal.

Counsel is hereby ORDERED to serve a copy of the RICO case statement on all parties.

IT IS SO ORDERED.

DATED: _____

_____	_____
Chief Judge United States District Court	United States District Judge
_____	_____
United States District Judge	United States District Judge
_____	_____
United States District Judge	United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

	)	Civil No.
	)	
Plaintiff(s),	)	
	)	
v.	)	
	)	
Defendant(s).	)	
	)	

RICO Case Statement

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. List the defendants and state the alleged misconduct and basis of liability of each defendant.

3. List alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activities or collection of unlawful debts alleged for each RICO claim. The description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes that were allegedly violated;

b. Provide the date of each predicate act, the participants in each predicate act, and a description of the facts constituting each predicate act;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and substance of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of any predicate act;

e. State whether civil litigation has resulted in a judgment with regard to any predicate act;

f. Describe how the predicate act forms a "pattern of racketeering activity;" and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe the alleged relationship and common plan in detail.

6. Describe in detail the alleged "enterprise" for each RICO claim. A description of the enterprise shall include the following: (a) state the name of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise; (b) a description of the structure, purpose, function and course of conduct of the enterprise; (c) a statement of whether any defendants are employees, officers or directors of the alleged enterprise; (d) a statement of whether any defendants are associated with the alleged enterprise; (e) a statement of whether plaintiff is alleging that the defendants are individuals or entities separate from the alleged enterprise or that the defendants are the enterprise itself, or members of the enterprise; (f) if any defendants are alleged to be the enterprise itself, or members of the enterprise, an explanation of whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether plaintiff is alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following: (a) state who received the income derived from the pattern of racketeering activity or through the

collection of unlawful debt; and (b) describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following: (a) state who is employed by or associated with the alleged enterprise, and (b) state whether the same entity is both the liable "person" and the "enterprise" under section 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the facts showing the existence of the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of 18 U.S.C. § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendant state claims, if any.

20. Provide any additional information that you feel would be helpful to the court in processing your RICO claims.

DATED:

_____

Attorney for Plaintiff(s)

SAMPLE FORM 12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s),	)	NO. C- -WWS
v.	)	ORDER SETTING STATUS CONFERENCE
Defendant(s).	)	

IT IS HEREBY ORDERED that, pursuant to Rule 16, Federal Rules of Civil Procedure, and Local Rule 235-3, a status and scheduling conference will be held in this case before the undersigned on _____ at 9 a.m. in Courtroom No. 9.

Plaintiff is directed to serve copies of this order at once on all parties to this action, and on any parties subsequently joined, in accordance with the provisions of Rules 4 and 5, Federal Rules of Civil Procedure. Following service, plaintiff shall file a certificate of service with the clerk of this court.

Counsel are directed to confer in advance of the status conference with respect to all of the agenda items listed below. Not less than 10 days before the conference, counsel shall file, jointly if possible, a status conference statement addressing each agenda item.

Matters which the court will take up at the status conference will include the following:

1. **Jurisdiction and Service.** Does the court have subject matter jurisdiction? Are all parties subject to the court's jurisdiction? Do any remain to be served?

2. **Substance of the Action.** What are the factual and legal bases for plaintiff's claims and defendant's defenses? (See Rule 11)

3. **Identification of Issues.** Which factual and legal issues are genuinely in dispute?

4. **Narrowing of Issues.** Can the issues in litigation be narrowed by agreement or by motions? Are there dispositive or partially dispositive issues appropriate for decision on motion? (See Rule 16(c)(1)(3)(4))

5. **Relief.** What specific relief does plaintiff seek? What is the amount of damages sought and generally how is it computed?

6. **Discovery.** What discovery does each party intend to pursue? Can discovery be limited? Are less costly and time-consuming methods available to obtain necessary information? (See Rule 26(b)(1)) Should a discovery order be entered pursuant to Rule 26(f)?

7. **Alternative Means of Disposition.** Is the case suitable for reference to binding arbitration, to a master, or to a magistrate judge for trial? (See Rule 16(c)(6))

8. **Length of Trial.** What are the dimensions of the trial anticipated by the parties? Is it feasible and desirable to bifurcate issues for trial? Is it possible to reduce the length of the trial by stipulations, use of summaries or statements, or other expedited means of presenting evidence?

9. Will this case be tried to a jury?

10. Are there related cases pending before other judges of this court? (L.R. 205-2)

11. In class actions, establishing dates for class certification proceedings, defining the scope of necessary discovery, establishing notice procedures, and identifying other class management issues.

12. Setting of dates for discovery cutoff, pretrial conference and trial. (See Rule 16(b))

13. **Settlement.** What are the prospects for settlement? Does any party wish to have a settlement conference with another judge or magistrate judge? How can settlement efforts be assisted? (L.R. 240-1)

14. Such other matters as any party considers conducive to the just, speedy and inexpensive determination of this action. (See Rule 16(a) and (c))

Each party shall be represented at the status conference by counsel prepared to address all of the above matters.

Representatives of the parties may but are not required to attend. Failure to prepare for and participate in good faith in the conference may result in the imposition of sanctions. (See Rule 16(f))

No continuance of the conference will be granted except by order of the court upon application of the parties made seven days before the date of the conference supported by a declaration stating the reasons for the request.

DATED:

_____

United States District Judge

SAMPLE FORM 13

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

plaintiff,	)	NO.
v.	)	ORDER REQUIRING JOINT STATUS REPORT
defendant.	)	

All parties are directed to confer and provide the court with a joint status report within 75 days of the date of entry of this order. The joint status report shall contain the following information:

1. The nature of the case;
2. The status of the case including hearings, motions, and discovery;
3. Whether the case or portions of it should be referred to a special master;
4. Whether the case is appropriate for mediation under Local Rule 39.1;
5. The date the case will be ready for trial, considering Local Rule 16 deadlines;
6. Whether the trial is jury or non-jury;
7. The number of trial days required;
8. The names of trial counsel;
9. The dates on which trial counsel are unavailable and any other complications to be considered in setting a trial date;
10. Suggestions for shortening trial.

It is the responsibility of plaintiff's counsel to serve a copy of this order upon all parties who may appear after this order is filed

within 10 days of receipt of service of an appearance. It is also the responsibility of plaintiff's counsel to initiate the communication necessary to prepare this joint status report.

If counsel are unable to agree upon the content of any part of the status report, they may respond in separate paragraphs. **Separate status reports are not to be filed.**

If on the due date of the joint status report, *all* defendant(s) or respondent(s) have not been served, counsel for the plaintiff shall advise the court in an independent status report when service will be effected and why service has not been previously accomplished.

If on the due date the defendant(s) or respondent(s) have been served and no answer or appearance has been filed, counsel for the plaintiff shall file an independent status report setting forth the above information in items 1 through 10 to the extent possible. This report shall also include the current status of the non-appearing parties.

Failure to respond to this order pursuant to its terms may result in the imposition of sanctions by the court.

The clerk of this court is instructed to send uncertified copies of this order to all counsel of record.

DATED this _____ day of _____, 1991.

_____

U.S. DISTRICT COURT JUDGE

SAMPLE FORM 14

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

	)	
	)	
Plaintiff	)	
v.	)	CIVIL NO. H
	)	
Defendant	)	

Order

Consistent with the requirements of the Civil Justice Reform Act, the United States District Court for the Northern District of Indiana has adopted a plan designed to decrease the cost of litigation and to expedite the disposition of civil cases. Pursuant to that plan, this court has been designated to experiment with the mandatory disclosure of discovery materials instead of the more formalized method of conducting discovery under the Federal Rules of Civil Procedure.

This matter is set for a preliminary pretrial conference on _____ at _____ ___.m. Within 20 days of the receipt of this order, the plaintiff shall provide the following information to each defendant:

1. The name, address, and telephone number of each person known or reasonably believed to have information relating to the allegations contained in the complaint.
2. A short statement of the expected testimony of each such witness (e.g., this witness saw the defendant run a red light).
3. The identity of each expert witness (including medical witnesses) expected to be called at trial.
4. A short statement of the expected testimony of each expert witness.
5. A list of all medical expenses incurred by the plaintiff(s) to date including:
   A. Which expenses have been paid;
   B. Who made the payments;

C. Whether the plaintiff has been put on notice of any subrogation liens.

6. An itemization of all claimed lost wages.

7. A concise, but meaningful, description of how the accident occurred including the specific allegations of negligence.

The plaintiff shall further provide the defendant with copies of all photographs, medical bills, and other documents supporting the foregoing information consistent with Federal Rule of Civil Procedure 26(b).

Within 20 days of the receipt of the foregoing information, the defendant shall provide the plaintiff with the following information:

1. The name, address, and telephone number of each person known or reasonably believed to have information relating to the allegations contained in the complaint or any affirmative defense.

2. A short statement of the expected testimony of each such witness (e.g., this witness saw the plaintiff run a red light).

3. The existence and content of all contracts of insurance including policy limits.

4. A concise, but meaningful, description of how the accident occurred including any specific allegations of comparative negligence or any other affirmative defense.

The defendant shall further provide the plaintiff with copies of all photographs and other documents supporting the foregoing information consistent with Federal Rule of Civil Procedure 26(b).

It is expected that by providing all of the foregoing information, the parties will eliminate or significantly reduce the need for filing interrogatories and requests for production. Therefore, a party is not required to respond to any pending discovery requests which extend beyond the scope of this order until after the preliminary pretrial conference. After the required information has been exchanged by the parties, meaningful deadlines for completing discovery and filing dispositive motions can be discussed at the preliminary pretrial conference so that trial dates may be assigned.

ENTERED this _____ day of _____, 199___.

_____

United States Magistrate Judge

SAMPLE FORM 15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Plaintiff,	)	
vs.	)	CIVIL NO. 91-352
Defendants.	)	

Joint Report of Counsel
Prior to Pretrial Conference

This court, in accordance with all relevant Rules of Civil Procedure, including but not limited to Rule 11 and Rule 16(f) , in an effort to facilitate discovery and exchange of relevant information necessary for an amicable settlement, hereby submits the following joint report to be completed by the counsel for the parties and any parties appearing *pro se.*

A. Appearance

Have all parties who are not proceeding *pro se* retained local counsel pursuant to N.D. Ind. General Rule 1(d)? _____

Has defendant's counsel filed his formal written appearance for such defendant pursuant to N.D. Ind. General Rule 2(a)? _____

B. Jurisdiction and Venue

What is the jurisdictional basis (statutory or otherwise) for this cause of action? _____

_____

Is the aforementioned jurisdiction agreed upon by the parties? _____

If not, has the defendant filed an appropriate motion pursuant to Fed. R. Civ. P. 12(b)(1)? _____

Is the venue in this district or division agreed upon by the parties? _____

If not, has the defendant filed a timely motion pursuant to Fed. R. Civ. P. 12(b)(3)? _____

C. **Service**

Have all parties to this action been properly served? _____

If not, has the defendant filed a timely motion pursuant to Fed. R. Civ. P. 12(b)(2), (3), (4), or (5)? _____

D. **Cause of Action**

What is the nature of the plaintiff's claim? Specifically, set out what plaintiff feels defendant or defendants did wrong (list acts of negligence, if any), why plaintiff feels he should collect damages, and what damages plaintiff feels he is entitled to, and why.

_____

_____

_____

_____

_____

What is the nature of the defendant's defense claim and/or counterclaims for an affirmative defense? Specifically set out why plaintiff should not prevail in this litigation (list acts of negligence, if any). If defendant disagrees as to the nature and extent of damages, specifically set out why.

_____

_____

_____

Have any cross-claims, third-party claims or an amended complaint been filed in this cause? _____

If so, briefly describe the nature of the same. Specifically set out the basis of the cross-claims, third-party claims or amended complaint. List acts of negligence, if any.

_____

_____

_____

Describe the factual and legal issues involved in this cause.

_____

_____

_____

What type and what amount of damages or other relief is being sought? Set injuries and/or damages out specifically.

_____

_____

_____

Has any party filed a motion pursuant to either Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure? _____

If not, is such a motion anticipated of filing? _____

If such a motion has been filed, has it been fully and timely briefed pursuant to N.D. Ind. General Rule 9 or 11? _____

E. **Discovery**

1. All parties, including plaintiffs, defendants, cross-claimants, cross-defendants, counterclaimants, counterdefendants, third-party plaintiffs, third-party defendants, and *pro se* parties to the action, should separately list each and every specific witness and/or possible witness who has knowledge or information relative to any aspect of this case, and include with his or her list a summary of the knowledge the witness may possess which is relevant to the case. **(Attach the lists with summaries to this joint report.)**

2. In cases where insurance is involved, all defendants are ordered to file a declaration sheet indicating coverage within 20 days of entering appearance with the court, with copies to all parties. If a copy of the policy is required, this can be addressed through discovery procedures.

3. In cases involving personal injuries, all parties shall exchange all medical records, work records, and specials in their files (including those in possession of insurance adjusters) within 20 days of this order. *Failure to comply with this order may result in the court striking these exhibits or testimony regarding these exhibits.*

4. In cases involving personal injuries, plaintiffs, cross-claimants, counterclaimants, third-party plaintiffs and *pro se* plaintiffs shall deliver to or make available to counsel for defendants, cross-defendants, counterdefendants, third-party defendants and/or *pro se* defendants within 20 days of this order, medical and work authorizations to obtain copies of all medical and work records. In the event a special reason exists to justify non-production of said authorizations, a motion must be filed with the court within 10 days seeking relief. The court may order sanctions when

ruling on motions for relief from the order to supply medical and work record authorizations. Copies of any and all records obtained by authorizations shall be supplied to all counsel or *pro se* parties for inspection and/or copying within 10 days of receipt of said records. *Failure to supply or make available medical and work authorizations may result in the court striking any reference to medical or work records which were not available to opposing counsel and could have been made available by way of authorizations. Failure of the defendants, cross-defendants, counterdefendants, third-party defendants and/or* pro se *defendants to provide copies of the records obtained by way of authorizations for inspection or copying by any or all parties may result in the court striking any reference by defendants, cross-defendants, counterdefendants, third-party defendants and/or* pro se *defendants to said records.*

Information obtained by medical or work authorizations may only. be disclosed (with the exception of trial evidence) to the attorneys involved in this case, their parties or representatives, insurance companies or experts. Said information, with the exception mentioned above, is ordered to be kept confidential. Violations of the confidentiality order may result in sanctions. Medical and/or work authorizations submitted pursuant to this order is *only* for the purpose of obtaining medical and/or work records. It is *not* intended to be used for talking or conferring with doctors, medical personnel, representatives of medical institutions or places of employment.

5. Disclosure of Expert Testimony

a. In addition to any other order of discovery required by this court, each party shall disclose to every other party any evidence that the party may present at trial under Rule 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied on in forming such opinions; any exhibits to be used as a summary of or in support of such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

b. The information referred to in paragraph 5(A) shall be submitted by plaintiffs, cross-claimants, counterclaimants, third-party plaintiffs and *pro se* plaintiffs for their experts at least 105 days prior to this court's first trial setting on this matter.

c. Depositions by defendants, cross-defendants, counter-defendants, third-party defendants, and *pro se* defendants of experts referred to in paragraph 5(A) shall be completed at least 85 days prior to this court's first trial setting on this matter.

d. The information referred to in paragraph 5(A) shall be submitted by defendants, cross-defendants, counterdefendants, third-party defendants, and *pro se* defendants for their experts at least 65 days prior to this court's first trial setting on this matter.

e. Depositions by plaintiffs, cross-claimants, counter-claimants, third-party plaintiffs and/or *pro se* plaintiffs of experts referred to in paragraph 5(A) shall be completed at least 45 days prior to this court's first trial setting on this matter.

f. The information referred to in paragraph 5(A) for purposes of any party's rebuttal experts shall be submitted to all counsel at least 40 days prior to this court's first trial setting on this matter.

g. Depositions of rebuttal experts shall be completed at least 30 days prior to this court's first trial setting on this matter.

Failure to comply with the court's orders in paragraphs 5(A)-5(G) may result in this court's striking of an expert's and/or experts' testimony. This court WARNS counsel to abide by this order. It is the court's intent to avoid "sandbagging" and/or surprise experts at the last minute. This court also suggests that all discovery regarding experts be exchanged and/or completed prior to the final pretrial conference so that a more meaningful settlement conference may be addressed by the court.

Has discovery been initiated? _____

Have any discovery disputes developed? _____

If so, describe the existing or anticipated problems.

_____

_____

_____

_____

_____

_____

Have any discovery motions been filed pursuant to Fed. R. Civ. P. 37(a)? _____

If not, is such a motion anticipated for filing? _____

Have the parties conducted the discovery conference required by N.D. Ind. General Rule 13 as to any and all motions related to discovery? _____

How long do the parties feel they need for discovery?

_____

F. **Settlement**

Have the parties begun settlement negotiations? _____

If so, what is the likelihood of settlement in this cause?

_____

Would a settlement conference conducted by this court at the close of discovery aid in the disposition of this cause? _____

G. **Motions**

Aside from those already listed in this report, are there any other motions pending or anticipated for filing? _____

If so, what are they? _____

_____

_____

Are any of these motions unopposed of record (i.e., without a response brief being filed in opposition thereto pursuant to N.D. Ind. General Rule 9 or 11)? _____

If so, describe the same: _____

_____

_____

Have all motions, routine in nature or uncontested, been filed with an accompanying tendered form of order in the number and manner required by N. D. Ind. General Rule 7(d)?

_____

H. **Trial**

Has there been a jury demand made in this case? _____

If so, will the demand be challenged? _____

Estimated number of trial days: _____

Comments

(The parties may use this portion of the report to apprise this court of any additional matters regarding this case which require its attention at this stage in the proceedings.)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

In compliance with the prior order of this court, the undersigned now represent that they personally met on the _____ day of _____, 19___; that they have complied with this court's orders and with the local and federal rules of civil procedure; and that this report constitutes a thorough and accurate record of the same.

Dated: _____

_____ _____

Plaintiff or counsel Typewritten name

_____ _____

Defendant or counsel Typewritten name

SAMPLE FORM 16

Guidelines for Discovery, Motion Practice and Trial (1987)[1]

by William W Schwarzer
U.S. District Judge, Northern District of California

Guidelines

These guidelines are furnished for the convenience of counsel and the court to promote the just, speedy, and economical disposition of cases. They should be accepted in that spirit.

General Matters

Attorneys appearing in the district court in civil litigation must observe three sets of rules:

The Federal Rules of Civil Procedure,

The district court's local rules, and

The rules and practices of the particular judge to whom the case is assigned.

You can become familiar with the rules and practices of the judge assigned to your case in two ways:

i. By obtaining from that judge's courtroom deputy copies of the standing orders used by that judge; and

ii. By inquiring of the deputy (not the law clerks) how that judge wants things done.

The following matters require particular attention:

1. **Removal from the State Court.** Before filing a petition to remove from state to federal court, consider the jurisdictional facts carefully in light of 28 U.S.C. § 1441 and other applicable law. Do not attempt to remove unless you are satisfied that good grounds exist.

Note that (1) the existence of a federal law defense does not normally create federal jurisdiction and (2) the presence of fictitious defendants may destroy diversity of citizenship.

2. **Related Cases** (L.R. 205-2). If you have a case that you believe may be related to another case on file in the court (whether closed or not), you must promptly file a notice of related case. The judge with the lower-numbered case will decide whether to relate the cases, depending on whether assignment to a single judge will be conducive to economy or efficiency.

3. **Status Conferences** (L.R. 235-3; Fed. R. Civ. P. 16). Judges generally hold a status conference in a case within three months of filing of the complaint. The purpose of this conference is to formulate and narrow the issues; to schedule a discovery cutoff, pretrial conference and trial date and to explore the possibility of settlement. The conference should be attended by an attorney who is thoroughly familiar with the case and is authorized and prepared to speak on these matters. Use the conference to inform the judge about your case and to propose a practical litigation program for it. A brief, informative and non-argumentative statement filed at least seven days in advance is helpful to the judge. Some judges will hear status conferences by conference telephone call if requested. Consult the assigned judge's status conference order for details.

4. **Settlement.** Over 90% of all civil cases settle before trial. You can expect the judge to inquire about prospects for settlement at every opportunity. Always be prepared with a reasonable negotiating position and a credible and persuasive explanation for it. At the request of any party the court will arrange a settlement conference before another judge or magistrate judge. Brief settlement conference statements should be submitted to the settlement judge in advance of the conference but not filed.

5. **Rule 11 Sanctions.** As amended in 1983, Rule 11 now provides that an attorney who signs a pleading or other paper filed with the court certifies that, after having made a reasonable inquiry, the attorney believes it to be well-grounded in fact and warranted by existing law or a good faith argument for modification or extension of existing law and that it is not interposed for an improper purpose such as to harass, delay or unnecessarily increase expense. Thus, Rule 11 requires a lawyer to make a reasonable pre-filing inquiry and not to misuse the litigation process by frivolous litigation or harassment of an opponent. See also 28 U.S.C. § 1927.

Lawyers can expect the pleadings, motions and other papers they file to be scrutinized by the judge in light of this rule, regardless of whether a motion to impose sanctions is filed. When a paper is filed that does not appear to conform to Rule 11, the lawyer will be called on to explain; in the absence of a satisfactory explanation, sanctions such as the resulting costs and fees incurred by the opponent may be assessed.

Rule 11 should not be permitted to generate satellite litigation. Do not file a Rule 11 motion unless you are certain it is well-founded. It is advisable to take up the matter with the court before filing. Generally, discovery will not be permitted in Rule 11 proceedings.

Discovery

1. **General Principles of Discovery.** Counsel should be guided by courtesy, candor and common sense, and conform to the Federal Rules of Civil Procedure, the local rules, and any applicable orders. In particular, counsel should have in mind the restrictions on the scope of discovery stated in Rule 26(b)(1) and the good faith obligations implicit in Rule 26(g). Direct and informal communication between counsel is encouraged to facilitate discovery and resolve disputes.

2. **Timeliness.** The time limits specified in the rules and applicable orders must be observed. If additional time is needed, a continuance must be sought in advance by stipulation and order.

3. **Discovery Cut-Off.** Discovery cut-off dates in orders are the last date for filing discovery responses, unless otherwise specified. To be timely, therefore, discovery requests must be filed sufficiently in advance of the deadline for responses to be made. The court will normally set cut-off dates only after consultation with counsel. Once they are set, however, they will be changed only for good cause shown.

4. **Supplementing Discovery Responses.** Rule 26(e) requires that an earlier discovery response be supplemented if it was incorrect or is no longer true or to the extent it relates to potential expert or other witnesses. Failure to comply may result in exclusion of evidence or witnesses at trial.

5. **Depositions**

a. **Scheduling.** Barring extraordinary circumstances, opposing counsel should be consulted and the convenience of counsel, witnesses and parties accommodated before a deposition is noticed. Concurrent depositions are not permitted in the absence of stipulation or order. Note that it is often less expensive to bring the witness to the deposition (and for the parties to share the expense) than for the lawyers to travel.

b. **Stipulations.** When counsel enter into stipulations at the beginning of a deposition, the terms of the stipulation should be fully stated on the record of the deposition.

c. **Questioning.** Questions should be brief, clear and simple. Rarely should a question exceed ten words. Each question should deal with only a single point. Argumentative questions are out of order. The purpose of a deposition is not to harass or intimidate, but simply to make a clear and unambiguous record of what that witness's testimony would be at trial.

d. **Documents.** Normally, except in the case of impeachment, a witness should be shown a document before being questioned about it.

e. **Objections.** Under Rule 30(c), objections to the manner of taking the deposition, to the evidence or to the conduct of a party shall be noted on the record but the evidence objected to shall be taken subject to the objection. In the absence of a good faith claim of privilege, instructions not to answer are rarely justified and may lead to sanctions under Rule 37(a)(2) and (4). Speaking objections and other tactics for coaching a witness during the deposition may also be cause for sanctions. If counsel believes that a motion to terminate or limit the examination under Rule 30(d) would be warranted, counsel should promptly initiate a conference call to the court with opposing counsel for a pre-motion conference to attempt to resolve the problem. (See paragraph 9(a) below.)

f. **Persons Attending Depositions.** In the absence of a specific order, there is no restriction on who may attend a deposition. Only one lawyer may normally conduct the particular deposition for each side.

g. **Expert Discovery.** Rule 26(b)(4) should be consulted. However, experts who are prospective witnesses are normally

produced for deposition by the opposing party as a matter of course. If the expert is expected to testify at trial, a written statement of his anticipated testimony should be given to opposing counsel in advance of the deposition.

h. **Number of Depositions.** Counsel are expected to observe the limitations specified in Rule 26(b)(1), and, in particular, to avoid unnecessary depositions. Counsel should explore less expensive alternatives for obtaining the needed information.

6. **Interrogatories**

a. **Informal Requests.** Whenever possible, counsel should try to exchange information informally. The results of such exchanges, to the extent relevant, may then be made of record by requests for admission. (See paragraph 8 below.)

b. **Number and Scope of Interrogatories.** Although the court has no standing limitation, it will be guided in each case by the limitations stated in Rule 26(b)(1). Counsel's signature on the interrogatories constitutes a certification of compliance with those limitations. (See Rule 26(g).) Interrogatories should be brief, simple, neutral, particularized and capable of being understood by jurors when read in conjunction with the answer. Ordinarily they should be limited to requesting objective facts, such as identification of persons or documents, dates, places, transactions and amounts. Argumentative interrogatories, attempts to cross-examine, multiple repetitive interrogatories (such as "state all facts on which an allegation or a denial is based") are objectionable. Except in certain specialized areas of practice, such as maritime personal injury cases, standard interrogatories generated by word processors should be avoided.

c. **Responses.** Rule 33(a) requires the respondent to produce whatever information is available (but only what is available), even if other information is lacking or an objection is made. When in doubt about the meaning of an interrogatory, give it a reasonable interpretation (which may be specified in the response) and answer it so as to give rather than deny information. Generally, the responding party is required to produce information only in the form in which it is maintained. If an answer is made by reference to a document, attach it or identify it and make it available for inspection. (See Rule 33(c) and paragraph 7

below.) Generalized cross-references, such as to a deposition, are not an acceptable answer.

d. **Objections.** Unless the objection is based on privilege or burdensomeness, or a motion for protective order is made, the information requested must be supplied to the extent available, even if subject to objection. Counsel's signature on the answer constitutes a certification of compliance with the requirements of Rule 26(g).

e. **Privilege.** A claim of privilege must be supported by a statement of particulars sufficient to enable the court to assess its validity. (See L.R. 230-5.) In the case of a document, such a statement should specify the privilege relied on and include the date, title, description, subject and purpose of the document; the name and position of the author and the addresses of other recipients. In the case of a communication, the statement should include the date, place, subject and purpose of the communication and the names and positions of all persons present.

7. **Requests for Production of Inspection**

a. **Informal Requests.** See paragraph 6(a) above.

b. **Number and Scope of Requests.** Requests should specify with particularity the title and description of documents or records requested. Information needed for specification can often be obtained by informal discovery, or by depositions or interrogatories if necessary. Argumentative or catch-all requests, such as "all documents which support your claim," are objectionable. The certification requirement of Rule 26(g) applies.

c. **Responses.** Materials should be produced either with labels identifying the specific requests to which they respond or in the manner in which they are kept in the ordinary course of business. Opening a warehouse for inspection by the requesting party, burying documents, and similar procedures do not meet the good faith requirements of the rules. (See Rule 26(g).)

d. **Objections.** See paragraph 6(d) above.

e. **Privilege.** See paragraph 6(e) above.

8. **Requests for Admission**

a. **Use of Requests.** Requests for admission are an economical and efficient means of making a record of informal exchanges of information, stipulations, matters subject to judicial notice, and of narrowing issues.

b. **Form of Requests.** Each request should be brief, clear, simple, addressed to a single point and stated in neutral, non-argumentative words. Requests ordinarily should deal only with objective facts. They may be combined with interrogatories to ask for the factual basis of any denial.

c. **Responses.** Rule 36(a) requires that a response shall specifically deny a matter or set forth in detail the reasons why the party cannot admit or deny. A denial shall fairly meet the substance of the request and, when good faith requires, a party shall specify so much as is true and qualify or deny the remainder. The responding party has a duty to make reasonable inquiry before responding. The certification requirement of Rule 26(g) applies.

d. **Objections.** See paragraph 6(d) above.

9. **Motions to Compel or for Protective Orders**

a. **Pre-Motion Conference.** Counsel are required to confer in good faith before bringing a discovery dispute to the court. If they are unable to resolve it, they should arrange a telephone conference with the court through the courtroom deputy. If the differences cannot be resolved, the court will direct further proceedings. Motions to compel should ordinarily not be filed without a prior conference with the court.

b. **Memoranda.** In the event memoranda are submitted, they should be brief, focus on the facts of the particular dispute, and avoid discussion of general discovery principles.

c. **Sanctions.** If sanctions are sought, include a declaration to support the amount requested.

d. **Reference to Guidelines.** The court will be guided by these guidelines in resolving discovery disputes and imposing sanctions.

Motion Practice

1. **General.** Do not file a motion without first exploring with opposing counsel the possibility of resolving the dispute by stipulation. Many motions now being filed could be avoided.

2. **Motion to Dismiss or for Summary Judgment.** Motions to dismiss for failure to state a claim under Rule 12(b)(6) must be made solely on the pleadings. If matter outside the pleadings is referred to, the motion is treated as a motion for summary judg-

ment. Fed. R. Civ. P. 56. Do not file a summary judgment motion unless you are satisfied that a material issue can be resolved without reference to disputable evidentiary facts. A motion devoted to arguing evidentiary facts is likely to lose. If you think your opponent has admitted the material facts, make it of record by using requests for admission.

3. **Supporting Memoranda and Other Papers.** Follow these guidelines:

Be helpful: State the grounds for the motion and the issues clearly at the outset, marshal the supporting facts and law and distinguish opposing authority. Check all citations, include jump citations, and verify the continuing validity of decisions relied on.

Keep it short: Rarely if ever should it be necessary to exceed the 25-page limit under L.R. 220-4. Approval for filing a brief in excess of 25 pages will only be grudgingly granted and without it the brief will not be filed. Avoid voluminous supporting documentation; the larger the motion, the less its chance for success.

Be candid: Address directly the hard issues that must be decided; do not sweep them under the rug. Cite adverse authority and explain why it does not support a ruling against you. Don't gamble on the judge not finding it. Don't mislead the court, either as to the facts or the law; once your credibility is in question, it is difficult to restore it.

Avoid invective and vituperation: Argument advances your case far less than exposition and analysis. Adjectives and adverbs, other than those having independent legal significance, do not make a brief persuasive; avoid them.

Submit a proposed order, retaining the original.

Submit an extra copy of all papers for use by the judge's chambers.

4. **Time Limits.** Observe the time limits in L.R. 220-2 and 220-3. Responses must be filed not less than 14 days before the noticed hearing date; replies not less than seven days. The judges need that time to prepare. Late filed papers may be disregarded.

5. **Continuances.** Motions will not be continued without a good reason once an opposition is filed. Even then a court order must be applied for not less than seven days before the hearing date. Contrary to the practice in some state courts, most judges

will not take motions "off calendar." Continuances must be requested to a specified date and for good cause. (L.R. 220-9)

Reduce all stipulations extending time to writing. After the first extension, a court order is required. (L.R. 220-10)

6. **Hearings.** The judge may decide the motion without hearing or by holding a hearing by conference telephone call.

If a hearing is held, assume the judge is familiar with the matter. State the issue succinctly, fairly and persuasively and limit your argument to the heart of the matter. Deal with adverse authority and whatever other matters you believe may be obstacles to a ruling in your favor. Don't overstate your case but don't give away a good point. Be prepared to answer questions.

Although the papers filed will usually determine the outcome, don't underestimate the effect of a good oral argument. It can turn a case around if it is well-prepared, brief and to the point, and presented with conviction, common sense and candor. You will not harm your case by being courteous to the court and counsel, observing proper demeanor and making a dignified appearance.

Conduct of Trials

1. **Pretrial.** Ordinarily the court will determine at pretrial what claims and defenses will be tried, what witnesses will testify and what exhibits will be received at trial. Except for proper impeachment, trial by ambush is not acceptable. Therefore do not expect to raise new issues or offer new evidence at trial. Consult the judge's form of pretrial order for specific requirements.

2. **Opening Statements.** An opening statement is simply an objective summary of what counsel expects the evidence to show. No argument or discussion of the law is permissible.

3. **Questioning of Witnesses**

a. Conduct the examination from the lectern. Ask permission to approach the witness when necessary and return to the lectern as soon as practicable. Treat witnesses with courtesy and respect; do not become familiar.

b. Ask brief, direct and simply stated questions. Cover one point at a time. Do not ask a witness "do you recall . . ." unless the fact of his recollection is material. Use leading questions for back-

ground material. Write out the examination or have at least a complete outline.

c. Cross-examination similarly should consist of brief, simple and clearly stated questions. It is helpful to write out questions in advance but do not read them. Cross-examination should not be a restatement of the direct examination nor should it be used for discovery or to argue with the witness.

d. Only one lawyer for each party may examine any one witness.

4. **Using Depositions**

a. The deposition of an adverse party may be used for any purpose. It is unnecessary to ask a witness if he "recalls" it or otherwise to lay a foundation. Simply identify the deposition and page and line numbers and read the relevant portion. Opposing counsel may then immediately ask to read such additional testimony as is necessary to complete the context.

b. The deposition of a witness not a party may be used for impeachment or if the witness has been shown to be unavailable. For impeachment, allow the witness to read to himself the designated portion first, ask simply if he gave that testimony, and then read it. Opposing counsel may immediately read additional testimony necessary to complete the context.

c. A deposition may be used to refresh a witness's recollection by showing it to him, or, just as any other document, as a basis for relevant questions.

d. In bench trials, do not offer depositions wholesale. Unless all of the testimony is important, copy the relevant pages only, staple the extracts from each deposition, and offer each as an exhibit.

e. Note: It is the responsibility of counsel anticipating use of a deposition at trial to check in advance of trial that it has been made available to the witness for signature and that the original is filed with the clerk's office.

5. **Objections**

a. To make an objection, rise, say "objection" and briefly state the legal ground (e.g., "hearsay," "privilege," "irrelevant").

b. Do not make a speech or argument, or summarize evidence, or suggest the answer to the witness. If argument is desired, ask for an opportunity to argue the objection.

c. Where an evidentiary problem is anticipated, bring it to the court's attention in advance to avoid interrupting the orderly process of a jury trial.

6. **Exhibits**

a. All exhibits must be marked before the trial starts, using the clerk's standard form of label. Normally plaintiff's will be numbered, defendant's lettered. Copies must be provided to opposing counsel and the court before trial.

b. When offering an exhibit follow this procedure to the extent applicable (unless foundation has been stipulated):

Request permission to approach the witness;

Show the witness the document and say:

I show you (a letter) pre-marked Exhibit _____, dated _____, from A to B. Please identify that document.

Identification having been made, make your offer as follows: I offer Exhibit _____.

Note: In some circumstances additional questions may be necessary to lay the foundation.

c. It is the responsibility of counsel to see that all exhibits counsel want included in the record are formally offered and ruled on, and that they are in the hands of the clerk. Take nothing for granted.

d. Avoid voluminous exhibits. When possible offer only relevant extracts.

7. **Interrogatories and Requests for Admission**

Counsel wishing to place into the record an interrogatory answer or response to request for admission should prepare a copy of the particular interrogatory or request and accompanying response, mark it as an exhibit and offer it.

8. **Use of Prepared Direct Testimony**

In bench trials when the direct testimony of witnesses has previously been submitted in narrative written statement form, the proponent of the witness must have the witness available for cross-examination unless cross-examination has been waived.

The following procedure should be followed:

When the witness is called to the stand, ask the witness to identify the statement, which should be pre-marked as an exhibit, as his testimony and to state that it is true and correct. Then offer the exhibit.

9. **Conduct of Trial**

a. The court expects counsel and the witnesses to be present and ready to proceed promptly at the appointed hour—normally starting at 9:30 a.m. A witness on the stand when a recess is taken should be back on the stand when the recess ends.

b. Bench conferences should be minimized. Raise anticipated problems at the start or the end of the trial day or during a recess.

c. Have a sufficient number of witnesses available to fill the time available. Running out of witnesses may be taken by the court as resting your case.

d. Trials normally are conducted each day except on the day scheduled for the motion calendar (normally Friday). Do not assume that the court will recess on any of those days unless prior arrangements have been made with the court and counsel.

e. Counsel are expected to cooperate with each other in the scheduling and production of witnesses. Witnesses may be taken out of order where necessary. Every effort should be made to avoid calling a witness twice (as an adverse witness and later as a party's witness).

f. Counsel should be prepared each day to discuss with the court the next day's schedule of witnesses and exhibits.

10. **Jury Trial**

a. When trial is to a jury, counsel should present the case so that the jury can follow it. Witnesses should be instructed to speak clearly and in plain language. When documents play an important part, an overhead projector and screen should be used to display the exhibit while a witness testifies about it.

b. Jury instructions must be submitted no later than the pretrial conference but may be supplemented during the trial. Only those dealing with the particular issues in the case need be presented—the court's standard instructions may be obtained from the clerk. Instructions are to be drafted specifically to take into account the facts and issues of the particular case, and in plain language; do not submit copies from form books. Do not submit argumentative or formula instructions. Consult the court's order for pretrial preparation for additional guidance.

c. Do not offer a stipulation in the presence of the jury unless agreement has previously been reached. Preferably stipulations should be in writing.

d. In final argument, do not express personal opinions or ask jurors to place themselves in the position of a party or to consider possible consequences of the litigation beyond the evidence presented.

e. Normally, the court will instruct the jury before closing argument. Accordingly, there will be no need to explain the law in the closing argument.

11. **General Decorum**

a. A trial is a rational and civilized inquiry to seek a just result. Counsel are expected to conduct themselves with dignity and decorum at all times, which include appropriate dress and courtroom behavior. Disruptive tactics or appeals to prejudice are not acceptable.

b. Colloquy between counsel on the record is not permitted—all remarks are to be addressed to the court.

c. Vigorous advocacy does not preclude courtesy to opposing counsel and witnesses and respect for the court. Calling witnesses or parties by first names or the court "judge" on the record is not appropriate.

d. Do not engage in activity at counsel table or move about the courtroom while opposing counsel is arguing or questioning witnesses, or in other ways cause distraction. Neither counsel nor client while at counsel table should indicate approval, disapproval or other reactions to a witness's testimony or counsel's argument.

e. If you have a question or problem, contact the judge's courtroom deputy but not the law clerks.

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[1] Copies of these guidelines are routinely provided to attorneys in cases assigned to Judge Schwarzer. They have no official status in the Northern District of California.

SAMPLE FORM 17

Procedures to be Followed in Cases Assigned to Judge Suzanne B. Conlon

I. Motion Practice

Effective immediately, all motions, civil and criminal, are generally heard only on Tuesday, Wednesday and Thursday at 9:00 a.m.

The original motion must be delivered to the clerk's office on the 20th floor no later than the third business day preceding the day the motion is to be heard. A courtesy copy should be delivered to chambers at the same time.

A. Uncontested Motions

Counsel should designate an uncontested motion as an "agreed motion" or should advise the minute clerk prior to the hearing if a motion is uncontested. The movant should contact the minute clerk or secretary the afternoon prior to the hearing date to determine whether an appearance is necessary. If an appearance is not necessary, it is the obligation of the movant to notify the respondent(s) accordingly.

All motions to extend a discovery cutoff date or to reset a trial date, whether agreed or contested, require a court appearance.

B. Emergency Motions

Requests to set a hearing on an emergency motion shall be made to the minute clerk. All reasonable efforts must be made to give actual notice to opposing counsel.

C. Summary Judgment Motions

Motions for summary judgment and responses must comply with Local General Rule 12(1) and (m).

D. Discovery Motions

Civil discovery motions shall not be heard without an affidavit pursuant to Rule 12(k) of the local general rules. In addition, no party shall serve on any other party more than 20 interrogatories in the aggregate without leave of court, in strict compliance with the provisions of Local General Rule 9(g).

Criminal motions shall not be heard unless a conference has been held and a statement is submitted in compliance with Rule 2.04(c) of the local criminal rules.

E. **Memoranda of Law**

The 15-page limitation on all memoranda shall be strictly enforced. A motion exceeding that limit is looked upon with disfavor and shall not be granted except in unusual circumstances.

F. **Briefing Schedule**

The briefing schedule is generally set by court order. A motion for an extension shall not be granted except in extraordinary circumstances. The circumstances warranting an extension shall be set forth in specific detail by written motion. Unauthorized briefs shall be stricken. Counsel shall not respond to motions by correspondence with the court.

II. Status Calls

Status hearings are generally held at 9:00 a.m. on Tuesday, Wednesday and Thursday for all cases, civil and criminal. Status calls are scheduled to enable the court to set the case for trial. Trial dates and discovery cutoff dates will not be reset except by written motion. *Counsel of record primarily responsible for a case are expected to appear at status calls.*

III. Pretrial Conferences

A preliminary pretrial conference in the form of a status hearing in open court will be held in all civil cases, except those cases exempted by Rule 5.00(b) of the local general rules. Counsel should be fully prepared and have authority to discuss all aspects of the case.

A final pretrial conference is held prior to all jury trials. The court requires attendance by trial counsel and may request attendance by the parties. Trial procedures and scheduling are discussed at this time.

Prior to the final pretrial conference in civil cases, the parties are required to file a written pretrial order in the standard form used by the court.

Motions are not heard at pretrial conferences.

IV. Trial

Trial dates are firm, subject to court availability. Accordingly, any motion to reset a trial date shall be made at the earliest possible time.

All exhibits are to be marked and numbered before trial and copies are to be furnished to opposing counsel and the court with an exhibit list.

Counsel are to meet before trial for the purpose of designating agreed jury instructions. The working sets of jury instructions shall be numbered by each party to facilitate orderly discussion of disputed instructions.

If a civil case has been settled or if a defendant in a criminal case intends to plead guilty, the minute clerk shall be notified promptly. *In criminal cases, a copy of any plea agreement shall be submitted to chambers in advance of the hearing on the change of plea.* Jury costs may be assessed for failure to inform the clerk until the day of trial of a settlement or guilty plea.

In criminal cases, the Assistant United States Attorney is requested to produce all section 3500 material to defense counsel prior to each court session in order to give defense counsel *adequate* time to review the material without using court time.

V. Sentencing

Sentencing hearings are generally scheduled on Tuesday, Wednesday and Thursday at 1:00 p.m.

Suzanne B. Conlon
United States District Judge
July 3, 1990

SAMPLE FORM 18

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Plaintiff(s),	)	NO._____
-vs-	)	Trial setting 9:30 a.m.
	)	_____
Defendant(s).	)	East St. Louis, Ill.

Trial Practice and Schedule

This case has been assigned to the docket of District Judge _____. The following procedures supplementing the published rules of practice for the United States District Court, Southern District of Illinois, will apply to the procedure to be followed in this case. This trial practice and schedule is considered by the court to be the scheduling conference mandated by Fed. R. Civ. P. 16(b). However, additional scheduling conferences or pretrial conferences may be ordered by the court.

Discovery Practice.

Discovery between the present parties to the action shall be completed on or before _____. The court may refuse to consider any motion pertaining to discovery which does not comply with Local Rules 14 and 16.

Third-Party Practice.

Leave to add additional parties or file third-party complaints must be sought as provided in Rule 14, Fed. R. Civ. P. Early filing of these motions is strongly recommended. Leave to file third-party complaints that impact on the time schedule may be denied, or the third-party complaint may be severed for purposes of trial.

Motion Practice.

All motions must be filed and will be considered by the court as provided in Local Rule 6. However, motions to amend pleadings, for extension of time, to compel answers to interrogatories and other motions customarily considered to be ex parte may be submitted at any time. All motions shall be accompanied by an appropriate proposed order.

All dispositive motions shall be filed *prior to* the discovery cut-off date.

Expert Witnesses.

Plaintiffs shall reveal to opposing counsel the names, addresses, field of expertise, and general area of proposed testimony no later than 150 days prior to the discovery cut-off dates and make said experts available to defendants for deposition within 30 days thereafter. Defendants shall similarly reveal their expert witnesses within 60 days after taking the deposition of plaintiffs' experts, and make them available to plaintiff, for deposition within 30 days thereafter.

Preliminary Pretrial.

There will not be a preliminary pretrial conference scheduled unless specifically ordered by the court.

Final Pretrial.

A final pretrial conference is hereby scheduled for _____ at _____ ___.m. in East St. Louis, Illinois. Pursuant to instructions for preparing for trial before District Judge Stiehl, *counsel responsible for trying the case for each party shall appear with a prepared final pretrial order, and be ready to consider all matters necessary in preparation for trial, including settlement.* There shall be *only one* proposed final pretrial order, which shall be signed by all trial counsel. The burden for preparing the proposed order is on the plaintiff. (Instructions for preparing this order may be obtained at the clerk's office.) *Counsel are also required to present at the final pretrial conference, a single completed proposed pretrial exhibit stipulation signed by trial counsel for all parties.* (Copies of this form are also available from the clerk.)

Jury Instructions.

Counsel for the parties are required to prepare a jury instruction order (instructions for preparing this order may be obtained at the clerk's office). This order shall be filed together with the tendered instructions no later than 10 days prior to the scheduled trial date.

Trial Date.

The anticipated trial date shown at the top of this notice will, except in unusual circumstances, be met. In order to make more efficient utilization of jurors, all cases will be stacked for trial on the aforementioned date and will be subject to a calendar call, at which time the final ranking will be made to ascertain the order and date the cases will proceed to trial. Because of the Speedy Trial Act, criminal cases must take priority. If the case is not reached as scheduled, it will be placed on another trial docket, as well as being placed on a stand-by docket. Special cases that will be ready for trial or requiring an earlier hearing in advance of the trial setting will be considered for advancement upon motion filed setting forth reasons for an early trial date.

DATED: _____

_____
DISTRICT JUDGE

SETTINGS HEREIN:
DISCOVERY CUT-OFF: _____
FINAL PRETRIAL CONFERENCE: _____
TRIAL: _____

N.B. Trial counsel must appear at final pretrial conference

SAMPLE FORM 19

Judge Cedarbaum's Rules

A. Communications with Chambers

1. Except on urgent matters requiring Judge Cedarbaum's immediate attention, communications with chambers shall be in writing, with a copy to opposing counsel. Letters must be delivered to opposing counsel in the same manner in which they are delivered to chambers, and must show the method of delivery (e.g., "By Hand" or "By Mail").

2. All requests for extensions of time or adjournments of motions, pretrial conferences, and other matters must be made in writing and received in chambers not later than 48 hours before the scheduled time.

B. Motion Practice

1. Parties who wish to make a discovery motion or a motion for summary judgment should arrange for a conference before preparing any papers.

2. Motions, except those of an emergency nature or those which require provisional relief, are returnable on any Friday at 9:30 a.m. Motions must be served and filed by noon on the Monday of the week before the week of the return date. Answering papers must be served and filed by noon on the Monday before the return date. Reply papers, if any, must be filed by noon on the Wednesday before the return date. Copies of all papers should be delivered directly to chambers at the time of filing. No originals will be accepted by chambers.

3. Oral argument is required on all motions, except in *pro se* matters, challenges to the denial of Social Security benefits, and motions to reargue.

4. Applications for default judgments must be made by notice of motion.

C. Orders to Show Cause

All orders to show cause should be taken to the orders and appeals clerk for approval. Unless special cause is shown, an order to show cause will not be issued unless the party requesting such an order has notified all adversaries of the time and date the request is to be made and all adversaries have had an opportunity to ap-

pear and oppose the application. Applications for orders to show cause should be accompanied by a supporting memorandum of law.

Judge Cedarbaum's Instructions for Joint Pretrial Orders

In civil cases, a joint pretrial order (JPTO) must be filed on or before the date set by Judge Cedarbaum, which will precede the date of the final pretrial conference. The attorneys who will actually try the case must appear at the final pretrial conference.

The JPTO is to be a single document. The parties must cooperate in its preparation, and may not submit their portions of the documents separately to the court. The parties must exchange serious settlement proposals at the time they sit down to work on the JPTO.

The format of the JPTO in a case to be tried before a jury must be as follows:

1. Best estimate of the length of the trial.
2. Undisputed Facts.
3. Plaintiff's Contentions of Fact. For each contention, there must be a citation to at least one witness or document that will establish that fact.
4. Plaintiff's Contentions of Law. For each contention, there must be a citation to at least one case or statute.
5. Defendant's Contentions of Fact. For each contention, there must be a citation to at least one witness or document that will establish that fact. The defendant's contentions should state the defendant's version of the facts, and should not simply deny the plaintiff's contentions.
6. Defendant's Contentions of Law. For each contention, there must be a citation to at least one case or statute.
7. List of Witnesses. The parties must list all proposed witnesses. Witnesses not listed in the JPTO will be precluded from testifying at trial.
8. Exhibits. The parties must exchange and pre-mark all exhibits. The JPTO must include a list of each party's exhibits, with any objections by the other side on the same page immediately adjacent. Objections will be ruled on at the final pretrial confer-

ence. Exhibits not exchanged and listed in the JPTO may not be introduced at trial.

The same format must be followed in non-jury cases, except that the parties should include "Proposed Findings of Fact" in place of "Contentions of Fact," and "Proposed Conclusions of Law" in place of "Contentions of Law."

N.B. Once a case is placed on the ready trial calendar, it is the obligation of counsel regularly to report conflicting engagements to the Court. Conflicting engagements reported after a case is called for trial will not excuse appearance for trial.

SAMPLE FORM 20

Instructions Regarding Pretrial Proceedings In the United States District Court for the Northern District of Georgia

The following instructions of the court pertain to (1) the filing of a joint certificate of interested persons; (2) the conduct of discovery; (3) the scheduling of settlement conferences during and following discovery and the filing of a settlement certificate;[1] (4) the submission of a joint preliminary statement and scheduling order;[2] (5) time limits for various motions; (6) the submission of a proposed consolidated (not separate) pretrial order; and (7) the submission of requests to charge in the above-styled case. Forms are attached for counsel to use in the submission of the joint settlement certificate, the joint preliminary statement and scheduling
order, and the proposed consolidated pretrial order.

The purpose of these instructions is to summarize information contained in the court's local rules and to direct your attention to the appropriate local rules. No further instructions regarding these pretrial matters will be provided you. Rather, it is the responsibility of counsel to assure the orderly conduct of discovery and to submit promptly the documents requested by the court without further notice, order, or direction. Failure on the part of any party to cooperate with others in compliance with these instructions may result in the imposition of dismissal, default judgment, or other sanction as provided by the Federal Rules of Civil Procedure and the local rules of this court.

Summary of Relevant Dates

Certificate of interested persons: within 10 days after issue is joined. L.R. 201-1.

Settlement conference during discovery: within 30 days after issue is joined. L.R. 235-2(a).

Settlement certificate: within 10 days after initial settlement conference. L.R. 235-2(a).

Preliminary statement and scheduling order: within 10 days after initial settlement conference. L.R. 235-3.

Motions not specially limited by local rules: within 100 days after the complaint is filed. L.R. 220-1(a); 235-3 (Appendix B).

Motions to compel: prior to close of discovery or, if longer, within 10 days after service of the timely-filed discovery responses. L.R. 220-4; 225-4(d); 235-3 (Appendix B).

Settlement conference after discovery: within 10 days after the close of discovery. L.R. 235-2(b).

Summary judgment motions: within 20 days after the close of discovery, unless otherwise permitted by court order. L.R. 220-5; 235-3 (Appendix B).

Close of discovery: four months after the last answer to the complaint is filed or should have been filed, unless the court has either shortened the time for discovery or has for cause shown extended the time for discovery. Discovery must be initiated sufficiently early in the discovery period to permit the filing of answers and responses thereto within the time limitations of the existing discovery period. L.R. 225-1(a); 235-3 (Appendix B).

Proposed pretrial order: not later than 30 days after the close of discovery. L.R. 235-4.

Requests to charge: no later than 9:30 a.m. on the date on which the case is calendared (or specially set) for trial, unless otherwise ordered by the court. L.R. 255-2.

Instructions

I. **Certificate of Interested Persons.**

Local Rule 201-1. Counsel for all private (nongovernmental) parties shall be required to submit a joint certificate of interested persons within 10 days after the joinder of issue. The certificate must include a listing of all persons, associations of persons, firms, partnerships or corporations having either a financial interest or some other interest which could be substantially affected by the outcome of this particular case. Subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party must be listed. Lawyers serving in the proceeding must also be listed. A prescribed form for the certificate is set out in L.R. 201-1(c).

II. **Discovery Limitations.**

A. **Interrogatories.** Local Rule 225-2(a). A party shall not at

any one time or cumulatively serve more than 40 interrogatories upon any other party. Each subdivision of one numbered interrogatory shall be construed as a separate interrogatory. If counsel for a party believes that more than 40 interrogatories are necessary, he shall consult with opposing counsel promptly and attempt to reach a written stipulation as to a reasonable number of additional interrogatories. In the event a written stipulation cannot be agreed upon, the parties seeking to submit additional interrogatories shall file a motion with the court showing the necessity for relief.

B. **Depositions.** Local Rule 225-2(b). Unless otherwise ordered by the court, no deposition of any party or witness shall last more than six hours.

C. **Extensions of Time.** Local Rule 225-1. The basic discovery period in this court during which discovery must be initiated and completed is four months after the last answer to the complaint is filed or should have been filed. Discovery must be initiated sufficiently early within the discovery period to permit the filing of answers and responses thereto within the time limitations of the existing discovery period. L.R. 225-1(a). A request for an extension of time for discovery must be filed with the court prior to the expiration of the original or previously extended discovery period and must include the date issue was joined, the date on which the time period in question is to expire, the dates of any and all previous extensions of time, and a description of the additional discovery which is needed. L.R. 225-1(b).

D. **Motions to Compel.** Local Rules 220-4; 225-4; 235-3 (Appendix B). Counsel are required to confer regarding discovery disputes before filing a motion to compel. A certificate certifying both counsel's good faith effort to resolve the discovery dispute by agreement must be attached to the motion. Directions regarding the form and content of a motion to compel are contained in L.R. 225-4(b). Motions to compel may be filed prior to the close of discovery or, if longer, any time within 10 days after service of the responses upon which the objection is based.

III. **Settlement Conference and Certificate.**

A. **Conference During Discovery.** Local Rule 235-2(a).

1. Within 30 days after issue is joined, lead counsel for all parties are required to confer in person or by telephone in a good

faith effort to settle the case. At the conclusion of the conference, any offers made shall be communicated to the client.

2. Within 10 days after the conference, counsel shall file a joint statement certifying that the conference was held, whether the conference was in person or by telephone, the date of the meeting, the names of all participants, and that any offers of settlement were communicated to the clients. The certificate shall also indicate whether counsel intend to hold any future settlement conferences prior to the close of discovery; counsel's opinions as to the prospects of settlement of the case; specific problems, if any, which are hindering settlement; and whether counsel desire a conference with the court regarding settlement problems. A form settlement certificate prepared by the court and which counsel shall be required to use is contained in Appendix B to the local rules. A copy of the form is also attached to these instructions.

B. **Conference Following Discovery.** Local Rule 235-2(b).

Lead counsel are required to meet *in person* within 10 days following the close of discovery to discuss, in good faith, settlement of the case. All settlement offers must be communicated to the parties and the results of the conference must be reported in the pretrial order.

C. **Cases Not Subject to Rule.** Local Rule 235-2(c).

Pro se litigants and their opposing counsel and cases involving administrative appeals are exempt from the requirements of this rule.

IV. **Preliminary Statement and Scheduling Order.**

Local Rule 235-3. For all cases not settled at the initial settlement conference, counsel are required to complete and file (concurrently with the settlement conference certificate) a joint preliminary statement and scheduling order form providing the information requested in, L.R. 235-3. Counsel are required to use the form preliminary statement and scheduling order contained in Appendix B to the local rules, a copy of which is attached to these instructions. *Pro se* litigants and opposing counsel shall be permitted to file separate statements. Appeals to this court of administrative determinations which are presented to the court for review on a completed record are excepted from the requirements of this rule.

V. **Motions.**

A. **Generally.** All motions filed in this court shall be made in compliance with the Federal Rules of Civil Procedure and the local rules of this court. See Local Rule 220. Motions not specially limited in time by the local or federal rules must be filed within 100 days after the complaint is filed. Local Rule 220-1(a); 235-3 (Appendix B).

B. **Motions to Compel.** Local Rules 220-4; 225-4; 235-3 (Appendix B). Unless otherwise ordered by the court, motions to compel discovery must be filed prior to the close of discovery or, if longer, within 10 days after service of the timely filed discovery responses upon which the motions are based.

C. **Summary Judgment.** Local Rules 220-5; 235-3 (Appendix B). Motions for summary judgment shall be filed as soon as possible, but, unless otherwise permitted by court order, not later than 20 days after the close of discovery. The court will provide the respondent 20 days' notice of his right to file materials in opposition to the motion.

VI. **Proposed Consolidated Pretrial Order.**

Local Rule 235-4. The court has prepared a form pretrial order, which counsel shall be required to complete and file with the court no later than 30 days after the close of discovery. Use of the form pretrial order, which is contained in Appendix B of the local rules, is mandatory. A copy of the form is also attached to these instructions. No deviations from this form shall be permitted, except upon the express prior approval of the court. The form may be retyped, provided it is not modified in any way. Additional copies of the form pretrial order may be obtained from the public filing counter in each division.

It shall be the responsibility of plaintiff's counsel to contact defense counsel to arrange a date for the conference. If there are issues on which counsel for the parties cannot agree, the areas of disagreement must be shown in the proposed pretrial order. In those cases in which there is a pending motion for summary judgment, the court may in its discretion and upon request extend the time for filing the proposed pretrial order.

If counsel desire a pretrial conference, a request must be indicated on the proposed pretrial order immediately below the civil action number. Counsel will be notified if the judge determines

that a pretrial conference is necessary. A case shall be presumed ready for trial on the first calendar after the pretrial order is filed unless another time is specifically set by the court.

VII. **Requests to Charge.**

Local Rule 255-2. Requests to charge shall be filed with the courtroom deputy no later than 9:30 a.m. on the date on which the case is calendared (or specially set) for trial unless otherwise ordered by the court. The requests shall be numbered sequentially with each request containing the citations to authorities supporting the request presented on a separate sheet of paper. In addition to the original, counsel must file two copies of each request with the clerk and must serve one copy of the requests on opposing counsel. Additional instructions regarding requests to charge are contained in item 22 of the form pretrial order.

BY ORDER OF THE COURT.

_____

Clerk

---

[1] Pro se litigants and opposing counsel and counsel in cases involving administrative appeals are not required to hold settlement conferences.

[2] Pro se litigants and opposing counsel shall be permitted to file separate preliminary statements. Preliminary statements are not required in cases appealing administrative determinations.

SAMPLE FORM 21

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Plaintiff,

v. No. CIV _____

Defendant.

Scheduling Order

THIS MATTER having come on for a scheduling conference set by the court and counsel having consulted with United States Magistrate Judge Joe H. Galvan,

IT IS HEREBY ORDERED that the parties shall adhere to the following:

Discovery

The termination date for discovery is _____, and discovery shall not be reopened, except by an order of the court upon a showing of good cause. This deadline shall be construed to require that discovery be *completed* before the above date. Service of interrogatories or requests for production shall be considered timely only if the responses are due prior to the deadline. A notice to take deposition shall be considered timely only if the deposition takes place prior to the deadline. The pendency of dispositive motions shall not stay discovery.

Motions on Discovery

Motions relating to discovery (including but not limited to notions to compel and motions for protective order) shall be filed no later than _____. This deadline shall not be construed to extend the 20-day time limit in D.N.M.L.R.-CV 33.2, 34.1 and 36.1.

Other Pretrial Motions

Pretrial motions, other than discovery motions, shall be filed on or before _____. Any pretrial motions, other than discovery motions, filed after the above date, may be subject to summary denial in the discretion of the court.

Expert Witnesses

Plaintiff shall identify to all parties in writing any expert witness to be used by plaintiff at trial no later than _____. All other parties shall identify in writing any expert witness to be used by such parties at trial no later than _____.

"Identity" of expert witnesses shall include the name of the expert, address, qualifications, area of expertise, and a brief summary of expert testimony.

Other Matters

By agreement of the parties the following are the issues remaining in the case:

Plaintiff - (Itemize causes of action)

Defendant - (Itemize defenses)

Plaintiff withdraws the following causes of action:

Defendant withdraws the following defenses:

Pretrial Order

Counsel are directed to file a consolidated pretrial order as follows: plaintiff to defendants on or before _____; defendants to the court on or before _____. In jury cases, the pretrial order shall require jury instructions and requested voir dire to be delivered to the court five days prior to the trial date.

In non-jury actions, requested findings of fact and conclusions of law shall be delivered to the court no later than five days prior to trial date.

Counsel are directed that the pretrial order will provide that no witnesses except rebuttal witnesses whose testimony cannot be anticipated will be permitted to testify unless the name of the witness is furnished to the court and opposing counsel no later

than 30 days prior to trial date. Any exceptions thereto must be upon order of the court for good cause shown.

If documents are attached as exhibits to notions, affidavits or briefs, those parts of the exhibits that counsel want to bring to the attention of the court shall be highlighted in yellow on all copies which are filed or delivered to the court or served on other counsel.

Estimated Trial Time

The parties estimate trial w'll require _____ days, including jury selection.

Settlement

The possibility of settlement in this case is considered:
poor _____ fair _____ good _____ (check one)

Exceptions

(Where counsel cannot agree to any recitation herein, exceptions shall be listed)

APPROVED:
(Subject to exceptions noted above)

_____
For Plaintiff

_____
For Defendant

_____
Other Party

APPROVAL RECOMMENDED:

_____
UNITED STATES MAGISTRATE JUDGE

APPROVED AND ADOPTED AS THE ORDER OF THE COURT:

_____
UNITED STATES DISTRICT JUDGE

SAMPLE FORM 22

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
_____ DIVISION

	:	Civil Action No. _____
	:	Settlement Conference
Style of Case	:	(is) (is not) requested.
	:	

Settlement Certificate

The undersigned lead counsel for the parties hereby certify that:

1. They met (in person) (by telephone) on _____, 19___, to discuss in good faith the settlement of this case.
2. The following persons participated in the settlement conference:

For plaintiff: Lead counsel: _____.
Other participants: _____
_____.

For defendant: Lead counsel: _____.
Other participants: _____
_____.

3. The parties were promptly informed of all offers of settlement.
4. Counsel (_____) do or (_____) do not intend to hold future settlement conferences prior to the close of discovery. The proposed date of the next settlement conference is: _____.
5. It appears from the discussion by all counsel that there is:
   (_____) A good possibility of settlement.
   (_____) Some possibility of settlement.
   (_____) Little possibility of settlement.
   (_____) No possibility of settlement.
6. The following specific problems have created a hindrance to settlement of this case: _____
_____
_____.

7. Counsel (_____) do or (_____) do not desire a conference with the Court regarding settlement problems.

Submitted this _____ day of _____, 19____.

_____ _____

Counsel for Plaintiff Counsel for Defendant

SAMPLE FORM 23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

	)	
	)	
Plaintiff	)	
	)	
vs.	)	CAUSE NO. S9
	)	
Defendant	)	

Order on Discovery

Pursuant to section 3.03 of this court's Civil Justice Expense and Delay Reduction Plan and 28 U.S.C. § 473(b)(6), and in the interests of reducing cost and delay in the progress of this action, the court now enters the following order concerning the conduct of discovery in this cause.

A. Mandatory Pre-Discovery Disclosures

1. **Content of Mandatory Disclosure.** Before conducting any discovery, the parties shall exchange the following information without the requirement of formal interrogatory or request:

a. the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on the claims and defenses, identifying the subject(s) of the information possessed by that individual;

b. a copy, or a description by category and location, of all documents, data compilations, and tangible things in the party's possession, custody, or control that are likely to bear significantly on any claim or defense;

c. a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Fed. R. Civ. P. 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

d. identify for inspection and copying as under Fed. R. Civ. P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

2. **Timing of Disclosure.** Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made:

a. by a plaintiff within 30 days after service of an answer to its complaint;

b. by a defendant within 30 days after serving its answer to the complaint; and

c. in any event, by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosures.

3. **Incomplete Investigation.** A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or (except with respect to a party that has not answered the complaint by the date of this order) because another party has not made its disclosures.

4. **Limitation on Use.** Recognizing that further investigation or discovery may be undertaken, the court will not consider the written pre-discovery disclosures required by this order to be served and filed (as distinct from the information disclosed or discovered thereby) for any purpose when considering a motion for summary judgment under Fed. R. Civ. P. 56.

5. **No Pre-Disclosure Discovery Requests.** Except with leave of court or upon agreement of the parties, a party may not seek discovery under Fed. R. Civ. P. 26-37 from any source before making the disclosures described above and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party.

B. Disclosure of Expert Testimony

1. **Scope of Expert Disclosure Requirement.** In addition to the disclosures required in Part A of this order, each party shall

disclose to every other party any evidence (other than the testimony of a treating physician) which the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence.

2. **Content of Expert Disclosure.** This disclosure shall be in the form of a written report prepared and signed by the witness that includes:

a. a complete statement of all opinions to be expressed and the basis and reasons therefor;

b. the data or other information relied upon in forming such opinions;

c. any exhibits to be used as a summary or support for such opinions;

d. the qualifications of the witness; and

e. a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

3. **Timing.** This disclosure of expert testimony shall be made at least ninety days before the trial date, or by such date that the court may establish at a preliminary pretrial conference. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under the preceding paragraph, disclosure shall be made within thirty days after the disclosure made by such other party.

4. **Post-Disclosure Expert Depositions.** After any report required by Part B of this order has been provided, a party may depose any person who has been identified as an expert whose opinions may be presented at trial. When depositions are sought pursuant to these provisions, leave of court to take an expert's deposition pursuant to Fed. R. Civ. P. 26(b)(4)(A)(ii) shall be deemed to have been granted.

C. Form of Disclosure

1. **Signature Required.** The disclosures required in Parts A and B of this order shall be made in writing and signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the disclosure and state the party's address.

2. **Certificate of Signer.** The signature of the attorney or party shall constitute a certification that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the disclosure is complete as of the time it is made.

3. **Method of Disclosure; Filing.** If feasible, counsel shall meet to exchange disclosures required by Part A; otherwise, disclosures shall be served as provided by Fed. R. Civ. P. 5. Unless otherwise ordered, disclosures shall be promptly filed with the court.

D. Supplementation of Disclosures and Discovery Responses

1. **Supplementing Disclosure.** A party is under a duty seasonably to supplement its disclosures under Parts A and B, or correct the disclosure or response to include information thereafter acquired, if the party learns that the information disclosed is not complete and correct. This duty also applies to information disclosed during the deposition of an expert whose opinions the party may present at trial; any additions or changes with respect to information provided in an expert's deposition shall be disclosed at least 30 days before trial.

2. **Supplementing Responses to Discovery Requests.** A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission, or correct the disclosure or response to include information thereafter acquired, if the party learns that the response is not complete and correct.

E. Motions to Compel or for Protective Order

1. **Duty to Confer.** Motions to compel or for protective order shall not be filed unless accompanied by the certificate required by District Rule 13 concerning personal or telephonic attempts to resolve the discovery dispute.

2. **Protective Orders.** The provisions of Fed. R. Civ. P. 26(c) concerning protective orders shall apply to the disclosure requirements established by this order, as well as to discovery requests.

3. **Motion to Compel Mandatory Disclosure.** If a party fails to make a disclosure required by Part A or Part B, any other party

may move to compel disclosure and for appropriate sanctions under Fed. R. Civ. P. 37(a).

4. **Exclusion of Evidence for Failure to Disclose.** A party that without substantial justification fails to disclose information as required by Parts A, B, and D of this order shall not, unless such failure is harmless, be permitted to present as substantive evidence at trial or on a motion under Fed. R. Civ. P. 56 any evidence not so disclosed, and, if such evidence is presented by an adverse party, the adverse party shall be permitted to disclose at the trial or hearing the fact of such failure to disclose. In addition or in lieu thereof, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions which, in addition to requiring payment of reasonable expenses including attorney fees caused by the failure, may preclude the party from conducting discovery and may include any of the actions authorized under subparagraphs (A), (B), and (C) of Fed. R. Civ. P. 37(b)(2).

SO ORDERED.
ENTERED: _____

_____

United States District Court

SAMPLE FORM 24

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Plaintiff,	)	
	)	
v.	)	CIVIL NO. F
	)	
Defendant.	)	

Order

The parties to this lawsuit are ordered to answer the following interrogatories pursuant to the rules attached hereto as Appendix I and the parties shall also produce for inspection and copying the following documents and things in accordance with the following schedule:

The plaintiff shall serve the other parties with written responses to the interrogatories and produce the documents and things for inspection and copying within 30 days and the other parties shall do likewise within 45 days of this order.

Interrogatories

1. Give the name, address and occupation of each person (including expert witnesses) who has knowledge or opinions pertaining to this case and for each person listed provide a summary of his or her knowledge or opinions and the grounds therefor.

2. Identify each cause of action and/or defense you are alleging and each and every fact and legal authority on which you rely or of which you are aware which supports the cause of action/defense.

3. Set forth each and every form of damages/relief you are seeking and for each form listed provide:

a. the names, addresses and occupations of each person who has knowledge or opinions relating thereto and a summary of his or her knowledge or opinions and the grounds therefor; and

b. the amount of the damages and the method of calculation.

Request for Production of Documents and Things

4. All documents, records, writings and things which show or tend to show any fact pertaining to any claims or defenses you are asserting.

Enter this _____ day of _____, 199__.

_____

Judge/Magistrate Judge
United States District Court

Appendix I

Rules for Answering Interrogatories. The following rules shall be adhered to by all parties in answering the foregoing interrogatories:

a. All interrogatories must be answered fully in writing in accordance with Rules 33 and 11 of the Federal Rules of Civil Procedure.

b. All answers to interrogatories must be signed by the party. An attorney representing such a party may file the interrogatories without the party's signature if an affidavit from the attorney is filed simultaneously therewith stating that properly executed responses to interrogatories will be filed within 20 days. Such time may be extended by order of the court.

c. In the event any question cannot be fully answered after the exercise of reasonable diligence, the party shall furnish as complete an answer as he/she/it can and explain in detail the reasons why he cannot give a full answer, and state what is needed to be done in order to be in a position to answer fully and estimate when he/she/it will be in that position.

d. If there is more than one plaintiff or more than one defendant in a case, each interrogatory must be answered separately for each party unless the answer is the same for all.

e. Each interrogatory shall be set forth immediately prior to the answer thereto.

f. A party shall seasonably, and in no event more than 30 days after receipt of the information in question, supplement his response with respect to any question directly addressed to (A) the identity, address and telephone number of persons who may be called as witnesses at trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, the substance of facts and opinions to which he is expected to testify, and a summary of the grounds for each opinion.

g. A party is also under a duty seasonably, and not more than 30 days after receipt of the information in question, to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, of (B) he knows that the response, though correct when made, is no

longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

SAMPLE FORM 25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Plaintiffs,	)	
vs.	)	CIVIL NO. ____
Defendants.	)	

Order Regarding Discovery

The court, being in receipt of the joint report of counsel in this matter, hereby issues the following orders concerning discovery.

1. In cases where insurance is involved, all defendants are ordered to file a declaration sheet indicating coverage within 20 days of entering appearance with the court, with copies to all parties. If a copy of the policy is required, this can be addressed through discovery procedures.

2. In cases involving personal injuries, all parties shall exchange all medical records, work records, and specials in their files (including those in possession of insurance adjusters) within 20 days of this order. *Failure to comply with this order may result in the court striking these exhibits or testimony regarding these exhibits.*

3. In cases involving personal injuries, plaintiffs, cross-claimants, counterclaimants, third-party plaintiffs and *pro se* plaintiffs shall deliver to or make available to counsel for defendants, cross-defendants, counterdefendants, third-party defendants and/or *pro se* defendants within 20 days of this order, medical and work authorizations to obtain copies of all medical and work records. In the event a special reason exists to justify non-production of said authorizations, a motion must be filed with the court within 10 days seeking relief. The court may order sanctions when ruling on motions for relief from the order to supply medical and work record authorizations. Copies of any and all records obtained

by authorizations shall be supplied to all counsel or *pro se* parties for inspection and/or copying within 10 days of receipt of said records. *Failure to supply or make available medical and work authorizations may result in the court striking any reference to medical or work records which were not available to opposing counsel and could have been made available by way of authorizations. Failure of the defendants, cross-defendants, counterdefendants, third-party defendants and/or* pro se *defendants to provide copies of the records obtained by way of authorizations for inspection or copying by any or all parties may result in the court striking any reference by defendants, cross-defendants, counterdefendants, third-party defendants and/or* pro se *defendants to said records.*

Information obtained by medical or work authorizations may only be disclosed (with the exception of trial evidence) to the attorneys involved in this case, their parties or representatives, insurance companies or experts. Said information, with the exception mentioned above, is ordered to be kept confidential. Violations of the confidentiality order may result in sanctions. Medical and/or work authorizations submitted pursuant to this Order is *only* for the purpose of obtaining medical and/or work records. It is *not* intended to be used for talking or conferring with doctors, medical personnel, representatives of medical institutions or places of employment.

4. **Disclosure of Expert Testimony**

A. In addition to any other order of discovery required by this court, each party shall disclose to every other party any evidence that the party may present at trial under Rule 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied on in forming such opinions; any exhibits to be used as a summary of or in support of such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

B. The information referred to in section 4(A) shall be submitted by plaintiffs, cross-claimants, counterclaimants, third-party

plaintiffs and *pro se* plaintiffs for their experts at least 105 days prior to this court's *first* trial setting on this matter.

C. Depositions by defendants, cross-defendants, counterdefendants, third-party defendants, and *pro se* defendants of experts referred to in section 4(A) shall be completed at least 85 days prior to this court's first trial setting on this matter.

D. The information referred to in section 4(A) shall be submitted by defendants, cross-defendants, counterdefendants, third-party defendants, and *pro se* defendants for their experts at least 65 days prior to this court's *first* trial setting on this matter.

E. Depositions by plaintiffs, cross-claimants, counterclaimants, third-party plaintiffs and/or *pro se* plaintiffs of experts referred to in section 4(D) shall be completed at least 45 days prior to this court's *first* trial setting on this matter.

F. The information referred to in section 4(A) for purposes of any party's rebuttal experts shall be submitted to all counsel at least 40 days prior to this court's *first* trial setting on this matter.

G. Depositions of rebuttal experts shall be completed at least 30 days prior to this court's *first* trial setting on this matter.

Failure to comply with the court's orders in sections 4(A)-4(G) may result in this court's striking of an expert's and/or experts' testimony. This court WARNS counsel to abide by this order. It is the court's intent to avoid "sandbagging" and/or surprise experts at the last minute. This court also suggests that all discovery regarding be exchanged and/or completed prior to the final pretrial conference so that a more meaningful settlement conference may be addressed by the court.

ENTER: _____

_____

Judge
United States District Court

SAMPLE FORM 26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Plaintiff,	)	
	)	
v.	)	CIVIL NO.
	)	
Defendant.	)	

Scheduling Order

Issue having been joined herein, it is ORDERED pursuant to Rule 16, Fed. R. Civ. P., and Local Rule CV-16, that:

1. Motions to dismiss must be filed on or before (two months from date order is signed).

2. Motions concerning the joinder of other parties and the amending of pleadings must be filed on or before (three months from date order is signed).

3. Discovery shall be completed by the parties on or before (four months from date order is signed).

Required Disclosures:

A. **Initial Disclosures.** Each party shall, without awaiting a discovery request, disclose to every other party;

i. the name and, if known, the address and telephone number of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

ii. a general description, including the location, of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are reasonably likely to bear significantly on the claims and defenses;

iii. the computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

iv. the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making available such agreement for inspection and copying as under Rule 34.

Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (a) by a plaintiff within 30 days after service of an answer to its complaint; (b) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (c) by any party that has appeared in the case within 30 days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or, except with respect to the obligations under clause (c), because another party has not made its disclosures.

B. **Disclosure of Expert Testimony.** In addition to the disclosures required in paragraph i, each party shall disclose to every other party any evidence which the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years. Unless the court designates a different time, this disclosure shall be made at least 30 days before the expiration of discovery and is subject to the duty of supplementation.

C. **Pretrial Disclosures.** In addition to the disclosures required in the preceding paragraphs, each party shall disclose to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes;

i. the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

ii. the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and

iii. an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 60 days before the expiration of discovery. Within 14 days thereafter, unless a different time is specified by the court, other parties shall serve and file (a) any objections that deposition testimony designated under subparagraph C(ii) cannot be used under Rule 32(a); and (b) any objection to the admissibility of the materials identified under subparagraph C(iii). Objections not so made, other than under Rules 402-03 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

D. **Signing of Disclosures.** Every disclosure made by a party as required herein shall be signed by the attorney of record or the party if unrepresented. The signature constitutes a certification that the signer has read the disclosure and, to the best of the signer's knowledge, information and belief formed after a reasonable inquiry, the disclosure is complete as of the time it is made.

E. **Timing and Sequence of Discovery.** Except with leave of court or upon agreement of the parties, a party may not seek discovery from any source before making initial disclosures and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party.

F. **Privileged Information.** When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the party withholding the information must prepare a statement which: (a) identifies the document, communication or thing not produced,

(b) identifies the privilege claimed and (c) briefly describes why the privilege applies. The statement must be provided to opposing counsel at the time disclosures are made or the response to discovery is due.

4. All motions for summary judgment must be filed no later than two weeks after the close of discovery. Failure to meet this deadline may be deemed a waiver of the motion.

5. A conference of attorneys shall be held and counsel for the parties shall submit their proposed agreed pretrial order to the court on or before (six months from date order is signed). The plaintiff is responsible for scheduling the conference of attorneys and for preparing and submitting the pretrial order. Defendant is obligated to cooperate with plaintiff in this effort. Failure of any party to perform their duties can result in the imposition of sanctions. The proposed order shall follow the form of the pretrial order checklist (Form PT-1) found in section IV, Appendix B, of the local court rules. Separate pretrial orders shall not be accepted.

6. Extension of these deadlines *may* be granted by the court upon a showing of good cause.

7. These deadlines shall not relieve the parties of full compliance with arbitration proceedings pursuant to Local Rule CV-87. Similarly, submission of the case to arbitration does not stay any of these deadlines.

8. Motions for continuance of trial must be filed at least two weeks prior to trial.

9. Counsel are obligated to familiarize themselves with the local court rules of the United States District Court for the Western District of Texas. Failure to obey this scheduling order or the local court rules may result in the imposition of sanctions.

SIGNED this _____ day of _____, 199__.

_____

UNITED STATES MAGISTRATE JUDGE

SAMPLE FORM 27

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Standing Orders of the Court on Effective Discovery in Civil Cases

Effective March 1, 1984

Subject to the power of any judge or magistrate judge to rule otherwise for good cause shown, the following are adopted as standing orders of this court:

I. General Provisions

1. **Cooperation Among Counsel.** Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

2. **Stipulations.** Unless contrary to a prior order of the court entered specifically in the action, the parties and when appropriate a non-party witness may stipulate in any suitable writing to alter, amend or modify any practice with respect to discovery.

II. Judicial Intervention

3. a. **Scheduling Conference.** Promptly after joinder of issue, but in any event as soon as practicable and reasonably before the expiration of the 120 day period provided by Fed. R. Civ. P. 16(b), the judge shall determine whether the judge or the magistrate judge shall deal with the scheduling order, and if the magistrate judge, the judge shall make a suitable reference.

b. **Scheduling Order.** Prior to any scheduling conference, the attorneys for the parties shall attempt to agree to a scheduling order and if agreed to, shall submit it to the court. If such scheduling order is reasonable, the court will approve it and advise counsel. The court may for any reason convene a conference with counsel by telephone or otherwise to clarify or modify the

scheduling order agreed to by counsel. If the attorneys for the parties cannot agree on a scheduling order, they shall promptly advise the court.

4. **Reference to Magistrate Judge.**

a. **Selection of Magistrate Judge.** A magistrate judge shall be assigned to each case at random on a rotating basis upon the commencement of the action, except in those categories of actions set forth in Civil Rule 45 of this court. A magistrate judge so assigned shall take no action with respect to any matter until a suitable order of reference is received.

b. **Scope of Reference.** At the time the judge determines whether the judge or the magistrate judge shall deal with the scheduling order, the judge shall determine whether discovery matters shall be referred to the magistrate judge and the scope of such reference. The judge may at any time enlarge or diminish the scope of any reference to the magistrate judge.

c. **Orders of Reference.** The attorneys for the parties shall be provided with copies of all orders referring a matter to the magistrate judge, the scope of such reference, and any enlargement or diminution thereof.

5. **Review of Magistrate Judge's Rulings.**

a. **Procedure.** A party may make application to the judge to review a ruling of the magistrate judge on a discovery matter pursuant to Fed. R. Civ. P. 72(a). Such application shall be made by short-form notice of motion as appears in Form A, delineating the scope of the issues to be reviewed by the judge.

b. **Timing.** An application for review of a magistrate judge's order shall be made to the judge within 10 days after the entry of such order.

c. **Written Exposition of Magistrate Judge's Rulings.** The magistrate shall enter into the record a written order setting forth the disposition of the matter within such 10-day period if requested to do so by the judge or a party considering review. Such written order may take the form of an oral order read into the record of a deposition or other proceeding.

6. **Mode of Raising Discovery Disputes with the Court.**

a. **Pre-motion Conference.** Prior to seeking judicial resolution of a discovery dispute, the attorneys for the affected parties

or non-party witness shall confer in good faith in person, by writing, or by telephone in an effort to resolve the dispute.

b. **Resort to the Court.**

i. **Depositions.** Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of a discovery dispute that arises during the taking of a deposition, they shall notify the court by telephone and request a telephone conference with the court to resolve such dispute. If such dispute is not resolved during the course of the telephone conference, the court shall take other appropriate action, including scheduling a further conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except where a ruling which was made exclusively as a result of a telephone conference is the subject of de novo review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

ii. **Other Discovery.** Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of any other discovery dispute, they shall notify the court, at the option of the attorney for any affected party or non-party witness, either by telephone or by a letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages in length attaching relevant materials. Any affected party or non-party witness may request a hearing or the opportunity to submit additional written materials, or to make any other appropriate presentation to the court. If the dispute is not resolved during the course of the telephone conference or if the letter option is exercised, the court shall take appropriate action to resolve the dispute, including scheduling a telephone or other conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except for the letters and attachments authorized herein or where a ruling which was made exclusively as a result of a telephone conference is the subject of de novo review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

iii. Where a ruling is made exclusively as a result of a telephone conference it may be the subject of de novo reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Any other affected party or non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.

iv. Where papers are filed or a letter submitted, the attorneys shall set forth in appropriate detail the efforts they have made to resolve the dispute prior to raising it with the court.

c. **Decision of the Court.** The court shall when appropriate enter into the record a written order setting forth the disposition of the matter. Such written order may take the form of an oral order read into the record of a deposition or other proceeding.

d. **Timing.** The court shall deal with all applications for rulings respecting discovery disputes as promptly and expeditiously as the business of the court permits.

III. Depositions

7. **Non-Stenographic Recording of Depositions.** Motions in accordance with Fed. R. Civ. P. 30(b)(4) for leave to record the deposition of an adverse party or of a non-party witness by means other than stenographic recording, including tape recording or videotaping, shall presumptively be granted. If requested by one of the parties, the recording or videotaping shall be transcribed.

8. **Telephonic Depositions.** The motion of a party to take the deposition of an adverse party by telephone will presumptively be granted. Where the opposing party is a corporation, the term "adverse party" means an officer, director, managing agent or corporate designee pursuant to Fed. R. Civ. P. 30(b)(6).

9. **Persons Attending Depositions.** A person who is a party, witness or potential witness in the action may attend the deposition of a party or witness.

10. **Depositions of Witnesses Who Have No Knowledge of the Facts.**

a. Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposi-

tion or subpoena regarding a matter about which he or she has no knowledge, he or she may submit reasonably before the date noticed for the deposition an affidavit to the noticing party so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action.

b. The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness' right to seek a protective order.

11. **Directions Not to Answer.**

a. Repeated directions to a witness not to answer questions calling for non-privileged answers are symptomatic that the deposition is not proceeding as it should.

b. Where a direction not to answer such a question is given and honored by the witness, either party may seek a ruling as to the validity of such direction.

c. If a prompt ruling cannot be obtained, the direction not to answer may stand and the deposition should continue until (1) a ruling is obtained or (2) the problem resolves itself.

12. **Suggestive Objections.** If the objection to a question is one that can be obviated or removed if presented at the time, the proper objection is "objection to the form of the question." If the objection is on the ground of privilege, the privilege shall be stated and established as provided in Standing Order 21. If the objection is on another ground, the objection is "objection." Objections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper.

13. **Conferences Between Deponent and Defending Attorney.** An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted.

14. **Document Production at Depositions.** Consistent with the requirements of Fed. R. Civ. P. 30 and 34, a party seeking production of documents of another party in connection with a deposition should schedule the deposition to allow for the production of the documents in advance of the deposition. If requested documents which are discoverable are not produced prior to the deposition, the party noticing the deposition may either

adjourn the deposition until after such documents are produced or, without waiving the right to have access to the documents, may proceed with the deposition.

IV. Interrogatories

15. **Form Interrogatories.** Attorneys serving interrogatories shall have reviewed them to ascertain that they are applicable to the facts and contentions of the particular case. Interrogatories which are not directed to the facts and contentions of the particular case shall not be used.

16. **Interrogatories Shall Be Drafted and Read Reasonably.**

a. Interrogatories shall be drafted reasonably, clearly and concisely, be limited to matters discoverable pursuant to Fed. R. Civ. P. 26(b), and shall not be duplicative or repetitious.

b. Interrogatories shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client.

17. **Responses to Interrogatories.** Each interrogatory and each part thereof shall be answered separately and fully to the extent no objection is made. No part of an interrogatory shall be left unanswered merely because an objection is interposed to another part of that interrogatory.

V. Requests for Documents

18. **Form Requests for Documents.** Attorneys requesting documents pursuant to Fed. R. Civ. P. 34 and 45 shall have reviewed the request or subpoena to ascertain that it is applicable to the facts and contentions of the particular case. A request or subpoena which is not directed to the facts and contentions of the particular case shall not be used.

19. **Requests for Documents and Subpoenas *Duces Tecum* Shall Be Drafted and Read Reasonably.**

a. Requests for documents and subpoenas *duces tecum* shall be drafted reasonably, clearly and concisely and be limited to documents discoverable pursuant to Fed. R. Civ. P. 26(b).

b. A request for documents or subpoenas *duces tecum* shall be read reasonably in the recognition that the attorney serving it generally does not have knowledge of the documents being sought and the attorney receiving the request or subpoena generally does have such knowledge or can obtain it from the client.

VI. Other

20. **Discovery of Experts.** After completion of fact discovery and within a reasonable period but in no event less than thirty days prior to the time for completion of all discovery, each party, if requested pursuant to Fed. R. Civ. P. 26(b)(4), shall identify each person the party expects to call as an expert witness at trial and shall state the subject matter and the substance of the facts and opinions on which the expert is expected to testify and a summary of the grounds for each opinion.

21. **Privilege.**

a. Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion,

i. the attorney asserting the privilege shall identify during the deposition the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

ii. the following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of privileged information:

(A) for documents, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document, e.g., letter or memorandum; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(B) for oral communications: (1) the name of the person making the communication and the names of persons present

while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

(C) Objection on the ground of privilege asserted during a deposition may be amplified by the objector subsequent to the objection.

iii. After a claim of privilege has been asserted, the attorney seeking disclosure shall have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of the privilege, including (a) the applicability of the particular privilege being asserted, (b) circumstances which may constitute an exemption to the assertion of the privilege, (c) circumstances which may result in the privilege having been waived, and (d) circumstances which may overcome a claim of qualified privilege.

b. Where a claim of privilege is asserted in responding or objecting to other discovery devices, including interrogatories, requests for documents and requests for admissions, and information is not provided on the basis of such assertion,

i. the attorney asserting the privilege shall in the response or objection to the discovery request identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

ii. the following information shall be provided in the response or objection, unless divulgence of such information would cause disclosure of privileged information:

(A) for documents: (1) the type of document, e.g., letter or memorandum; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(B) for oral communications: (1) the name of the person making the communication and the names of persons present

while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

iii. The attorney seeking disclosure of the information withheld may, for the purpose of determining whether to move to compel disclosure, serve interrogatories or notice the depositions of appropriate witnesses to establish other relevant information concerning the assertion of the privilege, including (a) the applicability of the privilege being asserted, (b) circumstances which may constitute an exception to assertion of the privilege, (c) circumstances which may result in the privilege having been waived, and (d) circumstances which may overcome a claim of qualified privilege.

VII. Effective Date and Termination

22. These standing orders are effective March 1, 1984. They are adopted on an experimental basis and if not otherwise ordered by the court they will be effective until March 1, 1987.

SAMPLE FORM 28

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO.
	)	
Defendant	)	
_____	)	

Memorandum and Order Regarding Discovery

Discovery disputes have arisen in this case. On the basis of an examination of matters on file, the court is concerned that this may be an instance in which counsel on both sides are taking positions that do not comply with either the letter or the spirit of the Federal Rules of Civil Procedure. An excessive discovery demand, knowingly made, violates Rule 11 and Rule 26(g). An inadequate response, knowingly made, violates Rule 11, Rule 26(g) and other rules as well. For example:

(a) Fed. R. Civ. P. 33(a) requires that a party "furnish such information as is available to the party." That you may have an objection to interrogatories as excessively burdensome is not an excuse for your responding with nothing but objections or a motion for a protective order. You must forthwith furnish such information responsive to the interrogatories as is available through reasonable efforts. Failure to do so in this court is regarded as sufficient ground for imposition of sanctions.

(b) Fed. R. Civ. P. 34(b) provides that if a ground of objection goes only "to a part of an item or category" of documents demanded, "the part shall be specified." It is implicit, if not explicit, that production or allowance of inspection "will be permitted as requested" except as to the part or parts to which stated objections apply. Thus, the fact that a demand for production is objectionable in part is not an excuse for producing nothing. Failure to produce forthwith documents or parts of documents to which no

objection applies is in this court regarded as sufficient ground for imposition of sanctions.

(c) Fed. R. Civ. P. 36(a) provides that "when good faith requires that a party . . . deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder." Thus, an objection that goes only to some part or parts of requests for admission is not an excuse for failure to respond to all other parts to which the ground of objection is not applicable. Failure to respond with such admissions is in this court regarded as sufficient ground for imposition of sanctions.

(d) Fed. R. Civ. P. 26(g) provides that a party's attorney must sign each discovery request, response, or objection. The signature constitutes a certification that to the best of the attorney's knowledge, information, and belief formed after a reasonable inquiry, the discovery request, response, or objection is: "(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive . . . ." Certification in violation of Rule 26(g) is sufficient ground for imposition of sanctions.

The court will not serve, or acquiesce in a magistrate's serving, as a mediator for settlement of disputes over discovery in which each party takes unreasonable positions with the purpose of conceding what is plainly due under the rules only when before the court or magistrate. If counsel make excessive demands or insufficient responses after this cautionary order by the court, an order may be entered providing for more stringent controls over discovery, including the following:

(1) Having determined that both sides have been unreasonable, the court may impose an appropriate sanction, pursuant to Fed. R. Civ. P. 26(g) and 37. An appropriate sanction in this case may include an order in which the court declines to undertake the burdensome task of working out some compromise position that is a reasonable accommodation within the range counsel should have agreed upon; the court may instead determine only which side has been more unreasonable and, as a sanction for mis-

conduct, enter an order that discovery proceed in accordance with the other side's position.

(2) The court may award attorney fees against a party, or against counsel.

(3) The court may order that no client be charged for any of the time of counsel on either side spent on the discovery dispute in which counsel on both sides were taking unreasonable positions.

Order

For the foregoing reasons, it is ORDERED:

The parties are allowed 30 days from this date to resolve all outstanding discovery disputes or modify their respective positions to come into compliance with the Federal Rules of Civil Procedure, including Rule 11, Rule 26(g) and other rules relating to discovery. A hearing is scheduled for _____ at _____ __.m. to be held only if the parties have not succeeded in resolving all discovery disputes.

_____

United States District Judge

SAMPLE FORM 29

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Plaintiff(s),	)	
	)	NO.
	)	
	)	ORDER REGARDING
v.	)	DISCOVERY AND
	)	DEPOSITIONS
	)	
Defendants.	)	

IT IS ORDERED that:

1. Discovery. All discovery matters are to be resolved by agreement if possible. If a ruling is needed as to any discovery question, and counsel wish to avoid the time and expenses of a written motion, they may obtain an expedited ruling through a telephone conference call to the court at (206) 553-4424.

2. Depositions. Depositions will be conducted in compliance with the following rules:

(a) *Examination.* If there are multiple parties, each side should ordinarily designate one attorney to conduct the main examination of the deponent, and any questioning by other counsel on that side should be limited to matters not previously covered.

(b) *Objections.* The only objections that should be raised at the deposition are those involving a privilege against disclosure, or some matter that may be remedied if presented at the time (such as the form of the question or the responsiveness of the answer), or that the question seeks information beyond the scope of discovery. Objections on other grounds are unnecessary and should generally be avoided. All objections should be concise and must not suggest answers to, or otherwise coach, the deponent. Argumentative interruptions will not be permitted.

(c) *Directions Not to Answer.* Directions to the deponent not to answer are improper, except on the ground of privilege or to enable a party or deponent to present a motion to the court or spe-

cial master for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the party or the deponent, or for appropriate limitations upon the scope of the deposition (e.g., on the ground that the line of inquiry is not relevant nor reasonably calculated to lead to the discovery of admissible evidence). When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of the communication, who made the statement in question, to whom and in whose presence the statement was made, other persons to whom the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

(d) *Responsiveness.* Witnesses will be expected to answer all questions directly and without evasion, to the extent of their testimonial knowledge, unless directed by counsel not to answer.

(e) *Private Consultation.* Private conferences between deponents and their attorneys during the actual taking of the deposition are improper, except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may, however, be held during normal recesses and adjournments.

(f) *Conduct of Examining Counsel.* Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(g) *Courtroom Standard.* All counsel and parties should conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

3. **Responsibility of plaintiff's counsel.** This order is issued at the outset of the case, and a copy is delivered by the clerk to counsel for plaintiffs. Plaintiff's counsel (or plaintiff, if pro se) is directed to deliver a copy of this order to each other party within ten (10) days after receiving notice of that party's appearance.

United States District Judge

SAMPLE FORM 30

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Plaintiff(s),	)	
	)	
vs.	)	CIVIL NO.
	)	
Defendant(s).	)	

Proposed Final Pretrial Order

This matter comes before the court at a final pretrial conference held pursuant to Rule 16, Federal Rules of Civil Procedure.

Plaintiff(s) Counsel:

(Insert name, address, and telephone number.)

Defendant(s) Counsel:

(Insert name, address, and telephone number.)

I. Nature of the Case

The parties should prepare a brief statement of the nature of the case including the claims of the parties (personal injury, federal tort claim, breach of contract, etc.). The principal purpose of this statement is to assist the court in explaining the case to prospective jurors upon selection of a jury.

II. Jurisdiction

A. This is an action for:

(State the remedy sought, such as damages, injunctive or declaratory relief.)

B. The jurisdiction of the court is not disputed (or, if the issue has not previously been raised, the basis on which jurisdiction is contested).

1. If not disputed, state the statutory, constitutional or other basis of jurisdiction.

III. Uncontroverted Facts

The following facts are not disputed or have been agreed to or stipulated to by the parties:

(This section should contain a comprehensive statement of the facts which will become a part of the evidentiary record in the case and which, in jury trials, may be read to the jury.)

IV. Agreed to Issues of Law

The parties agree that the following are the issues to be decided by the court:

V. Witnesses **(Including those to testify by deposition.)**

A. List of witnesses the plaintiff expects to call, including experts:

1. Expert witnesses.
2. Non-expert witnesses.

B. List of witnesses defendant expects to call, including experts:

1. Expert witnesses.
2. Non-expert witnesses.

C. If there are any third parties to the action, they should include an identical list of witnesses as that contained in Parts A and B above.

D. **Rebuttal Witnesses.** Each of the parties may call such rebuttal witnesses as may be necessary, without prior notice thereof to the other party.

VI. Exhibits

(Refer to Pretrial Exhibit Stipulation appended hereto.)

VII. Damages

An itemized statement of all damages, including special damages.

VIII. Bifurcated Trial

Indicate whether the parties desire a bifurcated trial, and, if so, why.

IX. Trial Briefs

Trial briefs should be filed with the court at the final pretrial conference on any difficult factual or evidentiary issue and also set forth a party's theory of liability or defense.

X. Limitations, Reservations and Other Matters

A. **Length of Trial.** The probable length of trial is ____ days. The case will be listed on the trial calendar to be tried when reached.

Mark appropriate box: Jury_____
Non-jury____

B. **Number of Jurors.** There shall be six jurors and _____ alternate jurors.

C. **Jury Voir Dire.** The court will conduct voir dire. If voir dire questions are to be tendered, they should be submitted with the final pretrial order.

IT IS ORDERED that this Final Pretrial Order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice or for good cause shown. Such modification may be made either on application of counsel for the parties or on motion of the court.

DATED:_____

_____
DISTRICT JUDGE
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM AND SUBSTANCE:

_____
ATTORNEY FOR PLAINTIFF(S)

_____
ATTORNEY FOR DEFENDANT(S)

NOTE: Where a third-party defendant is joined pursuant to Rule 14(a) of the Federal Rules of Civil Procedure, the pretrial order may be suitably modified. The initial page may be modified to reflect the joinder. List attorney's name, address, and telephone number.

Instructions for Preparation of Pretrial Exhibit Stipulation

The parties shall prepare and append to the final pretrial order a pretrial exhibit stipulation which shall be on a separate schedule.

The pretrial exhibit stipulation shall contain the style of the case, be entitled "Pretrial Exhibit Stipulation," shall contain each party's numbered list of trial exhibits, other than impeachment exhibits, with objections, if any, to each exhibit, including briefly the basis of the objection. All parties shall list their exhibits in numerical order. Where practicable, copies of all exhibits to which there is an objection will be submitted with the stipulation. The burden for timely submission of a complete list is on the plaintiff.

The list of exhibits shall be substantially in the following form:

Pretrial Exhibit Stipulation

Plaintiffs' Exhibits

Number	Description	Objection	If objection, state grounds

Defendants' Exhibits

Number	Description	Objection	If objection, state grounds

SAMPLE FORM 31

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Plaintiff	)	
	)	
v.	)	No.
	)	
Defendant	)	

Scheduling Order

Pursuant to Rules 16(b) and 26(f), Fed. R. Civ. P., and upon consideration of the parties' proposals in the matter, the following time schedule is herewith established with respect to pretrial discovery, the joinder of additional parties, amendment of the pleadings, the filing of motions, and certain additional matters.

1. Discovery shall close as of _____, 199__.

2. Any motions to join additional parties shall be filed not later than _____, 199__.

3. Any motion to amend pleadings shall be filed not later than _____, 199__.

4. Any motion to compel discovery shall be filed prior to the time specified for the close of discovery, unless a response to a discovery request is not due until after said date, in which case a motion to compel with respect to that discovery request shall be filed within 10 days immediately after the response is made or is due (whichever is earlier).

5. All other motions, except those which, under Rule 12(h)(2) or (3), may be made at any time, and except for motions in limine, shall be filed (with supporting suggestions) not later than 30 days immediately after the time specified for the close of discovery.

6. All supplemental responses to interrogatories concerning experts, required under Rule 26(e), Fed. R. Civ. P., shall, with respect to a party who intends to call an expert for the purpose of supporting an affirmative claim for relief, be filed not later than 60 days prior to the date specified for the close of discovery; and

shall, with respect to a party who intends to call an expert for the purpose of defending against an affirmative claim for relief, be filed not later than 30 days prior to the date specified for the close of discovery.

7. If the case involves a claim under 42 U.S.C. §§ 2000(e) *et seq.* (Title VII), 29 U.S.C. §§ 621 *et seq.*, or under 42 U.S.C. §§ 1981, 1983 or 1985 for discrimination in connection with employment, the party making such claim shall, not later than 60 days prior to the date specified for the close of discovery, serve and file a designation of each incident or happening which may be offered at trial to show either the discriminatory treatment for which the claim is made, or the discriminatory animus of those against whom the claim is made. Such designation shall include: (1) a brief description of the incident or happening; (2) the date and place thereof; and (3), the identity of the persons involved.

The schedules fixed herein will not be extended except for good cause shown and upon further written order of the court.

_____

UNITED STATES DISTRICT JUDGE

DATED: _____, 1991.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Plaintiff	)	
	)	
v.	)	No.
	)	
Defendant	)	

Trial Order

a. On or before *seven weeks before trial*, the parties shall file a stipulation of any uncontroverted facts. If no stipulated facts can be agreed upon, including facts related to the court's subject matter or personal jurisdiction, the parties shall file a joint statement to that effect.

b. On or before *six weeks before trial*, each party asserting an affirmative claim or claims for relief (plaintiff, third-party plaintiff, counterclaiming defendant, cross-claiming defendant, etc.) shall:

1. Serve and file a list of all witnesses who may be called at trial by that party in connection with such claim or claims;

2. Serve and file a list of all exhibits which may be offered at trial by that party in connection with such claim or claims. Each exhibit so listed shall be pre-marked and numbered. If only a portion of an exhibit is to be offered, the portion to be offered shall be specifically identified;

3. Serve and file a designation, by page and line number, of any deposition testimony to be offered in evidence as a part of that party's case-in-chief in connection with such claim or claims; and

4. Serve and file all proposed verdict directing and definition instructions. Such instructions shall be taken from or drawn in the manner of Missouri Approved Instructions (MAI). An original (without sources) and one copy (with sources) of all said instructions shall be delivered to chambers on or before the above date.

5. Serve and file proposed findings of fact and conclusions of law in support of such claim or claims.

Please note that a witness not listed in accordance with this paragraph b will *not* be permitted to testify, except for good cause shown and with leave of court; and that an exhibit not listed or deposition testimony not designated in accordance with this paragraph b will *not* be received in evidence, except for good cause shown and with leave of court. All witnesses shall be instructed to be available for testimony as of the first day of trial scheduled herein, should the court so require.

c. On or before *five weeks before trial*, each party defending against an affirmative claim for relief shall:

1. Serve and file a list of all witnesses who may be called at trial by that party in connection with such defense;

2. Serve and file a list of all exhibits which may be offered at trial by that party in connection with such defense. Each exhibit so listed shall be pre-marked and numbered. If only a portion of an exhibit is to be offered, the portion to be offered shall be specifically identified;

3. Serve and file a designation of those exhibits listed by any other party pursuant to subparagraph (b)(2), as to which identification and authentication is waived;

4. Serve and file any objections to proposed deposition testimony designated by any other party pursuant to subparagraph (b)(3);

5. Serve and file a designation, by page and line number, of any deposition testimony to be offered as cross-examination to deposition testimony designated by other parties pursuant to subparagraph (b)(3);

6. Serve and file a designation, by page and line number, of any deposition testimony to be offered in evidence as a part of that party's case-in-chief in connection with such defense; and

7. Serve and file all proposed affirmative defense and definition instructions. Such instructions shall be taken from or drawn in the manner of Missouri Approved Instructions (MAI). An original (without sources) and one copy (with sources) of all said instructions shall be delivered to chambers on or before the above date.

8. *Serve and file proposed findings of fact and conclusions of law in denial of such claim or claims.*

Please note that a witness not listed in accordance with this paragraph c will *not* be permitted to testify, except for good cause shown and with leave of court; and that an exhibit not listed or deposition testimony not designated in accordance with this paragraph c will *not* be received in evidence, except for good cause shown and with leave of court. All witnesses shall be instructed to be available for testimony as of the first day of trial scheduled herein, should the court so require.

d. On or before *four weeks before trial*, each party asserting an affirmative claim or claims for relief shall:

1. Serve and file a designation of those exhibits listed by any other party pursuant to subparagraph (c)(2), as to which identification and authentication is waived;

2. Serve and file any objections to proposed deposition testimony designated by any other party pursuant to subparagraphs (c)(5) or (c)(6); and

3. Serve and file a designation, by page and line number, of any deposition testimony to be offered as cross-examination to deposition testimony designated by any other party pursuant to subparagraph (c)(6);

e. On or before *3 weeks before trial*, all parties shall serve and file:

1. All other proposed instructions [Note: delete for non-jury];

2. All proposed voir dire questions [Note: delete for non-jury];

3. All motions in limine, with supporting suggestions; and

4. Any desired trial briefs.

f. On or before *two weeks before trial*, each party defending against an affirmative claim or claims for relief shall serve and file any objections to proposed deposition testimony designated by any other party pursuant to subparagraph (d)(3).

g. On or before *one week before trial*, all parties shall serve and file:

1. Any desired responses to motions in limine; and

2. Any desired responses to earlier filed trial briefs.

And it is further

ORDERED that the above-styled cause is hereby set for pre-trial conference commencing at 8:30 a.m. in chambers (Room

716), and for [non-] jury trial, commencing at 9:00 a.m., both on _____, at the United States District Courthouse, 811 Grand Avenue, Kansas City, Missouri.

[Note: for back-up settings] ORDERED that the above-styled cause is hereby set for pretrial conference commencing at 8:30 a.m. in chambers (Room 716), and for jury trial, commencing at 9:00 a.m., both on _____ as a #2 setting on that date, at the United States District Courthouse, 811 Grand Avenue, Kansas City, Missouri. The attorneys for the parties shall have the responsibility to maintain contact with the attorneys in the #1 set case to determine if the #2 case will be tried. The #1 case set _____ is _____ CV-W-I. The attorneys are: _____, telephone number _____ for the plaintiff; and _____, telephone number _____, attorney for the defendant. If the case cannot be reached for trial on the above date, it is

ORDERED that the cause will be tried on the civil, accelerated jury docket which commences the week of [October 7, 1991/April 6, 1992] and runs continuously thereafter through the end of the week of [October 21, 1991/April 20, 1992].

_____
UNITED STATES DISTRICT JUDGE

DATED: _____, 1991.

SAMPLE FORM 32

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Plaintiff

v. Cr. No. 91-027-01, -02, -03

Defendants

Pretrial Order

The above matter having been placed on the trial calendar for June, 1991, with empanelment scheduled for June 3, 1991, it is hereby

Ordered:

1. On or before May 28, 1991, all counsel shall submit to the court the following:

a. A memorandum containing a concise recitation of the relevant facts that counsel is relying upon and/or intends to prove at trial, a brief analysis of the applicable law (including that applicable to any evidentiary issues that counsel anticipate), and a description of any matters that counsel believe ought to be considered by the court prior to trial;

b. A list of all questions that counsel requests the court to ask of prospective jurors during voir dire examination.

2. On or before May 28, 1991, all counsel shall submit to the court any instructions that counsel request be included in the court's charge to the jury together with citations to any authorities supporting such proposed instructions. No request will be considered without such a citation.

3. On or before May 20, 1991, counsel for any party that proposes to offer a recorded conversation as evidence shall furnish the court and counsel for all other parties with a transcript of

such recording. Not more than seven days thereafter, counsel for any party disputing the accuracy of such transcript shall furnish the court and counsel for all other parties with an alternate transcript and a statement identifying with specificity those portions that are in dispute and the reasons that they are disputed. Failure to comply with this provision may be considered by the court as a waiver of the right to offer such recorded conversation or to dispute the accuracy of said transcript, as the case may be.

BY ORDER:

_____

Deputy Clerk

ENTER:

_____

United States District Judge

_____, 19___

SAMPLE FORM 33

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

	)	
	)	
Plaintiff(s),	)	
	)	
v.	)	Civil Action No.
	)	
Defendant(s).[1]	)	

Final Pretrial Order

This matter having come before the court at a pretrial conference held pursuant to Fed. R. Civ. P. ("Rule") 16, and [insert name, address and telephone number] having appeared as counsel for plaintiff(s) and [insert name, address and telephone number] having appeared as counsel for defendant(s), the following action was taken:

This is an action for[2] and the jurisdiction of the court is invoked under _____ U. S. C. § _____. Jurisdiction is [not] disputed.[3]

All * of the following stipulations and statements were submitted and are attached to and made a part of this order:

a. a comprehensive stipulation or statement of all uncontested facts, which will become a part of the evidentiary record in the case (and which, in jury trials, may be read to the jury by the court or any party);[4]

b. an agreed statement of the contested issues of fact and law, together with separate statements by each party of any contested issues of fact or law not agreed to;[5]

c. schedules of (1) all exhibits (all exhibits shall be marked for identification before trial), including documents, summaries, charts and other items expected to be offered in evidence and (2) any demonstrative evidence and experiments to be offered during trial;[6]

d. a list or lists of names and addresses of the potential witnesses to be called by each party, with a statement of any objec-

tions to calling, or to the qualifications of, any witness to be noted on the list;[7]

e. stipulations or statements setting forth the qualifications of each expert witness in such form that the statement can be read to the jury at the time the expert witness takes the stand;[8]

f. a list of all depositions, or portions thereof, to be read into evidence and statements of any objections thereto;[9]

g. an itemized statement of special damages;[10]

h. waivers of any claims or defenses that have been abandoned by any party;

i.* trial briefs;[11]

j.* for a jury trial, one set of marked proposed jury instructions, verdict forms and special interrogatories, if any, by each party;[12]

k.* for a jury trial, a list of the questions each party requests the court to ask prospective jurors in accordance with Rule 47(a);

l.* for a non-jury trial, each party's proposed findings of fact and conclusions of law in duplicate (see guidelines available from the court's minute clerk or secretary);[13] and

m. a statement summarizing the history and status of settlement negotiations, indicating whether further negotiations are ongoing and likely to be productive. Each party has completed discovery, including the depositions of expert witnesses (unless the court has previously ordered otherwise). Except for good cause shown, no further discovery shall be permitted.[14]

Trial of this case is expected to take _____ days. It will be listed on the trial calendar, to be tried when reached.

Mark appropriate line:

Six-person Jury _____ Non-Jury _____

Alternates will _____ will not _____ deliberate

It is the parties' preference that the issues of liability and damages should _____ should not _____ be bifurcated for trial. On motion of any party or on motion of the court, bifurcation may be ordered in either a jury or a non-jury trial.

Mark appropriate line:

The parties do not object to this case being tried by a magistrate if need be. _____

The parties are not in agreement that this case may be tried by a magistrate judge. _____

This order will control the course of the trial and may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.

Possibility of settlement of this case was considered by the parties.

_____
United States District Judge

Date: _____

APPROVED AS TO FORM AND SUBSTANCE:

_____
Attorney for Plaintiff(s)

_____
Attorney for Defendant(s)

Schedule (c)

Exhibits

1. The following exhibits were offered by plaintiff(s), received in evidence and marked as indicated:

[State identification number and brief description of each exhibit.]

2. The following exhibits were offered by plaintiff(s) and marked for identification. Defendant(s) objected to their receipt in evidence on the grounds stated:[15]

[State identification number and brief description of each exhibit. Also state briefly the ground of objection, such as competency, relevancy or materiality, and the provision of Fed. R. Evid. relied upon. Also state briefly plaintiffs' response to the objection, with appropriate reference to Fed. R. Evid.]

3. The following exhibits were offered by defendant(s), received in evidence and marked as indicated:

[State identification number and brief description of each exhibit.]

4. The following exhibits were offered by defendant(s) and marked for identification. Plaintiff(s) objected to their receipt in evidence on the grounds stated:[16]

[State identification number and brief description of each exhibit. Also state briefly the ground of objection, such as competency, relevancy or materiality, and the provision of Fed. R. Evid. relied upon. Also state briefly defendants' response to the objection, with appropriate reference to Fed. R. Evid.]

Pretrial Memorandum
for Use in Personal Injury Cases

	)	Civil Action No.
	)	
	)	Plaintiff requests $_____
v.	)	
	)	Defendant offers $_____
	)	
	)	Court recommends $_____

Plaintiff's Name: _____

Occupation: _____

Attorney(s) for plaintiff (add name and phone number of trial attorney):

_____

_____

_____

Attorney(s) for defendant:

_____

_____

_____

Date, hour and place of accident: _____

Attending physicians: _____

Hospitals:

_____

Place of employment: _____

Miscellaneous expenses:

_____

_____

_____

Total liquidated damages: $_____

Age: _____

Marital status: _____

Summary of injuries (note especially any permanent pathology):

_____

_____

_____

_____

_____

_____

_____

Medical fees: _____

Hospital bills: _____

_____

Loss of income: _____

_____

_____

_____

_____

Important

Attach: One or more of the following items as required by the court:

1. copies of all medical reports—plaintiff and defendant current reports);
2. police report, if any, of all witnesses;
3. summary of depositions of critical witnesses (based on joint consultation by counsel);
4. copies of interrogatories and answers; and
5. copies of bills of special items of expense.

Furnish copies of above items to court and defendant's attorney at least one week in advance of pretrial hearing.

Brief Statement of Circumstances of Occurrence

Plaintiff's view: _____

_____

_____

_____

Defendant's view: _____

_____

_____

_____

The parties shall attach any medical reports or summaries useful for discussion at the pretrial conference.

---

[1] Where a third-party defendant is joined pursuant to Rule 14(a), the order may be suitably modified. In that respect, the caption and the statement of parties and counsel shall be modified to reflect the joinder.

[2] Breach of contract, personal injury, etc.

[3] In diversity cases or other cases requiring a jurisdictional amount in controversy, the order shall contain either a stipulation that $10,000 is involved or a resume of the evidence supporting the claim that such sum could reasonably be awarded.

* If it does not appear that the case will be reached for trial in the near future, or if active settlement discussions are in progress, the court may defer asterisked requirements until shortly before the case is set for trial. See items (i), (j), (k) and (l). On motion of any party or on the court's own motion, any requirements of this order (including one or more of the asterisked requirements) may be waived entirely.

[4] Counsel for plaintiff has the responsibility to prepare the initial draft of a proposed stipulation dealing with allegations in the complaint. Counsel for any counter-cross or third-party complainant has a like responsibility as to a stipulation dealing with allegations that speak to that party's complaints. If the admissibility of any uncontested fact is challenged, the party objecting and the grounds for objecting must be stated.

[5] If any difficult or unusual problems of law or evidence are likely to arise during the trial, they should be called to the court's attention, together with a statement of the parties' contentions and the most important authorities. In this respect, all motions in limine should be filed with supporting briefs *at the time of the filing of the order.* Responses to such motions shall be filed within 14 days thereafter, and replies shall be filed within seven days after the responses are filed. All other information called for by subparagraph (b) of the text or this footnote may of course be included in the trial briefs or, in non-jury cases, in the proposed Findings of Fact and Conclusions of Law.

[6] Items not listed will not be admitted without good cause shown. Cumulative documents, particularly among x-rays and photos, should be omitted. Duplicate exhibits shall not be scheduled by different parties, but may be offered as joint exhibits. All parties are directed to stipulate to the authenticity of exhibits wherever possible, and this order shall identify any exhibits whose authenticity has not been stipulated and specific reasons for the failure to stipulate. As the attached Schedule (c) form reflects, non-objected-to exhibits are received in evidence by operation of this order, without any need for further foundation testimony. Copies of exhibits shall be made available to opposing counsel and a bench book of exhibits shall be prepared and delivered to the court at the start of the trial unless excused by the court. If the trial is a jury trial and counsel desires to display exhibits to the members of the jury, sufficient copies of such exhibits must be made available so as to provide each juror with a copy, or alternatively enlarged photographic copies or projected copies should be used.

[7] Each party shall indicate which witnesses *will* be called in the absence of reasonable notice to opposing counsel to the contrary and which *may* be called as a possibility only. No witness who is not listed will be allowed to testify except for good cause shown, except that each party reserves the right to call such rebuttal witnesses (who are not presently identifiable) as may be necessary, without prior notice to the opposing party.

[8] Only one expert witness on each subject for each party will ordinarily be permitted. If more than one expert witness is listed, the subject matter of each expert's testimony shall be specified.

[9] If any party objects to the admissibility of any portion, the name of the party objecting and the grounds shall be stated, and the parties shall be

prepared to present to the court a copy of a sufficient portion of the deposition transcript to permit the objection to be ruled on in limine at such time as directed to do so. All irrelevant and redundant material and all colloquy between counsel must be eliminated when the deposition is read at trial. If a video deposition is proposed to be used, opposing counsel must be so advised sufficiently before trial to permit any objections to be made and ruled on by the court, so that objectionable material can be edited out of the film before trial.

10 If the case involves personal injuries, a special pretrial memorandum form available from the court's minute clerk or secretary shall also be filed with this order.

11 Except as previously approved by the court, no party's trial brief shall exceed 15 pages. Trial briefs are intended to provide full and complete disclosure of the parties' respective theories of the case. Accordingly each trial brief shall include statements of (a) the nature of the case, (b) the contested facts the party expects the evidence will establish, (c) the party's theory of liability or defense based on those facts and the uncontested facts, (d) the party's theory of damages or other relief in the event liability is established and (e) the party's theory of any anticipated motion for directed verdict. It shall also include citations of authorities in support of each theory stated in the brief. Any theory of liability or defense that is not expressed in a party's trial brief will be deemed waived. Trial briefs need not repeat matters covered in the proposed findings of fact and conclusions of law in non-jury cases.

12 To the extent possible *agreed* instructions shall be presented by the parties. Whether agreed or unagreed, each marked copy of an instruction shall indicate the proponent and supporting authority. All objections to tendered instructions shall be in writing (failure so to object may constitute a waiver of any objection) and shall also include citations to authority. In diversity and other cases where Illinois law provides the rules of decision, use Illinois Pattern Instructions ("IPI") as to all issues of substantive law. As to all other issues, and as to all issues of substantive law where Illinois law does not control, Seventh Circuit pattern jury instructions or, if there are none, *Fifth Circuit* District Judges Association pattern jury instructions are preferred (though care should be taken to make certain substantive instructions on federal questions conform to Seventh Circuit case law). If Fifth Circuit pattern instructions are not otherwise available to counsel, the Chicago Bar Association has a copy of the volume containing such instructions. At the time of trial an unmarked original set of instructions and any special interrogatories (all on 8 1/2" x 11" sheets) shall be submitted to the court, to be sent to the jury room after being read to the jury. Supplemental requests for instructions during the course of the trial or at the conclusion of the evidence will be

granted solely as to those matters that cannot reasonably be anticipated at the time of the preparation of this order.

[13] These shall be separately stated in separately numbered paragraphs. Findings of fact should contain a detailed listing of the relevant material facts the party intends to prove. They should not be in formal language, but should be in simple narrative form. Conclusions of law should contain a full exposition of the legal theories counsel urges.

[14] If this is a case in which (contrary to the normal requirements) discovery has not been completed, this order shall state what discovery remains to be completed by each party.

[15] Copies of objected-to exhibits should be delivered to the court with this order, to permit rulings in limine where possible.

[16] See n.1.

SAMPLE FORM 34

Guidelines for Proposed Findings of Fact and Conclusions of Law

Plaintiff shall first serve and file proposed findings and conclusions. Each defendant shall then serve and file answering proposals.

Plaintiff's proposals shall include (1) a narrative statement of *all facts* proposed to be proved and (2) a concise statement of plaintiff's legal contentions and the authorities supporting them:

(1) Plaintiff's narrative statement of facts shall set forth in simple, declarative sentences all the facts relied upon in support of plaintiff's claim for relief. It shall be complete in itself and shall contain no recitation of any witness' testimony or what any defendant stated or admitted in these or other proceedings, and no reference to the pleadings or other documents or schedules as such. It may contain references in parentheses to the names of witnesses, depositions, pleadings, exhibits or other documents, but no party shall be required to admit or deny the accuracy of such references. It shall, so far as possible, contain no pejoratives, labels or legal conclusions. It shall be so constructed, in consecutively numbered paragraphs (though where appropriate a paragraph may contain more than one sentence), that each of the opposing parties will be able to admit or deny each separate sentence of the statement.

(2) Plaintiff's statement of legal contentions shall set forth all such plaintiff's contentions necessary to demonstrate the liability of each defendant to such plaintiff. Such contentions shall be separately, clearly and concisely stated in separately numbered paragraphs. Each paragraph shall be followed by citations of authorities in support thereof.

Each defendant's answering proposals shall correspond to plaintiff's proposals:

(1) Each defendant's factual statement shall admit or deny each separate sentence contained in the narrative statement of fact of each plaintiff, except in instances where a portion of a sentence can be admitted and a portion denied. In those instances, each defendant shall state clearly the portion admitted and the portion denied. Each separate sentence of each defen-

dant's response shall bear the same number as the corresponding sentence in the plaintiff's narrative statement of fact. In a separate portion of each defendant's narrative statement of facts, such defendant shall set forth all affirmative matter of a factual nature relied upon by such defendant, constructed in the same manner as the plaintiff's narrative statement of facts.

(2) Each defendant's separate statement of proposed conclusions of law shall respond directly to plaintiff's separate legal contentions and shall contain such additional contentions of the defendant as may be necessary to demonstrate the non-liability or limited liability of the defendant. Each defendant's statement of legal contentions shall be constructed in the same manner as is provided for the similar statement of each plaintiff.

SAMPLE FORM 35

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s),	)	NO. C- -WWS
v.	)	ORDER FOR PRETRIAL PREPARATION
Defendant(s).	)	

Good cause appearing, it is hereby ORDERED pursuant to Fed. R. Civ. P. 16(e):

A. **Trial Date.** Trial before the COURT/JURY will begin on _____ at ____.m., in Courtroom No. 9.

Estimated length of trial is _____ days.

B. 1. **Discovery Cutoff.** All discovery shall have been completed and all responses to interrogatories and other requests served and filed by _____.

2. **Designation of Experts:** By plaintiff _____; by defendant _____.

Counsel intending to call an expert witness at trial shall furnish to opposing counsel a written statement of the expert's proposed trial testimony (in narrative form) not less than five days before the expert's deposition is taken.

Experts will be bound by the opinions expressed in their statements and will not be permitted to offer new matter at trial.

C. **Pretrial Conference.** A pretrial conference will be held on _____, at _____.m., in Courtroom No. 9. It shall be attended by counsel who will try the case. All counsel shall be fully prepared to discuss all aspects of the trial.

D. **Pretrial Preparation.**

1. Counsel shall meet and confer in good faith in advance of complying with the following pretrial requirements in order to clarify and narrow the issues for trial, arrive at stipulation of fact, simplify and shorten the presentation of proof at trial, and explore possible settlement.

2. The following matters shall be accomplished not later than _____:

a. Trial memoranda. Each party shall serve and file a trial memorandum which shall briefly state the party's contentions, the relevant facts expected to be proved at trial, and the law on the issues material to the decision. (L.R. 235-8(a))

b. Jury instructions. Each party shall serve and file with the court proposed jury instructions on all substantive issues and on any other points not covered by the court's standard instructions, which may be found in the Ninth Circuit Manual of Model Jury Instructions. Instructions shall be brief, clear, written in plain English and free of argument, and shall be organized in logical fashion so as to aid jury comprehension. (See the attached memorandum) Standard or form instructions, if used, must be revised to address the particular facts and issues of this case. (L.R. 235-8(b)(ii))

c. Findings of fact. In non-jury cases, each party shall serve and lodge with the court proposed findings of fact on all material issues. Findings shall be brief, clear, written in plain English and free of pejorative language, conclusions and argument. (L.R. 235-8(b)(ii))

d. Exhibits. Each party shall provide every other party and the court with one set of all exhibits, charts, schedules, summaries and diagrams and other similar documentary materials to be used at the trial, together with a complete list of all such exhibits (in the form attached). Voluminous exhibits shall be redacted by elimination of irrelevant portions or use of summaries. (Fed. R. Evid. 1006) Each item shall be pre-marked using the form of mark attached; generally, plaintiff's exhibits with numbers, defendant's with letters. (L.R. 235(8)(d))

No exhibits, including damage exhibits, which have not been provided as required by this paragraph will be received at trial.

e. Witnesses. Each party shall serve and file with the court a list of all persons who may be called as witnesses. The list shall include a summary of the substance of each witness' proposed testimony. With respect to expert witnesses, see para. (B)(2) above.

No witnesses not included on the list will be permitted to testify at trial.

In non-jury cases, unless otherwise ordered, each party shall serve and lodge with the court a written narrative statement of the proposed direct testimony of each witness under that party's control (i.e., who will appear without subpoena) in lieu of a summary of testimony. (A memorandum describing this procedure may be obtained from the courtroom deputy.) Each statement shall be marked as an exhibit and be in form suitable to be received into evidence.

f. Designation of discovery excerpts. Each party expecting to use discovery excerpts as part of its case in chief shall serve and lodge with the court a statement identifying (1) by witness and page and line, all deposition testimony and (2) by number and filing date, all interrogatory answers and requests for admission to be used as part of its direct case. Each interrogatory answer intended to be offered as an exhibit shall be copied separately and marked as an exhibit. (L.R. 235-8(c)) The original of any deposition to be used at trial must be filed prior to trial.

g. No other pretrial papers, including a pretrial statement (L.R. 235-7), are required without further order of the court.

3. The following matters shall be accomplished no later than the day on which the pretrial conference is to be held:

a. Objections to evidence. Each party anticipating making an objection to any testimony or exhibits expected to be offered, or wishing to make a motion in limine, shall file and serve a statement briefly identifying each item objected to and the ground for the objection. (L.R. 235-9)

b. Jury voir dire and verdict forms. Each party shall submit proposed questions for jury voir dire and a proposed form of verdict. (L.R. 235-8(b)(i); 245-2)

E. **Status and Discovery Conferences.** Any party desiring to confer with the court may, upon notice to all other parties, arrange a conference through the courtroom deputy (telephone

(415) 556-3120). Conferences may be conducted by conference telephone call. The court encourages the parties to bring discovery disputes before the court in the first instance informally by way of a conference. (L.R. 230-4(e); 285-3)

F. **Settlement Conferences.** Any party wishing to arrange a settlement conference before another judge or magistrate judge may do so by contacting the courtroom deputy. (L.R. 240-1)

G. **Copies.** Each document filed or lodged with the court must be accompanied by a copy for use in the judge's chambers. In addition, one copy of the witness and exhibit list should be provided to the court reporter.

H. **Transcripts.** If transcripts will be requested during or immediately after the trial, arrangements must be made with the court reporter at least one week before trial commences.

I. **Sanctions.** Failure to comply with this order is cause for sanctions under Fed. R. Civ. P. 16(f).

J. **Guidelines.** Counsel may obtain a copy of the court's Guidelines for Discovery, Motion Practice and Trial from the clerk's office.

DATED:

_____

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Guidelines for Preparation of Jury Instructions

The purpose of jury instructions is to inform jurors of the legal principles they must apply in deciding the case. It is essential, therefore, that instructions be written and organized so that they will be understood by the jurors. To this end counsel are requested to follow these guidelines in preparing jury instructions.

The court has prepared standard procedural instructions for civil and criminal cases which can be found in the Ninth Circuit Manual of Model Jury Instructions. Counsel may request revisions, additions or deletions in the standard instructions appropriate for the case. There will ordinarily be no need, however, to submit procedural instructions.

Substantive instructions should be submitted as directed by the order for pretrial preparation. Counsel may submit both preliminary instructions and instructions to be given at the close of the case. Verbatim copies of Devitt & Blackmar or other pattern instructions will ordinarily not be accepted. Instructions should be drafted for the particular case. This means that their text will be confined to what the jury needs to decide that case.

Instructions should be organized so as to state, first, the essential elements of the offense, claim or defense, followed by explanation or clarification of each element as needed in light of the facts of the case. Commonly, the explanation will give the jury the relevant factors to be considered.

The instructions as a whole should be organized into a logical sequence conforming to the analytical approach the jury should take to the case. It is well to explain this organization to the jury in the instructions and to provide transitional statements.

If the instructions cover controversial points of law, those should be discussed, with citation of authorities, in a brief accompanying memorandum.

In drafting instructions, counsel should follow these guidelines:

1. Instructions should be an accurate statement of the law;

2. Instructions should be as brief and concise as practicable;

3. Instructions should be understandable to the average juror;

4. Instructions should be neutral, unslanted and free of argument;

Counsel should avoid submitting formula instructions, statements of abstract principles of law (even if taken from appellate opinions), lengthy recitations of the parties' contentions, additional cautionary instructions (unless clearly required), and instructions on permissible or prohibited inferences (this will normally be left to closing argument). For further guidance, consult 69 Calif. L.R. 731 (May 1981).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. _____ DATE _____

_____ vs. _____

Exhibit List

( ) Plaintiff **( ) Defendant**

Exhibit Number	Date		Description
	Marked for Identification	Admitted in Evidence	

Plaintiff's Exhibit Markers	Defendant's Exhibit Markers

•PLAINTIFF•	*DEFENDANT*
United States District Court Northern District of California Case No._____ Case Title_____ Exhibit No._____ Date Entered:_____ [ ],Clerk By:_____, Deputy Clerk	United States District Court Northern District of California Case No._____ Case Title_____ Exhibit No._____ Date Entered:_____ [ ],Clerk By:_____, Deputy Clerk
•PLAINTIFF•	*DEFENDANT*
United States District Court Northern District of California Case No._____ Case Title_____ Exhibit No._____ Date Entered:_____ [ ],Clerk By:_____, Deputy Clerk	United States District Court Northern District of California Case No._____ Case Title_____ Exhibit No._____ Date Entered:_____ [ ],Clerk By:_____, Deputy Clerk
•PLAINTIFF•	*DEFENDANT*
United States District Court Northern District of California Case No._____ Case Title_____ Exhibit No._____ Date Entered:_____ [ ],Clerk By:_____, Deputy Clerk	United States District Court Northern District of California Case No._____ Case Title_____ Exhibit No._____ Date Entered:_____ [ ],Clerk By:_____, Deputy Clerk

SAMPLE FORM 36

NOTE: Use this form for both Status Report (complete to extent possible at time filed) and Final Pretrial Order (complete fully)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

_____	)	
Plaintiff,	)	
	)	
vs.	)	CIV-
_____	)	
Defendant.	)	

(Status Report)
or
(Final Pretrial Order)
(use title as appropriate)

Date of conference: _____, 19___.
Appearing for plaintiff: _____
Appearing for defendant: _____
Jury Trial Demanded _____ **Non-Jury Trial** _____

I. **Brief Preliminary Statement.** State summarily the facts and positions of the parties. (Suitable for use as the statement of the case in jury selection.)

II. **Jurisdiction.** The basis on which the jurisdiction of the court is invoked.

III. **Stipulated Facts.** List stipulations as to all facts that are not disputed or reasonably disputable, including jurisdictional facts.

Examples:

A. All parties are properly before the court;

B. The court has jurisdiction of the parties and of the subject matter;

C. All parties have been correctly designated;

D. Etc.

IV. **Disputed Facts.** Those facts not stipulated to, which are legitimately in dispute and as to which opposing counsel expects to

present contrary evidence at trial or genuinely challenges on credibility grounds.

Examples:

A. Was plaintiff injured and damaged by the negligence of the defendant?

B. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

C. Etc.

V. **Legal Issues.** State separately, and by party, each disputed legal issue and the authority relied upon.

Examples:

A.

B.

VI. **Contentions and Claims for Damages or Other Relief Sought**

A. **Plaintiff:**

Examples:

1. As to liability.
2. As to damages.
3. Etc.

B. **Defendant:**

Examples:

1. As to liability.
2. As to damages.
3. Etc.

VII. **Exhibits.** (The following exclusionary language **must** be included.)

Exhibits not listed will not be admitted by the court unless good cause be shown and justice demands their admission.

A. **Plaintiff:**

Number	Title/Description	Objection	Federal Rule of Evidence Relied Upon
(Pre-marked for trial) *Examples:*			
1	Police Report	Hearsay	803(8)
2	Photo of plaintiff	None	

B. **Defendant:**

Number	Title/Description	Objection	Federal Rule of Evidence Relied Upon
(Pre-marked for trial) *Examples:*			
1	Photo of scene	None	
2	Scale model	None	

VIII. **Witnesses.** (The following exclusionary language **must** be included)

No unlisted witness will be permitted to testify as a witness in chief except by leave of court when justified by exceptional circumstances.

A. **Plaintiff:**

Name	Address	Proposed Testimony

B. **Defendant:**

Name	Address	Proposed Testimony

IX. **Estimated Trial Time:** For liability _____;
For damages _____

X. **Bifurcation Requested:** Yes _____ No _____

XI. **Possibility of Settlement:**

Good _____ Fair _____ Poor _____

XII. **For Status Reports Only** *(Not for Final Pretrial Orders)*

A. **Possibility of Court-Annexed Arbitration—Local Rule 43.**

Include a statement as to the eligibility of this case for mandatory arbitration and/or whether you wish to consent to arbitration under Local Rule 43. In accordance with 28 U.S.C. § 652(a)(2) and Local Rule 43(B)(2)(c), this statement should also include any necessary certification as to amount of damages.

B. **Mediation Requested.** Yes _____ No _____

C. **Parties Consent to Trial by Magistrate Judge.** Yes _____ No _____

D. **Management Plan Requested.** Standard _____
Specialized _____

All parties approve this order and understand and agree that this order supersedes all pleadings, shall govern the conduct of the trial and shall not be amended except by order of the court.

Counsel for Plaintiff

Counsel for Defendant

APPROVED this _____ day of _____, 19____.

UNITED STATES DISTRICT JUDGE

SAMPLE FORM 37

Juror No. _____

Juror Questionnaire

Name of case: _____
Case number: _____
Nature of case: _____
_____
_____
Trial date: _____

* * * * *

1. Name: _____
2. Age: _____
3. What community or area do you live in? _____
4. Area lived in before current address: _____
5. Occupation: _____
6. Employer: _____
7. How long? _____
8. Former employer: _____
9. How long? _____
10. Marital status: ( ) Married ( ) Divorced ( ) Separated ( ) Single
11. Name of spouse: _____
12. Occupation: _____
13. Spouse's employer: _____
14. How long? _____
15. Former employer: _____
16. How long? _____
17. Number of children & ages: _____
18. Occupations of adult children: _____

_____
_____

19. If you or your spouse were in the military service, state:
    What branch? _____ When? _____
    Serve in combat? _____ Highest rank attained? _____
    Please supply answers about spouse's military service, if any:
    _____

20. Are you, or have you been, employed by a governmental entity? _____

21. If "yes," what entity? _____
What position, title, or capacity did you hold? _____
How long work there? _____ When leave? _____

22. Are members of your family, or have they been, employed by a governmental entity?_____

23. If "yes," what family members and what entities? _____
_____
_____

24. Please state your educational background: _____
_____

25. What high school did you attend? _____
Where? _____ Years: _____

26. If you attended college, please state:
Name of college: _____
Location: _____
Major subject: _____ Did you graduate? _____
Highest degree attained: _____

27. Have you previously served on a civil jury? _____
If "yes," without stating the result, did you reach a verdict in each case? _____

28. Have you previously served on a criminal jury? _____
If "yes," without stating the result, did you reach a verdict in each case? _____

29. Have you ever testified as a witness in a case? _____
If "yes," please state nature of case and your relationship to it:
_____

30. Have you ever been a party to a lawsuit? _____
If "yes," please state nature of case and your participation in it: _____

31. Do you have any physical problems which may interfere with your service as a juror? _____
If "yes," please state nature of problem: _____
_____
_____

32. Do you have any pressing personal or business affairs which would make jury service of _____ days a week for a trial which may last for a period of _____ weeks difficult at this time? _____

If "yes," please state nature of difficulty: _____

_____

33. Have you read, seen, or heard anything about any aspect of this case from any source whatsoever? If "yes," please describe what you may have learned about this case: _____

_____

_____

_____

34. Are you aware of any reason why you would not be able to serve as a fair and impartial juror if selected? If "yes," please state the reason: _____

_____

_____

I declare (affirm, certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Signed on this date: _____

_____

(signature)

_____

(print or type name)

SAMPLE FORM 38

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Plaintiff,	)	
vs.	)	IP 88-1453-C
Defendant.	)	
Counterclaim Plaintiff,	)	
vs.	)	
Counterclaim Defendant,	)	
and	)	
Additional Counterclaim Defendant.	)	

Notice Regarding Jury Selection and Opening Statements

This matter comes before the court *sua sponte* regarding the scheduling of jury selection and opening statements in the above trial. Jury selection will commence on **Friday, October 18, 1991 at 8:30 a.m. in Room 307** of the United States Courthouse in Indianapolis, Indiana. Counsel will be permitted to make a brief opening statement to the entire panel of prospective jurors prior to the commencement of voir dire. The court requests that counsel in their opening statements introduce themselves, their clients and refer to the names of all witnesses they expect to call so that the prospective jurors may be questioned about whether they are familiar with counsel, the parties, witnesses or the issues in the

case. No additional opening statements will be allowed. After the jury is impaneled, the court will read the preliminary instructions. The trial will then be recessed until Monday, October 21, 1991, when the presentation of evidence will begin. The court expects that all evidence in the trial will be completed no later than Thursday, October 24th.

ALL OF WHICH IS ORDERED this ___ day of ___, 19__.

_____
United States District Court

Copies to:

Attorneys
Court Reporter

SAMPLE FORM 39

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Plaintiff,	)	
vs.	)	IP 88-359 C
Defendants.	)	

Order on Opening Statements and Trial Procedures

This matter comes before the court *sua sponte* in preparation for the trial which will commence on Monday, November 6, 1989. The court wants counsel for the parties to be aware that they will be expected to make their opening statements in the presence of all prospective jurors as a part of the jury selection process. This will be done to acquaint all prospective jurors with the case so that the parties and the court can better determine whether any particular prospective juror can fairly sit on this case. *See in re Yagman*, 796 F.2d 1165 (9th Cir. 1986).

Counsel should keep in mind that the purpose of an opening statement is to inform the jurors of the nature of the case, the facts they expect to be proved in the trial and the issues in the case. *See Wolf by Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613 (D. N.J. 1982). An opening statement is *not* an argument to the jury, and it is *not* permissible to attempt to argue to the jury about the application of the law or the facts at this stage of the case. Arguments of that nature are reserved for the final arguments of counsel at the conclusion of the evidence in the case.

Rulings on the various motions in limine filed by the parties will be issued before counsel will be permitted to make an opening statement. Counsel should also keep in mind that they should not make any reference, either directly or indirectly, to matters arguably within the prohibitions of an order sustaining a motion in limine.

Finally, the ground rules with respect to the opening statements and trial procedures are as follows:

1. Opening statements, final arguments and the questioning of witnesses is to be done from the podium. The only exception to this rule is that counsel may leave the podium if it is necessary to do so in connection with the handling of an exhibit or the performance of a demonstration. Permission to do so need not be requested, but permission to do anything else away from the podium must be sought and obtained in advance.

2. Exhibits are not to be displayed in a manner visible to prospective jurors or jurors until admitted into evidence. The only exception to this rule are that exhibits which have been stipulated by the parties to be admissable in evidence in this case may be displayed to the prospective jurors during opening statements.

3. Counsel for the plaintiff may use up to 20 minutes on the opening statement. Each defendant may use up to 15 minutes on opening statement. No party is required to make an opening statement if they do not wish to do so, and none of the parties are required to use all of the time which is allotted to them.

4. This trial will be conducted under the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the local rules of the United States District Court for the Southern District of Indiana and the orders which have been and will be issued by the judge and the magistrate judge in this case.

5. Both peremptory and cause challenges to prospective jurors will be made on the record at the bench, and out of the hearing of the prospective jurors. The court will announce the number of peremptory challenges which will be permitted to each side prior to the first challenge of prospective jurors.

6. Counsel are requested to notify the court of any witness or attorney scheduling problems or needs as much in advance as possible.

All of which is ORDERED this ____ day of _____, 19__.

_____

United States District Court

Copies to:
Attorneys

SAMPLE FORM 40

Civil Jury Trial Checklist

NOTE: Roll will have been taken, and the appropriate number of prospective jurors will have been seated in "the box" in front of the bar.

1. Call case. Are the parties present and ready?

2. The entire jury panel will please stand and be sworn for examination on voir dire.

3. Ladies and gentlemen, the court will now ask you questions to determine whether you can sit as fair and impartial jurors in this case. I hope you understand that these questions are not intended to embarrass you or to pry into your personal affairs. If your answer to a question is "yes," please raise your hand so that additional questions can be asked. If the answer to a question is "no," you need do nothing; we will assume by your silence that your answer is no. Those jurors who have not been seated in "the box" should listen closely to these questions, because you may be seated in "the box" if other prospective jurors are excused. If in response to any question you would feel more comfortable responding to the court at the bench, please let me know.

4. The case which will be tried today is entitled _____ vs. _____. The plaintiff claims _____ which occurred on _____ at _____. The defendant denies any responsibility for the damages claimed by plaintiff.

a. Have any of you ever seen or heard anything about this case from any source whatsoever? (I take it by your silence that none of you have.)

b. The plaintiff is seated at counsel table. Mr./Ms._____, will you please stand. Do any of you know the plaintiff? Plaintiff is represented by _____. Mr./Ms. _____ is a member of the firm of _____. Do any of you know Mr./Ms. _____ or any member of their firm on a social or professional basis? (Or introduce the attorney and let him introduce his client.)

c. The defendant is seated at the other counsel table. Mr./Ms. _____, will you please stand? Do any of you know the defendant? Defendant is represented by Mr./Ms. _____. Mr./Ms. _____ is a member of the firm of _____. Do any

of you know Mr./Ms. _____ or any member of their firm on a social or professional basis?

d. I am going to read a list of witnesses who may be called during this trial. Please raise your hand if you know any of these persons (read list).

e. I have briefly described the nature of this case. Have you, any members of your family or close friends ever been involved in a (insert appropriate facts). When did the accident take place? Who was driving? Who was hurt? How badly? Was any claim made for injuries? Was there litigation? Do you feel that this accident might have some bearing on your judgment if you were chosen as a juror in this trial?

f. The plaintiff claims the following injuries: _____. Have you, any member of your family or close friends ever sustained similar injuries?

g. Have any of you, any member of your family or close friend ever been a plaintiff or a defendant, or a witness in any lawsuit other than a domestic relations or a probate proceeding?

h. Do any of you have strong feelings either for or against a party who brings a personal injury suit?

i. Do any of you not drive a car?

j. Is there anything which has occurred to any of you or are there any facts which you think we should know about which might have a bearing on your judgment in this case?

k. Do all of you understand that this is a civil case which is to be decided by the relative weight of evidence on each side? And that this is different from a criminal case where the government has to prove it's case beyond a reasonable doubt?

l. Do all of you understand that you are to wait until all the evidence has been presented and you have been instructed as to the law which is to be applied, before making up your minds as to any fact or issue in this case?

m. (If you were either the plaintiff or the defendant, would you be willing to have six jurors with the same frame of mind that you now have sit in judgment in your case?)

n. This case is expected to take ___ days. Would the length of the trial create an undue hardship for any of you?

o. Do any of you have any other reasons whatever, such as a physical defect, a health problem or home problems which might interfere with your serving as fair and impartial jurors in this case?

p. **Pose questions submitted by counsel.**

5. Ladies and gentlemen, on the easel you will see a number of questions. (See jury questions at end of checklist.) Starting with _____, please stand and answer the questions. The last question asks you about your service on prior juries. With respect to civil cases, please indicate the nature of the subject matter involved in each of the civil juries you have been on.

Do counsel have any additional questions to be presented to panel? **Do counsel pass the panel?**

6. (After the court has finished voir dire) Those jurors who have not been called forward and seated in "the box" are excused subject to call by the jury clerk. Thank you for assisting us in this selection process.

7. Ladies and gentlemen, we will now take a 15 minute recess while counsel are selecting those of you who will serve as jurors on this case. I admonish you not to discuss this case among yourselves or with anyone else during the entire course of the trial. NOTE: Any *Batson* challenge should be asserted at this time so that, if necessary, corrective action can be taken before seating the jury.

8. (After recess) The record may show the presence of the defendant and the presence of the jury panel of __ with roll call waived. The clerk will please read the names of the jurors selected to try this case. As your name is called, please come forward and be seated as directed by the bailiff.

9. Those members of the jury panel who were not selected as trial jurors are excused subject to call by the jury clerk. Thank you for assisting in this jury selection process.

10. Will those who have been chosen as jurors in this case please stand and be sworn.

11. Admonition and instructions to jury prior to the commencement of a civil case.

Admonitions and General Instructions to Jury Prior to Commencement of Civil Case

Ladies and gentlemen, you have been sworn as the jury to try this case. I take this opportunity to explain to you your function and duties, the role of the court, and the part the lawyers will play in the trial.

You and I are to be the judges in this case. You are the judges of the facts. I will decide all questions of law that arise during the trial. At the conclusion of the trial, I will instruct you on the law governing this case.

You must not discuss this case among yourselves or with anyone else during the course of the trial. You are not to permit anyone to talk about the case within your hearing. You are to avoid visiting the scene of any incidents referred to in the trial.

You must not form any opinion regarding any fact or issue in the case until you have received the entire evidence, have heard arguments of counsel, have been instructed as to the law of the case, and have retired to the jury room.

In order that you decide this case only upon the evidence presented, I direct you not to read, listen to, or observe any newspaper, radio or television account of the trial while it is in progress.

You must avoid even the *appearance* of any improper conduct. In this regard, I caution you not to talk with any of the parties, lawyers, or witnesses in the case at any time during the trial, even upon matters unconnected with the case. Should anyone approach you about the case in any manner, report it promptly to me or to one of the bailiffs.

From time to time I will be asked to rule on the admissibility of evidence or the propriety of questions asked of witnesses. You are not to be concerned with the reasons for the court's rulings. You must not attempt to draw any inference in favor of either side, because the rulings will simply be based upon the law.

In our adversary system, it is the duty of the lawyers to present their client's case in its most favorable light. You must remember, however, that arguments and comments of counsel are not evidence in the case and must not be treated by you as evidence.

You will be the sole judges of the credibility of witnesses and the weight to be given to the testimony of each of them. You may consider each witness's ability and opportunity to observe, their manner while testifying and any interest they may have in the case.

You will be permitted to take notes during the trial—for your use only—don't be too detailed. The court will maintain custody of the notes during recesses and they will be destroyed after the trial has concluded.

You are not permitted to ask questions of witnesses. However, if you have a question relating to any significant matter, write it out and give it to the bailiff so that it may be brought to the court's attention.

(Include if appropriate) If any of you from out of town have any questions concerning accommodations, transportation or other arrangements, please see the bailiff during the recess.

On our staff we have a bailiff. If you need anything, the bailiff will assist you.

At this time, I would like to introduce the court staff to you.

Making a verbatim record of the trial proceedings is our court reporter _____.

Swearing in all witnesses, keeping the exhibits in order and entering all minutes relating to the trial is our courtroom deputy clerk _____.

Finally, to assist in the smooth function of this trial is my law clerk and courtroom bailiff _____.

12. **Rule of Exclusion of Witnesses.** Will all the witnesses please come forward and give your names to the clerk. (Note: more dignity is given to the oath if each witness is sworn individually just before he testifies. This procedure is recommended.)

To Witnesses: Ladies and gentlemen, the rule of exclusion of witnesses has been invoked in this case. This means that you are to remain outside the courtroom during the entire progress of this trial except when you are called to the witness stand. You are not to discuss your testimony with anyone except counsel and then, only when no one else is present, until after the trial has been completed. You may now leave the courtroom until you are called by the bailiff to testify.

13. Opening statements of counsel.

14. **Short Admonition to Jury.** Ladies and gentlemen, we will now take a short recess. Please remember the admonition given to you by the court about not discussing this case or forming any conclusions until after all of the evidence is in. You are to be back in the jury box at _____.

Admonition at Noon and Evening Recess. Ladies and gentlemen, we are now going to take the noon (evening) recess. Please remember the admonition given to you by the court about not discussing any aspect of this case with anyone. You are not to make up your mind as to any fact or issue until all the evidence has been presented and the case is finally submitted to you. You are to avoid visiting the scene of any incident that may have been referred to in the evidence. I instruct you not to read, listen to, or observe any newspaper, radio or television account of this trial while it is in progress. Please be back in the jury box at ____. (The audience will remain seated while the jurors retire from the courtroom.)

15. (After each recess) The record may reflect the presence of the jury with roll call waived.

16. Presentation of evidence.

17. Settlement of instructions—permit counsel to make record in absence of jury. (See Fed. R. Civ. P. 51)

18. Arguments of counsel.

19. Instruct the jury. (NOTE: Consider instructing jury before counsel present closing arguments.)

20. Do counsel have any additions or corrections to the instructions.

21. Designate by lot, then dismiss and thank alternate juror.

22. The clerk will please swear the bailiffs.

23. The bailiffs will conduct you to the jury room. Ladies and gentlemen, if you have any questions during your deliberations which pertain to the evidence, the instructions or the verdicts, please write them out and give them to the bailiff. You need not write out requests for coffee, phone calls or for care of your car. (Give anticipated time for meal, if appropriate). The jury will now retire to deliberate.

24. (After jury returns) Ladies and gentlemen, have you reached a verdict? (Foreman hands verdict to bailiff who gives it

to the court. The court reads it and hands it to the clerk). The clerk will please read and record the verdict.

25. Does either counsel wish to have the jury polled?

26. Ladies and gentlemen, thank you for your services in this case. I am proud of the fact that citizens such as yourselves are willing to serve on juries. The jury is dismissed.

Release Jurors
From Admonitions

Jury Questions

Name
City - give area but not address, e.g., North Phoenix
Education:
    Self
      College - major area of study
                - business classes
      Graduate School - area of study
    Spouse
    Children - field of study beyond high school
Military: branch, rank, years of service
Job:
    Self - duties, length
    Spouse - same
    Children - same
Prior Job:
    Self
    Spouse
Newspapers/periodicals subscribed to:

Civic, Social, Fraternal, Union, or Professional Organizations:

Bumper Stickers on Your Car - content (response is optional)
Prior Jury Duty: civil - criminal - grand jury

SAMPLE FORM 41

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Procedure for Presentation of Direct Testimony by Written Statement

In bench trials the court expects counsel to prepare and exchange a narrative written statement for each witness whose direct testimony will involve considerable expository matter but no significant issues of credibility. These witness statements shall be used at trial in accordance with the following procedure.

Form of statement. For each witness whose direct testimony will be presented in statement form, counsel shall prepare a statement setting forth in declaratory form all of the facts to which that witness will testify. The facts shall be stated in narrative form, not by question and answer. The statement shall contain all of that witness's direct testimony so that a person reading it will know all of the relevant facts to which the witness would testify. It shall not be sworn or notarized.

Use of statements. At the trial, each witness whose direct testimony has previously been submitted in statement form shall take the stand and under oath shall adopt the statement as true and correct. The party offering that witness shall then offer the statement as an exhibit, subject to appropriate objections by the opposing party on which the court will then rule.

The witness will then be allowed to supplement his statement by any additional live direct testimony considered necessary by counsel.

Thereafter cross-examination shall proceed in the ordinary course, followed by redirect, etc.

Exceptions to use of statements. Statements will be required of the parties and other witnesses under their control, such as employees, contractors, experts, associates, etc. They are not to be used for adverse parties or for persons whose attendance is compelled by subpoena.

Exhibits. Documents to be offered as exhibits shall not be attached to witness statements but shall be pre-marked and exchanged along with other proposed exhibits in the usúal fashion.

Schedule for exchange of statements. Ordinarily, witness statements will be exchanged one week in advance of the pretrial conference. The court will set dates for the serving and filing of witness statements in connection with the pretrial schedule.

SAMPLE FORM 42

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s),	)	No.
v.	)	
Defendant(s).	)	

Consent to Proceed Before a United States Magistrate Judge

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above-captioned civil proceeding hereby waive their right to proceed before a judge of the United States District Court and consent to have a United States Magistrate Judge conduct all further proceedings in the case, including the trial of the case, and order the entry of judgment, and to take any appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any judgment of the district court.

Counsel for Plaintiff	Counsel for Defendant

Order of Reference

IT IS HEREBY ORDERED that the above-captioned matter be referred to

1. the office of Chief United States Magistrate Judge _____ for assignment;
2. to Magistrate Judge _____.

The designated magistrate judge will conduct all further proceedings and enter judgment in accordance with 28 U.S.C. § 636(c) and the foregoing consent of the parties.

DATE

United States District Judge

SAMPLE FORM 43

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____x STANDARD
REFERRAL ORDER
_____x CV_____

The civil case hereinabove set forth is referred to Magistrate Judge _____ [ ] for the following pretrial purposes:

____ All of the following;

or

Those purposes indicated below:

____ 1. To enter the scheduling order provided for in Fed. R. Civ. P. 16(b);

____ 2. To consider holding a discovery conference and entering the related order provided for in Fed. R. Civ. P. 26(f);

____ 3. To hear and determine any disputes arising from discovery;

____ 4. To hear and determine any other pretrial matters to the extent allowed by 28 U.S.C. § 636(b)(1)(A);

____ 5. To consider the possibility, if any, of settlement and to assist therewith as may be appropriate;

____ 6. To prepare a pretrial order where such order seems indicated;

____ 7. To schedule an appropriate trial date, in consultation with the chambers of the undersigned;

____ 8. To file a report with the undersigned within 120 days [ ] as to the status of the case, in the event the tasks set forth above are not then completed.

____ 9. _____

____ 10. _____

SO ORDERED.

_____
U. S. D. J.

Dated: Brooklyn, New York
_____, 19___.

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About the Federal Judicial Center

The Center is the research and education arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs 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 Court Education Division provides educational programs and services for non-judicial court personnel such as those in clerks' offices and probation and pretrial services offices.

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

The Planning & Technology Division supports the Center's education and research activities by developing, maintaining, and testing information processing and communications technology. The division also supports long-range planning activity in the Judicial Conference and the courts with research, including analysis of emerging technologies, and other services as requested.

The Publications & Media Division develops and produces educational audio and video programs and edits and coordinates 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.

The Center's Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

The Interjudicial Affairs Office serves as clearinghouse for the Center's work with state–federal judicial councils and coordinates programs for foreign judiciaries, including the Foreign Judicial Fellows Program.