

Chapter X

Techniques for Expediting and Streamlining Litigation

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I. INTRODUCTION

§ X:1 Scope note

The high stakes and complexity of business disputes test the ability of federal courts to dispense civil justice speedily and inexpensively. If participants believe they will not benefit from quick and low-cost justice, they may try to evade it.

This chapter identifies techniques that experience has shown can expedite and streamline commercial cases even in the face of opposition. It begins by discussing interests that may cause participants in civil litigation to resist its efficient conduct and outlines ways to give them a common interest in efficiency. It then reviews techniques—from the start of a case through trial—for overcoming resistance and realizing the advantages of litigating commercial disputes faster and easier.

The organization of the chapter reflects the three relationships that exist in every civil case—between client and counsel, between opposing sides, and between both sides and the court. Each relationship provides an opportunity to establish and implement techniques that promote expediting and streamlining the litigation. We will treat the techniques that apply to each relationship in turn.

II. PRELIMINARY CONSIDERATIONS AND STRATEGIC OBJECTIVES

§ X:2 Overview

Rule 1 of the Federal Rules of Civil Procedure expresses the federal court system’s aspiration of securing “the just, speedy, and inexpensive determination of every action.”¹ Litigants who genuinely seek civil justice—people who have suffered from wrongdoing as well as those defending against false allegations—share the ideal of fair and fast decisions on the merits at a reasonable cost. This chapter is primarily for them.

This chapter also aims to help courts and the lawyers who represent these justice-seeking litigants. Rule 1, after all, applies not to the parties directly but to them.

The original version of Rule 1, dating to its adoption in 1937, called only for *construction* of the Federal Rules of Civil Procedure so as to secure just, speedy, and inexpensive determinations. A 1993 amendment added a requirement for *administration* of the rules in that way as well. According to the Advisory Committee’s notes, the addition aimed to “recognize the affirmative duty of the court to exercise the authority

¹ Fed. R. Civ. P. 1.

conferred by these rules to ensure that civil litigation is resolved not only fairly, but without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.”² Judges and attorneys both have a duty to construe and administer the rules of procedure to effectuate the Rule 1 ideal.

But this model of judges, parties, and counsel pursuing civil justice involves imperfect actors. The system struggles with their flaws, none more than the blemish of self-interest. That not everyone really cares about justly, speedily, and inexpensively determining every civil action in the federal courts should surprise no one. Some participants in fact find Rule 1 counter to their own interests; some let self-interest prevail.

Who are these resisters of fast and inexpensive civil justice? Are they judges? Parties? Their lawyers?

§ X:3 Sources of resistance to expediting and streamlining litigation

Judges are seldom the problem. They generally do want fast and cost-effective civil justice. For one thing, under the Civil Justice Reform Act of 1990,³ they have to report their own slowness in moving cases.⁴ For another, an appellate court may overrule

² Fed. R. Civ. P. 1 Advisory Committee’s Note.

³ 28 U.S.C.A. §§ 471-82.

⁴ For examples of information that federal courts must disclose, see *The Judicial Business of the United States Courts 2004*, <http://www.uscourts.gov/judbus2004/contents.html> and *Federal Court Management Statistics 2004*, <http://www.uscourts.gov/cgi-bin/cmsd2004.pl>. These statistics include multiple measures of efficiency, including each district court’s median time from filing of a civil case to disposition, the percentage of its cases pending more than three years, and the number of civil cases per judgeship. The reports also show each court’s ranking within its circuit and in comparison to all district courts.

Certain of the reports track, *by judge*, the number of motions pending six months or more and the number of cases pending at least three years. See 28 U.S.C.A. § 476(a) (mandating contents “for each judicial officer” of semiannual report by Administrative Office of U.S. Courts). The reports also compare each judge’s performance against his or her peers on the same court and circuit and nationwide. Although litigants do not have standing to enforce the reporting requirements, *Lawson v. Callahan*, 111 F.3d 403, 404-05 (5th Cir. 1997), the statistics do exert a “normative effect” on “the ways in which courts do their business,” *U.S. East Telecomm., Inc. v. U.S. West Information Systems, Inc.*, 15 F.3d 261, 263 (2d Cir. 1994). Having “to explain in a published report why the case had not yet been resolved...generally is perceived (whether correctly or incorrectly) as something of a stigma” to the reporting judges. *Otis v. City of Chicago*, 29 F.3d 1159, 1172 (7th Cir. 1994) (Rovner & Cudahy, JJ., concurring in judgment).

The semiannual publication of judicial statistics may influence strategy. Plaintiffs generally will shun courts that move cases slowly, for example, and defendants typically will embrace them. See *infra* §§ X:20-23. The delicate matter of an individual judge’s less-than-stellar performance in the statistics,

them if they reach the wrong decision. And the great majority of federal judges simply believe in the civil justice system and work hard to make it operate fairly.

The current *Manual for Complex Litigation* emphasizes the theme of judicial duty, asserting that “[f]air and efficient resolution of complex litigation *requires* at least that [] the court exercise early and effective supervision (and, where necessary, control)”⁵ The Judicial Conference of the United States, by contrast, appeals to judges’ altruism *and* self-interest, assuring them that “[m]anaged cases will settle earlier and more efficiently, and will provide a greater sense of justice to all participants. Even in the absence of settlement, the result will be a more focused trial, increased jury comprehension, and a more efficient and efficacious use of our scarcest institutional resource, judge time.”⁶ Another source notes that “[j]udges who think they are too busy to manage cases are really too busy not to.”⁷

Parties—and the lawyers, who must represent them zealously⁸—do not always share the judiciary’s interests. Like the guilty criminal defendant who wants freedom instead of justice, the wrongdoing civil defendant and the lawsuit-abusing civil plaintiff prefer victory to a just result. Ideally, the lawyers will behave strictly in keeping with their obligations as officers of the court and will restrain their clients from pursuing self-interest inappropriately.⁹ But the clash of interests between the parties creates incentives for them and their counsel to take advantage of imperfections in the civil justice system. Examples include:

moreover, may make him or her surprisingly receptive to diplomatic suggestions on ways to expedite the case. Such a judge may in fact welcome innovative proposals that promise to relieve the statistical pressure.

Finally, the flood of decisions in March and September of each year coincides with the final months, respectively, of the two semiannual reporting periods. The best times to take advantage of the reports’ “normative effect” may thus be at the ends of February and August.

⁵ Federal Judicial Conference, *Manual for Complex Litigation*, Fourth, § 20 (2004) (emphasis added).

⁶ The Judicial Conference of the United States, *Civil Litigation Management Manual* at 1 (2001).

⁷ Schwarzer and Hirsch, *The Elements of Case Management* 1 (1991).

⁸ See, e.g., Preamble: A Lawyer’s Responsibilities, American Bar Association Model Rules of Professional Conduct (5th ed.) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

⁹ Lawyers have an ethical obligation to “make reasonable efforts to expedite litigation consistent with the interests of the client.” Rule 3.2, American Bar Association Model Rules of Professional Conduct (5th ed.).

- Seeking injunctive relief before the defendant has time to defend itself properly.
- Pursuing claims, usually weak ones, for the purpose of disciplining or injuring a competitor or forcing a settlement disproportionate to the claimant's injury.
- Raising the cost of resolving claims in order to wear down or distract the opposition¹⁰ or establish a reputation as a fierce litigant.
- Seeking sanctions, particularly against counsel, in an effort to gain tactical advantage.
- Delaying trial preparation or trial without legitimate cause.

Thus, although in the abstract parties and counsel may endorse the just, speedy, and inexpensive resolution of civil disputes, they in fact may favor the opposite. And the complexity and high stakes of commercial litigation multiply the opportunities for and consequences of such abuses.

§ X:4 Overcoming resistance

We believe that the best techniques for streamlining and expediting commercial litigation provide incentives for the participants to align themselves with the system's goal of efficient civil justice. These techniques include measures that involve only one side—such as fee arrangements that reward efficiency and trial team procedures that economize on costs without compromising likelihood of success. Others involve interaction between opposing counsel—including establishment of a good working relationship and agreeing on ground rules for discovery, motion practice, and the like. And some techniques will require the court to exercise its authority—for example, to set and keep a firm trial date, actively discourage squabbles between lawyers, minimize duplicative litigation through transfer or consolidation, impose time limits, and employ creative ways to resolve cases on the merits.

The circumstances of each case will determine your success in implementing these techniques. In an ideal world, all the participants would agree to adapt and apply efficiency-enhancing measures. In the real world, not all clients will embrace optimal fee arrangements and trial team structures, not all lawyers will accept reasonable

¹⁰ See, e.g., Colloquy on Complex Litigation, 1981 B.Y.U. L. Rev. 741, 744 (“Very often, a case is designedly made complex because it is in the interest of one party or the other to make it so. To achieve wear-down exposure, bring a lot of people in. If the attorney wants to assert the case is beyond the grasp of jurors, he goes in every direction to make the case seem inordinately complex.”).

compromises on procedures, and not all judges will make effective use of their authority to manage the litigation. You must work hard to persuade them.

The techniques function best together but can do good separately also. A client who cooperates will help even if the other side’s counsel refuses to. A judge who administers the litigation efficiently, firmly, and fairly can make up for bad clients or bad lawyers. And you can employ techniques selectively. Use whatever works.

§ X:5 Judges’ management powers

Federal judges “have the authority to tell lawyers and litigants to do it *my* way, when zealous advocates want to do it *their* way[.]”¹¹ The authority comes from the courts’ “inherent” power—which ““must necessarily result to our Courts of justice from the nature of their institution”—as well as from the Federal Rules of Civil Procedure and the Federal Rules of Evidence, among other sources.¹² Relevant rules permit (and may even require) courts to conduct pretrial conferences and issue scheduling orders,¹³ to certify cases for class action treatment,¹⁴ to impose sanctions,¹⁵ to limit discovery,¹⁶ to disregard mistakes or defects unless they affect a party’s substantial rights,¹⁷ generally to handle matters in any way they see fit so long as consistent with federal law and local rules,¹⁸ to avoid unjustifiable expense and delay in the reception and presentation of evidence,¹⁹ to exclude relevant but unnecessary evidence,²⁰ and to control how parties and

¹¹ The Judicial Conference of the United States, Civil Litigation Management Manual 1 (2001) (emphasis in original).

¹² *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812) and affirming district court’s imposition of sanctions under inherent authority for bad faith conduct).

¹³ Fed. R. Civ. P. 16.

¹⁴ Fed. R. Civ. P. 23.

¹⁵ Fed. R. Civ. P. 11, Fed. R. Civ. P. 37.

¹⁶ Fed. R. Civ. P. 26(b)(2).

¹⁷ Fed. R. Civ. P. 61.

¹⁸ Fed. R. Civ. P. 83.

¹⁹ Fed. R. Evid. 102.

²⁰ Fed. R. Evid. 403.

counsel present evidence.²¹ And several rules authorize judges to enforce agreements between counsel.²²

Rule 16(c)(12) of the Federal Rules of Civil Procedure may have special importance in commercial litigation. It provides that the court may “adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”²³ District courts have cited the rule as authority for addressing a potentially dispositive legal issue early in the case,²⁴ for enjoining a parallel state action,²⁵ for requiring “RICO Case Statements,”²⁶ and for entering an extensive case management order.²⁷

The effectiveness of federal judges in using their management powers often determines the cost and quality of the civil justice that parties receive. Once judicial neglect allows a case to get out of hand, in fact, “a judge cannot restore order It’s almost impossible to get the genie back into the bottle.”²⁸ When the parties and counsel do not cooperate, in fact, the court *must* act.

§ X:6 The essential importance of beginning at the outset

²¹ Fed. R. Evid. 611(a).

²² See, e.g., Fed. R. Civ. P. 29 (allowing parties to make stipulations regarding discovery procedure); Fed. R. Civ. P. 65 (providing that parties may stipulate to extension of temporary restraining order beyond usual time limit); Fed. R. Civ. P. 68 (authorizing offer and acceptance of judgment).

²³ Fed. R. Civ. P. 16(c)(12).

²⁴ *In re HealthSouth Corp.*, 308 F. Supp. 2d 1253, 1267 n.24 (N.D. Ala. 2004) (“The court determined that the best way to address this complex case is one issue at a time. Thus, the court has authority to address at this early stage the purely legal question of the effect of the severability clause on the insurers’ right to rescind.”).

²⁵ *In re Lease Oil Antitrust Litig. No. II*, 48 F. Supp. 2d 699, (S.D. Tex. 1998) (“In light of this mandate to adopt special procedures to better manage complex litigation, the Court, acting pursuant to the All Writs Act, will enter a preliminary order designed to avoid the conflicts that will inevitably arise if parties in a parallel state action prematurely enter into a settlement agreement which purports to release the exclusive federal antitrust claims which are now before this Court.”).

²⁶ *Northland Ins. Co. v. Shell Oil Co.*, 930 F. Supp. 1069, 1074 (D.N.J. 1996).

²⁷ *Active Products Corp. v. A.H. Choitz & Co., Inc.*, 163 F.R.D. 274, 277 n.2 (N.D. Ind. 1995).

²⁸ Levin and Wheeler, Judge Rubin and Judicial Management of the Docket, 52 La. L. Rev. 1489, 1495 (1992) (quoting Circuit Judge Alvin B. Rubin in *Colloquy on Complex Litigation*, 1981 B.Y.U. L. Rev. 741, 803).

Although circumstances will vary from case to case, one principle will apply to all—that your work to expedite and streamline the litigation should begin the first moment of your involvement. As counsel, start out with a fee agreement that puts a premium on advancing the case and a trial team that can win efficiently. You also should immediately make friends with opposing counsel and coax him to accept efficiency-enhancing procedures. Devote yourself to helping the court solve problems, to proposing solutions that will save the court time and effort, and to imposing on the court to decide only those issues determinative of the outcome.

For judges, “[e]stablishing early control over the pretrial process is pivotal in controlling litigation cost and delay.”²⁹ Indeed, “[t]his intervention cannot occur too soon; the process of federal case management, and the role accorded the assigned judge in its administration, argue for the *earliest* exercise of control and oversight to ensure that case resolution comes at the soonest, most efficacious, and least costly moment in every case.”³⁰

In short, do not delay. Events will overtake you if you do.

III. RELATIONS BETWEEN LAWYER AND CLIENT

A. FEES AND EXPENSES

§ X:7 Types of fee arrangements

Contingent fee contracts align the interests of the party and counsel who enter into them. The usual arrangement allocates litigation expenses and percentages of any monetary recovery between the party and counsel. If no recovery results, counsel receives no fee; but he may earn a premium on a large recovery. Counsel and client thus have a mutual interest in maximizing the monetary recovery and expediting resolution of the case through settlement or trial and judgment. If they also share out of pocket costs—typically through reduction of the net recovery that determines the dollar amount of the contingent fee—they also share an interest in keeping litigation expenses low.

Another kind of contingent fee arrangement, far rarer, provides similar incentives for the defendant and her counsel. A “negative” or “defense” contingent fee entitles counsel defending against a claim to receive her fee based on a percentage of the dollar amount representing the difference between what the client pays the plaintiff to resolve the case and the client’s probable exposure. (The difficulty of agreeing on how to measure the cost to the defendant — especially in outcomes that include a non-cash

²⁹ Civil Litigation Management Manual 5 (footnote omitted).

³⁰ Civil Litigation Management Manual 5 (footnote omitted).

component — and the client’s probable exposure account for some of the rarity of negative contingent fees.) If the lawyer achieves an outcome better than the client’s likely exposure, the client will pay her a bigger fee in return for sharing the risk of loss. The lawyer may get no fee at all under a pure negative contingent fee arrangement. The defendant and her counsel thus have a joint incentive to prevail on the merits while minimizing waste.

Flat fees put the onus on counsel to achieve efficiency and on the party to get its money’s worth. Flat-fee contracts may provide for periodic disbursements (e.g., monthly, quarterly, or annually), an up-front payment of the entire fee, or remittances dependent on the stage of litigation (e.g., before filing a complaint or petition; before decision of a motion to dismiss, to transfer, or for preliminary injunction; before completion of discovery; before the start of trial; or before verdict) or achievement of a specific goal (dismissal or transfer of the case, a preliminary injunction, or a favorable settlement or judgment). The amounts may change or end with the passage of time.

An hourly fee arrangement places the lawyer and client at odds with the system’s goal of efficient justice. The lawyer has an incentive to bill for as many hours as the client will bear, regardless of whether the work advances the case towards resolution. The client, on the other hand, understands counsel’s conflict of interest and therefore may tend to distrust his judgment and make additional demands on him. The lawyer, in turn, may defer more to the client and may engage in inefficient and unfair (but ethical and non-sanctionable) conduct to help the client achieve a goal collateral to the merits of the case.

The system benefits from fee and expense arrangements that align the interests of parties and counsel with the system’s goals. Contingent and, to a lesser extent, flat fee agreements promote a focus on resolving cases on their merits. Favoring them over hourly engagements will help expedite and streamline commercial litigation.

Some may worry that contingent- and flat-fee arrangements make lawyers lazy and clients apathetic. They suspect that lawyers may not work a case hard enough and will instead hope for a windfall and that clients may let the lawyers control the case.

Our experience doesn’t bear out these concerns. We believe the real trouble isn’t a tendency of alternative fee arrangements to encourage sloth; it is instead the risk of making a bad deal—one that excessively rewards lawyers for sharing risk and gives them too much control over the lawsuit—or choosing the wrong lawyers—generally ones without a record of success in contingent-fee or flat-fee cases or who don’t have adequate resources.

Business clients can avoid bad-deal risk and bad-lawyer risk with “beauty contests”. These auditions let clients evaluate law firms and get competitive proposals

from them.³¹ A beauty contest may involve nothing more than telephone interviews and emails but also may include elaborate in-person presentations by each firm’s trial team and submission of detailed bid proposals. These precautions will cut bad-deal/bad-lawyer risk to an acceptable level.

Clients should always insist that each contestant specify its fee proposal. Material terms are the percentages or flat-fee amounts that apply at each stage of litigation, who pays expenses, whether reimbursement of expenses comes before or after calculation of the contingent-fee, the client’s right to reject settlement offers, and the circumstances that allow the firm to withdraw (such as in the event the client refuses a reasonable settlement offer).³²

The effort that goes into the evaluation process will depend on the stakes in the litigation and therefore the potential cost of making bad choices. A small-dollar case that doesn’t raise policy questions, for example, probably won’t justify a beauty contest. But a big portfolio of little cases or one precursor of a flood likely will. The cost of these efforts pales in comparison to the *much higher* fees the clients will have to pay in a non-competitive environment, regardless of the fee arrangement.

The courts do not generally dictate contractual arrangements between parties and their counsel. And in the salient exception to the rule—class actions—courts often postpone setting the parameters for a fee award until after the lawyers have performed the work for which they seek compensation.³³ But nothing should stop courts from requiring early disclosure of private fee arrangements—particularly in cases involving a claim for recovery of attorneys’ fees. The Private Securities Litigation Reform Act (“PSLRA”) in fact requires that fees to class counsel “shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.”³⁴ The court has the power to require disclosure and ought to exercise it early so that the court as well

³¹ The availability of information on commercial litigators’ expertise and willingness to work on an alternative fee basis has made the job of identifying prospects easier. For examples of services that claim to list outstanding commercial litigators, see www.bestlawyers.com, www.chambersandpartners.com/us/, and www.superlawyers.com. Most lawyers now have Internet sites that describe their experience with different kinds of commercial lawsuits and alternative fee arrangements.

The increasing knowledge and sophistication of in-house counsel also help. General counsel now have available to them, for example, monthly publications such as *Corporate Legal Times*, websites like <http://www.thecorporatecounsel.net/home.asp>, and membership in the Committee on Corporate Counsel of the ABA’s Section on Litigation and similar groups.

³² See *infra* Form X-1, which sets out examples of language for a contingent fee agreement.

³³ See, e.g., *In re Cendant Corp. Litig.*, 264 F.3d 201, 254-86 (3d Cir. 2001) (vacating award of fee to class counsel per agreement with lead plaintiff and remanding for reconsideration).

³⁴ 15 U.S.C.A. § 78u-4(a)(6).

as opposing parties and counsel understand the financial incentives that the fee and expense arrangements create.³⁵

Courts, clients, and counsel should likewise encourage arrangements that reward efficiency. Some courts already have implemented auctions and other methods for establishing reasonable contingent fee percentages in class action cases.³⁶ These methods simulate market forces by requiring competing firms to submit bids detailing their experience, resources, and proposed compensation. Some companies, moreover, have developed innovative deals that pay lawyers a premium for handling routine commercial litigation efficiently and at a discount for doing it the other way.³⁷ Such bargains include negative contingent fees (percentage x [exposure – payment to plaintiff]), flat fees (\$X per month, quarter, or year), blended hourly fees (all lawyers, regardless of seniority, charge the same rate), and bonuses for accomplishing specific results (client pays \$X if lawyers win summary judgment motion). The trend should continue.

§ X:8 Cost-effective trial team procedures³⁸

In handling complex litigation, lawyers and their clients should be guided by two principles, both of which reduce expense without sacrificing chances for success. First, less is best. Excess discovery is not just non-productive, it is often counterproductive. It removes the element of surprise at trial, forces the opposition lawyers and witnesses to get prepared, and often takes the eyes of the lawyers who engage in it off the ball. The lawyers who don't educate the opposition are better able to handle surprise at trial and are better off retaining their advantage.

Minimal discovery, however, doesn't mean being ill-prepared. It means the trial team prepares by means other than formal discovery, such as thoroughly interviewing the client's employees and the other side's ex-employees, organizing all documents and information chronologically to understand the complete picture, and conducting jury simulations. It also means taking necessary discovery before the other side does. Take

³⁵ Fed. R. Civ. P. 52(d)(2)(B), for example, empowers the court to require a party seeking to include attorneys' fees in a judgment to "disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made."

³⁶ See, e.g., Harel and Stein, Auctioning for Loyalty: Selection and Monitoring of Class Counsel, 22 *Yale L. & Pol'y Rev.* 69, 71 (2004); Third Circuit Task Force Report on Selection of Class Counsel, 74 *Temp. L. Rev.* 689 (2001); Weiss and Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 *Yale L.J.* 2053, 2064-66 (1995).

³⁷ See, e.g., Grimes, On the Case, *Wall St. J.* R10, Mar. 31, 2005 (discussing approaches to litigation services and cost by Mark Chandler, General Counsel of Cisco Systems).

³⁸ The authors have adapted this section from How Susman Godfrey Handles Cases, <http://susmangodfrey.com/HandleCases.html>.

the first depositions, and depose the top executives first—before they can get their stories straight. Extensive document discovery is not necessary to do this.

§ X:9 The bottom line

Counsel should focus on their role as stand-up trial lawyers, not discovery litigators. Everything they do should be designed to prepare them to persuade a jury, judge, or other decision-maker.

Handling contingent fee and flat fee matters for plaintiffs encourages good habits in trial team members. Since preparation in these cases is on their own nickel, they learn how to economize and to insist that everything they do be potentially outcome-determinative. The good habits the trial team develops from this contingent fee work carry over to flat fee and hourly work and result in lower costs to the client.

Teamwork on the big case (or group of cases) is essential. At the beginning of a complex commercial engagement, the lead lawyer should assemble the team that will try the case or cases. A trial team should rarely consist of more than one or two partners, an associate, and a legal assistant. Although more than one trial team will be necessary in cases that go to trial at the same time, each team should be similarly lean.

Continuity of the core trial team is also vital. The same lawyer who leads the team at the start should lead it at the trial. The other lawyers and the legal assistants who handle discovery and briefing ought to have key responsibilities throughout, including at trial. And the same client representative, whether lawyer or business person, needs to oversee the case from outset.

Counsel should candidly discuss staffing with the client up front and try to assign to the case lawyers with whom the client feels comfortable and whose abilities fit the needs of the case. Each lawyer will ideally be strong both in book lawyering and in courtroom lawyering. It's important to have both strengths on the team even if different lawyers have them.

The lead lawyer should insist on a one-lawyer-one-task rule. Except in the case of the first crucial deposition or dispositive hearings, two or more lawyers should rarely be assigned to cover a litigation event.

The lawyer in charge manages preparation by use of a task assignment memo, revised weekly, and a regular weekly team meeting or conference call. Task assignment memos specify the responsible team member and the due date. These memos are numbered sequentially and revised after each weekly meeting.

Interoffice conferences among trial team members are necessary for effective communication and to avoid duplication of effort. But they are wasteful if the same

message must be repeated. By focusing all interoffice communications into a regularly scheduled meeting or conference call, unnecessary jawboning among team members at other times can be avoided. This also allows the client's in-house counsel, co-counsel, and others who are invited to attend to keep up to date.

If a member of the team talks to the client, co-counsel, or opposing counsel, he routes a call report by e-mail to other team members.

All correspondence coming into the lawyers' office goes first to the partner in charge and then is routed by her to other team members on a need-to-know basis. All members of the team, including co-counsel and in-house counsel, communicate by e-mail.

B. DISCOVERY, DISCOVERY DISPUTES, AND TRIAL PREPARATION

§ X:10 Dealing with opposing counsel

At the start of a case, send a memo to opposing counsel seeking agreement to a number of protocols that will facilitate cooperation and reduce costs. We list these in X:19 below.

§ X:11 Document production

Upon receipt of the other side's document request,³⁹ an experienced attorney, in consultation with the client, determines what should be objected to. It is better to produce too much than too little. It is very expensive to review masses of documents to remove what is non-responsive or irrelevant. Sooner or later, the documents probably will have to be produced anyway. Clients should even be encouraged to allow open files searches if counsel can get a stipulation preserving privileges or can find a way to identify files that are likely to contain privileged documents before production.⁴⁰

If possible, do not rely on the client to locate responsive documents and furnish them to outside counsel. Legal assistants should be experts at this, and there is too much danger of an inadvertent omission unless the lawyers are involved from the beginning. It is also wise to number the originals of all documents produced for inspection before they are inspected, to log all files searched, and to interview file custodians while the searches are being made.

³⁹ See generally Chapter 20 "Document Discovery".

⁴⁰ See Form X-2.

Before numbered originals are produced for inspection, a lawyer should review them to remove those that are privileged. All documents withheld on the ground of privilege are logged at the time they are withheld.

§ X:12 Document organization

Imaging all hard copy documents does not make sense in most cases. The process is expensive and usually unnecessary. Even the most complex case boils down to fewer than several hundred hot documents. As trial team members initially review documents—the client’s and the other side’s—lawyers select those that are to be included in the hot document chronology. These are the documents that tell the story and that the trial team will use to prepare witnesses and to depose witnesses. They are the ones that will likely become trial exhibits.

Electronic discovery requires early attention. The proliferation of email and common use of personal computers and servers have astronomically increased the pages of potentially relevant documents that you must get a handle on for production and that you may receive in production from the other side. Dealing with electronic discovery exceeds the scope of this chapter,⁴¹ but the necessity of organizing the documents into a hot document chronology is just as essential with electronic documents as it is with hard copy.

From the document chronology and other sources, prepare a written chronology of events. It is not a document digest, but rather an annotated narrative of what happened. It is your most important trial preparation work product and is frequently updated.

§ X:13 Depositions

Don’t take many depositions, and keep the ones you do take short. You don’t need to look under every stone. You just need to know where the boulders are. Excessive questioning of witnesses, particularly experts, serves only to educate them.

Normally counsel should videotape all depositions they take. Videotaping minimizes excessive talking by opposing counsel and enables the trial team to show the other side’s key witnesses during jury simulations and to the real jury.

An important exception to the videotape-all-depositions rule is when you depose an expert. Normally, you should save your tough cross-examination for trial; otherwise the expert will know your line of attack and prepare accordingly. The result of holding your fire will be an in-the-can videotape that lays out the expert’s opinions but doesn’t

⁴¹ See generally Chapter 21 “Discovery of Electronic Records”.

challenge them. That allows the other side to call the expert by videotape and thereby thwart your plan to destroy the expert on the stand.

There is no such thing as a bad witness—only one who has been ill-prepared. Give witnesses who are clients a memo that describes the deposition process and how the witness's testimony at the deposition will play at trial. Then prepare them for the 20 toughest questions. Do *not* sit them in a room alone with the thousands of documents they may have been copied with over the years and ask them to review them. The documents they may have problems with are usually those they have authored. Concentrate on them and the few others that are important to the witness's testimony.

§ X:14 Witness preparation

Witnesses learn through doing. You should therefore cross-examine your own witnesses as part of their preparation. Do it on video. Then play it back and critique their performance.

Defending lawyers are not supposed to talk during depositions. Courts are sanctioning those that do. If the witness is well prepared, there is nothing for the defender to do but listen proudly. And, by involving the most experienced lawyers in witness preparation, you are often able to trust deposition defense to lawyers with lower billing rates.

Some lawyers believe that what a witness doesn't know can't hurt him. They encourage their witnesses not to remember, not to know. This is dangerous. A witness who doesn't know or recall at his deposition is often useless at trial. Encourage fact witnesses to learn, remember, and be responsive, even at their depositions—to be able to handle even the most off-the-wall hypothetical questions. And encourage your experts to type out a short version of their opinions to hand to the other side and refer to during their testimony

Most lawyers do not question their own witnesses at their depositions. They are afraid to commit to what they want to prove at trial, often because they themselves haven't taken the time to think their case through.

You should ask many of your own witnesses questions at their depositions. If the other side calls one of these witnesses at trial, your examination of him or her gives you some favorable testimony to show or play to the jury during the other side's case. It also removes the need to bring all of your witnesses to trial. Usually opposing counsel is ill-prepared to engage in a trial-type cross examination after you question your own witnesses on direct at the end of the deposition—frequently, they are in a hurry to catch planes home.

§ X:15 Discovery disputes

Try to conduct all discovery by agreement. It is expensive to do otherwise.

Most discovery disputes would never blossom into motion practice if courts adopted one requirement: lead counsel must personally discuss any disagreement over discovery before filing a motion. Leaving such disputes to lawyers who don't have the authority and experience necessary to reach a sensible resolution invites wasteful motions, hearings, and bad feelings.

Experienced counsel know they should rarely take discovery disputes to court. Judges hate them because they consume so much time and do so little to advance the case to resolution.⁴² Partly as a result, judges seldom handle fights over discovery quickly or effectively and usually give both sides less than they could get by agreement. The lack of attention bogs down the discovery process and hinders trial preparation.

The rule should be to take a discovery dispute to court only when the issue is outcome-determinative (few are) and only when you have confidence that you can win. If the other side withholds a key document under a weak claim of privilege, for example, move to compel production of that document. But don't file a motion that asks for routine documents or challenges a strong privilege claim. If your opponent makes a habit of missing deadlines, such as for serving expert reports, move to preclude the evidence. But don't contest a mistake that was quickly corrected and didn't hurt your client.

Discovery disputes take on more significance than they deserve to the parties and the lawyers. A motion to compel or for protection becomes a way to get leverage or momentum, discourage the opposition, or "educate" the judge. But these are forlorn hopes. And the small victories the motions achieve do not nearly compensate for the expense, the lawyers' loss of credibility, and the waste of the court's time.

§ X:16 Budgeting and calling the odds

You should be willing—and, more and more often, must be willing—to prepare litigation budgets for your clients.⁴³ Predicting expenses is useful but less desirable than working on a fixed-fee basis, which places the risk of inefficiency on the lawyers and allows the clients to budget accurately for a case.

⁴² "Discovery disputes, if not controlled early and firmly, will constitute the most time-consuming, inefficient, and costly investment of pretrial judicial case management time." Civil Litigation Management Manual 34.

⁴³ See Chapter X "Litigation Management by Law Firms" and Chapter X "Litigation Management by Corporations".

Clients are entitled to know what you see as the issues and how you call the odds on each.⁴⁴ Though you will often be unable to opine much for auditors, do not be reluctant to commit yourself in writing to your client.

§ X:17 Jury simulations

Conduct jury simulations early and frequently in most cases.⁴⁵ The simulations help lawyers predict the outcome, hone arguments, and conduct discovery with an eye to telling a simple story to a jury. They let clients see how their lawyers will look and sound during the real thing. When the result is favorable, you can disclose the outcome to the other side to encourage settlement. And your presentation at the real trial will be crisper, quicker, and more compelling.

A mock trial with 40 jurors costs around \$25,000. In some cases, the expense can be lowered by conducting the jury simulation in-house. Legal assistants should be trained to conduct them. Even then you should use professional jury consultants to interpret the results. They can do this by merely watching the videotapes of the arguments and deliberations.

III. RELATIONS BETWEEN OPPOSING SIDES

§ X:18 Rapport between counsel; judicial responsibility

Opposing lawyers who get along with each other make an enormous difference to the administration of civil justice. Their good relations translate into all kinds of benefits to the courts, judges, and parties. These include ease in scheduling conferences, hearings, trials, and discovery; elimination of unnecessary motion practice and discovery fights; a focus on the merits; fewer misunderstandings and, as a result, less disagreement; far lower costs; a happier judge; and more confidence in the fairness of the process.

Getting off to an amiable start does not take much effort. Counsel on either side can encourage good relations simply by calling the opposing lawyers as early as possible to introduce themselves. *Make this a habit!* That way you can truthfully tell them that you always call regardless of which side you represent. You can say you propose, in every case, that both sides agree on a standard set of procedures *before* either side can figure out which will benefit more from any particular procedure. Offer to send them a draft, and promise to consider any additions or changes they suggest. The worst that can happen is the opposition says no. But you will have started the process of setting a cooperative tone and deserving trust and therefore of improving the likelihood of

⁴⁴ See generally Chapter 5 “Case Evaluation”.

⁴⁵ See Chapter 29 “Jury Selection”.

entering into pre-discovery agreements that will streamline and expedite discovery, motion practice, and trial on the merits.⁴⁶

Why don't lawyers on one side of a case make a point of developing a working rapport with the lawyers on the other side? Don't they understand that they aid themselves and their clients by waiting to fight until they get to trial?

The best lawyers do grasp these things and have enough confidence in themselves and influence with their clients to avoid unnecessary disputes and delays. Others lack that understanding, confidence, or influence and cannot help themselves do better. A third group sees cost and delay as in their interest or in the interest of their clients and so deliberately provoke opposing counsel in hopes of wearing them out or, at the least, distracting them and forcing errors. The court has a key responsibility for relations between counsel. While many judges hate the idea of refereeing fights that counsel get into and tend to think both sides share equal blame, leaving poor relations to fester creates more problems for the judges over time. Abuses multiply. Communication vanishes. Justice suffers.

The court must strongly discourage disputatiousness, personal attacks, and displays of anger. And it must grapple with the problem early and consistently. Adopting codes of behavior helps,⁴⁷ but it cannot substitute for personal intervention by the judge when appropriate. Indeed, judicial aloofness gives the appearance of sanctioning boorish behavior and worse. Consistently bad conduct by counsel truly reflects poor management by the court.

But persuading the court to take action may be a challenge and may become impossible late in a case. As soon as you see a chronic problem, therefore, consider asking for a brief conference with the court to establish expectations about professional behavior. Do not under any circumstances attack the other side, even if—especially if—they warmly deserve it. A neutral but earnest request for the court's assistance has the best chance of success. Most judges will take the hint.

§ X:19 Pre-discovery agreements

Lawyers should try to reach agreements on procedural matters before discovery begins. These agreements will make life easier for both sides and do not obviously advantage one side over the other. If the lawyers wait until they are in the heat of battle to try to reach these agreements, one side or the other will feel at a disadvantage. So try it very early. Indeed, lawyers should not hesitate to give a copy of their standard list of agreements to opposing counsel.

⁴⁶ See § X:19.

⁴⁷ See Chapter X "Civility".

As to any discovery dispute, the lead lawyers will try to resolve it by email and phone, and no one will write letters to the other: just email and phone calls.

Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the deponents are identified.

The parties will use the same court reporter/videographer, who agrees to provide specified services at discounted prices for the right to transcribe and videotape all depositions.

All papers will be served on the opposing party by email.

Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.

If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write the court letters that include each's preferred version and, without argument, ask the court to select one or the other as soon as possible.

All deposition exhibits will be numbered sequentially (Ex. 1, Ex. 2, etc.) regardless of the identity of the deponent or the side introducing the exhibit, and the same numbers will be used in pretrial motions and at trial.

The parties will share the expense of imaging all deposition exhibits.

Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports.

Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent or that the documents are privileged.

Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.

Demonstrative exhibits need only be shown to the other side before shown to the jury and need not be listed in any pretrial order.

The parties will submit a questionnaire to potential jurors and will work in good faith to agree on the questions.

The parties will prepare and provide a notebook for the court and each juror. The notebook may contain a cast of characters, a list of witnesses (and their photos), a timeline, a glossary, dispositive documents, and blank paper for jurors' personal notes. The parties will do their best to reach agreement on the contents of each item in the notebook.

Each side will both gain and lose as a result of these agreements. The careful lawyer who knows not to send funny emails to experts or ask them to circulate rough drafts of initial impressions won't be able to get those materials from the opposing counsel who does not understand the rules on discovery of experts. Having to serve papers instantaneously by email instead of first class mail may sometimes hurt your opponent sooner than you want. But the advantages and disadvantages generally balance out. Don't be greedy.

IV. COURT INVOLVEMENT AND INTERVENTION

A. TRANSFER, COORDINATION, AND CONSOLIDATION OF SIMILAR CASES

§ X:20 Overview

Commercial litigation misuses the resources of federal courts and parties if it proceeds in an inconvenient place or duplicates litigation elsewhere. Individual parties may, from their own perspective, have good reasons for imposing such costs on the system; they may find the venue easier to get to, less likely to move their case slowly, more favorable to their substantive legal position, or otherwise “better” for them.⁴⁸

The system as a whole discounts these individual preferences. The system as a whole desires to achieve *overall* efficiency in dispensing civil justice, and it pursues that goal primarily by moving cases around or, at the least, trying to coordinate them, as the next three sections illustrate. These transfer and coordination devices offer important ways to expedite and streamline.

§ X:21 Transfer of venue

Under 28 U.S.C.A. §§ 1404(a) and 1406, one federal court may transfer a case to another. Section 1404(a) provides that, “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” It authorizes transfer even if the transferor court has proper venue over the case.⁴⁹ Section 1406, on the other hand, requires lack of

⁴⁸ Parties may also pursue less worthy strategies, including choosing a venue for its inconvenience to the other side or for its pokiness.

⁴⁹ For details on sections 1404 and 1406, see Chapter 3 “Venue, Forum Selection, and Transfer.”

proper venue in the transferor court and allows dismissal as an alternative to transfer, providing that “[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”

Sections 1404(a) and 1406 allow a party to ask the court to send the case to a forum the party prefers. A lot of things can make a forum unfavorable or preferable to the party—the judge’s leanings, controlling law in the forum circuit,⁵⁰ characteristics of jury venires, proximity of the forum to the party and its witnesses, the forum’s familiarity to the party and its lawyers, community attitudes towards the parties, and the historical performance of the forum in pushing cases to resolution,⁵¹ among other factors. The party who concludes that these considerations favor moving to transfer must then carry the burden of establishing, in the case of a section 1404(a) motion, clear convenience advantages of the transferee court⁵² and, for a motion under section 1406, that venue properly lies in the transferee court but not in the forum court.⁵³ File the motion early to get the most advantage from it.

§ X:22 Multidistrict litigation

⁵⁰ Under section 1404(a), the forum circuit’s interpretation of *state* law issues continues to govern even after transfer to a district court in another circuit. E.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Sheldon v. PHH Corp.* 135 F.3d 848, 852 (2d Cir. 1998) (“[W]hen a case has been transferred pursuant to 28 U.S.C. § 1404(a), even on the plaintiff’s own motion, a court will apply the law of the transferor forum, including that forum’s choice of law rules.”); *Boardman Pet., Inc. v. Federated Mut. Ins. Co.*, 135 F.3d 750, 752 (11th Cir. 1998). “If instead a transfer is made from an improper venue to a proper one, pursuant to 28 U.S.C. § 1406(a), the district court receiving the case ‘must apply the law of the state in which it is held rather than the law of the transferor district court.’” *Iannello v. Busch Entertainment Corp.*, 300 F. Supp. 2d 400, 402 (E.D. Va. 2004) (quoting *Myelle v. Am. Cyanamid Co.*, 57 F.3d 411, 413 (4th Cir. 1995) (citation omitted)). As to *federal* law issues, including questions of procedure, the transferee court applies the law of its own circuit. E.g. *Hartline v. Sheet Metal Workers’ Nat’l Pension Fund*, 201 F. Supp. 2d 1, 3-4 (D.D.C. 1999) (explaining *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987)).

⁵¹ The District of Hawaii had the worst median time to disposition—72.6 months—while the Western District of Wisconsin had the best—6.0 months—during the year ending in March 2004. See <http://www.uscourts.gov/caseload2004/tables/C05Mar04.pdf>. Although the performance of most courts varies far less than the 66.6-month difference between those two courts, prudent lawyers will check the statistics of the forum court and judge against those of potential transferee courts and judges before recommending whether or not to seek a transfer of venue.

⁵² E.g., *In re Volkswagen AG*, 371 F.3d 201, 203-06 (5th Cir. 2004) (issuing writ of mandamus directing district court to grant motion to transfer under section 1404(a)).

⁵³ E.g., *World Skating Federation v. Int’l Skating Union*, 357 F. Supp. 2d 661, 666-67 (S.D.N.Y. 2005) (granting dismissal under section 1406).

The challenges of overlapping lawsuits in two or more federal districts prompted Congress in 1968 to enact 28 U.S.C.A. § 1407. The statute authorized appointment of a special group of federal judges—the seven-member judicial panel on multidistrict litigation⁵⁴ and empowers the panel to transfer all federal actions “involving one or more common questions of fact” to a single federal judge for “coordinated or consolidated pretrial proceedings.”⁵⁵ The panel must first make a “determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”⁵⁶ The transferee court generally must remand the cases, after completion of pretrial proceedings, to the court or courts they originated in for trial.⁵⁷ The parties may, of course, waive the right to remand.⁵⁸

Section 1407 does a lot to further the goals of Rule 1 of the Federal Rules of Civil Procedure, at least on a system-wide basis. Individual litigants concerned about delay and cost may resist transfer for consolidation or coordination with other cases under section 1407.⁵⁹ As with venue transfers under sections 1404 and 1406, the benefits of centralizing overlapping cases generally accrue to federal courts as an institution. The *system* achieves the just, speedy, and inexpensive determination of the cases—not the parties or their counsel.

But parties also may get huge efficiency gains from section 1407 transfers. The filing of similar cases in different district courts means the parties take the same discovery, conduct the same motion practice, and try the same issues over and over again. Particularly in multidistrict cases involving hundreds or thousands of individual claims, duplication can easily cost \$1 million and may even run more than \$10 million.⁶⁰

The same efficiency considerations that go into deciding whether to file transfer motions under sections 1404(a) and 1406 apply to section 1407 motions. In most

⁵⁴ See generally Chapter 11 “Multidistrict Litigation”.

⁵⁵ 28 U.S.C.A. §1407(a).

⁵⁶ 28 U.S.C.A. §1407(a).

⁵⁷ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

⁵⁸ *In re Carbon Dioxide Industry Antitrust Litig.*, 229 F.3d 1321, 1326-27 (11th Cir. 2000) (holding that plaintiffs waived right to remand to transferor court and distinguishing *Lexecon*).

⁵⁹ For an example of defendants opposing transfer, see *In re Not-for-Profit Hospitals/Uninsured Patients Litig.*, 341 F. Supp. 2d 1354 (J.P.M.L. 2004).

⁶⁰ Mega-cases are not rare. As of May 10, 2005, the *In re Asbestos Products Liability Litigation* alone included 33,679 pending actions, and well over 300 consolidated, coordinated, or centralized multidistrict litigation matters existed. See http://www.jpml.uscourts.gov/Pending_MDLS/PendingMDL-May-05.pdf.

instances, the gain in efficiency to defendants will dwarf any tactical advantages to them of litigating similar cases separately.⁶¹ (Another downside to a case-by-case strategy is that collateral estoppel may prevent the defense from relitigating common questions of fact in all similar lawsuits, turning a small defeat into a huge loss.⁶²) Many plaintiffs, on the other hand, believe that section 1407 transfers not only deprive them of their forum choice but also bog them down in the bureaucracy of a multidistrict litigation matter.⁶³ As a result, plaintiffs will rarely file a motion under section 1407 except to counter one by defendants.⁶⁴

A crucial decision in section 1407 proceedings is which transferee court to choose. The panel has tremendous discretion in selecting the transferee court and judge and rarely grants lawyers more than a few minutes to argue at the panel's periodic sittings. Most litigants therefore concentrate on the factors that will make their preference most attractive to the Panel.

§ X:23 Cases in state court

The bane—or boon, depending on your perspective—of parallel multi-party cases in state and federal courts lost much of its potency with enactment of Public Law 109-2 in February 2005. The new statute vastly expands the ability of defendants to remove class action and mass action cases from state courts to federal courts.⁶⁵ An important

⁶¹ Plaintiffs usually are the ones who oppose transfer, but occasionally ones with weak claims ask for transfer in hopes of finding an indulgent judge. See *In re Not-for-Profit Hospitals/Uninsured Patients Litig.*, 341 F. Supp. 2d 1354 (J.P.M.L. 2004) (denying plaintiffs' motion for order centralizing litigation in single district).

⁶² For discussion of offensive use of collateral estoppel, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979); *Bear, Stearns & Co., Inc. v. 1109580 Ontario Corp.*, 2005 WL 1231616, at *3-*4 (2d Cir. May 25, 2005) (discussing *Parklane Hosiery*).

⁶³ A section 1407 transfer requires the transferee court to apply the transferor court's understanding of state law. E.g., *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 911 (8th Cir. 2004) ("When considering issues of state law, . . . the transferee court must apply the state law that would have applied had the cases not been transferred for consolidation."). As to *federal* law issues, including questions of procedure, the transferee court applies the law of its own circuit. E.g., *id.* ("When a transferee court receives a case from the MDL Panel, the transferee court applies the law of the circuit in which it is located to issues of federal law."); see *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 911 n.17 (6th Cir. 2003) (noting that transferee court may not have to apply "precedent 'unique' to a particular circuit and arguably divergent from the predominant interpretation of a federal law")

⁶⁴ By filing their own counter-motion, plaintiffs concede the need for transfer but highlight their preference among potential transferee courts.

⁶⁵ Public Law 109-2, which bears the title "Class Action Fairness Act of 2005," also attempts to make class actions harder to maintain and less profitable for lawyers to win. See Chapter 15 "Class Actions".

consequence of the law, at least in the short run: More cases for the judicial panel on multidistrict litigation to centralize for pretrial purposes.

Removal under Public Law 109-2 will probably help defendants and the state and federal courts overall resolve related commercial litigation more efficiently and faster. Removing eligible cases to federal courts will permit transfer under sections 1404, 1406, and 1407 and consolidation or coordination of the cases with other civil actions involving one or more common fact questions.

Handling cases that overlap factually in two different court systems increases the difficulty of coordination and therefore raises the overall costs of the litigation. The *Manual for Complex Litigation* recommends efforts to achieve coordination between state and federal courts.⁶⁶ Federal courts, moreover, have become more aggressive about enjoining parallel state court cases that they believe interfere with their exercise of federal jurisdiction.⁶⁷

Defendants who face parallel state and federal court lawsuits should give careful consideration to removing the state cases to federal court and, failing that, to seeking an injunction that directs the plaintiffs not to proceed with their state court cases. Coordination is also a possibility but still is more wasteful than having all the cases in one federal court.

B. PRE-TRIAL CONFERENCES, SCHEDULING ORDERS, AND OTHER CASE MANAGEMENT ORDERS

§ X:24 Scheduling

Fed. R. Civ. P. 16 gives federal courts broad authority to structure and schedule pretrial proceedings and trial. Rule 16(b) requires the court to enter a scheduling order that limits the time for joining parties and amending pleadings, filing motions, and completing discovery.⁶⁸ The scheduling order may also modify the time for making disclosures under Rule 26(a) and (e)(1), limit discovery, set dates for pre-trial conferences and trial, and include “any other matters appropriate in the circumstances of the case.”⁶⁹ But the key is an early and firm trial date.

⁶⁶ *Manual for Complex Litigation*, Fourth § 20.3.

⁶⁷ See, e.g., *Newby v. Enron Corp.*, 338 F.3d 467 (5th Cir. 2003) (affirming district court’s stay of discovery and injunction against efforts to freeze assets in parallel state litigation).

⁶⁸ Fed. R. Civ. P. 16(b); see generally Chapter 27 “Scheduling and Pretrial Conferences and Orders”.

⁶⁹ Fed. R. Civ. P. 16(b).

§ X:25 --Trial setting

Time limits are essential in streamlining complex cases. One instance of limiting time—setting a firm trial date early and sticking to it later—has almost universal commendation. As the *Manual for Complex Litigation* points out, “in litigation involving experienced attorneys working cooperatively, a firm but realistic trial date may suffice if coupled with immediate access to the court for disputes that counsel cannot resolve.”⁷⁰ The *Civil Litigation Management Manual* endorses “the setting of a firm trial date as part of the early case management approach” and “adher[ing] to that date as much as possible.”⁷¹

The trial setting should give diligent parties and counsel just enough time to prepare the case for trial. Long hiatuses between key events—the initial pre-trial conference, submission of summary judgment motions, and trial—are a great enemy of efficiency. These breaks cause everyone to forget the details of the case and force the participants to do the same preparation over and over. An early trial date keeps the participants constantly up-to-date on the case, minimizes loss of momentum, encourages settlement, and enhances the trial’s quality.

A trial date forces parties and their counsel to think carefully about how to resolve the case and what resources to devote to resolving it. Lawyers will have to ask themselves questions like: What evidence do I need to prove or rebut the plaintiff’s claims or the defendant’s defenses? How can I find out if the evidence exists and who has it? How can I get it? What discovery can I do without? How should I staff the case? What steps can I take to put the case in the best posture for settlement? What is the range of likely outcomes if the case goes to trial?

Parties will want to ponder the same questions plus additional ones such as these: How much will getting the case to judgment cost me, both in terms of out of pocket expenditures and in terms of distraction from my business? How do those costs compare with what I would likely get or give up in settlement? As a result of trial and judgment?

The trial setting also creates the framework for time limits during the pre-trial phase. The discovery cut-off, the due dates for expert reports, the deadline for filing dispositive motions, and all the other pretrial time horizons must take the trial date into account. Less obviously but more importantly, the amount of time until trial influences the resources that parties and counsel choose to expend on the pretrial phase. A deposition that would last two days without the discipline of a not-too-distant trial date

⁷⁰ Manual for Complex Litigation, Fourth § 10.13.

⁷¹ Civil Litigation Management Manual 2.

may take only a few hours with it. A second, third, or fourth set of interrogatories may prove, on reflection, non-essential. And perhaps informal discovery methods—such as witness interviews, review of public records, and Internet searches—may become more attractive.

Those who disfavor reasonable trial settings do so either because they do not trust the federal courts to produce just outcomes on the merits or because they do not want just outcomes. Both groups aim at keeping a case alive in order to give it a slow and expensive death. “O, that way madness lies; let me shun that; no more of that.”⁷²

§ X:26 Case management

Fed. R. Civ. P. 16(a) permits a court to convene pre-trial conferences for purposes of “(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.”⁷³

Subparagraph (c) of the rule empowers the court to consider, and take appropriate action with respect to, 16 categories of “subjects” at a pre-trial conference.⁷⁴ Subparagraph (e) mandates that the court “shall” enter an “order reciting the action taken” at the pre-trial conference; that the order “shall control the subsequent course of the action unless modified by a subsequent order”; and, in the case of a final pre-trial order, “shall be modified only to prevent manifest injustice.”⁷⁵ Sections X:27 through X:31 suggest methods for streamlining a case before trial.

§ X:27 --Challenges to pleadings

Fed. R. Civ. P. 12(b)(6) authorizes a party to challenge a pleading on the ground that it fails to state a claim on which the court may award relief.⁷⁶ A motion under Rule 12(b)(6) must establish beyond doubt that the party whose claim it challenges may not prove any set of facts that would justify relief.⁷⁷ A successful motion under the rule may eliminate legal and factual issues and therefore reduce the scope of future proceedings, particularly discovery and trial.

⁷² King Lear, Act 3, Scene 4. Despite the significance of a trial setting, Rule 16(b) does not require that scheduling orders include one.

⁷³ Fed. R. Civ. P. 16(a); see Chapter 27 “Scheduling and Pretrial Conferences and Orders”.

⁷⁴ Fed. R. Civ. P. 16(c).

⁷⁵ Fed. R. Civ. P. 16(e).

⁷⁶ Fed. R. Civ. P. 12(b)(6); see Chapter 6 “Responses to Complaints”

⁷⁷ Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Whether or not to seek a *partial* dismissal turns on the impact that the dismissal would have on those future proceedings. The dismissal of one count of a multiple-count complaint, for example, may cost tens of thousand of dollars to obtain but may not narrow the scope of discovery at all.⁷⁸ Unless a motion for partial dismissal would result in savings that more than offset the cost of bringing it, do not draft it. As with discovery motions, the hope of obtaining collateral benefits—such as hurting your opponent—should not influence your decision.⁷⁹

§ X:28 --Requests for preliminary injunctive relief

Commercial litigation often involves requests for preliminary injunctions, particularly in cases alleging theft of trade secrets, infringement of other intellectual property (including patents, copyrights, and trademarks), and violation of covenants not to compete. Fed. R. Civ. P. 65 governs applications for an order enjoining a person or persons from engaging in such wrongful conduct pending trial on the merits.⁸⁰

The availability of preliminary injunctive relief may materially expedite resolution of a case. Rule 65 specifically authorizes courts to “order the trial of the action on the merits to be advanced and consolidated with the hearing of the application” for preliminary injunction.⁸¹ Indeed, appellate courts have encouraged district courts and parties to proceed to trial on the merits as expeditiously as possible in lieu of prosecuting an interlocutory appeal challenging the grant or denial of a preliminary injunction.⁸²

§ X:29 --*Markman* hearings in patent cases

The process of “construing” the “claims” in a patent affords an important means to advance patent litigation towards resolution.⁸³ An early *Markman*⁸⁴ hearing often will

⁷⁸ Worse, it may also block use of evidence that would damage the plaintiff’s credibility on the remaining claims.

⁷⁹ See supra § X:15.

⁸⁰ See Chapter 13 “Provisional Remedies”.

⁸¹ Fed. R. Civ. P. 65(a)(2).

⁸² See, e.g., *Lakedreams v. Taylor*, 932 F.2d 1103, 1110 & n.13 (5th Cir. 1991) (noting concern that “this interlocutory appeal has caused a length delay in the resolution of the case” and urging district court to expedite trial on merits).

⁸³ See Chapter 63 “Patents”.

⁸⁴ The name comes from *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), in which the Court held that interpretation of claims in patents presented a question of law for the courts rather than a fact question for juries.

allow the parties to adjust their dispute in light of the court’s interpretation of the patent claims. That is because many patent disputes raise the question of whether the often arcane language in a patent “claim” has a particular meaning and, therefore, covers the device or process that the plaintiff accuses of infringement. The parties may thus avoid the frequently gargantuan expense of litigating the other patent issues.

§ X:30 --Expert discovery and *Daubert* challenges

Commercial lawsuits, almost without exception, require expert testimony of some kind.⁸⁵ Subjects include the definition of relevant product and geographic markets in antitrust cases; market efficiency and loss causation in securities fraud cases;⁸⁶ infringement of intellectual property in patent, copyright, and trademark cases; and damages in practically all commercial cases.

Expert evidence presents modest opportunities for expediting and streamlining litigation. Disclosure of experts and expert discovery typically happen relatively late in commercial litigation, so resolving the question of admissibility of the experts’ opinions under the requirements of *Daubert*⁸⁷ will not usually permit early resolution of the dispute by settlement or judgment. The admissibility question often remains in doubt until the district court resolves *Daubert* challenges to expert evidence. The court and parties may therefore want to schedule a *Daubert* hearing a month or more before the trial date.

§ X:31 --Summary judgment

Under Rule 56, the court may grant summary judgment on claims or defenses before trial.⁸⁸ The court must conclude that the party opposing a motion for summary judgment has failed to present evidence that would, at trial, raise a genuine issue of material fact in support of that party’s claims or defenses and therefore entitle the party to submit the claims or defenses to the finder of fact for decision.⁸⁹

Some commercial cases present distinct issues that a court may resolve early under a Rule 56 motion. In one case, for example, the district court dealt first with the

⁸⁵ See Chapter 23 “Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony” and Chapter 35 “Expert Witnesses”.

⁸⁶ See *Dura Pharmaceuticals, Inc. v. Broudo*, ___ U.S. ___, 2005 WL 885109 (Apr. 19, 2005) (setting standard for assessing loss causation).

⁸⁷ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (establishing standards for evaluating admissibility of experts’ opinions).

⁸⁸ See Chapter 25 “Summary Judgment”.

⁸⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

question of whether severability clauses in insurance policies allowed the insurers to rescind.⁹⁰ But, as with motions to dismiss, think carefully about whether bringing a summary judgment motion really will produce time-and-effort savings that *substantially* outweigh the cost.

C. TRIAL

§ X:32 Juror notes and notebooks

Other chapters will discuss trial of commercial cases in federal court.⁹¹ This section and the following sections consist of suggestions for making the trial go faster and smoother.

“To expect six or twelve individuals sitting on a jury to absorb weeks or months of testimony on an unfamiliar subject, retrieve it from memory, analyze it, and somehow reach the correct decision is to adopt a method of decision-making fraught with unreliability.”⁹² Allowing jurors to take notes during trial and providing each with a notebook containing instructions, photographs of witnesses, time lines, glossaries, key exhibits, and the like decrease lawyers’ inclination to duplicate evidence. A shorter trial results.

§ X:33 Trial time limits

“One of the most direct and important ways [the judge’s] leadership can be exercised in the course of the final pretrial conference is in discussions of scheduling of trial events and the actual trial time likely to be required by the case.”⁹³ Indeed, few things encourage waste of judge and jury time more than letting lawyers fail to prepare exhaustively for trial and, once the trial starts, allowing them to take as long as they want to put on their cases.

Usually, by the time of trial, one side or the other concludes it has the weaker case and will try to make the proceedings cumbersome, long, and confusing. To use a familiar but non-commercial and non-federal example, the civil trial of wrongful death claims against O.J. Simpson lasted a little over three months (from October 23, 1996 to February 4, 1997). The criminal trial, by contrast, consumed more than a year (from September 26,

⁹⁰ In re HealthSouth Corp., 308 F. Supp. 2d 1253, 1267 n.24 (N.D. Ala. 2004) (refusing to grant summary judgment for insurers).

⁹¹ See Chapter 33 “Trials”.

⁹² Parker, Streamlining Complex Cases, 10 Rev. Litig. 547, 550 (1991).

⁹³ Civil Litigation Management Manual 84.

1994 to October 2, 1995). Despite important differences between the civil and criminal trials, both involved the exact same incidents. Did the quality of justice suffer because the civil trial didn't last another nine months? Were 101 witnesses and 41 trial days not enough for the civil jury to reach a just verdict?

As the Simpson example shows, trial efficiency requires the court to impose time limits. And the court must do it as early as possible, with appropriate input from the lawyers. Under Rule 16(c)(15), the court may enter at any pretrial conference “an order establishing a reasonable limit on the time allowed for presenting evidence....”⁹⁴ The order should generally state the limits in the total days or hours each side may have to put on its case, from voir dire through final summation; or the order may divide the available time for each phase of the trial (*e.g.*, voir dire, opening statements, examination of witnesses, and closing statements).⁹⁵ Lawyers usually can give ballpark estimates of the trial-hours that the case requires even at the beginning. The court always has discretion to loosen the restrictions as justice requires.

§ X:34 Bifurcation

Fed. R. Civ. P. 42(b) authorizes a court to order separate trials of any claims or issues “when separate trials will be conducive to expedition and economy”.⁹⁶ Bifurcating a trial into separate pieces may promote expedition and economy if the first piece will resolve a distinct issue or set of issues and potentially avoid the second piece. In *American Trim, L.L.C. v. Oracle Corp.*, for instance, the court of appeals affirmed the bifurcation of the trial of American Trim’s misrepresentation claims from trial of tort damages and contract issues. The court agreed with the trial judge that the misrepresentation claims focused on the formation of a software contract, that the damages-and-contract issues related to events post-dating formation, and that trial of the misrepresentation claims up front therefore would avoid trial either of tort damages (if American Trim lost on the misrepresentation claims) or of contract issues (if American Trim prevailed on them and had the contract set aside).⁹⁷ Other courts have bifurcated for trial purposes a laches defense from a counterclaim for willful copyright infringement,⁹⁸ a

⁹⁴ Fed. R. Civ. P. 16(c)(15).

⁹⁵ *E.g.*, *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1507-11 (9th Cir. 1995) (affirming rulings that excluded evidence to enforce 56-hour per side time limit); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994) (“In the management of its docket, the court has an inherent right to place reasonable limitations on the time allotted to any given trial.”), cert. denied, 513 U.S. 1014 (1994).

⁹⁶ Fed. R. Civ. P. 42(b). The rule also allows separate trials “in furtherance of convenience or to avoid prejudice”. *Id.*

⁹⁷ 383 F.3d 462, 473-75 (6th Cir. 2004); see *Palace Exploration Co. v. Petroleum Development Co.*, 316 F.3d 1110, 11119 (10th Cir. 2003) (holding that district court properly bifurcated trial of claim for equitable rescission of contract from claim for breach of contract).

⁹⁸ *Danjac LLC v. Sony Corp.*, 263 F.3d 942 961-64 (9th Cir. 2001),

fraud issue from RICO claims alleging the fraud as a predicate act,⁹⁹ and liability for patent infringement from damages for it.¹⁰⁰

§ X:35 Motions in limine

Rulings on motions in limine, usually at the final pretrial conference, often pare the evidence that the parties may submit at trial.¹⁰¹ Limine motions may raise any objection to admission of evidence—including privilege, hearsay, lack of foundation, failure to satisfy *Daubert* requirements for expert evidence, non-compliance with discovery rules and pretrial orders, and undue prejudice or excessive repetition. Large swaths of a case may disappear during the in-limine process. Obvious savings in time result.

The granting of a motion in limine does not exclude evidence.¹⁰² It instead requires the party seeking to introduce the evidence to ask for a decision on the admissibility question before mentioning the proof in front of the jury. One who loses an important in-limine ruling should redouble efforts to show admissibility during the trial itself. The ruling doesn't bind the judge, who may reach a contrary conclusion after hearing other evidence at trial.

§ X:36 Depositions

Requiring parties to exchange designations of deposition testimony before trial will avoid delays in trying the case. Not only must the parties designate the testimony they expect to present in their cases in chief; they must also make cross-designations in response to the opposing side's designations, state objections to specific questions and answers, and obtain rulings on the objections before reading or playing a video of the testimony before the jury.

§ X:37 Exhibits

Parties should have numbered all deposition exhibits sequentially during discovery. That makes numbering them for trial easy and presentation of testimony about the exhibits—especially deposition testimony—less confusing.

⁹⁹ Conkling v. Turner, 18 F.3d 1285, 1293-95 (5th Cir. 1994).

¹⁰⁰ William Reber, LLC v. Samsung Electronics America, Inc., 220 F.R.D. 533 (N.D. Ill. 2004).

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¹⁰² Nor does the filing of a motion in limine preserve error in the admission of evidence. The party opposing the evidence must object at the time of its admission.

Courts should also encourage or require parties to present a joint exhibit list for trial, to justify objections to the opposing party's exhibits in advance of trial, and to stipulate to the authenticity of exhibits. With respect to demonstrative exhibits, judicial flexibility will allow counsel to adapt their presentation to the development of evidence at trial. A witness may testify in person about events on certain dates, for example. The trial team may summarize the testimony on a time-line that shows the sequence of key events. If the testimony related to production of widgets, say, the team may represent the testimony in a pie or bar chart. Or the team may choose to put a quote from the testimony on a poster-board to keep in front of the jury. Because of the need for this kind of flexibility, the court should require parties to disclose demonstrative exhibits to the opposing party before presenting them in court but should not require them to list demonstratives on their exhibit lists before trial.

§ X:38 Disclosure of witnesses

Scheduling orders typically set deadlines for parties to identify witnesses they expect to call to testify at trial.¹⁰³ They should also require the parties to differentiate between the witnesses (1) they *probably* will call and those they *may* call and (2) those they will call *live* and those they will call *by deposition*. The parties additionally need to disclose any difficulties they expect in subpoenaing particular witnesses or in scheduling them to testify, including the possible need to call a witness out of order to accommodate his schedule.

Finally, the court ought to direct the parties to tell each other, no later than a specific time before a party presents witnesses during trial, the names of the witnesses the party anticipates calling, the order in which it expects to call the witnesses, whether it will call each witness live or by deposition, and any changes in deposition excerpts it previously disclosed. These disclosures reduce surprise and allow the lawyers a reasonable opportunity to prepare for cross-examination of specific witnesses. They also provide time for editing excerpts from video depositions and alert the opposing party of the need to object to particular deposition testimony and ask the court for rulings on the objections. These precautions will allow for a smoother, faster, and more understandable presentation of testimony at trial.

§ X:39 Jury charge and questions

The parties should provide the court with their respective versions of the jury charge and questions necessary to the decision of the case. They should remain free to update and revise their proposals during the course of trial. These steps should shorten the time necessary for the charge conference following the close of evidence.

¹⁰³ See Chapter 27 "Scheduling and Pretrial Conferences and Orders".

VI. PRACTICE AIDS

§ X:40 Practice checklist

- As the judge or counsel to a party, consider what incentives each of the participants in the litigation may have to expedite and streamline it and what reasons each may have to slow and complicate it. (See §§ X:2 to X:3)
- Recognize that you may have to overcome resistance through the exercise of judicial authority to manage the litigation and that starting to put efficiency-enhancing techniques in place at the outset is essential. (See §§ X:5 to X:6)
- Consider techniques for overcoming resistance to speed and economy appropriate to the circumstances and the case. (See § X:4)
- As counsel, establish with your client arrangements that reward efficiency, including the fee contract and trial team procedures. (See §§ X:7 to X:18)
 - Contingent, flat, or hourly arrangements. (See § X:7)
 - Cost-effective trial team procedures.
 - Trial team communication and assignments. (See § X:8)
 - Discovery and discovery disputes. (See §§ X:10 to X:15)
 - Budgeting and calling the odds. See § X:16)
 - Jury simulations. (See § X:17)
- As counsel, strive to develop a good working relationship with opposing counsel from the beginning. Judicial intervention nonetheless may be necessary and is essential to prevent breakdowns in communications. (See § X:18)
- Enter into pre-discovery agreements regarding procedures for discovery and trial. Send opposing counsel a memo with the list of agreements at the beginning of a case, before either side can figure out whether the procedures will help them later. (See § X:19)
- Move for (lawyer) or order (judge) transfer, coordination, or consolidation of similar cases under statutory authority. Consider an injunction against

state court cases that interfere with federal jurisdiction. (See §§ X:20 to X:23)

- Request (lawyer) or direct (judge) pre-trial conferences to develop scheduling and case management orders. (See §§ X:24)
- Establish and maintain a firm trial date—the most important setting in any scheduling order. (See § X:25)
- Take advantage of opportunities to narrow issues, avoid discovery disputes, and expedite resolution of the case on the merits. (See §§ X:26 to X:31)
- At trial, permit jurors to take notes, provide them with notebooks containing instructions and other key materials, and establish procedures for presenting deposition testimony, exhibits, disclosure of witnesses, and the jury charge. (See §§ X:32 to X:39)

§ X:40 Forms

See other Word files for the following forms: Sample Provisions for Engagement Letter; Task Assignments Memo; Written Chronology; Cast of Characters; Exhibit List; Stipulation of Privilege Non-waiver.

Form X-__

Sample Provisions for Contingent Fee Engagement Letter

1. Contingent Fee

Firm will receive a contingent fee based on the Agross sum recovered@ by settlement or judgment. The Agross sum recovered@ means all money or other things of value, including the value of any business accommodation recovered by you through any settlement, judgment or other agreement, including any attorney=s fees awarded by the court or arbitration panel. Client authorizes Firm to require that any settlement payment via wire transfer be made to Firm and that any settlement check be made payable jointly to Client and Firm and agrees that, after endorsing the check, it will allow Firm to cash the same and make payment to the Client of Client=s portion of the recovery. In Phase One of our representation, Firm=s contingent fee will be _____ percent (___ %) of the Agross sum recovered.@ In Phase Two, Firm=s contingent fee will be _____percent (___ %) of the Agross sum recovered.@ In Phase Three, Firm=s contingent fee will be _____ percent (___%) of the Agross sum recovered.@ Phase One begins with the execution of this agreement. Phase Two begins when your case is within sixty (60) days of an active trial setting (or, in an arbitration, an active date for the start of the arbitration hearing) and continues thereafter, regardless of whether the trial setting that triggers the start of Phase Two is subsequently postponed, continued, or re-set. Phase Three begins after the conclusion of the submission of evidence in a bench trial or arbitration and upon return of a verdict in a jury trial.

2. Noncash Settlements

If the cause of action [DEFINE] is settled in whole or in part by the Client=s receipt of anything of value other than cash, Firm shall be entitled to demand and receive at its option (a) payment for all time at its normal hourly rates in effect at the time of settlement, (b) payment in cash, under paragraph _____ above, of the applicable Firm contingent percentage of (i) the present value of any noncash consideration plus (ii) any cash received upon settlement, or (c) an undivided interest in any property received by Client, equal to the applicable Firm contingent percentage as identified in paragraph ____, plus payment of the applicable Firm contingent percentage of any cash received as a result of settlement.

3. Expenses

Client agrees to pay all costs and expenses of litigation monthly. Firm will periodically send to Client, for direct payment by Client, invoices received by Firm from third parties such as court reporters, expert witnesses and reproduction centers for services rendered on Client's behalf. Client agrees to pay these third-party invoices when due.

(*Client name)

[DATE]

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4. Firm=s Right to Terminate

- A. Should Client elect to abandon any litigation asserting the cause of action, should the conduct of Client seriously prejudice the prospects of successful prosecution of such litigation (including but not limited to a change of ownership of Client or the filing of a bankruptcy proceeding involving Client), should Client's failure either to disclose material facts or accurately to describe such facts seriously prejudice the continued prosecution of such litigation, or should Client breach this agreement, then Firm shall have the right to terminate this agreement and to demand and receive payment for all unreimbursed expenses advanced on behalf of Client and for all time expended to such date at its hourly rates in effect when the time was expended.
- B. (1) Client shall have the sole and exclusive right to accept or reject any offers for settlement of the cause of action. In making that determination, Client shall weigh fully the opinions and recommendations of Firm, and Client agrees not to unreasonably withhold consent to a settlement proposal that, in the good faith professional judgment of Firm, represents a fair and reasonable basis for the disposition of the cause of action.
- (2) In an unusual situation, Client may decide to withhold its consent to a settlement, notwithstanding Firm=s opinion that the settlement offer is the best offer likely to be received and that rejecting the settlement and risking a trial or similar proceeding would pose a substantial adverse risk to Client of no recovery or a materially smaller recovery. If the matter is not successfully resolved, Firm will have the right to withdraw from Client=s representation, so long as time remaining before trial allows Client=s retention of other counsel. Client agrees to execute all documents necessary to facilitate Firm=s withdrawal, such as documents necessary to obtain the court=s approval of the withdrawal. Upon withdrawal, Firm will cooperate with Client in transferring the file to Client=s other selected counsel. Client agrees that Firm has the immediate right to compensation from any recovery Client may receive in the future, in the amount of Firm=s fees and out-of-pocket expenses determined as set out in Paragraphs ___ (fees) and ___ (expenses) and that Firm would have earned if Client had accepted the recommended offer. Client also agrees that Firm has the right to secure such compensation through a lien on any future settlement, judgment, or other recovery, including the right to notify defending parties and Client=s successor counsel of Firm=s lien. Client specifically understands and agrees that the amount that client may be required to pay successor counsel shall not diminish or otherwise adversely affect Firm=s right to recover its fees as agreed to here.

(*Client name)

[DATE]

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- C. Should it become the opinion of Firm at any time that Client=s cause of action lacks merit (for example, because of inability to verify Client=s claims through witnesses, because of adverse developments in the law or because of a materially adverse change in the financial condition of the defendant), then Firm shall have the option to terminate this agreement and be relieved of any obligation to participate in any pending litigation involving the cause of action. If that happens, Client shall be liable to Firm only for unreimbursed expenses Firm has advanced on behalf of Client.

Form X-__

[FIRM NAME]

Interoffice Memorandum

TO:

FROM:

**PRIVILEGED-
ATTORNEY/CLIENT
ATTORNEY WORK PRODUCT**

DATE:

RE: Task Assignments No. _____

No.	Tasks	Due Date	Assigned To	Status
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				

Form X-___

Stipulation of Privilege Non-waiver

In order to facilitate discovery before entry of a more thorough protective order, the parties stipulate that:

1. Only outside counsel of record for a party in this case (AOutside Counsel@) may receive documents and information that (a) another party produces or discloses through formal or informal discovery in this case and (b) the other party designates Ahighly confidential@ in writing or on the record and within calendar five (5) days after the production or disclosure. Outside Counsel shall treat these documents and this information as highly confidential pending entry of a protective order that expressly supersedes this stipulation. Treating documents and information as highly confidential shall include taking reasonable precautions to prevent provision or disclosure of the documents and information to any person except other Outside Counsel.
2. The inadvertent or unintentional production of documents or information containing, or other disclosure of, privileged information or information constituting attorney work product shall not be deemed a waiver in whole or in part of a party=s claim of privilege or work product protection, either as to the specific document or information disclosed or as to any other document or information relating to it or on the same or a related subject matter. Each party shall return documents or other information with respect to which another party asserts a claim of privilege in writing or on the record. Upon receiving a notice of such a claim as to specific documents or information, the returning party shall return the documents or information within five (5) calendar days regardless of whether the returning party agrees or disagrees with the claim of privilege.
3. This stipulation may be enforced as an order of the court.

Signed and effective as of the _____ day of _____, 200_.

[NAME]
Counsel for Plaintiff

[NAME]

Counsel for Defendant