



## **MATERIALS**

### **PRE-TRIAL PROCEDURES AND SETTLEMENT CONFERENCES**

**Moscow, Russia  
November 2-5, 1998**

## **NATIONAL JUDICIAL COLLEGE**

**with the participation of  
Georgia State University  
Russian Federation Fiscal Reform Project and  
the United States Department of Treasury**

**Sponsored by United States Agency for International Development (USAID)**

**RUSSIA COMMERCIAL COURT WORKSHOP**

**TAX LAW, PRE-TRIAL PROCEDURES AND  
SETTLEMENT CONFERENCES**

**RUSSIAN-AMERICAN JUDICIAL PARTNERSHIP  
(RAJP)**

**GEORGIA STATE UNIVERSITY  
RUSSIAN FEDERATION FISCAL REFORM PROJECT**

**UNITED STATES DEPARTMENT OF TREASURY**

**Moscow, Russia  
November 2 - November 5, 1998**

**Sponsored by USAID**

**DAY 1  
Monday, November 2**

**PRE-TRIAL PROCEDURES AND SETTLEMENT CONFERENCES**

10 30 - 11 00 Registration

11 00 - 11 30 **Welcomes and Opening Remarks**

**Justice Oleg Boikov, Deputy Chairman of Supreme Commercial  
Court of the Russian Federation**

**Judge Betty Barteau, Chief of Party, RAJP**

**Sharon Hester, Georgia State University**

**Rick Chewning, US Department of Treasury**

11 30 - 13 00 **Pre-trial Procedures and Settlement Conferences**

**Presentation by Judge V Sue Shields, United States Federal  
Magistrate, Southern District of Indiana**

This presentation will focus on pre-trial conferencing, including a  
discussion of case management planning

13 00 - 14 00 Lunch

14 00 - 15 15 **Pre-trial Procedures and Settlement Conferences (Continued)**

15 15 - 16 45 **Pre-Trial Procedures in State Courts**

**Presentation by Judge Brent Adams, Superior Court of the State  
of Nevada**

This session will address the variety of pre-trial procedures used in  
state court systems

16 45 - 17 00 Coffee Break

17 00 - 18 00 **Workshop**

Participants will explore settlement conferencing through a role playing exercise to gain a better understanding of pre-trial procedures. Following the demonstrations, a panel discussion will be led by Judge Shields, Judge Adams and Judge Plotkin.

18 00 Adjourn

**DAY 2**  
**Tuesday, November 3**

**PRE-TRIAL PROCEDURES AND SETTLEMENT CONFERENCES**  
**(CONTINUED)**

9 00 - 10 30 **Summary Judgements, Default Judgements, and other Pre-trial Disposal Techniques**

**Presentation by Judge Steven Plotkin, Louisiana Court of Appeals**  
This presentation will cover summary judgements, default judgements, and other pre-trial disposal techniques used in the United States.

10 30 - 10 45 Coffee Break

10 45 - 12 00 **Summary Judgements, Default Judgements, and other Pre-Trial Disposal Techniques (Continued)**

12 00 - 13 00 Lunch

13 00 - 14 30 **Pre-trial procedures in the Russian Federation**

**Presentation by Professor Sherstyuk V M , Law Academy**

14 30 - 14 45 Coffee Break

14 45 - 16 00 **Improvement of Russian Tax Legislation**

**Presentation by Judge Andreeva T K , Head of Legislation Development Department**

16 00 Adjourn

**DAY 3**  
**Wednesday, November 4**

**TAX COURT**

- 9 30 - 10 30 **Fundamentals of Russian Tax Law**  
**Presentation by Justice Oleg Boikov, Supreme Commercial Court of the RF**
- 10 30 - 10 45 Coffee Break
- 10 45 - 12 00 **Prepayment Forum**  
**Presentations by Judge Stephen Swift of the United States Tax Court and Kristine Roth of the Office of the General Counsel, United States Internal Revenue Service**  
This session will focus on prepayment litigation, Internal Revenue Service collection authority and jeopardy situations
- 12 00 - 13 00 Lunch
- 13 00 - 14 30 **Trials**  
**Presentations by Judge Stephen Swift of the United States Tax Court and Kristine Roth of the Office of the General Counsel, United States Internal Revenue Service**  
This presentation will address the role of the judge, lawyer and witnesses, as well as issues related to burden of proof and record-keeping requirements
- 14 30 - 14 45 Coffee Break
- 14 45 - 16 00 **Decision-Making**  
**Presentations by Judge Stephen Swift of the United States Tax Court and Kristine Roth of the Office of the General Counsel, United States Internal Revenue Service**  
This session will focus on bench opinions, the different types of written opinions, publication, staff (law clerks), the appeals process and standards of review
- 16 00 Adjourn

**DAY 4**  
**Thursday, November 5**

**TAX COURT (CONTINUED)**

- 9 00 - 10 30 **Comparison with Other Courts**  
**Presentations by Judge Stephen Swift of the United States Tax Court and Kristine Roth of the Office of the General Counsel, United States Internal Revenue Service**  
This presentation will explore the differences between the US Tax Court and other US Federal Courts
- 10 30 - 10 45 Coffee Break
- 10 45 - 12 00 **Resolution of Tax Disputes in Russian Judicial Practice**  
**Presentation by Judge Vyshniak N G , Chair of Judicial Panel of Supreme Commercial Court of the RF**
- 12 00 - 13 00 Lunch
- 13 00 - 14 30 **Mock Trial**
- 14 30 - 14 45 Coffee Break
- 14 45 - 16 00 **Appellate and Supreme Court Arguments**
- 16 00 Closing remarks

## **JUDGE BRENT ADAMS**

Judge Adams is of the Second Judicial District Court, Reno, Nevada. He graduated, with honors, from the University of Arizona College of Law in 1974. He has taught for the State Bar of Nevada, Nevada Judges Association, Nevada Trial Lawyers Association, and The National Judicial College in the areas of evidence, trial tactics, ethical issues, complex case management, and case settlement techniques. He is a member of the Nevada Supreme Court Alternative Dispute Resolution Study Committee and editor-in-chief of the Nevada Civil Practice Manual and Forms (3<sup>rd</sup> edition). He is an alumnus of NJC and joined the faculty in 1989.

## **DR. ERNST MARKEL**

Justice Markel received his law degree in 1962 from the University of Vienna. In 1966, he was appointed to a local court, where he heard civil cases, and, in 1971, he joined the Juvenile Court of Vienna, where he heard criminal cases and cases involving custody and care for juveniles in danger. In 1985, Justice Markel was appointed to the Court of Appeals for the Region of Vienna, and, in 1989, he was elevated to the Supreme Court of Austria. Justice Markel has been a leading member of the Association of Austrian Judges since 1973 and served as the organization's press spokesman from 1973 to 1982. He later served as President from 1983 to 1992. Justice Markel has spoken at many seminars for members of the Austrian judiciary and during the past several years also has participated in training seminars in Eastern Europe and Central Asia. He has published works on diverse judicial issues, particularly the problems confronting the judiciary and was co-author of the current edition of the Austrian Judicial Code. Justice Markel is also Vice President of the International Association of Judges.

## **JUDGE STEVEN PLOTKIN**

Honorable Steven R. Plotkin received his B.A. and L.L.B. (J.D.) degrees from Tulane University, and was inducted into the Order of the Coif in 1988. He received a Master of Laws degree from the University of Virginia. Judge Plotkin was a trial lawyer, an assistant district attorney for 4 years and senior partner in his own firm for 20 years. During this time he was elected President of the greater New Orleans Trial Lawyers Association. Thereafter, in 1978 he was appointed to the Municipal Court, in 1979 he was elected a District Court Judge, and in 1987 he was elected to the Court of Appeal. He is an adjunct professor of law and teaches Civil Law Torts, Louisiana Code of Civil Procedure (trial and appellate practice), and Comparative Law at Tulane Law School and is Director Emeritus of the Tulane Trial Advocacy courses. He lectures regularly for, and is a former Director of, the Louisiana Judicial College. He teaches annually at Harvard University and other law schools, including regional and advanced NITA programs. Judge Plotkin also teaches annually in Tulane Law Summer School in Greece, and has taught in numerous other international programs. He is a member of the American Law Institute. He has authored or co-authored more than 20 publications for bar journals, law reviews, and trial publications on diverse topics such as "Judicial Malpractice-Pulliam is Not the Answer" and "Trial Tips" an eight-part series, and three books on "Louisiana Civil Procedure." Judge Plotkin received the ATLA Judicial Achievement Award for the State of Louisiana in 1986. In 1993 he received the Jefferson Bar Association Auxiliary-Law-Day-Outstanding Judge Award, and the Monte Lemann Distinguished Teaching Award at Tulane Law School. He is currently Chairman, Louisiana State Bar Association Committee on Professionalism and Quality of Life. He was a discussion leader, faculty member and a faculty coordinator for the National Judicial College from 1981 to 1993. Since 1989 he has hosted a weekly one-hour TV show entitled "It's the Law" on Cable TV in New Orleans.

## **DAVID M VAUGHN**

Mr Vaughn currently serves as Deputy Chief of Party in Moscow for the Russian-American Judicial Partnership project with is assisting the judicial leadership of Russia to implement judicial reforms. Prior to this assignment, he served in Almaty, Kazakhstan, as a volunteer liaison for the American Bar Association Central and East European Law Initiative, where he ran two fully-staffed field offices and was responsible for a variety of legal reform programs aimed at judges and lawyers. While in Kazakhstan, he also worked closely with the Parliament on improving the quality of legislation. He obtained a B.A. in Russian language and an M.A. in political science for the University of Vermont in Burlington, and a J.D. concentrating in international law for the American University in Washington, D.C. He received Russian language training at the Pushkin Institute of the Russian Language in Moscow and the University of Khar'kov in Ukraine. He has over six years experience in international, constitutional and criminal law, and has a background in international affairs and human rights issues.

## **JUDGE BETTY BARTEAU**

After receiving a law degree from Indiana University School of Law - Indianapolis, Judge Barteau was in private practice for 10 years. During this time she also served as a deputy prosecutor, a defense attorney, county attorney and as a city court judge. She was elected to the Marion Superior Court in Indianapolis, Indiana in 1974 where she served for 16 years. In 1991 she joined the Indiana Court of Appeals, leaving that court in 1998 to become the Chief of the Russian American Judicial Partnership, a USAID funded project of the National Judicial College and Chemonics International based in Moscow, Russia. This project is providing and developing judicial education and training for the Commercial and General Jurisdiction courts of Russia, as well as working with the courts in the development of technical support systems and legal publications.

She received her LLM in the Judicial Process from the University School of Law in 1994.

Judge Barteau is past president of the Association of Family and Conciliation Courts and was a founding member of the National Association of Women Judges.

She has received many awards including being named Indiana Women of the Year in 1978 for her contribution in furthering equality for women in the business and professional fields.

Judge Barteau is a 1975 graduate of the National Judicial College, has been on the faculty since 1978, and was the 1993 recipient of the Griswold Award for Excellence in Teaching. She was a charter member of the NJC Faculty Council and served as its chair for the year 1990.

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## BIOGRAPHICAL INFORMATION

### V SUE SHIELDS

#### UNITED STATES MAGISTRATE JUDGE, SOUTHERN DISTRICT OF INDIANA

#### PERSONAL

Born January 17 1939 in Wilmore, Kentucky  
Married to William E Shields, Attorney  
Son Greg Shields Attorney, Austin, Texas  
Son Brad Shields Law Clerk to United States District Judge El Paso Texas

#### POSITIONS HELD

January 28, 1994 to present	United States Magistrate Judge United States District Court Southern District of Indiana
July 1 1978 to January 28, 1994	Judge, Indiana Court of Appeals
January 1, 1965 to June 30, 1978	Judge Hamilton County Superior Court
1962-1964	Deputy Attorney General State of Indiana
1961	Attorney with Office of Regional Counsel Internal Revenue Service

#### EDUCATION

A B , Ball State University 1959  
L L B with distinction, Indiana University School of Law 1961  
Graduate, Indiana Judicial College  
General and graduate courses, National College of State Trial Judges  
Graduate, Appellate Judges Seminar, New York University

#### HONORS

First recipient Antoinette Dakin Leach Award Indianapolis Bar Association  
Paul Buchanan Award of Excellence Indianapolis Bar Association  
Academy of Alumni Fellows, Indiana University School of Law, Bloomington Indiana 1994  
Indiana Business Journal, The Indiana Lawyer One of Indianapolis Most Influential Women  
1997

#### ACTIVITIES

Formerly held numerous appointed and elective offices in State Trial and Appellate Judges  
Section, Judicial Administration Division American Bar Association Formerly held chairs and  
membership on numerous committees of the Indiana Judges Association



V ROBERT PAYANT *President*  
KENNETH A ROHRS *Dean*

# THE NATIONAL JUDICIAL COLLEGE

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AFFILIATED WITH  
AMERICAN BAR ASSOCIATION

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JUSTICE TOM C CLARK 1899 1977  
*Chair of the Founders*

JUSTICE FLORENCE K MURRAY  
*Chair Emerita*

WALTER H BECKHAM JR. ESQ  
*Chair Emeritus*

## PRETRIAL PROCEDURES AND SETTLEMENT CONFERENCES

### Objective

to give the participants a better understanding of pretrial procedures and settlement conferences used in the USA judicial practice

### The participants will study the following

GOAL OF CASE MANAGEMENT

KEYS TO SUCCESSFUL CASE MANAGEMENT

THE PRETRIAL PROCESS

SAMPLE CASE

SAMPLE ORDER REGARDING INITIAL PRETRIAL CONFERENCE

SAMPLE ORDER REGARDING SETTLEMENT CONFERENCE

TRIAL SETTING AND NOTICE OF CONFERENCE

LOCAL RULES RELEVANT TO CASE MANAGEMENT

# **PRETRIAL PROCEDURES AND SETTLEMENT CONFERENCES**

*MAGISTRATE JUDGE V SUE SHIELDS  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA*

## GOAL OF CASE MANAGEMENT

The goal of case management is to help the parties satisfactorily resolve their dispute in the most efficient way possible.

Settlement is most often the most efficient means of resolving a case. Settling a case almost always costs the parties less money than preparing a case for trial, and it can be done much quicker than going to trial. Settlement also uses much less of the courts' limited resources.

In addition, settlement is almost always more satisfactory for the parties than going to trial. It allows the parties to have more input into how the case is resolved, and allows for more creative resolutions. Even parties who initially feel strongly that they want their day in court will likely find satisfaction in the settlement process.

Because settlement most often satisfies the goal of case management, the judge should always keep settlement in mind when choosing case management methods. In other words, ask yourself "will this case management deadline or policy further the possibility of settlement?"

## KEYS TO SUCCESSFUL CASE MANAGEMENT

- Establish a realistic trial date from the beginning of the case
- Enter a case management order as soon as possible (60 days from date case is filed) to get things moving
- Be sure attorneys understand continuances will be rarely granted
- Meet with the parties for an initial pretrial conference to set the stage for early settlement negotiations and efficient and cooperative case management. It is never too early to begin discussing settlement!
- Help establish a discovery schedule with settlement and/or summary judgment in mind
- Resolve discovery disputes promptly
- Hold a settlement conference before too much has been invested in the case
- If settlement conference is not successful, follow up! Positions change with time, especially with a trial date looming
- Keep your word -- grant extensions of time only in rare circumstances

## THE PRETRIAL PROCESS

- 1) Enter case management plan instructions for preparing are given to plaintiff when case is filed, plan is due 60 days after case is filed and entered by court shortly after it is filed
- 2) Set trial date, pretrial and settlement conferences as soon as the case management plan is entered, the following dates are set
  - initial pretrial conference
  - settlement conference
  - final pretrial conference
  - trial
- 3) The initial pretrial conference is held approximately 30 days from the date the case management plan is entered
  - determine issues involved in case
  - ensure that parties have discovery schedule in place
  - suggest ways to streamline discovery for maximum efficiency (i.e. concentrate on discovery needed to determine settlement positions first)
  - begin settlement discussions as appropriate
- 4) A settlement conference is typically held approximately 6-8 weeks prior to the summary judgment deadline, unless parties request an earlier date, occasionally an additional settlement conference is necessary after summary judgment is ruled upon
- 5) The final pretrial conference is held 1-2 weeks before trial
  - Determine final witness and exhibit lists
  - Ensure that witnesses have been subpoenaed
  - Discuss stipulations of evidence
  - Make one final attempt at settlement

# SAMPLE CASE

JOHN SMITH & COMPANY \_\_\_\_\_

VS.

JANE DOE, INC.

Filed in United States District Court on  
January 2, 1998



- b On or before **April 17, 1998**, plaintiff shall file
  - 1 preliminary witness and exhibit lists, which plaintiff shall supplement by letter or fax to defendant upon discovering any additional witnesses or exhibits,
  - 11 a statement of preliminary contentions, which plaintiff shall amend or delete by letter or fax to defendant upon discovering a factual or legal basis for the amendment or deletion
- c On or before **May 2, 1998**, defendant shall file
  - 1 preliminary witness and exhibit lists, which defendant shall supplement by letter or fax to plaintiff upon discovering any additional witnesses or exhibits,
  - 11 a statement of preliminary contentions, which defendant shall amend or delete by letter of fax to plaintiff upon discovery a factual or legal basis for the amendment or deletion
- d Plaintiff shall prepare a statement of special damages, if any, and make a settlement demand, on or before **June 2, 1998** Defendant shall respond thereto within **15 days** after receipt of the demand
- e Plaintiff shall disclose the name, address and vita of all expert witnesses, and shall provide the report required by Fed R Civ P 26(a)(2)(B) on or before **July 12, 1998**
- f Defendant(s) shall disclose the name, address and vita of all expert witnesses, and shall provide the report required by Fed R Civ P 26(a)(2)(B) on or before **July 22, 1998**
- g All parties shall file a statement of final contentions, final witness lists, and final exhibit lists on or before **September 2, 1998**

6 **Motion Practice**

- a All motions for leave to amend the pleadings and/or to join additional parties shall be filed on or before **April 2, 1998**
- b Counsel shall file all motions regarding defenses raised pursuant to Fed R Civ P 12(b) on or before **May 2, 1998**
- c Motions for summary judgment (including partial summary judgments) shall be filed as soon as practicable, but no later than **July 2, 1998**

7 **Alternative Dispute Resolution**

- a A settlement conference will be set with the magistrate judge in this cause during the month of **May 1998**

8 **Trial Considerations**

- a This case will be ready for trial during the month of **January 1999**
- b The trial by jury will take 3 days

9 **Required Pretrial Preparation**

- a **TWO WEEKS PRIOR TO THE TRIAL DATE**, the parties shall
  - i File a list of witnesses who will be called at trial
  - ii Number in sequential order all exhibits, including graphs, charts and the like, that will be used during the trial. Provide the court with a list of these exhibits, including a description of each exhibit and the identifying designation. Make the original exhibits available for inspection by opposing counsel
  - iii Submit all stipulations of facts in writing to the court. Stipulations are encouraged so that the trial can concentrate on relevant contested facts
  - iv A party who intends to read any depositions into evidence during the party's case in chief shall prepare and file with the court and copy to all opposing parties either
    - 1 brief written summaries of the relevant facts in the depositions that will be offered. (Because such a summary will eliminate time that is frequently wasted in reading depositions in a question and answer format, it is strongly encouraged), or
    - 2 if a summary for some reason is inappropriate, a document which lists the deposition(s), including the specific page and line numbers, that will be read
  - v Provide all other parties and the court with any trial briefs and motions in limine, along with all proposed jury instructions, voir dire questions, and areas of inquiry for voir dire (or, if the trial is to the court, with proposed findings of fact and conclusions of law)

- b **ONE WEEK PRIOR TO THE TRIAL DATE**, the parties shall
- 1 Submit to the court in writing any objection to the proposed exhibits. The objection shall include a description and designation of the exhibit, the basis of the objection, and the legal authorities supporting the objection.
  - 11 If a party has an objection to the deposition summary or to a designated portion of a deposition that will be offered at trial, or if a party has additional portions that he, she, or it intends to offer at trial in response to the opponent's designation, the party shall submit the objections and counter summaries or designations to the court in writing. Any objections shall be made in the same manner as for proposed exhibits.
  - 111 File objections to any motions in limine, proposed instructions and voir dire questions (or to the proposed findings of fact and conclusions of law) submitted by the opposing parties.

The failure of counsel for any party to comply with the requirements of this plan may result in the imposition of sanctions, which could include the dismissal of the complaint or the entry of a default judgment.

**ENTERED** this 5th day of March, 1998

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V SUE SHIELDS, Magistrate Judge  
United States District Court  
Southern District of Indiana

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

John Smith & Company, )  
 )  
 Plaintiff, )  
 )  
 vs ) IP 98-4321  
 )  
 Jane Doe, Inc , )  
 )  
 Defendant )

**ORDER REGARDING INITIAL PRE-TRIAL CONFERENCE**

It appears this cause will benefit from early intervention by the court. Therefore, counsel for the parties shall appear for an initial pretrial conference before Magistrate Judge V Sue Shields in Room 256, United States Courthouse, 46 East Ohio Street, Indianapolis, Indiana, on **April 3, 1998 at 9 00 A M**, in order to commence settlement discussions and/or to discuss means to expedite the resolution of this dispute.

Dated this 9th day of March, 1998

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V SUE SHIELDS, MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

**JOHN SMITH,**

**Plaintiff,**

**v**

**JANE DOE, INC ,**

**Defendant**

)  
)  
)  
)  
) **CAUSE NO IP 98-4321**  
)  
)  
)  
)

**ORDER REGARDING SETTLEMENT CONFERENCE**

This cause is set for a settlement conference before Magistrate Judge V Sue Shields on **May 2, 1998**. The following are mandatory guidelines for the parties in preparing for the settlement conference.

**1 PURPOSE OF CONFERENCE**

The purpose of the settlement conference is to permit an informal discussion between the attorneys, parties, non-party indemnitors or insurers, and the magistrate judge of every aspect of the lawsuit. This educational process provides the advantage of permitting the magistrate judge to privately express his or her views concerning the parties' claims. The magistrate judge may, in his or her discretion, converse with the lawyers, the parties, the insurance representatives or any one of them outside the hearing of the others. Ordinarily, the settlement conference provides the parties with an enhanced opportunity to settle the case, due to the assistance rendered by the magistrate judge.

## 2 FULL SETTLEMENT AUTHORITY REQUIRED

In addition to counsel who will try the case being present, a person with full settlement authority must likewise be present for the conference. This requires the presence of your client or, if a corporate entity, an authorized non-lawyer representative of your client.

For a defendant, such representative must have final settlement authority to commit the company to pay, in the representative's discretion, a settlement amount up to the plaintiff's prayer, or up to the plaintiff's last demand, whichever is lower.

For a plaintiff, such representative must have final authority, in the representative's discretion, to authorize dismissal of the case with prejudice, or to accept a settlement amount down to the amount of the defendant's last offer.

The purpose of this requirement is to have representatives present who can settle the case during the course of the conference without consulting a superior. A governmental entity may be granted permission to proceed with a representative with limited authority.

## 3 EXCEPTION WHERE BOARD APPROVAL REQUIRED

If Board approval is required to authorize settlement, attendance of the entire Board is requested. The attendance of at least one sitting member of the Board (preferably the Chairperson) is absolutely required.

## 4 APPEARANCE WITHOUT CLIENT PROHIBITED

Counsel appearing without their clients (whether or not you have been given settlement authority) will cause the conference to be canceled and rescheduled. Counsel for a government entity may be excused from this requirement upon proper application.

5 AUTHORIZED INSURANCE REPRESENTATIVE REQUIRED

Any insurance company that (1) is a party, (2) can assert that it is contractually entitled to indemnity or subrogation out of settlement proceeds, or (3) has received notice or a demand pursuant to an alleged contractual requirement that it defend or pay damages, if any, assessed within its policy limits in this case must have a fully authorized settlement representative present at the conference. Such representative must have final settlement authority to commit the company to pay, in the representative's discretion, an amount within the policy limits.

The purpose of this requirement is to have an insurance representative present who can settle the outstanding claim or claims during the course of the conference without consulting a superior. An insurance representative authorized to pay, in his or her discretion, up to the plaintiff's last demand will also satisfy this requirement.

6 ADVICE TO NON-PARTY INSURANCE COMPANIES REQUIRED

Counsel of record will be responsible for timely advising any involved non-party insurance company of the requirements of this order.

7 PRE-CONFERENCE DISCUSSIONS REQUIRED

Prior to the settlement conference, the attorneys are directed to discuss settlement with their respective clients and insurance representatives, and opposing parties are directed to discuss settlement so the parameters of settlement have been explored well in advance of the settlement conference. This means the following:

By 25 DAYS PRIOR TO CONFERENCE, plaintiff must tender a written settlement offer to defendant.

By 15 DAYS PRIOR TO CONFERENCE, each defendant must make and deliver a written response to plaintiff. That response may either take the form of a written

substantive offer, or a written communication that a defendant declines to make any offer

Silence or failure to communicate as required is not itself a form of communication which satisfies these requirements

#### 8 CONFIDENTIAL SETTLEMENT CONFERENCE STATEMENT REQUIRED

One copy of each party's confidential settlement conference statement must be submitted directly to the magistrate judge no later than one week prior to the settlement conference. Confidential settlement statements **should not be filed**

Your statement should set forth the relevant positions of the your client concerning factual issues, issues of law, damages, and the settlement negotiation history of the case, including a recitation of any specific demands and offers that may have been conveyed, as well as any additional information you feel would be helpful to the magistrate judge

The settlement conference statement may not exceed five (5) pages in length and will not be made a part of the case file. Lengthy appendices should not be submitted. Pertinent evidence to be offered at trial should be brought to the settlement conference for presentation to the settlement judge if thought particularly relevant

#### 9 CONFIDENTIALITY STRICTLY ENFORCED

Neither the settlement conference statements nor communications of any kind occurring during the settlement conference can be used by any party with regard to any aspect of the litigation or trial of the case. Strict confidentiality shall be maintained with regard to such communications by both the settlement judge and the parties

#### 10 CONTINUANCES

Applications for continuance of the settlement conference will not be entertained unless such application is submitted to the settlement conference judge in writing at least seven (7) days prior to the scheduled conference. Any such application must contain both a statement setting forth good cause for a continuance and a recitation of whether or not the continuance is opposed by any other party.

11 NOTIFICATION OF PRIOR SETTLEMENT REQUIRED

In the event a settlement between the parties is reached before the settlement conference date, parties are to notify the magistrate judge immediately.

12 CONSEQUENCES OF NON-COMPLIANCE

Noncompliance with this order may result in sanctions, including contempt proceedings and/or assessment of costs, expenses and attorney fees, together with any additional measures deemed by the court to be appropriate under the circumstances.

**ENTERED** this 9th day of March, 1998

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V Sue Shields  
United States Magistrate Judge  
Southern District of Indiana

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

<b>JOHN SMITH,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v</b>	)	<b>CAUSE NO IP 98-4321</b>
	)	
<b>JANE DOE, INC ,</b>	)	
	)	
<b>Defendant</b>	)	

**TRIAL SETTING AND NOTICE OF CONFERENCE**

The court has reviewed and approved the parties' Case Management Plan. Accordingly, this cause is now set for a jury trial on **January 4, 1999 at 9 00 A M** in Room 246 of the United States Courthouse, 46 East Ohio Street, Indianapolis, Indiana.

A final pretrial conference with Magistrate Judge V Sue Shields is also set for **December 22, 1998 at 4 00 P M** in the Chambers of Magistrate Judge V Sue Shields (Room 256 in the same building). Counsel are requested to comply with Local Rule 16 1(e) in preparation for the conference. A copy of the proposed agenda for the conference should reach the court (at the above office) at least two working days prior to the conference. The subjects to be covered at the conference are listed in Rule 16(c) and (d) of the Federal Rules of Civil Procedure, and may also include any other matters suggested by counsel which may aid in the orderly disposition of this cause.

**ENTERED** this 9th day of March 1998

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V Sue Shields  
United States Magistrate Judge  
Southern District of Indiana

# **LOCAL RULES RELEVANT TO CASE MANAGEMENT**

## **L R 6 1 - Initial Enlargements of Time**

In every civil action pending in this court in which a party wishes to obtain an initial enlargement of time not exceeding thirty (30) days within which to file a responsive pleading or a response to a written request for discovery or request for admission, the party shall contact counsel for the opposing party and solicit opposing counsel's agreement to the extension. In the event opposing counsel does not object to the extension or cannot with due diligence be reached, the party requesting the extension shall file a notice with the court reciting the lack of objection to the extension by opposing counsel or the fact that opposing counsel could not with due diligence be reached. No further filings with the court nor action by the court shall be required for the extension. However, any further extension requires leave of the court, which will be given for good cause only. Such extensions are disfavored due to their potential for interference with the procedures in L R 16 1.

In the event the opposing counsel objects to the request for extension, the party seeking the same shall file with the Clerk a motion for such extension and shall recite in the motion the effort to obtain agreement.

Any such motion or notice filed pursuant to this rule shall state the date such response is due and the date to which time is enlarged.

## **L R 16 1 - Pretrial Procedures**

(a) **Purpose** The fundamental purpose of pretrial procedure as provided in Rule 16 of the Fed R Civ P is to eliminate issues not genuinely in contest and to facilitate the trial of issues that must be tried. The normal pretrial requirements are set forth in Rule 16 of the Fed R Civ P. It is anticipated that the requirements will be followed in all respects unless any Judge of this Court shall vary the requirements and shall so advise counsel. The following provisions shall also apply to the conduct of pretrial conferences by a United States Magistrate Judge and where applicable, reference to the Judge or the Court shall include a United States Magistrate Judge.

(b) **Notice** In any civil case, the assigned or presiding Judge may direct the Clerk to issue notice of a pretrial conference, directing the parties to prepare and to appear before the Court.

The following types of cases will be exempted from the scheduling order requirement of Rule 16(b) of the *Fed R Civ P*

- (1) Social Security cases filed under 42 U S C § 405(g),
- (2) Applications for writs of habeas corpus under 28 U S C § 2254,
- (3) Motions to vacate sentence under 28 U S C § 2255,
- (4) Civil forfeiture cases,
- (5) IRS summons cases and summary proceedings,
- (6) Bankruptcy matters,
- (7) Land condemnation cases,
- (8) Naturalization proceedings filed as civil cases,
- (9) Cases under 42 U S C § 1983 *pro se* by prisoners,
- (10) Veterans Administration overpayment cases,
- (11) Student loan cases,
- (12) Out-of-district subpoena cases,
- (13) HUD overpayment cases,
- (14) Mortgage foreclosures, and
- (15) Any other case the Judge finds that justice would not be served by using the scheduling order procedure of Rule 16(b)

(c) Initial pretrial conference

(1) In all cases not exempted pursuant to subsection (b) of this rule, the Court shall order the parties to appear for an initial pretrial conference no more than 120 days after the filing of the complaint. The order setting the conference shall issue promptly following the appearance of counsel for all defendants and in any event no later than sixty days after the filing of the complaint.

(2) The order setting the initial pretrial conference, in addition to such other matters as the Court may direct, shall require counsel for all parties to confer and prepare a case management plan and to file such plan by a date specified in the order, which date shall be at least fifteen days before the pretrial conference setting. The order may provide that the pretrial conference setting shall be vacated upon the filing of a case management plan that complies with this rule and upon the approval of such plan by the Court.

(3) Upon the filing of an acceptable case management plan in compliance with the order and this rule, the Court may issue an order adopting the plan, ordering it performed and vacating the initial pretrial conference setting. Any such order shall also set a firm trial date.

(4) If the parties do not file a case management plan, or file a plan that fails materially to comply with the order and this rule, or file a plan that reflects material disagreements among the parties, the Court may

(A) Conduct the initial pretrial conference and, following

such conference, enter an order reflecting the matters ordered and agreed to at the conference and setting a firm trial date, or  
(B) Issue an order without further hearing adopting the acceptable portions of the plan, omitting unacceptable portions, supplying omitted matters, resolving disputed matters, vacating the pretrial conference setting and setting a firm trial date. The Court may conduct a telephone conference with counsel prior to entering such an order.

(5) To the extent permitted by statute and rule, orders entered under subparagraphs (c)(3) and (c)(4) may set an alternative trial date in the event the parties thereafter consent to referral of the case to a magistrate judge.

(d) **Contents of case management plan**

(1) The objective of the case management plan is to promote the ends of justice by providing for the timely and efficient resolution of the case by trial, settlement or pretrial adjudication. In preparing the plan, counsel shall confer in good faith concerning the matters set forth below and any other matters tending to accomplish the objective of this rule. The plan shall incorporate matters covered by the conference on which the parties have agreed as well as advise the court of any substantial disagreements on such matters.

(2) The conference and case management plan shall address the following matters:

-- **Trial date** The plan should be premised on a trial setting between six and eighteen months after the filing of the complaint and should recommend a trial date by month and year. If counsel agree that the case cannot reasonably be ready for trial within eighteen months, the plan shall state in detail the basis for that conclusion. The plan shall also state the estimated time required for trial.

-- **Contentions** The plan shall set forth the contentions of the parties, including a brief description of the parties' claims and defenses.

-- **Discovery subjects** The plan shall identify the subjects on which discovery is needed.

-- **Discovery schedule** The plan shall provide for the timely and efficient completion of discovery, taking into account the desirability of staged discovery where discovery in stages might materially advance the resolution of the case. The parties should discuss initial

disclosures under *Fed R Civ P* 26(a)(1) and L R 26 3, and the plan should provide for stipulations relating to such disclosures if appropriate. The plan shall provide for disclosure of expert witnesses as required by *Fed R Civ P* 26(a)(2)(A), and the parties shall discuss any stipulations with respect to the timing and requirements of expert reports under that rule. The plan should also provide a schedule for the taking of the depositions of expert witnesses, together with (1) a designation whether the deposition is for discovery purposes only or is to be offered in evidence at trial, (2) a determination of the party responsible for the payment of the witness' fees, and (3) as to each witness designated, an order for the production of *curriculum vitae*

-- Witnesses and exhibits The plan shall incorporate a schedule for the preliminary and final disclosure of witnesses and exhibits and should schedule the pretrial disclosures required by *Fed R Civ P* 26(a)(3)

-- Accelerated discovery The parties shall discuss and seek agreement on the prompt disclosure of relevant documents, things and written information without prior service of requests pursuant to *Fed R Civ P* 33 and 34

-- Limits on depositions, interrogatories, and admissions The parties shall discuss whether the limits on the number or length of depositions, the number of interrogatories, imposed by *Fed R Civ P* 30(a)(2)(A), 31(a)(2)(A), and 33(a), or the number of admissions under L R 26 1(b) should be varied by stipulation

-- Motions The plan will identify any motions which the parties have filed or intend to file. The parties shall discuss whether any case-dispositive or other motions should be scheduled in relation to discovery or other trial preparation so as to promote the efficient resolution of the case and, if so, the plan shall provide a schedule for the filing and briefing of such motions

-- Stipulations The parties shall discuss possible stipulations and, where stipulations would promote the efficient resolution of the case, the plan shall provide a schedule for the filing of stipulations

-- Bifurcation The parties shall discuss whether a separation of claims, defenses or issues would be desirable, and if so, whether discovery should be limited to the claims, defenses or issues to be tried first

-- **Alternative dispute resolution** The parties shall discuss the desirability of employing alternative dispute resolution methods in the case, including mediation, neutral evaluation, arbitration, mini-trials or mini-hearings, and summary jury trials

-- **Settlement** The parties shall discuss the possibility of settlement both presently and at future stages of the case. The plan may provide a schedule for the exchange of settlement demands and offers, and may schedule particular discovery or motions in order to facilitate settlement

-- **Referral to a magistrate judge** The parties shall discuss whether they consent to the referral of the case to a magistrate judge

-- **Amendments to the pleadings, joinder of additional parties** The parties shall discuss whether amendments to the pleadings, third party complaints or impleading petitions, or other joinder of additional parties are contemplated. The plan shall impose time limits on the joinder of additional parties and for amendments to the pleadings

-- **Other matters** The parties shall discuss (1) whether there is a question of jurisdiction over the person or of the subject matter of the action, (2) whether all parties have been correctly designated and properly served, (3) whether there is any question of appointment of a guardian ad litem, next friend, administrator, executor, receiver or trustee, (4) whether trial by jury has been timely demanded, (5) whether related actions are pending or contemplated in any court, and whether there is any need for protective orders under *Fed R Civ P 26(c)*

-- **Interim pretrial conferences** The parties shall discuss whether interim pretrial conferences prior to the final pretrial conference should be scheduled

The plan shall specifically address the early scheduling of motions based on any defense raised pursuant to *Federal Rule of Civil Procedure 12(b)(1)-(6)*

(e) **Additional pretrial conferences** Additional pretrial conference(s) shall be held as ordered by the Court. Prior to each such pretrial conference, counsel for all parties will confer, in person or by telephone, to prepare for the conference. Such conference shall include a review of the case management plan and shall address whether the plan should be supplemented or amended. In cases in which pretrial case management is

assigned to a magistrate judge, counsel shall also discuss whether direct involvement by the district judge prior to trial might materially advance the case. The discussions of counsel shall be summarized by one of counsel who shall prepare an agenda for the pretrial conference which shall reflect the agreements reached among or between counsel, including any proposed supplements or amendments to the case management plan. It shall be the responsibility of all counsel that an agenda be presented to the Court at the pretrial conference. Failure to present an agenda and failure to confer as required may be grounds for the imposition of sanctions.

(f) Contents of final pretrial order. In addition to such other provisions as the Court may direct, the final pretrial order may direct each party to file and serve the following:

(1) A trial brief, the nature and extent of which shall be directed by the Judge. Copies of all foreign statutes involved, with reference to their source, shall also be submitted.

(2) In nonjury cases, proposed findings of fact and conclusions of law, including citations for each conclusion of law if available.

(3) In jury cases, requested charges to the jury covering issues to be litigated. Each charge should cite appropriate authority.

(4) A stipulation of facts relating to jurisdiction and the merits of the issues.

(5) A list of exhibits to be offered at trial, except those to be used solely for impeachment or rebuttal.

(6) A statement of any objections to exhibits listed by other parties. Unless objections to authenticity are noted, copies of exhibits may be introduced in lieu of originals.

(7) A list of names and addresses of witnesses to be called, except those to be called solely for impeachment or rebuttal. The list shall specify the general subject matter of each witness's testimony.

(g) Preparation of pretrial entry. The Court may order one of counsel to prepare a pretrial entry setting forth the agreements of counsel reached and the orders of Court entered at the pretrial conference. Such entry shall be signed by all counsel. Signature shall affirm that such orders were made but shall not be a waiver of any right to object to such orders.

(h) Settlement. Counsel should anticipate that the subject of settlement will be discussed at any pretrial conference. Accordingly, counsel should be prepared to state his or her client's present position on settlement. In

particular, prior to any conference, counsel should have ascertained his or her settlement authority and be prepared to enter into negotiations in good faith. Details of such discussions at the pretrial conference should not appear in the pretrial entry.

(l) **Deadlines** Deadlines established in any order or pretrial entry under this rule shall not be altered except by agreement of the parties and the Court, or for good cause shown.

(j) **Sanctions** Should a party willfully fail to comply with any part of this rule, the Court in its discretion may impose appropriate sanctions.

### L R 16 3 - Continuances in Civil Cases

Upon verified motion, or other evidence, or agreement of the parties, trial or other proceedings in civil actions may be postponed or continued in the discretion of the Court. The Court may award such costs as will reimburse the other parties for their actual expenses incurred from the delay. A motion to postpone a civil trial on account of the absence of evidence can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, that due diligence has been used to obtain it, where the evidence may be, and if it is for an absent witness, the affidavit must show the name and residence of the witness, if known, and the probability of procuring the testimony within a reasonable time, and that his/her absence has not been procured by the act or connivance of the party, nor by others at the party's request, nor with his/her knowledge or consent, and what facts the party believes to be true, and that he/she is unable to prove such facts by any other witness whose testimony can be as readily procured. If the adverse party will stipulate to the content of the evidence that would have been elicited at trial from the absent document or witness, the trial shall not be postponed. In the event of a stipulation, the parties shall have the right to contest the stipulated evidence to the same extent as if the absent document or witness were available at trial.

### L R 37 1 - Informal Conference to Settle Discovery Disputes

The Court may deny any discovery motion (except those motions brought by a person appearing *pro se* and those brought pursuant to Rule 26(c), *Fed R Civ P*, by a person who is not a party), unless counsel for the moving party files with the Court, at the time of filing the motion, a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion.

This statement shall recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. If counsel for any party advises the Court in writing that opposing counsel has refused or delayed

**meeting and discussing the problems covered in this rule, the Court may take such action as is appropriate to avoid unreasonable delay**



V ROBERT PAYANT *President*  
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## THE JUDGE'S ROLE IN ALTERNATIVE DISPUTE RESOLUTION

### Objective

to understand, implement and practice alternative dispute resolution techniques, including judicial settlement conferences

### The participants will study the following

- I WHAT IS THE PURPOSE OF THE CIVIL LEGAL SYSTEM?
- II WHAT ARE THE FEATURES OF THE TRADITIONAL CIVIL LEGAL PROCESS?
- III WHAT ARE THE BENEFITS AND DETRIMENTS OF THE TRADITIONAL PROCESS FOR RESOLVING CIVIL DISPUTES?
- IV WHAT IS THE JUDGE'S ROLE?
- V WHAT ARE THE GOALS OF ANY ALTERNATIVE DISPUTE RESOLUTION (A D R) PROCESS?
- VI HOW TO ESTABLISH A D.R PROGRAMS IN YOUR COURT
- VII A SURVEY OF A D R. PROGRAMS
- VIII EVALUATE AND MONITOR YOUR A D R. SYSTEM BY ASKING
- IX JUDICIAL LEADERSHIP AND THE SETTLEMENT CONFERENCE

THE JUDGE'S ROLE IN ALTERNATIVE DISPUTE RESOLUTION

by  
Brent Adams, District Judge  
State of Nevada

OBJECTIVE

To understand, implement and practice alternative dispute resolution techniques, including judicial settlement conferences

I What is the purpose of the civil legal system?

- A To resolve civil disputes
- B To achieve justice
- C To develop the common law
- D To create or implement legal policy
- E To enforce legal decisions

II What are the features of the traditional civil legal process?

- A An adversarial system
- B Formal discovery
- C Pretrial motion practice
- D A jury or non-jury trial
- E Appellate review

III What have been the benefits and detriments of the traditional process for resolving civil disputes?

- A Benefits

- 1 Careful oversight of procedural fairness
- 2 Primary focus on procedure, not results
- 3 Appellate review provides development of new legal doctrines through case precedents
- 4 Finality of decision
- 5 A public process
- 6 Equal treatment for all participants in the process

B Detriments

- 1 Time
- 2 Cost
- 3 Uncertainty of outcome
- 4 Outcomes are limited to the remedies specified in the law which applies to the case
- 5 The focus of the process is backward not forward  
Thus, a law suit is not a good planning tool for businesses and individuals
- 6 The process itself can eclipse the subject of the controversy

IV What is the role of the judge?

- A In an adversarial system the judge is an umpire <sup>1</sup>
- B Should the judge be merely a "order machine"?
- C Does the judge have a responsibility as the leader or

manager of the civil legal system?

- D What is the ultimate purpose of the system?
- E What is the public opinion of the traditional legal system?
- F How do you value reaching results verses development of legal doctrine?
- G What are the virtues and dangers of a public verses "private" dispute resolution system?

V What are the goals of any alternative dispute resolution (A D R ) process?

- A If the present system is too expensive, any alternative must be cheaper
- B If the present system is too slow, any alternative must be faster
- C Any alternative process should increase satisfaction with both the process and results and thereby generally increase respect for the legal system
- D Any A D R program should be fair to all concerned  
A D R should not be a maneuver for a party to obtain an advantage not available in the traditional system

VI How to establish A D R programs in your court

- A Who should be involved?

- 1 The judges
  - 2 The lawyers
  - 3 The media
  - 4 The public
  - 5 The scholarly community
  - 6 Outside consultants
- B Understand and analyze the caseload of your court
- 1 Find out
    - a How many cases
    - b How many cases per judge
    - c What is the nature of the caseload (e g ,  
tort, contract, construction, toxic or mass  
torts, divorce)
    - d What is the average time from commencement of  
the case to final disposition?
    - e What are the reasons for delays?
    - f Where are the bottlenecks?
  - 2 Based on the analysis of your caseload, select a  
variety of appropriate A D R programs

## VII A survey of A D R programs

- A Arbitration
- B Summary jury trial
- C Small claim mediation

- D Neighborhood dispute resolution
- E Judicial settlement conferences
- F Lawyer settlement conferences
- G Settlement conferences conducted by others (contractors, architects, doctors, etc )

VIII Evaluate and monitor your A D R system by asking

- A Are all those who assisted in creating the A D R program still involved or has someone or a small group taken over?
- B Is it becoming too "bureaucratized"?
- C Are we keeping it simple?
- D Is the program meeting its goals (saving time and money)?
- E Are the lawyers helping?
- F Should the programs be changed, increased or reduced?
- G Are the programs being monitored not only by judges and lawyers but by knowledgeable third parties?
- H Are there ways to highlight the A D R programs and maintain interest? (e g , special "settlement days" or weeks, speeches by judges to community groups and interviews with the media, school visits, meetings with representatives of law firms, confidential peer review)
- I Are flexibility and voluntariness still the main features

of the A D R programs in your court?

**IX Judicial leadership and the settlement conference**

A What are the differences in the role of the trial judge and the settlement judge?

B Judge Adams' practical guide to judicial effectiveness in settlement conferences ("tricks of the trade")

1 Know and be thyself Be comfortable, natural, candid and helpful Rely on the traits which make you a good person and a good judge Each has his or her own style There is no "model" which fits everyone or applies in every case

2 Be hospitable ("keep the donuts rolling") Help the parties and lawyers loosen tensions Maintain an air of civility Be generous with your compliments "Hospitality" is not required or even expected of a trial judge, it is indispensable to successful settlement conferences

3 Set the stage carefully Explain to everyone the difference between the settlement process and the process of judicial decision Obtain agreement on simple, fair ground rules Focus on the responsibility of the parties in the process, not just the judge

- 4     The decisionmakers must be present     All efforts are wasted if the decisionmaker is not in the room. Make sure parties and lawyers know in advance that the decisionmakers must be present. They are not always the parties (e.g., insurance carriers).
- 5     Forewarned is forearmed     "A judge intent on settling a civil dispute must be prepared. That is, the judge must have full knowledge of the case file. A prepared judge can settle almost any case." (Judge Samuel G. DeSimone) Utilize settlement memos with strict limits on pages and content. You may wish to prepare visual aids in advance or "props" in the courtroom, chambers or conference room.
- 6     Practice shuttle diplomacy     Meet with each side privately so they and you can be comfortable and candid. The key is to maintain complete confidentiality unless authorized to disclose matters to the other side. This technique also enables you to discover information you may not know otherwise (e.g., the financial condition of the party). Ask, "Do you want to end this lawsuit?" and then, "If so, how are we going to do it in a way the other side will accept?"
- 7     Help each party evaluate the legal and practical

- risks unique to this case Candidly review issues such as time, money, result, uncertainty, losses, personal anxiety, business plans and the impact of this case upon other values important to the party
- 8 Don't be afraid of the "fork in the road " The famous New York Yankee catcher, Yogi Berra, said it best "When you come to a fork in the road, take it " Try innovative techniques such as reversing the deal, narrowing issues, shifting the focus from substance to process, and taking a "time out "
- 9 Be a good listener and share insights and information which the parties may not have considered If you listen very carefully, the ~~parties will tell you~~ how to help them settle the case A variety of "reality checks" will give them something new to think about (e g information about results in other cases, showing the parties the files in the case or the courtroom, evaluating prior or future fees and costs)
- 10 Avoid a "bidding war" You, as an experienced judge, are contributing your insights and observations to assist the parties to settle the case Constantly swapping high and low numbers rarely achieves results and is beside the point The settlement amount is the last thing to discuss

- 11 Make sure the deal is done As soon as an agreement has been reached, put it on the record or in the form of a docket entry so everyone knows exactly what the terms of the agreement are. If settlement proceeds are to be paid later or the agreement calls for future performance, set precise consequences if the settlement sum is not paid or the acts performed (e.g., accrual of interest or exercise of continuing jurisdiction to conduct contempt proceedings)
- 12 Never give up If the parties come to the settlement conference voluntarily, the chances are very high that a settlement will be achieved, no matter what their respective positions are at the outset. The judge must "keep the faith" by being cheery, confident and helpful even when the parties seem to have given up. A little extra effort is usually all it takes.

1 "In America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the courts and to deal with the rules and law and procedure exactly as the professional football coach with the rules of the sport.

The effect of our exaggerated contentious procedures is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witnesses it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful."

Dean Roscoe Pound, 1904

2 "These rules shall be construed to secure the just, speedy and inexpensive determination of every action "

Rule 1  
Federal Rules of Civil Procedure

**“These rules shall  
be construed to  
secure the just,  
speedy and  
inexpensive  
determination of  
every action.”**

**Rule 1**

**Federal Rules of Civil Procedure**

## **Litigation:**

Public

Set Precedents

Prospect of Winning

Emphasizes Positions

Looks Backward

Others in Control of  
Process (Judge)

Process Over Result

More Costly

Indefinite

Ignores Practicalities

Formal

## **Settlement:**

Private

No Value as  
Precedent

Avoid Risk

Emphasizes Interests

Looks Forward

Parties in Control

Result Over Process

Less Costly

Case Ends

Focus Always on the  
Practical

Informal

**“Mercifully, there is time and hope if we combine patience and courage. The day may dawn when fair play, love for one’s fellowmen, respect for justice and freedom, will enable tormented generations to march forth serene and triumphant from the hideous epoch in which we have to dwell. Meanwhile, never flinch, never weary, never despair.”**

**Winston Churchill**

**Farewell address before the House of Commons, March 1, 1955**

**“Brother, I’m not depressed and haven’t lost spirit. Life everywhere is life, life is in ourselves and not in the external. There will be people near me, and to be a human being among human beings, and remain one forever, no matter what misfortunes befall, not to become depressed, and not to falter—this is what life is, herein lies its task.”**

**Fyodor Dostoevsky**

**Letter to his brother, Mikhail, concerning the events of December 22, 1849**



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## MOORE'S MANUAL FEDERAL PRACTICE AND PROCEDURES

JAMES W MOORE

ALLAN D VESTAL

Professor of Law, University of Iowa

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Professor of Law, University of Chicago

RELEASE 62, June 1998

### Objective

to study the procedures of the US Federal Law on default judgment procedure

### The participants will study the following

RULE 55 DEFAULT JUDGMENT

COMMENTS

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# MOORE'S MANUAL FEDERAL PRACTICE AND PROCEDURE

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VOLUME 3

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**1998**

*Current Through*

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## § 25 04 Default

[1]—General \* The procedure followed upon default involves two operations the entry of default, and the subsequent entry of judgment by default

Rule 55(a) provides that the clerk shall enter the default of a party against whom a judgment for affirmative relief is sought, who has failed to plead or otherwise defend, and that fact is made to appear by affidavit or otherwise <sup>1</sup> Although the entry of default should normally be performed by the clerk, the court also has the power to do so <sup>2</sup> It should appear from the face of the complaint that the court has jurisdiction of the claim,<sup>3</sup> and the complaint should state a cause of action <sup>4</sup>

After a default has been entered, Rule 55(b) provides that judgment by default shall be entered by the clerk in certain specified situations,<sup>5</sup> and in all other cases by the court <sup>6</sup> The court may set aside an entry of default for good cause, and may set aside a judgment by default in accordance with Rule 60(b) <sup>7</sup> The provisions of Rule 55 are applicable whether the party entitled to a judgment by default is a plaintiff, third-party plaintiff, counterclaimant, or cross claimant <sup>8</sup> Rule 55 does not require the moving party to act within any particular time, however, failure to act for a protracted period may result in dismissal of the claim for failure to prosecute under Rule 41(b) <sup>9</sup> If the United States or an officer or agency thereof defaults, the judgment by default should be entered by the court, but the right to relief must, nevertheless, be established by evidence satisfactory to the court <sup>10</sup>

An appearance<sup>11</sup> does not prevent a party from defaulting for failure to plead or otherwise defend <sup>12</sup> Although Rule 12(b), (e), or (f) motions are not pleadings under Rule 7(a), Rule 12(a) provides that the service of such a motion results in a postponement of the time for serving an answer, and, consequently, no default results pending disposition of these motions <sup>13</sup> When a party has appeared but defaults for failure to plead, or otherwise defend, as provided by the Rules, such a party is entitled to at least three days' written notice of the application for the entry

of a default judgment against it,<sup>14</sup> and the court (not the clerk) shall enter the judgment <sup>15</sup>

Rule 37 authorizes the district court to enter a default judgment as a sanction for failure to comply with a discovery order,<sup>16</sup> or, after proper service, for non-compliance with certain discovery rules <sup>17</sup> Rule 37 also provides for lesser sanctions, such as an order specifying that certain facts be taken as established for the purposes of the case,<sup>18</sup> and precluding the disobedient party from introducing evidence supporting a defense or defenses <sup>19</sup> Even though the practical effect of these lesser sanctions may be to establish the disobedient party's liability, this does not amount to a judgment by default <sup>20</sup>

[2]—Entry of Default • Rule 55(a) provides

Entry When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default

The first step leading to the entry of a judgment by default is that of entering a default Under Rule 55(a), the clerk shall enter a default when a claim for affirmative relief has been made against a party, who has failed to plead or otherwise defend, and that failure is made to appear "by affidavit or otherwise "

The language "plead or otherwise defend" relates to the provisions of Rule 12, which, in general, require the defendant to present its defenses in an answer served within twenty days of the date on which it was served with process, but permits certain defenses to be raised by motion, at the option of the pleader <sup>1</sup> If the defendant presents no defenses within the period allowed by Rule 12, and has received no extension of time,<sup>2</sup> it is in default under Rule 55

Assuming that the party is in default, the Rule requires the clerk to "enter" the default when the fact of default "is made to appear by affidavit or otherwise " If an answer, like a notice of appeal, had to be filed within a given number of days, the fact of default would "appear" to the clerk at the close of the last day for filing Under Rule 12(a), however, the answer must be served within 20 days after service of the summons and complaint <sup>3</sup> Under Rule 5(d), an answer must be filed with the court "within a reasonable time after service " <sup>4</sup> The clerk will know when the summons and complaint were served on the defendant,<sup>5</sup> but will not know if the answer was served within the period provided for in Rule 12 <sup>6</sup> Thus, the plaintiff who seeks a default judgment must

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establish the fact of default by evidence,<sup>7</sup> which can take the form of an affidavit showing the time of service of the summons and complaint, and an averment that an answer or motion in compliance with Rule 12 was not served within the allowed time

The Rule does not refer to any request for the entry of a default. It provides that when the fact of default has been made to appear, the clerk shall enter it. In practice, however, a request, supported by an affidavit, will usually be made, the burden of preparing the request appears minimal.<sup>8</sup>

It has been held that the court should not grant a default judgment unless the party has first obtained the entry of default,<sup>9</sup> although there is also authority for the entry of the default by the court.<sup>10</sup> The mechanics for entry of a default by the clerk are not prescribed by Rule 55(a), nor is any provision made in Rule 79 for the entry of a default, nor is an official form provided. Presumably, however, the fact is simply noted on the docket.<sup>11</sup>

#### *Effect of Entry*

Once default is entered, the defaulting party loses the right to receive notice of future proceedings,<sup>12</sup> unless the party had made an appearance. The defaulting party also loses its standing before the court and the right to present evidence on issues other than unliquidated damages.<sup>13</sup> In addition, a party who has not appeared is subject to immediate entry of judgment by default, without notice, on motion by the plaintiff.<sup>14</sup> A default judgment does not follow as a matter of right, however, after entry of default. Judgment by default may be granted only for such relief as may properly be granted upon the well pleaded facts alleged in the complaint. While such facts are deemed admitted on entry of default, the plaintiff's conclusions of law are not deemed admitted or established, and the court may grant only the relief for which a sufficient basis is asserted in the complaint.<sup>15</sup> The entry of default bars the defendant from contesting the truth of the facts alleged in support of the plaintiff's claim, but the defendant may contest the sufficiency of those facts to establish a claim for relief.<sup>16</sup> The defendant may also contest the measure of unliquidated damages.<sup>17</sup>

The entry of a default is largely a formal matter<sup>18</sup> and is in no sense a judgment by default. There is no res judicata or estoppel by judgment until entry of the judgment by default,<sup>19</sup> nor may an appeal be taken until the default judgment is entered.<sup>20</sup>

[3]—Judgment by Default, By the Clerk Rule 55(b)(1) provides

Judgment Judgment by default may be entered as follows

(1) *By the Clerk* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person

After the entry of default, the plaintiff is entitled, under Rule 55(b)(1), to have a default judgment entered by the clerk only where (1) the claim is for a sum certain, or for a sum which can by computation be made certain, and (2) the default is for want of appearance, and (3) the defendant is neither an infant nor an incompetent person. When these criteria are met, the plaintiff must apply first to the clerk for entry of judgment. If the application is refused, the plaintiff may then apply to the court.<sup>1</sup>

The "sum certain" requirement of Rule 55(b)(1) provides a familiar and rather precise criterion. In an action for return of a deposit,<sup>2</sup> for a co payee's share of check,<sup>3</sup> and in similar situations, the courts have held the claim to be for a sum certain.<sup>4</sup> On the other hand, a claim for personal injury,<sup>5</sup> an unliquidated claim for attorney's fees,<sup>6</sup> good will,<sup>7</sup> and statutory damages for copyright infringement<sup>8</sup> are clearly not for a sum certain.

The clerk is also directed to include costs authorized by 28 U S C § 1920 in the judgment,<sup>9</sup> 28 U S C § 1923 specifically makes the assessment of the statutory attorney's and proctor's docket fee applicable to cases in which a default judgment is entered by the court or the clerk. Whether or not to tax the attorney's docket fee as costs lies within the discretion of the district court.<sup>10</sup>

In addition to the specific requirements of Rule 55(b)(1) two other provisions must also be considered. Rule 55(e), and the Soldiers and Sailors Civil Relief Act of 1940.<sup>11</sup>

Under Rule 55(e), a judgment by default cannot be entered against the United States or an officer or agency thereof unless the claimant establishes its claim or right to relief by evidence satisfactory to the court.<sup>12</sup> While the government may sometimes default, it will seldom default for want of appearance, so that Rule 55(b)(1) will seldom come into play. If, however, the government does default for want of appearance, the specific provision of subdivision (e) should control over the general provisions of subdivision (b)(1), and the judgment by default should be rendered by the court because of the specific requirement that the claim or right to relief be established by evidence satisfactory to the court.<sup>13</sup>

The Soldiers' and Sailors' Civil Relief Act of 1940 has greater applicability when the defaulting party is a natural person. Under that Act, when the defendant is in "default of any appearance"

If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment.<sup>14</sup>

While the rendition or pronouncement of a judgment is a judicial act of the court, Rule 55(b)(1) constitutes a standing instruction to the clerk to enter judgment under the circumstances discussed above.<sup>15</sup>

[4]—Judgment by Default, By the Court • Rule 55(b)(2) provides

Judgment Judgment by default may be entered as follows

(2) *By the Court* In all other cases the party entitled to a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

The rather limited instances in which the clerk is authorized to enter a judgment by default have been discussed.<sup>1</sup> In other situations a default judgment can only be obtained by application to the court.<sup>2</sup>

Under Rule 55(b)(2), the entry of judgment by default must be made by the court, and not by the clerk, if any one of the following

conditions exists (1) the claim is not for a certain or arithmetically ascertainable sum,<sup>3</sup> (2) the defaulting party has made an appearance in the action,<sup>4</sup> (3) the defaulting party is an infant or an incompetent, or (4) the defaulting party is the United States or an officer or agency of the United States.<sup>5</sup> Furthermore, under the Soldiers' and Sailors' Civil Relief Act,<sup>6</sup> if the defaulting party is a natural person, a default judgment may be entered only by the court, unless an affidavit has been filed indicating that the defaulting party is not currently serving in the military.<sup>7</sup>

*Subject to the Court's Discretion*

The disposition of a motion for entry of a default judgment by the court lies within the court's sound discretion.<sup>8</sup> In exercising its discretion, the court may consider a wide variety of factors. When the defendant's failure to plead or otherwise defend is merely technical,<sup>9</sup> or where the default is de minimis,<sup>10</sup> the court should generally refuse to enter a default judgment. On the other hand, if there is reason to believe that the defendant's default resulted from bad faith in its dealings with the court or opposing party, the district court may properly enter default and judgment against defendant as a sanction.<sup>11</sup> For example, if the district court concludes that a party intentionally chose to ignore particular litigation the district court's entry of a default judgment is proper.<sup>11</sup> Other factors which may influence the exercise of the court's discretion are the possibility of prejudice to the plaintiff,<sup>12</sup> the merit of plaintiff's substantive claim,<sup>13</sup> the sufficiency of the complaint,<sup>14</sup> the sum of money at stake in the action,<sup>15</sup> the possibility of a dispute concerning material facts,<sup>16</sup> whether the default was due to excusable neglect,<sup>17</sup> and the strong policy underlying the Federal Rules favoring decisions on the merits.<sup>18</sup>

*Where Party Has Appeared, Notice*

If the defaulting party has not appeared in the action, it is not entitled to any notice of the entry of a judgment by default, whether it is entered by the clerk or by the court.<sup>19</sup> An appearance does not prevent a party from becoming in default for failure to plead or otherwise defend.<sup>20</sup> If, however, a party has entered an appearance, the court, and not the clerk, must enter the judgment by default, and the party (or, if appearing by representative, the party's representative)<sup>21</sup> must be served with written notice of the application to the court for judgment at least three days prior to the hearing on such application.<sup>22</sup> The service contemplated is that pursuant to Rule 5(b).<sup>23</sup>

The filing of a praecipe or notice of appearance, a responsive pleading,<sup>24</sup> a motion to dismiss under Rule 12,<sup>25</sup> or a stipulation extending the time within which defendant must file an answer<sup>26</sup> would constitute an appearance within the meaning of Rule 55(b)(2). However, it is not necessary to file formal documents with the clerk or court in order to make an appearance. "Appearance" is defined broadly by the courts to include a variety of informal acts on the defendant's part which are responsive to the plaintiff's formal action in court, and which may be regarded as sufficient to give the plaintiff a clear indication of defendant's

held that a party has appeared within the meaning of Rule 55(b)(2) only when the party has "actually made some presentation or submission to the district court in the pending action," and not merely where the party has entered into "informal settlement negotiations" with opposing party <sup>28</sup>

Failure to give notice as required by Rule 55(b)(2) is a serious procedural error, but it does not, without more, provide grounds for vacatur of the default judgment in all cases. Whether a judgment obtained following a violation of the notice requirement must be vacated depends upon the facts of the particular case <sup>29</sup>. In many cases failure to give notice will be harmless <sup>30</sup>. If a defendant does not move to obtain relief from a default judgment within a reasonable time after receiving actual notice, it cannot obtain relief under Rule 60(b), regardless of any violation of Rule 55(b)(2) <sup>31</sup>.

#### *When Party Is an Infant or Incompetent Person*

Only the court can enter a judgment by default against an infant or incompetent person, and then only when the infant or incompetent person is represented in the action by a general guardian, committee, conservator, or other such representative who has appeared in the action <sup>32</sup>. If the infant or incompetent defendant is not represented by a general fiduciary who has appeared in the action, the court should appoint a guardian ad litem who should plead such a denial as to put the plaintiff to the proof of its case <sup>33</sup>.

[5]—Default Judgment Where There Are Several Defendants  
In an action against multiple defendants in which one of those defendants fails to plead or otherwise defend, the issue arises whether default and default judgment may be entered against that party. While it is clear that entry of default may be made in such cases,<sup>1</sup> the propriety of an entry of default judgment may be determined only after an analysis of the substantive theory of relief asserted by the plaintiff.

A default judgment may not be entered against one of several defendants (1) when the theory of recovery is one of true joint liability, such that, as a matter of law, no one defendant may be liable unless all defendants are liable, or (2) when the nature of the relief demanded is such that, in order to be effective, it must be granted against each and every defendant <sup>2</sup>.

However, this rule is not applicable to cases involving the joint and several liability of multiple defendants for damages, because in such cases the liability of each defendant is not necessarily dependent upon the liability of any other defendant, and plaintiff may be made whole by a full recovery from any defendant <sup>3</sup>.

In a case presenting a claim of true joint liability, it would be proper to enter defendant's default,<sup>4</sup> thereby depriving it of standing to participate in further adjudication of the claim. The case would then proceed to judgment, and, for purposes of the judgment, the defaulting defendant would be treated in the same manner as the non defaulting defendants. If plaintiff should prevail on the merits, all defendants would be liable, if plaintiff's claim should fail, all defendants, including the defaulting defendant, would be exonerated. In a case presenting a claim of joint and several liability a default judgment may be entered against one of several defendants pursuant to Rules 54(b) and 55, and the case may proceed to judgment on the merits of the claim against the remaining defendants.<sup>5</sup>

When a default judgment is properly entered against one of several defendants, each of whom is jointly and severally liable for plaintiff's damages, the default judgment establishes the defaulting party's liability only, and not its relative share or percentage of fault.<sup>6</sup>

The above analysis may also be applied in cases which do not fall within the traditional concepts of joint liability.<sup>7</sup>

A distinction must be drawn between a traditional joint liability situation and the case of independent concurrent wrongs which result in a single indivisible injury.<sup>8</sup> In the latter case, local law frequently provides that liability for satisfaction of the judgment is joint and several if the conduct of two or more defendants is found to give rise to liability. The clearest illustration is the collision case. Suppose vehicle A and vehicle B are involved in an intersection collision. A passenger in vehicle A sues both operators in a jurisdiction that does not have a guest statute. In this case, each defendant's conduct must be assessed separately by the fact finder. If one of the defendants defaults, entry of a default judgment is entirely appropriate because the liability of each defendant presents a separate issue for determination. A finding that the non defaulting defendant is not liable presents no inconsistency with the liability finding pursuant to the default judgment.<sup>9</sup>

[6]—Right to Jury Trial, Hearing or Reference \* No hearing or reference is needed in cases in which the clerk is authorized to enter judgment by default, since Rule 55(b)(1) limits that authority to situations in which the defendant has been defaulted for failure to appear, is not an infant or incompetent person, and the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain.<sup>1</sup> In such event, "the clerk upon request of the plaintiff and upon affidavit of the amount due shall

enter judgment for that amount and costs against the defendant<sup>2</sup>

In all other cases, the entry of a default judgment must be made by the court<sup>3</sup> Rule 55(b)(2) goes on to provide that

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States

A default does not admit the amount of unliquidated damages,<sup>4</sup> but in a default situation neither the plaintiff nor the defendant has a constitutional right to a jury trial on the issue of damages, even if the action is legal in character<sup>5</sup> Neither is there a general statutory right in default cases In actions on bonds and specialties, 28 U S C § 1874 does, however, accord a right of jury trial, upon request of either party, if the "sum is uncertain" When the type of issue and the particular circumstances warrant, the judge, exercising sound discretion, may have a jury assess the damages, although there is no such constitutional or statutory right<sup>6</sup>

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Once the entry of a default establishes the fact of damage, the trial judge has considerable latitude (while relying on the evidence presented) in determining the amount of damages, and such determinations are disturbed on appeal only for an abuse of discretion<sup>7</sup> Indeed, under certain circumstances the trial judge may award unliquidated damages without conducting a hearing<sup>8</sup>

A defaulting defendant who has appeared in the action is entitled to at least three days' notice of the hearing on the application for default judgment,<sup>9</sup> and a defaulting defendant is entitled to be heard at the hearing on the amount of damages<sup>10</sup>

[7]—As Limited by Demand for Judgment A default judgment cannot give to the claimant greater relief than that to which it is entitled by the pleaded claim,<sup>1</sup> and Rule 54(c) provides that such a judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" Since the prayer limits the relief granted in a judgment by default, both as to the kind of relief<sup>2</sup> and the amount, the prayer must be sufficiently specific that the court can follow the mandate of the Rule<sup>3</sup>

Judgments by default are of two kinds for want of appearance, and for failure to plead or otherwise defend, or as a discovery sanction, as provided by the Rules, although the party has appeared in the action. It is arguable that, as a matter of policy, the limitations of the Rule apply only to a judgment by default for want of appearance and not to a default judgment when the defendant has appeared. In the latter situation, a party who has put in an appearance is entitled to receive notice of all proceedings in the action,<sup>4</sup> including a written notice of the application for judgment at least three days prior to the hearing on such application,<sup>5</sup> and only the court can render the default judgment.<sup>6</sup> These factors would warrant a rule authorizing the court to render such a judgment as the complainant proved itself entitled to, without regard to the initial pleading. But Rule 54(c) does not go that far, it makes no distinction in the type of judgment by default, and hence all judgments by default are subject to its limitations.<sup>7</sup>

If, however, the defendant appears at the hearing on the application for judgment, the court, in its sound discretion, may permit the claimant to amend the prayer for relief.<sup>8</sup> An amended pleading may be served in accordance with the provisions of Rule 5, when a party, although in default, has appeared.<sup>9</sup> But if the amended pleading asserts new or additional claims for relief against a party in default for non appearance, it must be served upon the party in accordance with the provisions of Rule 4.

[8]—Setting Aside Default • Rule 55(c) provides

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 55(c) properly makes a distinction between relief from a default, which involves an interlocutory matter, and relief from a judgment by default, which involves final judicial action.

Under subdivision (c) the court is authorized to set aside an entry of default for "good cause shown", and to set aside a judgment by default, if one has been entered, in accordance with Rule 60(b).

The entry of default is largely a formal matter.<sup>1</sup> However, when a defendant has exceeded a time limit imposed by the Rules, but formal entry of default has not been made, that defendant must nevertheless apply to the district court for an extension of time, or leave to file the pleading late, in accordance with Rule 6(b).<sup>2</sup> Although a defendant is in default and an entry thereof has been made, the entry is only an interlocutory act looking toward the subsequent entry of a final judgment by default. Rule 60(b) is properly confined to relief from a final judgment<sup>3</sup> and its time limits do not, therefore, restrict the power of the court in granting relief from a default.<sup>4</sup> Thus, although the court may properly

consider the length of time that has elapsed between the default and the defendant's motion to set aside the default.<sup>5</sup> If the defendant makes a showing of good cause, such as mistake, the court may set aside the default on a motion made more than one year after the entry of default, although the court could not set aside a default judgment, because of mistake, on the basis of a motion made more than one year after entry of the default judgment.<sup>6</sup> This distinction between a default which involves interlocutory action and a judgment by default which represents final judicial action is sound. In the interest of finality, Rule 60(b) provides that a motion for relief from a final judgment must be made "within a reasonable time" and on particular grounds not more than one year after entry of the judgment, but since finality is not involved in a default, there is no time limitation on the motion for relief.<sup>7</sup> A party then must show due diligence in seeking to open a default or a default judgment,<sup>8</sup> and upon a default judgment, is subject to certain maximum time periods of Rule 60(b).

A party in default should make a formal motion for relief,<sup>9</sup> and may be required to post security for costs<sup>10</sup> or for the amount of the judgment in appropriate circumstances.<sup>11</sup> Apart from jurisdictional and related grounds,<sup>12</sup> the moving party must, in general, show a meritorious defense<sup>13</sup> whether it seeks to set aside an entry of default<sup>14</sup> or a default judgment.<sup>15</sup> The grant or denial of the motion is within the district court's sound discretion,<sup>16</sup> and will be reviewed by the appellate court only for abuse of that discretion.<sup>17</sup> However, when there are no intervening equities,<sup>18</sup> any doubt generally should be resolved in favor of the movant in order to secure its right to a final trial upon the merits.<sup>19</sup>

#### *Grounds for Relief—Setting Aside Entry of Default*

As previously stated, the interlocutory entry of default may be set aside under Rule 55(c) for good cause. A final judgment by default, like any other final judgment, may be set aside in accordance with Rule 60(b). The principal factors to be considered in determining whether the defendant has met the good cause standard of Rule 55(c) in a motion to set aside an entry of default are (1) whether the default was willful, (2) whether the plaintiff would be prejudiced if the default should be set aside, and (3) whether the defendant has presented a meritorious defense to the plaintiff's claim.<sup>20</sup> The court must also balance the interests of the defendant in the adjudication of its defense on the merits against the interests of the public and the court in the orderly and timely administration of justice.

Thus, in accordance with those principles, courts may set aside a default where it is only technical due to reliance on an ineffective stipulation<sup>21</sup> or when it arises out of a misunderstanding between counsel for the respective parties,<sup>22</sup> when the default is due to excusable neglect on the part of the defendant,<sup>23</sup> counsel,<sup>24</sup> or defendant's insurance carrier,<sup>25</sup> and in any situation where the equities of the case warrant.<sup>26</sup> When the defaulting party and counsel have

for the court's process by their haste in acting to set aside the default,<sup>28</sup> the courts have been inclined towards leniency. When the judgment demanded is large<sup>29</sup> or implicates important public policies,<sup>30</sup> judgment on the merits is strongly favored.<sup>30,1</sup> However, the existence of any one or more of these factors does not automatically require setting aside a default, because the court has broad discretion in making that determination.<sup>30,2</sup> Clearly, however, the court may refuse to set aside a default, where the defaulting party has no meritorious defense,<sup>31</sup> where the default is due to willfulness or bad faith,<sup>32</sup> or where the defendant offers no excuse at all for the default.<sup>33</sup>

A showing that would present sufficient grounds to permit the district court to set aside a default judgment which represents final judicial action should, as a general proposition, warrant the court in setting aside the interlocutory entry of default. However, a court might feel justified in setting aside a default on a showing that would not move it to set aside a default judgment.<sup>34</sup>

#### *Grounds for Relief—Setting Aside Default Judgment*

Rule 55(c) provides that if a judgment by default has been entered the court may set it aside in accordance with Rule 60(b). The latter rule does not afford a substitute remedy for appeal, and a motion for relief under Rule 60(b) does not lie merely because there might be grounds for reversal on appeal.<sup>35</sup> A motion under Rule 60(b) to obtain relief from a default judgment normally invokes the discretion of the district court, and the movant ordinarily must show that it has a meritorious defense.

Under Rule 60(b), the court, upon such terms as are just, may relieve a party from a judgment by default for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect.<sup>36</sup>

Some courts of appeals have articulated tests for the district court to use when making a determination of whether to grant a motion under Rule 60(b)(1). Thus, it has been held that a district court may, in the exercise of a sound discretion and where a meritorious defense is shown, grant relief from a default judgment under clause (1) when the default of the defendant is slight and non-prejudicial to the plaintiff,<sup>37</sup> when the plaintiff has not been prejudiced and its consent judgment,<sup>38</sup> when the defendant did not have actual knowledge that the action was being prosecuted,<sup>39</sup> when a 3-day notice required by Rule 55(b)(2) for a default judgment against a party who has appeared in the action was not given,<sup>40</sup> and in any situation where the circumstances and equities of the case warrant such relief.<sup>41</sup>

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) <sup>42</sup>

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party <sup>43</sup>

(4) The judgment is void <sup>44</sup> While a court may set aside a void default judgment on motion made under Rule 60(b)(4), such a judgment is also subject to collateral attack in any court where its validity is properly called into question <sup>45</sup> Failure to give a defendant, who has appeared in the action, notice of the application for default judgment is a procedural irregularity that may be serious, particularly in conjunction with other errors, <sup>46</sup> and in such conjunction has led to a holding that the judgment is void <sup>47</sup> However, this is an extreme position that can seldom be justified <sup>48</sup> At times the failure to give the required notice is harmless error <sup>49</sup>

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application <sup>50</sup>

(6) Any other reason justifying relief from the operation of the judgment <sup>51</sup> Clause (6) of Rule 60(b) is a residual clause embracing matters that do not fall within the preceding five clauses and are of such character that, in equity and good conscience, they warrant relief from the judgment <sup>52</sup>

It is important to distinguish between the reasons set forth for relief in clauses (1)–(6), since, while any motion for relief under Rule 60(b) must be made within a reasonable time, a motion based on reasons (1), (2) and (3) cannot be made more than one year after the judgment, order, or proceeding was entered or taken, <sup>53</sup> and this time limit is not subject to enlargement <sup>54</sup>

A motion under Rule 60(b) for relief from a default judgment does not affect its finality or suspend its operation <sup>55</sup> If the motion is denied and the denial is not set aside on appeal or otherwise, the denial is res judicata of all the relevant grounds that were litigated or could have been litigated in support of the motion to vacate, and the default judgment remains binding upon the parties or their privies <sup>56</sup>

#### *Relationship to Soldiers' and Sailors' Civil Relief Act*

The Soldiers and Sailors' Civil Relief Act<sup>57</sup> provides for the setting aside of judgments in certain situations <sup>58</sup> The provision of the Act requiring a plaintiff to file an affidavit before entry of a default judgment does not go to the jurisdiction of the court, thus, failure to file such an affidavit where a defendant is not in fact in the military service does not entitle the defendant to have such judgment set aside <sup>59</sup>

### *Motion by Non-Defaulting Party*

Although normally a motion to set aside a default will be made by the defaulting party, a non-defaulting party is not precluded from making such a motion,<sup>60</sup> and under Rule 55(c) a party who has obtained a judgment by default should also be able to have it set aside in accordance with Rule 60(b). Rule 60(b) authorizes the court to relieve a party or its legal representative from a final judgment, order, or proceeding for the reasons set forth in clauses (1)–(6). Since a party who has obtained a judgment by default may collaterally attack it when the judgment is void,<sup>61</sup> it should also be able to move to have a federal district court judgment by default set aside, if it is void, pursuant to Rule 60(b)(4). There is no sound reason why such a party should not be able to move under the other clauses when the circumstances of the case warrant relief within the terms of one or more of the clauses.

[9]—Plaintiffs, Counterclaimants, Cross Claimants • Rule 55(d) provides

Plaintiffs, Counterclaimants, Cross Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

Rule 55(d) provides that the provisions of Rule 55 governing the entry of a default judgment, and the setting aside of a default judgment, are applicable whether the party seeking to obtain the default judgment is a plaintiff, third-party plaintiff, counterclaimant,<sup>1</sup> or cross-claimant.<sup>2</sup>

The last sentence of Rule 55(d) states that in all cases a judgment by default is subject to the limitations of Rule 54(c), which states that a judgment by default shall not be different in kind from, or exceed in amount, that prayed for in the demand for judgment.<sup>3</sup> However, if a hearing is held to determine the amount of unliquidated damages and the defendant participates at the hearing, the court, in its sound discretion, may permit the claimant to amend the prayer for relief.<sup>4</sup>

[10]—Judgment Against the United States • Rule 55(e) provides

Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Even though the government does not answer or otherwise defend within the 60 day time period imposed by Rule 12(a), entry of a default judgment is not authorized,<sup>1</sup> except upon a hearing establishing the plaintiff's claim.<sup>2</sup> Presumably, the government

may defend as to the merits of plaintiff's claim as if a default had never occurred.<sup>3</sup> Of course, in cases in which the government fails to file a timely answer, the court, in order to protect the plaintiff's interest, may enter an order directing an answer to be filed within a specified period.<sup>4</sup>

The interrelationship of Rule 55(e) with the sanction provisions of Rule 37(b) for failure to comply with a discovery order and of Rule 37(d) for failure to attend a deposition hearing, file answers to interrogatories, or to respond to a request for inspection or production, is not expressly delineated. Although it can be argued that Rule 55(e) governs default judgments entered pursuant to Rule 55(a) but not default judgments entered in accord with Rule 37(b) or (d),<sup>5</sup> it has been held that Rule 55(e) precludes entry of default judgments in all cases.<sup>6</sup> A court may, however, impose other sanctions provided for by Rule 37(b), such as entry of an order that designated facts shall be deemed established against the United States and that the government may not introduce evidence to controvert them.<sup>7</sup> If the designated facts are those necessary to prove a claim against the government, the sanction order is equivalent to a default judgment, since entry of summary judgment in favor of the plaintiff would be pro forma.<sup>8</sup>

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V ROBERT PAYANT *President*  
KENNETH A ROHRS *Dean*

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## FEDERAL CIVIL RULES HANDBOOK 1998 Edition

by

STEVEN BAICKER-McKEE  
Babst, Calland, Clements & Zomir

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Saul, Ewing, Remick & Saul

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### Objective

to study the provisions of US Federal Law on procedure for summary judgment

### The participants will study the following

RULE 56 SUMMARY JUDGMENT

COMMENTS

# FEDERAL CIVIL RULES HANDBOOK

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ST PAUL, MINN  
WEST GROUP  
1998

Prof. Steven Baicker-McKee  
William M. Janssen  
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**RULE 56****SUMMARY JUDGMENT**

**(a) For Claimant** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof

**(b) For Defending Party** A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof

**(c) Motion and Proceedings Thereon** The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so

specified shall be deemed established, and the trial shall be conducted accordingly

**(e) Form of Affidavits, Further Testimony, Defense Required** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

**(f) When Affidavits Are Unavailable** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended effective March 19 1948 July 1 1963 August 1 1987 ]

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**AUTHORS' COMMENTARY ON RULE 56**

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**PURPOSE AND SCOPE**

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Rule 56 sets the procedure by which a party may request or oppose summary judgment, and the standards the federal courts consider when ruling on motions for summary judgment

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**COMPARISONS WITH OTHER RULES OF ADJUDICATION**

*Dismissals and Judgments on the Pleadings* When granting a dismissal under Rule 12(b)(6) or a judgment on the pleadings under Rule 12(c), the district judge generally examines only the allegations contained in the non moving party's pleadings to determine whether the averments of law and fact, if true, are legally sufficient. In contrast, a motion for summary judgment under Rule 56 permits the district judge to consult not only the pleadings, but affidavits, depositions, interrogatory answers, admissions, and other evidence to determine whether any factual dispute exists between the parties.

*Note* A motion to dismiss under Rule 12(b)(6) for failing to state a claim upon which relief can be granted, or a motion for judgment on the pleadings under Rule 12(c), will be converted into a Rule 56 motion for summary judgment if the court considers matters outside the pleadings in ruling on the motion.

*Judgments as a Matter of Law* When entering a judgment as a matter of law under Rule 50 (the federal equivalent to a directed verdict), the district judge listens to the plaintiff's case and, possibly, the defendant's case, and rules that the plaintiff has failed to meet the required burden of proof. The district judge is free to consider the credibility of witnesses in making this decision. In contrast, the judge may not evaluate witness credibility in ruling on a motion for summary judgment under Rule 56, nor may the judge predict whether the plaintiff will ultimately be able to bear the proof burdens. Instead, the court simply tests whether disputed questions of fact remain for trial.

**RULE 56(a)–(b) PARTIES WHO MAY MAKE MOTION****CORE CONCEPT**

Motions for summary judgment may be filed in any federal court action—whether at law or equity—by any party, plaintiff or defendant, and against any party, including the United States, its agencies and officers.

**APPLICATIONS****Motions by Claimants**

Claimants may move for summary judgment no earlier than 20 days after commencing a lawsuit, or immediately after a summary judgment motion is filed against them

**Motions by Defending Parties**

Defending parties may move for summary judgment at any time<sup>1</sup> Note, however, that the case law is unclear whether moving for summary judgment tolls the time for filing an answer to the complaint<sup>2</sup>

**Cross-Motions**

Both parties may file for summary judgment in the same action with 'cross motions' under Rule 56

**RULE 56(c) MOTION AND PROCEEDINGS  
FOR SUMMARY JUDGMENT****Core Concept**

The district court may enter summary judgment when the motion papers, affidavits, and other evidence submitted to the court show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law

**APPLICATIONS****Purpose of Summary Judgment**

The purpose of summary judgment is to isolate, and then terminate claims and defenses that are factually unsupported<sup>3</sup> The Supreme Court has emphasized that summary judgment is to be viewed not as a disfavored technical shortcut, but rather as an integral component of the Federal Rules<sup>4</sup> Summary judgment motions must be resolved not only with an appropriate regard for the rights of those asserting claims and defenses to have their positions ruled upon by a factfinder, but also with due regard for the rights of persons opposing such claims and defenses to demonstrate, under this Rule and *before* trial, that

the claims and defenses have no factual basis<sup>5</sup> Thus, a party moving for summary judgment forces the opponent to come forward with at least one sworn averment of specific fact essential to that opponent's claims or defenses, before the time-consuming process of litigation will continue<sup>6</sup>

#### **Standards for Granting or Denying Summary Judgment**

Summary judgment is proper when, after an adequate period for discovery,<sup>7</sup> one party is unable to show a genuine issue as to a material fact on which that party will bear the burden of proof at trial, so long as judgment against that party is appropriate as a matter of law<sup>8</sup>

*Genuine Issue* A "genuine issue" exists where the evidence before the court is of such a nature that a reasonable jury could return a verdict in favor of the non-moving party This standard parallels the test for judgment as a matter of law under Rule 50(a) a mere "scintilla" of evidence, or evidence that is only "colorable" or is not sufficiently probative, is not enough to defeat summary judgment Instead, there must be evidence upon which a jury could reasonably find in the non-moving party's favor<sup>9</sup>

*Controlling Legal Standard* The court will test for a "genuine issue" through the prism of the applicable controlling legal standard—the quantum and quality of proof necessary to support liability under the claims raised Thus, if the plaintiff must prove its case by clear and convincing evidence, the court will assess whether the evidence in the summary judgment record would allow a rational factfinder to find for the plaintiff by that standard of clear and convincing evidence<sup>10</sup>

*Material Fact* Whether a fact is "material" hinges on the substantive law at issue A fact is "material" if it might affect the outcome of the case Disputes over irrelevant or

unnecessary facts are insufficient to defeat a motion for summary judgment <sup>11</sup>

*Appropriate As A Matter Of Law* Judgment is appropriate 'as a matter of law' when the law supports the moving party's position <sup>12</sup>

#### **Stipulated Facts and Cross Motions**

If the parties stipulate to the facts, obviously no genuine dispute as to material facts then exists for a factfinder to resolve <sup>13</sup> Nevertheless, the summary judgment standard remains the same The court must draw inferences from the stipulated facts and resolve those inferences in favor of the non moving party <sup>14</sup> Similarly cross motions for summary judgment are examined under the same standards <sup>15</sup> Each cross motion must be evaluated on its own merits, with the court viewing all facts and reasonable inferences in the light most favorable to the nonmoving party <sup>16</sup> Thus, the mere fact that cross motions have been filed does not, by itself, necessarily justify the entry of a summary judgment <sup>17</sup>

#### **Burden of Proof**

The party moving for summary judgment always has the burden of persuasion on such a motion The burden of going forward however, shifts during the motion process

The moving party must first make a prima facie showing that summary judgment is appropriate under Rule 56 This

does not require the moving party to disprove the opponent's claims or defenses. Instead, this prima facie burden is discharged simply by pointing out for the court an absence of evidence in support of the non moving party's claims or defenses. The burden of going forward then shifts to the non-moving party to show, by affidavit or otherwise, that a genuine issue of material fact remains for the factfinder to resolve.<sup>18</sup> The burden of showing the existence or absence of a disputed issue of material fact will rarely shift to the trial judge. The district court generally is not obligated to sift through the often voluminous record, unguided, searching for a genuine issue of fact sufficient to defeat summary judgment.<sup>19</sup>

### Doubts and Inferences

In ruling on a motion for summary judgment, the court will never weigh the evidence or find the facts. Instead, the court's role under Rule 56 is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial.<sup>20</sup> Thus, the evidence of the non-moving party will be believed as true, all doubts will be resolved against the moving party, all evidence will be construed in the light most favorable to the non moving party, and all reasonable inferences will be drawn in the non-moving party's favor.<sup>21</sup>

"Reasonable" inferences are inferences reasonably drawn from all the facts then before the court, after sifting through the universe of all possible inferences the facts could support. "Reasonable" inferences are not necessarily more probable or likely than other inferences that might tilt in the moving party's favor. Instead, so long as more than one reasonable inference can be drawn, and that inference creates a genuine issue of material fact, the trier of fact is entitled to decide which inference to believe.<sup>22</sup>

### Credibility Questions

The court will not weigh the credibility of witnesses or other evidence in ruling on a motion for summary judgment.

Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the jury.<sup>23</sup>

#### State of Mind Questions

Summary judgment is never foreclosed merely because a person's state of mind (such as motive, knowledge, intent, good faith or bad faith, malice, fraud, conspiracy, or consent) is at issue.<sup>24</sup> But such cases will seldom lend themselves to a summary disposition because questions of credibility will ordinarily abound.<sup>25</sup>

#### Discretion of District Court

The court must *deny* summary judgment when a genuine issue of material fact remains to be tried or where the moving party is not entitled to a judgment as a matter of law. In all other cases, the court enjoys the discretion to deny summary judgment where the court concludes that a fuller factual development is necessary<sup>26</sup> or where there is some particular reason to believe that the wiser course would be to proceed to trial.<sup>27</sup>

#### Form of Motion

Motions for summary judgment generally must be in writing.<sup>28</sup> In some judicial districts, the local rules may also require the moving parties to compile a list of all material facts they believe are not in dispute, and require non-moving parties to submit a counterstatement listing material facts they believe to

be disputed. Such requirements have been enforced strictly and practitioners should take care to notice these district-specific obligations when consulting the local rules.<sup>29</sup>

#### ***Sua Sponte* Motions**

The court may enter summary judgment *sua sponte*.<sup>30</sup> The case law, however, cautions great care in the grant of *sua sponte* summary judgments.<sup>31</sup> In practice, *sua sponte* summary judgments should be unnecessary because the trial court may always invite a party to file a summary judgment motion.<sup>32</sup> Where the court considers entering a *sua sponte* judgment, it must first ensure that proper advance notice of this intention has been made.<sup>33</sup> The court must also confirm that the litigants have a full and fair duty to respond.<sup>34</sup> Discovery must either be completed or clearly be of no further benefit.<sup>35</sup>

**Materials Accompanying the Motion**

A moving party may choose to submit the motion papers alone or may supplement the motion with affidavits, pleadings, deposition transcripts, interrogatory answers, admissions, stipulations, transcripts from another proceeding, oral testimony, authenticated exhibits, and anything of which the court may properly take judicial notice. To be considered, the facts contained in these materials must be admissible or usable at trial, although for purposes of summary judgment, the facts need not be presented to the court in a form admissible at trial.<sup>36</sup>

*Briefs.* Local rules may prescribe the briefing requirements for summary judgment motions, and these rules should always be consulted before briefing. The court may consider concessions in a party's brief in gauging whether a genuine issue of material fact exists, otherwise, however, the parties' briefs are not evidence.<sup>37</sup>

**Responding to the Motion**

When the moving party supplements the motion by affidavit or other material, the non-moving party cannot respond with mere allegations or denials.<sup>38</sup> Instead, the non-moving party must show by affidavit, deposition testimony, or otherwise, that a genuine issue of material fact remains for trial.<sup>39</sup>

**Warning to Unrepresented Parties**

Before summary judgment may be entered against unrepresented litigants, some courts require that the unrepresented party first be expressly informed of the consequences that may follow from failing to come forward with contradicting evidence.

(e.g., the party must be told he or she cannot rely merely on the allegations of the pleadings, and risks dismissal in doing so) <sup>40</sup>

#### **Time for Response**

The non moving party must be served with the motion papers at least 10 days before any hearing or disposition on the motion <sup>41</sup>. The purpose of this 10-day notice rule is to allow non moving parties a specific period of time in which to marshal their resources and offer into the summary judgment record additional materials and arguments <sup>42</sup>. The 10-day period is an essential and mandatory component of the Rule, and not a mere technicality <sup>43</sup>. However, if the non moving party has had ample opportunity to oppose the motion, or if the 10-day period would not have developed additional materials that could have defeated summary judgment, a failure to provide the 10-day notice may be deemed harmless error and excused <sup>44</sup>.

#### **New Evidence in Reply**

If the moving party introduces new evidence in a reply brief or memoranda, the trial court should not accept and consider the new evidence without first affording the non-moving party an opportunity to respond <sup>45</sup>.

#### **Hearings and Oral Argument**

Although the district court may, in its discretion, entertain a hearing or oral argument on the Rule 56 motion, hearings and

oral argument are not obligatory <sup>46</sup>

#### **Multiple Summary Judgment Motions**

The district court may permit a second motion for summary judgment, especially where there has been an intervening change in the controlling law, where new evidence has become available or the factual record has otherwise expanded through discovery or where a clear need arises to correct a manifest injustice <sup>47</sup>

#### **Appealability**

Ordinarily, an order denying a party's motion for summary judgment is interlocutory and, therefore, not immediately appealable <sup>48</sup>. Conversely, an order granting summary judgment is appealable only when it constitutes the "final order" in the case <sup>49</sup>. Practitioners must beware, however. Exceptions to these general rules are numerous. For example, where the summary judgment motion implicates questions of a party's immunity, immediate appeals from the denial of summary judgment may be permitted <sup>50</sup>. This question must be researched

carefully within the context of the specific issues presented in the summary judgment motion

## **RULE 56(d) PARTIAL SUMMARY ADJUDICATION**

### **CORE CONCEPT**

The court may enter a summary ruling on the issue of liability alone, even though a genuine issue of material fact exists as to damages. The court may also summarily resolve other individual issues as to which there remain no genuine issue of material fact.

### **APPLICATIONS**

#### **Effect of Partial Summary Adjudications**

Where a summary judgment is not possible (or not requested) and the dispute will have to go to trial, the district court is nevertheless permitted to declare certain facts—those which it determines appear without substantial controversy—as established for purposes of the case.<sup>51</sup> Although not a “judgment”, this partial summary adjudication is a ruling on a “dispositive motion”<sup>52</sup>, which allows the court to salvage some constructive result from its efforts in ruling upon an otherwise denied summary judgment motion.<sup>53</sup> Partial summary adjudications accelerate litigations by narrowing the triable issues and eliminating, pretrial, those matters involving no genuine issues of material fact.<sup>54</sup>

#### **Liability Alone**

Under Rule 56(c), the court may summarily enter an interlocutory judgment on liability questions, where the issue of damages must await trial.

#### **Standards for Granting or Denying Partial Summary Adjudication**

In resolving a motion for partial summary adjudication, the court will apply the same standards and criteria used for evaluating full motions for summary judgment.<sup>55</sup>

**District Court's Discretion**

Similar to motions for "full" summary judgment, the district judge has the discretion (subject to the familiar summary judgment standards generally) to defer a partial adjudication ruling until the proper time arrives for making a complete adjudication on all issues in the case<sup>56</sup>

**Finality and Appeal**

Partial summary adjudications are generally interlocutory, subject to revision by the district court, and thus not immediately appealable<sup>57</sup>. The parties, however, are entitled to rely on the conclusiveness of any partial summary adjudication issued by the district court. Thus, if the court later decides to alter a partial adjudication, it must inform the parties of this intent and permit them an opportunity to present evidence concerning any revisited issues<sup>58</sup>.

**RULE 56(e) USE OF AFFIDAVITS IN SUMMARY JUDGMENT PRACTICE****CORE CONCEPT**

When submitted to support or oppose a summary judgment motion, an affidavit must be based on personal knowledge, must set forth facts that would be admissible at time of trial, and must establish the affiant's competence to testify.

**APPLICATIONS****When Affidavits or Other Materials Are Required**

When a summary judgment motion is supported with affidavits or other material, the non-moving party cannot rely on mere allegations or denials. Rather, the non-moving party must demonstrate, by affidavit, deposition testimony, or otherwise, that a genuine issue of material fact remains for trial<sup>59</sup>.

**Affidavit Prerequisites**

To be considered on a motion for summary judgment, an affidavit must contain three prerequisites: it must be sworn upon personal knowledge; it must state facts admissible in evidence at time of trial; and it must be offered by a competent affiant. In ruling upon a motion for summary judgment, the court should not consider affidavits that fail to satisfy these prerequisites<sup>60</sup>.

*Sworn* A summary judgment affidavit must be “sworn” or verified<sup>61</sup>

*Personal Knowledge* A summary judgment affidavit must be made on personal knowledge<sup>62</sup> Affidavits based on “information and belief”—facts that the affiant believes are true, but which the affiant does not know are true—are not proper<sup>63</sup> Likewise, inferences and opinions must be premised on first hand observations or personal experience<sup>64</sup>

*Admissible Facts* The facts set forth in a summary judgment affidavit must also be admissible in evidence at time of trial<sup>65</sup> Thus, hearsay statements,<sup>66</sup> conclusory aver

ments,<sup>67</sup> and self serving declarations<sup>68</sup> are generally improper in Rule 56(e) affidavits. A party's promise that he or she has certain unidentified "additional evidence", which will be produced at trial, is insufficient to avoid summary judgment.<sup>69</sup>

*Competence* The summary judgment affidavit must demonstrate that the affiant is competent to testify as to the facts contained in the affidavit.<sup>70</sup> Competence to testify may be inferred from the affidavits themselves.<sup>71</sup> Ordinarily, statements of counsel in a memorandum of law are not competent to support or oppose a motion for summary judgment.<sup>72</sup>

#### Verifications

For purposes of Rule 56(e), the federal courts will accept verified statements made under the penalties of perjury in lieu of an affidavit.<sup>73</sup> Thus verified complaints (ordinarily not required under the Rules) may be treated as summary judgment

“affidavits”,<sup>74</sup> so long as they otherwise satisfy the Rule 56(e) prerequisites<sup>76</sup>

#### **Striking Affidavits**

A party may move to strike a Rule 56 affidavit. However, only those improper portions of an affidavit are disallowed, all properly stated facts are allowed.<sup>76</sup> Moreover, if a party fails to move to strike an improper affidavit or improper portions thereof, the objection is waived.<sup>77</sup>

### **RULE 56(f) WHEN AFFIDAVITS ARE UNAVAILABLE**

#### **CORE CONCEPT**

If, for some specific reason, the non-moving party is currently unable to obtain a factual affidavit to defeat summary judgment, the non-moving party may file an affidavit to that effect with the court. In turn, the court may grant at least a temporary reprieve from summary judgment.

#### **APPLICATIONS**

##### **Rule 56(f) Discovery**

Parties often rely on Rule 56(f) to delay their summary judgment responses until initial or additional discovery is completed. Although such requests are construed generously and granted liberally,<sup>78</sup> the courts generally require that (a) the

request be made timely, and that the affidavit show (b) what particular discovery is sought, (c) how that discovery would preclude the entry of summary judgment, and (d) why the discovery had not been obtained earlier.<sup>79</sup> The court is unlikely to grant such a request where the moving party has delayed in beginning discovery.<sup>80</sup>

**Affidavit Required**

Some courts will not consider a Rule 56(f) request unless it is accompanied by a sworn affidavit.<sup>81</sup>

**Burden on the Movant**

The party moving for additional discovery bears the burden of demonstrating the requisite basis for relief under Rule 56(f) <sup>82</sup>

**Reprieve From the Court**

On the basis of the non moving party's Rule 56(f) affidavit, the district court may (1) deny the motion for summary judgment, (2) grant a continuance to allow affidavits to be prepared and submitted, (3) permit discovery, or (4) make any other order as is just

**RULE 56(g) AFFIDAVITS MADE IN BAD FAITH****CORE CONCEPT**

If the district court concludes that an affidavit submitted under Rule 56(c) or Rule 56(f) was presented in bad faith or solely for purposes of delay, the court will order the offending party to pay reasonable expenses incurred by the party's adversary (including attorney's fees) as a result of the improper affidavits. The court may also hold the attorney and the offending party in contempt.

**Prerequisites of Bad Faith or Delay**

Rarely invoked or granted, this Rule directs the court to compensate an adversary who confronted affidavits submitted either in bad faith or for purposes of delay <sup>83</sup>. Merely because one party disbelieves the other party is not a basis for invoking this Rule <sup>84</sup>. Instead, the court must find that the affidavit was, in fact, submitted in bad faith or with the purpose of delay <sup>85</sup>.

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**Rule 55 Default**

(a) **Entry** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise the clerk shall enter the party's default.

(b) **Judgment** Judgment by default may be entered as follows:

(1) **By the Clerk** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) **By the Court** In all other cases the party entitled to a judgment by default shall apply to the court therefor but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action the party (or if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) **Setting Aside Default** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, Counterclaimants, Cross Claimants** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment Against the United States** No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

(As amended Mar. 2, 1987; eff. Aug. 1, 1987.)

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Complete Annotation Materials see Title 28 U.S.C.A.



V ROBERT PAYANT *President*  
KENNETH A ROHRS *Dean*

# THE NATIONAL JUDICIAL COLLEGE

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JUSTICE TOM C. CLARK 1899 1977  
*Chair of the Founders*

JUSTICE FLORENCE K. MURRAY

*Chair Emerita*

WALTER H. BECKHAM JR. ESQ.

*Chair Emeritus*

## CASE DISPOSITION RULES AND TECHNIQUES

### Objective

to study the case disposition rules and techniques

### The participants will study the following materials

#### CONTENTS

ATTACHMENT 1

ATTACHMENT 2

ATTACHMENT 3

ATTACHMENT 4

ATTACHMENT 7

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ATTACHMENT 10

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ATTACHMENT 12

ATTACHMENT 13

ATTACHMENT 14

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## CASE DISPOSITION RULES AND TECHNIQUES

By Judge Steven R. Plotkin

### I DOCKET MANAGEMENT

#### A Allotment to Division of Court

- 1 When Suit Filed
- 2 When All Issues Joined
- 3 When Requested by Parties

#### B After Assignment to Specific Judge - State Court-30 Day Order (Attachment #1) - Federal Court-Preliminary Conference Notice (Attachment #2)

- 1 Schedule First Conference within 30 days of Assignment
- 2 Purpose of 30 day Conference
  - a Determine status and complexity of case
  - b Determine anticipated length of trial
  - c Determine degree and length of evidence, discovery and law issues
  - d In non-complex State case - issue a trial order and set a trial date  
(Attachment #3)
    - (1) confirms trial date
    - (2) creates deadlines for exchange of memorandums, witnesses, exhibits, etc
    - (3) creates deadlines of discovery and amendments
  - e In Federal case, clerk issues Pre-trial notice form (Attachment #4)
    - (1) Creates deadlines for exchange of experts and reports

- (3) Limits discovery
- (4) Sets status conference date
- (5) Sets trial date
- (6) Requires parties to discuss settlement

C State Pre-trial Conference and Trial Order (Attachment #5 & 6)

1 Scheduled by the Court When

- a Requested by any counsel
- b Trial date requested by counsel
- c Court rules require before case assigned trial date
- d Follow up date fixed by 1st conference or court management, or six month automatic review of case

2 Pre-trial conference periods scheduled by assigned judge's clerk

3 Requirements for pre-trial conference and order

D Federal Pre-trial Notice (Attachment #7) —

1 Sample Federal Pre-trial order (Attachment #8)

II DOCKET AND CALENDAR CONTROL (Attachment #9)

A Schedule monthly - jury or non-jury

B Schedule at least 3 or more cases per day

C Schedule "open dates" for continuances, resetting of open trials and other judicial business

D Schedule specific times for conferences and pre-trials

E Schedule motions, sentencing and miscellaneous hearing on separate dates

III OFFER OF JUDGMENT

A Louisiana Code of Civil Procedure article 970 (Attachment #10)

IV LOSER PAY RULE

A English and Continental Procedure Rule (Attachment #11)

V ABANDONMENT OR INACTIVITY RULE

A Federal Trial Court Show Cause and Dismissal Rule (Attachment #12 & 13)

B State Court of Appeal Abandonment Rule (Attachment #14)

CIVIL DISTRICT COURT  
IN AND FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CIVIL SUIT NUMBER \_\_\_\_\_

DIVISION \_\_\_\_\_

\_\_\_\_\_  
VERSUS  
\_\_\_\_\_

30 DAY CONFERENCE ORDER

The above captioned case was assigned to Division "G" for trial

A setting conference will be held on \_\_\_\_\_, 19\_\_\_\_  
at \_\_\_\_\_ m

The purpose of this conference is to determine the length of the trial and to select a trial date. Where desirable, a pre trial date will also be selected in close proximity to the trial date.

Please be prepared to discuss the nature of the case, approximate number of witnesses and types of documentary evidence relied on so the length of the trial can be determined.

New Orleans, Louisiana, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_

\_\_\_\_\_  
STEVEN R. PLOTKIN  
JUDGE  
DIVISION 'G'

Sent To

(ATTACHMENT #2)

*2*

UNITED STATES DISTRICT COURT FILED September 14, 1998 EASTERN DISTRICT OF LOUISIANA Loretta G Whyte Clerk
--

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

CARLINE MANAGEMENT COMPANY, INC.	CIVIL ACTION
VERSUS	NO 98-2354
JOSEPH FLOYD WILLIAMS	SECTION. L

PRELIMINARY CONFERENCE NOTICE

A PRELIMINARY CONFERENCE will be held BY TELEPHONE on WEDNESDAY, OCTOBER 7, 1998, at 10 30 am for the purpose of scheduling a pre-trial conference and trial on the merits and for a discussion of the status and discovery cut-off dates.

TRIAL COUNSEL are to participate in this conference. If, however, you are unable for good cause to do so, another attorney in your firm may participate if acquainted with all details of the case and authorized to enter into any necessary agreements. If, for good cause, neither is possible, you must file a Motion and Order to Continue at least one week prior to the above date.

*Gaylyn M Lambert*  
 Gaylyn M Lambert  
 Courtroom Deputy  
 504-589-7686

NOTICE:

COUNSEL ADDING NEW PARTIES SUBSEQUENT TO THE MAILING OF THIS NOTICE SHALL NOTIFY SUCH NEW PARTIES TO APPEAR AS REQUIRED BY THIS NOTICE.

COUNSEL ARE HEREBY NOTIFIED THAT, UPON WRITTEN REQUEST JOINED BY ALL PARTIES FOLLOWING A RULE 26(F) CONFERENCE, A JUDICIAL OFFICER WILL CONDUCT A CONFERENCE IN LIEU OF THE ABOVE REFERENCED PRELIMINARY CONFERENCE TO ESTABLISH A SPECIAL CASE MANAGEMENT AND SCHEDULING ORDER, UPON A SHOWING THAT THE COMPLEXITY OR SIMPLICITY OF THE CASE, ITS ANTICIPATED DISCOVERY NEEDS, OR OTHER FACTORS MAKE SUCH A CONFERENCE DESIRABLE.

FEE	_____
XPROCESS	GL _____
CHARGE	_____
INDEX	_____
ORDER	_____
XHEARING	GL _____
DOCUMENT NO	_____

CIVIL DISTRICT COURT  
IN AND FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CIVIL SUIT NUMBER \_\_\_\_\_

DIVISION \_\_\_\_\_

---

VERSUS

---

TRIAL ORDER

At a setting conference held this day, the above matter was set for trial for \_\_\_\_\_, 19\_\_ at 9 30 a m A pre-trial conference was deemed unnecessary

At least thirty (30) days prior to the trial date, plaintiff(s) is to furnish defendant(s) a pre-trial memorandum setting forth

- (a) the names of all witnesses who may be called to testify and a brief summary of their testimony,
- (b) an itemized list of all damages claimed,
- (c) a list of all exhibits and documents to be introduced, with copies of those not previously exchanged, and
- (d) a summary of the law and evidence relied on

Within twenty-five (25) days of the trial date, defendant(s) is to furnish plaintiff(s) with a similar memorandum

No discovery or amendment to pleadings, except for extraordinary circumstances, will be permitted within 10 days of the trial date

IT IS THE RESPONSIBILITY OF ALL PARTIES TO SEE THAT THE ABOVE MEMORANDUMS ARE EXCHANGED CONTINUANCES WILL NOT BE GRANTED BECAUSE OF THE FAILURE TO DO SO WITNESSES AND EXHIBITS MAY BE EXCLUDED FOR FAILURE TO TIMELY FURNISH MEMORANDUMS

New Orleans, Louisiana, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_,

---

STEVEN R PLOTKIN  
JUDGE  
DIVISION 'G

Sent to

UNITED STATES DISTRICT FILED  September 14, 1998  EASTERN DISTRICT OF LOUI Loretta G. Whyte Clerk
--

MINUTE ENTRY  
 FALLON, J.  
 September 10, 1998

UNITED STATES DISTRICT COURT  
 EASTERN DISTRICT OF LOUISIANA

JAMES MICHAEL JENNINGS	CIVIL ACTION
VERSUS	NO. 98-1580
BAXTER HEALTHCARE CORPORATION	SECTION. L

A Preliminary Conference was held this date. Participating were:

for plaintiff  
 for defendant

Pleadings have been completed. Jurisdiction and venue are established.

All pretrial motions, including motions *in limine*, regarding the admissibility of expert testimony, shall be filed and served in sufficient time to permit hearing thereon no later than 30 days prior to the trial date. Any motions filed in violation of this Order shall be deemed waived unless good cause is shown. All other motions *in limine* shall be allowed to be filed up to the time of trial or as otherwise ordered by the Court.

Counsel shall complete all disclosure of information as follows:

Depositions for trial use shall be taken and all discovery shall be completed not later than 30 days prior to Final Pretrial Conference Date.

Amendments to pleadings, third-party actions, cross-claims, and counterclaims, shall be filed no later than 30 days from the

PROCESS	_____
CHARGE	_____
ORDER	_____
HEARING	_____
DOCUMENT NO	_____

9-14-98

date of the Preliminary Conference.

Counsel adding new parties subsequent to mailing of this Notice shall serve on each new party a copy of this Minute Entry. Pleadings responsive thereto, when required, shall be filed within the applicable delays therefor.

Written reports of experts, including treating physicians, who may be witnesses for Plaintiffs fully setting forth all matters about which they will testify and the basis therefor shall be obtained and delivered to counsel for Defendant as soon as possible, but in no event later than 90 days prior to Final Pretrial Conference Date.

Written reports of experts, including treating physicians, who may be witnesses for Defendants fully setting forth all matters about which they will testify and the basis therefor shall be obtained and delivered to counsel for Plaintiff as soon as possible, but in no event later than 60 days prior to Final Pretrial Conference Date.

Counsel for the parties shall file in the record and serve upon their opponents a list of all witnesses who may or will be called to testify at trial and all exhibits which may or will be used at trial not later than 60 days prior to Final Pretrial Conference Date.

The Court will not permit any witness, expert or fact, to testify or any exhibits to be used unless there has been compliance with this Order as it pertains to the witness and/or exhibits,

without an order to do so issued on motion for good cause shown.

Settlement possibilities were discussed. A further settlement conference will be scheduled at any time at the request of any party to this action.

This case does not involve extensive documentary evidence, depositions or other discovery. [No] [S]pecial discovery limitations beyond those established in the Federal Rules, Local Rules of this Court, or the Plan are established [as follows:]

A Status Conference will be held on TUESDAY, FEBRUARY 2, 1999, at 8:30 AM, in Room C456. Not later than two days preceding the status conference, all parties shall fax (504-589-6966) or otherwise deliver to the Court and to all other counsel a short letter explaining the status of the case and any issues the Court needs to address at the conference. Out-of-town counsel may attend the status conference by telephone.

A Final Pretrial Conference will be held on TUESDAY, MARCH 2, 1999 at 1:00 PM. Counsel will be prepared in accordance with the final Pretrial Notice attached.

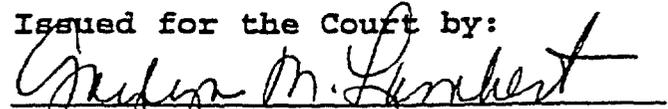
Trial will commence on MONDAY, MARCH 15, 1999 at 9:00 AM before the District Judge without a jury. Attorneys are instructed to report for trial not later than 30 minutes prior to this time. The starting time on the first day of a jury trial may be delayed or moved up because of jury pooling. Trial is estimated to last 1-2 day(s).

Deadlines, cut-off dates, or other limits fixed herein may only be extended by the Court upon timely motion filed in

compliance with the Plan and Local Rules and upon a showing of good cause. Continuances will not normally be granted. If, however, a continuance is granted, deadlines and cut off dates will be automatically extended, unless otherwise ordered by the court.

ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

Issued for the Court by:

  
Gaylyn M. Lambert

Courtroom Deputy - Section L  
504-589-7686

THIS PRE-TRIAL NOTICE CONTAINS NEW MATERIAL.  
REVISED DECEMBER, 1993

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

PRE-TRIAL NOTICE

IT IS ORDERED that a pre-trial conference will be held in chambers before Judge Eldon E Fallon, Section L, in the cases shown on the attached list on the dates and the times there indicated

The purpose of the pre-trial conference is to secure a just and speedy determination of the issues. If the type of pre-trial order set forth below does not appear calculated to achieve these ends in this case, please arrange a conference with the Judge and opposing counsel immediately so that alternative possibilities may be discussed.

The procedure necessary for the preparation of the formal pre-trial order that will be reviewed and entered at this conference is as follows:

I

The pre-trial order, in duplicate, must be delivered to the Court's chambers by 4:30 p.m. on a day that allows two full work days prior to the conference, excluding Saturdays, Sundays and holidays (i.e., if the conference is set for 10:00 a.m. Friday, it must be delivered by 4:30 p.m. Tuesday. If the conference is set on Monday, the pre-trial order will be delivered to the Judge on Wednesday by 4:30 p.m.)

II

Counsel for all parties shall confer in person (face to face) or by telephone at their earliest convenience for the purpose of arriving at all possible stipulations and for the exchange of copies of documents that will be offered in evidence at the trial.

It shall be the duty of counsel for plaintiff to initiate this conference, and the duty of other counsel to respond. If, after reasonable effort, any party cannot obtain the cooperation of other counsel, it shall be his duty to communicate immediately with the Court. The conference of counsel shall be held at least ten days prior to the date of the scheduled pre-trial conference in order that counsel for all parties can furnish each other with a statement of the real issues each party will offer evidence to support, eliminating any issues that might appear in the pleadings about which there is no real controversy, and including in such statement issues of law as well as ultimate issues of fact from the standpoint of each party. Counsel for plaintiff then will prepare a pre-trial order and submit it to opposing counsel, after which all counsel jointly will submit the original and one copy of the final draft of the proposed pre-trial order to the Judge.

### III

At their meeting, counsel **must** consider the following

A **Jurisdiction**. Since jurisdiction may not ever be conferred by consent and since prescription or statutes of limitations may bar a new action if the case or any ancillary demand is dismissed for lack of jurisdiction, counsel should make reasonable effort to ascertain that the Court has jurisdiction.

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

C **Joinder**. Questions of misjoinder or nonjoinder of parties.

### IV

At the pre-trial conference counsel must be fully authorized and prepared to discuss settlement possibilities with the Court. Counsel are urged to discuss the possibility of settlement with each other thoroughly before undertaking the extensive labor of preparing the proposed pre-trial order. Save your time, the Court's time, and the client's time and money.

V

The pre-trial conference **must** be attended by the attorneys who will try the case, unless prior to the conference the Court grants permission for other counsel to attend. These attorneys will familiarize themselves with the pre-trial rules, and will come to the conference with full authority to accomplish the purposes of Rule 16 of the Federal Rules of Civil Procedure.

VI

Pre-trial conferences will not be continued except for good cause shown in a **written** motion presented sufficiently in advance of the conference for opposing counsel to be notified.

VII

Failure on the part of counsel to appear at the conference may result in **sanctions**, including but not limited to sua sponte dismissal of the suit, assessment of costs and attorney fees, default or other appropriate sanctions.

VIII

All pending motions and all special issues or defenses raised in the pleadings must be called to the court's attention in the pre-trial order.

IX

The pre-trial order shall bear the signatures of all counsel at the time it is submitted to the Court, the pre-trial order shall contain an appropriate signature space for the Judge. Following the pre-trial conference, the signed copy of the order shall be filed into the record, and the additional copy shall be retained in the Judge's work file. The order will set forth

- 1 The date of the pre-trial conference
- 2 The appearance of counsel identifying the party(s) represented
- 3 A description of the parties, and in cases of insurance

carriers, their insured must be identified. The legal relationships of all parties with reference to the claims, counterclaims, third-party claims and cross claims, etc

- 4 a With respect to jurisdiction, a brief summary of the factual basis supporting each claim asserted, whether original claim, counterclaim or third-party claim, etc , and, the legal and jurisdictional basis for each such claim, or if contested, the jurisdictional questions,
  - b In diversity damage suits, there is authority for dismissing the action, either before or after trial, where it appears that the damages reasonably could not come within the jurisdictional limitation. Therefore, the proposed pre-trial order in such cases shall contain either a stipulation that \$75,000 (or for a case commenced before January 17, 1997, \$50,000) is involved or a resume of the evidence supporting the claim that such sum reasonably could be awarded
- 5 A list and description of any motions pending or contemplated and any special issues appropriate for determination in advance of trial on the merits. If the Court at any prior hearing has indicated that it would decide certain matters at the time of pre-trial, a brief summary of those matters and the position of each party with respect thereto should be included in the pre-trial order
- 6 A brief summary of the material facts claimed by
  - a Plaintiff
  - b Defendant
  - c Other parties
- 7 A **single listing** of all uncontested material facts
- 8 A **single listing** of the contested issues of fact (This does not mean that counsel must **concur** in a statement of the issues, it simply means that they must list in a single list all issues of fact ) Where applicable,

particularities concerning the following fact issues shall be set forth

- a Whenever there is in issue the seaworthiness of a vessel or an alleged unsafe condition of property, the material facts and circumstances relied upon to establish the claimed unseaworthy or unsafe condition shall be specified with particularity,
- b Whenever there is in issue negligence of the defendant or contributory or comparative negligence of the plaintiff, the material facts and a circumstances relied upon to establish the claimed negligence shall be specified with particularity,
- c Whenever personal injuries are at issue, the nature and extent of the injuries and of any alleged disability shall be specified with particularity,
- d Whenever the alleged breach of a contractual obligation is in issue, the act or omissions relied upon as constituting the claimed breach shall be specified with particularity,
- e Whenever the meaning of a contract or other writing is in issue, all facts and circumstances surrounding execution and subsequent to execution, both those admitted and those in issue, which each party contends serve to aid interpretation, shall be specified with particularity,
- f Whenever duress or fraud or mistake is in issue, and set forth in the pleadings, the facts and circumstances relied upon as constituting the claimed duress or fraud or mistake (see Fed R Civ P 9(b)) shall also be set forth in the pre-trial order,
- g If special damages are sought, they shall be itemized with particularity (See Fed R Civ P 9(g)),

- h If a conspiracy is charged, the details of facts constituting the conspiracy shall be particularized
- 9 A **single listing** of the contested issues of law (See explanation in 8 above )
- 10 For each party, a list and description of exhibits intended to be introduced at the trial Prior to the confection of the pre-trial order, the parties shall meet, exchange copies of all exhibits, and agree as to their authenticity and relevancy As to any exhibits to which the parties cannot agree, memoranda shall be submitted on or before five working days prior to trial
  - a Each list of exhibits first should describe those that are to be admitted without objection, and then those to which there will be objection, noting by whom the objection is made (if there are multiple adverse parties), and the nature of the objection Markers identifying each exhibit should be attached to the exhibits at the time they are shown to opposing counsel during preparation of the pre-trial order,
  - b If a party considers he has good cause not to disclose exhibits to be used solely for the purpose of impeachment, he may ex parte request a conference with the Court and make his position known to the Court in camera
  - c Where appropriate to preserve trade secrets or privileges, the listing of exhibits may be made subject to a protective order or in such other fashion as the Court may direct If there are such exhibits, the pre-trial order will state The parties will discuss exhibits alleged to be privileged (or to contain trade secrets, etc ) at the pre-trial conference
  - d In addition to the formal list of exhibits, counsel shall prepare copies for opposing counsel and a bench book of tabbed exhibits delivered to the

Court **five** working days before the start of the trial. If the trial is a jury trial and counsel desires to display exhibits to the members of the jury, then sufficient copies of such exhibits must be available so as to provide each juror with a copy, or alternatively, enlarged photographic copies or projected copies should be used. The Clerk of Court has available an opaque projector, and arrangements for its use should be made directly with the Clerk.

- e Unless otherwise ordered by the Court, only exhibits included on the exhibit list and/or for which memoranda have been submitted shall be included for use at trial.
  - f Each counsel shall submit to the Court on the day of trial a list of exhibits properly marked for identification which he or she desires to use at trial.
- 11 a A list of all deposition testimony to be offered into evidence. The parties shall, prior to trial, meet and agree as to the elimination of all irrelevant and repetitive matter and all colloquy between counsel. In addition, the parties shall, in good faith, attempt to resolve all objections to testimony so that the Court will be required to rule only on those objections to which they cannot reach an agreement as to their merit. As to all objections to the testimony which cannot be amicably resolved, the parties shall deliver to the Court, not less than **three** days prior to trial, a statement identifying the portions objected to, and the ground therefor. Proponents and opponents shall furnish the Court appropriate statements of authorities in support of their positions as to the proposed testimony.
- b In non-jury trials, the parties shall, at least **five** days prior to trial, submit to the Court

A summary of what each party intends to prove

and convey to the Court by the deposition testimony, including, where appropriate, particular page and line reference to said depositions. The parties shall indicate to the Court by page and line numbers, those parts of the deposition which each party intends to use, and upon which each party shall rely, in proving their respective cases.

- 12 a A list and brief description of any charts, graphs, models, schematic diagrams, and similar objects which, although not to be offered in evidence, respective counsel intend to use in opening statements or closing arguments,
- b Either a stipulation that the parties have no objection to the use of the listed objects for such purpose, or a statement of the objections to their use, and a statement that if other such objects are to be used by any party, they will be submitted to opposing counsel at least three days prior to trial and, if there is then opposition to their use, the dispute will be submitted to the Court at least one day prior to trial.
- 13 a A list of witnesses for all parties, including the names, addresses and statement of the general subject matter of their testimony (it is not sufficient to designate the witness simply "fact," "medical" or "expert"), and an indication in good faith of those who will be called in the absence of reasonable notice to opposing counsel to the contrary,
- b A statement that the witness list was filed in accordance with prior court orders. No other witness shall be allowed unless agreeable to all parties and their addition does not affect the trial date. This restriction will not apply to rebuttal witnesses or documents whose necessity cannot be reasonably anticipated. Furthermore, in the case of expert witnesses, counsel shall certify that they have exchanged expert reports in accor-

dance with prior court orders Expert witnesses whose reports have not been furnished opposing counsel shall not be permitted to testify nor shall experts be permitted to testify to opinions not included in the reports timely furnished,

- c Except for good cause shown, the Court will not permit any witness to testify unless with respect to such witness there has been complete compliance with all provisions of the pre-trial order and prior court orders,
  - d Counsel shall not be allowed to ask questions on cross-examination of an economic expert which would require the witness to make mathematical calculations in order to frame a response unless the factual elements of such questions shall have been submitted to that expert witness not less than three full working days before trial
- 14 A statement indicating whether the case is a jury or non-jury case
- a If the case is a jury case, then indicate whether the jury trial is applicable to all aspects of the case or only to certain issues, which issues shall be specified In jury cases, add the following provisions  

"Proposed jury instructions, special jury interrogatories, trial memoranda and any special questions that the Court is asked to put to prospective jurors on voir dire shall be delivered to the Court and opposing counsel not later than five working days prior to the trial date, unless specific leave to the contrary is granted by the Court "
  - b In a non-jury case, suggested findings of fact and conclusions of law and a separate trial memorandum are required, unless the Court enters an order that such is not required Same are to be submitted not

less than five full working days prior to trial

- c In a jury case, a trial memorandum shall be required only when and to the extent ordered by the Court. However, any party may in any event submit such memoranda not less than five working days prior to trial and should accomplish this with respect to any anticipated evidentiary problems which require briefing and jury instructions requiring explanation beyond mere citation to authority
- 15 In cases where damages are sought, include a statement for completion by the Court, that "The issue of liability (will or will not) be tried separately from that of quantum." It is the policy of this Court in appropriate cases to try issues of liability and quantum separately. Accordingly, counsel should be prepared to discuss at the pre-trial conference the feasibility of separating such issues. Counsel likewise should consider the feasibility and desirability of separate trials as to other issues.
- 16 A statement describing any other matters that might expedite a disposition of the case.
- 17 A statement that trial shall commence on \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_ a m /p m. A realistic estimate of the number of trial days required. Where counsel cannot agree upon the number of trial days required, the estimate of each side should be given. In addition, the proposed order must contain a sentence including the trial date and time previously assigned.
- 18 The statement that "This pre-trial order has been formulated after conference at which counsel for the respective parties have appeared in person. Reasonable opportunity has been afforded counsel for corrections, or additions, prior to signing. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice."
- 19 The statement that "Possibility of settlement of this

case was considered "

20 The proposed pre-trial order must contain appropriate signature spaces for counsel for all parties and the Judge

IT IS FURTHER ORDERED that the foregoing pre-trial notice be mailed to counsel of record for all parties to these cases, and counsel will comply with the directions set forth herein

New Orleans, Louisiana

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UNITED STATES DISTRICT JUDGE

EACH NUMBERED PARAGRAPH IS TO BE PRECEDED  
BY A HEADING DESCRIPTIVE OF ITS CONTENT

FILE

ADP

CHAMBER  
U.S. DISTRICT  
ELDON E. FALLON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

MOBIL EXPLORATION & PRODUCING U.S. INC.	*	CIVIL ACTION
	*	
VERSUS	*	NO.:
	*	C/W
A-Z/GRANT INTERNATIONAL COMPANY	*	SECTION "L" MAG. (4)

PRETRIAL ORDER

1. Date of Conference

The final pretrial conference was held before The Honorable Eldon E. Fallon, Judge, on Tuesday, April 16, 1996 at 1:00 p.m.

2. Appearance of Counsel

a.

Attorneys for Mobil Exploration &  
Producing U.S. Inc. and Mobil Oil  
Exploration & Producing Southeast Inc.

b.

Telephone (504) 830-3838  
Attorneys for Rowandrill, Inc. and  
Rowan Companies, Inc.

### 3. Description of Parties

Plaintiff, Mobil Oil Exploration & Producing Southeast Inc. ("MOEPSI"), was the operator and co-owner of the offshore lease covering the Ship Shoal 68 area. Plaintiff, Mobil Exploration & Producing U.S. Inc. ("MEPUS"), acted as MOEPSI's agent, pursuant to contract, in connection with exploration and production activities on the Ship Shoal 68 lease.

Rowandrill, Inc. and Rowan Companies, Inc. (sometimes collectively referred to as "Rowan") have been made defendants herein. Rowandrill, Inc. was the owner of the ROWAN PARIS at all pertinent times herein. Further, Rowandrill, Inc. entered into the March 1, 1990 contract with Mobil Exploration & Producing U.S. Inc. ("MEPUS"). Rowan has filed a counterclaim against Mobil in the amount of \$496,000.00 plus interest, costs and attorneys' fees for its failure to pay the September 6, 1990 invoice submitted to Mobil. Additionally, Rowan claims that Mobil is liable for Rowan's fees and expenses incurred in this matter pursuant to the March 1, 1990 contract.

### 4. Jurisdiction

Jurisdiction is premised on the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, and 28 U.S.C. § 1331. In a pre-trial ruling, Judge Sear ruled that maritime law, rather than

state law, is applicable to the case. Rowan does not contest that this court has subject matter jurisdiction.

5. Pending or Contemplated Motions

a. Mobil's Motion in Limine regarding deferred production damages.

b. Mobil's Motion in Limine regarding A-Z/Grant expert witness John Forrest.

c. Mobil's Motion in Limine regarding Rowan witness John Buvens

d. Mobil's Motion to Quash Rowan's Trial Subpoena to Ray Easley.

e. Mobil's Motion in Limine regarding evidence of other incidents involving the A-Z/Grant packstock and post-accident modifications to the packstock tool.

f. Rowan's Motion in Limine regarding deferred production damages.

g. Rowan's Motion in Limine to preclude evidence of Rowan's drilling contracts with other companies.

h. Rowan's Motion in Limine regarding Mobil expert witness Peter Hill.

i. Rowan may file a Motion to Compel Mobil to produce documents and/or supplemental prior responses.

6. Summary of Material Facts Claimed by the Parties

a. Mobil Exploration & Producing U.S. Inc. and Mobil Oil Exploration & Producing Southeast Inc.

At all pertinent times, Mobil Oil Exploration & Producing Southeast Inc ("MOEPSI") and Amoco Production Company ("Amoco") were the owners of a federal offshore lease covering the Ship Shoal 68 area located on the Outer Continental Shelf off the coast of Louisiana. Under the terms of the Joint Operating Agreement between MOEPSI and Amoco, MOEPSI was designated as the lease operator and authorized to enforce claims for and on behalf of the joint account. In furtherance of its obligation as lease operator, MOEPSI entered into a services agreement with its affiliate, Mobil Exploration & Producing U.S. Inc. ("MEPUS"), under which MEPUS agreed to operate and manage exploration and production activities on behalf of MOEPSI (MOEPSI and MEPUS are sometimes collectively referred to as "Mobil").

In March 1990, MEPS and Rowandrill, Inc., an affiliate of Rowan Companies, Inc. (collectively "Rowan"), entered into a drilling contract pursuant to which Rowan agreed to furnish the jack-up drilling rig ROWAN PARIS to drill the Ship Shoal 68 #4 well. Drilling commenced on June 24, 1990. On August 3, 1990, the Coast Guard conducted its annual inspection of the drilling vessel. When a Coast Guard inspector requested a test of the remote emergency shutdown device for the rig's ventilation system, a Rowan electrician activated a device that was labeled as the shutdown for the ventilation system. When the electrician activated the switch, all power on the rig was lost, including power necessary to turn the drill bit and circulate drilling fluids in the well. This loss of power resulted in the drill string becoming stuck in the hole. Subsequent efforts to free the pipe and fish the drill string were unsuccessful.

When Rowan investigated the event, it discovered that the ventilation and power plant shutdown devices were not properly labeled. The device labeled as the ventilation shutdown was in reality the power plant shutdown, while the device labeled as the plant shutdown was actually the device for the ventilation system. After questioning its rig employees, Rowan was able to determine only that the mislabeling occurred at some point subsequent to the Coast Guard's prior annual inspection.

Rowan's mislabeling of the emergency shutdown devices was a violation of applicable Coast Guard and American Bureau of Shipping regulations. The only labels for the shutdowns were located on removable covers. Rowan was grossly negligent in failing to install permanent labels on the wall or bulkhead, in failing to perform any test or inspection of the shutdown system to ensure that this important safety device functioned as intended, and in failing to establish and/or disseminate instructions to its employees regarding the identity of "responsible persons" authorized to remove covers from the shutdown switches.

Under the terms of the drilling contract, Rowan agreed that it would comply with all applicable laws, orders, rules and regulations of governmental authorities pertaining to the rig, and further that Rowan would indemnify and hold Mobil harmless for all liabilities and damages resulting from Rowan's non-compliance with applicable laws, orders, rules and regulations. Pursuant to this express indemnification agreement, Rowan is liable to Mobil for all damages sustained as a consequence of the August 3 incident, as well as attorneys' fees and costs associated with defending Rowan's claim for rig time and lost equipment. Rowan is further liable to Mobil for all damages caused by Rowan's breach of contract and its negligent conduct.

During the early stages of the case, Judge Sear ruled that the pertinent contract provisions were ambiguous and that parole evidence would be admissible to show the intent of the parties. If after hearing evidence concerning contractual intent, the jury finds that the contract is indeed ambiguous, the indemnity provisions must fall, and the outcome of the case must be determined on the basis of implied contract and tort.

In an effort to mitigate damages caused by Rowan, Mobil attempted to perform a sidetrack operation out of the original Ship Shoal 68 #4 well. A packstock tool purchased from A-Z/Grant International Company (A-Z/Grant) was lowered into the hole, but either became stuck or set prematurely at a location above the intended depth. Mobil filed suit against A-Z/Grant and the matter was consolidated with Mobil's action against Rowan. After investigation and discovery revealed that the packstock's setting was not the result of any product defect or negligence on the part of A-Z/Grant or Mobil, Mobil settled its claim against A-Z/Grant.

The damages sought here are those of the Ship Shoal 68 joint account (Mobil and Amoco). As the result of Rowan's mislabeling of the shutdown devices, Mobil was forced to abandon its original objectives and complete the Ship Shoal 68 #4 well in a sand at a much shallower depth than initially intended. Mobil later drilled the Ship Shoal 68 #5 well for the purpose of

reaching the original target sands. Costs associated with lost downhole equipment, efforts to free or fish the drill string, and redrill total \$5,364,000. In addition, the joint account sustained deferred production losses of approximately \$7,500,000 (this figure must be updated based upon the most recent production figures available for the Ship Shoal 68 #4 and #5 wells).

b. Rowandrill, Inc. and Rowan Companies, Inc.

In the later part of June 1992, the Ship Shoal 68 #4 well was spudded. Drilling activities were conducted from the ROWAN PARIS pursuant to Mobil's drilling program and under Mobil's direction and supervision. Throughout the course of the drilling operations, various problems were encountered in the well.

On August 2 and 3, 1990 the United States Coast Guard was on the ROWAN PARIS conducting a biannual inspection for the purposes of renewing the certificate of inspection. On August 3, 1990 the Coast Guard insisted upon testing the remote ventilation shutdown on the back side of the living quarters even though Rowan had previously advised the Coast Guard that it did not desire any of the shutdowns to be tested. Rowan's toolpusher discussed this with Mobil's drilling supervisor, Wayne Peltier, to determine whether Mr. Peltier would authorize the test. Rowan's toolpusher also asked the Mobil drilling supervisor if he wanted to pull into

the casing or come off bottom during the test. The Mobil drilling supervisor declined to do either and instructed Rowan to continue to drill.

The Coast Guard representative and the Rowan electrician went to the back of the living quarters and the cover was removed from the switch which was labeled as the ventilation shutdown. At the same time that the electrician activated the remote switch, the Coast Guard representative activated the quarters shutdown switch, without permission and without advising anyone that he intended to activate that switch. It was immediately noticed that power was lost and that the engines were shutting down. Power was restored within 8 to 10 minutes.

Investigation revealed that the power was lost because the labels to the remote ventilation and plant shutdown switches on the back of the quarters were accidentally cross labeled on or about July 26, 1990 following the completion of routine maintenance. Mobil has produced no evidence demonstrating that Rowan acts or omissions were willful or intentional, or even constitute gross negligence.

Rowan disputes that the pipe was stuck merely because of the brief loss of power. Rather, downhole conditions had to exist to permit the pipe to stick and those conditions were either known

or should have been known to Mobil. The downhole conditions, the angle of the well and problems with Mobil's mud system were all factors in causing the pipe to become stuck. Moreover, efforts which were undertaken by Mobil to extract the pipe were unsuccessful because Mobil was imprudent and utilized improper measures under the circumstances.

On August 6, 1990 Mobil pumped a cement plug which, according to the Mobil drilling engineer for the well, "went awry". In fact, the plug was negligently calculated and/or displaced by Mobil, and resulted in the cement setting up inside the pipe approximately one thousand feet higher than desired. Mobil's negligence regarding the cement job significantly changed the scope and the magnitude of the problem from that point forward. Mobil's negligent calculation/displacement was a superseding and intervening cause of its damages.

Mobil also ran a severing tool in the hole, on a wireline, prior to the cement having set. The counter on the wireline, owned by Western Atlas and working for Mobil pursuant to contract, malfunctioned resulting in the large severing tool being run very deep into the wet cement. Thereafter, the tool was pulled out of the cement stringing wet cement up the pipe.

Following these steps Mobil began different fishing operations through another contractor, Tri State Oil Tools. The options presented to Tri State were limited as a result of Mobil's negligence and they were unable to fish all of the drill pipe out of the hole because of the presence of the cement in the pipe. These operations continued until August 22, 1992.

On August, 22, 1992 Mobil decided to use a packstock tool sold to it by A-Z/Grant International. Mobil declined to run either a gauge ring or casing scraper into the hole prior to running the packstock tool. The packstock set prematurely at 6,960 feet, approximately 4,000 higher than expected. Mobil decided to side track at that point and elected to abandon some of the deeper objectives of the well. The #4 sidetrack well could have been drilled to each and every target sand of the original well without any delay. Moreover, Mobil could have drilled a new well to the same target sands immediately, without incurring a delay of approximately two years.

Rowan was not involved with the cement job of August 6, 1990, the fishing operations that followed the cement job, the decision to use a packstock instead of a whipstock, the running of the packstock into the hole, or the change in scope of the well resulting therefrom. Mobil originally sued A-Z/Grant International alleging that the packstock malfunctioned and A-

Z/Grant International was at fault for its improper design and/or manufacture of the packstock, and/or that A-Z/Grant International breached its warranty of workmanlike performance and the express terms of its contract with Mobil. Mobil and A-Z/Grant International have reached a settlement and A-Z/Grant International is no longer a party to this lawsuit. The failure of the packstock was also a superseding and intervening cause of Mobil's alleged damages.

In December 1990, Mobil contracted with Pool Offshore Company for a "completion" rig for the purposes of doing "completion" operations and thereafter began producing the well.

Rowan submits that the cross-labeling of the remote ventilation and plant shutdown switches caused, if at all, only a small portion of Mobil's damages. The fault of Mobil, in addition to the fault of third parties for whom Rowan is not responsible, constitutes superseding and intervening causes of Mobil's damages.

The contract between Rowan and Mobil allocates to Mobil the risk of various operations including all damages resulting from tools lost in the hole, loss of the hole, damage to the hole, loss of production and deferred production. The only obligation of Rowan under the contract was to reduce its operating rate by 15% for the time necessary to repair or redrill the hole, in the

event the damage to or loss of the hole stemmed from Rowan's sole negligence. However, this remedy was unavailable to Mobil because Rowan was not solely negligent. Moreover, Mobil temporarily plugged and abandoned the well and released the ROWAN PARIS without electing this remedy. The contract between Rowan and Mobil prohibits Mobil's recovery of damages in this case.

The specific contract dated March 1, 1990 between Mobil Exploration & Producing U.S. Inc. and Rowandrill, Inc. was not negotiated between the parties, with the exception of the rates of payment. Rather, a contract form was presented by Mobil to Rowan to sign with the representation that it was the same as a previous contract between Mobil and Rowan. Mobil and Rowan had previously entered into other contracts on several occasions, and Mobil's "form" or "base" contract was presented by Mobil as the contract which would be utilized between the parties. Rowan did discuss various aspects of that contract, in previous years, with Mobil and language was reached which was acceptable to the parties to the contract. Rowan has always rejected the inclusion of language specifically designed to subordinate the specific allocations of risks set forth in Article 9 to other provisions, and Mobil has agreed not to utilize such provisions in its contracts with Rowan.

Pursuant to the terms of the contract between Mobil and Rowan, the ROWAN PARIS was either operating or on standby during

the entire month of August 1990. On September 6, 1990, Rowan forwarded invoice number 910554 to Mobil for payment. Mobil has never paid the invoice, which totals \$496,000.00, and Mobil failed to exercise the remedies afforded by the drilling contract to dispute payment of the invoice. Accordingly, pursuant to the terms of the drilling contract, Rowan is entitled to recover the amount of the invoice. Furthermore, Rowan is entitled to interest on the amount of the invoice from the time the invoice became due. Further, pursuant to the drilling contract, Rowan is entitled to recover the fees and expenses it has incurred as a result of Mobil's lawsuit.

**7. Uncontested Material Facts**

1. At all pertinent times, MOEPSI and Amoco were co-owners of the Ship Shoal 68 offshore lease.
2. MOEPSI was designated as the operator of the Ship Shoal 68 lease in the Joint Operating Agreement between Mobil and Amoco.
3. Pursuant to an April 1, 1987 Services Agreement, MOEPSI retained MEPUS to provide services in connection with the exploration and production of hydrocarbons.
4. At all pertinent times, there was in effect between MEPUS and Rowan a March 1, 1990 drilling contract relating to the services of the jack-up drilling rig ROWAN PARIS.
5. A-Z/Grant issued a job ticket in connection with the packstock tool.
6. Mobil paid \$249,000 to Sperry-Sun for the MWD tool lost in the hole.
7. Mobil paid \$40,295.00 to Wilson Downhole Services for drill collars, stabilizers and subs lost in the hole.

8. On August 2, 1990 representatives of the U.S. Coast Guard were on the ROWAN PARIS conducting a biannual inspection for the renewal of the rig's certificate of inspection. On August 3, 1990, the remote ventilation shutdown switch on the back of the quarter's building was tested and power was lost for eight to ten minutes. It was determined on August 6, 1990 that the remote plant and vent shutdown switches on the back of the quarter's building were cross labeled.
9. On August 3, 1990, when electrical power was lost on the ROWAN PARIS, drilling was under way.
10. During the period of August 1, 1990 through August 31, 1990, the ROWAN PARIS was either operating or was on standby in Ship Shoal No. 68 in the Gulf of Mexico.
11. On September 9, 1990, Mobil released the ROWAN PARIS.
12. Mobil did not give Rowan written notice of Mobil's dissatisfaction with Rowan's conduct before the ROWAN PARIS was released on September 9, 1990.
13. Mobil did not terminate the drilling contract before September 9, 1990.
14. Mobil did not ask Rowan to redrill or repair the Ship Shoal 68 #4 well at a 15% reduction of Rowan operating rate for the time necessary to redrill or repair the hole.
15. Rowan forwarded invoice no. 910554 dated September 6, 1990 to MEPUS for use of the ROWAN PARIS from August 1, 1990 through August 31, 1990.
16. The amount of invoice no. 910554 is \$496,000.00.
17. Mobil filed its complaint against Rowan on November 1, 1991.
18. Mobil has not been fined, taxed, penalized or held liable by any government agency or authority of any kind as a result of the acts and/or omissions of Rowan.
19. Mobil has not been cast in judgment to anyone for any claim, demand or damages of any kind as a result of the acts and/or omissions of Rowan.
20. Prior to the execution of the March 1, 1990 drilling contract between Rowandrill, Inc. and MEPUS for the

ROWAN PARIS, the parties had entered into the following contracts:

- a. ROWAN JUNEAU (April 30, 1984);
  - b. ROWAN MIDLAND (December 6, 1985);
  - c. ROWAN HOUSTON (July 3, 1986);
  - d. ROWAN HALIFAX (CALIFORNIA) (December 4, 1986);
  - e. ROWAN CALIFORNIA (November 7, 1988);
  - f. ROWAN MIDLAND (November 15, 1988)
21. Since 1988, twenty-one Mobil wells drilled in the Gulf of Mexico have incurred "trouble time" in excess of \$1,000,000.00.
  22. Insofar as MOEPSI and MEPUS have been able to determine, neither has ever sued a drilling contractor for damage to a well.
  23. Mobil and A-Z/Grant International have entered into a settlement agreement of all of Mobil's claims against A-Z/Grant International.

8. Contested Issues of Fact

1. Obligations of parties pursuant to the contracts.
2. Negligence and/or fault of the parties.
3. Causation.
4. Nature, extent and allocation of damages, if any.
5. Interpretation of March 1, 1990 contract between Mobil and Rowan for ROWAN PARIS.
6. The date on which Mobil received Rowan invoice #910554.
7. Whether Mobil's claims against Rowan are time-barred.
8. Whether Mobil mitigated its damages.
9. Whether the April 24, 1964 term contract between Mobil and A-Z/Grant applied to work performed and/or materials supplied to the Ship Shoal 68 #4 well.

9. Contested Issues of Law

1. Obligation of parties pursuant to the contracts.
2. Negligence and/or fault of the parties.
3. Legal causation.
4. Whether Mobil is entitled to damages for lost production and/or Electra damages.
5. Whether Rowan owes Mobil the warranty of seaworthiness.
6. Whether Rowan is legally entitled to recover all or part of the amounts due under invoice #910554.
7. Applicability of recoupment or setoff.
8. The admissibility of design modifications made by A-Z/Grant to its packstock tool and related equipment subsequent to the events of August 22, 1990.
9. Admissibility of other packstock tool failures.
10. Whether Mobil's claims against Rowan are time-barred.
11. Admissibility of Rowan's contracts with other oil companies.

10. List of Exhibits

- a. Joint Exhibits to be introduced at start of trial without objection
  1. Rowan IADC daily drilling reports.
  2. Rowan morning reports.
  3. Rowan barge engineer's daily logs.
  4. Notes of Rowan maintenance man.
  5. Electrical one line diagram for the ROWAN PARIS.
  6. Mobil detailed daily drilling reports for Ship Shoal 68 #4 well.
  7. March 1, 1990 drilling contract for the ROWAN PARIS.

8. Services Agreement dated April 1, 1987 between MOEPSI and MEPIJ.
9. Mobil's drilling program for the Ship Shoal 68 #4 well, together with all addenda thereto.
10. Mobil's drilling performance review for the Ship Shoal 68 #4 well.
11. Sperry-Sun invoice HN002080.
12. Wilson Downhole Services invoice 150932-D.
13. a) A-Z/Grant invoice relating to the Ship Shoal 68 #4 well and supporting documents.  
b) A-Z/Grant packstock report relating to the Ship Shoal 68 #4 well.
14. A-Z/Grant packstock operations manual.
15. Color copy of Mobil's copy of Rowandrill, Inc. invoice no. 910554 dated September 6, 1990 in the amount of \$416,000 to which Mobil attached its "Notice of Documents Sent to Field" and Mr. Sabathier's handwritten notes.
16. A copy of Rowandrill, Inc.'s invoice no. 910631 dated September 17, 1990 in the amount of \$120,000.
17. Temporary Certificate of Inspection issued by the United States Coast Guard on August 3, 1990.
18. Certificate of Inspection issued by the United States Coast Guard as a result of its inspection of August 2 and 3, 1990.
19. "Work list" converted to CG 835s at the completion of the inspection on August 3, 1990.
20. MODU Hull Inspection Book.
21. MODU Machinery Inspection Book.
22. Coast Guard CG 835 form dated August 7, 1990 relating to inspection of ROWAN PARIS.
23. Coast Guard work list dated August 2, 1990 relating to inspection of the ROWAN PARIS.

24. Correspondence of August 13, 1991 from the United States Department of Interior to Mobil.
25. Halliburton invoice 927987 dated August 7, 1990 and supporting documents.
26. Excerpts from Wayne Stevens tally book.
27. Aerial photograph of ROWAN PARIS.
28. Mark-up draft copy of November 15, 1988 Mobil/Rowan drilling contract for ROWAN MIDLAND containing handwritten charges by Rowan Vice-President, Robert Croyle
29. November 15, '88 Mobil/Rowan drilling contract for ROWAN MIDLAND (final version)
30. November 16, '88 letter from J.P. Webb of Mobil to R.A. Keller of Rowan regarding November 15, 1988 ROWAN MIDLAND contract.
31. Isochore maps by Mobil geologist David Walz:
  - a. Top U-8 sand structure
  - b. U-8 sand net pay (proven gas updip 5568 #2)
  - c. Top U-5 sand structure
  - d. U-5 sand net pay (proven gas updip 5568 #5)
  - e. U-5 sand net pay (proven recoverable oil)
  - f. U-5 sand net pay (proven downdip oil)
  - g. U-5 sand net pay (possible downdip oil)
  - h. Top U-4A (upper) sand structure
  - i. U-4A (upper) sand net pay (proven gas)
  - j. U-4A (upper) sand net pay (proven oil)
  - k. U-4A (upper) sand net pay (probable downdip oil)
  - l. U-4A (upper) sand net pay (possible downdip oil)
  - m. Top U-4A (lower) sand structure
  - n. Top-4A (lower) sand net pay (proven oil updip to 58 #5)
  - o. U-4A (lower) sand net pay (proven recoverable oil)
  - p. U-4A (lower) sand net pay (proven downdip oil)
  - q. U-4A (lower) sand net pay (possible downdip oil)
  - r. Top U-4L sand structure
  - s. U-4L sand net pay (proven recoverable gas)
  - t. U-4L sand net pay (probable downdip gas)
- b. Joint Exhibits which may be introduced at trial and to

which there are no objections

32. Rowan toolpusher reports.
33. Martin Decker record-o-graph charts from the ROWAN PARIS.
34. Mobil's drilling file for the Ship Shoal 68 #4 well (excluding drilling reports).
35. Mobil's reservoir engineering file for the Ship Shoal 68 #4 well.
36. a) Ambar recap of work on Mobil Ship Shoal 68 #4 well.  
b) Ambar mud reports for the Ship Shoal 68 #4 well.  
c) Ambar concentration sheets for Ship Shoal 68 #4 well
37. Tri-State service reports for the Ship Shoal 68 #4 well.
38. Mobil's recommendation to drill Ship Shoal 68 #4 well.
39. Mobil's recommendation to drill Ship Shoal 68 No. 5 well.
40. Mobil's drilling performance review of February 18, 1991 for Ship Shoal 68 No. 3 well.
41. Mobil's drilling performance review of August 25, 1989 for Ship Shoal 68 No. 2 well.
42. Mobil's drilling performance review of May 25, 1990 for South Pelto 10 No. 21 well.
43. Mobil well file for Ship Shoal 68 #4 well.
44. Sundry notices and reports on wells submitted to the United States Department of Interior Minerals Management Service dated December 11, 1990 and the attachments thereto.
45. Sundry notices and reports on wells submitted to the United States Department of Interior Minerals Management Service dated August 29, 1990 and the attachments thereto.

46. Mobil's coding book or manual describing numerical and alphabetical codes used for each drilling procedure.
47. Excerpts from Rick Cannon's tally book.
48. MEPUS correspondence of November 9, 1989 to the Department of Interior and its supplemental developmental operations coordination document attached thereto.
49. Memorandum of August 8, 1990 from J. T. Sawyer to H. C. Kelly.
50. Mobil detail drilling reports and daily workover/completion reports for the Ship Shoal 68 #5 well.
51. Excerpts from Richard Carter's tally book.
52. Mobil production reports for Ship Shoal 68 #5 well (Terry Floyd depo. exhibit).
53. Mobil production reports for Ship Shoal 68 #4 well (Terry Floyd depo. exhibit).
54. Mobil production reports for S. Pelto 10 #21 well (Terry Floyd depo. exhibit).
55. Mobil well history for Ship Shoal 68 #4 well (Terry Floyd depo. exhibit).
56. Well test report/well production report for Ship Shoal 68 #4 well (Terry Floyd depo. exhibit).
57. Well test report/well production report for Ship Shoal 68 #5 well (Terry Floyd depo. exhibit).
58. Well test report/well production report for S. Pelto 10 #21 well (Terry Floyd depo. exhibit).
59. Master pricing agreement between Mobil and NL Sperry - Sun Drilling Service.
60. Ship Shoal 68 offshore lease
61. May 3, 1993 "Dear Payor" letter from United States Minerals Management Service.
62. a) Fishing Tool, Inc. invoice number 31039 and supporting documents.

- b) Fishing Tool, Inc. Harvey dispatcher log.
  - c) Fishing Tool, Inc Golden Meadow dispatcher log.
  - d) Recap of entries for Mobil job from Fishing Tool, Inc. Golden Meadow dispatcher log.
- c. Mobil Exploration & Producing U.S. Inc. and Mobil Oil Exploration & Producing Southeast Inc.

Rowan objects to the admissibility, but not authenticity, of these exhibits.

1. Drawings of shutdown switches by James Burrell (attached to Coast Guard statement):
  - a. Before mislabeling corrected
  - b. After mislabeling corrected
2. Excerpt from American Petroleum Institute (API) Publication RP 14C
3. Excerpts from April 5, 1990 Mobil/Rowan drilling contract for ROWAN ODESSA (final version)
4. Excerpts from March 14, 1988 Amoco/Drilling drilling contract
5. Excerpts from October 24, 1988 Conoco/Rowan drilling contract
6. Excerpts from September 23, 1987 Tenneco/Rowan drilling contract
7. Excerpts from April 28, 1988 Tenneco/Rowan drilling contract.
8. Excerpts from November 13, 1989 Japex/Rowan drilling contract.
9. Excerpts from August 12, 1988 Walter Oil & Gas/Rowan drilling contract.
10. November 18, 1992 Petrophysical Evaluation by Mobil petrophysicists: Wayne Nicosia.
11. Summary chart of Mobil's deferred production losses (gross) from U-8 and U-5 sands.

12. Summary chart of Mobil's production and gross revenue from Ship Shoal No. 4 sidetrack well.
13. (a) Summary chart of Mobil's damages (without deduction for royalties).  
(b) Summary chart of Mobil's damages (with deduction for royalties).

d. Rowandrill, Inc. and Rowan Companies, Inc.

Mobil objects to the admissibility, but not authenticity, of these exhibits.

1. Correspondence of April 29, 1991 to Rowandrill, Inc. from C. D. Sabathier.
2. February 1, 1991 memorandum of Zahid Qayum outlining Mobil's costs incurred as a result of the August 3, 1990 accident.
3. Mobil's two memoranda dated August 8, 1990 of B Wolcott and T. Martin.
4. Undated memorandum of Mike Kline.
5. Affidavit of Mike Kline.
6. Affidavit of D. L. Durkee.
7. Affidavit of Thomas Lewis.
8. Mobil employee appraisal reports of Ken Sellers.
9. Mobil employee appraisal reports of Zahid Qayum.
10. Correspondence of August 12, 1992 from Doug White to Danny McNease.
11. Term Contract dated December 22, 1971 between Mobil and Sperry-Sun Well Surveying Company.
12. Summary chart/sheet of Mobil's deferred production losses.
13. Mobil's Drilling Foreman's manual.
14. Mobil's Drilling Safety Program.

15. Charts, graphs, computer printouts dealing with recoverable reserve estimates, cash flow and delayed revenues.
16. Mobil's "base" or blank" contract.
17. Mobil's proposed draft of April 30, 1984 contract for ROWAN JUNEAU showing deletions and changes made by Rowan, and final executed copy of April 30, 1984 contract for ROWAN JUNEAU.
18. Mobil's proposed draft of December 6, 1985 contract for ROWAN MIDLAND showing deletions and changes made by Rowan, and final executed copy of December 6, 1985 contract for ROWAN MIDLAND.
19. Mobil's proposed draft of July 3, 1986 contract for ROWAN HOUSTON showing deletions and changes made by Rowan, final executed copy of July 3, 1986 contract for ROWAN HOUSTON, letter from K. Parasi of Mobil to D. McNease of Rowan dated July 1, 1986 regarding ROWAN HOUSTON, a letter from F. R. Johnson of Mobil to R. A. Keller of Rowan (undated but received September 22, 1986 by Rowan) regarding ROWAN HOUSTON, letter of J. R. Sutter of Mobil to R. A. Keller of Rowan dated July 10, 1986 regarding ROWAN HOUSTON, and letter from R. G. Croyle of Rowan to Ross Parasi of Mobil dated July 3, 1986 regarding ROWAN HOUSTON contract.
20. Mobil's proposed draft of December 4, 1986 contract for ROWAN HALIFAX (CALIFORNIA) showing deletions and changes made by Rowan, and final executed copy of December 4, 1986 contract for ROWAN HALIFAX (CALIFORNIA).
21. Mobil's proposed draft of November 7, 1988 contract for ROWAN CALIFORNIA showing deletions and changes made by Rowan, final executed copy of November 7, 1988 contract for ROWAN CALIFORNIA, and August 1, 1988 letter from John Boor to R. J. Pedrett regarding Mobil's standard drilling contract.
22. Mobil drilling contracts with other contractors:
  - a. Mobil contract with Huthnance for Rig 14 dated January 1, 1988.
  - b. Mobil contract with Gulf Offshore for Rig Pool 54 dated January 21, 1988.

- c. Mobil contract with Reading & Bates for Rig Randolph lost dated May 11, 1988.
  - d. Mobil contract with Gulf Offshore for Rig Pool 54 dated June 16, 1988.
  - e. Mobil contract with Atlantic Pacific Marine Corp. for Rig Ranger IV dated July 11, 1988.
  - f. Mobil contract with Gulf Offshore for Rig Pool Rig 14 dated July 14, 1988.
  - g. Mobil contract with Deepwater Drilling Partnership for Rig Sedco 601 dated March 28, 1989.
  - h. Mobil contract with Gulf Offshore for Rig Pool Rig 53 dated November 3, 1989.
  - i. Mobil contract with Dual Marine for Rig Dual Rig 25 dated March 21, 1990.
23. Time line of significant events.
  24. Charts, sketches and overlays of the hole and other South Pelto 10 wells showing various procedures and events.
  25. Enlargements of any exhibits.
  26. Chart of Mobil contracts.
  27. Frank Harrison geological maps and planometer charts.
  28. All geologic data and information for all wells in Mobil's South Pelto 10 field (objection to authenticity and admissibility).
  29. Copies of Rowan checks paying attorneys' fees, expert fees, costs, and other litigation expenses.
  30. Any exhibit listed or used by any other party.
  31. Diagram of No. 5 Well.
  32. Structural cross-section of No. 2 and No. 5 Wells
  33. Comparison of W-4A and U-5 sands.
  34. Structure map contoured on top of U-4A sand.

35. Structure map contoured on top of U-5 sand.
36. Structure map contoured on top of U-8 sand
37. Core photographs together with electrical log of U-5 sand in No. 5 Well.
38. Portion of TDE log through U-5 sand in No. 2 Well and portion of TDK log through U-4A and U-5 sands in No. 5 Well.
39. Production plots by Calvin Barnhill.
40. Revenue plots by Calvin Barnhill.
41. Chart of estimated production by sand.
42. Various directional drilling plots for Well No. 4ST.
43. Summary listing of A-Z/Grant problem packstock jobs.
44. A-Z/Grant's Answers to Interrogatories propounded by Mobil.
45. A-Z/Grant's Responses to Original and Supplemental Requests for Production of Documents propounded by Mobil.
46. A-Z/Grant inter-office memoranda and other documents relating to packstock manufacturing and assembly deficiencies.
47. A-Z/Grant reports and memoranda relating to problem packstock job.
48. Video of packstock in operation.
49. John Forrest's drawings, bar charts, graphs and torque/drag analyses for the Ship Shoal 68 #4, #4 ST, #5, #5 ST and proposed #4 ST wells.
50. OTC 4792, Economic and Statistical Analysis of Time Limitations for Spotting Fluids and Fishing Operations, Keller, Brinkman, Tanega, May, 1984.
51. A-Z/Grant inspection/testing records regarding the packstock used in the Ship Shoal 68 #4 well.
52. a) A-Z/Grant engineering specification ES-T-9.

- b) A-Z/Grant packstock quality assurance program
  - c) A-Z/Grant packstock assembly procedure.
  - d) A-Z/Grant engineering specification ES-H-5 (Rev. B).
  - e) A-Z/Grant engineering specification ES-H-5 (Rev. B).
53. a) Documents relating to manufacture of packstock slips.
- b) Drawing of packstock.
54. Rowan's Fourth Request for Production of Documents and Mobil's response thereto.
55. Rowan's Fifth Request for Production of Documents and Mobil's response thereto.
56. Mobil's records dealing with inspection of the ROWAN PARIS on July 23, 1990 (authenticity and admissibility).

11. Deposition Testimony to be Offered Into Evidence

All parties anticipate offering the deposition testimony of any witnesses who are unavailable for trial, or for impeachment purposes.

Mobil has submitted medical records regarding the unavailability of Mobil employee Ray Easley due to a heart condition.

Rowan objects to using the deposition of Mobil employee Mr. Easley. This witness was served with a subpoena. Mr. Easley's medical condition, which does not preclude him from working offshore, does not preclude him from testifying at trial.

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Mr. Easley is an important witness, and Mobil has not shown sufficient cause for setting aside the trial subpoena served on him.

### 12. Charts, Graphs and Models

Plaintiffs and defendants may utilize charts, graphs, models and/or schematic diagrams during opening statements or closing arguments. The parties reserve their right to object to the use of such items that have not yet been prepared or made available for inspection by opposing counsel. The parties agree to make such items available for inspection five working days before trial.

### 13. List of Witnesses

The parties have agreed to eliminate "may call" witnesses. A party is not required to call all witnesses on its respective "will call" list, but it will make any such witness in its employ or under subpoena available to the other party upon reasonable notice. Either party may call a witness from the other party's "will call" list. Mobil reserves the right to call rebuttal witnesses.

- a. Mobil Exploration & Producing U.S. Inc. and  
Mobil Oil Exploration & Producing Southeast Inc.

Will Call

- ✓ 1. Zahid Qayum  
1250 Poydras Street  
New Orleans, LA 70112

Facts and circumstances surrounding Mobil's use of the ROWAN PARIS, planning of the Ship Shoal 68 #4 well, drilling of the Ship Shoal 68 #4 well, including costs incurred, activities on the ROWAN PARIS during August 1990, and communication with A-Z/Grant.

2. Richard Carter  
Rt. 1, Box 162  
Roanoke, LA

Facts and circumstances concerning operations on the ROWAN PARIS.

- ✓ 3. Luke Brooks  
40332 Wilks Road  
Mt. Hermon, LA

Operations on the ROWAN PARIS, including the Coast Guard inspection of the rig and Rowan's mislabeling of shutdown devices.

- ✓ 4. T. F. Floyd  
1250 Poydras Street  
New Orleans, LA 70112

Deferred production losses of the Mobil Ship Shoal 68 joint account (Mobil and Amoco), and operations in connection with the Ship Shoal 68 #4 and #5 wells.

- ✓ 5. Blake Hebert  
1250 Poydras Street  
New Orleans, LA 70112

Expert testimony regarding electrical systems on the ROWAN PARIS.

- ✓ 6. Larry Flak  
6430 Hilcroft, Suite 112  
Houston, TX

Expert testimony regarding drilling operations and use of various tools downhole.

- ✓ 7. Sunyon A. Douglas  
3395 Highway 53  
Waynesboro, MS

Operations on the drilling rig during the time he was present on the rig

- ✓ 8. Melvin Humble  
Rt. 2, Box 98-D  
Jonesville, LA

Maintenance activities and operations on the drilling rig, including the Coast Guard inspection on August 2 and 3, 1990.

- ✓ 9. Ernest Bonnette  
9702 Railton  
Houston, TX

Facts and circumstances surrounding the Coast Guard inspection of the rig, knowledge of other Rowan rigs, and knowledge of rules and regulations applicable to the rig.

- ✓ 10. Danny McNease  
5450 Transco Tower  
2800 Post Oak Blvd.  
Houston, TX

Negotiation of the drilling contract, operations on the drilling rig, post-accident investigation and comments concerning events on the rig, and Rowan's overall operations.

11. Thomas Lewis  
1250 Poydras Street  
New Orleans, LA 70112

Operations on the drilling rig, the drilling contract, post-accident meetings regarding events on the rig, and dealings with Rowan.

- ✓ 12. Steve Conger  
1250 Poydras Street  
New Orleans, LA 70112

Negotiation of Rowan midland and other drilling contracts.

13. James Quinn  
1250 Poydras Street  
New Orleans, LA 70112

Production figures from the Ship Shoal 68 #4 sidetrack well, prices received by Mobil for oil and gas produced during the time production was deferred, and Mobil's costs and expenses

14. Hank Kelly  
1250 Poydras Street  
New Orleans, LA 70112

Activities on the rig, planning and drilling of the Ship Shoal 68 #4 and #1 wells, damages sustained by the Ship Shoal 68 joint account, and Mobil's overhead costs/percentages.

15. Wayne Peltier  
209 Spyglass Lane  
Broussard, LA

Operations on the drilling rig, including the Coast Guard inspection and events of August 2 and 3, 1990.

16. David Walz  
1250 Poydras Street  
New Orleans, LA 70112

Expert geologic testimony regarding sands intended to be reached by the Ship Shoal 68 #4 well.

17. Wayne Nicosia  
1250 Poydras Street  
New Orleans, LA 70112

Expert petrophysical testimony.

18. Peter Hill  
3190 Chartres Street  
New Orleans, LA

Expert testimony regarding Rowan's violation of applicable laws, rules and regulations.

19. K. Thornton  
Ambar  
Lafayette, LA

Drilling mud operations conducted on the rig.

- ✓ 20. David Edelson  
1005 Surrey Drive  
Simonton, TX

Coast Guard inspection of August 2 and 3, 1990, certification of the drilling rig, and Rowan's violation of applicable laws, rules and regulations.

- ✓ 21. James Burrell  
841 N. Farmington Dr.  
Southaven, MS/  
Broussard, LA

Operations on the TOWAN PARIS, including the Coast Guard inspection of the rig and Rowan's mislabeling of shutdown devices.

- b. Rowandrill, Inc. and Rowan Companies, Inc.

Will Call

1. Calvin Barnhill  
P. O. Box 5-7  
Lafayette, LA 70505

Expert regarding drilling operations, the sticking of the pipe, the fishing operations, the packstock operation, production problems, zone sizes, geologic variances, industry standards regarding day work contracts, reserves, cash flow, delayed revenues.

2. Robert G. Croyle  
5450 Transco Tower  
2800 Post Oak Blvd.  
Houston, TX 77056-6111

Facts and circumstances surrounding discussions with Mobil about contracts, Rowan's intent concerning contracts, and Rowan's costs of defense.

- ✓ 3. Frank Harrison  
P. O. Box 51143  
Lafayette, LA 70505

Expert on geologic size of the various sands.

✓ 4 Ray Basley  
P. O. Box 405  
Patterson, LA 70293

The drilling of Well #4, drilling operations, Mobil's activities, the fishing operations, the cement job, the packstock operations, the accident of August 3, 1990, the accident of August 23, 1990, the side track of the well.

5. P. V. Carroll  
16455 Crossell Road  
Bastrop, LA 71220-6130

Facts concerning various drilling operations during the course of drilling the well, including at the time of the packstock operation, maintenance.

✓ 6. Horace Howard  
Rt. 2, Box 47  
Gilbertown, LA 36908

Facts concerning Mobil's cement job of August 6, 1990, Mobil's control of the operations, discussions and communications with Mobil concerning operations, maintenance.

7. John Buvens  
5450 Transco Tower  
2800 Post Oak Blvd.  
Houston, TX 7056-6111

Facts and circumstances surrounding discussions with Mobil about contracts, Rowan's intent concerning contracts.

8. Phillip Cormier  
Rt. 3, Box 30626 YR  
Rayne, LA

Facts and circumstances surrounding discussions with Mobil, the packstock tool and operation, the accident of August 23, 1990.

✓ 9. Ricky Cannon  
102 Kirkdale Circle  
Lafayette, LA 70508

Activities on the rig, drilling operations, the packstock operation, the accident of August 23, 1990, tools rented by Mobil.

✓ 10. Mike Kline  
1250 Poydras Street  
New Orleans, LA 70112

Meeting with Ken Sellers and C. B. Wolcott, his notes surrounding that meeting, the contract.

11. Ken Sellers  
660 Fairlawn Drive  
Gretna, LA 70056

The March 1, 1990 contract, discussions with Rowan concerning contract, the execution of the contract, other contracts he prepared on behalf of Mobil with other drilling contractors, Mobil's base/form contract, comments made regarding the contract, previous Mobil/Rowan contracts.

12. T. Martin  
1250 Poydras Street  
New Orleans, LA 70111  
(address uncertain)

Meetings regarding the accident of August 3, 1990, discussions with the Coast Guard.

13. John Forrest  
Drilex Systems, Inc.  
15151 Sommerweyer  
Houston, TX 7041

Directional drilling operations, the operational capabilities and utilization of directional drilling in the completion of the Ship Shoal 68 No. 4 S/T and No. 5 S/T well.

14. Richard Haas  
1102 Brecom Hall Dr.  
Houston, TX 77077

Facts and Circumstances surrounding the Coast Guard inspection and the arrangements therefor, Rowan's regulatory compliance program.

14. This is a jury case. Mobil submits that construction, interpretation and applicability of the various contracts should

be tried to the court, and all other aspects of the case tried to the jury.

Rowan contends that because this is a jury case, the jury should try all aspects of the claims between Mobil and Rowan. Rowan submits that since the Court has ruled that the drilling contract is susceptible to differing interpretation, the interpretation of the drilling contract is an issue to be decided by the trier of fact. Rowan further submits that the interpretation of a contract is solely a matter of law only when the Court finds that the contract is unambiguous, and that since the Court has already found that the contract is ambiguous, the contract cannot be interpreted as a matter of law.

Proposed jury instructions, special jury interrogatories, trial memoranda and any special questions that the Court is asked to put to prospective jurors on voir dire shall be delivered to the Court and opposing counsel not later than April 19, 1996, unless specific leave to the contrary is granted by Court.

15. The issue of liability will not be tried separately from that of quantum.

16. All parties have agreed that they will not attempt to use or introduce any drilling contracts dated after August 3, 1990. All

parties have also agreed that subpoenas served prior to the last trial date need not be reissued.

17. It is estimated that the trial will last seven (7) days.

18. This pretrial order has been formulated after a conference at which counsel for the respective parties have appeared in person. Reasonable opportunity has been afforded counsel for corrections, or additions, prior to signing. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice.

19. The possibility of settlement of this case was considered

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Attorneys for Mobil Exploration &  
Producing U.S. Inc. and Mobil Oil  
Exploration & Producing Southeast Inc.,

Attorneys for Rowandrill, Inc. and  
Rowan Companies, Inc.

UNITED STATES DISTRICT JUDGE

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10	11 8 00-9 00 a m Pre-trial Conf  9 30 a m -4 30 p m Trials	12 8 00-9 00 a m Pre-trial Conf  9 30 a m -4 30 p m Trials	13 OPEN	14 OPEN	15 9 00 a m -Noon OPEN  2 00-4 30 p m Administrative/ Research	16
17	18  HOLIDAY	19 8 00-9 00 a m Pre-trial Conf  9 30 a m -4 30 p m Trials	20 8 00-9 00 a m Pre-trial Conf  9 30 a m -4 30 p m Trials	21 8 00-9 00 a m Pre-trial Conf  9 30 a m -4 30 p m Trials	22 9 00 a m -Noon Motions  2 00-4 30 p m Administrative/ Research	23
24	25 8 00-9 00 a m Pre-trial Conf  9 30 a m -4 30 p m Trials	26 8 00-9 00 a m Pre-trial Conf  9 30 a m -4 30 p m Trials	27 OPEN	28 OPEN	29 9 00 a m -Noon OPEN  2 00-4 30 p m Administrative/ Research	30
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**LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 970****Art 970 Motion for judgment on offer of judgment**

A At any time more than thirty days before the time specified for the trial of the matter, without any admission of liability, any party may serve upon an adverse party an offer of judgment for the purpose of settling all of the claims between them. The offer of judgment shall be in writing and state that it is made under this Article, specify the total amount of money of the settlement offer, and specify whether that amount is inclusive or exclusive of costs, interest, attorney fees, and any other amount which may be awarded pursuant to statute or rule. Unless accepted, an offer of judgment shall remain confidential between the offeror and offeree. If the adverse party, within ten days after service, serves written notice that the offer is accepted, either party may move for judgment on the offer. The court shall grant such judgment on the motion of either party.

B An offer of judgment not accepted shall be deemed withdrawn and evidence of an offer of judgment shall not be admissible except in a proceeding to determine costs pursuant to this Article.

C If the final judgment obtained by the plaintiff-offeree is at least twenty-five percent less than the amount of the offer of judgment made by the defendant-offeror or if the final judgment obtained against the defendant-offeree is at least twenty-five percent greater than the amount of the offer of judgment made by the plaintiff-offeror, the offeree must pay the offeror's costs, exclusive of attorney fees, incurred after the offer was made, as fixed by the court.

D The fact that an offer is made but not accepted does not preclude a subsequent offer or a counter offer. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the damages remains to be determined by future proceedings, either party may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than thirty days before the start of hearings to determine the amount or extent of damages.

E For purposes of comparing the amount of money offered in the offer of judgment to the final judgment obtained, which judgment shall take into account any additur or remittitur, the final judgment obtained shall not include any amounts attributable to costs, interest, or attorney fees, or to any other amount which may be awarded pursuant to statute or rule, unless such amount was expressly included in the offer.

F A judgment granted on a motion for judgment on an offer of judgment is a final judgment when signed by the judge, however, an appeal cannot be taken by a party who has consented to the judgment.

If costs are not agreed between the parties the general rule is that costs follow the event the losing party will be ordered to pay the winning party's costs (and obviously his own). Normally the parties will try to agree the amount of costs to be paid to the winning party on the basis of a bill of costs drawn up by the winning party's solicitor or by a costs draftsman instructed by him. If the parties fail to reach agreement they proceed to taxation of the bill of costs (see part III RSC Ord 62 rr 12-35). Taxation is done in the High Court by a special taxing master (part IV RSC Ord 62). There are two bases for taxation: the standard basis and the indemnity basis (RSC Ord 62 r 12) which relate to the question whether certain costs were reasonably incurred or whether the amount was reasonable. On the standard basis any doubt concerning the reasonableness is resolved in favour of the losing party (the winning party therefore obtains a lower amount of costs) and on the indemnity basis in favour of the winning party (who then receives more). Costs are usually taxed on the standard basis.

Since the winning party's solicitor will in general charge his own client costs on an indemnity basis and furthermore taxation will not allow all costs this means that the winning party will not be able to recover all his costs from the losing party and will therefore have to bear part of his costs himself. The judge may also order solicitors and barristers personally to pay costs by making a wasted costs order. In *Ridchalghe v Horsefield* [1994] 3 All E R 848 the Court of Appeal discussed this wasted costs order in detail. Wasted costs orders may be given where the legal representative acted improperly, unreasonably or negligently. Wasted costs orders may also be given against lawyers of legally aided persons.

The master or judge in the pre-trial stage will give orders for costs in respect of interlocutory application and may determine that costs will be borne by a certain party regardless of the outcome of the main proceedings.

Normally the following costs may be charged:

- 1 solicitor's fees and expenses: these are disbursements (costs incurred by the solicitor e.g. costs of photocopying, travel expenses) and profit costs (based on the hours spent on the case); the total amount is subject to VAT,
- 2 barrister's fees: these are agreed beforehand between the solicitor and the barrister's clerk,
- 3 court fees: as set out in the Supreme Court Fees Order 1980 and other orders
- 4 experts' fees and expenses: these differ from case to case
- 5 witness expenses: these also differ from case to case and
- 6 interest of 15 per cent *per annum* on the total amount of costs from the date of the judgment until payment.

There are no lists with fixed amounts for the fees of barristers and solicitors. Since 1988 the government has increasingly referred to the drawing up and publication of such lists: thus Recommendation 57 of the Review Body on Civil Justice (a committee of recommendation set up by the Lord Chancellor in 1985) reads: 'Solicitors and barristers should be encouraged and expected to provide information to the public by way of stated rates per case or per hour and should be entitled to free publicity about those rates in lawyers' referral lists. It is expected that this recommendation will come into effect within five to ten years. A first directive concerning the amount of these costs was included in the Legal Advice and Assistance (Amendment) Regulations 1992 Schedule 6.

For the time being the amount is determined on the basis of the number of hours spent on the case and its difficulty and substance. The fees of barristers and solicitors are high compared to the fees of lawyers in other countries (*The Law Society's Gazette* 7 October 1992 p. 4).

Appeal from a decision by a taxing master lies to a Judge in Chambers assisted by assessors including another Taxing Master and an experienced legal practitioner.

As stated before there is no mandatory representation *ad litem* in England. When a party proceeds without a solicitor he may charge the opposing party for the costs which would otherwise have been incurred for and by a solicitor (Litigants in Person (Costs and Expenses) Act and RSC Ord. 62, r. 18).

Before a writ can be issued a writ fee of (currently) £100 is payable. This is a fixed amount which is not related to the amount claimed. If further summons are issued in the course of the proceedings (e.g. to call witnesses or experts), an amount of £20 is payable for each summons.

At the county court the court fees do depend on the amount of the claim, fees vary from £7 to £43. The County Court Fees Order and the Supreme Court Fees Order provide more details on fees.

Finally RSC Ord. 23 provides for security for costs. If the plaintiff is a foreigner litigating in England, the defendant can at any time in the proceedings after he has appeared request the court to order the plaintiff to give security for the costs of the action. In assessing the request the court considers the actual circumstances of the case. If the plaintiff is domiciled in one of the EC member states, he may not be required to give security for costs because this may conflict with arts. 59 and 60 of the Treaty. *Hubbard v Hamburger* (LCJ 1 July 1993). The plaintiff of an EC member state is covered by the CJJA 1982 on the basis of which the defendant's position is already more secure in respect of the enforcement of the judgment (see RSC Ord. 3 r. 1(1)(a)).

Call of the Docket NoticeUNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANASECTION LCALL DOCKET

You are hereby notified that the following cases in which issue is not joined, or in which there has been no action within the past 60 days will be called on WEDNESDAY, SEPTEMBER 30, 1998, at 9:00 am by JUDGE ELDON E. FALLON, and if no good cause be shown for such inaction, they will be dismissed:

97-1058 SOUTHERN TOWING COMPANY V FONTENOT MARINE TOWING, INC.  
ORDERED:

97-1234 EVENT ENTERTAINMENT V. THE BEEF ROOM, INC., ET AL  
ORDERED:

97-1870 LENDAR DENT III, ET AL V. JIVE RECOR, INC., ET AL  
ORDERED:

98-212 OLSHER METALS CORPORATION, ET AL V. MV FRANKA, ET AL  
ORDERED:

98-410 AMENTA FORD, ET AL V. HARRY LEE, ET AL  
ORDERED:

98-411 FRANK W. WINNE & SONS, INC, ET AL V. MV ALMIRANTE LUIS  
ORDERED:

98-820 HOCKERSON HALBERSTADT, INC. V ASICS TIGER CORPORATION  
ORDERED:

98-822 ADAM AUTIN III, ET AL V. COMMERCIAL RECOVERY SYSTEMS  
ORDERED:

98-1008 DUC V VO V. LU THI CAO, ET AL  
ORDERED.

98-1113 RENELL COMPEAUX V. JAMES GILLESPIE, ET AL  
ORDERED:

98-1341 K S MEDNOR V. PENTAL INSURANCE CO., LTD.  
ORDERED:

98-1516 USA V. CHARLES HENRY III  
ORDERED:

98-1647 MARATHON-ASHLAND PETROLEUM, LLC V. MV ALKAIOS  
ORDERED.

98-1650 WESTLEY WEST, ET AL V. NICK A. CONGEMI, ET AL  
ORDERED:

CALL DOCKET set WEDNESDAY, SEPTEMBER 30, 1998, 9 00 AM, SECTION L  
Page 2

98-1753 JOSEPH JONES, SR. V. NEW ORLEANS PADDLEWHEELS, INC.  
ORDERED:

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98-1846 PRISCILLA FOSTER V. SOCIAL SECURITY ADMINISTRATION  
ORDERED:

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98-1862 CLAUDETTE MATTHEWS, ET AL V DIXIE WAREHOUSE & CARTAGE  
ORDERED:

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98-1983 SHANE LAIRD V. LOUIS TALLO, ET AL  
ORDERED:

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98-2052 U. S. RENTALS OF CA., INC. V. THADDEUS M. BIAGAS, ET AL  
ORDERED:

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98-2122 MITSUI & CO (USA), INC. V. MV EBER, ET AL  
ORDERED.

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September 15, 1998

  
Gaylyn M. Lambert  
Courtroom Deputy  
Section L  
504-589-7686

Call of the Docket ORDERU S DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANAFILED 7-20-98  
LORETTA G. WHYTE  
CLERKMINUTE ENTRY  
FALLON, J.  
JULY 8, 1998UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANASECTION LCALL DOCKET

The following cases were called this date to show cause why they should not be dismissed. After hearing, IT IS ORDERED that said cases be disposed of as follows:

95-3972 KEVIN PAUL PELLEGRIN V. SCI-TECH INSTRUMENTS, ET AL  
ORDERED: PASSED 30 DAYS FOR POLARIS TO ANSWER.

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96-3898 OBO TRANSPORT SERVICES, INC. V HIRED TRUCKS, INC.  
ORDERED: Issue Joined

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97-1058 SOUTHERN TOWING COMPANY V. FONTENOT MARINE TOWING, INC.  
ORDERED: PASSED 30 DAYS.

---

97-1358 DANIEL LEE V. CANAL BARGE COMPANY, INC., ET AL  
ORDERED: Passed 100 days from 6-26-98.

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97-2067 KENNETH J. DUCOTE V MORRIS HOLMES, ET AL  
ORDERED: PASSED 30 DAYS

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97-1870 LENDAR DENT III, ET AL V. JIVE RECORDS, INC., ET AL  
ORDERED: Defendant, Michael Tyler, is dismissed w/o prejudice.

---

97-3630 JOSEPH CLAY, JR., ET AL V. MV ATLANTIC BULKER, ET AL  
ORDERED: Defts, Japan Cargo Tally Corporation, Masumoto Kaun Sangyo KK and Mitsui OSK Lines Ltd, are dismissed w/o prejudice.

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97-3878 CRESCENT TOW. & SALVAGE CO., INC. V. MV FAREAST VICTORY  
ORDERED: Issue Joined.

---

97-3892 FERROSTAAL INC V. MV IKAN TAMBAN, ET AL  
ORDERED. 60 day dismissal.

---

97-3949 AYSHONE HARRIS, ET AL V. NORMA LADNER, ET AL  
ORDERED. Stipulation of dismissal with prejudice.

---

98-212 OLSHER METALS CORP.. ET AL V. MV FRANKA ET AL  
ORDERED: PASSED 30 DAYS.

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98-410 AMENTA FORD, ET AL V HARRY LEE, ET AL  
ORDERED. Extension of time until 7-15-98 to plead.

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98-411 F. WINNE & SONS, INC., ET AL V. MV ALMIRANTE LUIS BRION  
ORDERED. PASSED 30 DAYS

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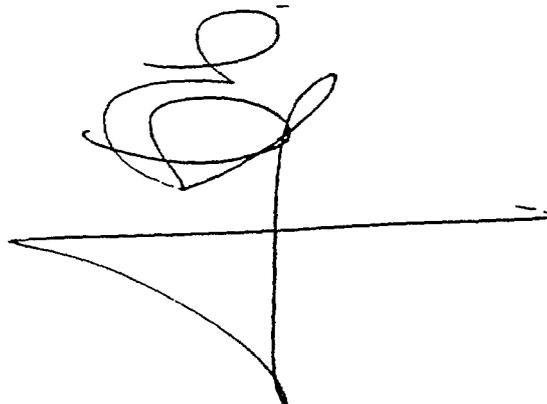
98-479 EDMORE GREEN, III V JACK STRAIN, ET AL  
ORDERED. Passed 30 days from 6-30-98

Fee \_\_\_\_\_  
Process \_\_\_\_\_  
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CALL DOCKET held JULY 8, 1999, SECTION L

Page 2

98-562 ORDERED	KATHERINE E REED V CHENAULT CREEK APARTMENTS Extension of time 20 days from 7-8-98.
98-567 ORDERED	KIRK P. REULET, ET AL V ROBERT MCCULLOUGH, ET AL Issue Joined.
98-684 ORDERED	FREDERICK D DEES, JR. V MOBIL OIL CORP., ET AL 60 day dismissal.
98-768 ORDERED.	JOYCE WATSON, ET AL V. HOFFMAN-LAROCHE, INC., ET AL Mtn and Order to Dismiss
98-822 ORDERED	ADAM AUTIN III, ET AL V. COMMERCIAL RECOVERY SYSTEMS PASSED 60 DAYS
98-909 ORDERED	RONALD R. HELBACH V. N.O. FIREMEN'S FEDERAL CREDIT UNION 60 day dismissal.
98-917 ORDERED.	JOE HAND PROMOTIONS, INC. V. ROOTBEERS SPORTS TAVERN 60 day dismissal.
98-1008 ORDERED	DUC V VO V. LU THI CAO, ET AL PASSED 60 DAYS.
98-1023 ORDERED	JANUARIUS BELLMAN, ET AL V. NORCEN EXPLORER, INC., ET AL DEFENDANT, PHILLIPS SERVICES/LA, IS DISMISSED WITHOUT PREJUDICE. PASSED 15 DAYS FOR DEFENDANT, NORCEN EXPLORER, TO ANSWER. (Pete Lewis, Esq )



**RULE 20 - ABANDONMENT OF CIVIL APPEAL**

**A** Except as provided hereafter when no activity occurs in an appeal for three years, the appeal shall be dismissed as abandoned, and notice thereof shall be sent to the appellant or the appellant's attorney at the last address shown on the court's records

**B** If a stay order or notice thereof resulting from a bankruptcy, receivership, liquidation, or like proceeding is filed the Clerk of Court shall send a notice to the appellant that one year thereafter the appeal shall be dismissed as abandoned unless the appellant in the meantime files a motion showing why the appeal should not be dismissed

**C** If the court is notified that a case has been settled or that the progress of a case should be suspended for any reason the Clerk of Court shall send a notice to the appellant that ninety days thereafter the appeal shall be dismissed as abandoned unless the appellant in the meantime files a motion showing why the appeal should not be dismissed

**D** In the event that an appellant files a written motion pursuant to Section (B) or (C) the court may order that the appeal be dismissed as scheduled, that the time of the dismissal be extended, or that any other appropriate action be taken

**ADOPTED ON FEBRUARY 12, 1998  
EFFECTIVE DATE JULY 1, 1998**



V ROBERT PAYANT *President*  
KENNETH A ROHRS *Dean*

AFFILIATED WITH  
AMERICAN BAR ASSOCIATION

# THE NATIONAL JUDICIAL COLLEGE

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JUSTICE TOM C. CLARK 1899 1977

*Chair of the Founders*

JUSTICE FLORENCE K. MURRAY

*Chair Emerita*

WALTER H. BECKHAM, JR. ESQ

*Chair Emeritus*

## ADDITIONAL MATERIALS

## PRETRIAL PROCEDURES

### Contents

#### FEDERAL RULES OF CIVIL PROCEDURE FOR US DISTRICT COURTS

##### RULE 16 PRETRIAL CONFERENCES PRETRIAL PREPARATION, ADMINISTRATIVE ISSUES

- (A) Pretrial Conferences Objectives
- (B) Timing and Planning
- (C) Issues to Be Considered at Pretrial Conferences
- (D) Final Pretrial Conference
- (E) Pretrial Orders
- (F) Sanctions

##### ADVISORY COMMITTEE NOTES REGARDING 1937 ADOPTION

##### 1983 AMENDMENTS

Introduction

Discussion

##### 1987 AMENDMENTS

##### 1993 AMENDMENTS

##### RULE 26 GENERAL PROVISIONS GOVERNING DISCOVERY DUTY OF DISCLOSURE

- (a) Required Disclosures Methods to Discover Additional Matter
- (b) Discovery Scope and Limits
- (c) Protective Orders
- (d) Timing and Sequence of Discovery
- (e) Supplementation of Disclosures and Responses
- (f) Meeting of Parties Planning for Discovery
- (g) Signing of Disclosures Discovery Requests, Responses and Objections

##### COMMENTS

*Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L REV 720 (1988), *Brussack Outrageous Fortune The Case for Amending Rule 15(c) Again*, 61 SCAL L REV 671 (1988), *Lewis The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 86 MICH L REV 1507 (1987)

In allowing a name-correcting amendment within the time allowed by Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court], this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted for example, if the defendant is a fugitive from service of the summons

This revision, together with the revision of Rule 4(i) [revision to subdivision (i) in Rule 4 was a proposed revision which was withdrawn by the Supreme Court] with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials, is intended to produce results contrary to those reached in *Gardner v Gartman*, 880 F.2d 797 (4th cir 1989), *Rys v US Postal Service*, 886 F.2d 443 (1st cir 1989), *Martin's Food & Liquor Inc. v US Dept. of Agriculture*, 14 F.R.S.3d 86 (N.D. Ill 1988) *But of Montgomery v United States Postal Service*, 867 F.2d 900 (5th cir 1989), *Warren v Department of the Army* 867 F.2d 1156 (8th cir 1989), *Miles v Department of the Army* 881 F.2d 777 (9th cir 1989), *Barsten v Department of the Interior* 896 F.2d 422 (9th cir 1990) *Brown v Georgia Dept. of Revenue* 881 F.2d 1018 (11th cir 1989)

#### 1993 AMENDMENT

The amendment conforms the cross reference to Rule 4 to the revision of that rule

### Rule 16 Pretrial Conferences, Scheduling, Management

(a) **Pretrial Conferences, Objectives** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

- (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

(b) **Scheduling and Planning** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail or other suit-

able means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings,
- (2) to file motions, and
- (3) to complete discovery

The scheduling order may also include

- (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted,
- (5) the date or dates for conferences before trial, a final pretrial conference, and trial, and
- (6) any other matters appropriate in the circumstances of the case

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge

(c) **Subjects for Consideration at Pretrial Conferences** At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

- (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses,
- (2) the necessity or desirability of amendments to the pleadings,
- (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence,
- (4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence,
- (5) the appropriateness and timing of summary adjudication under Rule 56,
- (6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37,
- (7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial,
- (8) the advisability of referring matters to a magistrate judge or master

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule,

(10) the form and substance of the pretrial order,

(11) the disposition of pending motions,

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems,

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case,

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c),

(15) an order establishing a reasonable limit on the time allowed for presenting evidence, and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

**(d) Final Pretrial Conference** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

**(e) Pretrial Orders** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

**(f) Sanctions** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails

to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

(As amended Apr 28, 1983, eff Aug 1, 1983, Mar 2, 1987, eff Aug 1, 1987, Apr 22, 1993, eff Dec 1, 1993)

#### NOTES OF ADVISORY COMMITTEE ON RULES 1937 ADOPTION

1 Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see A Proposal for Minimizing Calendar Delay in Jury Cases (Dec 1936—published by the New York Law Society), Pre Trial Procedure and Administration, Third Annual Report of the Judicial Council of the State of New York (1937), pages 207-243, Report of the Commission on the Administration of Justice in New York State (1934), pp (288)-(290). See also Pre-trial Procedure in the Wayne Circuit Court, Detroit, Michigan (1936), pp 63-75 and Sunderland, The Theory and Practice of Pre-trial Procedure (Dec 1937) 36 Mich L Rev 215-226, 21 J.Am.Jud.Soc. 125. Compare the English procedure known as the 'summons for directions,' English Rules Under the Judicature Act (The Annual Practice, 1937) O 38a, and a similar procedure in New Jersey, N.J.S.A. 2:27-135, 2:27-136, 2:27-160, N.J. Supreme Court Rules, 2 N.J. Misc. Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N.J. Misc. Rep. (1933) 955, N.J.S.A. Tit. 2).

2 Compare the similar procedure under Rule 56(d) (Summary Judgment—Case Not Fully Adjudicated on Motion), Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule see Rules 53(b) (Masters, Reference) and 53(e)(3) (Master's Report In Jury Actions).

#### 1983 AMENDMENT

##### Introduction

Rule 16 has not been amended since the Federal Rules were promulgated in 1938. In many respects, the rule has been a success. For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process. See 6 Wright & Miller, *Federal Practice and Procedure*

*Civil* § 1522 (1971) However, in other respects particularly with regard to case management the rule has not always been as helpful as it might have been. Thus there has been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation. See *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

Major criticism of Rule 16 has centered on the fact that its application can result in over-regulation of some cases and under-regulation of others. In simple run-of-the-mill cases, attorneys have found pretrial requirements burdensome. It is claimed that over-administration leads to a series of mini-trials that result in a waste of an attorney's time and needless expense to a client. Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974). This is especially likely to be true when pretrial proceedings occur long before trial. At the other end of the spectrum the discretionary character of Rule 16 and its orientation toward a single conference late in the pretrial process has led to under administration of complex or protracted cases. Without judicial guidance beginning shortly after institution, these cases often become mired in discovery.

Four sources of criticism of pretrial have been identified. First, conferences often are seen as a mere exchange of legalistic contentions without any real analysis of the particular case. Second, the result frequently is nothing but a formal agreement on minutiae. Third, the conferences are seen as unnecessary and time-consuming in cases that will be settled before trial. Fourth the meetings can be ceremonial and ritualistic, having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter into binding stipulations. See generally *McCargo v Hedrick*, 545 F.2d 393 (4th Cir. 1976). Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974). Rosenberg, *The Pretrial Conference and Effective Justice* 45 (1964).

There also have been difficulties with the pretrial orders that issue following Rule 16 conferences. When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. If the judge who tries the case did not conduct the conference he could find it difficult to determine exactly what was agreed to at the conference. But any insistence on a detailed order may be too burdensome depending on the nature or posture of the case.

Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. Flanders, *Case Management and Court Management in United States District Courts* 17 Federal Judicial Center (1977). Thus the rule mandates a pretrial scheduling order. However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated.

#### Discussion

**Subdivision (a), Pretrial Conferences, Objectives** The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase especially motions and discovery. In addition the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed. Rule 16 thus will be a more accurate reflection of actual practice.

**Subdivision (b), Scheduling and Planning** The most significant change in Rule 16 is the mandatory scheduling order described in Rule 16(b), which is based in part on Wisconsin Civil Procedure Rule 802.10. The idea of scheduling orders is not new. It has been used by many federal courts. See *e.g.* Southern District of Indiana, Local Rule 19.

Although a mandatory scheduling order encourages the court to become involved in case management early in the litigation it represents a degree of judicial involvement that is not warranted in many cases. Thus, subdivision (b) permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained. See Eastern District of Virginia Local Rule 12(1). Logical candidates for this treatment include social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions.

A scheduling conference may be requested either by the judge or a magistrate when authorized by district court rule, or a party within 120 days after the summons and complaint are filed. If a scheduling conference is not arranged within that time and the case is not exempted by local rule, a scheduling order must be issued under Rule 16(b), after some communication with the parties, which may be by telephone or mail rather than in person. The use of the term judge in subdivision (b) reflects the Advisory Committee's judgment that it is preferable that this task should be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. § 636(c). While personal supervision by the trial judge is preferred the rule in recognition of the impracticality or difficulty of complying with such a requirement in some districts, authorizes a district by local rule to delegate the duties to a magistrate. In order to formulate a practicable scheduling order the judge, or a magistrate when authorized by district court rule, and attorneys are required to develop a timetable for the matters listed in Rule 16(b)(1)-(3). As indicated in Rule 16(b)(4)-(5), the order may also deal with a wide range of other matters. The rule is phrased permissively as to clauses (4) and (5), however, because scheduling these items at an early point may not be feasible or appropriate. Even though subdivision (b) relates only to scheduling, there is no reason why some of the procedural matters listed in Rule 16(c) cannot be addressed at the same time, at least when a scheduling conference is held.

Item (1) assures that at some point both the parties and the pleadings will be fixed by setting a time within which joinder of parties shall be completed and the pleadings amended.

Item (2) requires setting time limits for interposing various motions that otherwise might be used as stalling techniques.

Item (3) deals with the problem of procrastination and delay by attorneys in a context in which scheduling is especially important—discovery. Scheduling the completion of discovery can serve some of the same functions as the conference described in Rule 26(f).

Item (4) refers to setting dates for conferences and for trial. Scheduling multiple pretrial conferences may well be desirable if the case is complex and the court believes that a more elaborate pretrial structure such as that described in the *Manual for Complex Litigation*, should be employed. On the other hand only one pretrial conference may be necessary in an uncomplicated case.

As long as the case is not exempted by local rule, the court must issue a written scheduling order even if no scheduling conference is called. The order, like pretrial orders under the former rule and those under new Rule 16(c), normally will "control the subsequent course of the action." See Rule 16(e). After consultation with the attorneys for the parties and any unrepresented parties—a formal motion is not necessary—the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. Since the scheduling order is entered early in the litigation, this standard seems more appropriate than a "manifest injustice" or "substantial hardship" test. Otherwise, a fear that extensions will not be granted may encourage counsel to request the longest possible periods for completing pleading, joinder, and discovery. Moreover changes in the court's calendar sometimes will oblige the judge or magistrate when authorized by district court rule to modify the scheduling order.

The district courts undoubtedly will develop several prototype scheduling orders for different types of cases. In addition, when no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise. In many instances this will result in a scheduling order better suited to the individual case than a standard order, without taking the time that would be required by a formal conference.

Rule 16(b) assures that the judge will take some early control over the litigation, even when its character does not warrant holding a scheduling conference. Despite the fact that the process of preparing a scheduling order does not always bring the attorneys and judge together, the fixing of time limits serves

to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.

Report of the National Commission for the Review of Antitrust Laws and Procedures 28 (1979)

Thus, except in exempted cases, the judge or a magistrate when authorized by district court rule will have taken some action in every case within 120 days after the complaint is filed that notifies the attorneys that the case will be moving toward trial. Subdivision (b) is reinforced by subdivision (f), which makes it clear that the sanctions for violating a

scheduling order are the same as those for violating a pretrial order.

**Subdivision (c) Subjects to be Discussed at Pretrial Conferences** This subdivision expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases. *Flanders Case Management and Court Management in United States District Courts* Federal Judicial Center (1977). See also *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial thereby saving time and expense for everyone. See generally *Meadow Gold Prods Co v Wright*, 278 F.2d 867 (D.C. Cir. 1960). The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).

The timing of any attempt at issue formulation is a matter of judicial discretion. In relatively simple cases it may not be necessary or may take the form of a stipulation between counsel or a request by the court that counsel work together to draft a proposed order.

Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). However, the rule's effectiveness depends on the court employing its discretion sparingly.

Clause (6) acknowledges the widespread availability and use of magistrates. The corresponding provision in the original rule referred only to masters and limited the function of the reference to the making of findings to be used as evidence in a case to be tried to a jury. The new text is not limited and broadens the potential use of a magistrate to that permitted by the Magistrate's Act.

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See *Moore's Federal Practice* ¶1617, 6 *Wright & Miller Federal Practice and Procedure Civil* § 1522 (1971). For instance, a judge to whom a case has been assigned may arrange on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate. The rule does not make settlement conferences mandatory because they would be a waste of time in many cases. See *Flanders Case Management and Court Management in the*

*United States District Courts* 39 Federal Judicial Center (1977) Requests for a conference from a party indicating a willingness to talk settlement normally should be honored unless thought to be frivolous or dilatory

A settlement conference is appropriate at any time. It may be held in conjunction with a pretrial or discovery conference although various objectives of pretrial management, such as moving the case toward trial may not always be compatible with settlement negotiations and thus a separate settlement conference may be desirable. See 6 Wright & Miller, *Federal Practice and Procedure Civil* § 1522, at p 571 (1971)

In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse. See, for example, the experiment described in Green Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loyola of L.A. L Rev 493 (1978)

Rule 16(c)(10) authorizes the use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. Some district courts obviously have done so for many years. See Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just Sys J 135 (1976). Clause 10 provides an explicit authorization for such procedures and encourages their use. No particular techniques have been described. The Committee felt that flexibility and experience are the keys to efficient management of complex cases. Extensive guidance is offered in such documents as the *Manual for Complex Litigation*.

The rule simply identifies characteristics that make a case a strong candidate for special treatment. The four mentioned are illustrative, not exhaustive and overlap to some degree. But experience has shown that one or more of them will be present in every protracted or difficult case and it seems desirable to set them out. See Kendig, *Procedures for Management of Non Routine Cases* 3 Hofstra L Rev 701 (1975)

The last sentence of subdivision (c) is new. See Wisconsin Civil Procedure Rule 802.11(2). It has been added to meet one of the criticisms of the present practice described earlier and insure proper preconference preparation so that the meeting is more than a ceremonial or ritualistic event. The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference or on subjects of a dimension that normally require prior consultation with and approval from the client.

**Subdivision (d), Final Pretrial Conference** This provision has been added to make it clear that the time between any final pretrial conference (which in a simple case may be the only pretrial conference) and trial should be as short as possible to be certain that the litigants make substantial progress with the case and avoid the inefficiency of having that preparation repeated when there is a delay between the last pretrial conference and trial. An optimum time of 10 days to two weeks has been suggested by one

federal judge Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just Sys J 135, 141 (1976). The Committee, however, concluded that it would be inappropriate to fix a precise time in the rule, given the numerous variables that could bear on the matter. Thus the timing has been left to the court's discretion.

At least one of the attorneys who will conduct the trial for each party must be present at the final pretrial conference. At this late date there should be no doubt as to which attorney or attorneys this will be. Since the agreements and stipulations made at this final conference will control the trial, the presence of lawyers who will be involved in it is especially useful to assist the judge in structuring the case, and to lead to a more effective trial.

**Subdivision (e), Pretrial Orders** Rule 16(e) does not substantially change the portion of the original rule dealing with pretrial orders. The purpose of an order is to guide the course of the litigation and the language of the original rule making that clear has been retained. No compelling reason has been found for major revision, especially since this portion of the rule has been interpreted and clarified by over forty years of judicial decisions with comparatively little difficulty. See 6 Wright & Miller, *Federal Practice and Procedure Civil* §§ 1521-30 (1971). Changes in language therefore have been kept to a minimum to avoid confusion.

Since the amended rule encourages more extensive pretrial management than did the original two or more conferences may be held in many cases. The language of Rule 16(e) recognizes this possibility and the corresponding need to issue more than one pretrial order in a single case.

Once formulated, pretrial orders should not be changed lightly, but total inflexibility is undesirable. See, e.g. *Clark v Pennsylvania R R Co*, 328 F 2d 591 (2d Cir 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next. In the case of the final pretrial order, however, a more stringent standard is called for and the words "to prevent manifest injustice," which appeared in the original rule, have been retained. They have the virtue of familiarity and adequately describe the restraint the trial judge should exercise.

Many local rules make the plaintiff's attorney responsible for drafting a proposed pretrial order, either before or after the conference. Others allow the court to appoint any of the attorneys to perform the task, and others leave it to the court. See Note, *Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts*, 64 Va L Rev 467 (1978). Rule 16 has never addressed this matter. Since there is no consensus about which method of drafting the order works best and there is no reason to believe that nationwide uniformity is needed, the rule has been left silent on the point. See *Handbook for Effective Pretrial Procedure*, 37 F R D 225 (1964).

**Subdivision (f), Sanctions** Original Rule 16 did not mention the sanctions that might be imposed for failing to comply with the rule. However courts have not hesitated

to enforce it by appropriate measures. See *e.g. Link v Wabash R. Co*, 370 U.S. 628 (1962) (district court's dismissal under Rule 41(b) after plaintiff's attorney failed to appear at a pretrial conference upheld), *Admiral Theatre Corp v Douglas Theatre*, 585 F.2d 877 (8th Cir 1978) (district court has discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of its pretrial order).

To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation, *cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v Rogers*, 357 U.S. 197 (1958), Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 65-67, 80-84, Federal Judicial Center (1981). Furthermore, explicit reference to sanctions reinforces the rule's intention to encourage forceful judicial management.

Rule 16(f) incorporates portions of Rule 37(b)(2), which prescribes sanctions for failing to make discovery. This should facilitate application of Rule 16(f), since courts and lawyers already are familiar with the Rule 37 standards. Among the sanctions authorized by the new subdivision are preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees caused by noncompliance. The contempt sanction however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.

As is true under Rule 37(b)(2), the imposition of sanctions may be sought by either the court or a party. In addition, the court has discretion to impose whichever sanction it feels is appropriate under the circumstances. Its action is reviewable under the abuse-of-discretion standard. See *National Hockey League v Metropolitan Hockey Club Inc.*, 427 U.S. 639 (1976).

#### 1987 AMENDMENT

The amendments are technical. No substantive change is intended.

#### 1993 AMENDMENT

**Subdivision (b)** One purpose of this amendment is to provide a more appropriate deadline for the initial scheduling order required by the rule. The former rule directed that the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a motion under Rule 12) or, if earlier (as may occur in some actions against the United States or if service is waived under Rule 4), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate

to enable participation by all defendants initially named in the action.

In many cases the scheduling order can and should be entered before this deadline. However, when setting a scheduling conference, the court should take into account the effect this setting will have in establishing deadlines for the parties to meet under revised Rule 26(f) and to exchange information under revised Rule 26(a)(1). While the parties are expected to stipulate to additional time for making their disclosures when warranted by the circumstances, a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself.

New paragraph (4) has been added to highlight that it will frequently be desirable for the scheduling order to include provisions relating to the timing of disclosures under Rule 26(a). While the initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference. Similarly, the scheduling order might contain provisions modifying the extent of discovery (*e.g.* number and length of depositions) otherwise permitted under these rules or by a local rule.

The report from the attorneys concerning their meeting and proposed discovery plan, as required by revised Rule 26(f), should be submitted to the court before the scheduling order is entered. Their proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the time of the court needed to conduct a meaningful conference under Rule 16(b). As under the prior rule, while a scheduling order is mandated, a scheduling conference is not. However, in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery.

This subdivision, as well as subdivision (c)(8), also is revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

**Subdivision (c)** The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course, settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules

403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants—which may include the cost to adversaries of securing testimony on the same subjects by other experts—would be unduly expensive given the needs of the case and the other evidence available at trial.

Paragraph (5) is added (and the remaining paragraphs renumbered) in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference. Renumbered paragraph (11) enables the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference. Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed.

Paragraph (6) is added to emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery. In many cases the court should also specify the times and sequence for disclosure of written reports from experts under revised Rule 26(a)(2)(B) and perhaps direct changes in the types of experts from whom written reports are required. Consideration should also be given to possible changes in the timing or form of the disclosure of trial witnesses and documents under Rule 26(a)(3).

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651–58, Section 104(b)(2), Pub. L. 101–650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that in appropriate cases a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate

party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

The explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers, e.g., *G Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989), or its power to require party participation under the Civil Justice Reform Act of 1990. See 28 U.S.C. § 473(b)(5) (civil justice expense and delay reduction plans adopted by district courts may include requirement that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences).

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

#### EDITORIAL NOTES

**Change of Name.** Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101–650, set out as a note under section 631 of this title.

## IV PARTIES

### Rule 17 Parties Plaintiff and Defendant, Capacity

(a) **Real Party In Interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of

another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought, and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the

## RULES OF CIVIL PROCEDURE

### Rearrangement of the Discovery Rules

The present discovery rules are structured entirely in terms of individual discovery devices except for Rule 27 which deals with perpetuation of testimony and Rule 37 which provides sanctions to enforce discovery. Thus Rules 26 and 28 to 32 are in terms addressed only to the taking of a deposition of a party or third person. Rules 33 to 36 then deal in succession with four additional discovery devices: Written interrogatories to parties; production for inspection of documents and things; physical or mental examination and requests for admission.

Under the rules as promulgated in 1938 therefore each of the discovery devices was separate and self-contained. A defect of this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery or to several discovery devices. From 1938 until the present a few amendments have applied a discovery provision to several rules. For example in 1948 the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34. The arrangement was adequate so long as there were few provisions governing discovery generally and these provisions were relatively simple.

As will be seen however a series of amendments are now proposed which govern most or all of the discovery devices. Proposals of a similar nature will probably be made in the future. Under these circumstances it is very desirable even necessary that the discovery rules contain one rule addressing itself to discovery generally.

Rule 26 is obviously the most appropriate rule for this purpose. One of its subdivisions Rule 26(b) in terms governs only scope of deposition discovery but it has been expressly incorporated by reference in Rules 33 and 34 and is treated by courts as setting a general standard. By means of a transfer to Rule 26 of the provisions for protective orders now contained in Rule 30(b) and a transfer from Rule 26 of provisions addressed exclusively to depositions, Rule 26 is converted into a rule concerned with discovery generally. It becomes a convenient vehicle for the inclusion of new provisions dealing with the scope, timing and regulation of discovery. Few additional transfers are needed. See table showing rearrangement of rules set out following this statement.

There are to be sure disadvantages in transferring any provision from one rule to another. Familiarity with the present pattern reinforced by the references made by prior court decisions and the various secondary writings about the rules is not lightly to be sacrificed. Revision of treatises and other reference works is burdensome and costly. Moreover, many States have adopted the existing pattern as a model for their rules.

On the other hand, the amendments now proposed will in any event require revision of texts and reference works as well as reconsideration by States following the Federal model. If these amendments are to be incorporated in an understandable way, a rule with general discovery provisions is needed. As will be seen the proposed rearrangement produces a more coherent and intelligible pattern for the discovery rules taken as a whole. The difficulties described are those encountered whenever statutes are reexamined and revised. Failure to rearrange the discovery rules now would

freeze the present scheme making future change even more difficult.

Table Showing Rearrangement of Rules

Existing Rule No	New Rule No
26(a)	30(a) 31
26(c)	30
26(d)	32
26(e)	32(f)
26(f)	32(g)
30(a)	30(f)
30(b)	26(c)
32	32(g)

### Rule 26 General Provisions Governing Discovery, Duty of Disclosure

#### (a) Required Disclosures, Methods to Discover Additional Matter

(1) **Initial Disclosures** Except to the extent otherwise stipulated or directed by order or local rule a party shall, without awaiting a discovery request provide to other parties

(A) the name and if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings—identifying the subjects of the information

(B) a copy of or a description by category and location of all documents, data compilations and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings—

(C) a computation of any category of damage claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material not privileged or protected from disclosure, on which such computation is based including materials bearing on the nature and extent of injuries suffered, and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

#### (2) Disclosure of Expert Testimony

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness including a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B) within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) **Pretrial Disclosures** In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and if not previously provided, the address and telephone number of each witness separately identifying those whom the party expects to present and those whom the party may call if the need arises,

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony, and

(C) an appropriate identification of each document or other exhibit including summaries of other evidence separately identifying those which

the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) **Form of Disclosures, Filing** Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) **Methods to Discover Additional Matter** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions, written interrogatories, production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes, physical and mental examinations, and requests for admission.

(b) **Discovery Scope and Limits** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General** Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) **Limitations** By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from

some other source that is more convenient less burdensome or less expensive (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or (iii) the burden or expense of the proposed discovery outweighs its likely benefit taking into account the needs of the case, the amount in controversy the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

**(3) Trial Preparation Materials** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney consultant, surety, indemnitor insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

**(4) Trial Preparation Experts**

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may through interrogatories or by deposition discover facts known or opinion held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

**(5) Claims of Privilege or Protection of Trial Preparation Materials** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that without revealing information itself privileged or protected will enable other parties to assess the applicability of the privilege or protection.

(c) **Protective Orders** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action and for good cause shown, the court in which the action is pending or alternatively on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance embarrassment oppression or undue burden or expense including one or more of the following:

- (1) that the disclosure or discovery not be had
- (2) that the disclosure or discovery may be had only on specified terms and conditions including a designation of the time or place
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery,
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters,

(5) that discovery be conducted with no one present except persons designated by the court

(6) that a deposition after being sealed be opened only by order of the court,

(7) that a trade secret or other confidential research development or commercial information not be revealed or be revealed only in a designated way, and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court

If the motion for a protective order is denied in whole or in part the court may on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 17(a)(4) apply to the award of expenses incurred in relation to the motion.

**(d) Timing and Sequence of Discovery.** Except when authorized under these rules or by local rule or by agreement of the parties a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f) unless the court upon motion for the convenience of parties and witnesses and in the interests of justice, orders otherwise. Methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise shall not operate to delay any other party's discovery.

**(e) Supplementation of Disclosures and Responses.** A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory request for production or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or

corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

**(f) Meeting of Parties, Planning for Discovery.** Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule including a statement as to when disclosures under subdivision (a)(1) were made or will be made,

(2) the subjects on which discovery may be needed when discovery should be completed and whether discovery should be conducted in phases or be limited to or focused upon particular issues

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c)

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

**(g) Signing of Disclosures, Discovery Requests, Responses, and Objections**

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name whose address shall

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be stated An unrepresented party shall sign the request response or objection and state the party's address The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension modification or reversal of existing law,

(B) not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case the discovery already had in the case the amount in controversy and the importance of the issues at stake in the litigation

If a request response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed

(3) If without substantial justification a certification is made in violation of the rule the court, upon motion or upon its own initiative shall impose upon the person who made the certification the party on whose behalf the disclosure, request response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation including a reasonable attorney's fee

(As amended Dec 27 1946 eff Mar 19 1948 Jan 21 1963 eff Jul 1 1963 Feb 28 1966 eff Jul 1 1966 Mar 30 1970 eff Jul 1 1970 Apr 29 1980 eff Aug 1 1980 Apr 28 1983 eff Aug 1 1983 Mar 2 1987 eff Aug 1 1987 Apr 22 1993 eff Dec 1 1993)

Summary of Federal District Courts Response to Rule 26 Amendments

For a summary of actions taken by federal district courts in response to amendments to this rule effective December 1, 1993 see 1997 U.S. Code Congressional & Administrative News Pamphlet No 4

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a) This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence Many states have adopted this practice on account of its simplicity and effectiveness safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable See Ark Civ Code (Crawford 1934) §§ 606 to 607, Calif Code Civ Proc (Deering, 1937) § 2021

1 Colo Stat Ann (1930) Code Civ Proc § 376 Idaho Code Ann (1932) § 16-906 Ill Rules of Pract Rule 19 (Smith Hurd Ill Stats c 110 § 259 19) Smith Hurd Ill Stats c 51 § 24 2 Ind Stat Ann (Burns 1933) §§ 2-1501 2-1506 Kan Codes (Carroll 1932) Civ Pract § 557 1 Mo Rev Stat (1929) § 1753 4 Mont Rev Codes Ann (1935) § 10645 Neb Comp Stat (1929) ch 20 §§ 1246-7 4 Nev Comp Laws (Hillver 1929) § 9001 2 NH Pub Laws (1926) ch 337 § 1 N C Code Ann (1935) § 1809 2 N D Comp Laws Ann (1913) §§ 7889 to 7897 2 Ohio Gen Code Ann (Page 1926) §§ 11525-6 1 Ore Code Ann (1930) Tit 9 § 1503 1 S D Comp Laws (1929) §§ 2713-16 Vernon's Ann Civ Sta Tex arts 3738 3752 3769 Utah Rev Stat Ann (1933) § 104-51-7 Wash Rules of Practice adopted by the Supreme Ct Rule 8 2 Wash Rev Stat Ann (Remington 1932) § 308-8 W Va Code (1931) ch 57 art 4, § 1 Compare [former] Equity Rules 47 (Depositions—To be Taken in Exceptional Instances) 54 (Depositions Under Revised Statutes §§ 863 865 866 867—Cross Examination), 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness)

This and subsequent rules incorporate modify and broaden the provisions for depositions under USC Title 28 [former] §§ 639 (Depositions de bene esse when and where taken notice) 640 (Same mode of taking) 641 (Same transmission to court) 644 (Depositions under dedimus potestatem and in perpetuam) 646 (Deposition under dedimus potestatem how taken) These statutes are superseded in so far as they differ from this and subsequent rules USC Title 28 [former] § 643 (Depositions taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a)

While a number of states permit discovery only from parties or their agents others either make no distinction between parties or agents of parties and ordinary witnesses or authorize the taking of ordinary depositions without restriction from any persons who have knowledge of relevant facts See Ark Civ Code (Crawford 1934) §§ 606 to 607 1 Idaho Code Ann (1932) § 16-906 Ill Rules of Pract Rule 19 (Smith Hurd Ill Stats c 110 § 259 19) Smith Hurd Ill Stats c 51 § 24 2 Ind Stat Ann (Burns, 1933) § 2-1501 Kan Codes (Carroll 1932) Civ Pract §§ 554 to 558 2 Md Ann Code (Bagby 1924) Art 35 § 21 2 Minn Stat (Mason 1927) § 9820 Mo St Ann §§ 1753 1759 pp 4023 4026 Neb Comp Stat (1929) ch 20 §§ 1246-7 2 NH Pub Laws (1926) ch 337 § 1 2 N D Comp Laws Ann (1913) § 7897 2 Ohio Gen Code Ann (Page 1926) §§ 11525-6 1 S D Comp Laws (1929) §§ 2713-16, Vernon's Ann Civil Stats Tex arts 3738 3752 3769 Utah Rev Stat Ann (1933) § 104-51-7 Wash Rules of Practice adopted by Supreme Ct Rule 8 2 Wash Rev Stat Ann (Remington 1932) § 308-8 W Va Code (1931) ch 57 art 4 § 1

The more common practice in the United States is to take depositions on notice by the party desiring them without any order from the court and this has been followed in these rules See Calif Code Civ Proc (Deering 1937) § 2031 2 Fla Comp Gen Laws Ann (1927) §§ 4405-7 1 Idaho Code Ann (1932) § 16-902 Ill Rules of Pract Rule 19 (Smith Hurd Ill Stats c 110, § 259 19) Smith Hurd Ill Stats c 51 § 24, 2 Ind Stat Ann (Burns 1933) § 2-1502 Kan Gen Stat Ann (1935) § 60-2827 Kan Codes (Carroll 1932) Civ Pract § 565 2 Minn Stat (Mason 1927) § 9820 Mo St Ann § 1761, p 4029 4 Mont Rev Codes Ann (1935) § 10601

Complete Annotation Materials, see Title 28 U.S.C.A.

## Chapter 8

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# THE PRETRIAL CONFERENCE

### *Analysis*

#### Sec

- 81 Nature and Purposes of a Pretrial Conference
- 82 Procedural Aspects of the Pretrial Conference
- 83 The Pretrial Order

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### § 81 Nature and Purposes of a Pretrial Conference

Aspects of modern litigation—especially expanded joinder of parties and claims,<sup>1</sup> virtually unlimited discovery,<sup>2</sup> less informative pleadings,<sup>3</sup> and increasingly complex and protracted cases—have created a need for greater judicial intervention to focus controversies before trial. In many jurisdictions, including the federal courts, this has been accomplished by use of the pretrial conference,<sup>4</sup> which is a meeting of the attorneys (and sometimes the parties) with a trial judge or with a magistrate possessing certain judicial powers.<sup>5</sup>

The pretrial conference was unknown at common law.<sup>6</sup> It was introduced in 1929 in Wayne County, Michigan as a device for relief

#### § 82

- 1 See generally Chapters 6 and 16
- 2 See generally §§ 71-76 above
- 3 See generally § 52 above

4 Fed Civ Proc Rule 16 Ala Rules Civ Proc Rule 16 Ariz Rules Civ Proc Rule 16(a) Cal Rules of Ct Rules 208-18 West's Fla Stat Ann Rules Civ Proc Rule 1200 Vernon's Ann Mo Civ Proc Rule 62.01 See generally 6 C Wright & A Miller Civil §§ 1521-30

5 In recent years the increase in the number of very large and complicated law suits has placed considerable pressure on the judicial system to develop special procedures to keep these cases from unduly clogging the calendar. Among the recommendations to combat this problem is an expanded use of multiple pretrial confer

ences commencing prior to discovery to formulate issues to channel discovery to avoid the excessive use of motions and to set timetables to keep the case moving. See generally Manual for Complex Litigation (5th ed 1981). This carefully structured and expanded use of the pretrial conference may help significantly in easing the progress of these difficult cases.

Federal Rule 16 also was amended in 1983 to promote better pretrial management. The amended rule encourages scheduling through a series of conferences and expands the list of matters that may be considered by the court at the pretrial conference in order to allow for better management of the case.

6 See 6 C Wright & A Miller Civil § 1521 at 564

ing an extremely congested court calendar<sup>7</sup> In 1938 the pretrial conference was embodied in Federal Rule 16 which now has many state counterparts<sup>8</sup>

Today the pretrial conference may be used as a management tool, controlling motion and discovery practice, preparing for and guiding the trial<sup>9</sup> informing the parties what issues and facts are in controversy,<sup>10</sup> and facilitating the decision of the case on its merits<sup>11</sup> It also may be utilized to encourage settlement of cases,<sup>12</sup> thereby relieving the pressure on court calendars<sup>13</sup> There is a continuing debate over which role should be primary Those emphasizing settlement tend to stress its utility to judges in urban areas with extremely crowded trial calendars<sup>14</sup> Those emphasizing preparation for trial argue that too active judicial intervention causes coerced settlements,<sup>15</sup> which leads to dissatisfaction with the judicial system and raises the possibility of prejudice in the settlement process Properly used to prepare for trial, the pretrial conference undoubtedly also encourages settlements, since it makes parties aware of the strengths and weaknesses of their cases<sup>16</sup>

Studies of the pretrial conference have attempted to evaluate its performance in terms of two criteria First, does it encourage settlement and reduce congestion?<sup>17</sup> Second, does it increase the quality of those trials that do take place and of the settlement process?<sup>18</sup> The

7 *Id.* at 565

8 Fed Civ Proc Rule 16 Mass Rules Civ Proc Rule 16 Minn Rules Civ Proc Rule 16 Ohio Rules Civ Proc Rule 16 Some states have adopted modified versions of the federal rule See e.g. Ind Tr Proc Rule 16 N J Civ Prac Rule 4 25

9 *Ely v Reading Co* 424 F 2d 758 (3d Cir 1970) *Padovani v Bruchhausen* 293 F 2d 546 548 (2d Cir 1961) *Lockwood v Hercules Powder Co* 7 FRD 24 28 (WD Mo 1947)

10 *Japanese War Notes Claimants Ass'n of the Philippines Inc v US* 178 Ct Cl 630 373 F 2d 356 (1967) certiorari denied 389 US 971 (1967) *Meadow Gold Prods Co v Wright* 278 F 2d 867 868-69 (DC Cir 1960) *Lockwood v Hercules Powder Co* 7 FRD 24 28 (WD Mo 1947)

11 See *Clark v Pennsylvania RR* 328 F 2d 591 594 (2d Cir 1964) certiorari denied 377 US 1006 (1964) *Mays v Disneyland Inc* 213 Cal App 2d 297 28 Cal Rptr 689 (1963) 6 C Wright & A Miller Civil § 1522 at 567 *Laws Pre-Trial Procedure* 1 FRD 397 399 (1940)

12 *Mott v City of Flora* 3 FRD 232 (ED Ill 1943) For a criticism of the current trend to encourage facilitating settlement see *Fiss Against Settlement* 93 Yale LJ 1073 1075 (1984) (Like plea bargaining settlement is a capitulation to

the conditions of mass society and should be neither encouraged nor praised )

13 *Identiseal Corp v Positive Identification Sys Inc* 560 F 2d 298 (7th Cir 1977) *Elder Beerman Stores Corp v Federated Dept Stores Inc* 459 F 2d 138 (6th Cir 1972) *Thermo King Corp v White's Trucking Serv Inc* 292 F 2d 668 671 (5th Cir 1961)

14 See Note *Pretrial Conference Procedures* 26 SCL Rev 481 485-86 (1974)

15 See *Clark Objectives of Pre Trial Procedure* 17 Ohio St LJ 163 (1956) *Moscowitz Glances of Federal Trials and Procedure* 4 FRD 216 218 (1944)

16 *Clark To an Understanding Use of Pre Trial* 29 FRD 454 456 (1961) But see *Walker & Thibaut An Experimental Examination of Pretrial Conference Techniques* 55 Minn L Rev 1113 1134 (1971)

17 M Rosenberg *The Pretrial Conference and Effective Justice* 25 (1964) *Gourley Effective Pretrial Must Be the Beginning of Trial* 28 FRD 165 (1962) *Martz Pretrial Preparation* 28 FRD 137 (1962) *Comment California Pretrial in Action* 49 Calif L Rev 909 (1961) *Note Pretrial Conferences in the District Court for Salt Lake County* 6 Utah L Rev 259 (1959)

18 M Rosenberg *The Pretrial Conference and Effective Justice* 25 (1964)

studies focusing on settlement do not resolve the first question, they indicate that congestion has been reduced in some parts of the country<sup>19</sup> and not in others<sup>20</sup>. The results of studies agree, however, that the issues and evidence in pretried cases are better presented, there is less likely to be surprise, trials are fairer, and settlements are more informed<sup>21</sup>.



#### WESTLAW REFERENCES

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## § 8 2 Procedural Aspects of the Pretrial Conference

Normally, the court is given discretion to order a pretrial conference either on its own motion or at the request of a party<sup>1</sup>. In some areas local rules actually require its use in all cases<sup>2</sup>. Mandatory use generally has been rejected, however, because a conference is a waste of time in simple cases and the procedure will not work unless the judge believes it will be useful<sup>3</sup>. Thus, some jurisdictions that in the past have used mandatory pretrial conferences have eliminated them,<sup>4</sup> in too many cases they took more time and cost more than they were worth.

The procedure governing a particular pretrial conference is largely within the discretion of the judge. In many instances local court rules provide guidance<sup>5</sup>. Despite this variety, some general observations can be made.

Once the court has called a pretrial conference, the attendance of the attorneys is compulsory,<sup>6</sup> and prepretrial preparation, usually

Lynch Pretrial Procedure 39 N D L Rev 176 (1963)

19 Gourley Effective Pretrial Must Be the Beginning of Trial 28 FR D 165 168 (1962) Martz Pretrial Preparation 28 FR D 137 137-38 (1962) Note Pretrial Conferences in the District Court for Salt Lake County 6 Utah L Rev 259 (1959)

20 M Rosenberg The Pretrial Conference and Effective Justice 45 (1964) Comment California Pretrial in Action 49 Calif L Rev 909 917 (1961)

21 M Rosenberg The Pretrial Conference and Effective Justice 29 (1964) Lynch Pretrial Procedure 39 N D L Rev 176 (1963)

#### § 8 2

1 McCargo v Hedrick 545 F 2d 393 (4th Cir 1976) Sleek v J C Penney Co 324 F 2d 467 (3d Cir 1963) Hayden v Chalfant Press Inc 281 F 2d 543 (9th Cir 1960) Fed Civ Proc Rule 16 Ala Rules Civ Proc Rule 16 N J Civ Prac Rule 4 25-1(a)

2 Eg Local Rule 235-5 US Dist Court Hawaii Local Rule 16 US Dist Court Kan Local Rule 5 US Dist Court W D Mich

3 Proceedings Cleveland Institute on the Federal Rules 299 (1938) Comment California Pretrial in Action 49 Calif L Rev 909 924 926 (1961) Note Pretrial Conference Procedures 26 S C L Rev 481 496 (1974)

4 Eg Cal Rules of Ct Rule 208

5 An examination of some of the local rules that have been adopted may be found in Note Pretrial Conference A Critical Examination of Local Rules Adopted by Federal District Courts 64 Va L Rev 467 (1978)

6 Identiseal Corp v Positive Identification Sys Inc 560 F 2d 298 (7th Cir 1977) Padovani v Bruchhausen 293 F 2d 546 (2d Cir 1961)

including the submission of a special pretrial conference memorandum, may be required.<sup>7</sup> Many courts require the presence at pretrial of the same attorneys who will present the case at trial<sup>8</sup> and who have full power to make admissions of fact and enter into stipulations.<sup>9</sup> Sanctions may be imposed for failure to meet the court's requirements, these may range from assessment of costs<sup>10</sup> against an offending party who is late filing a memorandum, to the entry of a default or a dismissal for failure to prosecute in the event of complete non-attendance<sup>11</sup> or failure to file a memorandum<sup>12</sup> or obey the pretrial order<sup>13</sup>.

The court is not limited to one pretrial conference but may call several as the nature of the case indicates.<sup>14</sup> In highly complex litigation as many as four pretrial conferences have been advocated.<sup>15</sup> When a series of conferences is scheduled, the first may take place prior to discovery, to take care of preliminary matters and to schedule the discovery and pretrial phase of the action.<sup>16</sup> This pre-discovery conference helps to frame the issues, as well as to keep the cost of discovery in check.<sup>17</sup> However, in most cases, the pretrial conference is held after discovery is essentially completed and shortly before trial.<sup>18</sup> This is logical because at that time each side should be thoroughly familiar with the strengths and weaknesses of its case and know which issues and facts it wishes to contest and which it is willing to concede. Thus, the parties are at an excellent point either to make an informed settlement or to narrow the case for trial to those matters that genuinely are disputed.

7 Local Rule 5.4(D) U.S. Dist. Court Del. Local Civ. Rule 25.02 U.S. Dist. Court E. Dist. N.C. Local Rule 300.6 U.S. Dist. Court W. Dist. Tex. 6 C. Wright & A. Miller, *Civil* § 1524 at 577-78, 581.

8 Fed. Civ. Proc. Rule 16(c).

9 Fed. Civ. Proc. Rule 16(d) Cal. Rules of Ct. Rule 210(a).

10 *Gamble v. Pope & Talbot, Inc.* 191 F. Supp. 763 (E.D. Pa. 1961) reversed in part on other grounds 307 F.2d 729 (3d Cir. 1961) certiorari denied 371 U.S. 888 (1962).

Federal Rule 16 as amended in 1983 mandates that the judge require the party or attorney representing him or both to pay the reasonable expenses including attorney fees incurred by the opposing party because of any noncompliance with a scheduling of a pretrial order. This sanction can be avoided only if the judge finds the noncompliance substantially justified or if such an award would be unjust. Fed. Civ. Proc. Rule 16(f).

11 *Link v. Wabash R.R.* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Suarez v. Yellow Cab Co.* 112 Ill.App.2d 390, 251 N.E.2d 340 (1969).

12 *American Electronics Lab, Inc. v. Dopp* 369 F.Supp. 1245 (D. Del. 1974); *Sleek v. J.C. Penney Co.* 26 FRD 209 (W.D. Pa. 1960) vacated on other grounds 292 F.2d 256 (3d Cir. 1961).

13 See § 8.3 below.

14 *Napolitano v. Compania Sud Americana De Vapores* 421 F.2d 382 (2d Cir. 1970); *Life Music, Inc. v. Edelstein* 309 F.2d 242 (2d Cir. 1962) (23 pretrial conferences held).

15 *Manual for Complex Litigation* § 0.40 (5th ed. 1981).

16 Under Fed. Civ. Proc. Rule 16(b) a scheduling order now is required within 120 days after filing the complaint. This order may be issued with or without a formal scheduling conference.

17 *Manual for Complex Litigation* § 1.00 (5th ed. 1981).

18 *Commercial Ins. Co. v. Smith* 417 F.2d 1330 (10th Cir. 1969); *Century Ref. Co. v. Hall* 316 F.2d 15 (10th Cir. 1963); *Clark*, *Objectives of Pre-Trial Procedure* 17 *Ohio St. L.J.* 163, 165 (1956).

In most jurisdictions a wide range of matters may be dealt with at a pretrial conference. It may be used to define the issues and facts still in contention,<sup>19</sup> to weed out extraneous issues,<sup>20</sup> and to make rulings relating to the remedies that might be awarded.<sup>21</sup> Amendments to the pleadings may be ordered if necessary.<sup>22</sup> To facilitate the presentation of evidence at trial, unnecessary items of proof may be eliminated,<sup>23</sup> the authenticity of documents may be determined,<sup>24</sup> rulings on the admissibility of evidence may be made,<sup>25</sup> and lists of documents and witnesses to be presented at trial may be required.<sup>26</sup> Matters also may be referred to a master whose findings may be introduced as evidence in a jury trial.<sup>27</sup>

Under broad catchall provisions in the federal type of pretrial conference rule, courts also have used the conference to rule on preliminary matters such as jurisdiction,<sup>28</sup> rather than taking them up by motion at the beginning of trial. Thus, courts have decided questions relating to stays,<sup>29</sup> consolidation or separation of issues for trial,<sup>30</sup> the right to a jury trial,<sup>31</sup> and the details of ongoing discovery<sup>32</sup> at pretrial conferences. In view of the wide range of matters that may be determined at pretrial and that will control the trial, counsel need to be

19 *FDIC v Gluckman* 450 F 2d 416 419 (9th Cir 1971) *Manbeck v Ostrowski* 384 F 2d 970 (D C Cir 1967) certiorari denied 390 U S 966 (1968)

20 *Manbeck v Ostrowski* 384 F 2d 970 (D C Cir 1967) certiorari denied 390 U S 966 (1968) *Mull v Ford Motor Co* 368 F 2d 713 (2d Cir 1966)

21 *Lundberg v Welles* 93 F Supp 359 361 (S D N Y 1950)

22 *FDIC v Gluckman* 450 F 2d 416 (9th Cir 1971) *Hatridge v Seaboard Sur* 74 F R D 6 (D Okl 1976) *Taylor v S & M Lamp Co* 190 Cal App 2d 700 12 Cal Rptr 323 (1961)

23 *FDIC v Gluckman* 450 F 2d 416 (9th Cir 1971) *Manbeck v Ostrowski* 384 F 2d 970 (D C Cir 1967) certiorari denied 390 U S 966 (1968)

24 *Pritchett v Etheridge* 172 F 2d 822 (5th Cir 1949)

25 *Pritchett v Etheridge* 172 F 2d 822 (5th Cir 1949) *In re Panoceanic Tankers Corp* 54 F R D 283 (S D N Y 1971) *Edenfield v Crisp* 186 So 2d 545 (Fla App 1966)

26 *U S v Hemphill* 369 F 2d 539 (5th Cir 1966) *Clark v Pennsylvania RR* 328 F 2d 591 (2d Cir 1964) certiorari denied 377 U S 1006 (1964) *Syracuse Broadcasting Corp v Newhouse* 295 F 2d 269 (2d Cir 1961) *Unita Oil Ref Co v Continental Oil Co* 226 F Supp 495 505 n 39 (D Utah 1964) *Bodnar v Jackson* 205 Kan 469

470 P 2d 726 (1970) *Fairbanks Publishing Co v Francisco* 390 P 2d 784 (Alaska 1964) *Glisan v Kurth* 153 Colo 102 384 P 2d 946 (1963)

27 Fed Civ Proc Rule 53(e) *Wilson v Kennedy* 75 F Supp 592 (W D Pa 1948) Fed Civ Proc Rule 16

28 *A H Emery Co v Marcan Prods Corps* 389 F 2d 11 (2d Cir 1968) certiorari denied 393 U S 835 (1968)

29 *Royster v Ruggerio* 2 F R D 429 (E D Mich 1941) modified on other grounds 128 F 2d 197 (6th Cir 1942) *Niaz v St Paul Mercury Ins Co* 265 Minn 222 121 N W 2d 349 (1963)

30 *Joseph v Donover Co* 261 F 2d 812 (9th Cir 1958)

31 *Schram v Kolowich* 2 F R D 343 (E D Mich 1942) *In re 1208 Inc* 3 F R Serv 2d 1643 case 1 (D Pa 1960) The 1980 amendments to Federal Rule 26 now authorize a special discovery conference Fed Civ Proc Rule 26(f)

32 Eg *Buffington v Wood* 351 F 2d 292 (3d Cir 1965) *DiDonna v Zigarelli* 61 N J Super 302 160 A 2d 655 (1960) See Judicial Conference of the United States Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery 48 F R D 485 524 532 (1969) The 1980 amendments to Federal Rule 26 now authorize a special discovery conference Fed Civ Proc Rule 26(f)

fully prepared on all aspects of their cases at the final pretrial conference

Certain matters have been definitely excluded from the purview of the pretrial conference, however. One party may not use it to steal his opponent's trial preparation, counsel are not to use the conference as a discovery device or for a fishing expedition.<sup>33</sup> Further, the conference may not serve as a substitute for trial.<sup>34</sup> Although the pretrial judge may grant summary judgment if there are no triable issues remaining,<sup>35</sup> he has no power to determine issues of fact.<sup>36</sup> The purpose of the conference is to achieve voluntary agreements, it is improper for the court to force concessions or settlement upon unwilling parties.<sup>37</sup>

Given the broad scope of the pretrial conference, and the powers of the presiding judge there has been some discussion whether the pretrial judge should be the judge who will try the case. When the conference is used primarily as a tool to induce settlement, a separate judge for pretrial is to be preferred, as this reduces coercion and lessens attorneys' fears that positions taken in pretrial discussions will prejudice them with the judge at trial if a settlement is not reached.<sup>38</sup> Generally, if the conference is designed primarily for trial preparation, most lawyers would favor having the same judge for pretrial and trial, they view the conference as focusing the case not only for the parties but also for the judge, allowing him to spend time prior to trial becoming familiar with the issues and preparing background on the rulings that will have to be made at trial.<sup>39</sup> Some states deal with this problem by providing for a separate settlement calendar,<sup>40</sup> in these jurisdictions, the pretrial judge will try the case without having participated in the settlement conference.

<sup>33</sup> *Berger v Brannan* 172 F.2d 241 (10th Cir. 1949) certiorari denied 337 U.S. 941 (1949). *Package Mach. Co. v Hayssen Mfg. Co.* 164 F.Supp. 904 (E.D. Wis. 1958) affirmed on other grounds 266 F.2d 56 (7th Cir. 1959).

<sup>34</sup> *Lynn v Smith* 281 F.2d 501 (3d Cir. 1960). *Syracuse Broadcasting Corp. v Newhouse* 271 F.2d 910 (2d Cir. 1959). See *Gullett v McCormick* 421 S.W.2d 352 (Ky. 1967).

<sup>35</sup> *Newman v Granger* 141 F.Supp. 37 (W.D. Pa. 1956) affirmed per curiam 239 F.2d 384 (3d Cir. 1957). *McComb v Trimmer* 85 F.Supp. 565 (D.N.J. 1949). *Green v Kaesler Allen Lumber Co.* 197 Kan. 788 420 P.2d 1019 (1966). *Ellis v Woods* 453 S.W.2d 509 (Tex. Civ. App. 1970).

<sup>36</sup> *Masculli v U.S.* 313 F.2d 764 (3d Cir. 1963). *Lynn v Smith* 281 F.2d 501 (3d Cir. 1960).

<sup>37</sup> *J.F. Edwards Constr. Co. v Anderson Safeway Guard Rail Corp.* 542 F.2d 1318 (7th Cir. 1976) (cannot force parties to

stipulate facts) *Gullett v McCormick* 421 S.W.2d 352 (Ky. 1967). *People ex rel Horowitz v Canel* 34 Ill.2d 306 215 N.E.2d 255 (1966). Cf. *Krattenstein v Fox & Co.* 155 Conn. 609 236 A.2d 466 (1967).

<sup>38</sup> Thomas, *The Story of Pretrial in the Common Pleas Courts of Cuyahoga County* 7 W. Res. L. Rev. 368 391 (1953). Note, *Pretrial Conference Procedures* 26 S.C.L. Rev. 481 497 (1974). Note, *Pretrial Conferences in the District Court for Salt Lake County* 6 Utah L. Rev. 259 261 (1959).

<sup>39</sup> See Clark, *Objectives of Pre-Trial Procedure* 17 Ohio St. L.J. 163 165 (1956). Kincaid, *A Judge's Handbook of Pre-Trial Procedure* 17 F.R.D. 437 445 (1955). Lynch, *Pretrial Procedure* 39 N.D.L. Rev. 176 185-86 (1963). Wright, *The Pretrial Conference* 28 F.R.D. 141 143 (1962). Note, *Pretrial Conference Procedures* 26 S.C.L. Rev. 481 496 (1974).

<sup>40</sup> Eg. Cal. Rules of Ct. Rule 2075



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### § 8 3 The Pretrial Order

Although some state pretrial regulations do not provide for it,<sup>1</sup> the federal rule and most of its state counterparts require the court to issue a pretrial order embodying the rulings made and matters agreed upon at the pretrial conference.<sup>2</sup> The pretrial order should incorporate all admissions and stipulations of the parties, list the issues remaining for trial, and note any requirements for filing statements or lists of evidence and witnesses.<sup>3</sup> In order to preserve the work done at pretrial for use at trial and to avoid its duplication there, the pretrial order is particularly necessary in those cases in which the pretrial judge will not try the case.<sup>4</sup>

The method of formulating the pretrial order is within the court's discretion, it frequently is done by requiring all counsel to draft an order and to present it for the court's approval.<sup>5</sup> If counsel cannot agree upon an order, the court will formulate its own.<sup>6</sup>

The order controls the subsequent course of the action.<sup>7</sup> Although it can be modified to prevent manifest injustice,<sup>8</sup> some courts may require a substantial showing of cause and may require any possibility of prejudice to the opposing party to be overcome.<sup>9</sup> The burden placed on a party seeking to amend a pretrial order is greater than that imposed when an amendment to the pleadings is sought.<sup>10</sup> This simply reflects the different functions of the pleadings<sup>11</sup> and the pretrial conference<sup>12</sup> and recognizes that the best way to make the conference an effective means of controlling or shaping the trial is to enforce the

#### § 8 3

- 1 *E.g.* S C Cir Ct Rule 43
- 2 Fed Civ Proc Rule 16(e) N M Dist Ct Rules Civ Proc Rule 16
- 3 *U.S. v. An Article of Drug etc. Acnotabs* 207 F Supp 758 (D N J 1962) *Clark v. U.S.* 13 FRD 342 344 (D Or 1952)
- 4 See *Clark, Objectives of Pre Trial Procedure* 17 Ohio St L J 163 169 (1956)
- 5 *Bradford Novelty Co v. Samuel Eppy & Co* 164 F Supp 798 (E D N Y 1958) *Curto v. International Longshoremen's & Warehousemen's Union* 107 F Supp 805 (D Or 1952) affirmed on other grounds 226 F 2d 875 (9th Cir 1955) certiorari denied 351 U.S. 936 (1956)
- 6 See *Life Music Inc v. Edelstein* 309 F 2d 242 243 (2d Cir 1962) *Brinn v. Ball Insular Lines Inc* 28 FRD 578 (E D Pa 1961)
- 7 *American Home Assurance Co v. Cessna Aircraft Co* 551 F 2d 804 (10th Cir 1977) *Colvin v. U.S. ex rel. Magini Leasing & Contracting* 549 F 2d 1338 (9th Cir 1977)
- 8 *Stahlin v. Hilton Hotels Corp* 484 F 2d 580 (7th Cir 1973) *Wallin v. Fuller* 476 F 2d 1204 (5th Cir 1973) *Herrell v. Maddux* 217 Kan 192 535 P 2d 935 (1975)
- 9 *McKey v. Fairbairn* 345 F 2d 739 (D C Cir 1965) *City of Lakeland v. Union Oil Co* 352 F Supp 758 (M D Fla 1973) *Cornish v. U.S.* 221 F Supp 658 (D Or 1963) reversed on other grounds 348 F 2d 175 (9th Cir 1965)
- 10 See § 5 26 above
- 11 See § 5 2 above
- 12 See § 8 1 above

pretrial orders<sup>13</sup> Thus instructions given or evidence introduced outside the scope of the pretrial order may result in a mistrial or in the reopening of the case following appeal<sup>14</sup> Failure to comply with the order may result in striking a defense,<sup>15</sup> the exclusion of evidence,<sup>16</sup> or, in an extreme case dismissal of the action<sup>17</sup> Thus great care must be taken in drafting the pretrial order Objections to it are waived if not raised at the outset of the trial<sup>18</sup> and they will lead to reversal upon appeal only if the order was an abuse of the trial court's discretion<sup>19</sup>



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13 Note Variance From the Pre Trial Order 60 Yale LJ 175 (1951)

14 Clark v Pennsylvania R R 328 F 2d 591 (2d Cir 1964) certiorari denied 377 U S 1006 (1964) Seaboldt v Pennsylvania R R 290 F 2d 296 (3d Cir 1961)

15 G & R Corp v American Sec & Trust Co 523 F 2d 1164 (DC Cir 1975) Associated Press v Cook 513 F 2d 1300 (10th Cir 1975)

16 Matheny v Porter 158 F 2d 478 (10th Cir 1946) Mellone v Lewis 233 Cal App 2d 4 43 Cal Rptr 412 (1965)

17 Delta Theatres Inc v Paramount Pictures Inc 398 F 2d 323 (5th Cir 1968) certiorari denied 393 U S 1050 (1969) Wirtz v Hooper Holmes Bureau Inc 327

F 2d 939 (5th Cir 1964) Kromat v Vestevich 14 Mich App 291 165 N W 2d 428 (1968) Cf Uxmal Corp v Wall Indus Inc 55 FRD 219 (SD Fla 1972) (defendant's failure to comply with order or respond to plaintiff's motion for summary judgment resulted in judgment for plaintiff)

18 Hodgson v Humphries 454 F 2d 1279 (10th Cir 1972) Community Nat Life Ins Co v Parker Square Sav & Loan Ass'n 406 F 2d 603 (10th Cir 1969)

19 Spellacy v Southern Pac Co 428 F 2d 619 (9th Cir 1970) Ely v Reading Co 424 F 2d 758 (3d Cir 1970) Cruz v U S Lines Co 386 F 2d 803 804 (2d Cir 1967)

§§ 84-90 are reserved for supplementary material



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## INTERNATIONAL AND EUROPEAN JUDGES ASSOCIATIONS

### Objective

**to learn about the objectives of the International and European Judges Associations**

### The participants will study the following

**RESUME**

**INTERNATIONAL JUDGES ASSOCIATION**

**INTERNATIONAL JUDGES ASSOCIATION COMMITTEES**

**NATIONAL ASSOCIATIONS AND REPRESENTATIVE GROUPS**



## INTERNATIONAL AND EUROPEAN JUDGES ASSOCIATIONS E. Markel

### Resume

1 Role and position of the independent judge in context of all other powers of state and society also is the focal point in all considerations about national and international judges associations, because these organizations define their goals and activities according to judicial independence as the central judicial concept

2 Expectation of society directly is focused on judicial independence. People are searching an authority making them able to solve their conflicts in a peaceful manner. The judge is the guarantor of the so-called peace by law protecting the fundamental rights and liberties of people.

3 Article 6 paragraph 1 of the European Convention of Human Rights and Fundamental Freedoms in most of the member states of the Convention enforced as an additional constitutional provision, of few words but comprehensive, dealing with competence, structure, organization of and procedure before the courts, is based on a strict concept of separation of powers as indispensable condition of judicial independence and impartiality.

4 In many states the judicial power has experienced that the judiciary itself continuously must look at the precautions for keeping and strengthening its independence. It seldom finds support from outside, it must seek and find the strength of the third state power within itself. That is the real reason, why judges associations are founded and the justification of their existence.

5 Judges associations participate in all areas of court administration for welfare and prosperity of the state. To be focused on the judicial independence means that never partisan goals must be connected with judicial activities and political affiliation strictly is to be avoided.

6 Judges associations play an important part in selection and education of candidates for the judiciary and on-going training of judges. They have to look on self-controlling and self-purifying of the judicial profession.

7 National judges associations became aware that they are confronted in each state and legal system with very similar problems. In 1953 in Salzburg, Austria, the International Association of Judges (IAJ) was founded as an association of national organizations and not of individual judges. Besides co-operation on an international level and exchange of knowledge and experiences other reason of the foundation was to be represented at the big international organizations (e.g. United Nations, Council of Europe).

8 Main goals are the safeguard of the independence of the judicial authority as an essential requirement of the judicial function and the guarantee of human rights and freedoms as well as the constitutional and moral standing of the judicial authority, increase of experience and understanding of judges by exchange and co-operation with other judges and their associations and common study of judicial problems of regional, national and universal interest for finding solutions to cope with.

9 Description of organization, structure and activities of the IAJ and its regional associations. For more details see further material.



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The International Association of Judges was founded in Salzburg (Austria) in 1955 as a professional, non-political, international organization, grouping not individual judges, but national associations of judges, admitted to the Association by decision of its Central Council. The main aim of the Association is to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedom.

Today the organization encompasses 52 such national associations or representative groups from five Continents.

The Central Council of the IAJ, which is its deliberative body, and on which each member-association has two representatives meets annually, preferably in a different country every year.

At the Porto meeting, which took place during the month of September 1998, the hon. Mrs Pâquerette GIRARD, "Conseiller référendaire à la Cour de Cassation" (France), was elected President of the IAJ for the following two years. The hon. Massimo Bonomo, Judge of the Supreme Court of Cassation of Italy, was elected Secretary General.

The Association has consultative status with the Council of Europe, with the International Labour Office and with the UN Economic and Social Council.

The Association has four Study-Commissions, dealing respectively with judicial administration and status of the judiciary, civil law and procedure, criminal law and procedure, public and social law. These Commissions are composed of delegates from national associations, and as a rule meet annually, generally in the same location as the Central Council. On the basis of reports prepared in advance and exchanged by mail, the members of the Commissions study problems of common interest to the justice process in every country of the world, on a comparative and transnational basis.

The Association has four Regional Groups: i) the European Association of Judges, ii) the Iberoamerican Group, iii) the African Group, iv) the Asian, North American and Oceanian Group.

Periodically, the Association organizes an International Congress. The 7th World Congress took place in Macao in 1989 on the subject "Role and Position of the Judge in the Modern Pluralistic Society".

The most recent meetings of the Central Council and of the Study-Commissions were held in Porto (Portugal, 1998), San Juan (Puerto Rico, 1997), Amsterdam (The Netherlands, 1996), Tunis (Tunisia, 1995), Athens (Greece, 1994), Sao Paulo (Brazil, 1993), Sevilla (Spain, 1992), in Switzerland (Crans-Montana, 1991), in Finland (Helsinki, 1990), in Macao (1989), in Germany (Berlin, 1988), in Ireland (Dublin, 1987), in Italy (Rome, 1986), in Norway (Oslo, 1985), in Liechtenstein (Vaduz, 1984), in Senegal (Dakar, 1983), in Portugal (Madeira, 1982), in Austria (Vienna, 1981), in Tunisia (Tunis, 1980), in Sweden (Stockholm, 1979).

At the last meeting in Porto in September 1998 the Study-Commissions discussed the following subjects: Managing case load - second part (1st Study Commission), Appeal proceedings (2nd Study Commission), The role of the lay person in the criminal process (3rd Study Commission), Fundamental structures that govern labor relations (4th Study Commission).

The next meeting of the Central Council and of the Study Commissions will be hosted in Taipei (Taiwan) by the R.O.C. Association of Judges from 14 to 18 November 1999. The four Regional Groups will meet on 14 November.

The following subjects will be discussed by the Study-Commissions in 1999: Updating the relationship between the judiciary and the other functions of the state for the better delivery of justice (1st Study Commission), Consequences of breach of contract (2nd Study Commission), The influence of the press and the other media upon integrity and freedom of opinion of the members of the judiciary in criminal justice matters (3rd Study Commission), The strike (4th Study Commission).



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