



Resource Guide for

MANAGING COMPLEX LITIGATION

THE NATIONAL  JUDICIAL COLLEGE
Est. 1963

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COMPLEX
LITIGATION**

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Pat Knighten, a former editor with Matthew Bender, served as the primary author and editor of the *Resource Guide*. She worked tirelessly through innumerable drafts to ensure that the *Resource Guide* is a helpful resource to state trial judges who handle complex litigation. Her professional demeanor helped the Board of Editors reach a consensus on many important matters.

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—Project Director: William J. Brunson, NJC Director of Special Projects

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The National Judicial College created the trial judges *Resource Guide on Complex Litigation* (the *Resource Guide*) for one simple reason: to assist state trial judges who are assigned complex civil cases whether they are seasoned veterans or relatively new to the bench. The *Resource Guide* is based upon the Federal Judicial Center's *Manual for Complex Litigation, Fourth*. While that work is excellent, the vision behind this guide was to simplify its contents for easier use by busy trial judges.

The *Resource Guide* has six chapters: (1) General Considerations; (2) Case Management Conferences; (3) Discovery; (4) Final Pretrial Conference/Preparation for Trial; (5) Trial; (6) Managing Class Actions; and the Appendix. In Chapter One, the *Guide* addresses general considerations such as the judge's role, counsel's role, appointing special masters, using court-appointed experts, and it examines related litigation.

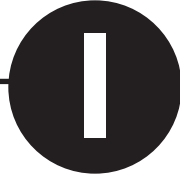
Chapter Two assists judges with the processes for scheduling initial conferences; identifies matters to address at those conferences and provides a checklist of items to cover in the case management order; and provides suggestions for later conferences. Because managing discovery in complex litigation can be challenging, Chapter Three is devoted to the subject. It provides ideas for establishing discovery schedules; designating discovery procedures; managing electronic discovery; placing limits on discovery; resolving disputes; issuing protective and sealed orders; and disclosing expert opinions.

To achieve better management, in Chapter Four, the *Resource Guide* recommends the use of trial management conferences. At those conferences, the trial judge can assist counsel in identifying matters to address; develop a case management order; and rule on motions in limine and *Frye* and *Daubert* motions. Chapter Five addresses how complex civil trials differ from regular trials from the conduct of the trial, to presentation of evidence, managing the jury, and awarding attorney's fees.

Many state trial judges do not preside over class actions because they are usually filed in federal court. For a state trial judge who oversees a class action, Chapter Six provides a roadmap. It defines how to precertify case management; determine the motion for certification of an action as a class action; determine notice to give to class members; review proposed settlements; and award attorneys' fees. The Appendix contains a number of helpful documents for trial judges, including a sample initial status conference order, case management order, and trial readiness conference order.

While the *Resource Guide* is useful for all state trial judges, users will need to ensure that they are following their own constitutions, statutes, rules, and procedures.

For ease of reading, the *Resource Guide* is not heavily referenced and consists of checklists and short summaries of information. It primarily references the *Manual for Complex Litigation, Fourth* and other useful resources for the judge who wants to perform additional research on the area in question.



GENERAL CONSIDERATIONS



§ 1.1 Judge's Role

To address the needs of a complex case, judges must consciously think about case management. While each complex case has its own distinctive demands, appropriately applying certain actions, principles and truths will enhance the trial judge's ability to provide timely justice. To understand the goals and concepts of effective caseflow management, judges should take a few minutes to read the National Judicial College's pamphlet *Fair, Timely, Economical Justice: Achieving Justice Through Effective Caseflow Management*. Management and supervision of cases, especially complex cases, are *core judicial responsibilities*, and the skills and abilities required to effectively supervise cases can be learned.

The foundational concepts discussed in the *Resource Guide* have been utilized by trial judges for over 40 years and proven effective in achieving justice in complex cases. Judges across the country have been utilizing the following principles: (1) identify whether the case is "complex" as early as possible; (2) assume immediate control of the case; (3) involve counsel and/or litigants in discussing issues and the elements of a case management plan; (4) conduct continuing court supervision over the progress of the case utilizing meaningful and monitorable case events scheduled at appropriate intervals; (5) apply supervision consistently and fairly toward all parties with deviation from the case management plan for good cause which may include reasonable accommodation of lawyers, litigants, and other participants; and (6) revisit barriers to the resolution of issues including appropriate settlement initiatives throughout supervision of the case.

The following suggestions are offered for trial judges' consideration in formulating the best approach to preside over a complex case.

To resolve complex litigation fairly, efficiently, and effectively, the judge should actively supervise all proceedings. In doing so, the judge should:

- ☐ Have in place mechanisms for early identification of complex litigation;
- ☐ Require counsel to identify major issues and any difficulties early;
- ☐ Anticipate problems before they arise rather than wait for counsel to present them;
- ☐ Decide disputes promptly, particularly those that may materially affect the course or scope of the litigation;
- ☐ Monitor continuously the progress of the case to confirm that the attorneys are meeting the deadlines set forth in the case management plan/order and to determine whether the plan needs modification;
- ☐ Use the court's statutory and inherent authority to manage the litigation; and
- ☐ Adopt special procedures, as necessary, to manage potentially difficult or protracted actions that may involve complex issues, difficult legal questions, or unusual trial or proof problems.

The judge should also begin supervision early in the proceedings through these mechanisms:

- ☐ Become familiar with the issues in the case as soon as it is assigned;
- ☐ Schedule an initial case management conference as soon as practical (*see* § 2.1, *infra*);
- ☐ Take action that may be necessary before the conference, e.g., to preserve evidence (*see* § 3.3, *infra*); and

- ☐ Work with counsel to develop and implement a comprehensive case management plan that is tailored to the particular circumstances of the case and the resources available to the parties:
 - Consider counsels' suggestions and concerns (*see* § 1.2, *infra*);
 - Establish a schedule to complete pretrial proceedings in the case that gives direction and order to the case (*see* §§ 2.4 and 3.1, *infra*); and
 - Set firm dates for the completion of procedural steps in the case and requiring counsel to adhere to these dates.

Exercise continuing control over the proceedings through these methods:

- ☐ Require counsel to meet and confer promptly before court intervention to attempt to resolve any disputes informally;
- ☐ Be available to counsel when they cannot reach agreement;
- ☐ Schedule case management conferences at regular intervals to review the progress of the case and to address any problems that may have arisen since the previous conference (*see* § 2.5, *infra*);
- ☐ Require counsel to prepare a joint agenda of matters to be discussed or separate agendas, if appropriate, before any case management conference;
- ☐ Impose appropriate sanctions for counsel's improper tactics (or a party's) or failure to comply with court orders or rules (on a party's motion or *sua sponte*); and
- ☐ Consider whether a special master should be appointed to resolve discovery and other pretrial matters (*see* § 1.3, *infra*).

Explore settlement as appropriate. (See p. 37, *infra*, for limits on judges encouraging settlement.)

The court may:

- ☐ Encourage the settlement process by asking counsel at the initial case management conference whether settlement discussions have occurred or might be scheduled;
- ☐ Help the parties to assess their cases realistically;
- ☐ Suggest that the parties reexamine their positions in light of current or anticipated developments as the case progresses;
- ☐ Facilitate negotiations by removing obstacles to compromise;
- ☐ Focus the parties' attention on the likely cost (e.g., legal fees and lost opportunities) of litigating the case to conclusion;
- ☐ Suggest and arrange for another neutral person to assist negotiations, including another judge or a special master; (*see* § 1.3, *infra*);
- ☐ Consider whether other alternative dispute resolution techniques (e.g., a summary jury trial) may assist the parties in valuing their cases for settlement purposes; Target discovery at information needed to further settlement negotiations;

- ☐ Promptly decide motions that will facilitate settlement;

(*Note:* Many judges have found that early rulings on in limine motions and discussion of verdict forms/jury instructions may lead to a narrowing of issues and settlement.)

- ☐ At the “appropriate time,” set a firm trial date to motivate the parties to settle;
- ☐ Ensure adequate staffing to assist the court in effectively and efficiently managing the litigation, including:
 - Clerical assistance;
 - Research attorneys or law clerks;
 - A court reporter proficient in *RealTime* or equivalent technology to produce immediate transcripts;
 - A bailiff; and/or
 - Technical support for electronic filing and other matters.

(*Note:* Because complex cases are particularly labor intensive, a judge who handles these cases may need additional staff. These individuals should receive specific training in complex case management and work together as a team. Consider establishing a website for rapid communication with counsel and maintenance of the case management order.)

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 10.1 (Judicial Supervision), 10.13 (Effective Management), 10.15 (Sanctions), 11.12 (Interim Measures), 13.-13.24 (Settlement), and 22.91 (Judicial Role and Settlement).

§ 1.2 Counsel’s Role

Counsel, who will be more familiar with the facts and issues in the case than the judge, should play a significant role in developing the case management plan; they are primarily responsible for its execution.

The judge should:

- ☐ Develop a realistic timeline, with counsel’s input, for resolving the case;
- ☐ Provide supervision and maintain control over the case in a manner that recognizes the burdens placed on counsel by complex litigation; and
- ☐ Foster mutual respect and cooperation between the court and counsel, as well as between the attorneys for the various parties.

(Note: The judge should let the attorneys know that the court recognizes the added demands and burdens that complex litigation places on them; however, the judge should emphasize that the court expects them to (1) fulfill their obligations as advocates in a manner that will foster and sustain good working relations among themselves and with the court, (2) communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible, (3) avoid unnecessary contentiousness, and (4) limit the controversy to material issues that are genuinely in dispute. Some courts are creating civility codes to address and promote professional behavior.)

To facilitate the orderly resolution of a complex case involving numerous parties with separate counsel, the judge may consider designating certain attorneys to act on behalf of other counsel and parties in addition to their own clients with respect to specified aspects of the litigation.

A judge may designate counsel to act as lead counsel, charged with formulating and presenting positions on substantive and procedural issues to court during the litigation. Such issues may include:

- ☐ Working with opposing counsel in developing and implementing a case management plan;
- ☐ Initiating and organizing common discovery requests and responses;
- ☐ Preparing motions and briefs on pretrial matters;
- ☐ Arguing motions on behalf of a particular side;
- ☐ Meeting and conferring on behalf of a particular side to resolve areas of dispute;
- ☐ Conducting the principal examination of deponents and designating other counsel who may examine a particular deponent;
- ☐ Employing experts and consultants; and
- ☐ Ensuring that schedules are met.

A judge may likewise designate liaison counsel, charged with administrative matters for a particular side, such as:

- ☐ Receiving and distributing communications (including notices, motions, and orders) between the court and other counsel;
- ☐ Managing the document depository (*see* § 3.2, *infra*);
- ☐ Convening meetings of counsel;
- ☐ Resolving scheduling conflicts;
- ☐ Advising parties of developments; and
- ☐ Assisting in coordinating activities.

When designating lead or liaison counsel, the judge should:

- ☐ Invite submissions and suggestions from all counsel;
- ☐ Conduct an independent review (usually at a hearing) to ensure that counsel appointed to leading roles in the litigation are qualified and responsible, and will fairly and adequately represent all parties on their side, and that their charges will be reasonable;
- ☐ State the functions of lead and liaison counsel in a court order that informs other counsel and the parties of the scope of the designated counsel's authority; and

(*Note:* It is usually impractical and even unwise for the judge to specify in detail the functions assigned or the particular decisions that designated counsel may make unilaterally and those that require an affected party's concurrence. To avoid controversy, designated counsel should seek the consensus of the affected parties when making decisions that may have a critical impact on the litigation. For a sample order, see *Manual for Complex Litigation, Fourth*, § 40.22 (Responsibilities of Designated Counsel).)

- ☐ Address how lead and liaison counsel will be paid for their work on behalf of non-clients whom they represent.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 10.13 (Effective Management), 10.21 (Responsibilities in Complex Litigation), 10.22 (Coordination in Multiparty Litigation-Lead/Liaison Counsel and Committees), and 22.62 (Organization of Counsel).

§ 1.3 Appointing a Special Master

Early in the litigation, the judge may consider the advisability of appointing a special master to supervise specified aspects of the litigation, enabling the judge to devote time to more urgent matters. Appointing a special master to supervise discovery may be appropriate when the amount of activity required would impose undue burdens on the judge, and the parties' financial stake in the case justifies imposing on them the expense of a special master.

A judge may also appoint a special master to:

- ☐ Supervise specified discovery issues or disputes, particularly those that may be time-consuming or require an immediate ruling, including resolving deposition disputes by telephone;
- ☐ Make preliminary rulings on claims of privilege;
- ☐ Hear and determine motions for protective orders (*see* § 3.6, *infra*);
- ☐ Assist counsel in reaching stipulations; and
- ☐ Facilitate settlement discussions.

It is generally preferable to appoint a special master with the parties' consent and either to permit the parties to agree on the selection or make the appointment from a list submitted by the parties. The specific authority delegated to the special master should be stated in a court order, along with the procedure for review by the judge and provisions for payment of the special master's compensation. Regular reports by the special master are advisable.

Factors militating against the appointment of a special master are:

- ☐ The substantial cost;
- ☐ Possible delay in the proceedings resulting from using a special master; and
- ☐ Limitations on the powers of a special master, e.g., a special master may recommend rulings, but only the judge may make rulings.

(Note: Some judges have found that attorneys who appear before them in complex cases appreciate the fact that the judge makes time to handle all aspects of their cases. These judges have also found that being directly involved in all proceedings often helps them to persuade the parties to settle, where appropriate. It also gives them a better understanding of the complex scientific or technical issues in the case. See p. 53, *infra*, for limits on judges encouraging settlement.)

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 10.14 (Supervisory Referrals to Magistrate Judges and Special Masters), 11.424 (Resolution of Discovery Disputes), 11.456 (Control of Abusive Conduct), 11.52 (Special Masters), 13.13 (Specific Techniques to Promote Settlement), 22.8 (Discovery), 22.91 (Judicial Role and Settlement), 23.32 (Initial Conference), and 40.28 (Referral of Privilege Claims to Special Master).

§ 1.4 Using Court-Appointed Experts

Early in the litigation, if permitted by state law, the judge should also consider the advisability of using one or more court-appointed experts.

These experts may serve a number of purposes. They may:

- ☐ Advise the judge on technical issues;
- ☐ Provide the jury with background information to aid its comprehension of the evidence presented by the parties; and
- ☐ Offer a neutral opinion on disputed technical issues.

In many jurisdictions, judges have broad discretion to appoint experts *sua sponte* or on the parties' request; however, it is advisable to consider whether there are adequate alternatives, such as directing the parties to clarify, simplify, and narrow the differences between them. Court-appointed experts have been used in mass tort litigation to help resolve disputed causation issues and screen cases to determine whether individual plaintiffs or groups of plaintiffs can establish a threshold level of injury.

Such an appointment may be helpful in cases involving:

- ☐ A highly disputed subject in which strong evidence appears to support the contentions of both sides of the litigation;
- ☐ A technical complexity that taxes the capacity of the adversary system;
- ☐ A likelihood that scientific evidence will determine the course of the litigation; and
- ☐ A need to develop criteria to decide the admissibility of evidence, as in cases involving novel claims.

The principal disadvantages to appointing experts include the possibility that their participation may:

- ☐ Increase the already high cost of complex litigation;
- ☐ Delay the trial when the need for a court-appointed expert does not become apparent until the case is ready for trial; and
- ☐ Lengthen the trial, although there may be offsetting savings by narrowing the issues, reducing the scope of the controversy and, perhaps, promoting settlement.

Early consideration of expert disclosure and discovery can assist the judge in deciding whether to appoint an independent expert. (See § 3.8, *infra*). When the judge decides to appoint an expert, the judge should make every effort to select a person who is acceptable to the litigants.

The best candidate is one whose fairness and expertise in the field cannot reasonably be questioned and who can communicate effectively as a witness. The order appointing the expert should specify the terms on which the expert serves; the nature of the functions the expert is to perform; the extent of discovery that is permitted; whether the expert must provide a written report to the parties before trial; whether *ex parte* communications with the judge are permitted, and how the jury should be instructed.

When state law makes no provision for the use of court-appointed experts, and there is a related case pending in federal court (see § 1.5, *infra*), coordination with a court-appointed expert in that case may be helpful.

For an extensive discussion of the various aspects of using court-appointed experts, see the following publications of the Federal Judicial Center: Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil & Dean Miletich, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials* (2002); Laural L. Hooper, Joe S. Cecil & Thomas E. Willging, *Neutral Science Panels: Two Examples of Panels of Court-Appointed Experts in the Breast Implants Product Liability Litigation* (2001); Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706* (1993); Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts* (1986). For the Federal Judicial Center publications catalog, go to www.fjc.gov.

For further discussion, see also *Manual for Complex Litigation, Fourth*, §§ 11.483 (Court-Appointed Experts), 11.51 (Court-Appointed Experts and Technical Advisors), 22.87 (Experts and Scientific Evidence), and 23.344 (Discovery of Court-Appointed Experts).

§ 1.5 Related Litigation

Counsel should be directed to inform the court, as early in the litigation as possible, of all related cases that are pending or may be filed in any court. The judge should also ask, at the initial case management conference, whether there are any related cases.

When the related cases are in the same court:

- ☐ They should be assigned to the same judge, at least initially, to determine whether they should be consolidated after considering:
 - The extent to which the cases involve the same parties, issues, and evidence;

- Whether consolidation will save time and money for the court and the parties without undue prejudice to any party;
 - Whether any party opposes consolidation;
 - Whether trying the cases together may confuse the jury;
 - Whether there is a possibility that the results reached in the cases will conflict if they are tried separately; and
 - Whether the cases will be ready for trial at the same time.
- ☐ The judge may then order the consolidation of the pretrial proceedings in these cases, including discovery proceedings, to avoid conflicts and duplication. At a later point in the litigation, the court, with the input of counsel, should determine whether:
- The cases should be consolidated for all purposes, so that they become a single case in which a single verdict and judgment will be issued for all parties on all issues; or
 - The cases should be consolidated with respect to the trial of specified issues only to avoid duplication of evidence on those issues and where the evidence presented on the common issues will apply to each case; the other issues particular to each case will be tried separately; and a separate verdict and judgment will be issued in each case.

(Note: Whether consolidation for trial is desirable depends largely on the identity of the primary issues and the amount of common evidence on these issues among the cases. Consolidated trials may confuse the jury rather than promote efficiency, unless common evidence predominates. To avoid this problem, the judge may consider severing for a joint trial those issues on which common evidence predominates and reserving the issues that are not common for subsequent individual trials. For example, in mass tort litigation, liability issues could be consolidated for joint trial and damage issues reserved for later individual trials. If most of the proof will be common, but some evidence admissible in one case should not be heard in others, the judge may consider a multiple-jury format. Cases with major conflicts between the basic trial positions of the parties should not be consolidated. Consolidation is also inappropriate if it will enlarge the dimensions of the litigation.)

When the related cases are in other courts in the same state, the judge should determine whether the cases should be coordinated after considering:

- ☐ Whether common questions of fact or law predominate;
- ☐ The convenience of parties, witnesses, and counsel;
- ☐ The relative development of the actions;
- ☐ The efficient utilization of court facilities and personnel;
- ☐ The courts' calendars;
- ☐ The disadvantages of duplicate and inconsistent rulings, orders, or judgments; and
- ☐ The likelihood of settlement of the actions without further litigation if coordination is denied.

When cases are coordinated, the judge may:

- ☐ Order the separate trial of any issue or defense;
- ☐ Conduct hearings at various sites in the interest of convenience; and
- ☐ Sever cases or claims from the coordinated proceedings and transfer them back to their original venue.

(Note: For a detailed discussion of coordination, see Mark Herrmann, Geoffrey Ritts & Katherine Larson, *Statewide Coordinated Proceedings: State Court Analogues to the Federal MDL Process*, 2d (Thomson West, 2004) (west.thomson.com), and California Judicial Council, *Handbook on Coordination of Civil Actions* (2000) (courtinfo.ca.gov).)

When the related cases are in different state courts:

- ☐ Determine whether the court has personal jurisdiction over all parties, as well as venue over all causes of action;
- ☐ Establish an appropriate means to communicate with the judges presiding over related cases in other venues to discuss management issues;
- ☐ If each court has jurisdiction, consider whether jurisdiction should be yielded to a particular court under the inconvenient forum doctrine or applicable rule/statute; and
- ☐ When filing all cases in a single court is not possible or warranted, consider using informal means to coordinate proceedings in these cases with the cooperation of all judges and counsel involved:
 - To the extent possible;
 - To reduce duplication of effort and potential conflicts; and
 - To coordinate and share resources.

(Note: At a minimum, the judges involved should exchange information and copies of orders they have entered that might affect proceedings in the other courts.)

When the related cases are in federal court:

- ☐ Determine whether the state court action will be removed to federal court;

(Note: Increasingly, complex litigation involves related cases brought in both federal and state courts and often involves a mass tort. It may involve numerous claims arising from a single event that is confined to a single location, such as a plane crash or a hotel fire. Other cases arise from widespread exposure to allegedly harmful products or substances dispersed over time and place. No single forum has exclusive jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. The Judicial Panel on Multidistrict Litigation (MDL) has no power over cases pending in state courts but has facilitated coordination by transferring federal cases to a district where related cases are pending in the state courts.)

- ☐ Consider issuing a stay of the state court action until the federal court action is resolved;
- ☐ Coordinate and share resources;
- ☐ Cooperate with the federal court judge to coordinate discovery and other pretrial proceedings by:
 - Exchanging case management plans or orders, master pleadings, and discovery plans;
 - Considering the joint appointment of lead or liaison counsel to coordinate activities between the courts (*see* §1.2, *supra*);
 - Jointly appointing a special master or expert to assist both courts with specified aspects of the litigation (*see* §§ 1.3, 1.4, *supra*);
 - Minimizing duplicative discovery activity, including consolidating the depositions of experts who will testify in both cases, ordering coordinated document production, maintaining a document depository, and coordinating rulings on discovery disputes (*see* §§ 3.2, 3.4, and 3.5, *infra*); and
 - Holding joint *Daubert* or *Frye* hearings (*see* § 4.4, *infra*).

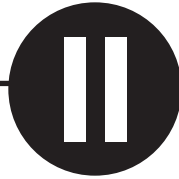
(*Note:* For a discussion of how these joint hearings were used successfully, *see* Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience*, 54 Drake L. Rev. 721 (Spring 2006) (law.drake.edu).)

- ☐ Resolve how the attorneys in the state court action who cooperate with federal MDL attorneys will be compensated;
- ☐ Attorneys should be encouraged to resolve fee disputes among themselves and to seek judicial intervention only if necessary; and
- ☐ The federal and state judges may enter orders establishing rates of compensation for attorneys who settle their cases using coordinated state-federal discovery.

(*Note:* For further discussion of coordinating state and federal court proceedings, see the following publications of the Federal Judicial Center: *Manual for Cooperation Between State and Federal Courts* (1997); and William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts* (1992). For the Federal Judicial Center publications catalog, *see* www.fjc.gov.)

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 10.123 (Related Litigation), 10.225 (Related Litigation), 11.455 (Coordination with Related Litigation), 11.631 (Consolidation), 22.4 (Multiple Filings in State and Federal Courts), and 40.51 (Coordinating Proceedings in Different Courts), and Chapter 20 (Multiple Jurisdiction Litigation).





CASE MANAGEMENT CONFERENCES



§ 2.1 Scheduling Initial Conference

Case management (or pretrial) conferences are the judge's primary means of establishing and maintaining control over a complex case.

To establish control at the outset of the litigation, the judge should:

- ❑ Hold an initial case management conference as early in the case as practical;
 - Refer to court rules that may specify the time for holding the conference;
 - Consider the advisability of holding the initial conference even before all parties have appeared or been served, i.e., within 30 to 60 days after the complaint is filed, but give counsel sufficient time to become familiar with the case and prepare for the conference;
 - Schedule the conference before any adversary activity begins, e.g., motions or discovery requests, and consider providing in the order setting the conference that this activity must be deferred until after the conference; and
- ❑ In the order scheduling the conference, the judge may wish to:
 - Require counsel to meet and confer before the conference to discuss claims and defenses, a plan for disclosure and discovery, any stipulations, and possible settlement, if appropriate;
 - List the matters the judge intends to address at the conference and require counsel to be prepared to discuss these matters (*see* § 2.3, *infra*);
 - Invite counsel to suggest other matters they would like the judge to address at the conference;
 - Direct counsel to submit a statement (jointly, if possible) that identifies agenda items, specifies disputed issues, and includes a brief statement of the case;
 - Direct counsel to submit proposed schedules for conducting the litigation, including a discovery plan (*see* § 3.1, *infra*); and
 - Direct counsel to provide information about any related litigation pending in this court or any other court(s) (*see* § 1.5, *supra*).

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 10.11 (Early Identification and Control), 11.11 (Scheduling the Initial Conference), 11.21 (Initial Conference and Orders), and 40.1 (Order Setting Initial Conference).

§ 2.2 Attendance at Conference

All attorneys and unrepresented parties should be required to attend the initial case management conference (consider suggesting counsel invite clients). This conference is the judge's first opportunity to meet the attorneys and parties, hear their views of the factual and legal issues, and obtain their input regarding a case management plan.

Whether attendance should be required at subsequent conferences will depend upon the purpose of the conference. Costs can be reduced by not requiring attorneys to attend subsequent conferences, in person, when their clients do not have a substantial interest in the matters to be discussed or their clients' interests will be fully represented by designated counsel. Alternatively, attendance by video or telephone conference may be appropriate.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 11.21 (Initial Conference and Orders) and 11.23 (Attendance).

§ 2.3 Matters to Cover at Conference

The principal objective of the initial case management conference is to develop a case management plan that will guide the course of the litigation. To develop this plan, the judge and counsel should consider the following matters.

Parties and Pleadings:

- ☐ Have all parties been served and appeared?
 - If not, set deadlines for service;
 - Or, consider dismissing or severing unserved parties.
- ☐ Have any parties been dismissed?
- ☐ Are essential parties missing?
- ☐ Will any other parties be added?
 - Set deadlines for amending pleadings to add these parties and for service on these parties;
 - Or, set a deadline for filing and service of motion for joinder.
- ☐ Will any additional pleadings be filed?
 - Set deadlines for filing and service.
- ☐ Will any pleadings be amended?

(Note: Any amendments may depend upon the results of discovery.)

 - Set deadlines for filing and service.
- ☐ Will any pre-answer motions be filed?

Counsel:

- ☐ Should lead and liaison counsel be appointed? *See* § 1.2, *supra*.
- ☐ What is the best way of communicating with counsel, e.g., by e-mail, or a website for the case or party?

Jurisdictional Matters:

- ☐ Are there any matters, such as a party's bankruptcy, which might affect the court's jurisdiction over the case?

Issues:

- ☐ What are the primary factual and legal issues?
 - Ask for specific information about the parties' claims and defenses;
 - Require the attorneys to describe the material facts they intend to prove and how they intend to prove them;
 - Obtain stipulations as to matters that are not genuinely in dispute; and
 - Encourage voluntary dismissal of tenuous claims or defenses after probing into the likelihood of success and the potential disadvantages of pursuing them.
- ☐ What amount of damages is claimed?
 - How will damages be proved?
 - How have damages been computed?
- ☐ What other relief is sought?

Motions:

- ☐ What motions are anticipated?
- ☐ Are there any motions that should be heard before other motions (i.e., because determination of a particular motion might preclude the need for other motions)?
- ☐ Are there any motions that should be heard and determined at the same time?
- ☐ Should the time for filing and service of any motion be shortened or extended?

Discovery:

- ☐ What is the status of discovery?
- ☐ What further discovery is anticipated?
- ☐ How will the parties approach the discovery of electronically stored information? *See* § 3.3, *infra*.

- ☐ What discovery disputes are anticipated, e.g., will any protective orders be sought or privileges asserted? *See* § 3.6, *infra*.
- ☐ Should a special master be appointed to supervise all discovery or specified discovery issues and disputes? *See* § 1.3, *supra*.
- ☐ Should the judge enter an order requiring the parties to preserve and retain documents, files, data, and records that may be relevant to the case? *See* § 3.3, *infra*.

(*Note:* Because a preservation order may interfere with the parties' normal business operations and impose unforeseen burdens, the judge should discuss with counsel the need for such an order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant evidence without imposing undue burdens. For further discussion, *see Manual for Complex Litigation, Fourth*, § 11.442 (Preservation).)

- ☐ Should a central document depository be created for the case? *See* § 3.2, *infra*.
- ☐ Should a uniform numbering system for documents be required? *See* § 3.2, *infra*.
- ☐ Will the parties agree to informal discovery and other cost-reduction measures? *See* § 3.2, *infra*.
- ☐ Should discovery be conducted in a particular sequence? *See* § 3.4, *infra*.
- ☐ Should any limitations be imposed on discovery? *See* § 3.4, *infra*.

Alternative Dispute Resolution (ADR):

- ☐ Are the parties willing to participate in ADR?
- ☐ What type of ADR is appropriate?

Settlement:

- ☐ Have any settlement discussions occurred, or have any settlement offers or demands been made?
- ☐ Are the parties willing to discuss settlement now?
- ☐ Are the parties willing to participate in an early settlement conference?
- ☐ What other steps might be taken to facilitate settlement, if appropriate? *See* p. 53, *infra*, for limits on judges encouraging settlement.

Related cases:

- ☐ Are there any related cases pending in this court or another court that should be consolidated or coordinated with this case? *See* § 1.5, *supra*.

Bifurcation or severance:

- ☐ Should consideration be given to bifurcating (or trifurcating) the trial of the case, i.e., to try issues separately, specified defenses first, or the issue of liability before the issue of damages?
- ☐ Should consideration be given to severing any claims, e.g., a cross-complaint that is not ready to be set for trial or claims that are required to be arbitrated?

(*Note:* Severance of certain issues for separate trial can reduce the length of the trial, particularly if determination of the severed issue may resolve the entire case or improve the jury's comprehension of the other issues and related evidence. Disadvantages, however, may include increased cost, delay, inconvenience (e.g., if the same witnesses may be needed to testify at both trials), and potential for unfairness if the result is to prevent a party from presenting a coherent case to the jury. For further discussion, see *Manual for Complex Litigation, Fourth*, § 11.632 (Separate Trials).)

Trial:

- ☐ When to set trial (after completing discovery)?
- ☐ When do the parties anticipate the case will be ready for trial?
- ☐ Are there any dates on which the parties or attorneys will not be available for trial?
- ☐ What is the estimated length of the trial?
- ☐ Is a jury trial requested?

(*Note:* As a case management tool, some judges advise counsel that each side will have a reasonable time for presenting its case; ask counsel to estimate the time needed for each witness; and impose a time limit. Although such an action may seem Draconian, it can be effective to force each side to hone its case and think through with great clarity what the real issues are and how its case can be presented at trial in its most cogent form. Such an action may also be effective to encourage meaningful settlement discussions.)

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 11.12 (Interim Measures), 11.211 (Case-Management Plan), 11.214 (Settlement), 11.33 (Identifying, Defining, and Resolving Issues), 22.631 (Adding Parties), 22.632 (Pleadings and Motions), 22.634 (Issue Identification and Development), 22.635 (Electronic Communications), and 23.32 (The Initial Conference).

§ 2.4 Case Management Order

At the conclusion of the initial case management conference, the judge should enter a case management order that sets a schedule for subsequent proceedings and otherwise provides for management of the case. This order will control the subsequent course of the case unless it is modified by a subsequent order.

The order should memorialize all rulings, agreements, or other actions taken at the conference and include the following provisions, as appropriate:

- ☐ A schedule for discovery (*see* § 3.1);

(*Note:* The judge should construct a discovery plan for the case after identifying the primary issues, at least preliminarily, based upon the pleadings and the parties' positions at the initial case management conference. Discovery may then provide information for further defining and narrowing issues, which may lead to revision and refinement of the discovery plan and case management order.)

- ☐ Referral of the case to mediation or other appropriate form of ADR, and set the date for completion of this process;

(*Note:* The Federal Judicial Center's *Guide to Judicial Management of Cases in ADR* (2001) discusses various ADR processes and how to use them. For the Federal Judicial Center publications catalog, *see* www.fjc.gov.)

- ☐ The trial date or when it will be set;
- ☐ Whether the trial will be a jury trial or a nonjury trial;
- ☐ The estimated length of the trial;
- ☐ Whether all parties have been served or have appeared;
- ☐ The dismissal or severance from the action of the unserved or non-appearing defendants;
- ☐ Deadlines for joining any additional parties, amending pleadings, and filing motions;
- ☐ The date, time, and place of any settlement conference; and
- ☐ The date, time, and place of the next case management conference (*see* § 2.5, *infra*).

(*Note:* Some judges do not issue a formal case management order; instead, they manage complex cases by holding frequent case management conferences. Other judges may issue a limited case management order, i.e., an order that merely sets out the schedule for commencing discovery and leaves further matters for subsequent case management conferences. If the court does not set the trial date early on, it should project the time when the trial, if needed, may be held (e.g., in March a year from date of order).)

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 11.211 (Case-Management Plan), 11.212 (Scheduling Order), 11.31 (Relationship to Discovery), 11.32 (Pleading and Motion Practice), 22.6 (Case-Management Orders), 22.61 (Initial Orders), 40.2 (Sample Case-Management Orders), 40.3 (Order Creating a Web Site), and 40.52 (Mass Tort Case-Management Order).

§ 2.5 Holding Subsequent Conferences

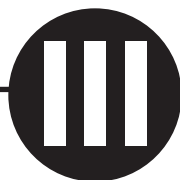
A judge should hold periodic case management conferences to:

- ☐ Monitor the progress of the case, including the parties' compliance with deadlines for completing discovery and other procedures that are contained in the existing case management order.
- ☐ Resolve any problems the parties are having in adhering to the schedule set forth in the case management order.
- ☐ Become familiar with the disputed issues in the case as they are clarified through discovery.
- ☐ Address any unanticipated events in the case, such as the belated addition of any new parties, newly discovered evidence, or a change in the law affecting a material issue in the case.
- ☐ Explore possible settlement.
- ☐ Determine whether any change in the trial setting/date is warranted.

(Note: Some judges schedule conferences at regular and frequent intervals (e.g., every two to three months); other judges schedule conferences only as the need arises. An agenda for the conference may be helpful – composed of items suggested by the parties or designated by the judge.)

For further discussion, see *Manual for Complex Litigation, Fourth*, § 11.22 (Subsequent Conferences).





DISCOVERY



§ 3.1 Establishing Schedule for Discovery

As early in the case as possible, the judge and counsel should establish a specific schedule and deadlines for discovery. This schedule should be made part of the case management order. *See* § 2.4, *supra*.

Depending upon the circumstances, the schedule may:

- ☐ Prescribe the sequence for particular types of discovery, i.e., interrogatories may be used to identify needed discovery and documents, followed by requests for production of documents, depositions, and finally requests for admission.
- ☐ Allow a party to vary the order for good cause, i.e., to take the deposition of a witness in ill health or of a witness who is about to leave the jurisdiction. The order should be flexible enough, so the parties do not have to go to court at all. Most judges will approve the parties' stipulations regarding discovery, but the parties should keep the judge informed about the status of discovery.
- ☐ Require initial discovery on matters (witnesses, documents, or information) that:
 - Appear pivotal and may make other discovery unnecessary or provide leads for further necessary discovery;
 - Might facilitate settlement negotiations; or
 - Might provide the foundation for a motion that will resolve the case.
- ☐ Set a discovery cut-off date by which all depositions must be completed and all discovery responses served.

(*Note:* The judge should monitor compliance with the discovery schedule at periodic case management conferences. *See* § 2.5, *supra*. Some judges require informal, status reports from counsel, by letter, telephone, or e-mail.)

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 11.41 (Relationship to Issues), 11.42 (Planning and Control), 11.421 (Discovery Plan/Scheduling Conference), and 40.24 (Scheduling Order).

§ 3.2 Designating Discovery Procedures

Managing discovery in complex cases may require special procedures, including the following:

Informal discovery:

- ☐ The judge should encourage the parties to exchange information informally, particularly relevant documents.

Information from other sources:

- ☐ When information is available from public records or other litigation, or from discovery conducted by others in the same litigation, the judge should consider requiring the parties to review those materials before undertaking additional discovery and limiting the parties to supplemental discovery.

Joint discovery requests and responses:

- ☐ The judge may consider requiring parties with similar positions to submit a combined set of interrogatories, requests for production, or requests for admission.
- ☐ If voluminous materials are to be produced in response to a discovery request, the judge may relieve the responding party of the requirement of furnishing copies to each discovering party and, instead, (1) require the parties to share copies to save costs, and/or (2) require the parties to open and maintain a document depository for the case (*see* “Document depository,” below).

Numbering system for documents:

- ☐ The judge may require the parties to use a uniform numbering system for documents, so they can be accessed and retrieved more readily.
- ☐ To reduce the risk of confusion, each document should be assigned a single identifying designation for use by all parties for all purposes throughout the case, including at depositions and trial. Parties must agree to the identifying designation for all documents.
- ☐ Consecutive numbering is usually the most practical method, with blocks of numbers assigned to each party in advance. This makes the source of each document immediately apparent.
- ☐ To avoid later disputes, the judge may encourage the parties to maintain a log of each document that is produced that indicates by whom the document was produced; to whom it was produced; and on what date it was produced.

(*Note:* Creating a log can take an enormous amount of time, so it may not be appropriate for all cases. When the parties believe a log would be useful, they should agree on the format. The log will normally be kept at the document depository.)

- ☐ The judge may order an identification system for electronically stored information that complements or integrates with the system adopted for paper documents. *See* § 3.3, *infra*.

Document depository:

- ☐ A document depository can promote efficient and economical management of voluminous documents in multiparty litigation and is frequently used in complex cases.

(*Note:* In most cases, the document depository will be electronic, but in other cases, e.g., construction defect cases involving architectural plans, the document depository may consist of documents in paper form.)

- ☐ A document depository can facilitate a determination of which documents have been produced and what information is in them.
- ☐ It can help ensure that newly joined parties have access to the product of prior discovery and hold demands for additional discovery to a minimum.
- ☐ Before ordering or approving a document depository, the judge should determine that the substantial cost of establishing and maintaining a depository is justified by the anticipated savings and other benefits.
- ☐ The judge's order establishing a document depository for the case may require the production of all discovery materials in common, computer-readable format, when these materials can be reasonably and cost-efficiently produced in this format; the order may also require that these materials be made available through a secure Internet website or some other means agreeable to the parties. This substantially reduces the expense and burden of document production and inspection.
- ☐ In consultation with counsel, the judge should allocate costs fairly among the parties, taking into account their resources, the extent of their use of the depository, and the benefit they derive from it.
- ☐ To ensure fair access, the judge may consider special arrangements for less affluent or technologically sophisticated parties.
- ☐ The judge should direct counsel to collaborate in establishing procedures for acquiring, formatting, numbering, indexing, and maintaining discovery materials; the judge should also direct counsel to decide when and by whom documents may be accessed for examination or copying.
- ☐ The judge should direct that discovery material be submitted to the depository in computer-readable format, unless impossible or impracticable. Paper documents should be imaged or scanned if at all possible.
- ☐ The judge and counsel may agree on a computer service provider to administer the depository. The depository should be at a neutral site with regulated access.
- ☐ The judge and counsel should determine what will happen to the depository once the case is resolved.

Interrogatories:

- ☐ The judge should consider requiring similarly situated parties to confer and develop a single or master set of interrogatories to be served on an opposing party.
- ☐ When interrogatories have already been served by a party, the judge should prohibit the other parties from asking the same questions since any party may use the answers to interrogatories served by another regardless of who propounded the interrogatory(ies).
- ☐ If some questions will require substantially more investigation than others, counsel may stipulate that the responding party will provide answers in stages as the information is obtained instead of seeking additional time for the first response.

- ❑ When interrogatories seek information that the responding party lacks or can obtain only with a significant expenditure of time and money, and the information can be provided in a different form, that party should advise the opposing party of such an attempt to reach an agreement on an acceptable form of response rather than first objecting.
- ❑ The judge may require the parties to object to interrogatories before the expiration of the time for submitting answers. If the parties cannot resolve the objections by modifying or clarifying the interrogatories, they should present their dispute to the court in a clear and concise joint statement in which each side presents its facts and legal arguments. The judge should rule promptly to avoid disrupting the progress of the litigation. If the dispute involves one or two discrete issues that are not overly complicated, counsel should be allowed to present the dispute to the judge in a telephone conference without submitting a joint statement.
- ❑ When a party seeks discovery from an organization but does not know the identity of the individuals with relevant knowledge, the judge may permit the party to name the organization as the deponent and identify with particularity the subjects on which the party desires to examine the organization. The judge may then require the deponent to designate the person(s) to testify on these subjects. This process may avoid the need to serve interrogatories to discover the identities of knowledgeable individuals and then to depose them individually. As always, users will need to ensure that they are following their own constitutions, statutes, rules, and procedures.
- ❑ The discovery plan may schedule one or more periodic dates for review and amendment of interrogatory responses to include new information that makes any previous response incomplete or incorrect.

(Note: Some judges leave it to the parties to decide when they wish to obtain supplemental answers and schedule only one review date, e.g., 60 days before trial.)

Depositions:

- ❑ The judge should manage the litigation so as to avoid unnecessary depositions, including when appropriate, limiting the number and length of depositions (*see* § 3.4, *infra*), to ensure that the process of taking depositions is as fair and efficient as possible.

(Note: If depositions are taken in a federal Multidistrict Litigation (MDL) proceeding and there are various pending state actions, the state court judge can take steps to ensure that state counsel are given a specific amount of time to question the witnesses.)

- ❑ The judge should insist that counsel observe rules for the fair and efficient conduct of depositions, e.g., by prohibiting speaking objections and requiring that objections be stated concisely and in a non-argumentative manner. When abuses occur, the judge may:
 - Require that, in the future, depositions be videotaped for judicial review or require counsel to expeditiously deliver a copy of the transcript following each deposition for judicial review;

(Note: In complex cases, depositions are almost always videotaped anyway, so they are available to be played during the trial.)

- Direct that one or more depositions be supervised in person by a judicial officer or special master, with costs taxed to the party whose abuse required the supervision;
- Direct that future depositions be taken in the courthouse (near the judge's courtroom), so the judge can hear and rule promptly when difficulties arise; and/or

(*Note:* The judge does not need to sit through each deposition. When a problem arises, the parties may ask the judge to come in; play back the videotape; or read back the transcript; and then the judge rules on the objection.)

- Impose sanctions, including the costs associated with any motions or briefing of counsel's abuses.
- ☐ The judge may issue guidelines covering who may attend depositions, where the depositions are to be taken, who may question the witness, and how the parties are to allocate costs.
- ☐ To make depositions proceed more smoothly, the discovery plan should establish procedures for marking deposition exhibits, handling copies and originals, and exchanging in advance all documents about which the examining party intends to question the witness, except those to be used for impeachment only. The judge may order that all documents used as exhibits in depositions be assigned an exhibit number that will belong exclusively to that document in all subsequent depositions, motion hearings, and at trial. This will prevent any confusion that may arise when a document is referenced by different exhibit numbers.
- ☐ Counsel may stipulate to, or the judge may order, telephone or videoconference depositions.

(*Note:* Remote depositions are most often used for relatively brief examinations that do not involve numerous documents; they may also be used to reduce travel costs or to avoid last-minute continuances when deposition testimony unexpectedly becomes necessary.)

- ☐ To save time and costs, individuals representing an organization may be deposed at the same time.
- ☐ When there are many potential nonparty witnesses, typically eye witnesses, counsel may agree on a few representative depositions and stipulate that the testimony of other named witnesses would be the same.

(*Note:* At the initial case management conference, some judges routinely advise counsel that they are free to depose nonparty witnesses as soon as possible before memories fade or these witnesses become unavailable.)

- ☐ Costs can be controlled by:
- Limiting the number of copies of deposition transcripts, particularly if a document depository is established;
 - Waiving the requirement that the original deposition transcript be filed with the court; and

- Not requiring that transcripts be prepared of depositions that ultimately turn out to be of minimal value, if all attorneys agree.
- ☐ The judge should provide for the use of depositions against persons who may become parties to the litigation by later amendment of the pleadings or the transfer of related cases.
 - The case management order may state that the court will consider allowing all previously taken depositions to be deemed binding on new parties; however, new parties may move to show cause why these depositions should not be deemed binding on them within a specified period of time after their appearance in the case. The judge should discuss with counsel the steps they should take to notify new parties of the depositions that have been taken and whether they must provide a summary or a transcript of these depositions and, at what cost, if any.
 - The judge may limit the resumption of earlier depositions to questioning relevant to the new parties.

Stipulations:

- ☐ The judge should encourage stipulations of facts that genuinely should not be in doubt after an appropriate opportunity for discovery is afforded.
- ☐ The judge should also seek stipulations with respect to matters that affect the admissibility of evidence, such as the authenticity of documents and the foundation requirements for exceptions to the hearsay rule. If the parties cannot agree on whether a particular item of evidence is admissible, the judge may encourage them to submit an early in limine motion for an order admitting or excluding the evidence. *See* § 4.3, *infra*.
- ☐ The judge should remind the parties of the tactical disadvantages of contesting at trial matters on which their opponents will certainly prevail, or of being confronted at trial with an earlier denial of a matter that could not have been fairly disputed.
- ☐ The judge may consider appointing a special master to assist the parties in arriving at stipulations. *See* § 1.3, *supra*, and *Manual for Complex Litigation, Fourth*, § 10.14 (Supervisory Referrals to Magistrate Judges and Special Masters).

Requests for admission:

- ☐ The judge should encourage the use of requests for admissions.
- ☐ The judge should emphasize to the parties their obligation to respond in good faith and the financial consequences of failing to do so.
- ☐ The judge should remind them that they may not deny a requested admission on the basis of a trivial disagreement with a statement or without indicating the portions of the statement that are true. The judge may point out the availability of sanctions for a failure to do so, which may include the attorneys' fees the opposing party incurred to prove the facts that were denied.

Early fact sheets:

- ☐ The judge may consider requiring counsel for the plaintiff(s) to submit early fact sheets to help streamline the litigation.

(Note: Early fact sheets may be of critical importance in mass tort cases, which can potentially involve hundreds of plaintiffs.)

- ☐ Among other matters, the fact sheets should provide each plaintiff's name and location, date(s) of injuries, nature of injuries, names of treating physicians, and basic facts about the plaintiff's claim.
- ☐ The judge may consider whether and to what extent the judge might use a special master to assist the judge in managing discovery. See § 1.3, *supra*, and *Manual for Complex Litigation, Fourth*, § 10.14 (Supervisory Referrals to Magistrate Judges and Special Masters).

(Note: Some judges rely heavily on the use of special masters, while other judges prefer to manage all aspects of the litigation themselves, including discovery. In some jurisdictions, a special master can be used only if the parties consent.)

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 11.423 (Other Practices to Save Time and Expense), 11.44 (Documents), 11.45 (Depositions), 11.46 (Interrogatories), 11.47 (Stipulations of Fact/Requests for Admission), 34.25 (Centralized Document Management), 40.261 (Order to Meet and Confer to Establish Joint Document Depository), and 40.262 (Order to Establish Separate Document Depositories).

§ 3.3 Managing Discovery of Electronically Stored Information

Managing the discovery of electronically stored information (ESI) in complex cases will generally require special procedures. The judge should encourage the parties to work together, particularly in connection with the completion of ESI discovery. No party should be permitted to use ESI discovery to harass or unnecessarily burden an opposing party, or to increase the costs of the litigation.

(Note: ESI includes e-mails, word processing files, databases, spreadsheets, and web pages. It includes current, back-up, archival, and legacy computer files, as well as metadata, which is the information embedded in an electronic file about that file, such as the date of its creation, author, source, and history. It also includes magnetic disks (such as computer hard drives and floppy disks), optical disks (such as DVDs and CDs), flash memory (such as "thumb" or "flash" drives), printers, fax machines, voicemail systems, instant messaging systems, personal digital assistants, cellular telephones, and pagers.)

Issues unique to the discovery of ESI, which are covered in this section, include:

- ☐ Its scope:

(Note: The volume and multiple sources of ESI may lead to disputes about the scope and cost of discovery. See "Scope of discovery of ESI," *infra*. Data privacy issues may also arise, e.g., with respect to medical or human resources records or personal e-mail, or regarding company data that is subject to privacy laws in other countries.)

- ☐ The form in which ESI is produced, e.g., in native format or some other form designated by the requesting party (see "Form of production of ESI," *infra*);

- ❑ Whether the costs of production should be shifted from the producing to the requesting parties or otherwise allocated between the parties (*see* “Shifting costs of producing ESI,” *infra*);
- ❑ Whether inadvertent production of ESI will lead to the waiver of the attorney-client privilege or work-product protection; and

(*Note:* The volume and multiple sources of ESI may make the review to identify and segregate privileged information more difficult, increasing the likelihood of its inadvertent production. As a result, the court should be open to the “claw back” of inadvertently produced privileged documents. *See* “Waiver of privilege or work-product protection,” *infra*. Other factors that may contribute to the problem are the use of “tracked changes,” reviewer’s comments, and other program features, and the production of certain metadata fields (e.g., file path).)

- ❑ The preservation of ESI.

(*Note:* The obligation to preserve ESI requires reasonable and good faith efforts to retain information that may be relevant to the case. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant ESI. The dynamic, changeable, and ephemeral nature of ESI typically makes it necessary for a party to take proactive steps to preserve information that may be discoverable. Accordingly, preservation of ESI should be addressed at the initial case management conference or as soon as it is clear that the case involves ESI. *See* “Preservation of ESI,” *infra*.)

General considerations:

- ❑ The judge should encourage the parties to discuss the scope of proposed discovery of ESI early in the case, particularly any discovery of ESI beyond what is available to the responding parties in the ordinary course of their business. This discussion should include:

- What information each party has in electronic form and where that information is located;

(*Note:* This may include identifying ESI systems that are likely to have relevant information and providing a general description of each system, including the nature, scope, character, organization, and formats employed in each system. The parties should also provide pertinent information about their ESI and should indicate whether the accessibility of any of this information is limited, e.g., because it is subject to destruction in the routine course of business, its retrieval may be very costly, or it is stored on media, systems, or formats that are no longer in use.)

- The identity of individuals who are most knowledgeable about the parties’ ESI systems and who can facilitate the location and identification of discoverable ESI;

(*Note:* To facilitate discovery, the judge may require each party to designate a single individual through whom all ESI discovery requests and responses will be made. This individual will generally be a party’s employee or an attorney. In some cases, the party may wish to designate a third-party consultant. He or she must be: (1) familiar with the party’s ESI systems and capabilities in order to explain these systems and answer relevant questions; (2) knowledgeable about the technical aspects of ESI discovery, including electronic document storage, organization, and format issues; (3) prepared to participate in ESI discovery dispute resolutions; and (4) responsible for organizing the party’s ESI discovery efforts to ensure consistency and thoroughness.)

- Any nonparties from whom discovery of ESI will be sought;
 - The method of search, and the words, terms, and phrases to be searched, as well as time frames, fields, and document types of searches if the parties intend to employ an electronic search to locate relevant ESI;
 - The anticipated schedule for production of ESI and the form of that production;
 - The difficulty and cost of producing the information and reallocation of costs, if appropriate;
 - The responsibilities of each party to preserve ESI; and
 - Agreements about privilege or work-product protection for ESI (e.g., a possible “claw back” or “quick peek” agreement, or an agreement on the scope, form, or content of privilege logs).
- ☐ To allow formulation of a realistic electronic discovery plan, the judge should require:
- The requesting parties identify the ESI they need as narrowly and precisely as possible; and
 - The responding parties be forthcoming and explicit in identifying what ESI is available from what sources.
- ☐ The judge should discourage costly, speculative, duplicative, or unduly burdensome discovery of ESI by exercising the judge’s authority to limit or modify the extent of otherwise allowable discovery when the burdens outweigh the likely benefits.

Scope of discovery of ESI:

- ☐ Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Given the unique nature and large and growing volume of ESI, relevant costs include the costs of data preservation, retrieval, review, and production, as well as the possible costs associated with the disruption of routine business processes.

(Note: For further discussion of this issue, see The Sedona Conference, *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2007), Section 2b (www.thesedonaconference.org).)

- ☐ To keep the scope of discovery reasonable, the judge should consider allowing the producing party to do the following:
- Collect ESI from key individuals rather than searching broadly through large electronic systems;
 - Limit the number of custodians from which ESI must be collected and produced; and
 - Use electronic tools and processes, such as sampling, search terms, and date restrictions to identify relevant information.

(Note: For further discussion, see *The Sedona Principles, supra*, Sections 6b and 11.)

- ❑ Assuming the requested information is relevant to the claims or defenses, or the subject matter of the litigation, and is not subject to a claim of privilege or protection, requests for the production of active data available to the responding party in the ordinary course of business should generally be approved.

(Note: Active electronic records are generally those currently being created, received, or processed, or that need to be accessed frequently or quickly.)

- ❑ When hard-to-access information is of potential interest, the judge should encourage the attorneys to negotiate a two-tiered approach in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the less accessible sources.

(Note: These sources may include metadata. They may also include systems data, which refers to computer records regarding the computer's use, such as when users logged on and off the computer or network, the applications and passwords they used, web sites they visited, and the documents they printed or faxed. Other types of data are even more removed from what is available in the ordinary course of business and may involve substantial cost and time, as well as active intervention by computer specialists. These types of data include offline archival media; backup tapes designed for restoring computer systems in the event of disaster deleted files; and legacy data that were created on now-obsolete computer systems with obsolete operating systems and computer software. Even active data may involve substantial burdens to produce, e.g., when vast amounts are requested or when data are requested in a form that requires the reprogramming of databases.)

- ❑ The requesting party may need discovery to test the responding party's assertion that the requested information is not reasonably accessible, which may include:
 - Taking depositions of those knowledgeable about the responding party's information systems;
 - Inspection of the data sources; and
 - Requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible.

(Note: Sampling of the less-accessible source can help refine the search parameters and determine the benefits and burdens associated with a broader search.)

- ❑ The judge should order production of ESI that is not reasonably accessible only if the requesting party has made a showing of need and relevance that outweigh the costs and burdens. *See The Sedona Principles, supra*, Section 8. To determine whether such an order is warranted, the judge should require the requesting party make a specific and tailored discovery request and may order:
 - The parties to examine the information that is available from reasonably accessible sources before requiring discovery into sources that are identified as not reasonably accessible;
 - Sampling of the sources identified as not reasonably accessible to assess the costs and burdens of production and the likelihood of finding responsive information and its usefulness to the litigation;

- Limited discovery into the costs and burdens of accessing the information from the sources identified as not reasonably accessible and into the basis for believing that they do or do not contain information likely to be important to the case and not available from other accessible sources, which may include deposing the responding party's computer system personnel; and
- The requesting party to pay all or part of the reasonable costs of producing the information from sources identified as not reasonably accessible.

Form of production of ESI:

- ☐ The judge should encourage the parties to discuss the issues of production forms early in the litigation, preferably before any production, to avoid the waste and duplication of producing the same data in different formats.
- The relatively inexpensive production of computer-readable images may be sufficient for the vast majority of requested ESI.

(*Note: ESI may be produced as a TIFF (tagged image file format) or PDF (portable document format) file, which is essentially a photograph of an electronic document. These forms of electronic production can be coupled with additional linked electronic information about each document that readily allows the documents to be searched and reviewed in an electronic database.*)
- Dynamic data may need to be produced in native format (i.e., the form in which the data was created and is used in the normal course of operations), or in a modified format in which the integrity of the data can be maintained while the data can be manipulated for analysis.
- If raw data are produced, appropriate applications, file structures, manuals, and other tools necessary for the proper translation and use of the data must be provided.
- ☐ In resolving disputes over the form of production, the judge should consider:
 - What alternatives are available?
 - What are the benefits and drawbacks for the requesting and responding parties?
 - If the responding party is not producing information in a form in which it is ordinarily maintained, is the party producing it in a form that is reasonably usable to the requesting party?
 - If the requesting party disputes that the proposed form of production is reasonably usable, what limits its use?
 - Has the responding party stripped features such as search features or embedded data that may be important and, if so, what is the claimed justification?

Shifting costs of producing ESI:

- ☐ The usual rules for allocating the costs of discovery generally apply when the ESI is in a reasonably accessible format.
- ☐ When the ESI is not available from reasonably accessible sources, the judge may shift at least some of the production costs from the producing party to the requesting party after considering:

- The extent to which the discovery request is specifically tailored to discover relevant information;
- Whether this information is available from other sources;
- The total cost of production compared to the amount in controversy;
- The total cost of production compared to the resources available to each party;
- How best to provide incentives to each party to control costs;
- The importance of the issues at stake in the litigation; and
- The relative benefits to the requesting party of obtaining the information.

Waiver of privilege or work-product protection:

- ❑ Because broad database searches may be necessary, safeguards against exposing confidential or irrelevant data to the opponent's scrutiny are necessary.

- Fear of the consequences of inadvertent waiver of privilege may add cost and delay to the discovery process for all parties by requiring the responding party to screen vast quantities of ESI for privilege before production.
- Inadvertent disclosure of privileged or protected material during production is a substantial risk that persists even if expensive and time-consuming steps are taken to identify and segregate it.
- To address this risk, the judge should consider encouraging the parties to enter into a "claw back" agreement, under which they typically review the material for privilege or protection before it is produced, but agree to a procedure for returning privileged or protected information that is inadvertently produced within a reasonable time from its discovery without any waiver of applicable privileges.

(*Note:* The judge may include the parties' "claw back" agreement in the case management order (*see* § 2.4, *supra*) or in a separate order. For example, it is quite common to include a "claw back" provision in a protective order or confidentiality stipulation. Entry of the "claw back" order by the court generally affords the parties greater protection of their privileged information and minimizes the risk that third parties will be able to claim a privilege waiver for inadvertently produced privileged information.)

- In rare circumstances, for example, when the volume of ESI is large and the value of the case is small, the judge should consider encouraging counsel to enter into a "quick peek" agreement. With a "quick peek" agreement, the responding party provides the requested material without a thorough review for privilege or protection with the explicit understanding that its production does not waive any privilege or protection. The requesting party then designates the specific documents it would like produced and the responding party has the opportunity to review these documents and withhold those that are privileged or protected.

(Note: “Quick peek” agreements may be viable when large volumes of records are produced that are likely to contain little or no privileged information or when any disclosure of privileged information is likely to be harmless to the producing party. Often, though, these agreements are problematic and understandably tend to be viewed skeptically by parties and counsel because of the problem of possible waiver privilege in related proceedings and because it can be difficult to “un-ring the bell” once the opposing party has seen a party’s privileged documents.)

- ❑ In determining whether a party has waived the attorney-client privilege due to an inadvertent disclosure of attorney-work product or other privileged ESI, the judge should consider:
 - The total volume of information produced by the responding party;
 - The amount of privileged information disclosed;
 - The reasonableness of the precautions taken to prevent inadvertent disclosure of privileged information, including the time and resources reasonably available to the responding party to screen the requested material given the amount in controversy in the case;
 - The promptness of the actions taken to notify the receiving party and otherwise remedy the error; and
 - Counsel’s reasonable expectations and any agreements entered into when the information was exchanged with counsel or other entities.
- ❑ The usual practice for testing an assertion of privilege is an in camera inspection of the material by the judge. In cases involving ESI, the judge may consider whether the sheer volume of information requires new methods of review, such as sampling or the use of a special master.

Preservation of ESI:

- ❑ Generally, each party has the responsibility to preserve relevant ESI. The judge should not issue a preservation order defining the scope of a party’s preservation obligation, unless the party requesting the order can demonstrate its necessity. *See The Sedona Conference, The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2007), Section 5f (www.thesedonaconference.org).
- ❑ In some cases, a preservation order may aid the discovery process by helping the parties to define the specific scope of their preservation obligations.
- ❑ The judge should discuss with counsel the possible need for a preservation order at the first conference at which ESI is addressed and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant ESI without imposing undue burdens.
- ❑ In crafting such an order, it is important to know from the responding party what data-management systems are routinely used, the volume of data affected, and the costs and technical feasibility of implementing the order. The parties should meet and confer about these issues and the overall scope of a preservation order before the judge sets the terms of the order.

- ❑ Routine system backups may preserve ESI subject to discovery, but recovery of relevant ESI from non-archival backups is costly, inefficient, and potentially disruptive. A data-preservation order that requires the accumulation of these backups beyond their usual short retention period may needlessly increase the scope and cost of discovery.
- ❑ A preservation order may cause hardship when the records are stored in data-processing systems that automatically control the period of retention. Revision of existing computer programs to provide for longer retention, even if possible, may be prohibitively expensive. The judge should consider alternatives, such as having the parties duplicate relevant data on removable media or retaining periodic backups.

Spoliation and sanctions:

- ❑ Absent exceptional circumstances, a judge should consider imposing sanctions for the destruction of ESI only if:
 - There was a duty to preserve the information at the time it was destroyed;
 - The destruction of the information was not the result of the routine, good faith operation of an ESI system, but instead was the result of a knowing or negligent violation of the duty to preserve; and
 - There is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party. Destruction of tangentially relevant information or information that has been produced from other sources does not constitute prejudice. *See The Sedona Principles, supra*, Sections 14, 14a, and 14c.

Identification system for ESI:

- ❑ The judge may order an identification system for ESI that complements or integrates with the system adopted for paper documents. *See* § 3.2, *supra*.
- ❑ At a minimum, computer tapes, disks, or files containing numerous email messages or word-processed documents should be broken down into their component documents for identification.
- ❑ Special consideration should be given to how the various elements in any databases should be identified.

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 11.423 (Other Practices to Save Time and Expense), 11.441 (Identification System), 11.442 (Preservation), 11.446 (Discovery of Computerized Data), 22.85 (Documents), 30.2 (Transactional and Economic Data, and Expert Opinion), and 32.432 (Computerized Records). Other helpful information is included in *The Sedona Principles, supra*; Barbara J. Rothstein, Ronald J. Hedges & Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (Federal Judicial Center, 2007) (www.fjc.gov); Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* (2006); National Conference of Commissioners on Uniform State Laws, *Uniform Rules Relating to the Discovery of Electronically Stored Information* (2007) (www.nccusl.org); Institute for the Advancement of the American Legal System, *Navigating the Hazards of E-Discovery: A Manual for Judges in State Courts Across the Nation* (2007) (www.du.edu/legalinstitute); and Shira Scheindlin, Daniel J. Capra & the Sedona Conference, *Electronic Discovery and Digital Evidence: Cases and Materials* (Thomson West, 2008) (www.west.thomson.com).

§ 3.4 Placing Limitations on Discovery

The judge is responsible for controlling discovery. Discovery control in a complex case may take a variety of forms, including time limits, sequencing (*see* § 3.1, *supra*), and restrictions on the scope and quantity of discovery, e.g., limiting the number and length of depositions, the number of interrogatories, and the volume of requests for production, as well as entering protective orders (*see* § 3.6, *infra*) and ruling on motions to compel. The judge may set presumptive limits early in the case, before discovery has begun, after consulting with counsel, and with the understanding that the limits are binding until further order.

The judge should not hesitate to ask counsel why particular discovery is needed and whether information can be obtained more efficiently and economically by other means.

The judge may limit discovery:

- ☐ When the discovery sought is cumulative or duplicative;
- ☐ When it is more convenient, less burdensome, or less expensive to obtain the discovery from another source;
- ☐ When the discovery seeks information the party has had ample opportunity to obtain; or
- ☐ When the discovery seeks privileged work product or attorney-client communications.

The judge must balance the burden and expense of any discovery sought against its benefit, after considering:

- ☐ The need for the discovery;
- ☐ The importance of the issues at stake; and
- ☐ The parties' resources.

Actions the judge can take with respect to specific types of discovery include:

- ☐ *Documents*: Prohibiting indiscriminate, overly broad, or unduly burdensome requests for documents and directing counsel to frame requests for production of the fewest documents possible. At the same time, the judge must be cognizant of the tendency for responding parties to read requests in the narrowest terms possible. These potential problems may be resolved at prediscovery conferences or by discovery devices that identify relevant documents before the request is made.
- ☐ *Depositions*: Using information provided by the parties about the need for proposed depositions, the subject matter to be covered, and the available alternatives in determining any limitations. The judge may place limits on the number of attorneys for each party or each side which may attend depositions, particularly when fees may be awarded or approved by the court. The judge should be careful about limiting the number of attorneys, however, because in many complex cases more than one attorney's presence is justifiable. The judge may consider requiring counsel to identify the documents about which the witness will be questioned a number of days before the deposition (e.g., three days).

- ❑ *Interrogatories*: Restricting the number of interrogatories to: (1) force counsel to make the best use of the limited number of interrogatories through skillful and thoughtful drafting designed to accomplish a legitimate purpose; (2) determine the existence, identity, and location of witnesses, documents, and other tangible evidence as a prerequisite to planning further discovery; and (3) require a party to disclose any facts that it believes raise a triable issue with respect to particular elements of a claim or defense. Before allowing contention interrogatories, the judge should consider whether they are likely to be useful at that stage of the proceeding and ensure that they will not be argumentative. In multi-party cases, the judge may consider having each side propound a number of joint interrogatories and, after these are answered, allow individual parties to propound their own follow-up questions.

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 11.42 (Planning and Control), 11.421 (Discovery Plan/Scheduling Conference), 11.422 (Limitations), 11.433 (Allocation of Costs), 11.451 (Depositions: Limitations and Controls), 11.462 (Interrogatories: Limitations), 22.8 (Mass Torts: Discovery), and 40.29 (Deposition Guidelines).

§ 3.5 Resolving Discovery Disputes

To prevent the time limits for discovery from being frustrated (*see* § 3.1, *supra*), the judge should rule promptly on discovery disputes so that further discovery is not delayed or hampered while a ruling is pending.

The discovery plan should include specific provisions for fairly and efficiently resolving discovery disputes, such as:

- ❑ Requiring counsel to meet and attempt to resolve any dispute before submitting it to the court for resolution;

(*Note*: The discovery plan should specify the ground rules for these conferences, such as requiring that the party requesting the conference send the opposing party a clear and concise statement of the asserted deficiencies or objections and the requested action. Any resulting resolution should be put in writing.)

- ❑ Directing the manner in which discovery disputes may be submitted to the court informally;

(*Note*: Many judges believe that making themselves available to decide discovery disputes informally discourages disputes and encourages quick resolution of those that are submitted. The judge may direct counsel to present disputes by conference call or e-mail. The availability of a speedy resolution process, particularly during the course of a deposition, tends to deter unreasonable and obstructive conduct. Avoiding formal motions in discovery disputes also forces counsel to narrow and simplify the dispute.)

- ❑ Restricting the length of discovery motions, memoranda, and supporting materials, and setting time limits for submission;
- ❑ Prohibiting discovery with respect to a discovery dispute itself, except in extraordinary circumstances; and
- ❑ Appointing a special master to resolve discovery disputes. *See* § 1.3, *supra*, and *Manual for Complex Litigation, Fourth*, § 10.14 (Supervisory Referrals to Magistrate Judges and Special Masters).

The discovery plan may also call for the judge to pre-approve written discovery. Once interrogatories and requests for admission or production are approved, the parties know that they may not object.

For further discussion, see *Manual for Complex Litigation, Fourth*, § 11.424 (Resolution of Discovery Disputes).

§ 3.6 Issuing Protective Orders

Attention should be given at the initial case management conference to any need for procedures to accommodate claims of privilege, or for protection of materials from discovery designated as work product materials or trade secrets, or on privacy grounds. If not addressed early, these matters may later disrupt the discovery schedule. The judge should consider not only the rights and needs of the parties, but also the interests of those not involved in the litigation.

The judge should consider the following:

- ☐ Addressing the possibility of claims of privilege at an early conference and establishing a procedure for their resolution or for avoidance through appropriate sequencing of discovery;
- ☐ Reviewing alleged privileged material in camera or referring the matter to a special master; (see § 1.3, *supra*); and
- ☐ Protecting only material for which a clear and significant need for confidentiality has been shown.

(Note: In fashioning a protective order, the judge must balance the moving party's legitimate concerns about confidentiality against the legitimate needs of the litigation, individual privacy, or the commercial value of the information. There may also be a public interest in the fruits of discovery, particularly in mass tort cases, in which evidence of a risk to the public emerges.)

The judge may also consider issuing an umbrella order when the volume of the discoverable, but confidential, material is large, to expedite production, reduce costs, and avoid the burden on the court of a document-by-document adjudication. Umbrella orders provide that all alleged confidential material disclosed is presumptively protected unless challenged. These orders are generally made without a particularized showing to support the claim for protection. Such a showing must be made, however, when a claim under the order is challenged. As a result, some judges find that umbrella orders merely postpone, rather than eliminate, the need for close scrutiny of discovery material to determine whether protection is justified, thereby delaying rather than expediting the litigation.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 11.43 (Privilege Claims and Protective Orders), 11.431 (Claims of Privilege/Full Protection), 11.432 (Limited Disclosure/Protective Orders), and 30.2 (Transactional and Economic Data, and Expert Opinions).

§ 3.7 Issuing Sealing Orders

When a party requests to file materials under seal to preserve their confidentiality, the judge should consider local rules/statutes and:

- ☐ Whether overriding interests support sealing the materials. Overriding interests that may justifying sealing include:
 - Preserving the parties' right to a fair trial;
 - Protecting the parties' privacy interests, e.g., with respect to proprietary information, such as customer or client lists, or with respect to personal identifying information, such as financial or medical records;
 - Protecting the privacy interests of nonparties, such as other employees' personnel records in an employee's action against the employer;
 - Protecting privileges;
 - Whether a substantial probability exists that these overriding interests will be prejudiced if the materials are not sealed;
 - Whether and how the proposed sealing could be narrowly tailored as to scope and duration; and

(Note: Any sealing order should direct the sealing of only those documents and pages (or, if reasonably practicable, portions of those documents and pages) that contain the materials that need to be placed under seal.)
 - Whether there are less restrictive means of protecting the materials from public disclosure.
- (Note: The judge may ask the attorneys whether they will agree to exchange the material informally so that it does not become part of the court file.)

§ 3.8 Disclosure and Discovery of Expert Opinions

Reasonable judicial control over the use of expert witnesses is required for effective management of complex litigation.

The judge should consider:

- ☐ Conferring with counsel before testifying experts are retained to determine whether the proposed testimony will be necessary and appropriate;
- ☐ Limiting the number of expert witnesses that each side may call at trial and the subjects they will cover;
- ☐ Setting a time limit for the parties' disclosure of the identity of expert witnesses they intend to call at trial;

☐ Requiring the parties to disclose for each expert:

- A signed written report stating all opinions to which the expert will testify;
- The bases for those opinions with specificity and the information considered in forming the opinions;

(*Note:* The matters an expert must disclose may be specified by statute. What is required to be disclosed varies from state to state.)

- Exhibits to be introduced as a summary or in support of the opinions;
- The expert's qualifications;
- The compensation the expert is to receive; and
- A list of other cases in which the expert has testified.

(*Note:* Early and full disclosure of expert reports may help define and narrow the issues in the case. To be effective, the reports must be specific about: (1) the underlying assumptions and facts on which they rely; (2) the methods, tests, or research employed by the experts; and (3) why those methods, tests, or research support the expert's proposed testimony. This disclosure may clarify the bases for contending experts' differences and enable substantial simplification of the issues. Disclosure can also facilitate rulings in advance of trial on objections to the qualifications of any expert; the relevance and reliability of opinions to be offered; and the reasonableness of an expert's reliance on particular information. Judges use various procedures to identify and narrow the grounds of disagreement between opposing experts, e.g., asking them to explain the reasons for the disagreement.)

☐ Whether appointing any experts for the court might be helpful, e.g., to:

- Advise the judge on scientific or technical issues;
- Provide the jury with background information to aid comprehension;
- Offer a neutral opinion on disputed scientific or technical issues; or
- Comment on the opinions of the parties' experts.

(*Note:* Because court appointment of an expert increases the already high cost of complex litigation for the parties, the judge should consider whether there are adequate alternatives to the appointment. However, appointment of a neutral expert may help clarify and narrow disputed issues; help the judge and jury understand complex issues and evidence; and facilitate stipulations and possibly settlement. A court-appointed expert may be most beneficial in a case in which strong evidence appears to support the contentions of both sides; the technical issues are particularly complex; and it is likely that scientific or technical evidence will determine the outcome of the litigation. *See* § 1.4, *supra*.)

For any expert the judge appoints, the judge should indicate:

- ☐ The terms on which the expert serves;
- ☐ The nature of the functions the expert will perform, including whether the expert will testify at trial and, if not, how the expert's testimony will be presented;
- ☐ The extent of discovery permitted;
- ☐ Whether the expert is required to provide a written report to the parties before trial;
- ☐ Whether the expert may communicate with the judge *ex parte* and, if so, a method by which the judge will disclose the substance of those communications;
- ☐ How the jury should be instructed about the expert's role in the proceedings and the weight to be given to the expert's opinion; and
- ☐ How the cost of the expert will be allocated among the parties.

For further discussion, *see Manual for Complex Litigation, Fourth*, § 11.48 (Disclosure and Discovery of Expert Opinions), 11.481 (Trial Experts), 11.482 (Consulting Experts), 11.483 (Court-Appointed Experts), 11.51 (Court-Appointed Experts and Technical Advisors), 22.87 (Experts and Scientific Evidence), and 30.2 (Transactional and Economic Data, and Expert Opinions).

Other considerations for use of experts in complex cases – The judge may consider requiring the following:

- ☐ When there is more than one expert in a case, the experts shall adopt a cooperative approach and produce a joint report addressed to the court, indicating areas of agreement and areas of disagreement that cannot be resolved.
- ☐ Experts' written reports shall include the following:
 - Details of the expert's relevant qualifications;
 - Details of the literature and other significant material that the experts have used in arriving at their opinions;
 - Identification of all persons, and their qualifications, who have carried out any data selection, data inspection, tests or experiments upon which have been relied upon in compiling the report;
 - All data, assumptions and methods upon which the experts have significantly relied upon to arrive at their opinions;
 - The bases for each of the opinions which are expressed;
 - Whether there are any qualifications to any of the opinions; and

- The following statement, at the end of their written report: “I confirm that the matters stated as facts in my report are true to the best of my knowledge and belief; and I further confirm that opinions that I have expressed in my report are my true and complete professional opinion.”
- ☐ Experts engage in discussion before the hearing to prepare the joint report. In so doing, they shall:
 - Identify and discuss the expert issues in the proceedings;
 - Reach agreement on those issues, and, if that is not possible, narrow the issues in the case;
 - Identify those issues on which they agree and disagree and summarize their reasons for disagreement on any issue; and
 - Identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.
- ☐ The parties, their lawyers and experts, should cooperate to produce the agenda for any discussion between experts, although primary responsibility should normally lie with the parties’ attorneys. The agenda should indicate what matters have been agreed upon, and summarize concisely those which remain in issue. If the parties cannot agree, the court may give directions for drafting the agenda. The agenda should be circulated to experts, and those instructing them, to allow sufficient time for the experts to prepare for the discussion.
- ☐ The parties’ lawyers may only be present at discussions between experts if all the parties agree or the court so orders. If the lawyers attend, they should not normally intervene except to answer questions posed by the experts or to give advice about the law. The content of discussions between experts should not be referred to at trial unless the parties agree in writing to do so.
- ☐ The joint statement should be agreed upon and signed by all the parties to the discussion. Agreements between experts during discussions do not bind the parties unless the parties expressly agree to be bound by the agreement. However, in view of the overriding objective, parties should give careful consideration before refusing to be bound by such an agreement; they should be able to explain to the court their refusal should it become relevant to the issue of costs.
- ☐ The attorneys must disclose whether a “shadow expert” (an expert who has not been otherwise disclosed) has been, or will be, used in preparation for the trial or hearing.
- ☐ The expert must attach to his or her report a copy of all written instructions and notes of oral instructions provided to him or her by the attorneys or party that hired him or her.
- ☐ The expert shall acknowledge in writing that his or her role is as an advisor to the court rather than an advocate of the parties.

For further discussion and a review of the literature on use of experts, see Miriam J. Massid, *Reforming the Culture of Partiality: Diffusing the Battle of the Experts in Western Water Wars* (2007) (dissertation) (to be published in the University of Denver Water Law Review).



IV

TRIAL MANAGEMENT CONFERENCE/PREPARATION FOR TRIAL



§ 4.1 Matters to Cover at Conference

A trial management conference should be held to formulate a plan for the trial and to facilitate the admission of evidence. It may also be used as an opportunity to discuss settlement one last time. This conference should be held as close to the time of trial as is reasonable under the circumstances. All attorneys who will conduct the trial should be required to attend the conference.

(*Note:* In complex cases, a trial management conference may turn into several “final” conferences, i.e., a final conference lasting more than one court session. This is particularly true if the judge will rule on numerous motions in limine at the final conference. *See* § 4.3, *infra*. As a result, many judges hold the final conference at least 30 days before trial.)

At the conference, counsel should submit to the judge, and exchange with opposing counsel, the following:

- ☐ A final list identifying the witnesses to be called, and
 - the anticipated time for presentation of each witness’s testimony,
 - the subject of their testimony, including a designation of any deposition excerpts to be read, and
 - address any legal problems or conflicts with the potential witnesses.

(*Note:* The judge may caution counsel that these lists should not be inflated to disguise from opposing counsel which witnesses will actually be called.)

- ☐ Copies of all proposed exhibits and visual aids, including illustrative exhibits and computer-generated evidence;

(*Note:* Digital evidence and illustrative aids should be submitted in the same format that will be used at trial.)

- ☐ A list of all equipment and software to be used at trial and suggestions as to possible shared use of equipment and operators;
- ☐ Proposed voir dire questions;

(*Note:* In jurisdictions that allow liberal and probing voir dire in civil cases, submission of proposed voir dire questions is generally unnecessary. However, the judge should encourage the attorneys to think about appropriate open-ended voir dire questions and should tell them that if there are “sensitive” questions that might be difficult for them to ask (e.g., have any of you filed for bankruptcy?), they should submit these questions to the judge and the judge will ask them.)

- ☐ Concise memoranda on important unresolved legal issues;
- ☐ Non-argumentative statements of facts/issues to be read to the jury, unless the judge will allow counsel to give “mini opening statements” before voir dire begins;
- ☐ Proposed jury instructions and verdict forms, or proposed findings of fact and conclusions of law in a nonjury case;

(*Note:* Some judges require counsel to confer and submit a set of jury instructions on which there is no disagreement and a set of those in dispute. Many judges then use the parties' submissions as a starting point for preparing their own substantive instructions and find that they are generally accepted by counsel with little argument. Proposed instructions can be submitted electronically to enable the judge to make revisions on his or her computer.)

- ☐ Any motions in limine; (*see* § 4.3, *infra*);
- ☐ Any *Daubert* or *Frye* motions (*see* § 4.4, *infra*); and
- ☐ Juror notebooks, containing a glossary of technical terms, note paper for taking notes, and other helpful information (*see* § 5.4, *infra*).

At the conference, the judge should:

- ☐ Explore the possibility of settlement with the parties.
 - Point out the strengths and weaknesses of each party's case.

(*Note:* In cases in which resistance to settlement arises from unreasonable or unrealistic attitudes of the parties and counsel, the judge may help them reexamine their premises and assess their cases realistically.)

- Focus the parties' attention on the likely cost of litigating the case to conclusion in fees, expenses, time, and other resources.
- Allude to comparable cases the judge has settled and why the results reached were deemed to be fair by both sides.
- If another judge is available, consider asking the other judge to conduct the settlement negotiations.

(*Note:* In this way, negotiations can continue even during the trial, and the trial judge stays insulated from them. The trial judge should not engage in settlement discussions if any party objects. In some jurisdictions, trial judges are specifically prohibited from discussing settlement with the parties. In jurisdictions that permit trial judges to do so, the parties' and attorneys' agreement to discuss settlement with the judge should be obtained and placed on the record. Their waiver of any right to disqualify the judge based on the settlement discussions should also be obtained and placed on the record. The agreement and waiver should be sufficiently broad to permit the judge to discuss the anticipated evidence, as well as the settlement amounts offered and demanded – not only in the presence of all of the attorneys, but also with each separately and in confidence. When a trial judge is allowed to discuss settlement with the parties, the judge will often become better informed about the case, which may be useful to the judge in trying the case if it does not settle.)

- ☐ Discuss with counsel approaches for structuring the trial that will improve the trial process. *See* § 5.2, *infra*.

- ❑ Set the trial schedule after consulting with counsel and making appropriate accommodations for the time demands of the participants. Some judges ascertain how much time each side needs and then limit each side to its estimate subject to modification if good cause is demonstrated. *See* § 5.1, *infra*.
- ❑ Eliminate, to the extent possible, irrelevant, immaterial, cumulative, and redundant evidence, by defining the issues to be tried.
- ❑ Encourage counsel to stipulate to relevant background facts, the authenticity of documents, offers of proof, and other noncontroversial matters.
- ❑ Identify motions that require evidence and defer ruling until trial but rule on any motions in limine (*see* § 4.3, *infra*), and attempt to resolve other objections to evidence and to cure technical defects, such as a lack of foundation.

(*Note:* The judge should weigh the benefits of advance rulings on objections against the potential for wasteful pretrial efforts by the court and counsel. For example, ruling on objections in a deposition may require the judge to read it before trial, even though the deposition or objections may become moot or be withdrawn because of developments during trial. Some judges prefer to make pretrial rulings only on objections that counsel consider sufficiently important – either because of their significance to the outcome of the case or because of their effect on the scope or form of other evidence.)

- ❑ Consider receiving exhibits into the record to save time at trial by avoiding the need for formal offers of proof.
- ❑ Discuss with counsel fair, effective, and innovative ways of presenting proof that may include presenting voluminous data through summaries or sampling; presenting summaries of deposition testimony; offers of proof; and presenting expert testimony by reports on videotape, videoconferencing, or all at once. *See* § 5.3, *infra*.
- ❑ Determine whether written or video depositions are appropriately edited; determine whether any issues need to be addressed in an in camera hearing or special proceeding; and determine whether the in camera hearing or special proceeding needs to take place during the trial and how and when such hearings will be held.
- ❑ Address any objections to digital evidence or illustrative aids, such as computer animations and simulations; any digital alteration of the matter presented; the treatment of any narration; the need for limiting instructions; the authenticity and reliability of the underlying data; and the assumptions on which the exhibit is based.
- ❑ Determine whether any limits on evidence should be imposed when the parties' pretrial estimates suggest that the trial will be excessively long. For example, the judge may:
 - Limit the number of witnesses or exhibits that may be offered on a particular issue or in the aggregate;
 - Control the length of examination and cross-examination of particular witnesses or limit the total time allowed to each side for all direct and cross-examination; or
 - Narrow issues by order or stipulation.

- ☐ Emphasize the purpose of opening statements and, perhaps, set a time limit.
- ☐ Review the parties' proposed jury instructions and discuss with counsel which instructions should be given to the jury as pre-instructions. *See* § 5.4, *infra*.

(*Note:* Judges may wish to rule on any objections to jury instructions which address matters of law; judges should also request the parties clarify their positions on instructions that must be ruled upon after the evidence is received. Judges who have followed this procedure indicate that most of the instructions can be settled at this conference, leaving the trial judge free to concentrate on those which pose questions of fact or law. The same is true for the verdict form, leaving only the determination of whether to include or exclude a few issues.)

- ☐ Review any special verdict forms to ensure that the questions are arranged in a logical and comprehensible manner, i.e., by asking questions common to several causes of action or defenses only once and grouping related questions together.
- ☐ Assess whether interpreters are needed.
- ☐ Identify the procedure to be followed during voir dire, along with questions the judge will ask and any special areas the attorneys wish to review, so the court can determine the appropriateness of the questions.

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 11.6 (Final Pretrial Conference/Preparation for Trial), 12.21 (Opening Statements), 13.13 (Specific Techniques to Promote Settlement), and 23.36 (Final Pretrial Conference).

§ 4.2 Case Management (Final Pretrial) Order

At the conclusion of the trial management conference, the judge should enter an order confirming all actions taken and rulings made, whether at the conference or earlier. The order should state that it will govern the conduct of the trial and will not be modified except to prevent manifest injustice.

Matters that should be included in the order are:

- ☐ The starting date of the trial and the trial schedule;
- ☐ The issues to be tried;
- ☐ The witnesses to be called and the exhibits to be offered by each side, other than for impeachment;
- ☐ Whether additional undisclosed or other specified evidence is precluded;
- ☐ The objections that are deemed waived;
- ☐ Procedures for presenting testimony and exhibits and the use of technology at trial;
- ☐ All stipulations/offers of proof by the parties;
- ☐ Formal rulings made on pending motions or identify those that have been deferred until trial which require additional evidence;

- ☐ Any time limits that have been set;
- ☐ Jury instructions, both agreed-upon and those that will be addressed during trial, along with the form of the verdict;
- ☐ Determination whether an interpreter(s) is necessary;
- ☐ The procedure to be used during voir dire; and
- ☐ Other administrative matters designed to expedite the trial (*see* § 5.1, *infra*).

For further discussion, *see Manual for Complex Litigation, Fourth*, § 11.67 (Final Pretrial Order).

§ 4.3 Motions in Limine

The judge should require counsel to submit all in limine motions at the trial management conference.

Addressing these motions before the trial begins:

- ☐ Affords the judge and counsel the opportunity to give more careful consideration to the issues raised by the motions than when raised for the first time during trial;
- ☐ Reduces the need to interrupt the trial for sidebar or chambers conferences to address the issues raised by the motions; and
- ☐ Avoids prejudice to any party that may arise when evidence is offered that is ruled inadmissible and then stricken.

When a judge grants a motion in limine to exclude evidence at trial, the judge's order should:

- ☐ Specify the excluded evidence;
- ☐ Instruct the attorneys to avoid mentioning this evidence in front of the jury; and
- ☐ Direct the attorneys to instruct their clients and witnesses not to mention it.

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 11.6 (Final Pretrial Conference/Preparation for Trial) and 11.642 (Pretrial Rulings on Objections).

§ 4.4 Daubert or Frye Motions

The judge should require counsel to submit all *Daubert* (*see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) or *Frye* (*see Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) motions no later than at the trial management conference. A *Frye* motion asks the court to determine the admissibility of expert testimony concerning a new or novel scientific technique. A *Daubert* motion asks the court to determine the admissibility of any type of expert testimony.

(Note: Many states follow the *Frye* test, while others have adopted *Daubert* and the subsequent U.S. Supreme Court decisions in *Kumho Tire* (see *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)), and *Joiner* (see *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)) (altogether known as the “*Daubert* trilogy”), which apply to federal courts. Among the states that have adopted *Daubert*, there is considerable variation in how *Daubert* is defined and applied. Other states have developed their own tests. Therefore, the judge must consult the specific law in his or her jurisdiction. A few general principles are discussed, *infra*. For a thorough discussion of the *Daubert* trilogy, see David L. Faigman, Michael J. Saks, Joseph Sanders & Edward K. Cheng, *MODERN SCIENTIFIC EVIDENCE: STANDARDS, STATISTICS, AND RESEARCH METHODS* (2008).)

Motions under Frye: Scientific evidence is admissible under *Frye* if it is based on a scientific technique that is generally accepted as reliable in the scientific community.

Motions under Daubert: Instead of general acceptance in the scientific community, *Daubert* requires an independent judicial assessment of reliability. A judge may not admit evidence based on innovative or unusual scientific knowledge unless this evidence is shown to be reliable and scientifically valid. It prescribes four tests for reliability: (1) testing; (2) peer review; (3) error rates; and (4) acceptability in the relevant scientific community. In *Kumho Tire, id.*, the U.S. Supreme Court held that (1) the judge’s gate keeping role identified in *Daubert* applies to all expert testimony, including testimony that is non-scientific, and (2) the reliability factors identified in *Daubert* do not constitute an exhaustive checklist or a definitive litmus test; judges may apply any useful factors that will assist them in determining the reliability of the proffered evidence that appear appropriate in the particular case. In *Joiner, id.*, the Court held that appellate courts must defer to a trial court’s decision regarding the admissibility of expert testimony unless the trial court is “strikingly wrong.” Rule 702 of the Federal Rules of Evidence was amended to conform to the *Daubert* trilogy and now provides that a witness may only testify if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliability to the facts of the case.

Ruling on motions: The judge may rule on the motion (1) on the basis of the papers submitted, (2) on the basis of the papers submitted and oral argument, or (3) after a hearing at which expert testimony is presented. The judge should not assess the credibility of the expert’s testimony or decide factual disputes among the parties, which are matters for the jury. In all cases, the judge should consider whether an extensive *Daubert/Frye* hearing is an effective use of the court’s and the parties’ resources.

The Federal Judicial Center’s *Reference Manual on Scientific Evidence* (2d ed. 2000) discusses specific scientific areas, e.g., epidemiology and toxicology, which may arise in complex civil litigation and may be useful to a judge in ruling on particular *Daubert/Frye* motions. For the Federal Judicial Center publications catalog, see www.fjc.gov.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 23.2-23.274 (The Use of Scientific Evidence in Complex Litigation), 23.351 (Initiating a *Daubert* Inquiry), 23.352 (Timing of Challenges to Expert Testimony), and 23.353 (Handling a Challenge to Expert Testimony).





TRIAL



§ 5.1 Addressing Administrative Matters

To ensure that the trial proceeds as smoothly as possible, the judge should:

- ☐ Arrange for any special accommodations that may be necessary, such as:
 - A larger courtroom because of the number of attorneys, parties, witnesses, and exhibits;
 - A courtroom that is technologically equipped, e.g., with computers and a screen on which enlargements of exhibits can be projected;
 - Physical modifications to the courtroom, i.e., to provide additional space for counsel, parties, files, exhibits, or persons whose presence may be needed, such as experts or consultants;
 - Jury accommodations, particularly in a lengthy trial;
 - Witness and attorney conference rooms, if available; and
 - Courtroom security.
- ☐ Require the parties to pre-mark all exhibits (*see* § 5.3, *infra*).
- ☐ Admit into evidence exhibits not objected to, or to which pretrial objections were overruled, without formal offer and ruling. Make sure objections are preserved in the record; otherwise, they will be deemed waived.
- ☐ Publish a trial schedule to be followed by all trial participants, including jurors. It is the judge's responsibility to adhere to the trial schedule, be punctual and prepared to proceed on schedule.

(*Note:* A trial schedule is essential to the orderly conduct of a trial. The schedule should be set after consultation with counsel; it should address appropriate accommodations for other time demands of the court and participants. The schedule ordinarily should be modified only in urgent situations. Very lengthy trials may require periodic review and adjustment of the schedule.)

- ☐ Devote the trial day to the uninterrupted presentation of evidence, so the jury is not kept waiting.
- ☐ Set aside time before the jury members arrive or after they leave for the day to address objections, motions, and other matters with counsel, such as the next day's proceedings and; the order of witnesses and exhibits. Such advanced planning helps to avoid surprises and ensure that the parties do not run out of witnesses.
- ☐ Rule promptly on objections.

(*Note:* When an objection is too complex for an immediate ruling, the judge may defer the matter until it can be resolved without taking the jury's time; the court can then proceed with the presentation of evidence. The judge may consider directing counsel to pursue a different line of questioning at that time.)

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 12.11 (Trial Schedule), 12.12 (Courthouse Facilities), 12.13 (Managing Exhibits), and 12.15 (Conferences During Trial). *See also* American Bar Association, Judicial Administrative Division, National Conference of State Trial Judges, *Trial Management Standards* (1993).

§ 5.2 Conduct of Trial

The judge's role at trial is to control the courtroom and proceedings; at the same time, the judge must respect the attorneys' rights to employ accepted and reasonable strategies and tactics that serve their clients' interests in the adversarial process. The judge should provide the parties, counsel, and jurors with prompt, firm, and fair rulings, and should keep the trial moving forward in an orderly and expeditious fashion; bar cumulative and unnecessary evidence; and hold all participants to high professional standards.

The judge should provide counsel with written guidelines describing the judge's courtroom policies and procedures, particularly if counsel has not previously tried cases in the judge's court. Some states permit judges to adopt their own courtroom rules, which are distributed to counsel routinely. Alternatively, the judge may explain his or her courtroom procedures to counsel, such as the location from which counsel may examine witnesses, and the mechanics for submitting exhibits to witnesses, the clerk, or the jurors.

In a multiparty case, the judge should consider employing special procedures to minimize delay and confusion. The judge may:

- ☐ Provide that objections made by one party will be deemed made by all similarly situated parties unless disclaimed; and
- ☐ Permit other counsel to add further grounds of objection on behalf of all similarly situated parties unless disclaimed.

To enhance jury recollection and comprehension in a lengthy and complex trial, the judge may consider altering the traditional order of trial by employing the following sequencing techniques:

- ☐ Organize the trial in logical order, issue by issue, with both sides presenting their opening statements and evidence on a particular issue before moving to the next. This should be done only after careful consultation with counsel, as early in the litigation as possible – recognizing that counsel will frequently object to altering the traditional order of the trial and may have valid reasons for doing so. For example, one of the biggest costs of most trials is the cost of expert witnesses. Because expert witnesses will often be retained to testify on more than one issue, a party's litigation expenses may be increased substantially if the party is required to recall its experts. It may also be unreasonably difficult to schedule experts to testify on more than one occasion during a trial.
- ☐ Arrange closing arguments by issue, with both sides making their arguments on an issue before moving to the next. The entire case may be submitted to the jury at the conclusion of all arguments or the issues may be submitted sequentially.
- ☐ Allow counsel to intermittently summarize the evidence that has been presented and to outline forthcoming evidence.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 12.11 (Trial Schedule), 12.22 (Special Procedures for Multiparty Cases), 12.24 (The Judge's Role), and 12.34 (Sequencing of Evidence and Arguments).

§ 5.3 Presentation of Evidence

Although the presentation of evidence is generally controlled by counsel's trial strategies and tactics, complex litigation presents special concerns for the judge – primarily the concern for jury comprehension due to the length of the trial, presence of multiple parties, and potentially complex issues.

The judge should encourage, or even direct, counsel to use techniques that facilitate comprehension and expedition, e.g., simplification of facts and evidence, use of plain language, and use of visual and other aids. The judge should determine which exhibits and demonstrative material, such as charts and graphs, if any, may be used in opening statements.

The following techniques improve the trial process:

- ☐ Require counsel (jointly, unless that is not feasible) to furnish the jurors with the following: glossaries of important terms, names, dates, and events; indexes of exhibits to assist in their identification and retrieval; and timelines of important events in the case.
- ☐ Display exhibits so the jurors, judge, and counsel can view them while hearing the related testimony, e.g., by:
 - Projecting the exhibit on a screen that is easily visible to the witness, judge, and jurors;
 - Using an evidence presentation system that displays evidence electronically and simultaneously to everyone in the courtroom; and/or
 - Providing jurors with individual binders containing indexed copies of selected exhibits.
- ☐ Pre-mark exhibits and receive them into evidence before trial to avoid cumbersome and time-consuming exhibit handling.
- ☐ Require counsel, when possible, to present voluminous or complicated data through summaries, including compilations, tabulations, charts, graphs, and extracts.
- ☐ Ask questions of a witness after the attorneys have finished their examinations when it appears to the judge that certain matters require clarification for the jurors.
- ☐ Encourage stipulations or offers of proof to avoid testimony about uncontested matters such as the date of a document.
- ☐ Require the attorneys to provide photographs of their witnesses to help the judge and jurors recall who testified during a lengthy trial. These photographs may be included in notebooks provided to the jurors. See juror notebooks in § 5.4, *infra*.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 12.3 (Presentation of Evidence), 12.31 (Glossaries/Indexes/Demonstrative Aids), 12.32 (Use of Exhibits), 12.35 (Judicial Control/Time Limits), and 23.37 (Trial).

§ 5.4 Management of Jury Trial

A jury trial requires the judge to consider the following matters:

- ❑ *Number of jurors:* In a complex case, it is particularly important to seat enough jurors to minimize the risk of a mistrial; therefore, give special consideration to the length of the trial and the probability of incapacity, disqualification, or other developments that may require the judge to excuse jurors during trial.
 - The judge should determine the number of alternate jurors that should safely be required, e.g., one alternate for each week of trial.
 - The judge should ask the attorneys if they will stipulate to accept a verdict returned by fewer than the number of jurors required by state law if there are no remaining alternate jurors.
 - The judge should ask the attorneys if they will stipulate to the use of undesignated alternates, i.e., the alternates will be selected at the end of the trial by lot from the jury (e.g., when 12 jurors are required, 14 jurors are selected, but the two jurors who will be the alternates are not designated until the case is submitted to the jury).

(*Note:* Sometimes jurors who are selected as alternates do not pay close attention to the proceedings, believing that they will not be called on to deliberate. This procedure is designed to keep all of the jurors engaged in the proceedings.)

- ❑ *Juror questionnaires:* The judge should review any proposed juror questionnaires submitted by counsel.

(*Note:* Juror questionnaires can help expedite jury selection. Some judges require counsel to review the completed questionnaires together and agree on which prospective jurors should be excused for cause. This may substantially reduce the number of prospective jurors who must actually be questioned in voir dire. The judge may consider asking counsel to place an advisory statement in the questionnaire that prospective jurors are prohibited from conducting their own research or investigation of the case.)

- ❑ *Voir dire:* The judge should conduct the initial voir dire of the jury and then allow the attorneys to ask their questions.
 - Thorough questioning by the judge can make jury selection proceed more expeditiously and can also prevent the attorneys from arguing their cases to the jurors by their questions. The judge should invite the attorneys to submit questions they would like the judge to ask.
 - To shorten the time required for jury selection, the judge may require the attorneys to address their questions to the jurors as a group and permit follow-up questions to particular jurors as necessary.
 - The judge may impose reasonable time limits on counsel's examination or scope of inquiry, including the form and subject matter of their questions.
 - The judge should inform prospective jurors of the expected length of the trial, the trial schedule, and other facts that may affect a juror's ability and qualifications to serve.

(*Note:* The prospect of a long trial may produce many requests to be excused. A judge may reduce these requests by emphasizing the responsibilities of citizenship and the importance of representative juries and by describing the challenge of litigation and the opportunity to learn more about the judicial process. Another way to reduce the number of requests to be excused is to allow counsel to make mini opening statements (subject to a time limitation of generally no more than five minutes). These statements frequently make prospective jurors more interested in the case.)

- ❑ *Peremptory challenges:* The judge may consider whether to grant additional peremptory challenges when parties on the same side of the case have divergent or conflicting interests.
 - Each side should be given the same number of challenges, although the number and position of the parties on each side will be important factors in allocating the challenges among them.
 - A judge should grant additional challenges sparingly because they will increase the size of the venire and lengthen the jury-selection process.
- ❑ *Note taking:* The judge should encourage the jurors to take notes during the trial. Note taking by jurors may be particularly important in a long and complicated trial.
 - The court should provide the jurors with paper (or notebooks with space for notes) and pens.
 - The judge should advise the jurors of the following: (1) notes are only for their individual use and may not be shown or read to others; (2) note taking should not distract them from observing the witnesses; (3) they must leave their notes in the courtroom during recesses; and (4) they are entitled to take their notes with them into the jury room once they begin deliberations.
 - The judge should also advise the jurors that the court reporter will read back any testimony the jurors request (or the requested testimony will be played back if the court uses a recording system), and that the testimony as read (or played) back should prevail over a juror's notes of what the witness said.
- ❑ *Juror Notebooks:* The judge may encourage (or require) counsel in complex cases to provide notebooks for the jurors to use during the trial to help them organize and retain information. At the outset of the trial, the notebooks should include:
 - The schedule for the trial, including days the court will not be in session;
 - A glossary of important scientific or technical terms the jurors are likely to hear during the trial;
 - Note paper; and
 - Instructions and blank forms if jurors are allowed to ask questions.

As the trial progresses, the following items may be added to the jurors' notebooks, as appropriate:

- Key admissions, offers of proof, or stipulations;
- A chronology or timeline of important events in the case;
- An exhibit list and copies of key exhibits that have been admitted;

- A witness list and pictures of witnesses who have testified; and
- Preliminary instructions.

(*Note:* The judge should review the notebooks before the trial begins and should control the amount of material in them to ensure that they remain clear and useful. The notebooks should not be so large that they become unmanageable. The judge should advise the jurors of the purpose of the notebooks, i.e., that they are intended to help the jurors understand and recall what happens during the trial and to help familiarize them with the parties, attorneys, witnesses, basic terminology that will be used in the case, and the evidence. The judge should advise the jurors that the judge will direct their attention to specific items in their notebooks that they may refer to while a witness is testifying, e.g., an exhibit about which the witness is being questioned, but they should otherwise give their complete attention to what the witnesses are saying and should not be referring to their notebooks while the witnesses are testifying. The judge should admonish the jurors that they must leave their notebooks in the courtroom during recesses but may take their notebooks with them into the jury room once they begin deliberations.)

- ❑ *Juror questions:* The judge should determine whether to allow jurors to ask questions. Some judges do not allow juror questions; most allow jurors to submit questions in writing for consideration by the judge and counsel. When allowing questions, the judge should:
 - Inform the jurors that they may submit written questions at any time, e.g., if they do not understand a word or a phrase used by the witness or simply did not hear the witness.
 - Caution jurors that questions occurring to them during one witness's examination may later be covered by another witness.
 - Explain that certain matters may be inadmissible under rules of evidence which the judge will determine.
- ❑ *Jury Instructions:* A complex and lengthy trial makes understandable jury instructions particularly important. The judge should carefully review the instructions drafted by counsel to ensure:
 - They are in plain English, concise and simple, and accurately reflect the law.

(*Note:* The judge should discuss with counsel why and when an approved pattern jury instruction is not sufficient. Use of pattern jury instructions is preferred in most cases.)

 - They are organized in a logical sequence.
 - Substantive instructions are tailored to the facts of the case and are not argumentative.

(*Note:* The judge should explain propositions of law with reference to the facts and parties in the case. Illustrations familiar to jurors may also be helpful.)

❑ *When to instruct:* The judge may give the jurors instructions in installments at different stages of the trial with a comprehensive set of final instructions at the end of the trial. The judge may give:

- Pre-instructions at the beginning of the trial, immediately before opening statements, to guide the jurors in properly discharging their duties, such as: (1) the role of the judge and the jury; (2) the difference between evidence and argument (including what is and is not evidence); (3) the difference between direct and circumstantial evidence; (4) the assessment of witness credibility; and (5) the burden(s) of proof. The judge should also give the jurors instructions that are intended to avoid a mistrial, such as: (1) the jurors may not discuss the case with any other persons; (2) the jurors may not read or listen to any news media accounts of the case; (3) the jurors may not visit or view the scene of any occurrence in the case; (4) the jurors may not conduct any independent investigation of, including use of the Internet to obtain information on, the facts or the law; and (5) the jurors may not converse with any trial participants.

(*Note:* The purpose of pre-instructions is to point out to the jurors the significant matters in the trial of the case and what the jury should look for during the course of the trial. Jurors can deal more effectively with the evidence in a lengthy trial if they are provided with a factual and legal framework to give structure to what they see and hear. The judge should emphasize that these instructions are preliminary and that instructions given at the conclusion of the case will govern their deliberations. Some judges pre-instruct at the beginning of jury selection to confirm the prospective jurors' willingness to follow the law as given by the judge, even if they disagree with it, and to confirm that they understand as jurors that they may not discuss the case with any other person and may not conduct any research or investigation of the case.)

- Interim and limiting instructions during the trial when evidence is admitted that is admissible as to some but not all parties or for a limited purpose only.

(*Note:* The judge may give instructions at any point in the trial when they may be helpful to the jury. For example, an explanation of applicable legal principles may be more helpful when the issue arises than if deferred until the end of the trial.)

- Final instructions before or after closing arguments.

(*Note:* Although, traditionally, instructions have been given after counsel's closing arguments, there are advantages to giving the majority of the instructions before argument. Instructions on the law may make closing arguments easier for the jurors to understand, and counsel can refer to the instructions in arguing their application to the facts. The judge should reserve the final closing instructions, however, until after arguments – reminding the jurors of the instructions given previously and instructing them about the procedures to follow during deliberations.)

❑ *Jury deliberations:* To aid the jurors in their deliberations, the judge should:

- Suggest to the jurors procedures they may employ in conducting their deliberations.

(Note: Some judges use the American Judicature Society pamphlet, *Behind Closed Doors: A Guide for Jury Deliberations* which tells jurors how to get started once they retire to the jury room; how to select a foreperson; how to discuss the evidence and the law; how to take votes; how to obtain assistance from the court; and what to do after they reach a verdict. The American Judicature Society pamphlet may be found at www.ajs.org.)

- Allow the jurors to take their notes and juror notebooks into the jury room.
- Furnish the jury with a copy of all jury instructions (some judges provide a single copy while others provide multiple) and a copy of all verdict forms.
- Decide which exhibits the jurors may take into the jury room.

(Note: Some judges send all exhibits received into evidence (except items such as currency, narcotics, weapons, and explosive devices) to the jury room for the jurors' reference during deliberations. Other judges wait for a request from the jurors or withhold some items, such as those received for impeachment or another limited purpose, unless requested by the jury. If the exhibits are voluminous, the jurors should be given an index or other aids to assist their examination during deliberations.)

- Determine, after consulting with counsel, the appropriate response to any request by the jury for supplemental instructions during deliberations.

(Note: The judge should allow counsel to object to the proposed response on the record. Any supplemental instructions may be given orally in open court or in writing. The judge should admonish the jury to consider these instructions as part of those previously given and that they remain binding.)

- Determine, after consulting with counsel, the appropriate response to any request by the jury for a read-back (or playback) of testimony.

(Note: The judge should instruct the jurors to make their requests as specific and narrow as possible, to avoid excessively long read-backs (or playbacks). The judge should then confer with the attorneys to seek their agreement on the portions of the testimony to be read (or played) and should permit them to state any objections on the record. Read-backs (or playbacks) should not unduly emphasize any part of the evidence.)

❑ *Verdicts:* The judge should:

- Review the completed verdict forms with counsel before instructing the jurors, to confirm that they are complete and consistent.
- Ensure that the verdict forms are concise, clear, and comprehensive.
- Review the verdict forms with the jurors during closing arguments and advise the jurors that these are the questions they will need to answer.
- Instruct the jurors on how to complete the verdict forms properly.
- Be prepared to determine what appropriate action to take if the jurors are deadlocked.

(*Note:* Although the large investment in a long trial makes a mistrial costly, the judge should not apply undue pressure on the jury to reach an agreement. The judge may ask the jurors what might assist them in reaching a verdict, such as a read-back (or playback) of testimony, further instructions, or additional argument by counsel if allowed under local law, and may encourage them to continue to deliberate for additional time.)

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 12.411 (Size of the Venire and Panel), 12.412 (Voir Dire), 12.413 (Peremptory Challenges), 12.421 (Note Taking), 12.422 (Juror Notebooks), 12.423 (Juror Questions), 12.43 (Jury Instructions), 12.44 (Avoiding Mistrial), 12.45 (Verdicts), and 23.37 (Trial).

§ 5.5 Management of Nonjury Trial

Before the beginning of the trial, the judge may require counsel to:

- ❑ Submit agreed-upon proposed findings of fact and conclusions of law.
 - The judge may ask counsel to exchange proposed findings and conclusions (if unable to agree) before submitting them to the court and mark the disputed portions for the court.
 - The judge may ask counsel to submit their proposed findings in electronic form, so the judge may more easily revise them.
 - The judge should advise counsel to draft the findings in neutral language, avoiding argument and conclusions, and to identify the evidence expected to establish each finding.

(*Note:* Proposed findings allow the judge to follow the evidence during trial and to adopt, modify, or reject findings as the trial proceeds. This process simplifies the judge's final preparation of findings of fact and conclusions of law.)

- ❑ Present the direct testimony of witnesses under their control through offers or proof, stipulations, or written statements.
 - At trial, the witness is sworn; adopts the testimony; may supplement the proffered testimony orally; and is then cross-examined by opposing counsel and perhaps questioned by the judge.
 - The statement may be received as an exhibit and is not read into the record.
 - Objections to exhibits should be resolved before trial. See § 4.1, *supra*.

(*Note:* This procedure may be particularly useful when a witness's testimony is complicated or technical, and credibility or recollection is not at issue. It may be appropriate for expert witnesses, witnesses called to supply factual background, or witnesses needing an interpreter. It has the following advantages: (1) the judge and opposing counsel, having read the statement, are better able to understand and evaluate the witness' testimony; (2) the proponent can ensure he or she has made a clear and complete record; (3) opposing counsel can prepare for more effective cross-examination; and (4) the reduction in live testimony saves time.)

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 12.51 (Adopted Prepared Statements of Direct Testimony) and 12.52 (Findings of Fact and Conclusions of Law).

§ 5.6 Awarding Attorneys' Fees

Because of the amounts involved, calculating a fee award in complex cases is often complicated, burdensome, bitterly contested, and leads to additional litigation. Establishing guidelines and ground rules early in the litigation helps ease the judge's burden and helps prevent later disputes.

Early in the case, the judge should make an initial determination as to whether the prevailing party will be entitled to court-awarded attorneys' fees. Fees may be awarded as follows:

In common fund cases:

- ❑ If the attorneys' efforts create or preserve a fund or benefit for others in addition to their own clients, the judge may award fees from the fund. Class actions are the predominant circumstance justifying a common fund award. See § 6.5, *infra*.
- ❑ Fees may be awarded as a percentage of the fund. In making the award, the judge should identify the factors considered and how these factors helped determine the percentage awarded. These factors may include:
 - The size of the fund and the number of persons who actually received monetary benefits;
 - Any agreements or understandings between the attorneys and their clients or other counsel involved in the litigation;
 - The attorneys' skill and efficiency in bringing the case to a conclusion;
 - The complexity and duration of the litigation;
 - The risks of non-recovery and nonpayment;
 - The amount of time the attorneys reasonably devoted to the case; and
 - Awards in similar cases.

(Note: Typically, the percentage awarded is between 25% and 30% of the fund. In "mega-cases," however, in which large settlements or awards serve as the basis for calculating a percentage, courts often find considerably lower percentages of recovery to be appropriate. To avoid creating a "windfall" for counsel in these cases, judges have also used a sliding scale, with the percentage decreasing as the magnitude of the fund increases, e.g., 30% of the first \$5 million, 20% of the next \$5 million, and 10% of any recovery greater than \$10 million.)

- ❑ Alternatively, fees may be awarded using the lodestar method, in which the number of hours the attorneys reasonably expended is multiplied by the applicable hourly market rate for their services. The product is the “lodestar.” When the fund is unusually large, the lodestar method may be more appropriate than the percentage method. As with percentage fees, an award of attorneys’ fees under the lodestar method should fairly compensate the attorneys for the reasonable value of services rendered, given the circumstances of the case.
 - The attorneys should submit comprehensive time records showing the number of hours spent on the case and the specific services provided. A failure to keep contemporaneous time records may justify an appropriate reduction in the award.
 - The judge may adjust the “lodestar” figure upward or downward based on a variety of factors, including the quality of the representation, novelty and difficulty of the issues presented, results obtained, and the contingent risk involved.
 - In awarding fees to a prevailing plaintiff, the judge should consider apportioning the fees between the successful and unsuccessful claims.
- ❑ When payment of a common benefit is scheduled to take place in the future, the judge may consider linking the attorney fee award to that future payment.
- ❑ The court should appreciate that when a common fund or benefit award is made, the attorneys and the class they represent have conflicting interests.

(*Note:* The court has an obligation to protect the class from an excessive fee award. In large or complicated cases, appointing an attorney to represent the class in the fee proceedings may be appropriate. *See* § 6.5, *infra*.)

When fees are authorized by statute:

- ❑ The judge should determine whether the award is mandatory or permissive, and whether an award is only available when the prevailing party is the plaintiff or is also available when the prevailing party is the defendant.
- ❑ When an attorney is entitled to statutory fees on some claims, but not others, the judge should determine whether apportionment of the fees is appropriate. Generally, this will depend upon the degree to which the claims are interrelated.
- ❑ The judge should consider the reasonableness of the amount of attorneys’ fees requested based on the nature of the litigation, complexity of the issues, attorneys’ experience and expertise, amount of time involved, and whether the amount requested is based on unnecessary or duplicative work.

To designated counsel:

- ❑ The judge may award fees to lead counsel, liaison counsel, and other attorneys designated to perform tasks on behalf of a group of litigants. *See* § 1.2, *supra*.

- ☐ Early in the litigation, the judge should define designated counsel's functions; determine the method of compensation; specify the records they must keep; and establish arrangements for their compensation, including setting up a fund to which designated parties are required to contribute in specified proportions. The court should provide notice to, and the opportunity for, consultation with the attorneys representing those who will pay these fees.
- ☐ Guidelines should cover staffing, hourly rates, and estimated charges for services and expenses.

When fees may be awarded, matters the judge may wish to discuss with the attorneys early on in the litigation include:

Fee guidelines:

- ☐ The judge may advise the parties at the outset of the litigation about the method the judge will use in calculating fees and, if using the percentage method, the likely range of percentages.
- ☐ When there are multiple attorneys on a side, the judge should discuss with the attorneys a fair allocation of fees among them.

Staffing:

- ☐ A major issue in determining fees is the appropriate level of staffing for the particular litigation.
- ☐ The judge may consider setting presumptive guidelines, which are appropriate and reasonable, at the outset of the litigation after discussion with counsel.
- ☐ Setting guidelines, subject to revision, can reduce the potential for later conflict and facilitate judicial review of fee applications.

Time records:

- ☐ The judge should advise counsel, early in the case, of the documentation the judge will require to support any fee request.
- ☐ The documentation may consist of:
 - Contemporaneous time records that show the name of the attorney, the time spent on each discrete activity, and the specific nature of the work performed;
 - Computerized billing records; and/or
 - Agreed-on summaries.

For further discussion, *see Manual for Complex Litigation, Fourth*, Chapter 14, Attorney Fees. For a discussion of awarding attorney's fees in a class action, *see* § 6.5, *infra*.



VI

MANAGING CLASS ACTIONS



§ 6.1 Precertification Case Management

Because the stakes and scope of class action litigation can be great, and potential conflicts between the class members and their counsel may occur, class actions require closer judicial oversight and more active judicial management than other types of litigation. These actions present many of the same problems and issues inherent in other types of complex litigation; however, the aggregation of a large number of claims, and the ability to bind individuals who are not named parties, tend to magnify those problems and issues; increase the stakes for the named parties; and create potential risks of prejudice or unfairness for absent class members.

These issues impose special responsibilities on the judge and counsel and make case management particularly important. If the action proceeds as a class action, the judge will be responsible for reviewing any proposed settlement of the action to determine whether it is fair, reasonable, and adequate – even when the settlement is unopposed. *See* § 6.4, *infra*.

Before ruling on class certification, the judge should address the following matters at an early stage in the case, typically at the initial case management conference:

- ❑ *Federal court jurisdiction.* The judge should determine whether this is a case in which the federal court has concurrent jurisdiction under the Class Action Fairness Act of 2005.
 - The act gives federal district courts subject matter jurisdiction over putative class actions involving 100 or more class members in which the amount in controversy, exclusive of interest and costs, exceeds \$5 million and in which at least one class member is a citizen of a state different from at least one defendant. 28 U.S.C. § 1332(d)(2), (5)(B).
 - Any defendant may remove such a class action to federal district court without regard to whether any defendant is a citizen of the state in which the action is brought. 28 U.S.C. § 1453(b).
 - A federal district court may decline to exercise jurisdiction over a class action if more than one-third, but less than two-thirds, of the plaintiffs and the primary defendants are citizens of the forum state, after considering (1) whether the asserted claims involve matters of national or interstate interest, (2) whether the asserted claims are governed by laws of the state in which the action was originally filed or by the laws of other states, (3) whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction, (4) whether the action was brought in a forum that has a distinct nexus with the class members, the alleged harm, or the defendants, (5) whether the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state and the citizenship of the other members of the proposed class is dispersed among a substantial number of states, and (6) whether, during the three-year period preceding the filing of the class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed. 28 U.S.C. § 1332(d)(3).
 - A federal district court must decline to exercise jurisdiction over a class action in which two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed, or one or more defendants from whom significant relief is sought and whose alleged conduct forms a significant basis for the asserted claims is a citizen of the state in which the action was originally filed; the principal injuries resulting from the alleged conduct were incurred in this state; and during the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons. 28 U.S.C. § 1332(d)(4).

(Note: While federal courts have concurrent jurisdiction over these class actions and it may be expected that at least one defendant will seek removal of the action to federal court, the case can proceed in state court if no notice of removal is filed.)

For further discussion of the Class Action Fairness Act, see the following publications of the Federal Judicial Center: Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges, Second Edition* (2009); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?* (2006); and *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* (2008). For the Federal Judicial Center publications catalog, see www.fjc.gov.

❑ *Motions:* The judge should decide whether to hear and determine threshold dispositive motions – particularly motions that do not require extensive discovery – before hearing and determining a class certification motion.

- The judge may decide motions such as challenges to jurisdiction and venue; motions to dismiss for failure to state a claim; and motions for summary judgment before a motion to certify the class, although any precertification rulings will only bind the named parties.

(Note: Early resolution of these motions may avoid expense for the parties and burdens for the court and may minimize use of the class action procedure for cases that are not meritorious.)

- If the judge decides to hear any threshold motions, the judge should set a timetable for their submission and any necessary discovery.

❑ *Interim class counsel:* The judge should decide whether to appoint interim class counsel.

- If the attorney who filed the suit is likely to be the only lawyer seeking appointment as class counsel, appointing class counsel may be unnecessary.
- If, however, there are a number of overlapping, duplicative, or competing suits pending in other courts, and some or all of those suits may be coordinated, a number of attorneys may compete for class counsel appointment. In these cases, designating interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting necessary discovery, and moving for class certification.

❑ *Related cases:* The judge should determine whether there are related cases pending in any other court and, if so, the status of these cases, including pretrial preparation, schedules, and orders. See § 1.5, *supra*.

❑ *Discovery:* The judge should discern whether any discovery is needed prior to making a determination as to whether to certify the proposed class.

- The judge should confer with counsel to determine the scope of discovery necessary to decide certification, as opposed to discovery related to the merits of the litigation.

(Note: Discovery that is only relevant to the merits delays the certification decision and may be unnecessary. Judges are generally liberal in allowing discovery that pertains to both the question of certification and the merits.)

- When facts relevant to any of the certification requirements (*see* § 6.2, *infra*) are disputed, or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues, some discovery may be necessary.

(*Note:* Although, at this early stage, the judge should not decide or even attempt to predict the weight or outcome of the claims and defenses, the judge need not rely only on the allegations of the pleadings. A strong understanding of the parties' positions and nature of the proof is necessary to decide whether the claims and defenses can be presented and resolved on a class-wide basis.)

- The judge should encourage counsel to confer and stipulate as to relevant facts that are not genuinely disputed; to reduce the extent of precertification discovery; and to refine the pertinent issues for deciding class certification.
 - The judge may require the parties to submit a specific and detailed precertification discovery plan which identifies the depositions and other discovery contemplated from other parties, as well as the subject matter to be covered and the reason it is material to determining class certification.
 - The judge should inquire whether the parties contemplate precertification discovery from potential class members and, if so, should determine whether the proposed discovery fills a legitimate need and what is the most cost-effective means for conducting it.
- *Precertification communications with proposed class members:* The judge should determine whether there is a need to regulate communications with potential class members before certification.
- Some courts have held that, absent specific evidence of abuse, requiring the parties to obtain a judge's prior approval of precertification communications is an impermissible prior restraint on protected speech.
 - Judicial intervention is generally justified only on a clear record and with specific findings which reflect that the judge has weighed the need for a limitation against the potential interference with the parties' rights.
 - Actions the judge might take to prevent abuse include: (1) requiring the parties to communicate with potential class members only in writing; (2) requiring the parties to file with the court copies of all non-privileged communications with class members; (3) correcting any inaccurate prior communications; (4) reminding plaintiff's counsel that even before certification or a formal attorney-client relationship, class counsel must act in the best interests of the class as a whole; and (5) reminding defendant's counsel that while the defendant may communicate with potential class members in the ordinary course of business, the defendant may not give false, misleading, or intimidating information; conceal material information; or attempt to influence the decision about whether to request exclusion from the class.

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 21.11 (Initial Case-Management Orders), 21.12 (Precertification Communications with the Proposed Class), 21.14 (Precertification Discovery), 21.15 (Relationship with Other Cases Pending During the Precertification Period), and 21.25 (Multiple Cases and Classes: The Effect on Certification).

§ 6.2 Determining Motion for Certification of Action as Class Action

The judge should determine whether an action should be certified as a class action at the earliest practicable time, i.e., when the judge has sufficient information to decide whether the case meets the criteria for being certified as a class action. At the initial case management conference, the judge and counsel should address the issues bearing on certification and establish a schedule for the work necessary to permit an informed ruling on the class certification motion.

An evidentiary hearing may be necessary to resolve some of the disputed facts relevant to the certification decision. The parties should present facts and arguments to let the judge determine (1) the nature of the claims and defenses and how they will be presented at trial, and (2) whether there are common issues that can be tried on a class-wide basis. The judge may limit the number of witnesses, require depositions to be summarized, and call for written statements of the direct evidence.

Most states have adopted, in some form, the class certification requirements set forth in Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. In order to prevail in their efforts to certify a class, proponents must first satisfy the requirements of Rule 23(a).

Rule 23(a) requires that:

- ☐ The proposed class must be so numerous that joinder of all members is impracticable;
- ☐ There must be common questions of fact or law;
- ☐ The named plaintiff's claims must be typical of the class as a whole; and
- ☐ The named plaintiff must be an adequate class representative.

The proponents must then satisfy one of the following criteria contained in Rule 23(b) by showing that:

- ☐ Certification is necessary to prevent (1) inconsistent rulings regarding the defendants' required conduct, or (2) adjudications with respect to individual class members that would, as a practical matter, be dispositive of the interests of the other members or would substantially impair or impede their ability to protect their interests;
- ☐ The party opposing certification has acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- ☐ Questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Meeting Rule 23(a) requirements: To certify an action as a class action, the judge must find:

- ☐ *Numerosity*: The proposed class is sufficiently numerous for certification.

(Note: Determining numerosity is usually straightforward. Affidavits, declarations, or even reasonable estimates in briefs are often sufficient to establish the approximate size of the class and whether joinder might be practical and manageable alternative to a class action.)

- ❑ *Commonality*: There are one or more common questions of fact or law.

(*Note*: Identifying common questions typically requires the judge to examine the parties' claims and defenses; identifying the type of proof the parties expect to present; and deciding the extent to which there is a need for individual, as opposed to common, proof.)

- ❑ *Typicality*: The named plaintiff's claims are typical of the class as a whole.

- The judge should consider whether the named plaintiff's claims arise from the same course of events and involve legal arguments similar to those of each class member. Class representatives with significantly stronger or weaker claims than class members may mislead the jury.
- The judge should also consider whether the named plaintiff's claims are subject to defenses that do not apply to other class members.

- ❑ *Adequacy of representation*: The named plaintiff will fairly and adequately represent the interests of the class.

- Class counsel must be qualified, experienced, and able to conduct the litigation in the interests of the class.
- The named plaintiff may not have any substantial interests that are antagonistic to those of the proposed class members.
- Counsel must show that there are no actual conflicts among the anticipated claims of class members, or must show that conflicts can be avoided or ameliorated by employing subclasses or by providing a plan for distributing benefits based on objective criteria.

Meeting Rule 23(b)(2) requirements

This rule may be satisfied when class-wide injunctive or declaratory relief is necessary to redress group injuries, such as infringement of civil rights. This type of class action generally does not permit class members to opt out of the class. It presumes that the class is homogeneous and therefore cohesive. This presumption can be overcome by showing individualized issues as to liability or remedy. When a proposed class seeks both injunctive relief and damages, the judge may have to make findings as to the relative importance of the damage claims and decide whether to provide class members notice and an opportunity to opt out.

To certify an action as a class action under this rule, the judge must find:

- ❑ *Ascertainability*: The proposed class must be ascertainable because class members are entitled to notice of the action and an opportunity to opt out. *See* Fed. R. Civ. P. 23(c)(2)(B).

- The class and any proposed subclasses must be definable and defined for the judge.

(*Note*: The definition must be precise and objective, e.g., the class may consist of those persons who purchased specified products from the defendants during a specified period, or it may consist of all persons who sought employment or who were employed by the defendant during a fixed period. Individual members need not be specifically identified, however, at this stage of the proceedings.)

- The judge should also consider whether the class definition captures all members necessary for an efficient and fair resolution of the common questions of fact and law in a single proceeding.

(Note: If the definition fails to include a substantial number of people with claims similar to those of the class members, the definition of the class may be questionable. A broader class action definition or a separate class might be more appropriate. If the class definition includes people with similar claims but divergent interests or positions, subclasses with separate class representatives and counsel might be sufficient.)

- ❑ *Common questions predominate:* The questions of fact or law that are common to the members of the class predominate over any questions affecting only individual members.
 - To analyze predominance, the judge must determine whether there are individualized issues of fact and how they relate to the common issues.
 - Precertification discovery may be needed to assist the judge in distinguishing the individual from the common elements of the claims, issues, and defenses, and in deciding the extent to which the need for individual proof outweighs the economy of receiving common proof.
 - In cases with nationwide or multi-state class members, counsel should explain (at the class certification hearing) the common elements of the substantive law that are applicable to all class members so that choice of law issues can be evaluated with regard to predominance.
- ❑ *Superior method of adjudication:* A class action is superior to other available methods for the fair and efficient adjudication of the controversy.
 - The judge should consider how the class action process compares to available alternatives such as individual suits or joinder, consolidation, intervention, or other nonrepresentational forms of aggregate litigation.
 - The judge should consider the size of the claims. In cases involving small claims, a class action may be the only viable procedure for bringing these claims.
 - Discovery may be needed to determine the extent to which individual class members have an interest in separate actions, inconsistent with class treatment.
 - The judge must determine whether the process for presenting claims and awarding relief to individual class members is manageable and takes account of differences among class members without creating conflicting interests.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 21.131 (Certifying a Litigation Class), 21.132 (Certifying a Settlement Class), 21.133 (Timing of the Certification Decision), 21.21 (Certification Hearings and Orders), 21.222 (Definition of Class), 21.23 (Role of Subclasses), 21.26 (Appointment of the Class Representatives), and 21.27 (Appointment of Class Counsel).

§ 6.3 Determining Notice to Be Given to Class Members

Certification notice: Notice to class members that the action has been certified as a class action (*see* § 6.2, *supra*) may be required.

- ❑ The notice should specify the nature of the action; the definition of the class and any subclasses; and the claims, issues, and defenses for which the class has been certified.

(*Note:* On its website, the Federal Judicial Center has numerous illustrative forms of class action notices that counsel (and the judge) may refer to in drafting a sufficient notice. *See* www.fjc.gov.)

- The notice should be stated concisely and clearly, in plain, easily understandable language. The judge should review the proposed notice to ascertain that it complies with this element.
- The judge should discuss with counsel whether class members are likely to require notice in a language other than English or in any other accessible form (e.g., in Braille or large print for the visually impaired).
- ❑ The certification notice should convey the information absent class members need to decide whether to be excluded from or opt out of the class and the opportunity to do so.
 - To enable absent class members to make an informed decision, the notice should describe succinctly the positions of the parties; identify the opposing parties and their counsel; describe the relief sought; and explain the risks and benefits of retaining class membership and opting out, while emphasizing that the court has not ruled on the merits of any claims or defenses. They should be advised that they can object and still participate in the class action if their objection is denied.
 - A simple and clear form for opting out is often included with the notice.
- ❑ Notice is generally given in the name of the court, although one of the parties typically prepares and distributes it.
 - The plaintiff ordinarily has the responsibility of providing notice and must bear the cost of doing so when certification is granted.
 - The judge may, however, require the defendant to bear or share the cost of providing notice when the defendant has the ability to provide notice easily and at relatively little cost, or when the defendant's conduct has unnecessarily complicated the problems of identifying and notifying class members.
 - When a class action is settled, the defendant generally pays for the cost of giving notice, although the parties may decide otherwise.
- ❑ The certification notice should generally be given by mail when the names and addresses of most class members are known.
 - Posting notice on Internet sites likely to be visited by class members (including the defendant's web site) and linked to more detailed certification information may be a useful, cost-effective supplement to individual notice.

- Publication of the notice in magazines, newspapers, or trade journals may be necessary when individual class members are not identifiable after reasonable effort or at reasonable cost, or as a supplement to other notice efforts. The judge may ask counsel why they have chosen a particular publication in which to give notice.
- Posting notice in public places likely to be frequented by class members may also be an appropriate alternative.

Settlement notice: Notice of any proposed settlement of the class action (see § 6.4, *infra*) must be given to all class members who will be bound by the settlement.

- ☐ Settlement notice should define the class and any subclasses, clearly describe the options open to the class members and the deadlines for taking action; describe the essential terms of the proposed settlement; disclose any special benefits provided to the class representatives; provide information regarding any claim for attorney's fees (see § 6.5, *infra*); indicate the time and place of the hearing to consider approval of the settlement; describe the method for objecting to or opting out of the settlement; explain the procedures for allocating and distributing settlement funds; explain how nonmonetary benefits were valued if the settlement includes them; provide information that will enable class members to calculate or at least estimate their individual recoveries; and give the address and phone number of class counsel and describe how to make inquiries.
- ☐ The settlement notice should be delivered or communicated to class members in the same manner as the certification notice.

(Note: The parties generally use the settlement agreement to allocate the costs of the settlement notice. These costs are often assessed against a fund created by the defendants or to the defendant, in addition to any funds paid to the class.)

Other notices – The judge may require other notices for the protection of class members, including:

- ☐ A notice giving class members a second opportunity to opt out of a class settlement;
- (Note: Rule 23(e)(4) provides that in a class action that was previously certified under Rule 23(b)(3), the judge may refuse to approve a settlement unless it affords a new opportunity to request exclusion to class members who had an earlier opportunity to request exclusion but did not do so.)
- ☐ A notice that the class has been decertified;
 - Such a notice might be appropriate to avoid prejudice to class members, e.g., when the statute of limitations is about to run.
 - The judge may consider using means less costly than personal notice.
 - ☐ A notice to correct misinformation or misrepresentations made by one of the parties or their attorneys; and
 - A curative notice should ordinarily be disseminated in the same form as the misinformation to be corrected.

- Those who made the misstatements should bear the cost of a notice to correct them.
- ❑ A notice of the procedure for filing a claim when the notice of settlement does not establish this procedure.
 - The notice should advise class members about when, where, and how to file claims, and should also provide claims forms.
 - The notice should be sent to all known class members and is generally part of the cost of administering the settlement, paid out of a settlement fund.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 21.31 (Notices from the Court to the Class), 21.311 (Certification Notice), 21.312 (Settlement Notice), and 21.313 (Other Court Notices).

§ 6.4 Reviewing Proposed Settlement

The judge must review any proposed settlement of a class action to determine whether it is fair, reasonable, and adequate – even when the settlement is unopposed. This review must be exacting and thorough, and it must include a review of all agreements and undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. In general, the judge must examine whether the interests of the class are better served by settlement than by further litigation.

The judge's role in reviewing a proposed settlement is critical, but is limited to approving the settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the settlement agreement, although the judge's statement of conditions for approval, reasons for disapproval, or discussion of reservations about proposed settlement terms may lead the parties to revise the agreement.

The court must be aware, in the context of settlement, that both sides have a common interest in obtaining the court's approval. Thus, there will not be the ordinary adversarial presentation, and the court must make at least a rough assessment of the merits of the plaintiffs' case in order to assess the fairness of the settlement.

In general, fairness calls for a comparative analysis of the treatment of class members with respect to each other and with respect to similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims, and the responsiveness of the settlement to those claims. Adequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action procedure.

Many factors may be considered in determining, fairness, reasonableness, and adequacy, including the following:

- ❑ The advantages of the proposed settlement versus the probable outcome of a trial on the merits. The judge may consider:
 - The strength of the plaintiffs' case;
 - The probable time, duration, and cost of a trial; and
 - The probability that the class claims, issues, or defenses could be maintained through trial on a class basis.

- ☐ The extent of participation in the settlement negotiations by class members or class representatives, and by a judge or a special master.
- ☐ The number and force of objections by class members.
 - The judge should consider the number of objections in light of the individual monetary stakes involved in the litigation.

(Note: When each class member's recovery is small, a minimal number of objections may reflect apathy rather than satisfaction. When each class member's recovery is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class's sentiments toward the settlement.)

 - The judge should distinguish between meritorious objections and those advanced for improper purposes.
 - Individual terms more favorable than those applicable to other class members should be approved only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from other class members.
- ☐ The fairness and reasonableness of the procedure for processing individual claims under the settlement.
 - The judge should determine whether the persons chosen to administer the claims procedure are disinterested and free from conflicts arising from representing individual claimants.
 - The judge should confirm that the eligibility conditions are not so strict and the claims procedures so cumbersome that class members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the fund will revert to the defendant.
 - Completion and documentation of the claims forms should be no more burdensome than necessary.
 - Any release of liability should be narrowly tailored.
- ☐ The provision for disposition of undistributed or unclaimed funds.
 - Judicial approval is required for this disposition.
 - The funds may be returned to the settling defendant, paid to other class members, or distributed to a charitable or nonprofit institution, or to a government agency. To avoid any appearance of impropriety, the judge should not suggest the charitable recipient.
 - The judge should allow adequate time for late claims before any refund or other disposition of settlement funds occurs and might consider ordering a reserve for late claims.
- ☐ The reasonableness of any provisions for attorney's fees. The judge may consider:
 - Agreements on the division of fees among attorneys;

- The terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;
 - Whether attorney’s fees are based on a very high value ascribed to nonmonetary relief awarded to the class, such as coupons;
 - Whether attorney’s fees are based on the allocated settlement funds rather than the funds actually claimed by and distributed to class members;
 - Whether attorney’s fees are so high in relation to the actual or probable class recovery that they suggest a strong possibility of collusion; and
 - Whether a portion of the fee award should be withheld until all distributions to class members have been made.
- ☐ The apparent intrinsic fairness (or unfairness) of the settlement terms. For example, the judge may consider:
- Whether the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large.
- Note:* Such differences are not necessarily improper, but call for judicial scrutiny. Compensation for class representatives may sometimes be merited based on a factual showing of the time spent meeting with class members or responding to discovery and of the risks assumed. For example, in an employment discrimination case, a named plaintiff may deserve extra compensation because by serving as a named plaintiff, this individual may have made himself or herself less attractive to prospective employers.
- Whether objectors receive better settlements than other class members.
 - Whether an agreement that grants class members illusory nonmonetary benefits, such as discount coupons for more of the defendant’s product, while granting a substantial monetary attorney’s fee award, is inherently unfair.
 - Whether nonmonetary relief, such as coupons or discounts, is likely to have much, if any, market or other value to the class, and the likelihood that they will be used.
 - Whether the settlement amount is much less than the estimated damages incurred by class members as indicated by preliminary discovery or other objective measures.
 - Whether the settlement was reached at an early stage of the litigation without substantial discovery and with significant uncertainties remaining.
- ☐ Whether another court has accepted or rejected a substantially similar settlement for a similar class.

For further discussion, see *Manual for Complex Litigation, Fourth*, §§ 21.61 (Judicial Role in Reviewing a Proposed Class Action Settlement), 21.62 (Criteria for Evaluating a Proposed Settlement), 21.63 (Procedures for Reviewing a Proposed Settlement), 21.643 (Role of Objectors in Settlement), 21.66 (Settlement Administration), and 22.92 (Review of Settlement in Mass Tort Class Actions).

§ 6.5 Awarding Attorneys' Fees

In class actions involving a monetary recovery, the natural conflict that exists between class counsel and class members necessarily draws the judge into the role of regulating and awarding attorneys' fees. Class counsel's interest in obtaining fees is adverse to the interest of the class because the fees come out of the common fund recovered for the benefit of the class, except when fees are to be paid separately by the defendants and not from the class recovery. Unless the judge protects the interests of absent class members, those interests may not be represented.

The judge has considerable discretion to regulate an attorney's fee award in a class action, whether as part of the settlement of the action or after trial. Calibrating the amount of attorney's fees to a reasonable share of the benefits of a class settlement or award is an appropriate and effective means of managing class action litigation and preventing abuses of the class action procedure.

For example, the judge can do the following:

- ☐ When fees are based on a percentage of the recovery, decrease this percentage as the amount of the recovery increases on the theory that a large recovery is generally due merely to the size of the class and may have no relationship to the attorney's efforts.
- ☐ Limit the fee award to a reasonable percentage of the value of the coupons actually redeemed in a "coupon settlement."
- ☐ Refuse to allow fees based on an inflated or arbitrary evaluation of the benefits to be delivered to class members.

(*Note:* It might be appropriate to require the attorneys to share in the risk of fluctuations in the value of an in-kind settlement, either by taking all or part of their fees in in-kind benefits or by deferring the collection of fees and making them contingent on the value of in-kind benefits that are actually delivered to the class members.)

- ☐ Use the lodestar method (*see* § 5.6, *supra*) rather than the percentage-of-recovery method to determine the amount of fees to which the attorneys are entitled when the benefit to the class is speculative.

(*Note:* Using the lodestar method may also be appropriate when the primary relief obtained is injunctive or declaratory relief and the value of this relief cannot be reliably determined or estimated.)

- ☐ Reduce the parties' estimates of the dollar value of the benefits delivered to the class members and base the fee award on the reduced amount.
- ☐ In a case involving distribution of benefits over time, base the fee award on the benefits actually delivered rather than the amount of money set aside to satisfy potential claims.

(*Note:* It is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete.)

- ☐ Appoint counsel to represent the class in the fee proceedings.

- ❑ By announcing at the outset of the litigation that the judge intends to employ one or more of these provisions, the judge may motivate the attorneys to ensure that class benefits have a real value to the class.
- ❑ The party seeking fees has the burden of submitting sufficient information to justify the requested fees. Even in common fund cases, judges frequently require an estimate of the number of hours spent on the litigation and a statement of the hourly rates for all attorneys and paralegals who worked on the case. This information can serve as a “cross-check” on the determination of the percentage of the common fund that should be awarded as fees. In lodestar or statutory fee award cases, applicants must provide full documentation of hours and rates.
- ❑ For general factors to consider in awarding attorney’s fees in complex cases, *see* § 5.6, *supra*.

For further discussion, *see Manual for Complex Litigation, Fourth*, Chapter 14, Attorney Fees, and §§ 21.7 (Attorney Fee Awards) and 22.927 (Awarding and Allocating Attorney Fees).



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APPENDICES



Court Name
County
City, State Zip

**Notice of Assignment to [Department No.]
for Case Management Determination**

This form, a copy of the notice to plaintiffs, the ADR information sheet, and a blank case management statement are to be served upon all opposing parties, all parties served with summons and complaint/cross-complaint.

1. This matter has been assigned to **[Department No.]**, **[Name of Judge]** presiding, for all purposes, **[Department No.]** is designated as the complex litigation department of the court and as such (a) hears all cases wherein a designation of complex case has been made and (b) conducts hearings, in cases that this court determines, on a preliminary basis may be complex, to determine whether the case should remain in the complex litigation program.
2. The court requires all counsel to appear in **[Department No.]** on **[Date]** at **[Time]**.
 - a) If the case has been designated as complex, and no counter-designation has been filed, the Court will hold its first case management conference at that time.
 - b) If the case has been assigned to **[Department No.]** on a preliminary basis, the Court will hold a hearing to determine if the matter is, or is not, complex. If the matter is determined to be complex, the court will then proceed with the first case management conference.
3. Each party shall file and serve a Case Management Conference Statement five (5) days before this hearing and be prepared to participate effectively in the Conference, including being thoroughly familiar with the case and able to discuss the suitability of the case for private mediation, arbitration or the use of a special master or referee.
4. Prior to the conference, counsel for plaintiff shall meet and confer with counsel for each other party in an effort to precisely define the issues in the case, discuss the possibility of early mediation, the identities of possible other parties, and their respective plans for discovery.
5. Until the time of the conference the following INTERIM ORDERS shall be in effect:
 - a) Plaintiff shall diligently proceed in locating and serving each and every defendant. It is the court's intention that each party be served in sufficient time to have entered an appearance within the time allowed by law and to attend the first conference.
 - b) All discovery shall be stayed excepting as all parties to the action might otherwise stipulate or the Court otherwise order.
 - c) No party shall destroy any writing or other evidence in its possession or under its control which bears in any way upon the matters which are the subject of this litigation.
 - d) Within the time limit for any part to file an answer or demurrer, such party may alternatively file a notice of general appearance. In such event, the time for filing of an answer or demurrer shall be extended to twenty (20) days following the first conference unless the Court shall, at that time, set a different schedule.
 - e) Counsel for each party shall do a conflict check to determine whether such counsel might have a possible conflict of interest as to any present or contemplated future party.

BY ORDER OF THE COURT

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[Attorneys' business address]

[Court name]

[Plaintiff's name],

Plaintiff,

vs.

[Defendant's name],

Defendant

) Case No.: [Case number]

) **INITIAL STATUS CONFERENCE ORDER**

) Complex Litigation Program

An initial status conference is set for [Date] at [Time] in [Department No], located at [Address], [City], [State], [Zip].

To facilitate the orderly conduct of discovery and motions brought before this court, no responsive pleadings or motions may be filed prior to the Initial Status Conference and all discovery is stayed. Parties should file a Notice of Appearance in lieu of an answer or other responsive pleading. Nothing herein stays the time for filing an affidavit of prejudice pursuant to [Code/Section].

1 The court orders all counsel for all parties to attend the Initial Status Conference. Counsel
2 who are managing the litigation, and who are able to make decisions regarding discovery and
3 briefing of legal issues, shall attend the Initial Status Conference and all subsequent Status
4 Conferences or Case Management Conferences. Attendance at the Initial Status Conference must
5 be in person rather than by telephone. Pursuant to [Code/Section], this court determines with
6 respect to this complex litigation that personal appearance by counsel at the Initial Status
7 Conference will materially assist in effective management of the case. If any counsel wishes the
8 court to make an exception for hardship, application may be made by telephonic request to the
9 court clerk, or by *ex parte* application, stating grounds for requesting an exception.

10 Prior to the Initial Status Conference, the court orders all counsel for all parties to meet
11 and confer in person (no later than 10 days before the Conference) and discuss the following
12 areas. Additionally, counsel shall be prepared to discuss these issues with this court at the Initial
13 Status Conference.

- 14 1. Parties and the addition of parties;
- 15 2. Claims and defenses;
- 16 3. Consideration of any issues of recusal or disqualifications;
- 17 4. Issues of law that, if considered by the court, may simplify or further resolution
18 of the case;
- 19 5. Appropriate alternative dispute resolution (ADR) mechanisms (e.g. mediation,
20 mandatory settlement conference, arbitration, mini-trial, etc.);
- 21 6. A plan for preservation of evidence;
- 22 7. A plan for disclosure of discovery;
- 23 8. Whether it is possible to plan “staged discovery” so that information needed to
24 conduct meaningful ADR is obtained early in the case, allowing the option to
25 complete discovery if the ADR effort is unsuccessful;
- 26 9. A target trial date;
- 27 10. Whether a structure of representation such as liaison/lead counsel is appropriate
28 for the case in light of multiple plaintiffs and/or multiple defendants;
11. Procedures for the drafting of a Case Management Order, if appropriate;
12. Any issues involving the protection of evidence and confidentiality;
13. The handling of any potential publicity issues;

1 14. The creation of a single master file for the litigation to eliminate the need for
2 multiple filings of similar documents when related cases have common parties;
3 and

4 15. Whether it is appropriate to reduce the number of parties upon whom service of
5 documents must be made.

6 Counsel for plaintiff is to take the lead in preparing a Joint Initial Status Conference
7 Report to be filed three court days prior to the Initial Status Conference. The Joint Initial Status
8 Conference Report is to include the following:

- 9 1. A list of all parties and counsel;
- 10 2. A statement as to whether additional parties are likely to be added and a
11 proposed date by which all parties must be served;
- 12 3. An outline of the claims and cross-claims and the parties against whom each
13 claim is asserted;
- 14 4. Service lists and procedures for efficient service filing;
- 15 5. Whether any issues of jurisdiction or venue exist that might affect this court's
16 ability to proceed with this case;
- 17 6. Applicability and enforceability of arbitration clauses;
- 18 7. A list of all related litigation pending in other courts, a brief description of any
19 such litigation, and a statement as to whether any additional related litigation is
20 anticipated;
- 21 8. A description of core factual and legal issues;
- 22 9. A description of legal issues that, if decided by the court, may simplify or
23 further resolution of the case;
- 24 10. Whether discovery should be conducted in phases or limited; and if so, the order
25 of phasing or types of limitations on discovery;
- 26 11. Whether particular documents relevant to the case can be exchanged by
27 agreement of the parties. Whether information concerning relevant witnesses
28 can be exchanged by agreement of the parties.
12. The parties' tentative views on an ADR mechanism and how such mechanism
might be integrated into the course of the litigation;

**Suggested Agenda Items to Consider at
Initial Case Management Conference
Held in Complex Civil Cases**

____ 1. **Nature of Case:**

- ____ a. Type of case (*e.g.*, antitrust, construction defect, securities litigation, environmental, mass torts, class actions, insurance coverage, etc.).
- ____ b. Parties' respective factual claims and legal theories.
- ____ c. Estimated number of class members (if applicable).
- ____ d. Estimated damages.
- ____ e. Other forms of relief sought.
- ____ f. "Watershed event" in the case (*e.g.*, class certification motion, demand futility demurrer, etc.) .

____ 2. **Procedural Posture of Case:**

- ____ a. Operative pleadings.
- ____ b. Unserved parties/pleadings and the reasons for lack of service.
- ____ c. Related articles pending in any jurisdiction and the possibility for consolidation or coordination.
- ____ d. Status of discovery.
- ____ e. Orders already made by the Court before single assignment for all purposes (if applicable).
- ____ f. Pending motions yet to be heard by the Court (if applicable).
- ____ g. Any insurance coverage issues/pending declaratory relief actions.

____ 3. **Appointment of Lead / Liaison Counsel.**

____ 4. **Evidence:**

- ____ a. Designation of central hard copy and/or electronic document depository.
- ____ b. Consider requiring source logs for voluminous document productions.
- ____ c. Discuss any concerns regarding preservation of evidence.
- ____ d. Discuss education of the Court concerning any technology and/or science involved in the case:
 - ____ 1) Need for court-appointed expert?
 - ____ 2) Sufficiency of tutorial presented by the parties?

____ 5. **Discovery:**

- ____ a. Discuss schedule:
 - ____ 1) Discuss anticipated discovery.
 - ____ 2) Create a discovery plan (*i.e.*, schedule needed discovery in stages around significant “watershed event” in case).
 - ____ 3) Consider placing limits on discovery.
 - ____ 4) Advise re: Court’s Standing Order re: Conduct at Depositions.
 - ____ 5) Consider setting dates deviating from the normal deadlines provided by the Code for discovery, both percipient and expert.
 - ____ 6) Defer setting specific dates until trial date is set (see Item 9 below).
- ____ b. Stipulated protective order:
 - ____ 1) Discuss need for stipulated protective order.
 - ____ 2) If needed, schedule preparation and filing of stipulated protective order.
 - ____ 3) Advise re: Court-approved model stipulated protective orders.
- ____ c. Appointment of discovery referee:
 - ____ 1) Discuss need for discovery referee.
 - ____ 2) If needed, seek parties’ agreement on a particular discovery referee.

____ 6. **Appropriate Dispute Resolution (“ADR”):**

- ____ a. Discuss need for special master, case manager, etc. to assist the Court in effectively managing the case:
- ____ b. Discuss ADR for possible resolution of case short of trial:
 - ____ 1) Get parties to agree on a particular ADR process (*e.g.*, mediation, neutral evaluation, arbitration, etc.).
 - ____ 2) Encourage parties to agree on a particular neutral.
 - ____ 3) Discuss when ADR session will be most beneficial and tentatively schedule same.
 - ____ 4) Refer parties to Mediator / Arbitrator Panel (M.A.P.)

____ 7. **Pretrial Motions:**

- ____ a. Schedule hearings on any pending motions.
- ____ b. Set timetable for any pretrial motions:
 - ____ 1) Pleading motions (*e.g.*, demurrers, motions to strike, motions for judgment on the pleadings, etc.).
 - ____ 2) Motion for class certification (if applicable).
 - ____ 3) Motions for summary judgment/summary adjudication.
 - ____ 4) Any other dispositive motions.

____ 8. **Trial:**

- ____ a. Explore possible severance/bifurcation of issues for trial.
- ____ b. Discuss setting trial date:
 - ____ 1) Set early trial date or
 - ____ 2) Discuss when case will be ready for trial date to be set.

- ____ c. Jury or court trial?
- ____ d. Estimated length of trial.
- ____ e. Consider limiting length of trial.
- ____ f. Discuss other guidelines to govern conduct of trial (*e.g.*, courtroom demeanor, conduct and etiquette, general courtroom procedures, etc.).

____ 9. **Discovery Deadlines** (Set Once Trial Date Set):

- ____ a. Discovery (non-expert) closes on _____.
- ____ b. Expert witness information to be exchanged on _____.
- ____ c. Expert witness's depositions to be taken commencing on _____ and concluding on _____.
- ____ d. Discovery motions shall be heard no later than _____.
- ____ e. Motions regarding expert witnesses shall be heard no later than _____.

____ 10. **Housekeeping Matters:**

- ____ a. Resolution motions:
 - ____ 1) Noticed hearings set on Monday at 9:00 a.m., or as otherwise scheduled by the Court.
 - ____ 2) *Ex partes* heard by appointment on any court day at 8:30 a.m., 4:30 p.m. or as otherwise scheduled by the Court.
 - ____ 3) Clear specific date with my Clerk and opposing counsel first.
 - ____ 4) Unless otherwise specifically provided by law (*e.g.*, **Statute/Court Rule**), increase **Statute/Court Rule** time periods by 2 court days:
 - ____ a) Moving papers to be filed and served 18 court days before the hearing;
 - ____ b) Opposition papers to be filed and served 11 court days before the hearing; and
 - ____ c) Reply papers to be filed and served 7 court days before the hearing.
- ____ b. Filing of papers:

-iv-

- ____ 1) Originals can be filed in either **City** or **City**.
- ____ 2) Courtesy copies need to be personally delivered to:
 - ____ a) Judge; and
 - ____ b) Research attorney.
- ____ c. Service of papers.
- ____ d. Length of briefs:
 - ____ 1) Comply with **Statute/Court Rule**.
 - ____ 2) *Ex parte* application to exceed page limits.
- ____ e. Tentative rulings:
 - ____ 1) No tentative rulings will be provided court day before the hearing.
 - ____ 2) Written or oral tentative ruling will be provided immediately prior to the hearing so that counsel can better focus their arguments.
- ____ f. Other rules for handling litigation in your particular department.
- ____ 11. **Subsequent Case Management Conferences (CMCs):**
 - ____ a. Discuss frequency of regular CMCs to be held.
 - ____ b. Set next CMC and discuss its agenda.
 - ____ c. Schedule deadline for filing of CMC statements (not to exceed 5 pages in length), *i.e.*, 5 court days prior to the hearing.
 - ____ d. Require counsel to meet and confer prior to each subsequent CMC.
 - ____ e. Encourage joint CMC statements.
- ____ 12. **Formal Orders:**
 - ____ a. Direct someone to prepare formal order for initial case management conference.
 - ____ b. Will alternate responsibility for documenting subsequent CMCs with formal orders.

-v-

[COURT NAME]

In Re Complex Litigation Matters

ELECTRONIC CASE FILING

STANDING ORDER

As amended effective [DATE]

Pursuant to [CODE/SECTION], the Court enters the following Standing Order, applicable to all matters now or hereafter designated by the court for electronic filing, effective as of [DATE]:

I. Applicability of Other Rules and Orders: Except to the extent modified by this Order, approved stipulation or other order of the court, all [STATE] Rules of Civil Procedure, Local Rules, and orders of the court shall continue to apply to cases which are subject to electronic filing. Electronic filing is subject to the provisions of [CODE/SECTION], as those Rules may be amended from time to time.

II. Selection of Cases: Most matters classified by the court as Complex Litigation are designated for mandatory e-filing, unless specifically exempted by order of the assigned Complex Litigation Judge. A matter classified as provisionally complex pursuant to [CODE/SECTION] should be filed electronically until exempted. A matter not provisionally complex but designated by a party as complex pursuant to [CODE/SECTION] need not be electronically filed until such time as the court enters a classification order pursuant to [CODE/SECTION].

III. Electronic Filing Service Providers: Pursuant to [CODE/SECTION] the court has contracted with two (2) Electronic Filing Service Providers (EFSPs) to establish an electronic filing system for the court. The currently designated EFSPs for the Complex Litigation Filing Project are:

Company 1

Company 2

1 Due to limitations on electronic service, only one EFSP may be used in each matter. The first
2 appearing party may select the EFSP, subject to modification by the court. If no selection is
3 made prior to the initial case management conference, the Court will select the EFSP to be used
4 by the parties.

5 **IV. Registration and Access**

6 **Obligation to Register:** At least one attorney of record for each party in a matter
7 designated for electronic filing must promptly register with the EFSP assigned or selected for
8 that matter. Upon receipt by the EFSP of a properly executed click-through user agreement, the
9 EFSP will assign to the user a confidential login and password to the system. Additional
10 authorized users may be added at any time. No attorney or other user shall knowingly authorize
11 or permit his or her username or password to be utilized by anyone, even another attorney of
12 record. Attorneys of record who fail to timely register, or to keep registration information
13 current shall be subject to such sanctions as may be imposed by the court.

14 **Obligation to Keep Information Current:** A party whose electronic notification
15 address changes while the action or proceeding is pending must promptly file a notice of change
16 of address with the court electronically and must serve this notice on all other parties or their
17 attorneys of record. An electronic notification address is presumed valid for a party if the party
18 files electronic documents with the court from that address and has not filed and served notice
19 that the address is no longer valid.

20 **V. Electronic Filing Requirements**

21 **Generally:** In any case subject to electronic filing, all documents to be filed with the
22 Clerk of Court shall be filed electronically through the designated EFSP. Except as otherwise
23 provided in this Order, or otherwise authorized by the court, the court will not accept or file
24 any pleadings or instrument in paper form.

25 **Format:** All electronically filed and served pleadings shall, to the extent practicable,
26 be formatted in accordance with the applicable rules governing formatting of paper
27 pleadings. The electronic document title of each pleading or other document, shall
28 include:

- 29
30 (a) Party or parties filing/serving the document,
31 (b) Nature of the document,
32 (c) Party or parties against whom relief, if any, is sought, and

1 (d) Nature of the relief sought

2 (e.g., “Defendant ABC Corporation's Motion for Summary Judgment”)

3 Where the filer possesses only a paper copy of a document, it should be scanned to PDF format.

4 **Completion of Filing:** Electronic transmission of a document consistent with the
5 procedures adopted by the court shall, upon the complete receipt of the same by the Clerk and
6 together with the receipt of acceptance by the court, transmitted from the EFSP, constitute filing
7 of the document for all purposes of the Code of Civil Procedure and the Rules of Court, and shall
8 constitute entry of that document onto the docket maintained by the Clerk.

9 **Deadlines:** Filing documents electronically does not alter any filing deadlines. All
10 electronic transmissions of documents must be completed (i.e., received completely by the
11 Clerk's Office) prior to [TIME] [TIME ZONE] in order to be considered timely filed that day.
12 Where a specific time deadline is set by court order or stipulation, the electronic filing shall be
13 completed by that time.

14 **Technical Failures:** The Clerk shall deem the electronic filing system to be subject
15 to a technical failure on a given day if the court is unable to accept filings continuously or
16 intermittently over the course of any period of time greater than one hour after 12:00 noon that
17 day, in which case filings due that day which were not filed due solely to such technical failures
18 shall become due the next business day. Such delayed filings shall be accompanied by a
19 declaration or affidavit attesting to the filing person's failed attempts to file electronically at least
20 two times after 12:00 noon separated by at least one hour on each, day of delay due to such
21 technical failure.

22 **Docket:** The record of filings and entries generated by the court's case management
23 system for each case shall constitute the docket.

24 **VI. Electronic Summons:** On electronic filing of a complaint, a petition, or another document
25 that must be served with a summons, the court will transmit a summons electronically to the
26 filer. The summons will contain an image of the court's seal and the assigned case number.
27 Personal service of the printed form of an electronic summons has the same legal effect as
28 personal service of an original summons. [CODE/SECTION]

29 **VII. Permissible Manual Filing [Rule]**

30 **Generally:** Parties otherwise subject to mandatory electronic filing may be excused from
31 filing a particular document electronically if it is not available in electronic format and it is not
32

feasible for the filer to convert it to electronic format by scanning it to PDF. Such a document may be manually filed with the Clerk of Court and served upon the parties in accordance with the applicable provisions of the Code of Civil Procedure and the Rules of Court for filing and service of non-electronic documents. Parties manually filing a document shall file electronically a Notice of Manual Filing setting forth the reason(s) why the component cannot be filed electronically.

Exhibits: Exhibits whose electronic original is not available to the filer, and which must therefore be scanned to PDF, should not be filed electronically if the file size of the individual scanned document would exceed the limit specified by the EFSP and the Court [5 Mb]. Exhibits filed on paper because they are too large to scan must be identified in the electronic filing by a Notice of Manual Filing attached in place of the actual document.

Original documents: In any proceeding that requires the filing of an original document, an electronic filer may file a scanned copy of a document if the original document is then filed with the court within ten (10) calendar days. [See Rule of Court _____]

Documents Lodged Conditionally: Documents lodged with the court conditionally under seal, as provided in [CODE/SECTION], may be submitted in paper form, pending hearing on a motion to seal.

Copies of Non-[STATE] authorities not required: The Complex Litigation Department has access to all non-[STATE] authorities and has, by its guidelines, waived the requirement to comply with [CODE/SECTION]. It is requested that parties **not** file such materials, manually or otherwise, or burden the Court with courtesy copies.

III. Courtesy Copies of Pleadings: A courtesy copy of any of the following papers shall be delivered to the chambers of the Judge that will be hearing the matter:

- (1) All papers supporting or opposing any motion for summary judgment or summary adjudication;
- (2) All issue conference statements as well as issue conference statement papers such as motions *in limine* or oppositions thereto.
- (3) All motions and oppositions thereto set for hearing in the Discovery Department ([DEPARTMENT NO.]).
- (4) All papers supporting or opposing any other motion wherein the total number of pages of the document or group of documents

being filed, including exhibits, exceeds fifteen (15) pages [not including pages of proofs of service];

- (5) All papers supporting or opposing any *ex parte* motion; or
- (6) Any papers other than those described above that the Court specifically orders to be supplemented with courtesy copies.

Courtesy copies are to be delivered no later than the following court day from the date of electronic filing. For *ex parte* motions they should be provided as early as reasonably feasible.

Courtesy copies of electronically filed documents other than those described above should not be delivered to the complex litigation department.

IX. Public-Access and Privacy

Personal Identifiers: Except as provided in Rules of Court [RULE NO.] through [RULE NO.], an electronically filed document is a public document at the time it is filed unless it is sealed under rule [RULE NO.] or made confidential by law. [See Rule of Court [RULE NO.]. In order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties must refrain from including, or must redact where inclusion is necessary, the following personal data identifiers from all pleadings and other papers filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court:

- (a) **Social Security numbers.** If an individual's social security number must be included in a pleading or other paper, only the last four digits of that number should be used.
- (b) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- (c) **Dates of birth.** If an individual's date of birth must be included in a pleading or other paper, only the year should be used.
- (d) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

Privileged or Confidential Information: No party shall intentionally include within pleadings, nor attach as exhibits, any other matter that the party knows to be properly subject to a claim of privilege or confidentiality.

1 **Filing of Sensitive Documents:** A party wishing to file a document containing the
2 personal data identifiers listed above, or material known to be subject to a claim of privilege,
3 may file an un-redacted document under seal as provided herein. The party must file a redacted
4 copy for the public file.

5 **Responsibility for Redaction:** The responsibility for redacting personal identifiers and
6 privileged or confidential information rests solely with counsel and the parties. The Clerk will
7 not review each pleading or other paper for compliance. The court may impose sanctions for
8 violation of these requirements.

9 **X. Signatures [Rule of Court _____]**

10 **Documents under Penalty of Perjury:** When a document to be filed electronically
11 requires a signature under penalty of perjury, the document is deemed signed by the declarant if,
12 before filing, the declarant has signed a printed form of the document. By electronically filing
13 the document, the electronic filer indicates that he or she has complied with this requirement and
14 that the original, signed document is available for review and copying at the request of the court
15 or any party. At any time after the document is filed, any other party may serve a demand for
16 production of the original signed document.

17 **Documents Not Under Penalty of Perjury:** If a document does not require a signature
18 under penalty of perjury, the document is deemed signed by the party submitting it if the
19 document is filed electronically.

20 **Documents Requiring Signatures of Opposing Parties:** When a document to be filed
21 electronically, such as a stipulation, requires the signatures of opposing parties, the following
22 procedure applies: (1) The party filing the document must obtain the signatures of all parties on a
23 printed form of the document; (2) The party filing the document must maintain the original,
24 signed document and must make it available for review and copying; (3) By electronically filing
25 the document, the electronic filer indicates that all parties have signed the document and that the
26 filer has the signed original in his or her possession.

27 **XI. Proposed Orders for Court Signature**

28 **Generally:** Court rules requiring filing of proposed orders with filings of motions or
29 oppositions should be filed and such proposed orders e-filed with the moving or opposing
30 papers. Such proposed orders must be clearly marked as "proposed".
31
32

1 **Signature Copies:** For the purpose of signing of orders, the prevailing party will need to
2 e-mail to the court at [COURT EMAIL ADDRESS] a signature copy, in word-processing
3 format so that it can be modified, if needed, and dated, prior to signing

4 **Format:** The e-mailed copy may be in any of the following formats: WordPerfect (.wpd);
5 Microsoft Word (.doc); Plain Text / ACSII (.txt).

6 **Timing of Signature Copies:** Excepting for orders pursuant to [CODE/SECTION] and
7 stipulated orders, proposed orders should not be e-mailed until the Court has indicated that the
8 requested relief will be granted. Orders e-mailed prior to the ruling of the court will not be
9 retained and replacement orders will be necessary.

10 Orders to be held for the statutory time period provided my [CODE/SECTION] of
11 [NUMBER OF DAYS] days may be sent when the notice of settlement is filed. Orders by
12 stipulation may be sent when the stipulation is e-filed. If the order is indicated upon the same
13 document as the stipulation, the document should be e-mailed as one word processing document.

14 **E-mailing Requirements**

15 (a) “Subject” or “Heading”: This must indicate the case name (at least in shortened form)
16 and the date of hearing. For orders by stipulation "By Stipulation" must replace the hearing date.
17 For [CODE/SECTION] orders the code section and last day for objection must be indicated.

18 (b) Accompanying message: This should include the case number, any information as to
19 the opportunity of opposing parties to object or seek modification of the submitted order, and any
20 other information that would be helpful to the Court.

21 **Service of the Court's Orders:** Orders filed by the court in cases designated for
22 electronic filing will be served: (a) through the EFSP; or (b) by e-mail from the court to the
23 address(es) provided to the EFSP. No paper service will be made by the court.

24 **XII. Service of Electronically Filed Documents**

25 **Generally:** The designated EFSP will provide electronic service for all documents
26 requiring service, including those which are not filed with the court, as provided in
27 [CODE/SECTION]. Delivery of e-service documents through the EFSP to other registered
28 users shall be considered as valid and effective service and shall have the same legal effect as an
29 original paper document. Recipients of e-service documents shall access their documents through
30 the EFSP. [The parties are also strongly encouraged to check the docket in their case on the
31 court's Open Access website at regular intervals.]
32

Proof of Service: Proof of service shall be made in the manner provided in [CODE/SECTION].

XIII. Service of this Order: A copy of this Standing Order must be served with the initiating pleading by any plaintiff, petitioner, or cross-complainant.

Dated: [DATE]

[NAME OF JUDGE]
[TITLE] [COURT]

1
2 [Court name]

3
4
5 [Plaintiff's name],

6 Plaintiff,

7 vs.

8 [Defendant's name],

9 Defendant(s)

) Case No.: [Case number]
) ORDER AUTHORIZING ELECTRONIC
) SERVICE

) Assigned for All Purposes to: [JUDGE]
) [DEPARTMENT]

11
12
13 The Court has deemed this matter to be complex litigation within the meaning of the
14 [CODE/SECTION]. As such, this is a case that requires specialized management to avoid
15 placing unnecessary burdens on the Court or the litigants, and to keep costs reasonable. Pursuant
16 to [CODE/SECTION], the Court makes this Order to reduce the costs of litigation; to facilitate
17 case management, document retrieval, and case organization; and to facilitate communication
18 between Court and counsel in these proceedings. The Court finds that entry of this Order is
19 necessary for the just, expeditious, and efficient litigation of this Action and that compliance
20 with the terms herein will not result in unnecessary hardship or significant prejudice to any of
21 the parties in this matter.

22 When a party to this litigation wishes to serve a document to counsel of record, that party shall
23 effectuate service of the document by the procedure set forth in this Order (subject to the
24 exceptions outlined herein):

25 **I. COMPANY NAME**

26 In order to facilitate case management, document retrieval and case organization, the
27 parties will utilize the services of COMPANY NAME and its litigation system (the “System”)
28 for providing electronic service, storage and delivery of court-filed and discovery-related
documents through a secure website to facilitate expeditious, efficient and economical

1 communication by and amongst counsel. The Court, at its option, may also use COMPANY
2 NAME and its System for these purposes as well to communicate with counsel of record.

3 **II. SERVICE ONLY**

4 The System shall apply only to the service of documents, and not to their filing. Original
5 documents must still be filed in the traditional manner (i.e., filing the signed original document
6 with the Court), pursuant to the applicable [STATE] Rules of Civil Procedure and Local Rules
7 of such Court.

8 **III. SERVICE LIST & SIGN-UP**

9 Within number of days () days of this Order, Plaintiffs counsel shall submit to the
10 COMPANY NAME representative [REPRESENTATIVE NAME], at [EMAIL ADDRESS] a
11 complete and current service list of counsel of record for this litigation. Within five days of this
12 Order, all law firms of record shall provide the following information to COMPANY NAME: (i)
13 firm address; (ii) firm telephone number; (iii) firm facsimile number; (iv) identity of lead
14 attorney(s) for this litigation; (v) list of other firm attorneys to be provided access (if any); (vi)
15 list of firm professional staff to be provided access (if any); (vii) email addresses of all attorneys
16 and professional staff to be provided access; and (viii) list of parties represented. Firms should
17 also provide the name and address of the individual designated to receive billing invoices. The
18 above information shall be provided to COMPANY NAME by email ([EMAIL ADDRESS]),
19 citing the case title in the subject line; fax ([FAX NUMBER]); or mail/overnight courier
20 (COMPANY NAME, [ADDRESS]).

21 **IV. SERVICE OF DOCUMENTS AND WEBSITE**

22 When any counsel of record wishes to serve a document, that counsel shall serve the
23 document according to all the requirements and procedures of this Order. All references to
24 “document” in this Order shall be interpreted to include any exhibits or attachments to the
25 document and shall include both pleadings and discovery-related documents (such as
26 interrogatories, requests for production, deposition notices, etc.); provided, however, that each
27 attorney shall determine individually whether to utilize the System to serve correspondence or
28 for production of discovery documents, provided large volume productions shall be coordinated
with COMPANY NAME.

COMPANY NAME shall establish and maintain an Internet website (the “Website”) for
this litigation. COMPANY NAME will post all documents served by the parties to the Website

1 as provided in this Order and shall serve each document on the parties included on the service
2 list provided to COMPANY NAME in accordance with the procedures herein.

3 Each attorney shall serve each document via electronic transfer of the document file to
4 COMPANY NAME via the Internet (either as a word-processing file or a scanned image of the
5 document). Each attorney shall title each document to identify the type and purpose of each
6 document and the party who is submitting such document. Each document electronically served
7 pursuant to this Order shall be deemed to have been served under the [STATE] Rules of Civil
8 Procedure.

9 After COMPANY NAME receives a document, COMPANY NAME shall convert such
10 document into Adobe Portable Document Format (“PDF”) and post it to the Website within one
11 (1) hour of receipt.

12 Within one (1) hour of the time a document is posted to the Website, COMPANY
13 NAME shall send an email to all registered users notifying them that the document has been
14 posted to the Website (unless such registered user has declined to receive such email
15 notifications). The email shall contain hypertext link(s) to the System.

16 Electronic service shall be complete at the time of transmission, provided any period of
17 notice or any right or duty to do any act or make any response within any period or on a date
18 certain after the service of the document, which time period or date is prescribed by statute or
19 rule of court, shall be extended after service by electronic transmission by two court days, but
20 the extension shall not extend the time for filing notice of intention to move for new trial, notice
21 of intention to move to vacate judgment pursuant to [CODE/SECTION], or notice of appeal.

22 In the event a document that is to be filed with the Court is rejected by the Court for
23 filing after it has been posted on the Website by COMPANY NAME, the rejection was caused
24 by an aspect of the caption of the document, and the party seeking to file the document
25 successfully files it with the Court within two (2) business days of its rejection with revisions to
26 the caption only, then the party filing the document shall promptly submit a notice of successful
27 filing, including the date of the filing and the revised page(s) of the caption, to COMPANY
28 NAME for posting on the Website. In all other circumstances in which a document to be filed
with the Court is rejected for filing after COMPANY NAME has posted it on the Website, the
party that caused the document to be posted shall promptly notify COMPANY NAME in
writing that the document was rejected by the Court for filing. COMPANY NAME shall cause

1 a permanent notation to be placed on the Website in conjunction with that document
2 memorializing the fact of rejection.

3 All documents posted on the System will be identified by: (a) the name of the serving
4 law firm; (b) the caption(s) of the case(s) to which the document belongs; (c) the title of the
5 document set forth on its caption; and (d) the identity of the party on whose behalf the
6 document is being served.

7 The System shall contain an index of all served documents for the litigation that will be
8 searchable and sortable according to methods that provide useful 24/7 365 days' access to the
9 documents.

10 Access to the System will be limited to registered users. Registered users will consist of
11 authorized Court personnel, counsel of record and their designated staff members, clients,
12 consultants, and experts. COMPANY NAME will provide each registered user with a user
13 name and password to access the System and the documents served in the litigation.
14 COMPANY NAME personnel will perform all administrative functions for the System, but all
15 initial data, additions, deletions or changes to the service list must be approved by the lead
16 counsel for Plaintiffs and Defendants. Any disputes regarding initial data, additions, deletions
17 or changes to the service list shall be submitted by COMPANY NAME to the Court for
18 resolution.

19 Every pleading, document and instrument served electronically shall bear a facsimile or
20 typographical signature of at least one of the attorneys of record, along with the typed name,
21 address, telephone number and State Bar of [STATE] number of such attorney. Typographical
22 signatures shall be treated exactly as personal signatures for purposes of electronically served
23 documents under the [STATE] Rules of Civil Procedure. The serving party of any document
24 requiring multiple signatures (e.g., stipulations, joint status reports) must list thereon all the
25 names of other signatories by means of an "s/" block for each. By submitting such a document,
26 the serving party certifies that each of the other signatories has expressly agreed to the form and
27 substance of the document and that the serving party has the actual authority to submit the
28 document electronically. The serving party must maintain any records evidencing this
concurrence for subsequent production to the Court if so ordered or for inspection upon request
by a party.

1 Any document transmitted to the System shall certify in the Proof of Service that a true
2 and correct copy was electronically served on counsel of record by transmission to COMPANY
3 NAME.

4 Until further notice, documents lodged or filed under seal (“sealed documents”) shall not
5 be served through the System. Instead, the service of sealed documents shall be made pursuant
6 to the applicable [STATE] Rules of Civil Procedure. To the extent practical, redacted copies of
7 all documents lodged or filed under seal shall be served through the System.

8 COMPANY NAME shall have available to counsel of record and the Court a telephone
9 ([PHONE NUMBER]) and e-mail ([EMAIL ADDRESS]) helpline available 365 days a year
10 for the minimum hours of [START TIME] to [END TIME]([TIME ZONE]).

11 Counsel for Plaintiff is ordered to prepare, serve and file within number of days days, a
12 Service List identifying all parties and their counsel which shall include the name of lead and
13 backup attorneys, addresses, including email addresses, and telephone numbers for all counsel.
14 Counsel for Plaintiff is further ordered to serve a copy of this ORDER AUTHORIZING
ELECTRONIC SERVICE on all counsel concurrently with service of the Service List.

15 COMPANY NAME shall activate the message/bulletin board function for the above
16 entitled case. All attorneys on the service list will automatically have access to the Message
17 Boards and start to receive e-mail notifications of new message board postings. If an attorney
18 does not want to receive the e-mail notifications or wants other staff members to receive e-mail
19 notifications, they are to contact customer support at COMPANY NAME, [PHONE
20 NUMBER(S)].

21 IT IS SO ORDERED.

22
23
24 Dated: [DATE]

[JUDGE], [TITLE] [COURT]

1 [Names of attorneys]
2 [Attorneys' business address]

3 [Court name]
4
5

6 [Plaintiff's name],) Case No.: [Case number]
7)
8 Plaintiff,) [PROPOSED]
9)
10 vs.) CASE MANAGEMENT ORDER
11)
12 [Defendant's name],) Complaint Filed: [DATE]
13 Defendant) Trial Date: [DATE]
14)
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Because this matter is a complex, multi-party action such that the orderly conduct of the litigation will be facilitated by the adoption of this Case Management Order (hereafter "CMO") good cause exists to issue the following orders to govern this action.

1. GENERAL PROVISIONS

1.1. The Court deems this matter complex within the meaning of the [STATE standards / court rule]. This CMO is entered to (a) facilitate resolution of the action in a fair, appropriate, and cost-effective manner, (b) to identify as early as reasonably possible in the litigation the issues to be determined, including the nature, extent, and location of all claims and damages, (c) to control discovery in an effort to avoid unnecessary and burdensome discovery procedures in the course of preparing for trial, and (d) to avoid placing unnecessary burdens on the Court or the litigants in connection with pleadings, discovery, mediation, and other pretrial proceedings.

2. SCOPE OF ORDER

2.1. This CMO applies to [COURT] Case No. [CASE NO.] and any and all cross-actions, related actions, and consolidated actions (hereafter collectively referred to as "the Action"), including any such cases that may later be deemed by the Court to be related and/or consolidated.

1 **2.2.** This CMO shall govern further pleadings, discovery, pre-trial, and settlement
2 matters in the Action.

3 **2.3.** On any matter to which this CMO is silent, the *[STATE] Code of Civil*
4 *Procedure*, the *[STATE] Rules of Court*, other applicable statutes, case law, and/or the Local
5 Rules of this Court shall be controlling.

6 **2.4.** This CMO is binding on all parties to the Action. Copies of this and all
7 subsequent Case Management Orders shall be served on any new party at the time of service of
8 the operative Complaint or Cross-Complaints. All parties appearing in the Action after the date
9 of entry of this CMO shall have number of days days from the operative service date to comply
10 with the terms contained in the CMO, unless specified otherwise herein.

11 **2.5.** This CMO may be modified by the Court on its own motion, upon motion and
12 showing of good cause by any party, upon recommendation of the Mediator as approved by the
13 Court, or by a written stipulation signed by all parties and approved by the Court.

14 **3. PLEADINGS**

15 **3.1.** Following the initial filing of an answer by a party, with the exception of
16 complaints or cross-complaints against design professionals for whom a Certificate of Merit is
17 required pursuant to **[CODE/SECTION]**, all cross-complaints for implied equitable indemnity,
18 contribution, declaratory relief and/or comparative fault are deemed filed, served, and denied
19 with all applicable affirmative defenses. Cross-Complaints that contain any other theory of
20 liability, alleging any new cause of action, or adding a new party, shall not be deemed filed,
21 served, and/or denied, and must be filed, served, and responded to pursuant to the *Code of Civil*
22 *Procedure*. Any complaint or cross-complaint served on a new party shall be accompanied with
23 all prior Case Management Order(s) and any operative amendments and a copy of the most
24 current service list.

25 **3.1.1.** Any cross-complaints against design professionals for whom a Certificate of Merit
26 is required under **[CODE/SECTION]** shall be separately filed and served. Answers by such
27 design professionals shall be separately filed and served.

28 **4. DISCOVERY**

29 **4.1. Discovery Stay:** All party discovery not specifically required or permitted under
30 this Order, including discovery pending on the date this Order is executed, is stayed except upon
31 Court Order for good cause shown. The stay of discovery will be lifted number of days (____)
32

1 days after the final mediation [if present]. However, the stay of discovery may be extended by
2 the Court. The discovery stay shall not apply to any discovery on any third parties or entities.

3 **4.2. Permitted Discovery:** The discovery attached hereto as Exhibits “A-E” is the
4 only permitted Discovery, except as expressly provided in Section 4.1 above.

5 **4.3. Document Depository:** The document depository shall be established at
6 [DEPOSITORY NAME], [ADDRESS], [CITY], [STATE] [ZIP], [PHONE NO.].

7 **4.3.1. Documents to be Deposited:** On or before [DATE], or thirty (30) days after a
8 party’s first appearance, whichever is later, each party shall provide all non-privileged, non-
9 protected documents, including oversized and color documents, as described in the attached
10 Exhibits A and B.

11 **4.3.1.1. Document Identification:** Each document and page deposited in the document
12 depository shall be sequentially numbered. The numbers will be preceded by a unique three digit
13 letter code identifying the depositing party.

14 **4.3.1.2. Notice of Compliance:** At the time a party deposits its documents, the party shall
15 serve a written Notice of Compliance on all parties. The Notice of Compliance shall also be
16 served on the document depository. The Notice of Compliance shall certify that all documents
17 and items responsive to Exhibits A and/or B have been deposited, as well as the date of deposit.
18 If a party deposits additional documents in the depository, a Notice of Compliance must be served
19 on all parties and the depository.

20 **4.3.1.3. Notice of Inability to Comply:** Parties who are not in possession of requested
21 documents shall serve on all other parties a Notice of Inability to Comply with Case
22 Management Order Discovery.

23 **4.3.1.4. Continuing Obligation To Deposit:** All parties are under a continuing
24 obligation to deposit, in accordance with the procedures set forth in this Order, all documents
25 discovered at any time after the initial deposit. If any party discovers or obtains additional
26 documents, they shall be deposited within 30 days of the party’s receipt of the additional
27 documents. Any supplemental deposits shall be accompanied by a Notice of Compliance as set
28 forth in Section 4.3.1.2 above.

29 **4.3.1.5. Privilege Log:** Any party withholding any document(s) on grounds of privilege
30 or protected work product shall deposit into the Document Depository and serve upon all parties a
31 privilege log that shall (a) identify the document(s) withheld, including the date of the document,
32

1 its author(s), and intended recipient(s), with sufficient particularity for a motion to compel to be
2 based; and (b) state the basis for refusing to produce each document including the particular
3 privilege(s) or doctrine(s) upon which protection against disclosure is based.

4 **4.3.1.6. Cost of Compliance:** The depositing party shall bear the costs of compliance
5 with the deposit obligations.

6 **4.3.2. Interrogatories:** Attached hereto as Exhibit C are special
7 interrogatories which shall be answered by each party in the Action other than the
8 Plaintiff. Verified responses to the interrogatories shall be served on all parties and on
9 the document depository on or before [DATE] or within thirty (30) days after
10 the party's first appearance, whichever is later.

11 **4.3.2.1. Objections as to Form:** Some of the interrogatories contained in Exhibit C may
12 be compound, contain subparts, or refer to other interrogatories. However, because of the
13 complex nature of this matter, no objections relating to these form issues will be sustained.

14 **4.3.2.2. Motions:** Any party may bring a motion before the Court to limit or compel
15 responses to the Interrogatories for good cause. The parties are required to meet and confer prior
16 to the Court's intervention and to discuss the issue with the Court in a telephonic conference
17 arranged through the Court's Clerk.

18 **4.3.3. Statement of Work:** On or before [DATE] or within thirty
19 (30) days of first appearance, all parties other than the Plaintiff shall complete and
20 serve on all parties and on the document depository a verified Statement of Work in the
21 form attached hereto as Exhibit D which shall describe in detail the work the party
22 performed and/or the party's involvement at the subject project. Where counsel represents more
23 than one party, a separate Statement of Work shall be completed under oath, served and deposited
24 by each party,

25 **4.3.3.1. Motions:** Any party may bring a motion before the Court to limit or
26 compel the response to the Statement of Work. The parties are required to meet and confer prior
27 to the Court's intervention and to discuss the issue with the Court in a telephonic conference
28 arranged through the Court's Clerk.

29 **4.4.4. Insurance Information**

30 **Statement of Insurance:** On or before [DATE] or within thirty (30) days of first
31 appearance, whichever is later, all parties other than Plaintiff shall complete under oath, serve on
32

1 all parties and on the document depository, a written statement identifying each and every
2 insurance policy that could possibly apply to Plaintiff's affirmative claims, including, but not
3 limited to, primary policies, excess policies, umbrella policies, additional insured endorsements,
4 denial letters, and reservation letters. If a party did not have insurance for his work, the
5 Statement of Insurance shall so indicate. The Statement shall be completed under oath in the
6 form attached as Exhibit E.

7 **4.4.4.1. Deposit of Policies:** All parties other than Plaintiff and self-insured parties shall
8 produce to the document depository a complete copy of each policy identified in the Statement of
9 Insurance, including all related binders, declaration pages, jacket provisions, manuscript
10 provisions, endorsements, certificates of insurance, additional insured endorsements, non-renewal
11 notices, cancellation notices, declination letters, and reservation of rights letters within that
12 party's care, custody, or control.

13 **4.4.5. Supplemental Responses:** No later than ninety (90) days prior to the
14 trial date, all parties shall provide supplemental verified responses to the
15 interrogatories and document demands required by this Order, or will provide a verified
16 statement that there are no changes to the earlier served responses and documents produced.

17 **4.5. Additional Discovery by Leave of Court:** A party may request leave of the
18 Court to propound additional discovery for good cause. Before requesting such leave, counsel
19 making the request shall meet and confer with all counsel affected by the discovery request in a
20 good faith effort to resolve the dispute. Further, before requesting leave of the Court, the parties
21 are required to discuss the issue with the Court in a telephonic conference arranged through the
22 Court's Clerk.

23 **5. PLAINTIFF PRELIMINARY DEFECT PRESENTATION** Plaintiff shall present its
24 preliminary defect presentation on or about [DATE]. All parties and counsel are invited to
25 attend. All information conveyed during or related to the presentation shall be privileged and for
26 mediation purposes only.

27 **6. DESTRUCTIVE AND NON-DESTRUCTIVE TESTING**

28 **6.1.** Any party appearing in the Action shall have the right to conduct
29 reasonable non-destructive and/or destructive testing at the Subject Property. Written
30 requests for inspections and/or testing shall be made to counsel for Plaintiff no later
31 than [DATE]. Written requests shall set out in reasonable detail the testing
32

sought, including the identification of persons who will be present and estimated time duration. Any dispute regarding proposed inspection and/or testing shall be decided by the Court. The parties are required to meet and confer prior to the Court's intervention and to discuss the issue with the Court in a telephonic conference arranged through the Court's Clerk.

6.1.1. Any party may observe testing conducted by any other party without charge. For purposes of this Order, observation includes visual inspection, photographing, and/or videotaping.

6.2. Plaintiff's Testing: Plaintiff shall serve notice of its intent to conduct additional destructive and/or non-destructive testing at least ten (10) days in advance of such intended testing. Such notice shall set out in general the testing to be conducted. Additionally, Plaintiff may conduct testing during the period specified in Section 6.3 as Defense Testing with three days written notice to all parties.

6.3. Defense Testing: Testing conducted by parties other than Plaintiff, if requested pursuant to Section 7.1, shall take place from [DATE] to [DATE] between the hours of [TIME] and [TIME]. No interviews of or discussions with owners or owner invitees shall be permitted without approval of owner's counsel.

6.3.1. Cost of Testing: The cost of any testing shall be equally shared by the party or parties participating in such testing. Participation is defined as including directing inspections, impeding testing, taking possession of samples or the direction of performance of testing of any nature.

6.3.2. Contractor Insurance: A contractor chosen to conduct testing for a party shall be licensed by the State of Name of State, have in force and effect an applicable comprehensive general liability insurance policy with a minimum per occurrence limit of one million dollars (\$1,000,000) and applicable workers compensation policy. In addition, such contractors shall name Plaintiff as an additional insured on the policies. Proof of such insurance must be furnished upon prior request by Plaintiff.

6.3.3. Restoration By Testing Party: Any property dismantled or exposed using any invasive inspection or testing by any party other than Plaintiff shall be repaired, restored, cleaned and returned promptly to the condition in which it existed before the testing. The property shall also be protected from the effects of inclement weather until restored to its pre-test condition.

Any and all damage which may occur during inspections and/or testing shall be the responsibility of the testing/inspecting party. Any disputes regarding damage, repairs, and/or restoration shall be submitted to the Court for decision.

7. REPAIRS BY PLAINTIFF

Notice shall be given to all parties regarding any repairs or remodeling, to the extent actually known by Plaintiff and related to the alleged defects and/or damages, at least five (5) days prior to such work being performed on the Subject Property. The above notice requirement does not apply to emergency repairs or other work.

8. DEFECT LISTS AND COST OF REPAIR ESTIMATES.

8.1. Preliminary Defect List: Plaintiff shall prepare and serve on all parties and on the document depository their Preliminary Defect List on or before [DATE]. Plaintiff's Preliminary Defect List shall be provided for mediation purposes only, without prejudice, may be subsequently amended, and shall be inadmissible and protected by evidentiary code / statute / court rule.

The Preliminary Defect List shall set forth a reasonably detailed description of each alleged defect and an exemplar location for the defects, if possible. Plaintiff will have the right to prepare and utilize revised defect lists, but if any defect or claim is added to the Preliminary Defect List, Plaintiff will afford the defense reasonable opportunity to inspect and test any added defects and/or claims.

8.2. Cost of Repair Estimate: Plaintiff shall prepare and serve on all parties and on the document depository its Cost of Repair Estimate on or before [DATE]. The Cost of Repair Estimate shall be used for mediation purposes only and protected in the same manner as the Preliminary Defect List. The Cost of Repair Estimate shall contain, where appropriate, a description of the repair methodology, the quantities of the repair components to be utilized and the unit cost per each repair component, including labor, materials, burdens, and profit. Plaintiff will have the right to prepare and utilize revised cost of repair estimates.

8.3. Settlement Demands: On or before [DATE] Plaintiff shall serve on the parties its Settlement Demand.

1 **8.4 Amendments To Defect List/Cost Of Repair Estimate:** Amendments to
2 Plaintiff's Defect List and/or Cost of Repair Estimate may be made until twenty (20) days prior to
3 the first expert consultant deposition. Thereafter, the Final Defect List and/or Cost of Repair
4 Estimate can only be amended upon motion to the Court with good cause shown.

5 **9. MEDIATION**

6 **9.1. Mediation – Attendance:** Any party that does not intend to attend and
7 participate in a mediation session in this Action shall notify counsel for [PARTY] in writing at
8 least 10 days prior to the mediation date of such intention not to attend.

9 **9.2. All Party Mediation:** The initial mediation session between all parties to the
10 action shall occur on [DATE] (Based on Mediator availability). A second mediation session, if
11 deemed appropriate by the mediator, shall occur on [DATE] (Based on Mediator availability).
12 The location of the mediation sessions shall be determined by the mediator.

13 **9.3. Mandatory Settlement Conference:** Should any parties opt not to participate in
14 Mediation, the Court may set a Mandatory Settlement Conference as requested by the parties or
15 as appropriate to attempt resolution of the case.

16 **10. POST-MEDIATION MEET AND CONFER SESSIONS**

17 After mediation has ended, all remaining parties shall meet and confer to discuss the issues,
18 damages, liability and claims to determine what, what discovery may be mutually agreed upon,
19 deposition scheduling, and to help evaluate the case. The date of [DATE] is scheduled for such
20 meet and confer discussions.

21 **11. EXPERT WITNESS DESIGNATION/EXCHANGE**

22 The expert witness designation and exchange of expert information, pursuant to
23 [CODE/SECTION], shall be served on the parties and on the depository on [DATE]. The
24 supplemental exchange of expert witness information shall be served on [DATE].

25 **12. DEPOSITIONS**

26 All depositions, unless otherwise required by statute, recommended by the Mediator, or
27 otherwise agreed by the parties, shall take place at the document depository. Since scheduling
28 changes will likely occur due to the availability of deponents, the parties shall cooperate with
29 each other to adjust the schedule as necessary. The Court shall resolve any outstanding
30 scheduling disputes which remain after the parties meet and confer.
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12.1. Percipient Witness Depositions: Percipient witness depositions, shall take place [DATE] through [DATE]. Counsel for Plaintiff and the Developer Defendants, shall work together to prepare the schedule percipient depositions. Such schedule shall be served by counsel for Plaintiff by [DATE].

12.2. Expert Witness Depositions: Expert witness depositions shall take place from [DATE] - [DATE]. Counsel for Plaintiff and the Developer Defendants shall work together to prepare the schedule for expert depositions which shall be served by Plaintiff's counsel by [DATE].

12.2.1. Expert deponents' reports and entire file, if any, and complete witness file or job file including all documents consulted or relied upon/shall be produced to the Depository no later than five (5) court days before the date set for the deposition of that expert.

13. MISCELLANEOUS

13.1. Any provision of this Order, including the extension of any scheduled dates and/or events, may be made by the Court on a showing of good cause. The Mediator can make recommendations regarding modifications of this Order subject to judicial review.

13.2. A summary of dates and deadlines imposed by this Order is attached hereto as Exhibit “G.”

IT IS SO ORDERED

Dated: **[DATE]**

By: _____
[JUDGE]
[TITLE] [COURT]

EXHIBIT “A”

Description of Documents to Be Deposited by All Parties Other Than Plaintiff

1. Any and all documents as defined in Evidence code / statute, including, but not limited to, YOUR entire job file, any and all contracts, subcontracts, sub-subcontracts, agreements, job files, blueprints, plans, specifications, notes, memoranda, advertisements, correspondence, photographs, videotapes, audiotapes, diagrams, calculations, invoices, purchase orders, change orders, addenda, reports, journals, marketing documents, job diaries, receipts, accounting records reflecting payment, writings, amendments to all plans, inspector punch lists and sign-off sheets and/or any other documents including discovery from previous litigation, referring to and/or concerning the development, construction and/or repair of the subject project.

2. Any and all policies of insurance, in their entirety, which may potentially provide insurance coverage for any claim asserted against each party in this lawsuit regardless of whether coverage has been reserved or denied by any insurance company. This request includes all declaration pages, jacket provisions, endorsements, certificates of insurance, non-renewal notices, declination notices, and cancellation notices. Any documents concerning any declaratory relief actions filed in connection with any claims made under such policies relating to this action.

3. Any and all reservation of rights letter received from insurance carriers pertaining to this matter.

4. Any and all documents subpoenaed from third parties.

5. Complaints or correspondence to and/or from Plaintiff concerning complaints, requests for repairs, etc., as to alleged defects in the Subject Property including, but not limited to, any warranty claims.

6. Complaints or correspondence to and/or from the Developer Defendants concerning complaints, requests for repairs, etc., as to alleged defects in the Subject Property, including, but not limited to, any warranty claims.

7. All photographs and videotapes which depict the condition of the Subject Property at any time including, but not limited to, photographs and videotapes where the property is in the

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background and/or of repairs to defects at the property.

8. All documents regarding repairs or proposed repairs to the subject project.

9. All communications with contractors, subcontractors, design professionals, or developers regarding the Subject Property.

10. All documents and items identified in your responses to interrogatories and/or statement of work as required by this Order.

EXHIBIT “B”

Description of Documents to Be Deposited by Plaintiff

1. Any and all documents as defined by Evidence code / statute, including, but not limited to, written homeowner complaints, memoranda, correspondence, invoices and repair contracts, and any other correspondence, notes, and memoranda concerning the maintenance of the Subject Property.

2. Complaints or correspondence from Plaintiff concerning complaints, requests for repairs, etc., as to alleged defects to the Subject Property including, but not limited to, any warranty claims.

3. All photographs and videotapes in Plaintiff’s possession which depict the condition of the property at any time including but not limited to, photographs and videotapes where the property is in the background and/or of repairs or defects at the property.

4. All documents, including but not limited to invoices, contracts, receipts, photographs, videotapes, purchase orders, correspondence, notes, telephone message slips and memoranda, which reflect damages Plaintiff contends was caused by the alleged defects.

5. Any and all documents subpoenaed from third parties.

6. Complaints or correspondence to and/or from Plaintiff concerning complaints, requests for repairs, etc., as to alleged defects in the Subject Property including, but not limited to, any warranty claims.

7. Complaints or correspondence to and/or from the Developer Defendants concerning complaints, requests for repairs, etc., as to alleged defects in the Subject Property, including, but not limited to, any warranty claims.

8. All documents regarding repairs or proposed repairs to the subject project.

9. All communications with contractors, subcontractors, design professionals, or developers regarding the Subject Property.

10. All documents evidencing or relating to any administrative complaint and/or complaint filed, lodged or made to the [STATE] State Contractor’s Licensing Board any

1 governmental agency and/or to any Surety Company providing any type of bond for a general
2 contractor and/or subcontractor that performed work at the subject property.
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EXHIBIT “C”

Interrogatories to Be Responded to by All Parties Except for Plaintiff

INTERROGATORY NO. 1:

Are you a corporation? If so, state:

- (a) The name stated in the current articles of incorporation;
- (b) All other names used by the corporation during the past ten years and the dates each was used;
- (c) Time and place of incorporation;
- (d) The address of the principal place of business;
- (e) Whether you are qualified to do business in [STATE].

INTERROGATORY NO. 2:

Are you a partnership? If so, state:

- (a) The current partnership name;
- (b) All other names used by the partnership during the past ten years and the dates each was used;
- (c) Whether you are a limited partnership and, if so, under the laws of what jurisdiction;
- (d) The name and address of each general partner;
- (e) The address of the principal place of business.

INTERROGATORY NO. 3:

Are you a joint venture? If so, state:

- (a) The current joint venture name;
- (b) All other names used by the joint venture during the past ten years and the dates each was used;
- (c) The name and address of each joint venture;
- (d) The address of the principal place of business

INTERROGATORY NO. 4:

Are you an unincorporated association? If so, state;

- (a) The current unincorporated association name;
- (b) All other names used by the unincorporated association during the past ten years and the dates each was used;
- (c) The address of the principal place of business.

INTERROGATORY NO. 5:

Have you done business under a fictitious name during the last ten years? If so, for each fictitious name, state:

- (a) The name;
- (b) The dates each was used;
- (c) The state and country of each fictitious name filing;
- (d) The address of the principal place of business.

INTERROGATORY NO. 6:

Within the past five years, has any public entity registered or licensed your businesses? If so, for each license or registration:

- (a) Identify the license or registration;
- (b) State the name of the public entity;
- (c) State the dates of insurance and expiration.

INTERROGATORY NO. 7:

Are you self-insured under any statute for the damages, claims or actions that have arisen out of the claims made in this action? If so, specify the statute.

INTERROGATORY NO. 8:

Please provide the name, address, and telephone number of the person most knowledgeable regarding the work performed and the contract for the subject property.

INTERROGATORY NO. 9:

Please provide your attorney's facsimile number: _____

1 I declare under penalty of perjury under the laws of the State of [STATE] that the
2 foregoing is true and correct.
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6 Dated: _____ By: _____
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8 On Behalf of: _____
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Attorney: _____

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II. Location of work performed

III. Inclusive dates between which work was performed:

IV. Identity of person or entity with whom you contracted to perform the above-described work:

V. Identity of person who acted as the project supervisor / foreperson for the developer / general contractor:

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Address:

Telephone No: _____

VI. Did you supply materials? _____ Yes _____ No

VII. If you supplied materials, describe the materials you provided:

VIII. If you supplied materials, identify the person or entity from whom you purchased the materials:

Name: _____

Address:

Telephone No.: _____

IX. Did you sub-contract any of the work that was to be performed by you to another person or entity?

_____ YES _____ NO

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2 X. If you did sub-contract any of your work to another, identify the person(s) or
3 entity/ies to whom you sub-contracted:
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5 Name:

6 Address:

7 Scope:
8

9 Name:

10 Address:

11 Scope:

12 Telephone No.: _____
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14 XI. If you did sub-contract any of your work to another, was that sub-contract in writing?
15

16 Yes _____ No _____

17 [If yes, deposit any written sub-contract agreement or related documents in the document
18 depository]

19 XII. If you did sub-contract any of your work to another, identify the nature of the work and/or
20 services.
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XIII. List the name, address and telephone number of each superintendent and/or foreperson you had on the project

I declare under penalty of perjury under the laws of the State of [STATE] that the foregoing is true and correct.

Dated: _____ By: _____

On behalf of: _____

EXHIBIT "E"

Insurance Questionnaire

(If more than one carrier/policy of insurance through which coverage relating to this matter may exist, you must complete a separate sheet for each potential carrier.)

1. Name of Party:
2. Name of Trial Attorney:
3. Name of Insurance Carrier:
4. Is this carrier: Primary Excess
5. Remaining Aggregate:
6. Does the policy have: Broad Form Coverage Completed Operations Coverage
7. Policy No.:
8. Policy Period:
9. Policy Limits:
10. Status of tender:
11. Is this carrier defending with or without reservation of rights?
12. Has coverage been denied? Yes No
13. Has coverage been revoked? Yes No
14. Date coverage was denied or revoked.
15. Name, address and telephone number of claims representative responsible for file:

16. Name, address and telephone number of claims representative with full settlement authority if different than above.

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17. Name, address and telephone number of claims representative denying or
revoking coverage.

18. Identify the name of any and all additional insureds to the policy and the type of
endorsement (for example, 2009 or 2010).

EXHIBIT “G”

Summary of Case Management Order Dates And Deadlines

Plaintiff Destructive Testing	[DATE]
All Parties Deposit Documents	[DATE]
Service and Deposit of Interrogatory Responses, Statement of Work, Statement of Insurance	[DATE]
Service and Deposit of Plaintiff Preliminary Defect List	[DATE]
Service and Deposit of Cost Repair Estimate	[DATE]
Plaintiff Defect Presentation/Site Inspection	[DATE]
Further Status Conference	[DATE]
Defense Written Requests for Testing (Destructive and Non-Destructive)	[DATE]
Defense Destructive and Non-Destructive Testing	[DATE]
Service of Settlement Demands	[DATE]
All Party Mediation	[DATE]
Additional All Party Mediation (if necessary)	[DATE]

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Meet and Confer Regarding Remaining Discovery	[DATE]
Expert Witness Designation/Exchange	[DATE]
Service of Percipient Witness/PMK Deposition Schedule	[DATE]
Percipient Witness/PMK Depositions	[DATE]
Supplemental Expert Witness Designation/Exchange	[DATE]
Service of Expert Deposition Schedule	[DATE]
Service of Final Defect List and Cost Estimate to Repair	[DATE]
Expert Witness Depositions	[DATE]
Final Status Conference	[DATE]
Trial	[DATE]

DATED: [DATE] [ATTORNEY’S NAME]

By: _____
[ATTORNEY]

[Names of attorneys]
[Attorneys' business address]

[Court name]

[Plaintiff's name],

Plaintiff,

vs.

[Defendant's name],

Defendant

Case No.: [Case number]

CASE MANAGEMENT ORDER NO. ONE
(Construction Defect)

TO ALL PARTIES HEREIN AND THEIR RESPECTIVE ATTORNEYS OF RECORD:
IT IS HEREBY ORDERED:

I. GENERAL PROVISIONS

A. Purpose: The Court deems this matter to be complex litigation within the meaning of the [STATE] Standards of Judicial Administration for Complex Litigation Section [NO.]. As such, this is a case that requires specialized management to avoid placing unnecessary burdens on the Court or the litigants. The primary areas that require specialized management are discovery and settlement discussion. To facilitate discovery and settlement, the Court may, by separate Order, appoint a Discovery Referee/Special Master and/or a Mediator at the request of the parties or on its own motion.

B. Objections to Case Management Order: Any party appearing subsequent to the date of this Case Management Order (CMO) shall have fifteen (15) days from initial appearance to lodge any objections, provided, however, that in the event that any party has not been previously provided a copy of this order such fifteen (15) days shall commence on the date when such party or its counsel receives a copy of this order.

1 **C. Codes/Rules Govern Where CMO is Silent:** On any matter as to which the
2 CMO is silent, the [STATE] Codes, the [STATE] Rules of Court and any
3 Local Rules of Court shall be controlling.

4 **D. Terms:** The term “Plaintiff” as used herein shall include each named plaintiff
5 and when designating action to be taken shall be deemed to mean counsel for
6 such parties. The term “Developer Defendant” shall include the party primarily
7 responsible for the residences or other construction which is the subject of this
8 action and, if multiple defendants are so charged in Plaintiff’s complaint shall
9 include each of those parties. The term “Developer Defendant” shall, when
10 designating action to be taken, be deemed to mean counsel for each of such
11 parties. The term “Subcontractors” shall include those sub-contracting with
12 Developer Defendant, those sub-contracting with other subcontractors, as well
13 as suppliers, design professionals, and similar parties, whether named as
14 defendants or cross-defendants.

14 **II. CROSS-COMPLAINTS**

15 The Court deems the inclusion into the action of all potential cross-defendants at the
16 earliest reasonable time to be a high priority of the effective management of this litigation.
17 Accordingly, the following is ordered:

18 **A. Serving Unserved Parties.** The parties shall diligently proceed to serve any
19 unserved party and each person or entity newly named by such party with the
20 appropriate pleadings, a summons issued thereon, and a copy of this Case
21 Management Order.

22 **B. Entry of Default.** All parties are ordered to seek the entry of default against any
23 served party if a responsive pleading or answer is not filed within forty-five (45)
24 days following service, or within ten (10) days of this order, whichever is later,
25 unless otherwise excused by the Court. Notwithstanding the foregoing, the
26 parties are authorized to grant reasonable additional extensions to accommodate
27 parties that are diligently pursuing identification or, and tender to, insurance
28 carriers.

1 **C. Answers.** In lieu of individually listing many affirmative defenses, answering
2 parties may adopt by incorporation by reference the affirmative defenses listed in
3 Exhibit A hereof. Additional affirmative defenses may, of course, be included in
4 the pleading.

5 **III. DEEMED CROSS COMPLAINTS**

6
7 Any party that wishes to pursue equitable indemnity, contribution, declaratory relief or
8 other causes of action against any other party or parties may file and serve such a cross-
9 complaint with its answer, or may OPT-IN to the deemed cross-complaint described herein by
10 filing a notice in the form attached in Exhibit B hereof. Any party filing and serving such a
11 notice that it elects to OPT-IN shall be deemed to have filed and served its own cross-complaint,
12 for implied equitable indemnity, contribution, and comparative negligence only, against the
13 parties identified in its notice. All of the allegations of the deemed cross-complaint shall be
14 deemed generally denied by all parties who shall additionally be deemed to have raised the
15 affirmative defenses listed in Exhibit A hereof. Nothing herein contained shall, however, affect
16 the requirements for filing of Attorney's Certificates as set forth in [CODE/SECTION]. Upon
17 resolution of the claims against any party by settlement, the deemed cross-complaint of that party
18 shall be considered to be dismissed unless that party files and serves within 15 days of the
19 dismissal of claims against that party a notice of intent to proceed upon the deemed cross-
20 complaint.

21 **IV. SUBSEQUENT ADDITIONAL PARTIES**

- 22 **A.** Additional plaintiffs may be joined into this action no later than [DATE]
23 without leave of court. Answers by defendant(s), which have been previously
24 filed, shall be deemed to have been filed and served as to any such amendment.
25 Nothing shall bar defendant(s) however, from asserting additional affirmative
26 defenses against any new plaintiff, including statute of limitation defenses.
- 27 **B.** Plaintiff (s) may add additional defendants (or name Does) no later than
28 [DATE] without leave of court. Additionally, should any defendant or cross-
 defendant add a new party to the action, plaintiff may elect, within 30 days of

1 receiving notice of the addition of the party, to add such party as an additional
2 defendant without seeking court permission.

3 **C.** Cross-complainants may add additional cross-defendants (or name Roes) no
4 later than [DATE], or at the time of appearing in the action if later, without
5 leave of court. In such event, plaintiffs and/ or defendants may, in a timely
6 fashion, also name such additional party without court permission.

7 **D.** Any party naming additional defendants or cross-defendants has the obligation
8 of serving the new party with a copy of the operative Case Management Order,
9 including amendments, together with copies of any correspondence indicating
10 a change in any previously scheduled dates.

11 **E.** Within 60 days of this Case Management Order, or of a party's first
12 appearance in the action, whichever shall last occur, each party shall make
13 reasonable efforts to identify all comprehensive general liability carriers that
14 may have provided coverage for their client, at any time from the date of
15 construction to the present.

16 **V. DOCUMENT DEPOSITORY**

17 A Document Depository shall be maintained at the offices of:

18 Name:

19 Address:

20 Phone No.:

21 Fax No.:

22 Email address:

23 Any party to the action and any insurance carrier participating in the defense and/or
24 indemnity of any party may have access to the depository once an appearance has been made by
25 such party, during the normal hours of operation of the depository.
26

Each party shall bear its own costs to locate documents for deposit, make copies of them, as well as its costs in copying documents from the depository. Once this matter is completed, each party shall be responsible for retrieval of the documents it deposited into the depository.

VI. DISCOVERY ISSUES

A. Stay On Discovery: All discovery not specifically permitted in this order is hereby stayed, except that any party shall be allowed to conduct third-party document discovery of individuals and entities upon proper notice to all parties and shall deposit such discovery in the Document Depository within thirty (30) days of its receipt. Any party may apply to the Court, or instead if a referee or special master has been appointed to such referee or special master, by noticed hearing to all parties and request leave to propose discovery not permitted in this order or to enforce discovery permitted in this order.

B. Allowable Written/Documentary Discovery: The following discovery is not stayed pursuant to this Order:

1. Document Production

All parties shall deposit true and correct copies of all relevant, non-privileged documents within forty-five (45) days of this order or within forty-five (45) days of their appearance in this action, whichever is later. The deposit must include copies of all relevant plans and specifications relating to the project. The parties shall use the first three letters of the parties' name followed by the applicable Bates stamp numbers. In the event of duplicative letters amongst the parties, each party shall adopt a three-letter combination sufficient to distinguish it from other parties in the action. The deposit of documents shall include a reasonably specific index and be accompanied by a verified Notice of Compliance, signed by the party, which shall be served on all other parties, stating a general description of the documents produced, their Bates-stamped numbers, and the date of deposit. Any party not depositing all documents in its possession, custody or control shall, in the Notice of Compliance: (a) identify the document(s) withheld with sufficient particularity as required by the [STATE] Code of Civil

1 Procedure, and (b) state the basis for refusing to produce such document, in
2 the form of a privilege log which shall include the privilege or doctrine upon
3 which non-disclosure is based. The parties are required to deposit oversized
4 or full-sized drawings, plans or documents by using the same procedure as
5 all other documents. The parties have a continuing obligation to deposit all
6 non-privileged documents discovered after initial production under the same
7 procedures outlined above.

8 2. Insurance

9 Within 30 days of the appearance of a party, or for those parties that have
10 previously appeared within 30 days of this Case Management Order, each
11 defendant and cross-defendant shall complete, under oath, and file and
12 serve, a Statement of Insurance in the form attached hereto as Exhibit C.

13 3. Interrogatories and Scope of Work Statements.

14 Attached hereto as Exhibit D are interrogatories and scope of work
15 statements which shall be answered under oath by each defendant and cross-
16 defendant to this action. Responses to the interrogatories and scope of work
17 statements shall be served on all parties and placed in the depository not
18 later than thirty-five (35) days after the date of service of this Order or
19 within thirty-five (35) days of first appearance, whichever is later. Any party
20 may, on proper notice, bring a motion to limit or compel responses to these
21 interrogatories or to propound further interrogatories to a party, and such
22 motions to compel are not limited to the deadlines imposed by the [STATE]
23 Code of Civil Procedure. Upon the granting of a motion to compel, the
24 Court will consider, as a potential remedy, the advancement of a deposition
25 of a person most knowledgeable for each party against whom such a motion
26 is granted without prejudice to any party noticing the deposition of such
27 person most knowledgeable at a later time.

28 **C. Inspections and Testing:**

1. On or before [DATE], in coordination with all parties to this litigation, Plaintiffs shall arrange non-intrusive visual inspections of the properties

1 which are the subject of this litigation. All parties, and/or their
2 representatives, may attend.

- 3 2. On or before [DATE], in coordination with all parties to this litigation,
4 Plaintiffs shall conduct preliminary intrusive inspections (destructive
5 testing). All parties, and/or their representatives, may attend.

6 **D. Other Discovery:** Counsel for Plaintiff and for Developer Defendant shall meet
7 and confer, at least fifteen (15) days before the Case Management Conference
8 next scheduled and attempt to develop a proposal of a mutually agreeable time
9 schedule for accomplishing further discovery. The proposals shall be submitted
10 for review by all parties no later than ten (10) days before the Conference and all
11 parties shall be prepared to discuss such scheduling with the Court at the
12 Conference.

13 VII. MANDATORY SETTLEMENT CONFERENCES

14 **A. Appointment of Special Master:** Counsel for plaintiffs and for Developer
15 Defendant shall meet and confer, at least fifteen (15) days before the Case
16 Management Conference next scheduled and attempt to reach a recommendation
17 to the Court and other parties as to (1) whether a special master should be
18 appointed to conduct one or more mandatory settlement conferences and (2) the
19 appropriate time for a mandatory settlement conference.

20 **B. Settlement Conferences:** It is the intention of the Court to hold one or
21 more mandatory settlement conferences in this matter. In most cases the
22 limited availability of the Court and of court facilities to hold mandatory
23 settlement conferences is such that it is necessary to appoint a special master to
24 conduct such conferences. Accordingly, when Plaintiff and Developer Defendant
25 meet and confer, as set forth above, they are to consider a recommendation to the
26 Court and to the other parties to the litigation as to the possible selection of a
27 special master and as to whether such special master shall additionally serve as a
28 discovery referee. Such recommendation shall be submitted to all parties no later
than ten (10) days before the Conference and all parties shall be prepared to
discuss such selection with the Court at the Conference.

1 **C. Mediation:** Nothing herein contained shall, however, prevent the parties, or at
2 least those that elect to do so, from engaging in mediation. The Court is amenable
3 to discuss with the parties, at any time, the selection of a mediator and the timing
4 for such mediation, including the possibility of entering a stay upon discovery to
5 facilitate mediation. **[IF APPLICABLE:]** Pursuant to the authority of **[CASE**
6 **LAW / STATUTE / COURT RULE]**, no party shall be required to participate in
7 any such mediation. It is called to the attention of the parties that (1) pursuant to
8 the **[STATE]** Rules of Court a person appointed to act as a referee (which
9 includes a special master) may not be appointed to act as a mediator and (2) the
10 broad confidentiality privilege designated by **[EVIDENTIARY CODE]** for
11 mediation is not applicable to mandatory settlement conferences. While this Court
12 is of the view that the limitation on use of evidence provided by
13 **[EVIDENTIARY CODE]** is to be broadly construed, the parties are urged to
14 reach agreement prior to negotiation of offers of compromise as to what evidence
15 is, and is not, to be later deemed admissible.

15 **D. Settlement Conference Materials:** The parties shall exchange offers of
16 settlement and documents related thereto and related to contemplated mediation,
17 which documents shall be subject to the appropriate privileges and exclusions of
18 the **[STATE]** Evidence Code as follows:

- 19 1. Plaintiffs shall prepare and deliver a preliminary defect list and preliminary
20 cost of repair on or before **[DATE]**.
- 21 2. Plaintiffs shall provide an informal expert presentation to all parties on or
22 before **[DATE]**.
- 23 3. Plaintiffs shall provide an up-dated Defect list on or before **[DATE]**.
- 24 4. Plaintiffs shall provide an up-dated Cost of Repair Estimate on or before
25 **[DATE]**.
- 26 5. The Court, or Special Master if one is appointed, shall establish time frames
27 for any additional exchanges of documents needed for meaningful
28 settlement negotiations or mediation as deemed appropriate.

VIII. ELECTRONIC FILING AND SERVICE

The Court designates this matter for electronic filing, pursuant to [STATE] Rule of Court [CODE/SECTION], and designates [NAME] as service provider. A party may request exemption from the requirement of electronic filing upon a showing of hardship or undue prejudice. [STATE] Rules of Court [CODE/SECTION] through [CODE/SECTION] will govern the electronic filing and service of documents in this action. Electronic service shall be subject to the Court's Standing Order as to Electronic Service which is available for review upon the Court's website: [WEB ADDRESS].

Counsel for Plaintiff shall develop, maintain and e-file a separate list which identifies the name of each plaintiff in the action, the residence owned by such plaintiff, and, if and when known, the identity of the original owner of the residence in the event that a plaintiff is not an original purchaser. All parties to this action are directed to provide facsimile numbers, telephone numbers and e-mail addresses to counsel for the Developer Defendant who shall prepare and maintain service list that is to be modified or augmented as necessary.

IX. CASE MANAGEMENT CONFERENCE

The Court will hold its next CASE MANAGEMENT CONFERENCE on [DATE]. Counsel wishing to participate in the discussion of a schedule and the protocol therefore, or upon the appointment and authority of a Special Master in this matter, must appear in person. Telephone appearances via COMPANY shall be allowed but only for the purpose of listening and answering inquiries which might be made by the Court but not otherwise participating.

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B. Communication with Court or Special Master: There shall be no *ex parte* communications with the Court, or with any Referee or Special Master that might be appointed by the Court. Notwithstanding the foregoing, *ex parte* communications may occur upon administrative issues (i.e., scheduling, etc.), or may occur as a part of any mandatory settlement conference or prior or after such conference when related solely to settlement (so long as consistent with a applicable ethics requirements). The Court is not to be copied with letters between the parties or between a party and any such Referee, Special Master or Mediator, excepting as to such administrative matters that involve the Court.

Dated: _____

[NAME OF JUDGE]

EXHIBIT A

Affirmative Defenses

The following separate affirmative defenses are deemed to be included in any party's answer to any complaint or cross-complaint herein:

1. **Failure to State a Cause of Action:** The complaint and cross-complaint do not state sufficient facts to constitute a cause of action against this answering defendant.
2. **Statute of Limitations:** Each cause of action is barred by the applicable statute of limitations as set forth in the [STATE] Code of Civil Procedure, commencing with section [SECTION NO.] and continuing through section [SECTION NO.], and more particularly sections [SECTION NOS.] , and/or [SECTION NO.], and [STATE] Commercial Code sections [SECTION NOS.].
3. **Comparative Negligence:** The plaintiffs and cross-complainants own carelessness and negligence may have proximately contributed to the events and damages complained of, if any, and such bars or proportionately reduces any potential recovery to the complaint or cross-complaint.
4. **Assumption of Risk:** The plaintiffs and / or cross-complainants may have assumed the risk, if any there was, in connection with the matters referred to in the pleading, and recovery is therefore barred or proportionately reduced as a result.
5. **Alteration of Product:** The plaintiff, cross-complainant, or others, may have altered the product involved, proximately causing the events and damages, if any there were, and recovery is therefore barred or reduced.
6. **Misuse of Product:** The plaintiff, cross-complainant, or others, may have improperly used or maintained the product involved, proximately causing the events and damages, if any there were, and recovery is therefore barred or reduced.
7. **No Privity:** The plaintiff and / or cross-complainant is barred from recovery of breach of any warranty because of lack of privity.
8. **Failure to Mitigate Damages:** The plaintiff and / or cross-complainant is barred from recovery due to having failed or neglected to use reasonable care to minimize losses or damages.

- 1 9. **Conduct of Others:** The injuries and / or damages alleged, if any there were, may have
2 been proximately caused by the conduct of parties other than this answering defendant, and
3 recovery is therefore barred or proportionately reduced.
- 4 10. **Active and Passive Conduct:** If it is determined that this party was negligent, said
5 negligence was secondary and passive, as contrasted with the active and primary negligence
6 of other parties to the action, and this party is therefore not liable for any of the damages or
7 injuries herein claimed.
- 8 11. **Uniform Commercial Code:** The claims of plaintiff and cross-complainants are barred by
9 the provisions of the Uniform Commercial Code **[IF APPLICABLE]** contained in sections
10 12-1(25), 2510, 2513(1) and (3), 2601, 2605(1)(a) and (b), 2606(1)(a) and (b), 2607,
11 2715(2)(a) and 2719(3).
- 12 12. **Notice of Breach of Warranty:** The plaintiff and / or cross-complainant failed to make
13 demand or make timely and proper notice of breach of warranty.
- 14 13. **Laches:** The plaintiff and / or cross-complainant may have known, or should have known,
15 of the matters alleged herein for an unreasonably long period of time prior to
16 commencement of this litigation, and did not give notice to this party and is therefore barred
17 by the provisions of Uniform Commercial Code **[IF APPLICABLE]** § 2607 and the
18 doctrine of laches.
- 19 14. **Spoliation of Evidence:** The plaintiff and / or cross-complainant, either intentionally or
20 negligently, has failed to preserve the primary evidence relevant to this claim, thus failing to
21 give this party an opportunity to inspect and examine such evidence, all to this party's
22 prejudice, and is therefore barred from introducing secondary or lesser evidence or from
23 recovery herein.
- 24 15. **Unclean Hands:** The plaintiff and / or cross-complainant are barred from recovery by virtue
25 of conduct causing the alleged damages or preventing this party from an opportunity of a
26 reasonable defense, under the doctrine of unclean hands.
- 27 16. **Waiver:** The claims of plaintiff and cross-complainant are barred by the doctrine of waiver.
- 28 17. **Estoppel:** The claims of plaintiff and cross-complainant are barred by the doctrine of
estoppel by virtue of acts directing, ordering, approving or ratifying the matters complained
of herein.

EXHIBIT B

Notice of Election to “Opt-In” to Deemed Cross-Complaint

[Name of party] hereby opts-in to the deemed cross-complaint for implied equitable indemnity, contribution, and comparative fault. Said cross-complaint is hereby asserted by this party as against:

1. [LIST PARTY]
2. [LIST PARTY]
3. [LIST PARTY]

ETC.

EXHIBIT C

Statement of Insurance

1. Name of party:
2. Name of insurance carrier(s):
3. Is the carrier excess or primary?
4. Policy Information:
 - a) Policy No(s).:
 - b) Policy Type:
 - c) Policy limits for each type of coverage contained in Policy:
 - d) Dates of coverage for each policy:
 - e) Provide the estimated amount of remaining aggregate coverage for each policy:
5. Is the carrier defending with or without a reservation of rights?
 - a) Please explain if there is reservation of rights.
 - b) Please indicate stated basis for reservation of rights (a brief statement).
6. Has coverage been denied?
 - a) Please explain if coverage has been denied.
 - b) Please indicate stated basis for reservation of rights (a brief statement).
7. Has coverage been revoked, rescinded or “bought back”?
8. Date coverage was denied, revoked, rescinded or “bought back”?
9. As to each policy, please indicate whether it provides completed operations coverage and/or contains a broad form endorsement.
10. Are you aware of any additional insured endorsements relating to this litigation? If “yes”, provide the name of each additional insured, the type of endorsement and the period of coverage.
11. State the name of each named insured.
12. At the time you performed your work at the project, who in your company was responsible for obtaining your insurance policies and additional insured endorsements?

NOTE: A verification signed by the party under penalty of perjury must accompany this statement of insurance.

EXHIBIT D

Interrogatories and Scope of Work Statements

NAME OF PARTY: _____

INTERROGATORY NO. 1:

Is the responding party a corporation? If so, state:

- a. The name stated in the current articles of incorporation;
- b. All other names used by the corporation in the past 10 years and the dates each was used;
- c. the date and place of incorporation;
- d. the address of the principal place of business of the corporation;
- e. whether you are qualified to do business in [STATE].

INTERROGATORY NO. 2:

Is the responding party a partnership? If so, state:

- a. The current partnership name;
- b. All other names used by the partnership during the past 10 years and the date each was used;
- c. Whether you are a limited partnership, and if so the jurisdiction under whose laws you are acting;
- d. The names and address of each general partner;
- e. The address of the principal place of business.

INTERROGATORY NO. 3:

Is the responding party a joint venture: If so, state:

- a. The current joint venture name;
- b. All other names used by the joint venture in the past 10 years and the dates each was used;
- c. The name and address of each joint venturer;
- d. The address of the principal place of business.

1 INTERROGATORY NO. 4:

2 Is the responding party an unincorporated association? If so, state:

- 3 a. The current name of the unincorporated association;
4 b. All other names used by the association during the past 10 years
5 and the dated each was used;
6 c. The address of the principal place of business.

7 INTERROGATORY NO. 5:

8 Has the responding party done business under a fictitious business name during the past
9 10 years. If so, for each such name state:

- 10 a. The name;
11 b. The date each was used;
12 c. The state and county of each fictitious name filing.

13 INTERROGATORY NO. 6:

14 Within the past 10 years has the [STATE] Contractors State License Board licensed the
15 business of the responding party: If so:

- 16 a. Identify the license;
17 b. State the name to whom the license is issued;
18 c. State the dates of each issuance;
19 d. State the date of any expiration of each issuance.

20 INTERROGATORY NO. 7:

21 Provide the name and address of the person or persons most knowledgeable as to any
22 goods or services that the responding party performed for the project that is the subject of
23 this action related to:

- 24 a. The bidding and contract for such goods or services;
25 b. The work performed and/or goods provided.

26 INTERROGATORY NO. 8:

27 State for each such person identified in the previous interrogatory whether or not the
28 person(s) is/are still employed by you.

1 INTERROGATORY NO. 9:

2 If the persons identified in interrogatory no. 7 are not owner, partners, or managing
3 partners, state the name and address of the owner, partner or management agent
4 who is most knowledgeable.

5 INTERROGATORY NO. 10:

6 State the name and address of the foreperson or construction supervisor for your work
7 upon the project which is the subject of this action, and state whether that person is still
8 employed by you.

9 INTERROGATORY NO. 11:

10 Describe in reasonable detail the work performed by you on the project pursuant to
11 a written contract, change or extra work order.

12 INTERROGATORY NO. 12:

13 Describe in reasonable detail the work performed by you on the project pursuant to
14 any oral contract, change order, extra work order or direction.

15 INTERROGATORY NO. 13:

16 Describe in reasonable detail the exact location of work performed (e.g., by tract, phase
17 or unit numbers, addresses, etc.)

18 INTERROGATORY NO. 14:

19 State the inclusive dates between which any work was performed.

20 INTERROGATORY NO. 15:

21 Describe in reasonable detail any materials that you provided to the project, and the
22 inclusive dates between which such materials were provided.

23 INTERROGATORY NO. 16:

24 Identify any person to whom or entity to which you provided such materials.

25 INTERROGATORY NO. 17:

26 Did you contract any of your work to another? If so, state the name and address of
27 each such person or entity and describe the work so contracted.
28

1 INTERROGATORY NO. 18:

2 If your contract for work on the project calls for naming another party as an additional
3 insured, identify each such party and state whether you did arrange for the inclusion upon
4 your policy of such additional insured.

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6 Dated: _____

By: _____

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8 On behalf of:

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[JUDGE]

Language Used in Construction Defect CMO Regarding Resolution of Discovery Disputes

The CMO in this case is amended to delete all references to a discovery referee. All discovery disputes will be resolved by the court. Before any status conference, parties who have a dispute concerning discovery, *and who have met and conferred in good faith regarding that dispute*, shall briefly summarize the nature of the dispute in a joint status conference report filed 3 court days prior to the status conference. At the status conference, the court will discuss the discovery dispute with the parties and, if a resolution cannot be reached at the status conference, the court will set a briefing schedule appropriate to the nature of the dispute. If a party or parties wish to resolve a discovery dispute between status conferences, *and if they have met and conferred in good faith to attempt to resolve the dispute (or attempted to do so)*, the party or parties may contact the court clerk to arrange a telephonic status conference with the court. The court clerk will require the requesting party to give notice of the telephonic status conference. Such a telephonic status conference ordinarily can be arranged on 48 hours notice. No papers need be filed in advance of the telephonic status conference. At the telephonic status conference the court will discuss the discovery dispute with the parties and, if a resolution cannot be reached at the status conference, the court will set a briefing schedule appropriate to the nature of the dispute.

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[Names of attorneys]
[Attorneys' business address]

[Court name]

[Plaintiff's name],

Plaintiff,
vs.

[Defendant's name],

Defendant

) Case No.: **[Case number]**

)

) JOINT STIPULATION AND STATEMENT
) RE: DETERMINATION OF THRESHOLD
) ISSUES AND CASE MANAGEMENT
) PROCEDURES

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Plaintiffs _____ and Defendants _____

submit to the Court, by and through their respective counsel of record, the following written stipulation and statement wherein the parties jointly request that a special motion be heard to determine the threshold legal issues in the case and that the Court adopt appropriate case management orders and procedures to implement the parties' request.

I.

Determination of Threshold Legal Issues in This Complex Case

[STATE] Rules of Court, Rules [RULE NOS.], *et seq.*, designate certain types of cases as “complex cases.” Class action cases are included within the scope of complex cases. (See [STATE] Rules of Court, [RULE NOS.] [STATE] Rules of Court, [RULE NOS.], set forth specific rules regarding the management of class action cases as complex litigation. This case is a “complex case” both because it has been designated as a Class Action in accordance with [STATE] Rules of Court, [RULE NOS.], and because some or all of the “factors” listed under [STATE] Rules of Court, [RULE NOS.] will be applicable to this litigation. Furthermore, this Court has agreed that the case is complex pursuant to [STATE] Rules of Court, [RULE NOS.].

This case requires the type of [INCLUDE STATE LANGUAGE] “exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision-making by the court, the parties, and counsel,” as provided in [STATE] Rules of Court, [RULE NOS.]. In addition, this Court has the inherent power to, among other things, “provide for the orderly conduct of proceedings before it.” (Code of Civil Procedure section [SECTION]. In particular, there are factual and legal complexities in this action that raise difficult and novel legal issues. ([STATE] Rules of Court, [RULE NOS.]) These issues include, however may not be limited to, the following:

- 1.
- 2.
- 3.

The parties believe that resolution of these issues before a determination of class certification issues, and before a trial is held, will promote efficiency and economy in the discovery phase of the case, and with regard to other matters of liability and damages that have yet to be determined. The parties and the Court agree that these issues are controlling questions of law as to which there are substantial grounds for differences of opinion and the resolution of which may materially advance the conclusion of this litigation.

1 In accordance with the foregoing principles, and at the suggestion of the Court, the parties
2 propose that these initial threshold legal issues be briefed by the parties and submitted to the
3 Court for determination by way of a modified briefing process. The parties recognize that the
4 Court's determination of these issues is not meant as a substitute for any future summary
5 adjudication motions as to specific facts, and that to the extent any party wishes to file a
6 subsequent motion applying the Court's determination of these issues, an appropriate motion
7 may be made in accordance with the Code of Civil Procedure and any future Case Management
8 Orders by this Court.

9 Any party may seek appellate review of the Trial Court's ruling on these threshold legal
10 issues, as provided by appellate procedural rules, and subject to the discretionary powers of the
11 Court of Appeal. The parties also specifically agree to this process, and in the event that any
12 party seeks appellate review of the Court's ruling on threshold legal issues, none of the parties
13 will object to the Court's ruling on the grounds that this jointly agreed process was procedurally
14 improper or did not result in a procedurally proper order subject to appellate challenge.
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II.

Threshold Legal Issues and Relevant Facts to Be Submitted to the Court

The parties tender to the Court the following threshold legal issues:

- 1.
- 2.
- 3.

The parties stipulate to the following facts for purposes of the Court's determination of the threshold legal issues:

- 1.
- 2.
- 3.

The parties further offer for the Court's consideration in ruling on the threshold legal issues the following disputed facts:

- 1.
- 2.
- 3.

The parties stipulate that the Court may enter an Order directing the briefing of the foregoing issues and further that the Court may enter such orders as may be appropriate upon its determination of the threshold issues tendered pursuant to this Stipulation.

Dated: _____

Counsel for Plaintiff

Dated: _____

Counsel for Defendant

1
2 **[Court name]**
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9 **In Re Complex Litigation Matters**
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) Settlement Protocol for
) Construction Defect Litigation
)

) STANDING ORDER
)

) *Effective [DATE]*
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13
14 ***Background***
15

16 The complex litigation program for the **[NAME OF COURT]** Court began in **[DATE]**
17 with the intention of promoting fair and cost effective case management. The ultimate goal was
18 to promote early case resolution where appropriate and/or streamlined trial disposition.

19 From the inception of the program, construction defect litigation distinguished itself as
20 being self executing in not only its case management but also in its ability to achieve early
21 disposition through recognized and well respected mediators.
22

23 In the past, in order to promote and foster settlement and at the same time work with the
24 agreed upon mediators selected by the parties and their counsel, the judges of the complex panel
25 developed and engaged in what has been euphemistically referred to as “Co-Mediation.” The
26 judges on the complex panel have, in a collaborative effort with counsel and mediators in our
27 community, achieved excellent results in obtaining early case resolution in construction defect
28 cases.
29

30 It is the desired goal of the complex litigation panel to continue this relationship; however,
31 recent case law and new rules of court require a clarification of the roles and protocols regarding
32 the coordination of efforts by and between the Court and outside mediators.

Settlement Protocol for Construction Defect Litigation - 1

Order

Accordingly, the following protocol (regarding the coordination by and between sitting bench officers and selected outside mediators) will be effective as of **[DATE]**.

1. The selection of an outside mediator may be done by the parties and counsel themselves on a voluntary basis, but will no longer be ordered by the court or become part of any governing case management order (herein CMO). **[CASE LAW / COURT RULE / STATUTE]**.
2. The case management orders will not designate mediators, direct the payment of mediators' fees, or compel attendance at mediation sessions. However, the CMO may identify for the Court those dates designated for outside mediation since many case management activities are triggered in accordance with dispute resolution sessions.
3. Should the parties and the selected mediator wish to coordinate settlement efforts with either the assigned trial judge or any other judge on the complex panel, the parties may request the assigned judge to order a mandatory settlement conference (hereinafter MSC) and the trial judge may, in his or her discretion, order an **MSC** pursuant to **[COURT RULE / STATUTE]**. Parties that have not participated in mediation efforts may also request a MSC. Any privileges available in mediation (**[EVIDENTIARY CODE]**), including provisions concerning mediation confidentiality will not apply. However, offers to compromise, and any "conduct or statements made in negotiation thereof at the MSC are inadmissible in evidence to prove or disprove liability. *See* **[EVIDENTIARY CODE]**. The option of an MSC, without the presence of a mediator, always exists for those parties that wish to bypass the mediation process entirely.
4. The judges on the Complex Panel will, at their discretion, continue to work with private mediators upon request of the parties; in such cases, however, their role as mediators will be deemed to have terminated upon the agreement of the parties and their work with the settlement judge will be in the capacity of facilitators.

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5. The purpose of this new protocol is to provide counsel with a definitive demarcation line between those discussions that fall within the mediation privilege and those that do not. It will also serve to better define the role of the bench officer and that of the mediator. It is believed that these changes best reflect the intent of recent case law and that of the advisory committee in the adoption of **[COURT RULE / STATUTE]**.

Dated this ____ day of _____, 20____.

[Name of Judge]
[Title]

1 [Court name]

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4 [Plaintiff's name],) Case No.: [Case number]
5)
6 Plaintiff,) TRIAL MANAGEMENT ORDER
7 vs.)
8)
9 [Defendant's name],)
10 Defendant)
11 and related cross-actions)
12

13 TO ALL PARTIES AND THEIR ATTORNEYS:

14 The Trial Management Conference in this matter is scheduled for _____ [DATE]
15 at _____ [TIME] in Department [DEPARTMENT NO.]. The following Orders are made with
16 reference to matters required to be filed prior to, and conduct of, the conference.
17

- 18
- 19 1. All parties shall file a trial management conference statement in accordance with
20 local rule _____ with only the exceptions set forth below.
 - 21 2. **TIME FOR FILING.** Trial management conference statements shall be filed by all
22 parties no later than 10 calendar days before the scheduled conference.
 - 23 3. **VOIR DIRE.** Only plaintiff(s) need file or lodge proposed *voir dire* examination
24 questions or a proposed statement of the case for prospective jurors. The Court will, at
25 the trial management conference, arrange a schedule to resolve issues relating to jury
26 selection that will encompass input from other parties.
 - 27 4. **JURY INSTRUCTIONS.** Only plaintiff(s) need file or lodge proposed jury
28 instructions. As to standard, unmodified [STATE] instructions only the index
29 described in [STATE] Rule of Court [RULE NO.] as opposed to copies of the
30 instructions, should be provided at this time. Proposed “special” instructions should be
31 on a separate sheet per instruction. At the trial management conference, the Court will
32 provide dates for the exchange of objections to such instructions as well as for

Trial Management Order - 1

proposed additional instructions from other parties and will set a deadline for the parties to meet and confer regarding differences on the subject.

5. **MOTIONS IN LIMINE.** Plaintiff(s) and Defendant_____ (only) are to file and serve any motions *in limine* no later than 15 calendar days before the trial management conference. If more than two motions *in limine* are filed by a party, an index of the motions shall be provided as well. Other parties are to review those motions and “joinder” in the motions will be unnecessary; any party may, at its later oral request, be deemed, for the record, to have joined in any motion. If other parties wish to file a motion *in limine* not covered in the original filings, they shall file and serve such a motion no later than 10 calendar days before the trial management conference. Opposition to any motions shall be filed and served 3 court days before the conference. Both the motions and opposition should consist only of a brief synopsis of the parties’ positions. Opposed motions shall, if requested at the conference, be set by the Court for separate hearing with a schedule for full briefing established. Attached hereto as Exhibit A is a list of *Sua Sponte* rulings by the Court for which it is not necessary to file a motion *in limine*; counsel are requested not to file duplicate motions but may file opposition to the *Sua Sponte* rulings.
6. **WITNESS LISTS.** Witness lists in or attached to trial management conference statements should not be exaggerated. Only witnesses that a party expects to actually call should be listed with a brief synopsis of the proposed testimony. Failure to list a witness that a party in good faith later determines to call will not bar calling that witness. At the conference, the Court will make separate arrangements for preparation of a joint list, for jury selection purposes, of possible witnesses and persons or entities that might otherwise be mentioned at trial.
7. **EXHIBIT LISTS.** Exhibit lists should be in a form identifying only admissible evidence in a singular fashion. Entries such as “files of ABC Company,” “all manufacturing formulas” or “photos of injuries” are not acceptable.
8. **COURTESY COPIES.** In electronic filing cases, all parties shall deliver copies of their trial management conference statements, as well as related trial management conference papers such as motions *in limine* or oppositions thereto, to the chambers

of Department **[DEPARTMENT NO.]** no later than one court day after the day of electronic filing.

9. It will not be necessary for clients or other persons with settlement authority to attend the trial management conference. The conference will be devoted solely to trial preparation.

Counsel having questions about the trial management conference statements or the trial management conference should contact the Courtroom Clerk in Department **[DEPARTMENT NO.]**, at **[PHONE NO.]**.

Dated:

[JUDGE]

EXHIBIT A

Sua Sponte Rulings of the Court for Trial

1. No witness may be called, except with Court permission in exceptional circumstances, unless notice has been given to all parties of the date when the witness will testify. Such notice shall be given no later than at the end of the court day proceeding the court day before the witness is to testify, (e.g. notice for a Tuesday witness to be given at or before adjournment of the Friday session)
2. All witnesses will be excluded from the courtroom, unless otherwise ordered, excepting those for whom an exception exists at law (e.g., parties and corporate representatives).
3. Evidence of, or reference to, settlement negotiations, mediation, and materials related thereto which are privileged under the evidence code or by agreement of the parties shall not be allowed.
4. Evidence of, or reference to, insurance, or the fact that an attorney is employed by, or has been compensated by, an insurance company, shall not be allowed.
5. Evidence of, or reference to, other claims or actions against any party to the litigation shall not be allowed without permission from the Court.
6. Evidence of, or reference to, the financial position or wealth, or lack thereof, of any party to the litigation, shall not be allowed without permission from the Court.
7. Generalized motions *in limine* regarding evidence not produced in discovery will not be granted. If parties expect a dispute regarding the admission of evidence, they should advise the Court at the earliest opportunity. Should an issue arise at trial, each party must be prepared to share with the Court the actual discovery record.

1 [Court name]

4 [Plaintiff's name],

5 Plaintiff,

7 vs.

8 [Defendant's name],

9 Defendant

) Case No.: [Case number]

) TRIAL READINESS CONFERENCE

) ORDER

) (Complex Litigation Program)

) Trial Date: [DATE]

) Trial Readiness Conference Date: [DATE]

12 The court has set a Trial Readiness Conference (TRC) for [DATE]. This litigation has
13 been determined by the Court to be "Complex" within the meaning of [STATE] Rule of Court
14 sections [SECTION NOS.] *et. seq.* To ensure a fair and expeditious trial for all parties, the
15 following procedures are required with respect to preparation for, and attendance at the
16 conference.

18 These procedures will govern trial preparation and are in lieu of the procedure for final
19 status conferences set forth in [COURT] Local Rule [SECTION NOS.], except as expressly
20 stated herein. Each party to the litigation (except parties who are self-represented) shall appear at
21 the TRC through the attorney who is then contemplated to have charge of the conduct of the trial
22 on behalf of such party.

24 **I. Counsels' Preparatory Conference**

26 At least thirty (30) days in advance of the date set for the TRC, counsel for the parties
27 shall meet in person at a convenient time and place and shall accomplish the following purposes:

29 **(A) Stipulation of Facts**

30 The parties shall make every effort to stipulate to facts upon which the parties know, or
31 have reason to know, there can be no dispute for the purpose of simplifying the issues of fact to
32

1 be tried. A joint stipulation of facts, or a statement signed by all counsel describing efforts to
2 reach such a stipulation, must be filed five (5) days prior to the TRC.

3
4 ***(B) Joint Witness List***

5 The parties are to prepare a Joint Witness List using the following format:
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1. The names of the witnesses are to be listed alphabetically;
 2. The name of each witness is to be listed only once;
 3. Witnesses that counsel believe in good faith will be called to testify shall be designated with an asterisk (*);
 4. The list shall be prepared using a “landscape” format (See sample attached);
 5. The “landscape” format shall include boxes for:
 - a. The witness’s name, including both percipient and expert witnesses,
 - b. The party calling the witness,
 - c. A brief description of the testimony,
 - d. The length of direct examination (in hours), and
 - e. The length of cross-examination (in hours).
 6. The Joint Witness List is to be signed by all counsel and is to be filed five (5) court days prior to the TRC.

23 ***(C) Joint Exhibit List***

24
25 The parties are to prepare a Joint Exhibit List using the following format:

- 26
27
28
29
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31
32
1. The list shall be prepared using a “landscape” format (see attached).
 2. The “landscape” format shall include boxes for:
 - a. The exhibit number;
 - b. A description of the exhibit;
 - c. The party offering the exhibit;
 - d. Whether there is a stipulation to authenticity;

- 1 e. Whether there is a stipulation to admissibility (every exhibit must be
2 discussed between or among counsel; for each exhibit the list must be
3 marked with a “yes” or “no,” indicating whether there is a stipulation as to
4 authenticity and/or admissibility of the exhibit); and
5 f. Columns for the date the exhibit is identified and date it is admitted.
6

7 Each exhibit is to be marked using a separate number and each document must be
8 internally paginated. Exhibits need not be consecutively numbered. All duplicates must be
9 eliminated.
10

11 **Any exhibit not previously marked and shared with opposing counsel, unless used**
12 **only for impeachment, will not be permitted to be used at trial, absent good cause.**
13

14 The Joint Exhibit List is to be filed five (5) court days prior to the TRC.
15

16 ***(D) Jury Instructions And Special Verdict Form***

17 The parties are to meet and confer regarding proposed jury instructions in order to
18 agree, to the extent possible, on a set of jointly proposed instructions, jointly proposed pre-
19 instructions to be read to the jury prior to opening statement, and a jointly proposed special
20 verdict form.
21

22 Five (5) court days prior to the TRC, the parties are to file a set of jointly proposed jury
23 instructions, following the form and format requirements of [STATE] Rule of Court
24 [SECTION NO.]. At the same time, each party is to file a set of its proposed jury instructions
25 to which another party objects, following the form and format requirements of [STATE] Rule
26 of Court [SECTION NO.].
27

28 At the same time, the parties are to file a set of jointly proposed pre-instructions to be
29 read to the jury prior to opening statement in the case. The parties should note that, to the
30 extent possible, the court will pre-instruct the jury on the basic elements of the claims and
31 defenses to be tried. *See* [STATE] Rule of Court [SECTION NO.]. To the extent the parties
32 do not agree on the pre-instructions, they are to file a set of jointly proposed pre-instructions

1 and each party's proposed pre-instructions to which another party objects. Pre-instructions also
2 must follow the form and format requirements of [STATE] Rule of Court [SECTION NO.].
3

4 Five (5) court days prior to the TRC, the parties are to file an agreed proposed jury
5 verdict form, giving due consideration to the verdict forms suggested by the [STATE] Jury
6 Instructions. If the parties cannot agree on a proposed jury verdict form, each party shall instead
7 file its proposed jury verdict form.
8

9 Please note that at some point before or during trial, the court may ask that proposed jury
10 instructions, pre-instructions, or jury verdict forms, be transmitted to the court in electronic form.
11

12 **II. Trial Brief**

13 Not later than seven (7) calendar days in advance of the TRC, each party shall serve
14 and file a Trial Brief containing a summary of the party's basic factual and legal contentions
15 supported by legal authority. The memorandum shall include the following parts:
16

- 17 1. *Factual Contentions*— The memorandum shall contain a brief but full
18 exposition of the party's theory of the case and a statement in narrative form of
19 what the party expects to prove.
- 20 2. *Issues of Law*— The memorandum shall include a legal brief discussing the
21 issues of law necessary to the determination of the case.
- 22 3. *Jury Trial*— The memorandum shall state whether any issues are triable to a
23 jury as a matter of right. If less than all issues are triable to a jury, the issues
24 triable to a jury and to the court shall be separately listed, with appropriate
25 citations of authorities.
26

27 **III. Motions In Limine**

28
29 The parties shall comply with [COURT] Rule [RULE NO.]. No motion *in limine* shall
30 be considered unless it is accomplished by a declaration that complies with Rule [RULE NO.].
31 Compliance with this Rule should render it unnecessary for counsel to file superfluous motions
32

1 *in limine*, (e.g., to preclude reference to insurance; to limit expert witnesses to testimony given at
2 deposition, etc.).

3
4
5 The motions *in limine* are to conform to the following guidelines:

- 6 1. Each motion *in limine* must be separately and consecutively numbered;
- 7 2. If two or more motions *in limine* are filed by any party, they shall be
8 accompanied by an index of the motions;
- 9 3. This index shall list each motion by number and description;
- 10 4. The description shall be sufficiently detailed to fairly inform the trial judge of the
11 subject of the motion; and
- 12 5. Oppositions to motions *in limine* shall bear the same number as the motion to
13 which they are directed.

14
15 Motions *in limine* must be filed and served in time to be heard at the TRC. At the TRC,
16 the court, in its discretion, may hear and decide all or some Motions *in limine* or may confer with
17 counsel as to an alternate date and time for hearing all or some Motions *in limine*.
18

19 20 **IV. Trial Package to be Presented to the Court**

21 In addition to filing the pleadings and documents referenced above, the parties must
22 prepare three ring binders for the court's use, which must include a table of contents and tabs and
23 contain documents as follows:

- 24 1. Binder #1 shall contain the following documents to assist the court during the
25 trial:
 - 26 a. The current operative pleadings (operative complaint(s), cross-complaint(s)
27 and answer(s);
 - 28 b. Joint witness list;
 - 29 c. Joint exhibit list;
 - 30 d. Trial Briefs;

- e. Proposed Jury Verdict Form(s); and
- f. Any proposed jury questionnaire.

2. Binder #2 shall contain Motions *in limine* followed by any Opposition and Reply papers and must be organized as follows:

- a. If all Motions *in limine*, including opposition and reply papers, cannot fit in one binder, a separate binder is to be used for each party or reasonably grouped parties;
- b. A declaration pursuant to [COURT] Rule [RULE NO.] shall be included for each motion or addressing all motions; and
- c. A table of contents shall be provided and documents must be tabbed.

All binders are to be lodged with the court at least five (5) court days in advance of the scheduled date of the Trial Readiness Conference.

IT IS SO ORDERED.

Date: [DATE]

[JUDGE]

Joint Witness List – Exemplar

- The name of witnesses are to be listed alphabetically
- The name of each witness is to be listed only once
- A landscape format may be used, if necessary
- The joint witness list is to be signed by counsel for each party

Name	Party Calling	Actually Expected to Testify	Brief Description of Testimony	Length of Direct exam. (in hours)	Length of Cross-exam. (in hours)	Sub-Total	Total (in hours)

***** Additional cells here *****

Plaintiff's Case	_____ hrs.		Cross-Complainant's Case	_____ hrs.
Plaintiff's Direct Exam.	_____ hrs.		Cross-Plaintiff's Direct Exam.	_____ hrs.
Defendant's Cross Exam.	_____ hrs.		Cross-Defendant's Cross Exam.	_____ hrs.
Sub-Total	_____ hrs.		Sub-Total	_____ hrs.
Defendant's Case	_____ hrs.		Cross-Defendant's Case	_____ hrs.
Defendant's Direct Exam.	_____ hrs.		Cross-Defendant's Direct Exam.	_____ hrs.
Plaintiff's Cross Exam.	_____ hrs.		Cross Plaintiff's Cross Exam.	_____ hrs.
Sub-Total	_____ hrs.		Sub-Total	_____ hrs.
GRAND TOTAL (The total time for all witnesses actually expected to testify):				_____ hrs.

Joint Witness List - Exemplar

[CASE NUMBER]

[PLAINTIFF] vs. [DEFENDANT]

Joint Exhibit List

[illegible]

Joint Exhibit List



Simplify and organize.

The National Judicial College created the trial judges *Resource Guide on Complex Litigation* (the *Resource Guide*) for one simple reason: to assist state trial judges, whether they are seasoned veterans or relatively new to the bench, who are assigned complex civil cases. The *Resource Guide* is based upon the Federal Judicial Center's *Manual for Complex Litigation, Fourth*. While that work is excellent, the vision behind the *Resource Guide* was to simplify its contents for easier use by busy trial judges.

The *Resource Guide* is a collaborative effort of The National Judicial College (the NJC) and a Board of Editors. The *Resource Guide* presents, in a step-by-step format, matters a judge should consider and procedures a judge should follow. For ease of reading, the *Resource Guide* is not heavily referenced and consists of checklists and short summaries of information. It primarily references the *Manual for Complex Litigation, Fourth* and other useful resources for the judge who wants to perform additional research on the area in question.

While the *Resource Guide* is useful for all state trial judges, users will need to ensure that they are following their own constitutions, statutes, rules, and procedures.

Please send any feedback on the usefulness of the *Resource Guide* to William Brunson, director of special projects, at brunson@judges.org.



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