DISCUSSION PAPER FOR DESIGN OF

CASE MANAGEMENT, DISCLOSURE/DISCOVERY AND MOTION PRACTICE

PILOT PROGRAM

FEBRUARY 1992

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I. THE PURPOSES AND STRUCTURE OF THIS DOCUMENT

This document identifies and discusses the large number of policy choices to be made in connection with the design of the Court's pilot program in case management, disclosure/discovery, and motion practice.[1] It will serve as an agenda for the series of meetings in which the Judges' CJRA Liaison Committee and representatives of the Court's CJRA Advisory Group ("the Pilot Planning Committee"), with input from other judges, expect to work out the details of the pilot program which will be implemented by July 1, 1992. The document describes the tentative decisions made at the January 28, 1991 Pilot Planning Committee meeting and incorporates, in a restructured format, the text of the two documents distributed before that meeting.

The Pilot Planning Committee tentatively decided that the pilot should involve two case management tracks: one for "standard" cases and the other for "complex" cases.[2] There are two reasons behind the decision to use two tracks. First, a two-track system will permit different case management systems for different categories of cases, such as an early disclosure obligation only in cases in the standard track. Second, a two-track system promises to provide a richer vehicle for learning and experimentation in keeping with the Court's statutory mandate to experiment with case management techniques.

The major differences between the management system in the two tracks relates to the disclosure obligation. In complex cases, it may be unwise and infeasible to impose by uniform rule an early disclosure obligation; instead, judges should fix the extent and timing of the parties' disclosures at the initial case management conference.

In the less complex, standard cases, by contrast, it seems feasible to impose a disclosure obligation before the first case management conference. We want to learn whether compelling parties to put some core information on the table very early in the pretrial period can make the first case management conference appreciably more productive and can in other ways contribute to saving time and money (e.g., by better focusing formal discovery and by encouraging earlier consideration of settlement).

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[1] The idea for a case management pilot and many of the suggestions presented in the document stem from the recommendations of the district's CJRA Advisory Group.

[2] A two-track system is not as great a departure from the norm as it might at first appear. Indeed, many of the ideas set forth in this document appear in CJRA plans of other districts which have already implemented courtwide case management systems based on as many as six tracks.

The disclosure provisions being considered also are not a radical departure from present practice because, e.g. under the existing rules plaintiffs may serve interrogatories and document requests when they serve their complaints.

The Pilot Planning Committee tentatively decided to impose in the standard track a uniform and relatively substantial disclosure obligation requiring the parties to complete their disclosures before the initial case management conference. In the complex cases, by contrast, it was decided that the parties would not be required to make any disclosures before the initial case management conference that will occur somewhat earlier than it would in the standard track cases, e.g., by day 90 as opposed to day 115, as suggested in the proposed timelines in Section XVI below.

Further, the Pilot Planning Committee tentatively decided that the scope of the disclosure in standard track cases should be to produce documents known, after reasonable inquiry, to tend to support any claim or defense of the disclosing party. The Committee discussed requiring the parties to identify persons with knowledge "relevant to" any claim or defense. It further considered adding to this obligation the requirement that the parties describe, but not produce, all other "relevant" or perhaps "discoverable" documents. Details of the scope and timing of the disclosure obligation must still be worked out and are addressed in Section IV below.

This document begins by describing, in Section II, the theory and objectives underlying the basic structure of the pilot program. These objectives provide a framework within which to make policy choices in designing the pilot. The document proceeds to identify a large number of issues to be resolved and presents discussion about and recommendations for resolving these issues.

Since the disclosure obligation comprises the major difference between the two tracks, its scope will have a significant bearing on decisions regarding many of the other elements of the pilot (such as which cases should be classified as standard and which as complex). Thus, the document addresses the disclosure obligation in Section IV before turning to a discussion of other elements of the pilot.

II. THE THEORY AND OBJECTIVES OF THE PILOT PROGRAM

Our task is to design approaches to civil litigation that will enable parties proceeding in good faith to resolve their disputes quicker and less expensively. The Advisory Group and the Court have identified three major sources of expense and delay and seek to design a case management system that eliminates or minimizes those factors.

One source of unnecessary expense and delay is the tendency of counsel and litigants to rely primarily on formal motion work and formal discovery to determine the essence of their claims and defenses and to identify the most significant evidence that supports them. Typically, pleadings overstate and undercommunicate, and it has become traditional for counsel to respond to the relative opaqueness of pleadings by filing motions and launching broad discovery campaigns. Thus, one major purpose of the pilot is to replace some formal motion and discovery proceedings with meaningful dialogue and exchange of information.

A second cause of expense and delay is the tendency of counsel to pay relatively little attention to civil cases in their early pretrial stages, partly because most lawyers simultaneously handle large numbers of cases and are inclined to put out their hottest fires first (attend primarily to the cases closest to trial). As a result, counsel often postpone efforts to aggressively evaluate civil cases until an external event or deadline compels them to do so. When aggressive case evaluations are postponed, opportunities to settle early are lost and discovery and motion work are not as focused and productive as they might otherwise be. The pilot will thus seek to encourage early aggressive case evaluations.

Third, expense and delay also result because early in the pretrial period clients often are less involved in decision-making about the handling of their cases than they might be. Greater early client involvement in basic decisions in civil cases could create opportunities to better capitalize on clients as sources of evidence, options for resolution, economic discipline, and common sense. Thus, the pilot will seek greater early client involvement in decision-making about the handling of their case.

In sum, in view of these sources of cost and delay, the fundamental purpose of the case management program is to **replace traditional approaches that rely on motions and formal discovery** with a system in which parties are **compelled**, very **early** in the pretrial period, to disclose core information about the case, to have **meaningful, meaty, informal dialogue** about both the merits of the case (what it is really about and what the important evidence is likely to be) and about how to position it most efficiently for disposition (by settlement, motion, or trial), and to propose **detailed case development plans** that reflect the **clients' cost-benefit analyses** and that include specific **limits on formal discovery.** In other words, we want the parties to put the key information on the table and to **talk**, early in the life of the case, instead of doing nothing or routinely filing motions and launching barrages of formal discovery.

III. DISCRETION AND FLEXIBILITY IN THE PILOT PROGRAM

A. *Should all pilot rules apply presumptively such that they can be modified or lifted only by a judge "in the interests of justice"?*

1. If the pilot judges were to decline to apply the rules in a large number of cases, or were to modify the rules in a wide range of ways in a large number of cases, it would be virtually impossible to draw reliable conclusions from this pilot project. Were that to happen, the court would be unable to meet its obligations under the CJRA.

⇨ 2. **Recommendation:** All the rules set forth for pilot cases will apply presumptively, meaning that they can be lifted or modified, but only on order of the assigned judge. The pilot judges may decline to apply the pilot program rules, or may modify them, only on a showing that, in the particular case in question, the interests of justice clearly would be harmed if the rules were enforced.

B. ***What should the requirements be for petitioning the assigned judge to modify or decline to apply any aspect of the pilot rules?***

➪ **Recommendation:**

1. Petitions shall be filed as far in advance as possible of the date of the earliest of the implicated obligations, and in any event no fewer than seven court days before that date. Failure to file a petition in conformity with this timing requirement may be deemed a waiver of the right to seek modification of the pilot rule in question.

2. Petitions may be filed only if:

   a. counsel certify that they have:

      (1) discussed the rationale for and objectives of the pilot program with their client and have considered with their client the impact on both cost and delay that the proposed modification of the pilot rules would entail (such certifications must be signed by both counsel and client),

      (2) explained to counsel for all other parties the rationale for their proposed modification of the rules,

      (3) considered the views about the matter that other counsel have expressed in reaction to the proposal, and

      (4) shared those views with their own client (this certification also must be signed by both counsel and client), and

   b. counsel set forth in their petitions:

      (1) their rationale for the proposed change(s) in the rules and the views of other counsel in the case about those proposed changes, and

      (2) what they propose, with specificity, in lieu of the requirement that they want the court to lift or modify, e.g., identify the proposed alternative date by which service would be effected, or the proposed alternative scope of the disclosure obligation.

C. We should also consider whether, or under what circumstances, petitions like these should be considered in the first instance by magistrate judges. There is a substantial discussion of other issues related to magistrate judges in Section XV below.

IV. MANDATORY EARLY DISCLOSURE OF CORE INFORMATION

⇨ A. Recommendation: Content of Disclosure Obligations

1. the identity of all persons known (reasonably under the circumstances) to have discoverable information about the case;

2. all documents in the party's custody or control and that are reasonably available that tend to support the party's positions;

3. a description by category and location of all other then known (reasonably under the circumstances) discoverable documents (including documents then known to be in the custody or control of non-parties),

4. a computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material on which that computation is based, including (but not limited to) materials bearing on the nature and extent of injuries allegedly suffered, and

5. any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that might be entered in the case or to pay part or all of the expense of representing a party in the action.

B. ISSUES RELATED TO THE SCOPE OF THE DISCLOSURE OBLIGATION CONSIDERED BY THE COMMITTEE

1. The Pilot Planning Committee tentatively agreed that the parties should be required to produce documents known, after reasonable inquiry, to "support" (or tend to support) any claim or defense asserted by the disclosing party.

2. The Committee discussed requiring the parties to identify persons with knowledge "relevant to" any claim or defense.

3. The Committee considered adding to this obligation the requirement that the parties describe, but not produce, all other "relevant" or perhaps "discoverable" documents.

4. ***Should the disclosure obligation incorporate the Advisory Committee recommendations concerning damages and insurance?***

The proposed amended Rule 26(a) calls for disclosure of:

(1) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered.

(2) a copy of any insurance agreement under which any person carrying on an insurance business may be liable to defend the action, satisfy part or all of a judgment which may be entered in the action or indemnify or reimburse for payments made to satisfy the judgment.

5. ***To what extent should the disclosure obligation require counsel to produce, rather than merely describe, documents?***

a. The Pilot Planning Committee tentatively agreed that in standard track cases parties should be required (absent a contrary stipulation?) in the early disclosures to produce not just descriptions of categories of documents, but at least some of the core documents themselves.

➪ (1) **Recommendation:** Require counsel to produce documents that tend to "support" their claims and defenses, while giving them the choice of either producing or simply describing by category other documents that might either be "relevant to," "bear significantly on" or be "discoverable with respect to" any claim or defense.

6. ***Should the scope of the disclosure obligation extend to information in the custody or control of non-parties?***

We might establish rules to require parties to describe, by category, documents in the custody/control of non-parties but that are believed likely to "support," "bear significantly on," be "relevant to" or "discoverable with respect to" any claim or defense.

7. ***Should we permit the judge, over the objection of a lawyer, to impose a disclosure obligation that exceeds the scope of the obligation imposed by the pilot program rules?***

If so, should there be any rule-based limits on the extent of the disclosure obligation that the pilot judges could impose?

C. ***Sequence: Should we require the plaintiff to disclose first, then give the defendant 30 days (or so) to make its disclosure?***

1. One argument in favor of this approach is that the plaintiff's disclosure might make clearer what the case is about and thus enable the defendant to be more focused and relevant in its disclosure (this also would save defendant the time and money that it might otherwise spend looking for documents/witnesses that turn out to be irrelevant).

2. A second argument in favor of this approach is that it poses less of a threat to defense counsel's work product interests. The more specific the plaintiff is forced to be about his/her claims and the bases for them, the less risk that defendant will inadvertently lead plaintiff to theories or evidence that plaintiff never would think of pursuing on his/her own.

3. The force of these arguments may vary directly with the complexity of the cases: they may be relatively weak with respect to simpler cases, but stronger with respect to more complex cases.

D. ***In the standard track, what should the relationship be (relative timing) between the exchange of core information and the meet and confer?***

➪ 1. **Recommendation**: Exchange core information before the meet and confer session. This would have the advantage of enriching the meet and confer and making it more realistically productive, e.g., in determining how much additional discovery is appropriate, or whether to drop or settle certain claims, etc.

Other options:

2. Exchange core information after the meet and confer session. The advantage of this alternative would be that the parties might negotiate away part of the case at the meet and confer, or find its center and agree to postpone the peripheral parts. This would place the parties in a

better position to determine what the core information consists of, avoiding unnecessarily broad productions of information and reducing the likelihood that something important would not be produced (e.g., because one lawyer did not understand that something was in fact a part of his opponent's case). The more complex the case, the greater the advantage might be of this approach.

3. Simultaneous: Bring witness lists and key documents to the meet and confer session.

E. ***Should there be a continuing duty to update/correct disclosures?***

1. The rule proposed by the national Advisory Committee reads:

"A party is under a duty seasonably to supplement its disclosures . . . if the party learns that the information disclosed is not complete and correct."

➪ 2. **Recommendation**: Rather than "seasonably," should the timing of the duty to supplement be at fixed intervals (e.g., every four months, or at least 90 days before the close of discovery, etc.)?

The reason for fixing the interval(s) instead of relying on the concept of "seasonable" updates is the fear that counsel will constantly be forced to review information as it is generated through discovery and later investigations out of fear of being accused of failing to "seasonably" add to their disclosure, thus spending a lot of their client's money in an exercise that might not be sufficiently productive.

F. ***In standard track cases, should we explicitly prohibit counsel from avoiding or reducing the disclosure obligation by stipulation?***

➪ **Recommendation:** In standard track cases, explicitly prohibit counsel from avoiding or reducing the disclosure obligation by stipulation.

1. There is some evidence that in Los Angeles and Miami counsel very often agree simply not to make the disclosures that are required by local rule.

2. If no disclosures are made, the productivity of both the meet and confer and the case management conference could be seriously compromised.

G. ***In standard track cases, should there be a protective order to protect trade secrets and other sensitive matter until the first case management conference?***

1. There is a risk that the disclosure obligation would result in parties running to court early in the pretrial period to seek a protective order for trade secrets or other sensitive matter

➪ a. **Recommendation:** Build into the pilot rules either a standard protective order or a requirement that counsel stipulate to a reasonable protective order until the first case management conference.

➪ b. **Recommendation:** Require, as a condition for filing a motion for a protective order before the first case management conference, that the moving party file a certification that it has in good faith but unsuccessfully sought agreement from opposing counsel on at least a temporary protective order. We might require such certifications to be accompanied by a copy of the protective order that the moving party presented to opposing counsel, with an account of why he/she declined to agree to it.

H. ***What should the scope of the disclosure obligation be in complex cases?***

1. The Pilot Planning Committee tentatively decided that in the complex track there would be no disclosure obligation before the initial case management conference, at which the judge would fix the scope of the disclosure obligation on a case-by-case basis.

2. ***Should the pilot rules constrain the pilot judges to order at least some disclosure, or should we permit them to leave all the information gathering to formal discovery?***

3. Even if we ask the pilot judges to fix most of the boundaries of the disclosure obligation in the complex cases at the initial case management conference, should we also, by rule, presumptively impose a limited disclosure obligation of some kind in these cases prior to the first meet and confer and the initial case management conference?

a. For example, in complex cases, are there kinds of information that would both (a) be feasible to find in relatively short time frames (e.g., within a month or so of learning about the filing of the case) and (b) substantially enhance the productivity of the meet and confer session and the initial case management conference?

(1) Insurance policies?

(2) Documents directly implicated by the pleadings, e.g. commercial contracts, patents, annual reports, offering circulars, etc.?

➪ b. **Recommendation:** Do not impose by rule even a limited disclosure obligation, but, instead, require counsel to consider in detail at the meet and confer session what kinds of information should be shared through a disclosure process and what kinds should be developed through formal discovery. After the meet and confer, counsel would be required to present to the court a plan in which they would identify the information that they propose be **disclosed** and the information that they propose be **discovered** along with reasons for each kind of information that counsel propose be developed through discovery rather than simply shared though disclosure. They also would propose a time frame/sequence for the disclosures.

I. ***Should we build into our pilot systems a set of incentives and sanctions to encourage compliance with the disclosure requirements?***

➪ 1. **Recommendation:** Build in a certification requirement, tracking the proposal by the national Advisory Committee for Rule 26(g) which requires a signature on every disclosure to certify that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete and correct as of the time it is made.

➪ 2. **Recommendation:** Explicitly authorize motions to compel full compliance with the disclosure obligation, as recommended by the national Advisory Committee in Rule 37(a). However, prohibit such motions until after the meet and confer session. Further, require that such motions be accompanied by a certification that (1) the moving party discussed the perceived shortcomings of her opponent's disclosures with opposing counsel at the meet and confer session and (2) has explained the basis for her perception that the disclosure does not comply with the rule and (3) despite these efforts, the additional disclosures that are perceived as mandated have not been made.

➪ 3. **Recommendation:** Explicitly incorporate the sanctions provisions recommended by the national Advisory Committee as proposed Rule 37(c).

Failure to disclose without substantial justification, unless harmless, shall preclude the party from presenting the evidence at trial or in connection with a motion, and if the adverse party learns of the evidence despite the failure to disclose and chooses to introduce that evidence at trial, that party may point out at trial that its opponent failed to make the disclosure required by the rule. In addition, the court may impose other sanctions, which may include attorneys fees, an order precluding the party who failed to make the disclosure from conducting discovery, and/or any of the sanctions authorized in paragraphs (A) through (C) of Rule 37(b)(2) (which include striking pleadings or parts of them, entering findings of fact in favor of an opposing party, entering a judgment of default, etc.).

V. ASSIGNMENT OF CASES TO TRACKS

A. OVERVIEW

The civil cases of the judges participating in the pilot would be divided into three groups:

1. Cases completely **excluded from the pilot** program.

   These would include matters like prisoner petitions, social security cases, student loan collections, all cases brought in pro per, etc.

   These kinds of cases account for about 1/3 of the annual civil filings.

   These cases would be processed as they are currently.

2. Cases assigned to the **standard track.**

   These would include mainstream civil cases that are not deemed "complex" and in which the principal relief sought is not equitable.

3. Cases assigned to the **complex track.**

   These would include class actions, antitrust cases, securities cases, patent cases, product liability cases, environmental actions, FSLIC matters, etc.

B. ***How should we deal with the significant percentage of cases that self-terminate with no judicial contact?***

1. It appears that between 30% and 50% of our civil cases self-terminate without any appreciable help from or contact with the court. It also appears that there is no formal discovery in a large percentage of cases, perhaps 50%. We don't know enough about this important world of cases, but we may want to be careful not to force on them a system that entails costs that would be avoided if we left these matters alone.

2. One important thing we do not know is when (i.e., at what stage) most of these cases self-terminate. If most of these cases are closed by the parties within 120 days or so of filing, we probably would want to avoid adopting a set of rules that would force activity on these cases that otherwise would not occur.

3. **Options:**

   a. Deal with this problem on a strictly case-by-case basis. Parties would be permitted to petition the assigned judge to lift or modify the special pilot obligations. Relying on this method might result in a considerable number of such petitions.

   b. Create a clearly separate procedural path that we might call the "**self-management**" (or "opt-out") track. Creating and publicizing such a track might reduce the number of petitions to lift or modify the special pilot obligations.

      The basic idea is that parties would be relieved of the obligations imposed in the standard track cases but, in return, would be required either to dispose of their case within a fixed period, e.g., four months, or have it ready for trial on a truly expedited basis, e.g., within six months. A version of this idea has been incorporated in the CJRA plan adopted in the Western District of Michigan.

      One possible structure for such a "self-management" track might include:

      (1) Even shorter service deadlines (e.g., 20 days)

      (2) Within 30 days of the filing of the complaint, all parties (through counsel) jointly request to opt out of the track system entirely and of the disclosure and meet and confer duties.

In so requesting, the parties must certify that there is a very high probability that they will be able to resolve and close the case on their own, without any judicial help, within 90 days (120 days?).

In return for being permitted to opt out of the management/disclosure systems, the parties waive their right to have an Article III judge preside at the trial of their case (in the unlikely event that a trial is necessary) and consent to have a magistrate judge so preside. This idea was first developed in the Eastern District of Michigan.

If a jury was timely demanded, opting out of the management system would not constitute a waiver of the right to trial by jury.

(3) If a dismissal (with prejudice) has not been filed within the prescribed period (90 days?),

(a) a magistrate judge will be assigned to the case and will host a status conference within 20 days;

(b) the magistrate judge will set the matter for trial within 100 days;

(c) discovery (by entitlement) would be very limited during this last period (i.e., between the failure to settle and the trial date).

C. ***Should certain categories of cases, by subject matter identification on the civil cover sheet, be excluded from both tracks of the pilot program?***

1. **Recommendation**: The following categories of cases would not be subject to the procedures of the pilot program, unless specifically so ordered by individual judges:

a. recovery of overpayment and enforcement of judgment (150)

b. medicare act (151)

c. recovery of defaulted student loans (152)

d. recovery of overpayment of veterans benefits (153)

e. prisoner petitions (510 - 550)

f. forfeiture/penalty (610 - 690)

g. bankruptcy (422 and 423)

h. social security (861 - 865)

i. state reapportionment (400)

j. deportation (460)

k. selective service (810)

l. Freedom of Information Act (895)

m. appeal of fee determination under Equal Access to Justice (900)

n. constitutionality of state statutes (950)

2. ***Which other categories of cases on the civil cover sheet should be presumptively excluded from the pilot?***

3. ***What procedures should apply to the cases in the categories listed above?***

a. Cases in categories for which the court has established special procedures (such as prisoner petitions) would be processed in accordance with those special procedures.

b. Cases in categories not already subject to special procedures will be processed by the pilot judges in whatever manner they feel is appropriate and consistent with the Federal Rules of Civil Procedure. At a minimum, each such case must be the subject of a scheduling order issued early in the pretrial period in compliance with Rule 16.

D. ***Which other types of cases should be excluded from the pilot regardless of their subject matter?***

1. **Pro per cases**

➪ a. **Recommendation:** Cases filed by pro pers should not be assigned to either track, in part because we probably do not want to force pro pers into a substantial meet and confer session with opposing counsel.

b. Should cases initially assigned to the pilot, but in which it turns out that the lead defendant (or any served party?) is proceeding in pro per, be removed from the pilot?

2. **Cases Involving Early TROs or Preliminary Injunctions**

a. Should the special obligations imposed by the pilot rules presumptively not apply to any case in which a party petitions for a TRO at the time of filing the complaint (or within 30 days of the filing of the complaint)? What about petitions for preliminary injunctions?

b. Is a General Order excluding from these rules cases that seek TROs at the outset sufficient notice to the parties, the clerk's office, and the judges?

c. In such cases, should the assigned judge determine, in connection with his or her consideration of the papers related to the motion for immediate equitable intervention, whether, to what extent, and when the matter should be subject to pilot program rules?

d. Or should all such cases be assigned to the complex track?

E. ***For cases included in the pilot program, should we adopt a system in which certain (or all) of these cases are automatically assigned, at the time of filing, to the standard or complex track?***

1. The higher the percentage of cases for which it is obvious which track is most appropriate, the less risky it is to establish an automatic system for assigning cases to tracks handled by the clerk's office personnel at the time the complaints are filed. There might be only a small percentage of cases as to which the appropriate track assignment will not be obvious from the outset, in which case an automatic system, administered by the clerk's office, would be feasible.

2. Some cases that belong in the complex track inevitably would be assigned to the standard track, but counsel in those cases could promptly seek review of the assignment from the assigned judge. That review, if not demanded in a large number of cases, could have the positive effect of engaging the court and counsel in a constructive case management dialogue earlier than usual.

3. Another possibility is to presumptively place all cases subject to the pilot program in the standard track (except perhaps some specific categories of cases) and require the parties to request that their case be re-classified into the complex track.

F. ***If we use automatic assignment for some or all cases, which categories of cases should be automatically assigned to the standard track?***

➪ **Recommendation:** Assign to the standard track the following types of cases:

1. All cases assigned to the arbitration program.

2. All other civil cases that are not either:

   a. exempted from the pilot program entirely or

   b. assigned to the complex track.

G. ***If we use automatic assignment for some or all cases, which categories of cases should be automatically assigned to the complex track?***

➪ **Recommendation:** Assign to the complex track the following types of cases:

1. all class actions

2. environmental cases

3. all antitrust cases

4. all securities cases (except client-broker churning)

5. all patent cases (copyright? trademark?)

6. product liability

The products liability defense bar complains that complaints in these cases tend to communicate very little, that it is very difficult to guess which people and which kinds of documents would bear significantly on plaintiff's case, and that the burden of looking for such documents can be immense, especially in large corporations.

7. mass torts

8. multi-district cases

9. constitutional challenges to state statutes (950)

10. Banks and banking (RTC, FDIC, FSLIC, etc.?)

H. ***Are there additional criteria that should cause cases to be designated administratively for the complex track?***

1. Our goal is to find objective factors that would permit us to identify the cases in which it is most likely that the complexity of the process of developing the evidence, or some other consideration, would make it unwise to subject the case to the time constraints and disclosure duties that would be imposed routinely on cases in the standard track.

2. Criteria that we might consider using include:

   a. number of parties (focusing on which parties are likely to be necessary sources of information/evidence; often the number of defendants will be more important for these purposes than the number of plaintiffs)

   b. number of claims or causes of action

   c. number of counterclaims and/or cross-claims

   d. nature of claims (or counter-claims/cross-claims)

   e. length of pleadings (number and complexity of factual allegations in pleadings)

   f. are the relevant legal theories or norms relatively straightforward (e.g., tort or contract claims), or are they likely to require counsel to develop a great deal of complex factual evidence (e.g., a RICO

claim, some intellectual property claims, some securities claims, some antitrust claims, etc.)

g. is disposition of the case likely to require extensive involvement by a substantial number of experts

h. class action (assigned automatically to the complex track)

i. multi-district action

j. several related actions

k. politically sensitive; high visibility

l. nature/magnitude of relief sought (high stakes; is plaintiff seeking an answer to a complex legal question, e.g., re coverage)? Should cases in which the only relief sought is equitable (injunctive?) be assigned automatically to the complex track?

m. size of the law firms or what is known about the kinds of cases in which they generally are involved?

n. size/nature of the parties, what is known about the quantity of relevant information they are likely to have, what is known about how widely dispersed that information is likely to be

3. Should some or all of the clerk's track assignments be reviewed? By whom?

I. ***If we decide not to use an automatic assignment system for at least some cases, who should decide, initially, which track is appropriate for a given case?***

1. The answer depends, in part, on what criteria we ask the decision-makers to apply, and on how subtle we think making these decisions is likely to be.

2. This decision must be made at the time the complaint is filed, or shortly thereafter, because the nature and extent of the time-pressured obligations that will be imposed on counsel will depend, in part, on which track the case is in.

3. **Options:**

a. **Option 1:** Self-designation by counsel for plaintiff at time of filing or within a short period thereafter (e.g., ten calendar days).

(1) If we were to adopt this kind of system, we might want to limit the lawyers' freedom with respect to self-designation by setting forth some objective criteria that would have to be satisfied in order for the case to be designated "complex."

(2) In addition, we might want to have someone within the court review each designation, or each designation of a "complex" case, within a few days of the self-designation.

(3) It appears that we would have between 200 and 250 civil filings each month for the court as a whole that might be subject to the pilot program. If half of the judges participate in the pilot, there would be between 100 and 125 new cases each month that might be subject to the pilot. Some of those (perhaps 10% - 15%?) would be designated for arbitration, and thus would be assigned automatically to the standard track. A few would be filed as class actions, and thus would be assigned automatically to the complex track. A few others would be excluded automatically, e.g., because the plaintiff is proceeding in pro per or because plaintiff is petitioning at the outset for a TRO. But even taking these matters into account, I would guess that there would be between 85 and 125 cases each month that would have to be assigned to one of the two tracks.

(4) If we permit plaintiff's counsel to self-designate, and if we decide to review, absent a complaint from opposing counsel, only the designations into the "complex" track, the number of such reviews that would be necessary (court-wide) each month should be relatively small (guessing: 20-40). If seven judges participate in the pilot, there would be somewhere between 3 and 7 designations to review per judge per month. At that level, it would seem that the most appropriate person to do the reviewing would be the assigned judge.

(5) If the court were to review (or make initially) every designation (to either the standard or the complex track), and if seven judges were participating in the pilot, there might be somewhere between 12 and 20 designations to review (or to make initially) per chambers each month. If the assigned judges did not want to review that many cases for this purpose, the alternatives might include their law clerks, their courtroom deputies, a magistrate judge (e.g., if a magistrate judge were assigned randomly at the time of filing, he or she might be assigned this task), or someone from central staff (who would have to be specially trained), or the Director or Deputy Director of ADR Programs.

(6) One downside to self-designation is that it probably would result in more motions challenging the designation than would be filed if the court initiated the designation.

(7) Another downside to self-designation is that plaintiff's counsel might use the designation to try to gain some tactical advantage or to try to avoid disclosure obligations or to try to impose disclosure obligations unreasonably on a defendant. If there are significant differences between the two tracks in obligations, speed of access to evidence, level of judicial attention, and/or amount of work imposed on counsel, we should expect some manipulation of the designation process by counsel, and some fights between counsel about which track is appropriate. One way to reduce these potential problems is to have the court do the designating. Of course, there still would be some challenges to the track selected, but there probably would be appreciably fewer such challenges than there would be under a system of self-designation.

b. **Option 2:** Have the assigned judge, or someone in his/her chambers (e.g., law clerk or courtroom deputy), make each designation. This probably would involve reviewing, shortly after the complaint is filed, somewhere between 12 and 20 cases per chambers per month.

c. **Option 3:** Have the assigned magistrate judge do the designating.

d. **Option 4:** Centralize (for the whole court) the task of designating cases in:

(1) one magistrate judge

(2) Director or Deputy Director of ADR Programs

(3) a specially trained member of the clerk's office.

This would compel someone to review between 80 and 125 cases per month. If each such review consumed 15 minutes, someone would have to commit between 20 hours and 30 hours per month (2-4 working days) to this work.

Centralization risks removing the judge and his/her staff from one potentially useful early contact with the case and seems inconsistent with our overall effort to encourage as much pro-activism as possible in case-specific management by the assigned judge.

On the other hand, at some point in the future the court might want to set up procedures under which a law-trained professional like our Director or Deputy Director of ADR Programs has some interaction (e.g., a telephone conference) with counsel early in the life of most civil cases, for the purpose of helping inform the litigants' and/or the court's decisions about whether to use an ADR program and, if so, which one. The Western District of Missouri uses this type of system.

J. ***Should assignments to tracks be postponed until after input is received from counsel?***

1. We might require the plaintiff to file a written statement with the complaint identifying which of the two classifications is appropriate and then require the defendant to file a similar statement with its first responsive pleading. When the responsive pleading is delayed, the Court might nonetheless issue a track assignment.

2. **Advantages** of receiving the defense counsels' input: Having the benefit of a defendant's answer (or perhaps other response) and defenses and knowing whether a counterclaim was brought will provide the person making the classification more information about the complexity of the case. This information, as well as other input from the parties, is likely to lead to a more reliable initial classification and thereby reduce the risk of misclassification and a resulting petition for re-classification.

3. **Disadvantages** of receiving defense counsels' input:

a. It may well be that the majority of the cases might be accurately classified on the basis of the complaint, without the benefit of the defendants' input. Waiting to classify a case until all defendants are served and have responded to the complaint may delay the mandatory disclosure in standard cases which, under the present proposal, must be completed within 80 days of the filing of the complaint. (Since a plaintiff has 40 days to serve the complaint and a defendant 20 days to file a responsive pleading, input from the defendant will generally not be filed until 60 days after the complaint is filed.)

b. Attorneys might manipulate the process by selecting the complex track to avoid the disclosure obligation in the standard track.

VI. SEQUENCE OF EARLY EVENTS: SERVICE DEADLINES AND TIMING OF MEET AND CONFER SESSIONS, DISCOVERY, MOTIONS AND INITIAL CASE MANAGEMENT CONFERENCE

The precise timelines for major early events in each of the tracks can be established only after decisions on the details of various events are made. At this juncture, however, it is useful to decide upon the interrelationship and relative timing of these events and the sequence in which they should occur within each track.

More details about discovery, the meet and confer session, the timing of motions and the initial case management conference are discussed in later sections. A chart and descriptions of proposed timelines appear in the final section of this document.

A. *What should the accelerated deadlines for service of the complaint be?*

➪ 1. **Recommendation:** Require the complaint in cases in both tracks to be served within 40 days. (General Order 26 requires that the complaint be served within 40 days for cases assigned to ENE. Under Local Rule 235-10, failure to serve the initial pleading within 40 days shall be presumptive evidence of lack of prosecution, thus justifying, presumptively, dismissal on that ground.)

2. **Alternative:** The Advisory Group recommended that plaintiffs be required to serve defendants within 30 days.

B. ***Should the rules also set early presumptive deadlines for adding parties and claims or for filing counterclaims or cross-claims?***

➪ 1. **Recommendation:** Parties shall have no more than 20 days from receipt of service to answer or otherwise appear and to file and serve any counterclaim or cross-claim they may have.

➪ 2. **Recommendation:** Parties shall have no more than 20 days after being served with a complaint, counterclaim or cross claim in which to bring any new party into the action.

3. **Option:** Set deadlines for adding parties or claims for the complex cases that are more generous than such deadlines for the standard cases, permitting parties to petition for extensions where necessary.

4. **Option:** Since these matters are difficult to prescribe abstractly for complex cases, leave them to the judgment of the assigned judge, exercised in connection with the initial case management conference.

C. ***Should the pilot rules set short, presumptively applicable deadlines for amending already-filed pleadings?***

D. ***Should the parties in the pilot cases be prohibited from extending by stipulation, without court order, the deadlines for filing pleadings?***

General Order 26, governing ENE, currently contains this prohibition.

Local Rule 220-10 permits parties to extend deadlines fixed by the FRCP for up to 60 days by stipulation, without the court's permission, unless specifically constrained by rule or case-specific order.

E. ***Discovery in standard track cases: What should the relationship be (relative timing) between formal discovery, on the one hand, and, on the other, (1) the disclosure of core information, (2) the meet and confer, and (3) the initial case management conference with the court?***

➪ 1. **Recommendation:**

a. Require the parties to make their disclosures before the meet and confer session and before the initial case management

conference.

b. Prohibit discovery (even by stipulation) before the meet and confer.

c. Permit discovery, but only by stipulation, after the meet and confer and before the initial case management conference.

(See proposed timelines in Section XVI below.)

2. **Alternatives:**

a. As the Advisory Group proposed, prohibit all discovery until after the initial case management conference.

b. Permit only that discovery on which parties can agree (before the initial case management conference) and that does not duplicate information that is subject to the duty of disclosure.

c. Prohibit discovery (even by stipulation) before the meet and confer session, but permit it (even without a stipulation) after that session but before the initial case management conference.

d. prohibit discovery (even by stipulation) only before the parties make the disclosures required by the rules of the pilot program (independent of whether they have met and conferred), but permit it between then and the initial case management conference (only on stipulation, or even without stipulation)?

e. prohibit discovery (even by stipulation) until both the disclosures have been made and the meet and confer session has been held (but permit it between then and the initial case management conference, only on stipulation? even without stipulation?).

F. ***Meet and Confer in standard track cases: When should the meet and confer session occur in relation to disclosure and the initial case management conference?***

➪ **Recommendation:** Counsel must meet and confer after completing the mandatory disclosure and before the first case management conference. (See proposed timeline).

G. ***Discovery in the complex track:*** ***What discovery activity, if any, should be permitted in complex cases before the meet and confer session and before the initial case management conference?***

➪ **Recommendation:** No discovery will be permitted before the meet and confer.

➪ **Recommendation:** If the initial case management conference can be held within 90 days of the filing of the complaint, no discovery should be permitted prior to the case management conference except by stipulation.

H. ***Meet and confer in complex track cases:*** ***When should the meet and confer session occur?***

➪ **Recommendation:** The meet and confer in complex track cases should be held before the initial case management conference.

I. ***Motions: Should the pilot case rules regulate the filing of motions before the initial case management conference?***

Theory: The filing of motions could threaten the heart of the system envisioned in this pilot: a system in which the disclosure of core information and a long, structured conversation between opposing counsel early in the pretrial period are required in order to compel much richer communication (than pleadings provide) early in the pretrial period about what the case really is about and what the fundamental underpinnings are for each side's position. Armed with this information, the parties should be in a position to consider the feasibility of early settlement and to formulate case development plans that are as cost-effective as possible. Thus the system here envisioned departs rather substantially from the traditional system in which counsel could expect to communicate little and to rely primarily on formal, expensive and time-consuming motions and discovery to shape the case and to expose the core material on which it is based.

Prohibiting (presumptively) certain kinds of motions in both tracks before the initial case management conference might encourage counsel to adopt a new way of thinking about early case development and discourage degeneration into formal motion fights before less expensive, more direct means of communication have been tried. The argument for presumptively prohibiting at least certain kinds of motions directed to the merits (e.g., Rule 12(b)(6) motions) before the first case management conference is stronger with respect to complex cases.

One significant quid pro quo for prohibiting or limiting motion work before the initial case management conference would be to prohibit or severely limit formal discovery (except by stipulation) in that same time period (before the first case management conference).

➪ 1. **Recommendation:** Prohibit all motions related to the merits of the case before the initial case management conference (this would preclude, absent specific permission from the judge, motions under Rule 9, Rule 11, Rule 12(b)(6), Rule 12(c), Rule 12(e), Rule 12(f), Rule 15, Rule 41, Rule 55, and Rule 56.

Other options:

2. Permit only motions challenging jurisdiction (personal or subject matter?) or motions to compel joinder of parties (Rule 19) before the initial case management conference (this would preclude, presumptively, all the motions listed in option (1) above, plus motions under Rule 12 challenging venue, insufficiency of process, and insufficiency of service of process).

3. Prohibit only motions based on Rule 12(b)(6) and Rule 56.

4. Prohibit only motions based on Rule 12(b)(6).

➪ **Recommendation:** Parties may file presumptively prohibited motions only with the permission of the assigned judge.

➪ **Recommendation:** Parties seeking permission to file a presumptively prohibited motion may do so only through letter briefs of no more than 5 pages rather than full motion papers. This measure would hopefully minimize the likelihood of counsel arguing the merits of the motion.

VII. CLIENT INVOLVEMENT AND ATTENDANCE AT CASE MANAGEMENT CONFERENCE

A. ***In standard track cases, should clients be required, presumptively, to attend (in person or by telephone?) the initial case management conference?***

➪ **Recommendation:**

Require clients to attend the case management conference only if the court issues a case-specific order to that effect. (Under this option the presumption would be that clients would not be required to attend).

B. ***In complex track cases, should clients be required, presumptively, to attend (in person or by telephone?) the initial case management conference?***

➪ 1. **Recommendation:** Presumptively require client attendance in the complex cases. In more complex and expensive cases, the arguments are stronger that we should compel, presumptively, direct client participation, by phone or in person, in these conferences.

C. ***Should representatives of insurance carriers (who are not parties) be actively encouraged or presumptively required to attend the initial case management conference?***

1. It is not clear that there is authority to compel the participation of a non-party, but we might consider ways actively to encourage such participation.

2. It is important, early in some cases, to get the assigned claims adjuster or insurance executive to start paying serious attention to the case.

➪ 3. **Recommendation:** In standard track cases, pursue attendance by non-party carriers only on a case-by-case basis, e.g., if, as a result of the meet and confer, the parties strongly urge participation of representatives of carriers.

➪ 4. **Recommendation:** Actively pursue attendance by representatives of non-party carriers in complex track cases.

D. ***Should clients be required to sign case management proposals for cases in both the standard and complex tracks?***

➪ 1. **Recommendation:** Require clients to sign case management proposals. (Other requirements for and topics in the case management proposals are discussed in Section XI below.)

E. ***Continuances: Should the rules for the pilot cases permit stipulations to continuances, or requests to the court for continuances, only with the permission of the clients?***

➪ 1. **Recommendation:** Require clients to sign stipulations and requests for continuances only with respect to certain especially significant matters,

e.g., the discovery cut-off date, the motions cut-off date, the trial date.

2. **Other option:** Require that stipulations to all continuances and requests to the court for continuances contain the written consent of the clients.

F. ***Should the pilot rules require the submission (at the initial case management conference) of budgets, signed by clients, in the either or both standard and complex track cases.***

1. Budgeting, billing, and expenses are extremely sensitive subjects. The purpose of a proposal like this is to provide additional assurances that counsel and client are making cost-effective decisions early in the pretrial period and to increase access to clients, at this early stage, as sources of economic discipline.

2. Because of the sensitivities involved in this subject, the court may want to consider alternatives to the submission of budgets.

Options:

a. Require the filing of such budgets only under seal.

b. Do not require filing budgets at all, but require parties to include statements of projected costs/fees in the pre-conference submissions.

c. Require certifications signed by counsel and by an authorized representative of each party affirming that each party and that party's counsel have conferred with a view to establishing a budget for the cost of conducting the full course, and various alternative courses, of the litigation. (The District of Massachusetts' CJRA plan includes this requirement.)

VIII. DISCOVERY

A. ***What systems might be developed to minimize discovery disputes and resolve them as quickly as possible, preferably without judicial intervention?***

➪ 1. **Recommendation:** Require counsel to consult with opposing counsel before noticing depositions, to avoid scheduling friction.

➪ 2. **Recommendation:** Prohibit any discovery that has not been the subject of discussion between counsel in some meet and confer process.

Other options:

3. Prohibit the filing of discovery motions without judicial permission.

4. Prohibit the filing of formal discovery motions, as opposed to five-page letter briefs on a shortened hearing schedule, e.g., ten days, without judicial permission? Should motions contesting privilege and motions for sanctions be on a 28-day schedule.

B. ***In Standard Track cases, should there be presumptive limits on discovery?***

➪ 1. **Recommendation:** Presumptively limit requests for admission to 20 (absent a stipulation or court order), prohibiting subparts and the use of conjunctives or disjunctives.

2. ***Should we require stipulations to foundational matters for documents?***

Should we require stipulations to foundational matters as to documentary evidence, except when the document is really important and when there is a serious, principled basis for questioning its authenticity, and thus should we prohibit use of requests for admission simply to establish the authenticity of documentary evidence, absent court order?

➪ 3. **Recommendation:** Prohibit lawyers from escaping the limit on interrogatories by submitting, at the end of a set of requests for admission, one follow-up interrogatory that says, in effect, detail every basis for denying your response to each request to admit that you deny. Such requests should be deemed the number of interrogatories equal to the number of requests to admit that are denied. (FRCP does not require a party to specify the basis of a straight denial.)

➪ 4. **Recommendation:** Presumptively limit the number of depositions.

Options: Limitations may be placed either on each party or each side and may apply to all depositions or only to non-party depositions.

a. Presumptively limit each party to depositions of all other parties plus 5 non-party witnesses, not counting experts (absent a stipulation or court order).

b. Presumptively limit each side to a total of 10 depositions (absent a stipulation or court order), with all plaintiffs constituting one side, all defendants one side, and all other parties one side.

➪ 5. **Recommendation:** Presumptively limit the length of depositions to 6 hours.

C. ***Should we require counsel to submit to a two-stage discovery/case development plan?***

➪ (1) **Recommendation:** Require counsel to submit a two-stage discovery/case development plan, excusing them only on a showing of good cause. The first stage is designed to get to the center of the case as quickly as possible (by motion, informal exchange of key information, and/or discovery), so as to set up serious settlement negotiations. The second stage would be reached only if the parties failed to achieve settlement. Also, require counsel to identify, before the initial case management conference, the discovery, informal information development, and/or motion work that really must be done before serious exploration of settlement.

(2) **Other option:** Require counsel to discuss, at the meet and confer session and in their case management statements, specifically whether the case lends itself to a two-stage discovery/case-development plan.

D. ***Should the court provide standard definitions applicable to all discovery requests?***

Option: We might provide standard definitions which are deemed incorporated by reference in all discovery requests (for terms such as "documents" and "identify") which may not be varied by litigants.

E. ***Should the court provide a standard protective order for automatic protection of confidential information, unless the parties stipulate or the court orders otherwise?***

a. If the court does not provide a standard protective order, counsel should be required to draft any proposed protective orders at the meet and confer session, or promptly thereafter, and to file proposed protective orders at least 5 court days before the initial case management conference. Counsel also should be required

to propose such orders jointly, and to set forth for separate argument (in writing) only those specific, limited aspects of the order as to which they disagree.

F. ***Should we limit elaboration on objections during depositions in the presence of witnesses?***

Should we permit only the following in the presence of the witness:

"Objection"

"Instruct not to answer on basis of privilege (and identify which privilege)"

(A last resort option of terminating the deposition would remain.)

G. ***Should we prohibit contention interrogatories?***

Should contention interrogatories be permitted at all? If so, how many, with respect to which issues, and at which stage(s) of the case?

H. ***Should we require some answer to arguably overbroad or unduly burdensome requests to produce documents?***

➪ **Recommendation:** The pilot rules governing document requests should track the local rule re interrogatories that imposes a duty to provide information even when the question as phrased is overbroad, unduly burdensome, etc., so that counsel would be required to provide the core documents that would be discoverable if the document request were narrowed to an unobjectionable reach.

I. ***Should we set up a peer review committee to review the discovery practices and other litigation conduct of attorneys practicing before the court?***

One court (D. Montana) is establishing a standing committee of at least five practicing members of the district bar to whom Judicial officers will submit requests to review particular discovery or litigation conduct of attorneys. The committee will present the judicial officer with an advisory opinion stating whether the practice or conduct falls within the bounds of accepted discovery or litigation practice.

IX. PRESUMPTIVE DISCOVERY CUT-OFF AND TRIAL DATES

A. ***In the standard track, should we set by general order presumptive time-frames for major events such as the discovery cut-off and trial date?***

1. **Option:** The discovery cut-off would be set a number of months after the Case Management Conference and the trial will be a couple of months later. (The month in which the trial will be held might be set and the precise date selected later.)

2. If the court often is unable to honor the automatically-set trial dates (or months), the credibility of the court's orders will be undermined.

X. MOTION PRACTICE

A. ***Should the court issue tentative rulings on motions?***

Options:

1. Tentative rulings will be issued by all the pilot judges, but only on certain kinds of motions, e.g., formally briefed (28-day) discovery motions, motions under Rule 12. Occasionally, a judge may choose not to issue a tentative ruling before the hearing.

2. Tentative rulings will be issued only by some of the pilot judges.

3. Tentative rulings will be issued only on those motions that the individual judge selects for this procedure (decision should be made a week in advance of the date set for oral argument).

B. ***Shall judges notify parties in advance (at least two days) of date set for oral argument when the judge has already decided the motion and decided that oral argument will be unnecessary?***

C. ***Should papers filed in connection with motions be limited?***

➪ 1. **Recommendation:** Eliminate, as separate filings, the (a) notice of motion, (b) formal motion itself, and (c) proposed order. Require the moving party to set forth in its memorandum the date and time for the hearing on the motion and to specify, in a separate initial section, what

relief it wants through the motion.

➪ 2. **Recommendation:** Without prior court approval, no memos or letters shall be permitted after the reply (but cases published after the memos are filed could be brought to the court's attention without editorial comment or advocacy).

➪ 3. **Recommendation:** Specify that the only papers that may be submitted in seeking an order shortening time are declarations.

➪ 4. **Recommendation:** Enforce uniform limit of 25 pages for memoranda supporting motions (prohibit less generous limits except in individual case-specific orders, but make it clear that judges could require letter briefs of no more than five pages in connection with discovery disputes).

D. ***Should there be differing page limits for motion papers depending on (1) whether the case is in the standard or complex track and (2) whether the motion is dispositive?***

In one court the page limit on all nondispositive motions is 15 pages. The limit for dispositive motions range from 10 to 40, depending on which of 5 tracks the case is classified under.

E. ***Should we require fax or next day delivery of all papers filed in connection with motions that will be heard/submitted on less than 28 days' notice?***

F. ***Should we establish a mechanism for encouraging judges to rule promptly on motions taken under submission?***

1. Many of the other courts' plans have a mechanism for encouraging judges to rule promptly on motions taken under submission.

   a. One court suggests judges rule on nondispositive motions within 30 days and on dispositive motions within 60 days. That court publishes a monthly list of those motions awaiting decisions.

   b. In another court, after a motion has been under submission 60 days, the Clerk of Court advises the judge in writing. If the decision is not rendered within 30 days thereafter, the judge must issue a written report as to the status of the pending motion and provide a copy to the chief judge.

   c. In another court, when a motion has been under submission 6

months, the Clerk's office contacts the judge's chambers to ascertain the status of the motion and the Clerk's office reports its findings to the parties. If the motion is still pending 3 months later, the Clerk checks again and continues to do so every 3 months.

2. **Pros:** To the extent that delay is caused by the time judges hold motions under submission, this might reduce such delay.

3. **Cons:** The pilot judges might not feel that it would be appropriate to add another review of their timeliness and more reporting obligations.

4. **Issues to Decide:** If we decide to have some mechanism, we will have to decide the following:

   a. who will be responsible for monitoring and contacting the judges?

   b. after what length of time will a judge (after holding a motion under submission) be contacted? and re-contacted?

   c. should the judge report orally to the clerk's office (which would reduce the report to a writing) or in writing? to whom? when?

   d. will the parties be notified?

   e. will a monthly list of motions under submission be published and where? only to the judges or the public also?

G. ***Should we have special requirements for all motions for sanctions?***

➪ 1. **Recommendation:** All motions for sanctions shall be:
   a. filed separately

   b. noticed for at least 28 days (nothing on shortened time)

   c. accompanied by a declaration that:

      (1) sets forth the facts on which it is based

(2) describes efforts to work out the problem by agreement (meet and confer)

(3) sets forth the hours spent only as a result of the allegedly breached duty that inspires the motion and the hourly rate actually charged the client (or normal hourly rate if the representation is on a contingency basis).

XI. MEET AND CONFER SESSION AND CASE MANAGEMENT STATEMENTS

A. ***Which topics should counsel be required to address at the meet and confer session and in case management conference statements?***

➪ **Recommendation:** Require counsel to address explicitly each subject listed in the "checklist" below that has any bearing on the case.

➪ **Recommendation:** Also, require counsel to prepare and file, at least five court days before the initial case management conference, a report (on a standardized format that we should provide, to increase the likelihood that counsel will in fact address every topic) that sets forth the results of their conversations on each topic in the checklist.

➪ **Recommendation:** Require that clients sign the case management proposal.

We must make it clear that counsel must propose a plan, not simply describe their conversations or report that no agreement was reached with respect to certain matters.

(We may decide to remove some of the items in the checklist and replace them with uniform rules applicable to all cases in the pilot).

CHECKLIST

1. **Describe what the case really is about.**

In this conversation, counsel shall describe the central facts/events that underlie their client's position in the case. Counsel shall identify (as best they can at this juncture) which of their claims/defenses are the most significant. For each such claim/defense, counsel shall identify the key evidence then known that tends to support their client's position.

2. **Explore actively the possibility of settling the case.**

   If no settlement can be reached, identify the principal obstacles (informational or other) to negotiating a settlement and set forth a plan for overcoming those obstacles. At a minimum, identify the key information/evidence that needs to be developed (exchanged or discovered) to equip the parties to generate appropriate positions re settlement. Propose a process and a schedule for developing that information.

3. **Set forth plans and deadlines for serving additional parties and for bringing any counterclaims or cross-claims.**

4. **Set forth plans and deadlines for amending already-filed pleadings.**

5. **Identify disputes about jurisdiction (personal and/or subject matter) and/or venue.**

6. **Designate lead, liaison, and/or committees of counsel for plaintiffs and defendants.**

7. **Determine whether the case is related to any others, state or federal, filed or likely to be filed.**

   If so, identify the related cases, the courts in which they are filed or likely to be filed, and the judges to whom they have been assigned. Describe briefly what those cases are about. Make a recommendation as to whether the cases should be formally related for some or all purposes and whether discovery conducted in other cases may be used in the case at bar.

8. **Discuss who should attend the case management conference.**

   Which lawyers? Whether clients ought to attend? if clients ought to attend, which particular representatives of institutional clients? Whether representatives of insurance carriers who are not parties but who arguably afford some relevant coverage ought to be present, and, if so, how their participation can be encouraged?

   If we require attendance by clients, at least by telephone (unless excused

on good cause shown), we must not give the impression, through the way this checklist is written, that anyone other than the judge can decide that a client need not attend. (Requiring attendance by clients is discussed in Section VII above.)

9. **Discuss whether it would be constructive to present at the initial case management conference case development budgets (signed by clients?) or more general cost/expense projections.**

10. **Exchange arguably applicable insurance policies and consider whether additional carriers might be involved.**

11. **Discuss utilization of alternative dispute resolution and/or issue-focusing techniques.**

    The checklist will specifically list the various available ADR options and encourage counsel and/or clients to call the ADR Program Directors with any questions about ADR.

    As part of the court's CJRA plan, there will be an Order, applicable in all cases (not just the pilot cases) requiring counsel to file a writing signed by the client indicating that the lawyer has explained the ADR options to the client and the economics of those options.

12. **Discuss whether the parties will consent to have the case assigned to a magistrate judge for all pretrial and trial purposes** (with appeal directly to the Ninth Circuit). If so, discuss whether the parties agree which magistrate judge they would like to be assigned to the case.

13. **Discuss whether the case should be assigned to a magistrate judge or to a special master for:**

    a. all pretrial purposes (except dispositive motions)

    b. all discovery

    c. settlement

    d. specified, focused pretrial tasks (related to discovery or otherwise)

14. **Discuss the utility and timing of motions under Rules 12, 19, and 56.**

➪ a. **Recommendation:** Require counsel to consider (and report to the court) the wisdom of prohibiting all motions directed at the merits of the case until after a period devoted to developing and sharing information and to discussing settlement.

➪ b. **Recommendation:** Require counsel to consider (and report to the court) whether early resolution of specified motions is likely to be necessary before settlement negotiations can be productive; or whether early resolution of a motion is really likely to have a significant effect on the scope of discovery. Also, require counsel to identify which motions and the discovery necessary for resolution of the specified motions, and to propose a plan (including time frame) for conducting that discovery.

15. **Set forth issues unique to class actions** (e.g., discovery necessary to prepare for certification, timing of certification motion, relation between class discovery and merits discovery, etc.)

16. **Address disclosing information independent of formal discovery** Review each side's compliance with mandatory disclosure requirements and consider whether additional information should be disclosed to comply with the General Order and whether parties can agree to exchange even more information informally, without necessity of discovery.

    In complex track cases, counsel should be required to frame detailed recommendations about the scope and the timing/sequence of the disclosure obligation and justifying the discovery they recommend independent of formal discovery.

17. **Formulate a cost-effective discovery plan, including setting discovery priorities and establishing limits on use of various discovery tools** Shape early discovery to position the parties for productive settlement negotiations as early as possible.

    a. As part of this process, require counsel to describe specifically any discovery that already has been completed (this could be substantial in cases that have been removed from a state court or that are closely related to other actions) or that has been conducted in related cases and that might be usable in the case at hand.

b. Require counsel to attempt to identify factual matters to which they can stipulate, or to which they likely will be able to stipulate, or as to which, for any other reason, they can put discovery on the back burner.

c. **Discuss staged resolution or bifurcation of issues:** Counsel should discuss whether it makes sense to bifurcate (or trifurcate) some issues either for trial only or for both trial and pretrial/discovery purposes. The report they write for the court should identify which issues or matters, if any, should be bifurcated, for which purposes, and why bifurcating makes sense.

d. Discuss whether counsel propose to follow a one or two-stage discovery plan. (Whether the parties should be required to submit to a two-stage plan or merely discuss whether the case lends itself to such a plan is addressed under Discovery in Section VIII above.)

e. ***Should we require counsel to propose specific discovery limitations, and should we require them to propose such limits for each discovery tool?***

➪ (1) **Recommendation:** List each discovery tool on this checklist and require counsel to propose limits on each. Then, the judge, in the order issued after the initial case management conference, will enter the limits he/she selected for each tool. In each case the court would be required to impose at least some limits on discovery in addition to limiting the time within which discovery could be completed. (The rules established for the pilot may place limitations on these discovery tools, rendering some of these items inapplicable. The discussion of policy choices to be made regarding discovery appears in Section VIII above.)

(a) **number of deposition:** (per side, per party, total): _____

(b) **length of depositions:** (in hours or days?) for each deposition: _____

(c) **number of interrogatories:** limit on number: _____

(d) **purposes of interrogatories:** limit purposes for which they could be used, or subjects they could address _____ (See e.g. S.D.N.Y. Local Rule 46.)

(e) **contention interrogatories:** should they be permitted at all? if so, how many, with respect to which issues, and at what stage(s) of the case?

(f) **number of requests for admission:** _____

(g) **purposes of requests for admission:** limit purposes or subjects or issues as to which they could be used

(h) **document requests**: limit number, establish timing, limit subject matters

(2) **Expert discovery:**

(a) limit number of experts

(b) limit number of issues or matters as to which experts might be called

(c) discuss whether parties will exchange written reports by the experts and whether such reports might be used in lieu of depositions

(d) discuss timing of expert discovery: e.g., if crucial to settlement, should there be some discovery from experts very early in the pretrial period, followed by settlement negotiations, followed by additional discovery from the same experts if necessary for final trial preparation

18. **Discuss strategies for containing expenses occasioned by use of experts** (e.g., exchanging written reports prior to depositions, using written reports in lieu of depositions, using video-taped depositions in lieu of live trial testimony, using written reports in lieu of direct examination at trial, etc.)

19. **Develop systems to minimize discovery disputes and resolve them as quickly as possible, preferably without judicial intervention.**

20. **Propose protective orders**: Counsel should be required to draft such orders at the meet and confer session, or promptly thereafter, and to file proposed protective orders at least 5 court days before the initial case management conference. Counsel also should be required to propose such orders jointly, and to set forth for separate argument (in writing) only those specific, limited aspects of the order as to which they disagree.

21. **Discuss special procedures or schedules for expediting resolution of motions** (e.g., letter briefs simultaneously exchanged on stipulated shortened schedules)

22. **Recommend deadlines/dates for completion of non-expert discovery, disclosure of experts, discovery from experts, motions related to the merits of the case, motions in limine, the final pretrial conference, and trial.**

XII. INTEGRATION OF THE ADR PROGRAM INTO THE PILOT PROGRAM

A. ***What effect, if any, should the fact that a pilot case is assigned to one of the court's mandatory (and non-binding) ADR programs (arbitration or ENE) have on the workings of the pilot case management rules/procedures?***

B. ARBITRATION

➪ 1. **Recommendation:** All cases assigned to **arbitration** should automatically be designated for the standard track (regardless of any other criteria). Since the requirements of the standard track are consistent with the demands of the arbitration program, the pilot judges should apply the standard track rules and procedures to cases that are designated for arbitration. If the cases are not disposed of by settlement or motion before the arbitration hearing, that hearing should be held.

➪ 2. **Recommendation:** Set rules that make it clear that no discovery will be permitted after the arbitration hearing except on order of the assigned judge for good cause shown (and that parties who by stipulation but without court order engage in discovery during that period will not be able to use the fruits of such tardy discovery at trial and will get no help from the court if they encounter discovery disputes).

➪ 3. **Recommendation:** If a request for trial de novo is filed after the hearing, the case should be promptly returned to the standard management track by holding a status conference within 30 days of the filing of the de novo demand. The court should set the trial date at that status conference. If the pilot judges set aside a week or two for trial of "short causes," the judges may want to set most/all cases that have been to arbitration for trial during their short cause week(s).

C. THE ENE PROGRAM

1. How to integrate the **ENE** program with cases that are subject to the pilot procedures is a more complex question. Some of the purposes of ENE (e.g., accelerating lawyer/client attention to the case and communication across party lines) will be served by the case management pilot, but there are other important contributions that ENE can make that the pilot case management system cannot, such as:

   a. Provide a frank early evaluation of the case and an early, meaningful opportunity to engage in settlement negotiations with the aid and encouragement of a neutral.

   b. Facilitate richer and more detailed communication across party lines about the merits of the case than in either a meet and confer session between the lawyers (without a neutral or their clients) or a conference hosted by the assigned judge.

   c. Offer more meaningful opportunities for participation by clients and, to a lesser extent, witnesses (thus ENE offers opportunities for catharsis by clients and for learning from percipient or expert witnesses that the court's conferences probably will not offer).

2. Because ENE can make contributions that the procedures contemplated in the pilot program are not likely to make, it would not be wise to remove cases from the ENE program simply because they have been assigned to the pilot program.

3. On the other hand, the overlap of some of the functions of the two processes, and the roughly parallel timing (in theory) of the ENE session and the first case management conference, make the task of sensibly integrating the two programs more challenging.

   ➪ a. **Recommendation** For cases assigned to the standard track and to ENE the optimal sequence might be:

(1) accelerated service (within 40 days, as per Gen. Order 26);

(2) parties exchange the information required under the standard track;

(3) counsel meet and confer, go through check list;

(4) counsel draft report from meet and confer session, and prepare case management plans, then deliver both documents to both the evaluator and the court (these documents could substitute for the written evaluation statements required by General Order 26);

(5) the evaluator holds the ENE session;

(6) any stipulations entered during the ENE session about facts or law, about further exchanges of information, about motion practice or discovery, or about using an ADR process, are committed to a writing that is filed with the court; and

(7) the assigned judge hosts the case management conference.

b. Occasionally there is a delay in holding the ENE session, because, e.g., we can't find an evaluator who is free of conflicts of interest, or because the parties and the evaluator decide to postpone the session until after certain discovery or motion work is completed, or because an important party cannot be promptly served, etc.

(1) The median time between the filing of the complaint and the ENE session has been about 110 days. That means that many ENE sessions occur more than 110 days after the filing of the complaint. We might well not want to hamstring the judges in the pilot to wait for the ENE process in such cases. At a minimum, we will have to set up very good lines of communication between the ADR staff and the judges in the pilot, so the latter can know when it appears that the ENE session will be delayed.

(2) If we have serious ambitions for holding the initial case management conference appreciably earlier than 110 days after the filing of the complaint, we will have to reverse the order set forth above and have that conference before the ENE session. The disadvantages of that sequence include:

(a) eliminating the possibility that the case will settle as a result of the ENE session before the initial case management conference and

(b) eliminating the possibility of the judge benefitting from the fact that the parties learn a lot about their case at the ENE session and sometimes fashion sensible stipulations about the case development process.

c. In cases assigned to the complex track and to ENE:

(a) If we can in fact hold the initial case management conference early in such cases (e.g., within about 90 days of the filing of the complaint), then it might make sense to postpone the decision about whether there should be an ENE session in these cases, and, if so, when, until that initial conference. At that conference the judge, with input from the lawyers, clients, and the court's ADR Director or Deputy Director, could determine whether going forward with ENE, or perhaps some modified version of it, is sufficiently likely to be productive.

(b) If we end up not holding the initial case management conferences in these complex cases until appreciably later (e.g., 200 days after the complaint is filed), then perhaps the ENE process should simply go forward under the normal provisions of General Order 26.

(c) It might be unwise/infeasible to make the decision about whether to postpone the ENE session on a case-by-case basis (in the complex case track). If so, we should write a presumptive rule for complex cases (I suggest that it be to postpone the session) that individual judges would be free to change in cases where they felt the presumptive sequence should be reversed.

XIII. REMOVED AND TRANSFERRED CASES

A. ***How should cases that have been removed from state court, or transferred to this court from another federal court, be treated in our pilot?***

1. Should they be excluded from it altogether?

2. Should the time lines be advanced for such cases?

3. If some discovery already has been done in state court or in the other federal court, what effect should that have on the disclosure obligation?

XIV. MEASURES TO FIRM UP CIVIL TRIAL DATES

A. ***Short cause trial weeks: Should some or all the pilot judges set aside one or two weeks annually or semi-annually to try short cause matters?***

➪ 1. **Recommendation:** All the pilot judges should set aside one or two weeks semi-annually to try short case matters which take three [or two?] days or less to try.

2. In each of the past two years all of the district judges have tried about 35 civil cases that have consumed two days or less of trial time. In each of those years the district judges have tried between 10 and 17 additional civil cases that consumed three days of trial time. Whether the number of such trials would increase or decrease if the "short cause trial weeks" plan were adopted is not clear.

3. What role, if any, should magistrate judges play in such short cause trial weeks?

➪ 4. **Recommendation:** If the district judge could not try one of these cases during the week(s) set aside for this purpose, the case should be referred for trial to a magistrate judge, and if the parties refused to consent, then to a senior judge.

B. ***Should magistrate judges and senior judges serve as back-up trial judges in standard track cases if the assigned district judge cannot try a case on the day set?***

a. Should such cases be referred to magistrate judges for trial?

b. Then referred from a magistrate judge to a senior judge only if the parties refuse to consent?

c. Or should these cases be referred directly to senior judges?

C. ***Are there measures that we can/should include to firm up trial dates in <u>complex track cases</u>?***

1. The short cause trial weeks obviously are not applicable to complex cases.

2. It would seem unwise, in complex cases, to use other judges (magistrate or senior) to pinch hit at the last minute for trial purposes:

   a. a judicial pinch hitter would have much more difficulty, in complex cases, developing an adequate understanding of the case at the last minute; and

   b. trying a long case would severely disrupt the judicial pinch hitter's ability to meet his/her earlier made calendar obligations.

XV. THE ROLE OF MAGISTRATE JUDGES

A. ***Should every case subject to the pilot be assigned randomly at the time of filing not only to a district judge, but also to a magistrate judge?***

1. If so, should certain matters routinely be referred to the assigned magistrate judge, or should there be an understanding that if the assigned judge decides to refer any aspect of the case to a magistrate judge, he or she will send it to the magistrate judge assigned randomly to the case at the outset?

2. Would the random assignment of magistrate judges at the time of filing encourage or discourage consents to magistrate judges for trial? Would it have any negative or positive effect on the court's provision of settlement services?

3. Under the current system, parties can <u>forum shop</u> for the magistrate judge of their preference either for trial or for settlement; it is not clear that this fact is widely known in the bar. If we adopt a system of randomly assigning magistrate judges at the outset, will parties feel that they cannot forum shop? If so, will that discourage consents?

➪ 4. **Recommendation:** Since the pilot programs are to be an experiment, and since we really don't know the answers to these questions, we should

try assignments at the outset, coupled with aggressive educational efforts, and see what happens.

B. ***Should we experiment with different presumptive roles for assigned magistrate judges?***

1. ***Should the magistrate judge in some (half?) of the pilot cases be assigned responsibility for all pretrial matters (except dispositive motions), while in other pilot cases the district judge would retain responsibility for case management but delegate some or all responsibility for discovery?***

2. ***Should the presumptive role of the assigned magistrate judge vary between the standard track and the complex track?***

   a. For example, should magistrate judges be given responsibility for all discovery disputes in all cases in the standard track? Or should the magistrate judges in those cases be given responsibility for all pretrial case management, discovery, and settlement (but not dispositive motions), leaving responsibility in the district judge only for dispositive motions and trial?

   b. In the complex cases, should there be no presumptive role for the magistrate judge (so the magistrate judge would be used in such cases only if the district judge decided, in a specific situation, to refer some matter to the magistrate judge)? Or, in the complex cases should an assigned magistrate judge attend the initial case management conference(s), along with the district judge (the Advisory Group recommended that the assigned magistrate judge attend the case management conference in every case, complex or otherwise). If there are two early case management conferences in complex cases, should the assigned magistrate judge attend both of these conferences, or only the second, which would take place after the exchange of core information and at which the court would make key decisions about motion practice and discovery?

C. ***What additional steps should be taken, if any, to assure that counsel and parties with cases in the pilot programs in fact give meaningful consideration to whether they should consent to full jurisdiction (including trial) by a magistrate judge?***

   a. Presumptive consents?

   b. Certifications by counsel, signed by clients, that the matter has been discussed and the pros and cons considered?

c. "Publishing" directly in each case to each party a description of the advantages of consent (forum shopping, really firm and early trial dates, etc.)?

D. ***Should certain kinds of cases be assigned randomly at the time of filing only to a magistrate judge?***

1. Certain kinds of cases, e.g., diversity cases, might be assigned randomly at the time of filing only to a magistrate judge (and not to a district judge). That magistrate judge might be presumptively responsible for all pretrial and trial matters, so that only if a party objected would dispositive motions and trial be assigned to a district judge.
2. Should the court experiment with this idea by having half of the diversity cases that are in the pilot program assigned to magistrate judges and the other half assigned to district judges?

E. ***Should motions seeking reconsideration of magistrate judge rulings on nondispositive matters be deemed denied if, within 15 calendar days, the district judge has neither set a briefing schedule nor taken other action on the motion?***

Under the current version of Local Rule 410-2, such motions are deemed denied if the district judge takes no action within 30 days.

XVI. PROPOSED TIMELINES

What should the timelines be for the standard and complex tracks?

A. PROPOSED TIMELINE FOR STANDARD TRACK CASES

Day 0: Complaint filed; if case is assigned to a participating judge, it is designated a pilot case and a magistrate judge also is assigned.

By Day 10: Case assigned to "standard" track or to "complex" track.

> Track-specific rules re disclosure, meet & confer, discovery, and case management conference become applicable. Notice re same mailed by Clerk's office to counsel for plaintiff, who must serve notice on other parties.

By Day 40: Service on all defendants must be effected.

By Day 80: Each party must have made the disclosures required by the pilot case rules.

By Day 95: Counsel must have completed the meet and confer process.

By Day 105: Counsel must have filed and served the report from the meet & confer session and their proposed case management plans.

By Day 115: The court will have conducted the initial case management conference, which will be followed promptly by the case management order. Among many other things, that order will set specific limits on discovery, announce whether the case will be subject to a two-stage development plan, and fix dates for the major pretrial undertakings and for trial.

B. PROPOSED TIMELINE FOR COMPLEX TRACK CASES

Day 0: Complaint filed; if case is assigned to a pilot judge, it is designated a pilot case and a magistrate judge also is assigned.

By Day 10: Case has been assigned to "complex" track. Notice of this assignment is sent by Clerk's office to counsel, along with copies of all relevant special rules and requirements; plaintiff's counsel must serve the notice and the related material on all other parties.

By Day 40: Service on all defendants must be effected.

By Day 70: Counsel must have completed the meet and confer process.

By Day 80: Counsel must have filed and served the report(s) reflecting the work done at the meet and confer session and their proposals for disclosure, discovery, and case management.

By Day 90: The court will have conducted the initial case management conference, which will be followed promptly by the case management order. Among many other things, that order will fix the scope and timing/sequence of the parties' disclosure obligations, articulate limits on discovery, announce whether the case will be managed under a two-stage discovery/case development plan, set the date for the next case management conference and describe what counsel are expected to have accomplished by then, and fix the deadlines for other major pretrial undertakings.

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TIMELINES

DAY	ADVISORY GROUP PROPOSAL	PROPOSED STANDARD TRACK	PROPOSED COMPLEX TRACK
0	complaint filed	complaint filed, assigned to pilot judge and magistrate judge	complaint filed, assigned to pilot judge and magistrate judge
10		case assigned to Standard Track	case assigned to Complex Track
30	last day to effect service of complaint on all defendants		
40		last day to effect service of complaint on all defendants	last day to effect service of complaint on all defendants
53	counsel must complete meet & confer and must file and serve Case Management Proposals		
60	Case Management Conference with Judge and Magistrate Judge, Judge issues Case Management Proposal (decide whether to require mandatory disclosure)		
70			counsel must complete meet & confer
80		counsel must **complete Mandatory Disclosure**	counsel must file and serve reports of meet & confer and proposals for disclosure, discovery & case management
90			Judge conducts initial Case Management Conference and promptly issues Case Management Order (**fix disclosure obligation** and set discovery limits and schedule)
95		counsel must complete meet & confer	
105		counsel must file and serve meet & confer report and proposed Case Management Plan	
115		Judge conducts initial Case Management Conference and promptly issues Case Management Order	
120	Judge conducts a second Case Management Conference (optional?) to assess effectiveness of mutual exchange and discuss additional discovery procedures		