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Panel: Pretrial Case Management in the Federal System - "Keeping the Cost of Justice Reasonable"

PANELS

PRETRIAL CASE MANAGEMENT IN THE FEDERAL SYSTEM—"KEEPING THE COST OF JUSTICE REASONABLE"

Panel Coordinator: Norma Shapiro, Judge, U.S. District Court (E.D. Pa.)

Panelists: Zita L. Weinshienk, Judge, U.S. District Court (Colo.)

Venetta S. Tassopoulos, Chief Magistrate, U.S. District Court (C.D. Cal.)

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INTRODUCTION

Participants in and critics of the judiciary agree that unless some solution to the problem of clogged court calendars is found, our system of justice will grind to a standstill. Against this backdrop, the panel members explored methods of expediting case flow[1] through the federal system so that litigants are assured a just and speedy resolution of their disputes whether through settlement, arbitration, or trial.

An efficient disposition of cases is not only important in itself but, as Judge Shapiro pointed out, is a measure of the quality of justice and its accessibility to the public. The goal of the judiciary in a democracy—to provide equal access to the courts to all members of society—calls for a system which assures litigants of the least expensive determination of their disputes. Without this assurance, courts become available only to those who can afford to wait, possibly for years, before their cases are resolved. Such protracted litigation is burdensome to all partici-

1. All panelists are present or former federal trial judges. Discussion was limited to pretrial case management of civil cases in the federal courts.

pants—courts, lawyers, and litigants.

In order to accomplish the dual purpose of reducing case backlog and dispensing speedier and less costly justice, judges must take control of moving individual cases along. Traditionally, lawyers have determined the rate at which a case was to proceed by making decisions such as when to file, when to serve, when to answer. Lawyers have employed a host of discovery devices, such as multiple depositions, excessive interrogatories, and frivolous motions to harass their opponents and delay trial. Such tactics, which have been limited only by the attorney's ingenuity and willingness to have the case drag on, were used as "negotiation" tools to force a settlement by exhausting the resources of the other side. The effectiveness of these methods is reflected in the 90% settlement rate of all civil cases. The challenge to the courts is how to identify those cases which will settle early on in the litigation process, and get them out of the system so that courts are free to try the 10% of cases which do not settle.

The panel discussed a variety of means by which judges can take a more active role in pretrial case management. These include: local procedural rules which expedite case flow; new federal rules; increased use of magistrates; alternative methods of dispute resolution; and more positive involvement with settlement.

Local Rules

In 1982, the Judicial Conference of the United States recommended that federal trial judges impose a scheduling order on their civil cases to set a time limit on each pretrial phase and incorporate the scheduling order in the local rules of court. Furthermore, the Judicial Conference called on judges to monitor their case load so that if a case did not move along, the court could prod dilatory attorneys with orders to show cause.

The recommendations of the Judicial Conference have resulted in a variety of local rules designed to expedite case flow. The panelists cited several such rules which are successfully employed in their courts.

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Order to Show Cause — Not Proceeding with Service

Many attorneys file a complaint to toll the statute of limitations but, for a variety of reasons ranging from strategy to neglect, fail to serve the other side. Judge Weinsheink's court requires that if a complaint is not served within thirty days after filing, an order to show cause is sent to plaintiff's attorney. If plaintiff's attorney does not satisfy the court within twenty days, the action is dismissed in another ten days.

Order to Show Cause — No Answer Has Been Filed

Plaintiff's attorney must file a motion for default judgment within a specific time after the answer is due or the court will dismiss the case.

Limitations on Discovery

Some courts limit the number of interrrogatories which can be asked; some limit the number of depositions which can be taken; all limit the time within which discovery must be completed.

Limitation on Briefs

Courts may limit the number of pages per brief. For instance, Judge Weinshienk limits briefs to ten pages. Judge Shapiro will only read twenty-five pages of any brief on a pretrial motion and her court is considering a three page limit. Such limitations are designed to save client costs and court time while forcing attorneys to write efficiently.

Uniform Pretrial Order

The court may require parties to meet and jointly develop the contents of a proposed pretrial order to be presented to the court at the pretrial conference. Such a stipulated order forces the attorneys to work together and come to an agreement concerning the issues in the case. The procedure has often been successful in facilitating settlement.

Telephone Conferences

Some judges are available to the parties for telephone conferences on a scheduled or unscheduled basis. This allows the attorneys to confer with the judge without having to go to court, and allows the judge to rule orally. The telephone conference is recorded and transcripts are available to counsel from the court reporter. Some courts only allow telephone conferences for arguing pretrial motions. Others use it for pretrial conferences as well. Experience suggests that settlement is more likely if the parties are face to face; settlement conferences by telephone, therefore, may have a lesser chance of success.

Bifurcation

Some districts bifurcate civil cases by trying the liability issues before trying the damages. This technique also may lead to settlement. If settlement is achieved after the liability phase, both the court and litigants are spared the time and expense of the second phase of the trial.

NEW FEDERAL RULES

Effective August 1, 1983, the Federal Rules of Civil Procedure were amended to provide judges with a more active role in case management. The new rules emphasize an attorney's duty to conduct litigation in a responsible manner, and reinforce that duty by giving judges broader powers to impose sanctions.

Rules 11, 16, and 26 are the amended rules directly affecting pretrial case management.

Rule 11:

This rule checks attorney abuse of the pretrial process. It requires courts to impose sanctions on attorneys, parties, or both, who bring or continue litigation for improper purposes such as harassment, delay, or increase of costs. The rule was en-

acted in the belief that "[g]reater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims and defenses."[2]

Rule 26:

This rule imposes standards and sanctions on discovery similar to those Rule 11 imposes on pleading and motions. The rule gives the district judge the power to limit the manner and scope of discovery if s/he finds it redundant or overly burdensome. It affirmatively requires attorneys to conduct discovery in a responsible manner. Specifically, attorneys must sign all discovery requests, responses, and objections, and certify that each one is based on a theory grounded either in law or in a good faith belief of what the law should be. If the court finds that an attorney has violated the standards set forth by the certification requirement, the court is empowered to impose sanctions appropriate under the circumstances. Sanctions may be imposed on the offending attorney, his/her client, or both, and may include costs and attorneys fees incurred by the opponent.

Rule 16:

This rule was amended in response to the need for judicial pretrial case management.[3] The new rule makes scheduling and case management an express goal of pretrial procedure. The rule requires the court and the parties to arrive at a scheduling order, including dates for pretrial conferences, thereby setting up a time frame for the litigation. Thus, no more than 120 days after filing the complaint the parties know what schedule the litigation will follow. This allows the judge early on to take control of the case's management and to use the power of the court to assure that the schedule is followed. Sanctions, including costs and

2. FED. R. CIV. P. 11 advisory committee note.

3. "Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently, and with less cost and delay, than when the parties are left to their own devices." FED. R. CIV. P. 16 advisory committee note.

attorneys fees, are awarded against a party who fails to comply with the provisions of a scheduling order, who fails to appear, or who participates at a pretrial conference unprepared or without good faith.

The amended rules expand the court's authority to curtail flagrant pretrial abuses. It is yet to be seen to what extent misconduct of counsel will be curbed. Some authorities, including Professor McCree, are frankly skeptical of the potential for effectiveness of the new rules.

As a member of the Judicial Conference, Professor McCree voted for the new rules but fears that skillful lawyers will find ways to circumvent them. He pointed out that attorney certification of good faith and reasonable inquiry is no more likely to guarantee responsible litigation than laws against perjury have assured truthful testimony. Nevertheless, the new rules constitute the finest distillation of experience and creativity that the judicial system has to offer to streamline litigation and combat pretrial abuse. The rules allow judges broad discretion to apply new methods and to impose sanctions. At the very least, the techniques suggested by the new rules should be implemented so that their effectiveness can be realistically evaluated.

Use of Magistrates

Courts are beginning to recognize the practicability of using magistrates during the pretrial phases of civil litigation. The office of U.S. Magistrate was originally created by the Federal Magistrates Act of 1968 to handle the increased volume of prisoner petitions which were beginning to inundate the courts. The 1983 Amendment to Rule 16 of the Federal Rules of Civil Procedure[4] specifically authorizes judges to refer pretrial matters to a magistrate or master.

To the extent that they cannot issue final judgments, magistrates are limited in their power. However, it is clearly within

4. Fed. R. Civ. P. 16(c)(6).

their power to rule on discovery disputes and to facilitate settlements. It is in these areas, which are especially burdensome to district courts, that magistrates can function most effectively.

Magistrates can establish local rules to expedite litigation referred to them by district courts. Magistrate Tassopoulos indicated, as an example, that the "meet and confer" rule is used successfully in her district. This rule requires that prior to *any* discovery motion, the parties must meet and confer to try to resolve their disputes. If the parties are unable to settle, then together they must prepare a statement of the issues the case presents. This forces the parties to get together and focus on their differences. Magistrate Tassopoulos thinks this rule is effective not only because it may lead to early settlement, but also because issue clarification eliminates otherwise needless discovery. Once the parties have met and conferred, they can request an early motion date and usually will be heard within ten days.

Magistrates can impose sanctions on parties who abuse the discovery process. Even prior to the amendment of Rule 11,[5] Magistrate Tassopoulos' district had a local rule which allowed the magistrate to award costs against the offending attorney. This rule was frequently although not excessively applied. Magistrate Tassopoulos pointed out the wisdom of starting with lenient sanctions and increasing them if the offending party persists in misusing the litigation process. Graduated sanctions provide an adequate record for appeal and allow the magistrate or judge to feel justified in imposing them.

The magistrate's ruling in any pretrial matter is subject to review by the district court within ten days of the ruling if the parties so request. The "clearly erroneous" standard of review, which allows the decision of the magistrate to stand under ordinary circumstances, is used.[6]

Many judges feel that it is improper to get involved in set-

5. *See supra* pp. 614-15.

6. Judge Learned Hand asserted that "[i]t is idle to try to define the meaning of the phrase, 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded." United States v. Aluminum Co. of America, 148 F.2d 416, 433 (1945).

tling a case which they may later have to try. Therefore, they refer these settlements to another judge or magistrate. Some districts use magistrates exclusively to conduct settlement conferences. A magistrate may then get as actively involved as her or his personal style allows, without jeopardizing the neutrality of the trial judge.

Since such an overwhelming number of cases do settle before trial, the efficient use of magistrates in discovery matters and settlement may ultimately free district courts to try those cases which cannot be settled.

Alternative Methods of Dispute Resolution

Judge Shapiro addressed two alternative methods of dispute resolution which several districts have successfully employed: arbitration and summary jury trial.

The District Court for the Eastern District of Pennsylvania, where Judge Shapiro sits, was one of the first districts to experiment with arbitration. Of 5,300 cases processed through the district court during the experimental period of sixty-five months, 98.2% settled or terminated without judicial intervention, and the remaining 1.8% went to trial. While some cases die a natural death and others would settle regardless of circumstance, credit for the high rate of extra-judicial resolution must go to the district's affirmative arbitration program.

Under the program, all arbitrators are volunteer attorneys paid a nominal fee. Arbitration is mandatory for certain classes of cases such as where less than $50,000 monetary damages is requested; where the United States is a party and the government has consented to arbitration under the Federal Torts Claim Act, the Longshoreman and Harborworkers Act, or the Miller Act; actions based on the Jones Act; contract actions based on negotiable instruments; contract actions where the damages are personal injury or property damage; and cases under the Federal Employer's Liability Act. In other cases, the parties may consent to arbitration provided they pay the fees.

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If the parties are not satisfied with the results of the arbitration they may request a trial de novo within thirty days. However, very few arbitrated cases actually go to trial. Lawyers use the request for a trial de novo as a negotiating tool in settlement, or as a tactic to gain time while the client decides whether to abide by the results of arbitration.

In half the cases, the results of a trial de novo are the same as the results of the arbitration. Arbitration tends to favor plaintiffs slightly, while at trials de novo juries tend to favor defendants somewhat more than do judges. All in all, the advantages of pressing for a trial de novo are at best unclear in light of the greatly reduced cost of arbitration.

Another alternative to the conventional trial is the summary jury trial. In this procedure, what amounts to an advisory jury verdict is used as a basis for settlement. Each side is allowed to argue her or his case to the jury for a limited time, as would be done in a closing argument. As no evidence is presented, the attorneys have a good faith duty to argue only what they believe would be admissible at trial.

The most effective use of the summary jury trial, according to Judge Shapiro, is in cases where the reaction of a jury is difficult to predict. These cases often involve costly and lengthy trials, not because the facts are complicated, but because the equities are unclear. Judge Shapiro believes that the client's presence is necessary at a summary jury trial because the client often needs to be exposed to the other side's arguments before acknowledging the advisability of settlement. The verdict rendered in a summary jury trial will provide the parties with an opportunity to re-evaluate their position and give them a realistic basis for settlement.

Both arbitration and summary jury trial represent useful alternatives to costly litigation and, along with other creative solutions, may well replace traditional trials in appropriate cases.

THE JUDGE'S ROLE IN SETTLEMENT

All panelists agreed that courts have an obligation to facilitate settlement. The panelists disagreed in degree rather than in

kind as to whether a judge should get personally and actively involved in settlement discussions. Many judges are reluctant to engage in settling cases which they will have to try should settlement negotiations fail. Judges play a more active role in non-jury than in jury trials. As a result, some judges are unwilling to participate in settlement efforts associated with cases in which the parties have requested a non-jury trial.

As amended in 1983, Federal Rule of Civil Procedure 16(c)(7) affirms the appropriateness of the judge's role in settlement — the rule specifically lists settlement or alternative methods of conflict resolution as subjects to be discussed at pretrial conference.

Judge Shapiro suggested that there are many opportunities for a judge to facilitate settlement outside of and prior to a pretrial conference. She indicated that many attorneys file suit without contacting their opponents and are surprised when she asks them if they ever attempted to settle. Judge Shapiro feels that she may be more successful than an attorney in dealing with a client whose sense of injury is great but the merits of whose case is poor. In such cases, lawyers often welcome the judge's initiative in proposing settlement. Where a judge is faced with attorneys who thrive on litigation, the judge has an obligation to remind counsel that they might better serve their clients by considering settlement. In cases where a trial could cause emotional trauma to plaintiff, the court might recognize that a greater good than maximum monetary recovery may be had by encouraging settlement. In other cases where the injured party's primary interest is in immediate recovery, it may be better to settle for less than could ultimately be gained by protracted litigation.

According to Judge Shapiro, it is of primary importance that the parties know the judge will not coerce a settlement. The judge's role is to facilitate, to meditate, to get the parties face to face so they can talk over their dispute. If the parties have confidence that the judge will not force settlement, they tend to be more honest in their estimate of the case's worth. The parties' honest estimates, according to Judge Shapiro, are often surpris-

ingly similar and pave the way for mutually satisfactory settlement.

CONCLUSION

The most elusive problem of case management in general and of settlement in particular is how to identify those cases which are likely to settle and to bring about settlement without unnecessary delay. However, as Judge Shapiro stated, "the most effective settlement device is a trial date." Many experts believe that cases which are destined to settle will do so when the case is ripe for settlement, with or without judicial intervention. Although they might condense litigation, mandatory pretrial conferences, uniform pretrial orders, scheduling orders, and threats of sanctions will not bring about a settlement between parties who are not ready to settle. Professor McCree emphasized that the job of trial judges is to try cases. By trying those cases which must be tried, judges shape the law and establish norms so that the vast majority of cases which are resolved outside the courtroom may be disposed of in a consistent and orderly fashion.

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