21st Century Civil Justice System

A Roadmap for Reform

Pilot Project Rules

INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM

UNIVERSITY OF DENVER

Institute for the Advancement of the American Legal System

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

IAALS provides principled leadership, conducts comprehensive and objective research and develops innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes.

IAALS is a part of the University of Denver, and it benefits from gifts donated to the University for its use. None of the gifts have conditions or requirements, other than accounting and fiduciary responsibility. All IAALS research and products are supported by pooled grants from individuals, businesses and private foundations.

Institute for the Advancement of the American Legal System
University of Denver
2044 E. Evans Avenue, HRTM Bldg., #307
Denver, CO 80208-2101
Phone: 303.871.6600
www.du.edu/legalinstitute

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

STAFF

Rebecca Love Kourlis, Executive Director

Pamela A. Gagel, Assistant Director

Jordan M. Singer, Director of Research

Michael Buchanan, Research Analyst

Corina Gerety, Research Analyst

Natalie Knowlton, Research Analyst

Dallas Jamison, Director of Marketing & Communications

Erin Harvey, Manager of Marketing & Communications

Abigail McLane, Executive Assistant

Stephen Ehrlich, Consultant

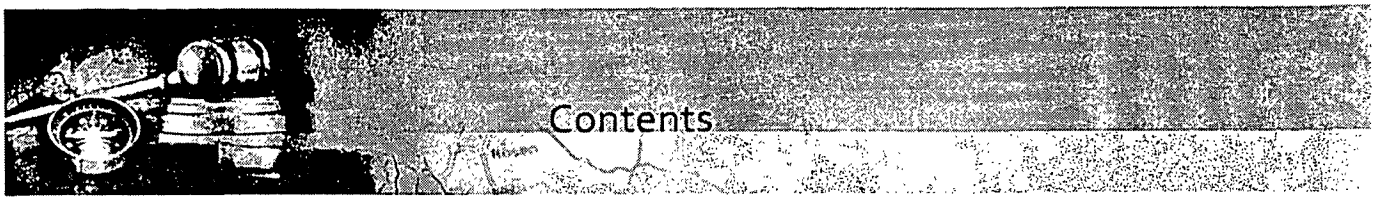
Suzanne Gremaux, Consultant

E. Osborne Ayscue, Jr., Charlotte, North Carolina, a member of the IAALS Board of Advisors and a Fellow of the American College of Trial Lawyers, participated as the Institute's liaison to the project.

American College of Trial Lawyers

The American College of Trial Lawyers (ACTL), founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

American College of Trial Lawyers
19900 MacArthur Boulevard, Suite 610
Irvine, California 92612
www.actl.com



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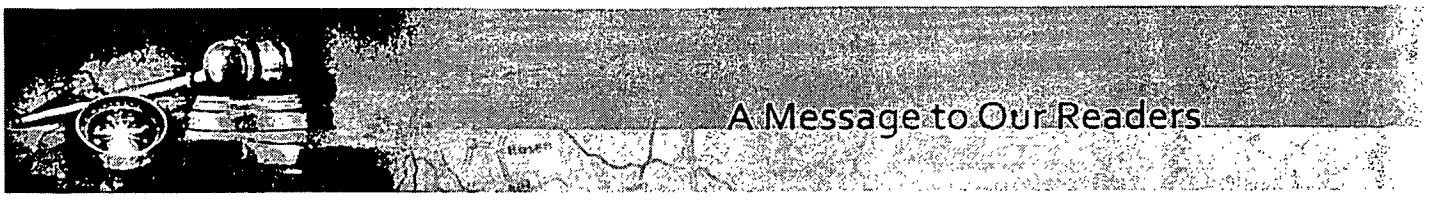


A Message to Our Readers

Rebecca Love Kourlis
Executive Director, IAALS

Paul C. Saunders
Chairperson, ACTL
Task Force on Discovery
and Civil Justice

The nation's civil justice system is too expensive, too cumbersome and takes too long. As a result, the price of justice is high and access is being compromised. Small to mid-sized cases that should be filed are not filed because they fail a reasonable cost/benefit analysis; cases that are brought often settle principally because of costs, not merits. Civil jury trials are disappearing.

The American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) are both dedicated to protecting and improving our civil justice system. In 2007, IAALS and the ACTL Task Force on Discovery and Civil Justice formed a partnership to study those problems.

We reviewed existing research on the subject, then surveyed the membership of the ACTL. The results of that survey voiced a compelling mandate. Of the Fellows responding, 65% thought that the system fails to meet the guarantee of Rule 1 of the Federal Rules of Civil Procedure of a "just, speedy and inexpensive determination of every action."

The next step was to focus on possible solutions to the problems. In March 2009, we published a joint *Final Report* that contains 29 Principles. Those Principles suggest changes to the civil justice system that would address costs by simplifying and expediting the system. The *Final Report* can be found on both of our websites at www.actl.com and www.du.edu/legalinstitute.

The Principles represent the best thinking of the individuals involved in our project, in collaboration with the broader membership of the ACTL and with experts across the nation. Nonetheless, we understand how important it is to test our proposed solutions before suggesting that they be widely implemented.

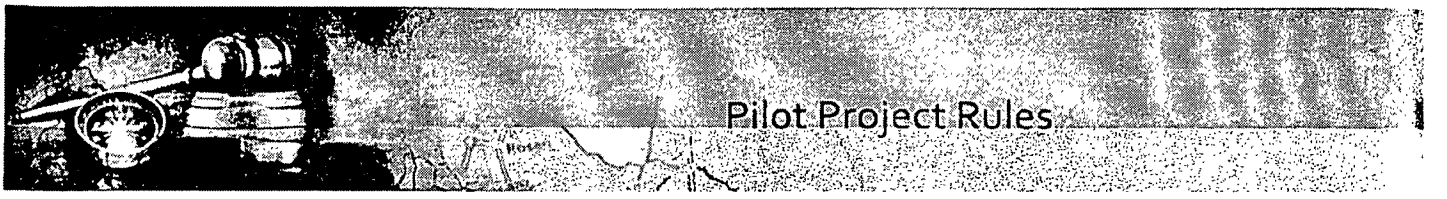
Accordingly, it is our intention that the Principles be tested in pilot projects in courts around the country, with the projects monitored and measured to determine what works and what does not. In order to be able to apply the Principles in those pilot projects, we have undertaken the task of reducing them to operational Rules.

We urge jurisdictions to use these Rules as a roadmap for consideration in creating and implementing a pilot project. IAALS has dedicated a portion of its website to these pilot projects (www.du.edu/legalinstitute/tcri2.html), and will be collecting information as we move forward. IAALS will also be developing metrics to gauge the impact of the pilot projects.

The civil justice system is a centerpiece of American democracy. It is in need of improvement. We must refuse to settle for an ailing system that does not adequately meet the needs of litigants. Rather, we must begin to test possible solutions. Our organizations commit to serving as a resource for you in that important work.

Rebecca Love Kourlis

Paul C. Saunders



Pilot Project Rules

Preamble These Pilot Project Rules (PPR) are meant to apply the Principles set forth in the *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* (ACTL/IAALS Principles).* They are not meant to be a complete set of rules. The court's existing rules will govern except to the extent that there is an inconsistency, in which case the PPR will take precedence. In addition, the PPR may need to be tailored to specific requirements in a jurisdiction. Furthermore, there may be certain kinds of cases to which the PPR should not apply because of statutory or constitutional requirements (for example, the requirements contained in the Private Securities Litigation Reform Act of 1995).

* The name of the Task Force was subsequently revised to the Task Force on Discovery and Civil Justice to acknowledge that the problems we identified were not confined to discovery.

Rule One Scope

1.1. These Rules govern the procedure in all actions that are part of the pilot project. They must be construed and administered to secure the just, timely, efficient, and cost-effective determination of such actions.

1.2. At all times, the court and the parties must address the action in ways designed to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information.

Comment to PPR 1.2

The Federal Rules of Civil Procedure and many state rules already contain factors that—where applied—address proportionality in discovery. However, these factors are rarely if ever applied because of the longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise. It is the purpose of these PPRs that the default be changed—all facts are not necessarily subject to discovery. Because these rules reverse the default, the proportionality factors that are provided in existing rules and restated in the PPR can be applied more effectively to achieve the goals stated in PPR 1.1.

Rule Two Pleadings – Form and Content

2.1. The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief.

2.2. Any statement of fact that is not specifically denied in any responsive pleading is deemed admitted. General denials are not permitted and a denial that is based on the lack of knowledge or information must be so pleaded.

Comment to PPR 2.1

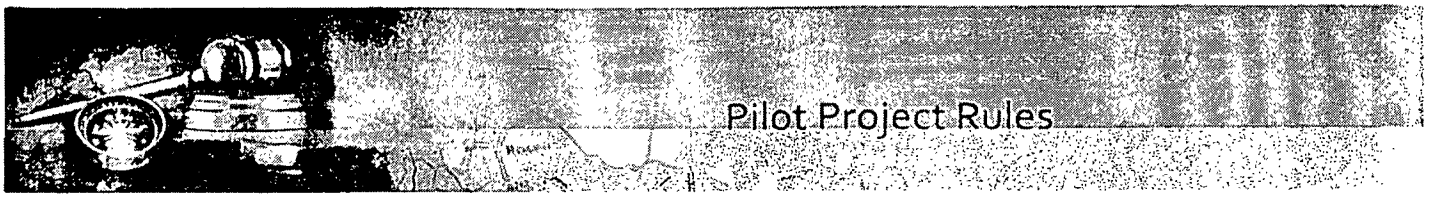
PPR 2.1 expects that the pleading party will plead all material facts known to support a claim or affirmative defense. It is intended to revitalize the role that pleadings play in narrowing issues at the earliest stages of litigation, by bringing salient facts to light in the hope that doing so will reduce the need for discovery. PPR 2.1 is not intended to resuscitate the technicalities associated with common-law pleading or foreclose access to the courts.

The material facts pleaded should provide the "who, what, when, where, and how" of each element of a claim or defense. Several examples follow. In a claim for breach of contract, the pleader should provide a description of the nature of the contract, identify the relevant signatories and date of signature, and for each provision alleged to be breached, state the provision and describe in detail the manner in which it was allegedly breached. In a claim for negligence arising from an automobile accident, the pleader should state in detail the time, date, and location of the accident, describe in detail the alleged negligent act, provide a precise description of the alleged physical injuries and property damage, and describe known monetary damages. In a claim for patent infringement, the pleader should provide facts identifying the patentee(s) and assignee(s), patent number, dates of application and issue, efforts to mark any products or processes covered by the patent, the specific products or processes that the defendants allegedly made, used or sold in violation of the patent, where and when those products or processes were made, used and sold within the United States, and the claims of the patent that are allegedly infringed.

The pleading requirements apply equally to affirmative defenses. For example, for an affirmative defense alleging the running of the statute of limitations, the pleader should state which claims are time-barred and, for each such claim, the applicable statute of limitations and specific time that has elapsed since the claim accrued.

If a pleading party cannot through due diligence obtain facts necessary to support one or more elements of the claim, the party may plead such facts on information and belief, again with as much detail as possible. However, this provision should not be used in a manner that evades the intent of the rule. Rather, the party should make use of the precomplaint discovery provision in PPR 3 to compile the facts to meet the burden.

The requirement that parties plead each remedy sought is not intended to preclude alternative remedies at the outset, and required damages are only those damages that can be quantified at the time of filing of the action.



Rule Three — Precomplaint Discovery

3.1. On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that:

a. the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by the discovery;

b. the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint;

c. the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought;

d. the proposed discovery is narrowly tailored to minimize expense and inconvenience; and

e. the moving party's need for the discovery outweighs the burden and expense to other persons and entities.

3.2. The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR 3.1. Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of the discovery.

Comment to PPR 3

The Federal Rules do not presently permit precomplaint discovery, but it is permitted in some states, either after an action has been commenced by writ of summons (e.g., PA. R. CIV. P. 4003.8), or by a miscellaneous action brought for the sole purpose of seeking leave to conduct the discovery (e.g., OHIO REV. CODE § 2317.48; N.Y. CPLR LAW § 3102(C)).

Rule Four — Single Judge

4.1. As soon as a complaint is filed, a judge will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case through trial and post-trial proceedings. It is expected that the judge to whom the case is assigned will handle all pretrial matters and will try the case.

Rule Five — Initial Disclosures

5.1. No later than (x) days after service of a pleading making a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support that party's claims.

5.2. The date for each responsive pleading should be fixed to follow the due date of the applicable initial disclosures required by PPR 5.1 by (x) days.

5.3. No later than (x) days after service of a pleading defending against a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support any defense of that party.

5.4. Each party has an ongoing duty to supplement the initial disclosures promptly upon becoming aware of the supplemental information.

5.5. A party that fails to comply with PPR 5.1, 5.3 or 5.4 may not use for any purpose the document or thing not produced, unless the court determines that the failure to disclose was substantially justified or was harmless.

Comment to PPR 5

The ACTL/IAALS Principles suggest that the plaintiff should be required to produce such documents very shortly after the complaint is served and that the defendant (who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand) be required to produce such documents within a somewhat longer period of time. However, court rules on timing vary so these rules have left the times to be determined by the pilot project court. *See* FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 8 (Mar. 11, 2009).

Rule Six — Motion to Dismiss/Stay of Discovery

6.1. Upon the making of a motion directed to the personal or subject matter jurisdiction of the court or the legal sufficiency of one or more claims for relief, made together with an answer or at the time within which an answer would otherwise be due, the court, at the request of the moving party based on good cause shown, may stay initial disclosures and discovery in appropriate cases for a period of up to 90 days. The motion must be decided within that 90 day period.

Rule Seven — Preservation of Electronically Stored Information

7.1. Promptly after litigation is commenced, the parties must meet and confer about preservation of any electronically stored information. In the absence of an agreement, any party may move for an order governing preservation of electronically stored information. Because the parties require a prompt response, the court must make an order governing preservation of electronically stored information as soon as possible.

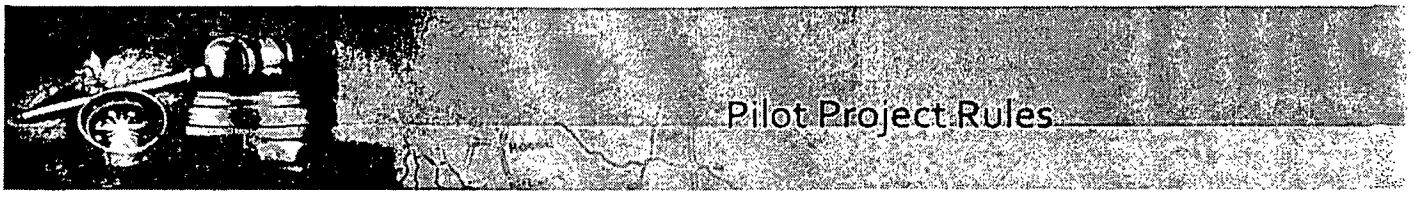
Rule Eight — Initial Pretrial Conference

8.1. Unless requested sooner by any party, the judge to whom the case has been assigned must hold an initial pretrial conference as soon as practicable after appearance of all parties. Each party's lead trial counsel must attend this conference. At least three days before the conference, the parties must submit a joint report setting forth their agreement or their respective positions on the following matters, if applicable:

a. an assessment of the application to the case of the proportionality factors in PPR 1.2;

b. production, continued preservation, and restoration of electronically stored information, including the form in which electronically stored information is to be produced and other issues relating to electronic information;

c. proposed discovery and limitations on discovery, specifically discussing how the proposed discovery and limitations on discovery are consistent with the proportionality factors in PPR 1.2. Limitations on discovery may include:



i. limitations on scope of discovery;

ii. limitations on persons from whom discovery can be sought;

iii. limitations on the types of discovery;

iv. limitations on the restoration of electronically stored information;

v. numerical limitations;

vi. elimination of depositions of experts when their testimony is strictly limited to the contents of their written report;

vii. limitations on the time available for discovery;

viii. cost shifting/co-pay rules, including the allocation of costs of the production of electronically stored information;

ix. financial limitations; and

x. discovery budgets that are approved by the clients and the court.

d. proposed date for the completion of discovery;

e. proposed date for disclosure of prospective trial witnesses;

f. dispositive motions;

g. the amount of time required for the completion of all pretrial activities and the approximate length of trial;

h. the issues to be tried;

i. the appropriateness of mediation or other alternative dispute resolution;

j. sufficiency of pleadings and compliance with PPR 2;

k. amendment of pleadings;

l. joinder of parties;

m. expert witnesses, including dates for the exchange of expert reports;

n. computation of damages and the nature and timing of discovery relating to damages; and

o. any other appropriate matter.

8.2. As soon as possible after that conference, the judge to whom the case is assigned must make an initial pretrial order with respect to each of the matters set forth above and set a trial date. The initial pretrial order must specifically include the court's own assessment of the applicability to the case of the proportionality factors in PPR 1.2. In arriving at that assessment, the court should consider, but is not bound by, the assessments made by the parties. Modifications to the initial pretrial order may be made only upon a showing of good cause. Except as otherwise provided by the PPR, continuances and stays must not be permitted.

Comment to PPR 8.1

PPR 8.1(c)(viii) anticipates that the parties' joint report may include an allocation of the costs of producing electronically stored information. Unless directed otherwise by an order of the court, the cost of preserving, collecting and producing electronically stored information must be borne by the producing party. The court shall consider shifting any or all costs associated with the preservation, collection and production of electronically stored information if the interests of justice and proportionality so require.

Rule Nine — Additional Pretrial Conferences/ Setting the Trial Date

9.1. A party may request a special conference with the court to seek guidance on or the modification or supplementation of the court's outstanding pretrial orders.

9.2. The court may hold additional status conferences on its own motion.

9.3. A conference may be held in person or by telephone or videoconference, at the court's discretion.

9.4. If not already set in the initial pretrial order, the court must set a trial date at the earliest practicable time, and that trial date must not be changed absent extraordinary circumstances.

Rule Ten Discovery

10.1. Discovery must be limited in accordance with the initial pretrial order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.

10.2. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality in PPR 1.2, including the importance of the proposed discovery in resolving the issues, total costs and burdens of discovery compared to the amount in controversy, and total costs and burdens of discovery compared to the resources of each party.

Rule Eleven Expert Discovery

11.1. Each expert must furnish a written report setting forth his or her opinions, and the reasons for them, and the expert's direct testimony will be strictly limited to the contents of the report. There must be no additional discovery of expert witnesses except as provided by the initial pretrial order.

11.2. Except in extraordinary cases, only one expert witness per party may be permitted to submit a report and testify with respect to any given issue.

Comment to PPR 11

This rule is intended to apply to Federal Rule of Evidence 702 experts. It is not meant to address testimony of fact witnesses who, by virtue of their training and experience, would be qualified to express expert opinions but are not retained by any party for that purpose.

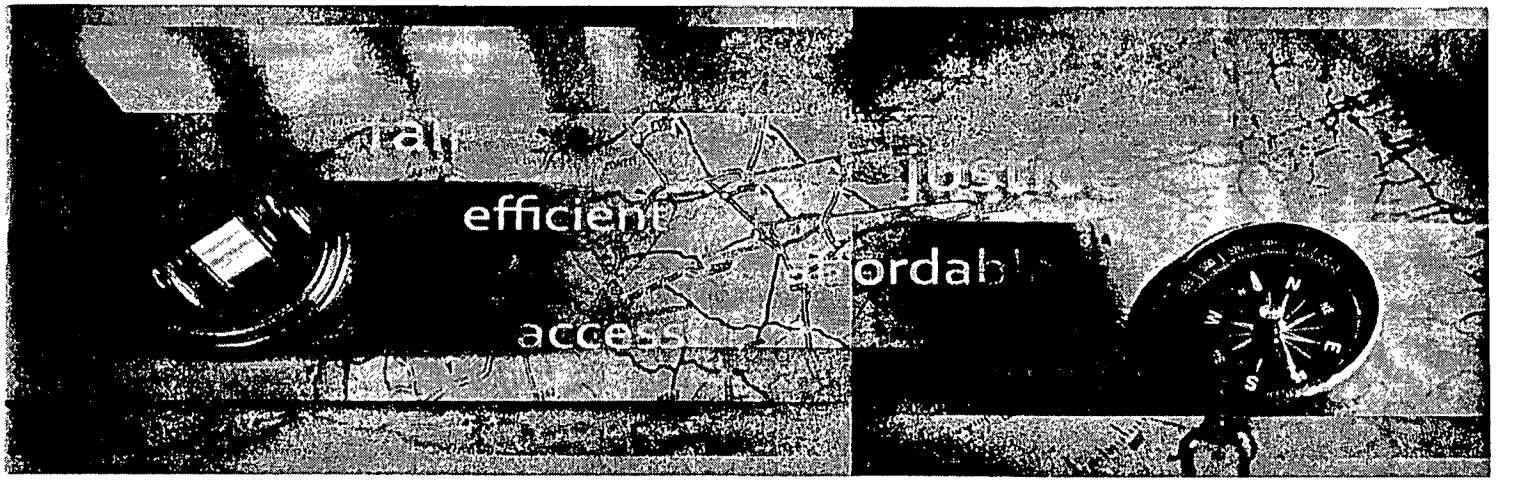
Rule Twelve Costs and Sanctions

12.1. The court may impose sanctions in addition to those set forth in PPR 5.5, as appropriate for any failure to provide or for unnecessary delay in providing required disclosures or discovery.

12.2. Sanctions may be imposed for destruction or failure to preserve electronically stored information only upon a showing of intent to destroy evidence or recklessness.

21st Century Civil Justice System

A Roadmap for Reform



Civil Caseflow Management Guidelines

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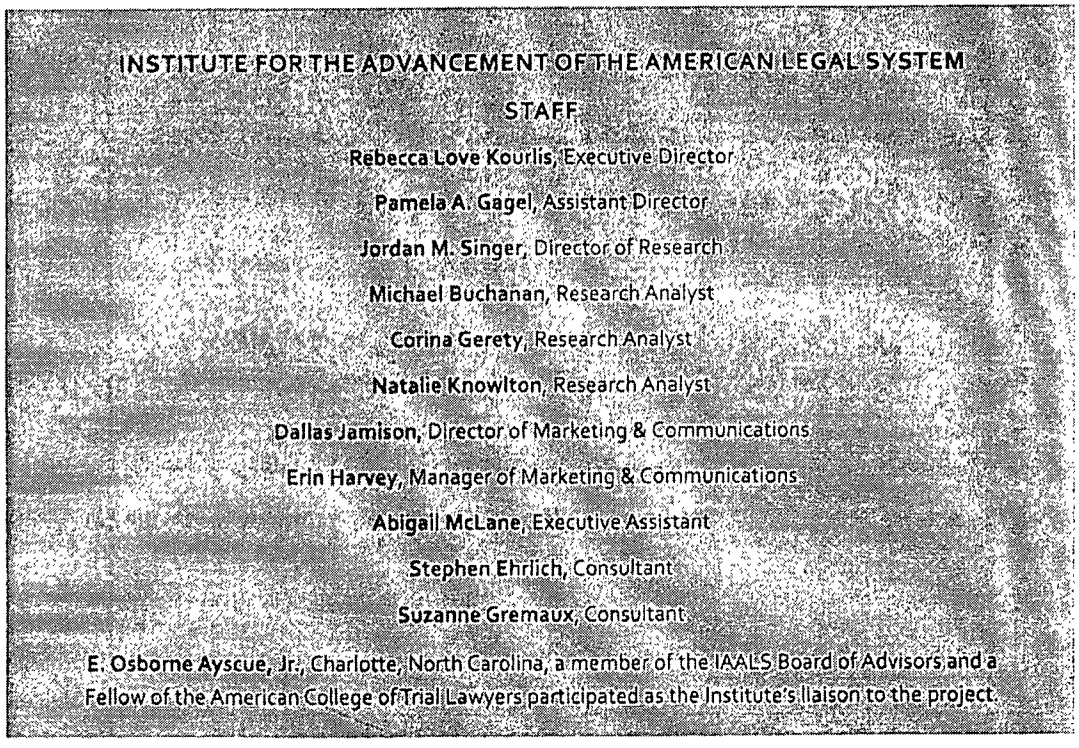

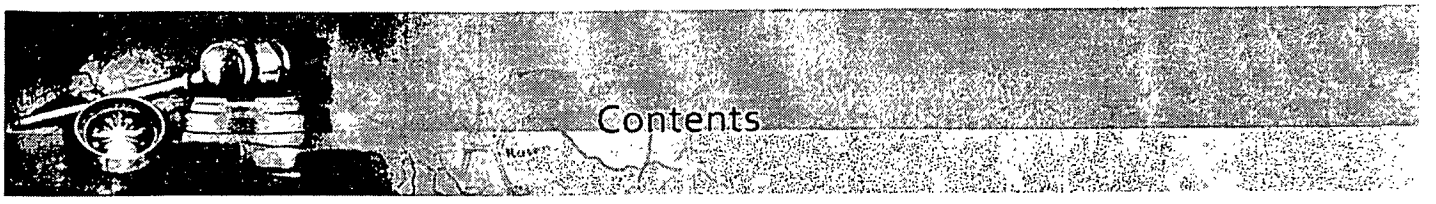

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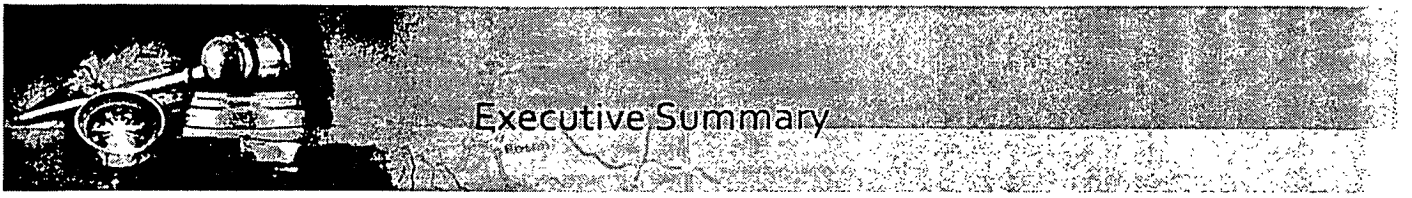
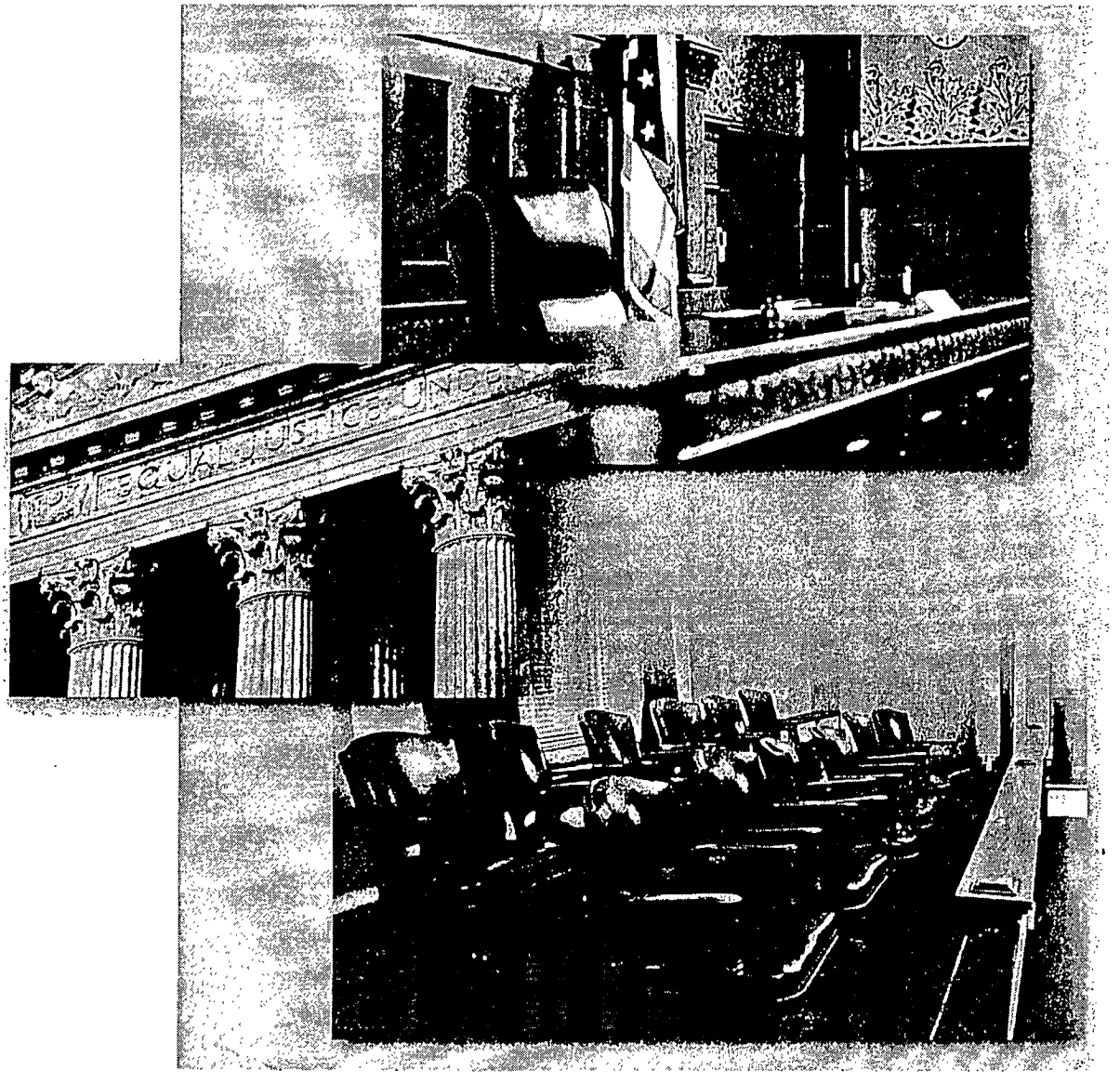


Executive Summary



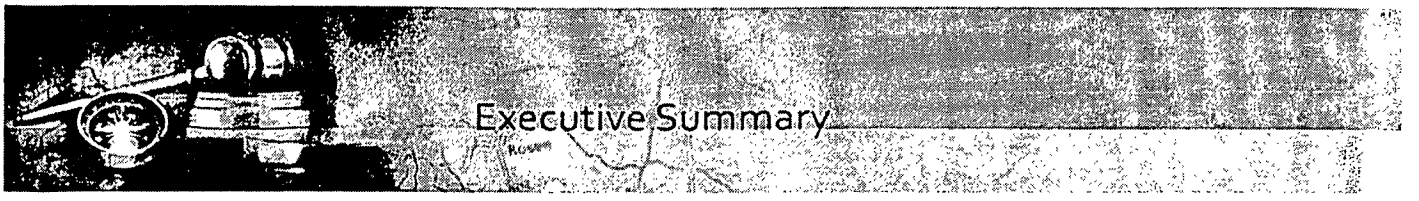
Excessive litigation costs and delay (separate but closely interrelated concerns) are two of the most serious problems in the civil justice system. These problems not only plague litigants whose cases do get into court, but also negatively affect access to justice, not just for the indigent,[1] but perhaps even for the middle class.[2] These concerns can be addressed meaningfully through caseflow management practices.

Effective caseflow management involves much more than reducing time to disposition; it involves timeliness throughout the life of the case. According to Maureen Solomon and Douglas Somerlot,

> [i]n a sense, the term 'caseflow' may be misleading in connection with the movement of cases through the court. Cases do not flow steadily and smoothly from filing to termination. In terms of court involvement, the life of a case, and reality, may be characterized as a series of events separated by times during which there is no court activity. A goal of active case management is to make the sequence and timing of these events more predictable and timely.[3]

Another goal of caseflow management is to ensure that each event is meaningful, in that "the activity and preparation required for the event to take place on the scheduled date is completed before that date by all involved stakeholders."[4] A corollary goal is to assure that effort is not duplicated. When the parties, counsel and the court prepare for an event, that event should occur. Otherwise, the preparation will have to be repeated. Additionally, the event itself should advance the resolution of the case in some way.

The Guidelines that follow were drawn from a number of sources, including the *Interim*[5] and *Final*[6] *Reports of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System*



(IAALS), and a recent and extensive IAALS civil case processing study.[7]

These Guidelines and the discussion of specific suggestions for applying the Guidelines are designed to assist judges in effectively managing the flow of civil cases to ensure that all events in the life of a case are timely and meaningful.[8]

The Discussion of the Caseflow Management Guidelines contains the following sections: Guideline, Basis and Background, Operational Protocols and Cross-References. The Guidelines are recommendations that are intended for the majority of cases. They are not intended to be adhered to in every instance and judges who are actively involved in case management are in the best position to determine the applicability of each Guideline, based on the specific needs of the case. Each Guideline is accompanied by a Basis and Background section that explains the rationale behind the Guideline and the benefits that flow from the caseflow management practice set forth in the Guideline. Where applicable, the Basis and Background section references support from the specific sources listed above.

The Operational Protocols accompanying the Guidelines are intended to breathe life into the Guidelines. The Protocols are recommended practices and procedures that will assist judges in implementing the Guidelines. As is true with the Guidelines, not all of the Operational Protocols will be applicable to every case and judges exercising active caseflow management will be best positioned to determine which Protocols should be adopted in each case.

These Guidelines were developed from the Principles set forth in the ACTL/IAALS *Final Report*, and are intended to supplement the ACTL/IAALS *Pilot Project Rules* (PPR). In order to facilitate the implementation of these Caseflow Management Guidelines, each Guideline is also accompanied by a Cross-Reference section to the PPR and, where applicable, the *Interim* or *Final Report*.

Guideline One Caseflow management should be tailored to the specific circumstances of the case and the parties. Judges should manage civil cases so as to ensure that the overall volume and type of discovery and pretrial events are proportionate and appropriate to the specific circumstances of the case.

Guideline Two Judicial involvement in the management of litigation should begin at an early stage of the litigation and should be ongoing. A single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.

Guideline Three Judges should be consistent in the application and enforcement of procedural rules and pretrial procedures, particularly within the same types of cases, and within the same courts.

Guideline Four Unless requested sooner by any party, the court should set an initial pretrial conference as soon as practicable after appearance of all parties.

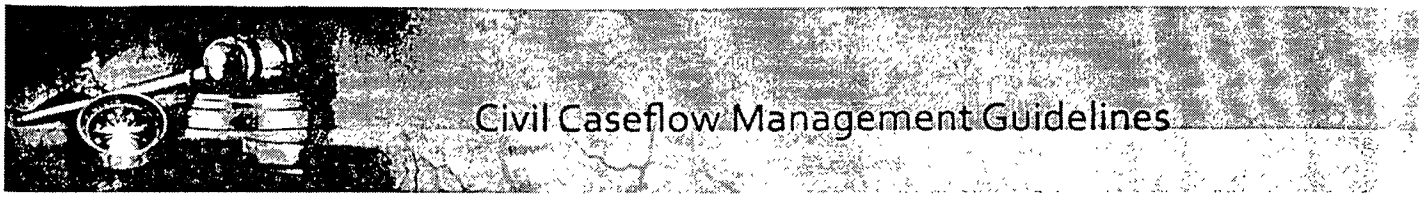
Guideline Five Additional pretrial conferences should be held on request by one or more parties or on the court's own initiative.

Guideline Six In the initial pretrial order, or at the earliest practicable time thereafter, the court should set a trial date, and this date should not be changed absent extraordinary circumstances.

Guideline Seven Judges should play an active role in supervising the discovery process and should work to assure that the discovery costs are proportional to the dispute.

Guideline Eight Judges should rule promptly on all motions.

Guideline Nine When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion to order mediation or other form of alternative dispute resolution at the appropriate time, unless all parties agree otherwise.



Civil Caseflow Management Guidelines

Guideline One

Caseflow management should be tailored to the specific circumstances of the case and the parties. Judges should manage civil cases so as to ensure that the overall volume and type of discovery and pretrial events are proportionate and appropriate to the specific circumstances of the case.

Basis and Background Just as not all cases require the full range of pretrial procedures provided for under the rules, not all cases require the same expenditure of judicial time and resources. Treating all cases in the same way results in under-management of some cases, over-management of others, and in both situations increased costs or delay, or both. Under-management can result in expensive and disputed discovery and may complicate pretrial processes, as issues may not be adequately narrowed. Problems, disputes, and motions may go unaddressed, protracting the dispute and the cost and time associated with resolving it. Over-management can impose unnecessary procedures and requirements on cases that do not require them, burdening parties and increasing cost and delay. Furthermore, over-managing cases takes judicial resources away from those cases that do require more attention.

Comments from the ACTL Survey highlighted the tension between too much judicial involvement and too little, and indicated frustration where judges imposed needless conferences and procedures that only waste time and resources. Although it is sometimes difficult to determine exactly where the middle ground lies, the general theme that emerged from the Survey comments was a desire for meaningful judicial intervention.

Differentiated case management (DCM) is one of the basic methods used by those courts identified as having successful caseflow management programs. This approach permits a preliminary assessment at the outset as to how much judicial attention a case may require and enables courts to prioritize those cases that might require more judicial attention. A DCM system can automate the screening process so that judicial time and resources are spent re-allocating the limited number of cases that require it, rather than individually screening the caseflow management needs of every case at the outset.

The Federal Rules of Civil Procedure—and their state analogs—were designed to be transsubstantive or "one size fits all," offering the full range of procedures for all cases, regardless of case type, amount in controversy, or complexity of the case. However, in many cases, the full panoply of pretrial rules and procedures is not appropriate and only leads to increased costs and delay. Over the years, courts have realized this and have informally developed special rules and procedures for certain types of cases. This is not to say that individual courts should tailor their own rules. That process is confusing and highly inefficient.

Rather, this Guideline supports a single system of civil procedural rules designed for the majority of cases while recognizing that the "one size fits all" approach is not the most effective approach for all types of cases.

Results from the ACTL Survey suggest that the process is bloated and has no scaled-down version for cases demanding less expenditure. The effect on access to the courts is pronounced; some deserving cases are not brought because the cost of pursuing

them fails a rational cost-benefit test, while other cases in the system that should be fully litigated are settled rather than tried because the trial process costs too much. Effective caseflow management can identify unnecessary events and requirements (based on the specific circumstances of each case), ensuring that inefficiencies in the process—which lead to cost and delay—are minimized.

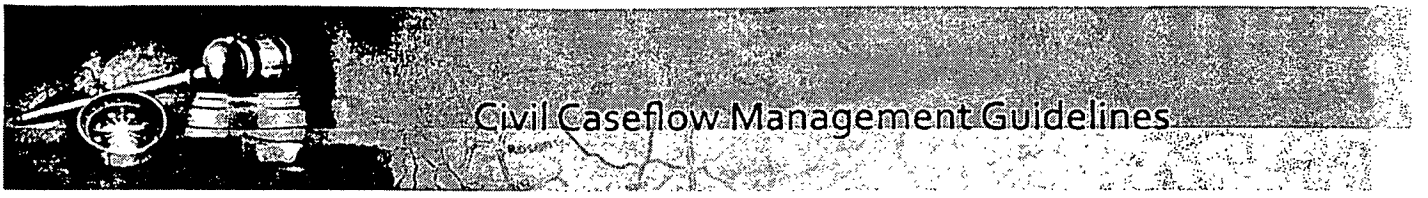
To this end, proportionality should be the most important principle applied to all discovery. Discovery is not the purpose of litigation. It is merely a means to an end. Discovery should promote the just, speedy, and inexpensive determination of actions and should be conducted in the most efficient, nonredundant, cost-effective method available to procure evidence directly relevant to the claims and defenses asserted in the pleadings.

Operational Protocols

- Most cases will not require intensive judicial involvement, and judges should assess each case as soon after filing as possible to determine the needs of the case and the expected degree of involvement required.
- In assessing the degree of involvement required for a case, judges should consider: the number of parties, including the number of separately represented parties; number of motions anticipated; amount of expected discovery; amount in controversy; complexity of the legal issues presented; disproportionate resources available to one party over the other; and any other factors that would suggest a need for more intensive management.[9]
- Judges should develop a differentiated case management system that includes simplified procedure for some cases and more intricate procedure for other kinds of cases. The system should consider categorizing cases by type in a way that would presume a certain level of judicial involvement for certain types of cases. The system might also include specific timelines for each track.[10]
- When determining the caseflow management needs of each case, judges may need to consider the experience and professionalism of counsel.
- Judges should ensure that the procedural requirements and costs imposed on the parties are consistent with the following proportionality factors: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation.
- Judges should encourage parties to agree on appropriate levels and methods of discovery at the outset of the case, and where agreement fails the court should tailor discovery orders according to the principle of proportionality.
- Judges should be particularly mindful of proportionality with respect to the discovery of electronically stored information (ESI), taking into account the nature and scope of the case, relevance, importance to the court's adjudication, and expense and burden of retrieving and reviewing the ESI, both for the producing party and for the receiving party.

Cross References

- ACTL/AALS Pilot Project Rules:
  - PPR 1.2 (Scope)
  - PPR 8 (Initial Pretrial Conference)
  - PPR 10.2 (Discovery)
- ACTL/AALS Principles



Guideline Two

Judicial involvement in the management of litigation should begin at an early stage of the litigation and should be ongoing. A single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.

Basis and Background Early involvement familiarizes the judge with more than just the facts and issues in the case; it also helps the judge become familiar with the parties' unique motivations, goals, and circumstances—characteristics that play a large part in determining the course and tone of the litigation. By becoming familiar with the case at an early stage, a judge can help the parties identify and narrow the issues, thereby narrowing the focus and scope of discovery to save the parties time and money. The judge can also gain an understanding of some of the areas of conflict that may arise in the future.

Early judicial involvement can reduce the parties' pretrial costs, as identifying and narrowing the issues in dispute focuses discovery and can prevent future discovery disputes. When disputes arise, ongoing judicial involvement can prevent them from becoming protracted—a situation that adds significantly to the total costs of litigation.

Judicial involvement early in the process can achieve earlier nontrial dispositions—for example, through dismissal or default at the case initiation stage, through a facilitated settlement at case screening, or through scheduling orders and case management plans that enable counsel to consider the merits of their case and focus their efforts on the issues in dispute. Because a significant majority of cases are disposed of before trial, reaching a nontrial disposition as early in the life of a case as possible can reduce discovery, litigation time, and overall cost.

Early and ongoing control of case progress has been identified as one of the core features common to those courts that successfully manage the pace of litigation. Active court control, which includes scheduling, setting and adhering to deadlines, and imposing sanctions for failure to comply with deadlines, can ensure that each scheduled event causes the next scheduled event to occur, thereby ensuring that every case has no unreasonable interruption in its procedural progress.

The use of a single judge assigned to a case from beginning to end provides the parties in the litigation with a sense of continuity. With respect to discovery issues and disputes, the same judge who handles the pretrial and trial matters is in a better position to resolve discovery matters because of his or her familiarity with the issues,

the parties, the history of the case, and the relationship between the parties. For cases that go to trial, the judge who handled all pretrial and discovery matters in a case is in a better position to try the case, based on a familiarity with the issues, the parties, and the history of the case.

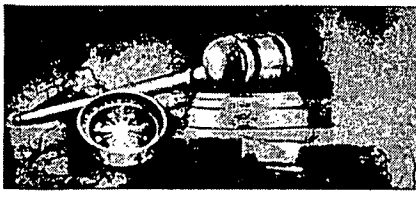
Understanding the parties and the case in this light enables a judge to truly tailor caseflow management to the specific needs of the parties and the case. This practice can also maximize judicial resources by minimizing duplication of work effort. For example, assigning a discovery dispute to a judge other than the judge handling general pretrial matters forces that judge to take the time to familiarize himself or herself with the same matter—an inefficient use of court resources. A similar redundancy results when the judge hearing the case at trial is different from the judge who handled the pretrial matters.

Operational Protocols

- A judge should assess each case as soon after filing as possible, in order to determine its caseflow management needs.
- Judges should become familiar with the issues in the case at an early stage in order to set realistic timelines and anticipate special needs and problems.
- A judge should make himself or herself available to parties and counsel to encourage informal ways of resolving disputes.
- Judges should routinely monitor the progress of the case in order to determine whether caseflow management needs have changed.
- All aspects of a case should be handled by one judge.
- A court's differentiated case management system should preserve judicial resources for the cases that need attention. Because the time and resources required of judicial officers will be minimal in many cases, the assignment of a single judge to every case should be feasible, even where judicial resources are not optimal.

Cross References

- ACTL/IAALS Pilot Project Rules:
  - PPR 4 (Single Judge)
- ACTL/IAALS Principles



Guideline Three

Judges should be consistent in the application and enforcement of procedural rules and pretrial procedures, particularly within the same types of cases, and within the same courts.

Basis and Background Where rules and procedures are consistently applied and enforced, lawyers know what to expect from the court and know what the court expects of them. Consistent application and enforcement of rules and procedures creates a culture and practice in which meaningful events occur as scheduled, and preparation and compliance are promoted. Policies of no continuances, extensions, or adjournments absent extraordinary circumstances create this culture. That culture moves a case toward timely and cost-effective resolution.

While local rules can be a useful mechanism through which a jurisdiction can experiment with new rules and procedures, in many federal district courts the local rules are accompanied by an additional set of rules specific to each judge. These rules result in confusion, unnecessary expenditure of time, and unpredictability.

Operational Protocols

- Judges should consistently apply and enforce rules and procedures both within a single courtroom and within judicial districts. Courtroom-by-courtroom rules or procedures impede efficiency and create a patchwork legal culture.
- Judges should use consistent application and enforcement of rules and procedures to foster a legal culture that accepts efficient case processing as the norm.
- Judges should consistently apply and enforce deadlines. If the case requires a deviation from normal deadlines (such as staying discovery pending resolution of a motion to dismiss or staying the proceedings when parties agree to alternative dispute resolution), those expectations should be set out as early as possible and enforced.

Cross Reference

- ACTL/IAALS Interim Report

Guideline Four

Unless requested sooner by any party, the court should set an initial pretrial conference as soon as practicable after appearance of all parties.

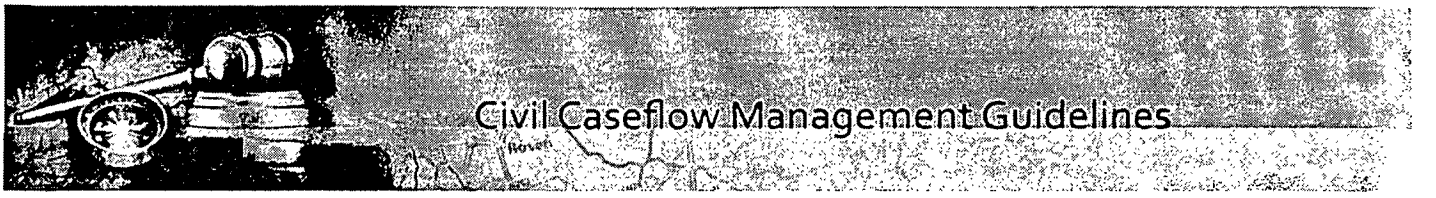
Basis and Background An initial pretrial conference can provide an important opportunity for the judge and the parties to flesh out the facts and issues in dispute, discuss the scope of permissible discovery, address anticipated motion practice, and determine how much judicial attention a case may require. During the initial pretrial conference, the judge can also set forth his or her expectations of the parties and their obligations to the court. This can be instrumental in fostering an expectation among the parties that scheduled events will occur and continuances will not be granted absent extraordinary circumstances. Initial pretrial conferences also provide an opportunity to foster cooperation between the parties at an early stage in the litigation, which can reduce costs and increase the efficiency and speed with which the case is resolved.

Operational Protocols

- In order to make the best use of the initial pretrial conference, the judge should be as familiar as possible with the issues in the case and the parties' potential discovery needs before the conference.
- Each party's lead trial counsel should attend the initial pretrial conference.
- At the initial pretrial conference, the judge should meet with counsel and (where appropriate) the parties, to attempt to narrow the issues in the case, explore discovery needs and (where appropriate) set firm dates for the close of discovery, discuss the filing of dispositive motions, and set a trial date.
- At the initial pretrial conference, or before the initial pretrial conference when requested by the parties, the judge and the parties should discuss the manner in which electronically stored information is stored and preserved. When the parties cannot agree, the court should issue an order governing electronic discovery that specifies which electronically stored information should be preserved and addresses the scope of allowable electronic discovery and allocation of cost among parties.

Cross References

- ACTL/IAALS Pilot Project Rules:
  - PPR 8.1 (Initial Pretrial Conference)
- ACTL/IAALS Principles



Guideline Five

Additional pretrial conferences should be held on request by one or more parties or on the court's own initiative.

Basis and Background In some cases, additional pretrial conferences or discovery conferences are a useful means of updating the court and parties on the progress of the case, resolving disputes, and assessing deadlines and timeframes. Conferences also provide the parties with an opportunity for face-to-face discussion and cooperation. However, their benefit must be weighed against the costs associated with attending conferences and available court resources.

Operational Protocols

- The judge should be mindful of the cost and expense to parties of multiple conferences and schedule them only when necessary and appropriate to the individual case.
- The judge should resolve all pending issues at a scheduled status conference.
- The judge should avoid taking issues under advisement whenever possible, because doing so inevitably protracts the litigation.

Cross References

- ACTL/IAALS Pilot Project Rules:
  - PPR 9.1 and 9.2 (Additional Pretrial Conferences/Setting the Trial Date)
- ACTL/IAALS Principles

Guideline Six

In the initial pretrial order, or at the earliest practicable time thereafter, the court should set a trial date, and this date should not be changed absent extraordinary circumstances.

Basis and Background Where the parties are given a trial date at an early stage and made to understand that the date will be firmly adhered to, they are able to plan and prepare for each stage of the litigation process. The IAALS case processing study found a fairly strong correlation—almost the strongest observed anywhere in the study—between the elapsed time from case filing to the setting of a trial date and the overall length of the case. Cases in which the trial date was set early in the litigation process tended to terminate earlier than cases in which the trial date was set later in the litigation process, regardless of whether the case actually went to trial. The study noted that the key to avoiding unnecessarily lengthy times to disposition appears to be keeping the trial date firm. While it is somewhat unclear exactly what point in the case constitutes "early," this timing should be considered in the initial evaluation of the case.

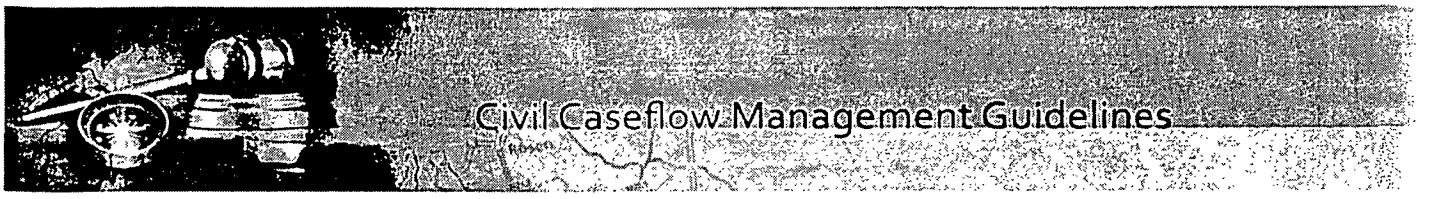
Firm and credible trial dates are another core feature of courts with successful caseflow management programs. The importance of this practice lies in fostering the expectation that events will occur as scheduled. Where such an expectation has been established, parties will prepare accordingly—either to be ready for trial or settlement. In order to ensure a firm trial date, it is important that courts adopt a firm policy—and apply it consistently—for granting continuances. Where continuances are granted too liberally, the expectation that events will occur as scheduled—and the corresponding effect on attorneys' expectations—become illusory.

Operational Protocols

- A judge should set a realistic and firm trial date at the initial pretrial conference or shortly thereafter. The judge should maintain this date except in extraordinary circumstances.
- In order to ensure that the date is realistic, before setting the trial date the judge should seek to understand the issues in the case and the appropriate scope and length of the discovery process.

Cross References

- ACTL/IAALS Pilot Project Rules
- PPR 9.2 (Additional Pretrial Conferences/Setting the Trial Date)
- ACTL/IAALS Principles



Guideline Seven

Judges should play an active role in supervising the discovery process and should work to assure that the discovery costs are proportional to the dispute.

Basis and Background Discovery can be one of the most costly aspects of the pretrial process, and cases involving extensive discovery often proceed more slowly than those involving little to no discovery. Because the potential for unnecessary cost and delay is so high, judicial supervision is crucial.

The discovery period is often the point in the pretrial process at which most of the disputes arise, and motion practice associated with resolving discovery disputes can take a significant amount of court time and resources. Early and active involvement in the discovery process can reduce the frequency of these disputes, as issues and areas of potential disagreement can be identified and either addressed ahead of time or anticipated and factored into caseflow management needs.

Cooperation between counsel can greatly reduce the cost and time associated with discovery; however, where counsel are generally uncooperative, active court involvement in enforcing discovery rules and agreements, and sanctioning noncompliance, can keep the process from becoming disproportionately costly and drawn out.

Even when parties agree on the scope of discovery, their agreement may not be representative of the most cost-effective and proportionate approach. Active court involvement in managing the discovery process can ensure that when parties reach an agreement on discovery, or when parties stipulate around imposed discovery limits, these agreements are not imposing unreasonable cost and delay on the client.

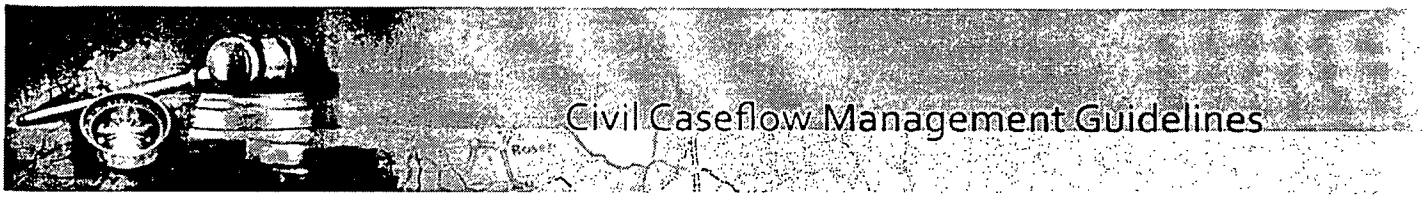
Most cases do not require much discovery; however, many lawyers are hesitant to limit the scope and tools of discovery on their own accord, based in part on fears of malpractice claims. Court-imposed limits on discovery provide lawyers with the "cover" they need to practice limited discovery.

Operational Protocols

- The judge should actively monitor the discovery process and should review party agreements on discovery matters. Where the parties' agreement is not conducive to a just, speedy and inexpensive resolution of the dispute, or is otherwise inappropriate in scope, volume, or methods to be employed, the judge may refuse to accept it in whole or in part. The judge has an important oversight role in making certain that everyone understands the implications of their agreement.
- The judge should consider requiring periodic reports from the parties on the progress of discovery.
- Where appropriate, the judge should consider financial restrictions on discovery, cost shifting, or co-pay rules, including cost allocation for the production of electronically stored information.
- Judges should enforce the defined default limits for discovery and should not permit additional discovery absent good cause and a showing of proportionality.
- Where any disputed issues require expert testimony, the judge should consider a court-appointed expert or require a joint expert agreed to by the parties.

Cross References

- **ACTL/IAALS Pilot Project Rules:**
  - PPR 1.2 (Scope)
  - PPR 6 (Motion to Dismiss/Stay of Discovery)
  - PPR 8.1 (Initial Pretrial Conference)
  - PPR 11.2 (Expert Discovery)
  - PPR 12 (Costs and Sanctions)
- **ACTL/IAALS Principles**



Guideline Eight

Judges should rule promptly on all motions.

Basis and Background Delay in ruling on motions can result in significant cost. For example, when a dispositive motion is pending, the parties must continue preparing their case in order to meet pretrial deadlines in the event the motion is denied. When the outcome of the motion is such that the case—in whole or in part—is terminated, the parties will have had significant preparation costs that were needlessly incurred. When discovery motions languish, the discovery process is interrupted, and that also forestalls progress of the case.

A significant amount of motion practice can be generated during the discovery process, and in order to move the case forward, prompt rulings on these motions are important. Courts can minimize the costs imposed on both the parties and the court and maximize efficiency in dealing with these motions by encouraging informal methods of resolving disputes and deciding motions.

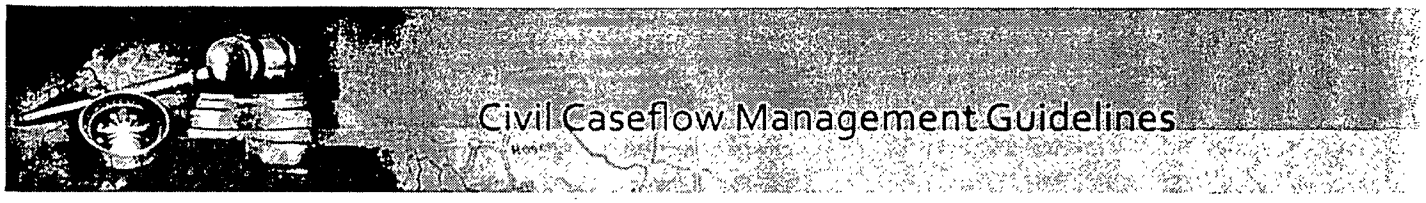
Prompt ruling on dispositive motions is also important—even when the motion will ultimately be denied—as parties often make settlement decisions based on a ruling with respect to dispositive motions. The IAALS case processing study found that cases often proceed toward a quick settlement after a dispositive motion is denied. Of the 743 cases where a motion for summary judgment was denied in its entirety, 24.2 percent still terminated within 30 days of the ruling, and nearly 40 percent terminated within 90 days of the ruling. Of the 396 summary judgment motions that were granted only in part, 15.4 percent still terminated within 30 days after the ruling, and 33.6 percent terminated within 90 days of the ruling. The study concludes that in some percentage of cases, parties making summary judgment motions look to the court to provide answers that affect settlement decisions.

Operational Protocols

- Judges should discuss potential dispositive motions at the initial pretrial conference.
- Judges should consider staying discovery where appropriate until resolution of a motion to dismiss.
- Early in the pretrial process, the judge should set a firm date for the filing of dispositive motions and should maintain this date except in extraordinary circumstances.
- Judges should consider requiring opposing counsel to meet and confer in good faith before filing motions.
- Judges should rule expeditiously on motions. If the judge decides to hold a hearing on the motion—either telephonic or in open court—that hearing should occur as soon as possible. Whether the motion is granted or denied, the ruling advances the case.
- Judges should make themselves available for informal resolution of motions, for example by being available to counsel by telephone before the filing of any motions.

Cross References

- ACTL/IAALS Pilot Project Rules:
  - Rule 6 (Motion to Dismiss/Stay of Discovery)
  - Rule 8 (Initial Pretrial Conference)
- ACTL/IAALS Principles



Guideline Nine

When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion to order mediation or other form of alternative dispute resolution at the appropriate time, unless all parties agree otherwise.

Basis and Background The growing preference for alternative dispute resolution (ADR) mechanisms to resolve legal disputes may be the result of a number of factors. The growth may reflect the efficiency and effectiveness of these mechanisms or could be a reflection of the increasing delay and inefficiency encountered in the judicial process. It could also be a means through which parties avoid costly discovery. Whatever the reason, the reality is that an increasing number of parties opt for ADR as opposed to judicial trials, and judges should consider the possibility of ADR when assessing caseflow management needs.

While a judge should raise the possibility of ADR early, so as to avoid the unnecessary expenditure of parties' time and money, the judge should also consider the appropriate timing of ADR in the individual case. Scheduling mediation or another form of ADR before the case is postured for meaningful discussion may be counterproductive and increase costs and delay.

Operational Protocols

- The judge should explore the possibilities for ADR at the initial pretrial conference. However, it is critical that the judge not create the impression that settlement is expected or demanded. Trial does not represent a failure of the system.
- The judge should ensure that ADR mechanisms are available after the parties have provided sufficient disclosures to fully understand the issues in dispute but before the parties have incurred significant costs for discovery and trial preparation.
- When parties agree to ADR, the judge should consider staying the underlying proceeding for a reasonable period of time.
- Where appropriate, judges should consider mediation of issues, as opposed to the entire case.

Cross References

- ACTL/IAALS Pilot Project Rules:
  - Rule 8.1 (Initial Pretrial Conference)
- ACTL/IAALS Principles

Notes

1. A 2005 study conducted by the Legal Services Corporation (LSC) found that for every individual served by LSC, at least one individual seeking assistance was turned away because of a lack of available program resources. The study estimated that in 2005, LSC-funded programs would have been unable to serve approximately one million people seeking legal help.

2. Results of the ACTL Fellows Survey show that the median monetary amount below which respondents believed it was not cost-effective to handle a case—and below which firms routinely turn a case away—is $100,000. *See, e.g.,* JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS app. B, at B-1 (2008).

3. MAUREEN SOLOMON & DOUGLAS SOMERLOT, CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE 3 (1987).

4. Giuseppe M. Fazari, *Caseflow Management: A Review of the Literature,* 24 CT. MANAGER 48, 49 (2009).

5. INTERIM REPORT, *supra* note 2.

6. JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT (Mar. 11, 2009).

7. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS (2009).

8. These Caseflow Management Guidelines use the term "judges" broadly; however, we recognize that certain Guidelines and related protocols may involve court personnel other than the judge.

9. A review of complex civil litigation rules in Arizona, California, Connecticut, Florida and Pennsylvania showed that these were among the most commonly recommended factors that judges are to consider when deciding whether a case is complex.

10. *See, e.g.,* E.D. Mo. R. 5.01 (2009).

Changes noted to April 15, 2009 version – January 18, 2010

[Current Rule]

RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a.

[Proposed New Rule]

RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

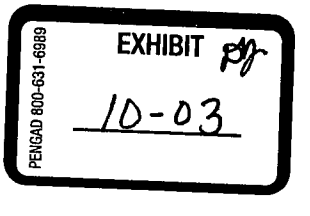
(a) *Request for Findings and Conclusions*

In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request must be entitled "Request for Findings of Fact and Conclusions of Law" and filed with the clerk of the court within thirty days after judgment is signed. The clerk must immediately call such request to the attention of the judge who tried the case. Each party making a request must serve it on all other parties in accordance with Rule 21a.

(b) *Duty to Make Findings and Conclusions* [Alternatives]

The judge must state findings of fact and conclusions of law on each ground raised by the pleadings and evidence in broad form whenever feasible and in the same manner as questions are submitted to the jury in a jury trial.

[OR]



The judge must state findings of fact and conclusions of law on each ground raised by the pleadings and evidence in sufficient detail to give fair notice as if the grounds had been submitted to the jury in a jury trial.

[OR]

The judge must state findings of fact and conclusions of law on each ultimate issue raised by the pleadings and evidence. Unless otherwise required by law, findings of fact shall be in broad form whenever feasible. The trial court's findings must include only so much of the evidentiary facts as are necessary to disclose the factual basis for the court's decision. The judge should make conclusions of law on each ground of recovery or defense.

Comment to Rule 296: Unnecessary or voluminous evidentiary findings are not to be included in the court's findings of fact and conclusions of law.

[Current Rule]

RULE 297. TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

If the court fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule 21 a a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the court to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

[Proposed New Rule]

RULE 297. FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Provided a timely request is made pursuant to Rule 296, the court must make and file its findings of fact and conclusions of law within fifty days after the date a final judgment is signed and promptly send a copy to each party.

[Current Rule]

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ten days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a.

The court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed, and cause a copy to be mailed to each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

[Proposed New Rule]

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) *Request for Additional or Amended Findings and Conclusions*
After the court makes and files original findings of fact and conclusions of law, any party may file a request for specified additional or amended findings or conclusions. The request for these findings must state the specific additional or amended findings requested and be made before the later of twenty days after the filing of the original findings and conclusions by the court or seventy days after the judgment is signed. Each party making a request must serve it on all other parties in accordance with Rule 21a.

(b) *Duty to Make Additional or Amended Findings and Conclusions*
The court must make and file any additional or amended findings and conclusions that are appropriate within the later of twenty days after such request is filed or ninety days after the judgment is signed, and promptly send a copy to each party. No findings or conclusions will be deemed or

presumed by any failure of the court to make any additional findings or conclusions.

[Current Rule]

RULE 299. OMITTED FINDINGS AND PRESUMED FINDINGS

When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

[Proposed New Rule]

RULE 299. OMITTED FINDINGS

(a) Omitted Grounds

When findings of fact are filed by the trial judge they shall form the basis of the judgment upon all grounds of recovery or defense. Upon appeal, a ground or defense not conclusively established under the evidence, no element of which have been requested or found, is waived.

(b) Presumed Findings

When an element of a ground of recovery or defense has been found by the trial judge, a finding is presumed in support of the judgment on an omitted elementof the ground to which the element found is necessarily referable, when supported by factually sufficient evidence. No finding, however, shall be presumed on an omitted element for which an additional finding has been requested.

[Current Rule]

RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

[Proposed New Rule]

RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Findings of fact must be filed apart from the judgment as a separate document. If there is a conflict between recitals in a judgment and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.

PROPOSED REVISED RULE 300
(January 14, 2010)

Rule 300. Finality of Judgment or Order.

(a) **Applicability.** This rule governs finality for purposes of appeal and plenary power.

(b) **Final judgment.** At the conclusion of the litigation, the court shall render a final judgment or order by disposing of all claims between all parties.

(c) **Disposition of all claims and parties.** A judgment or order is final if it:

(1) specifically disposes of all claims between all parties, by itself or in combination with earlier judgments and orders, or

(2) states with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that it finally disposes of all parties and all claims and is appealable.

(d) **Presumption after conventional trial.** A judgment rendered after a conventional trial on the merits that does not comply with section (c) is presumed to dispose of all claims between all parties and is presumed to be final and appealable.

COMMENT

1. Rule 300 codifies the holdings stated in *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001). It is not intended to apply to when there are special rules of finality, such as probate and receivership. *See, e.g.* De Ayala v. Mackie, 193 S.W.3d 575, 577-80 (Tex. 2006) (probate orders); Huston v. Federal Deposit Ins. Corp., 800 S.W. 2d 845, 847 (Tex. 1990). *See also* TEX. FAM. CODE § 105.001 (temporary orders before final order).

Rule 301. Motions Relating to Judgments [Updated 11/17/09]

(a) Motion for Judgment on the Verdict. A party may move for judgment on the verdict at any time before a final judgment has been signed. A motion for judgment on the verdict is overruled by operation of law [as to any requested relief not granted by a final judgment under Rule 300 *or* on the date when the court's plenary power expires under Rule 304.]

(b) Motion for Judgment Notwithstanding the Verdict or to Disregard Jury Finding. A party may move for judgment notwithstanding the verdict if a directed verdict would have been proper or may move to disregard one or more jury findings that have no support in the law or the evidence. The motion may be made after receipt of the jury's verdict. The motion is overruled by operation of law [as to any requested relief not granted by a final judgment under Rule 300 *or* on the date when the court's plenary power expires under Rule 304.]

(c) Motion to Modify Judgment. After a judgment has been signed, a party may move to modify the judgment in any respect, including by a motion for judgment on all or part of the verdict; a motion for judgment notwithstanding the verdict if a directed verdict would have been proper; or a motion request to disregard one or more jury findings that have no support in the law or the evidence. A prejudgment motion for judgment on the verdict, for judgment notwithstanding the verdict or to disregard jury findings is not a prerequisite to a postjudgment motion to modify a judgment.

A motion to modify a judgment may be filed within 30 days after the trial court's final judgment is signed. One or more amended or additional motions may be filed without leave of court within 30 days after the final judgment is signed, regardless of whether a prior motion to modify has been overruled. If not determined by signed written order within 75 days after the final judgment was signed, an original,

amended or additional motion to modify is overruled by operation of law on expiration of that period.

As long as the trial court retains plenary power over its judgment, the trial court has discretion to consider and rule on an amended motion that was not timely filed within 30 days after the signing of the trial court's final judgment. The trial court's ruling on such a late-filed motion is subject to review on appeal.

(d) Ordinary Motion for New Trial. A party may move to set aside a judgment and seek a new trial pursuant to Rule 302. A motion for new trial may be filed within 30 days after the final judgment is signed. One or more amended or additional motions may be filed without leave of court within 30 days after the final judgment is signed, regardless of whether a prior motion for new trial has been overruled. If not determined by signed written order within 75 days after the final judgment was signed, a motion for new trial is overruled by operation of law on expiration of that period.

As long as the trial court retains plenary power over its judgment, the trial court has discretion to consider and rule on an amended motion for new trial that was not filed within 30 days after the signing of the trial court's final judgment. The trial court's ruling on such a late-filed motion is subject to review on appeal.

(e) Motion for New Trial on Judgment Following Citation by Publication. If judgment has been rendered on citation by publication and the defendant did not appear in person or by counsel selected by the defendant, a motion for new trial made in compliance with Rule ____ (current Rule 329) may be filed within two years after the final judgment was signed. The parties adversely interested in such judgment must be served with citation as in other cases.

The court may grant a new trial on petition of the defendant showing good cause and supported by affidavit.

If not determined by signed written order with 75 days after the motion was filed, any such motion is overruled by operation of law on the expiration of that period [The periods provided for perfecting appeal run from the date the motion is overruled by signed, written order or by operation of law].

(f) Motion for Judgment Nunc Pro Tunc. A party may move for correction of clerical mistakes in the written judgment to conform it to the judgment previously rendered by the trial court. Such a motion may be filed at any time after a final judgment is signed, [but if the motion is filed within 30 days after the final judgment is signed, the motion will be overruled by operation of law on the expiration of 75 days after the final judgment was signed.][1]

(g) Motion Practice. Complaints or grounds in motions under this rule must be specific and a motion must contain a specific request for relief. [A party may file one or more motions identified in this rule and may renew or refile an additional motion of the same type containing additional complaints and requests for relief despite the denial of any previous motion.] A party must also submit a proposed judgment or order with the motion.

(h) Periods Affected by Modified Judgment. If a judgment is modified in any respect during the period of the trial court's plenary power, all periods provided in these rules that run from the date the final judgment is signed will run from the time the modified judgment is signed; *but, if the complaint applies to the original judgment and was urged by prior motion, then no new motion is required.* If a correction to a judgment is made pursuant to subdivision (f) after expiration of the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed will run from the date of the signing of the corrected judgment for any complaint that would not apply to the original judgment.

[1] This rule is not intended to change existing case law.

RULE 302. MOTIONS FOR NEW TRIAL [New]

(a) Grounds. For good cause, a new trial, or partial new trial under paragraph (f), may be granted and a judgment may be set aside on motion of a party or on the judge's own initiative, in the following instances:

(1) when the evidence is factually insufficient to support a jury finding;

(2) when a jury finding is against the overwhelming preponderance of the evidence;

(3) when the damages awarded by the jury are manifestly too small or too large because of the factual insufficiency or overwhelming preponderance of the evidence;

(4) when the trial judge has made an error of law that probably caused rendition of an improper judgment;

(5) when injury to the movant has probably resulted from, (i) misconduct of the jury, or (ii) misconduct of the officer in charge of the jury, or (iii) improper communication to the jury, or (iv) a juror's erroneous or misleading answer on voir dire examination;

(6) when new, non-cumulative evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and its unavailability probably caused the rendition of an improper judgment;

(7) when a default judgment should be set aside upon either legal or equitable grounds;

(8) when a judgment has been rendered on citation by publication, the defendant did not appear in person or by an attorney selected by the defendant and good cause for a new trial exists;

(9) when there is a material and irreconcilable conflict in jury findings;

(10) when any improperly admitted evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably caused rendition of an improper judgment; or

(11) when any other ground warrants a new trial in the interest of justice.

(b) Form. Complaints in general terms shall not be considered. Each complaint in a motion for new trial must identify the complaint with specificity.

(c) Affidavits. Supporting affidavits are required for complaints based on facts not otherwise in the record, such as:

(1) jury misconduct;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment; or

(4) good cause to set aside a judgment after citation by publication.

(d) Procedure For Jury Misconduct.

(1) Hearing. When the ground of the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of the jury, or improper communications made to the jury, or a juror's erroneous or incorrect answer on voir dire examination, the judge shall hear evidence from members of the jury or others in open court and may grant a new trial if it reasonably appears from the evidence both on the hearing of the motion and from the record as a whole on the trial of the case that injury probably resulted to the complaining party.

(2) Testimony Of Jurors. A juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in

evidence for any of these purposes. But a juror may testify about whether (i) extraneous prejudicial information was improperly brought to the jury's attention, (ii) any outside influence was improperly brought to bear upon any jury, (iii) misconduct occurring before the jury retired to deliberate, or (iv) the juror was qualified to serve.

(e) Excessive Damages; Remittitur

(1) Excessive Damages. If the judge is of the opinion that the damages found by the jury are not supported by factually sufficient evidence, the judge may determine the greatest amount of damages supported by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) Remittitur By Party. Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution may issue only for the balance of such judgment.

(f) Partial New Trial. If the judge is of the opinion that a new trial should be granted on a point or points that affect only a part of the matters in controversy that is clearly separable without unfairness to the parties, the judge may grant a new trial as to that part only, but a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

PROPOSED RULE 303. PRESERVATION OF COMPLAINTS [New]

(a) **General Preservation Rule.** As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Evidence and the Texas Rules of Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion either expressly or impliedly; or

(B) refused to rule on the request, objections, or motion, and the complaining party objected to the refusal.

(b) **Ruling by Operation of Law.** In a civil case, the overruling by operation of law of a motion in relation to the judgment made pursuant to Rule 301 preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) **Formal Exception and Separate Order Not Required.** Neither a formal exception to a trial court ruling or order not a signed, separate order is required to preserve a complaint for appeal if the ruling is otherwise reflected in the record.

PROPOSED RULE 304. PLENARY POWER OF THE TRIAL COURT [New]

(a) **Definition.** Plenary power is the power of the court to act, within its jurisdiction, according to law or equity, on any issue before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) **Duration.** Regardless of whether an appeal has been perfected, the trial court has plenary power, including the power to modify or vacate a judgment or grant a new trial:

(1) until the expiration of thirty days after the judgment is signed, or

(2) if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment, or (iii) motion to reinstate a judgment after dismissal for want of prosecution, until the earlier of the expiration of thirty days after the motion is overruled or one hundred and five days after the judgment is signed.

(c) **After Expiration.** After expiration of the time prescribed by (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the judgment;

(2) sign an order declaring a previous judgment or order to be void because signed after the court's power as prescribed in (b) has expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 301(d) if citation was served by publication; or

(7) grant a new trial or modify the judgment within the time allowed by Rule 306(a) when the moving party did not have timely notice or knowledge of the judgment.

RULE 305.

Repeal – new Rule 300.

RULE 306.

Repeal – new Rule 300.

RULE 306(a).

RULE 306(c).

RULE 307.

RULE 308.

RULE 308(a).

RULE 309.

RULE 310.

RULE 311.

RULE 312.

RULE 313.

RULE 314.

RULE 315.

Repeal – Rule 302(e).

RULE 316.

Repeal – Rule 301(e)

RULE 320.

Repeal – Rule 301(d)-302

RULE 321.

Repeal – Rule 301(d)-302

RULE 322.

Repeal – Rule 301(d)-302

RULE 324.

Repeal – Rule 303

RULE 326.

RULE 327.

Repeal – Rule 302(d)

RULE 329.

Repeal – Rule 301(d)

RULE 329(a).

RULE 329(b).

Repeal – Rule 301-302

To: Texas Supreme Court Advisory Committee
From: William V. Dorsaneo, III
Date: June 3, 2009
Re: Proposed Civil Procedure Rule 301

Proposed Civil Procedure Rule 301 makes several significant modifications of current law. Under current law, unlike motions for new trial and motions to modify the trial court's judgment, motions for judgment nov and to disregard particular jury findings are not overruled by operation of law. Thus, the failure to obtain an express ruling waives the complaint made in the Rule 301 motion. Subdivisions (a) and (b) of the proposed rule provide that motions for judgment on the verdict and motions for judgment nov or to disregard particular jury findings are overruled by operation of law.

Proposed subdivision (c) clarifies and simplifies the relationship between prejudgment motions for judgment, motions for judgment nov or to disregard particular jury findings and postjudgment motions to modify a judgment. Proposed subdivision (c) specifically provides that motions to modify may be used to make the same requests for relief as the prejudgment motions which are not a prerequisite for filing postjudgment motions to modify the trial court's judgment. Thus, the proposed subdivision's treatment of the relationship between prejudgment and postjudgment motions is roughly analogous to the current relationship between prejudgment motions for mistrial and postjudgment motions for new trial.

Subdivision (c) also makes three significant changes in current law.

First, by using the term "in any respect" the proposed subdivision expands the scope of motions to modify. Although the procedural rules are silent on this issue, under current case law a motion to modify must seek a "substantive change in an existing judgment." Lane Bank Equip. Co. v. Smith Southern Equip., Inc., 10 S.W.3d 308, 314 (Tex. 2000) (per Phillips, C.J.); *see also Hecht, J.*, concurring in the judgment but criticizing the majority opinion. Justice Hecht's opinion "would hold that any requested change, however slight, other than a merely clerical change expressly excluded from Rule 329b(g), extends the trial court's plenary power and the appellate timetable." 10 S.W.3d at 321. The proposed subdivision also eliminates the clerical change limitation currently contained within 329b(g) to avoid all arguments about whether the motion is sufficient to extend the trial court's plenary power and appellate timetables. Accordingly,

under proposed subdivision (c) it is not necessary to decide whether the requested change is "substantive" in some sense or a mere clerical change in order to extend trial and appellate timetables or to preserve complaints made in the motion.

Second, proposed subdivision (c)'s second unnumbered paragraph eliminates a technical requirement in current Rule 329b, which precludes a party from preserving a complaint in a postjudgment motion filed within 30 days after the final judgment is signed, if the party has filed a prior motion, which did not include the complaint, and the prior motion has been overruled by the trial court. In the case of In re Brookshire Grocery Co., 250 S.W.3d 66 (Tex. 2008), a bare majority of the Court determined that under current Rule 329b (b) and (e) an amended motion for new trial filed after a preceding motion has been overruled is not timely, even if it is filed within thirty days after the judgment or other order is signed. The basis for this holding is the text of the current rules, which unnecessarily penalize litigants who do not include all assignments of error in an original postjudgment motion. Justice Hecht's spirited dissent would have interpreted the text differently because "[t]ricky" procedural rules threaten substantive rights.

Third, by providing that a trial judge has discretion to rule on a tardy motion and that the ruling is subject to review on appeal, subdivision (c) is drafted to overrule Moritz v. Preiss, 121 S.W.3d 715 (Tex. 2003). In *Moritz*, the Court held that a tardy motion "is a nullity for purposes of preserving issues for appellate review." Although the Court did acknowledge an earlier opinion (Jackson v. Van Winkle, 660 S.W.2d 807, 808 (Tex. 1983)) allowing appellate review of issues raised and ruled upon before expiration of the court's plenary power, it concluded that "to give full effect to our procedural rules that limit the time to file new trial motions, today we hold that an untimely amended motion for new trial does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period." "Thus, *Moritz* eliminated the ability of the trial judge to permit a party to preserve a complaint about the trial court's judgment by ruling on the complaint, merely because the complaint should have been included in the party's earlier motion. The subcommittee believes that if a trial judge considers a complaint while the court has plenary power over its judgment, the trial court's ruling should be subject to review on appeal.

NOTE: Subsections (a), (b), and (c) repeat verbatim Appellate Rule 33.1(a)(b)(c). SUGGESTION: Add a comment cross referencing Evidence Rule 103?

(d) **Motion for New Trial Not Required.** A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (b).

NOTE: This repeats verbatim current Rule 324(a).

(e) **Motion for New Trial Required.** A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

(2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence;

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise ruled on by the trial court.

NOTE: This repeats verbatim current Rule 324 (b).

(f) **Sufficiency of Evidence Complaints in Nonjury Cases.** In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence—including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact—may be made for the first time on appeal in the complaining party's brief.

Rule 18a with suggested changes
[January 2010 strikeout version]

Rule 18a. Procedure for Recusal and Disqualification of Judges.

(a) Filing and Contents of Motion. At least ten days before the date set for trial or other hearing in any trial court, any party may file a motion stating one or more of the grounds specified in rule 18b why the judge before whom the case is pending should not sit in the case. If the judge was assigned to the case, or the movant learned of the grounds, within ten days of the date set for trial or other hearing, the motion must be filed at the earliest practicable time. The motion must be verified and must state with detail and particularity facts that, if proven, would be sufficient to justify recusal. The judge's rulings in the case *alone* may not be a basis for the motion. ~~unless they show a deep-seated favoritism or antagonism that would make fair judgment impossible.~~ The motion must be made on personal knowledge and must set forth facts that would be admissible in evidence, provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) Service of Motion. On the day the motion is filed, the movant must ~~send copies~~ *deliver a copy* to the judge*'s office and send copies to* the presiding judge of the administrative judicial region ("presiding judge") and all other parties. Any other party may file an opposing or concurring statement at any time before the motion is heard.

(c) Duties of Respondent Judge. The judge must, within three *business* days after *receiving* the motion, ~~is filed,~~ either recuse voluntarily or request the presiding judge to assign a judge to hear the motion, even if the motion does not comply with section (a). The judge must take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record.

If the judge recuses voluntarily, the judge must enter an order of recusal and request the presiding judge to assign another judge to sit. If the judge declines to recuse voluntarily, the judge must forward to the presiding judge an order of referral and copies of the motion and all opposing and concurring statements. If the judge fails to send to the presiding judge within three days an order either recusing voluntarily or declining to recuse, the movant may notify the presiding judge of this failure.

Notwithstanding the other provisions in this rule, ~~the judge may disregard any motion that~~ *when a motion* is made after ~~a trial or hearing has begun,~~ *a case has been called for trial, the judge may proceed with the trial,* but such a motion may be presented to the presiding judge with a request for stay.

(d) Hearing.

(1) If the motion does not comply with subsection (a), the presiding judge or the judge assigned to hear the motion may deny it, without an oral hearing, by written order stating the reasons why the motion does not comply.

(2) If the motion complies with subsection (a), the presiding judge may hear the motion or assign another judge to hear it, and must cause notice of such hearing to be given to all parties and make such other orders, including orders on interim or ancillary relief in the pending cause, as justice may require.

(3) The judge who hears the motion:

(a) must hear it as soon as practicable, and may hear it immediately, and

(b) may conduct the hearing by telephone on the record and may consider documents submitted by facsimile or electronic mail which are admissible under the rules of evidence.

(4) A presiding judge who hears a recusal motion is not subject to *recusal under this rule or to* objection under chapter 74 of the Government Code.~~, and a motion to recuse a presiding judge has no effect and may be disregarded., except by order of the Chief Justice of the Supreme Court.~~

(5) If the motion is granted, the presiding judge must assign another judge to the case.

(e) Subpoena of Judge. No subpoena or other discovery may issue to the respondent judge without the prior written approval of the presiding judge or the judge assigned to hear the motion. Any subpoena or discovery request made in violation of this paragraph may be disregarded.

(f) Sanctions. If, *after notice and hearing,* the judge hearing the motion to recuse determines that it was frivolous, as defined in Rule 13, or was brought for delay and without sufficient cause, the judge may~~, after notice and hearing,~~ *(1)* order the party or attorney who filed the motion, or both, to pay the reasonable attorneys' fees and expenses incurred by ~~the party opposing the motion.~~ *other parties, and (2) enjoin the movant from filing other recusal motions in the case without the presiding judge's prior written consent.*

(g) Assignment by Chief Justice. The Chief Justice of the Supreme Court may also assign judges and make rulings in conformity with this rule and pursuant to statute.

(h) Appellate Review. An order denying a motion to recuse may be reviewed only for abuse of discretion on appeal from the final judgment. An order granting a motion is not reviewable by appeal, mandamus, or otherwise.

(i) Disqualification. Paragraphs (a) through (g) of this rule apply to motions seeking disqualification under Rule 18b(1); but disqualification is not waived by failure to comply with time limits, and appellate review of disqualification is governed by other rules.