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## COMMENTARY

### JUDICIAL ECONOMY AND EFFICIENCY THROUGH THE INITIAL SCHEDULING CONFERENCE: THE METHOD

*Jaime Pieras, Jr.\**

Before I joined the bench, I practiced law for about thirty years, mainly in the area of civil litigation. During my years in practice, I found that most of the cases I handled were settled before trial. My experience is consonant with the statistics showing that only six percent of the civil cases filed in federal court are actually tried.<sup>1</sup> The practice of a trial lawyer clearly involves much more than the actual trial of cases in court; it is an exercise in negotiation of settlement agreements.

I believe the officers of the court, both judges and lawyers, can help the system by developing expertise in the art of pretrial procedure. Pretrial procedure properly conducted can serve to uncover those cases that should be settled rather than tried, and can do so expeditiously and accurately. In reality, there are three participants in every case: the plaintiff, the defendant, and the court. All of them have their particular interest. The plaintiff's and defendant's interests are of an economic nature; the court's interest is in the administration of justice in accordance with the law and in the speedy resolution of disputes. Speedy resolution translates into economy of time, effort, and money, and consequently the reduction of costs to all participants. Our present system of subsidized courts, in which the fees paid by the litigants do

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\* B.A. 1945, The Catholic University of America; J.D. 1948, Georgetown University. Judge, United States District Court for the District of Puerto Rico. I conducted the experiment recounted here with the collaboration of my law clerks, Janelle M. Diller, Jose R. Gaztambide, and Guillermo Pesant, all excellent scholars.

1. See A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 9 (Jan. 20, 1984) (revision of remarks at a Federal Judicial Center workshop). Arthur Miller states that more than 90% of all federal civil cases are settled or are disposed prior to trial. *Id.* In an accounting for fiscal year 1975-76, the Administrative Office of the United States Courts reported that 92% of the terminations of civil cases in federal courts occurred before trial. Hon. F.B. Lacey, The Judge's Role in the Settlement of Civil Suits 5 (Sept. 26, 1977) (address at a seminar for newly appointed judges sponsored by the Federal Judicial Center).

not cover the cost of the service provided to them, produces, as one commentator put it, "a cheap ride" for those who file frivolous suits.<sup>2</sup> By adopting a comprehensive pretrial procedure, the court can eliminate these cases, reduce the total number of cases on its docket, and enhance the quality of its decisionmaking.<sup>3</sup>

To appreciate the importance of a proper pretrial method, one must first understand that the trial court, in my case the United States District Court for the District of Puerto Rico, is the first line of fire on the battlefield of the judicial system. Its main thrust is to define and resolve controversies speedily, economically, and fairly. It is not primarily a place dedicated to creating great literary jewels. Its purpose, when achieved, may be important in shaping communal thought, but it is essentially and necessarily a place for the resolution of disputes through settlement.

By asserting its role and interest early in the pretrial stages of the case, and by varying the degree of its involvement according to the nature of the case, the court can reduce the cost of litigation to the public and achieve the fair and speedy administration of justice.<sup>4</sup> Those who oppose a more active judicial role in litigation argue that the goals of fairness and speed in judicial case management are conflicting.<sup>5</sup> It is my experience that these goals not only fail to conflict, but indeed complement each other in achieving the ends of justice for all.

The rules of civil procedure—both state and federal—are directed essentially to preparing for trial through the discovery process.<sup>6</sup> At the time of filing the pleadings, the lawyers know the facts by hearsay through what the client or some representative of the client told them or through statements gathered by investigators. Sometimes the information is the product of mere speculation. There is nothing wrong with this. The question is how the law-

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2. *Settling Out of Court*, Wall St. J., Aug. 22, 1985, at 22, col. 2.

3. For example, on the United States District Court for the District of Puerto Rico in September 1985, my caseload totalled 306 cases as compared with an average caseload of 423 cases for the same month.

4. A recent American Bar Association poll revealed that fully 85% of the attorneys polled believed involvement by federal judges in settlement discussions is likely to improve significantly the probability of settlement. See Brazil, *What Do Lawyers Expect from Judges?*, 2 TRIAL, Sept. 1985, at 69, 71. The key to successful judicial involvement, according to those polled, is a judge who carefully and logically expresses an *informed* evaluation of the case in conference with the parties. *Id.* at 69. Such an informed point of view only comes through learning the facts of the case from the lawyers in the early stages of the case.

5. See, e.g., Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Professor Resnik argues that "case processing is no longer . . . a means to an end; it [has] become the desired goal." *Id.* at 431. Although I acknowledge the pitfall of over-emphasizing the number of cases on one's docket, I cannot agree with Resnik that relying on judges to achieve the goal of speedier dispute resolution jeopardizes the quality of our judicial system.

6. See *infra* notes 24-37 and accompanying text.

yers are to learn the facts. Should they spend thousands of dollars and several years in discovery full of acrimonious arguments? The answer is clearly no. Yet the rules of civil procedure allow and even encourage this by setting forth elaborate rules of discovery and by paying little attention to stipulations of fact and settlement.<sup>7</sup> As a result, pretrial proceedings become extremely prolonged and costly.

I believe the rules of civil procedure should be revised to emphasize fact finding early in the litigation and to assist the parties in becoming familiar with their case. The facts of the case are generally more difficult to learn than the law. Attorneys and judges are schooled in the law. We either know the law or have the specialized technique to discover the law that applies. However, the facts continually change from case to case. Only through a knowledge of all the facts and evidence can the parties make an honest evaluation of the case.

The court can be instrumental in helping the parties acquire enough knowledge of the facts to discuss settlement intelligently. To this end, I began to experiment in court, in conferences, and in the settlement room. In particular, I directed the parties to learn the facts from their clients, their independent investigation, and informal discovery. I shortened pretrial procedure by monitoring cases from the moment a complaint was filed, thereby exercising the powers of the judge in the triad of plaintiff-defendant-court. I found that the power of the judge, in his impartial role in the triad, can provide much needed guidance with a lot of teeth. As a result, I developed a pretrial method that I call the Initial Scheduling Conference (ISC).

A major new element that the ISC provides is that the parties and the judge know the facts of the case better than at the time the case was filed and earlier than standard discovery procedures would allow. If at this point the parties do not settle, the case can proceed promptly to trial because all relevant discovery has been gathered and the parties share full knowledge of each other's facts and allegations. The ISC system actually enhances the ability of judges to focus their attention to the appropriate degree and in the proper areas. The system singles out and handles those cases that should settle because no factual questions or novel legal issues are involved. Those that remain are truly appropriate and ready for trial so that the judges's time spent in trial is both justified and economized.

## I. THE INITIAL SCHEDULING CONFERENCE METHOD

The ISC method revolves around holding a conference where the parties and I meet together in chambers as soon as possible after the pleadings are

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7. Compare FED. R. CIV. P. 26-37 with FED. R. CIV. P. 16(a), (c), and 23(e).

filed. The purpose of the conference is for all participants to become familiar with the allegations of all parties, to stipulate to as many facts as possible, and to identify which facts and legal issues remain in controversy. In addition, we use this conference to establish a schedule for discovery, a discovery cut-off date, and dates for a final pretrial conference and trial. To function properly, the method requires the coordination and participation of all the court personnel and law clerks on my staff.

*A. Step One: Monitoring the Pleadings*

My first step is to prepare standing orders to be followed by the docket and courtroom deputy clerks on my staff.<sup>8</sup> I instruct the docket clerk to monitor the time after the filing of a complaint very closely. If an extension of time to answer is requested, the clerk is to grant no more than a fifteen day extension and to state that no further extensions will be granted. This is the rule in all cases except those against the United States or its entities, which are referred to me for decision about extension of time.<sup>9</sup> I found that, by insisting on the close monitoring of the time between the filing of the complaint and the answer or other responsive pleading, the period for filing initial pleadings is cut far shorter than in unmonitored cases and, indeed, remains truer to the spirit of the rules of civil procedure.

Once a motion to dismiss or an answer is filed, the docket clerk sends the case to my office to have a date assigned for an ISC. In most cases, my law clerk will set a date for the ISC that allows the attorneys approximately fifteen to twenty-five days advance notice. This procedure is followed even when the defendant has not answered on time; such cases are likely to be resolved through motions by the plaintiff for default judgment prior to the date of the ISC. In cases with multiple defendants when not all have answered, the law clerk sets a date for the ISC. This date falls shortly after the time projected for the remaining answers to be due, that is, twenty days from the date of service of summons.<sup>10</sup> If the plaintiff has failed to serve the summons in a multiple-defendant case and other defendants have appeared, the

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8. In the United States District Court for the District of Puerto Rico, each judge is assigned two deputy clerks for the office of the Clerk of Court: the docket deputy clerk and the courtroom deputy clerk. The docket clerk processes all motions filed by attorneys and all orders filed by the judge and retains a record of the same on a docket card for each case. The courtroom deputy, among other duties, notifies the parties of court conferences, hearings, and trials.

9. FED. R. CIV. P. 12(a) grants the United States or an officer or agency thereof 60 days to answer after service of the complaint. In these cases, we therefore normally grant no more than a 30 day extension of time to answer.

10. FED. R. CIV. P. 12(a) grants a private party 20 days to answer after service of the complaint.

ISC is set as usual; it is to the plaintiff's advantage to serve summons on the remaining parties as quickly as possible and then to request a continuance of the ISC until appearance of the party or parties lacking.

I have also instructed my docket clerk to refer to my office any cases in which the plaintiff fails to serve the summons within 120 days. Such cases are then dismissed for lack of prosecution under Rule 41(b).<sup>11</sup>

At present, I use this monitoring system for all our civil cases except administrative appeals, such as social security disability claims; miscellaneous cases, such as motions to quash; and habeas corpus petitions. I have exempted these type of cases because by nature they do not involve the ordinary discovery route of other civil litigation; the facts to be reviewed already appear on an administrative record or the issues in controversy are solely legal rather than factual. Our "banking cases"<sup>12</sup> are subject to both the ISC procedure and to the separate expedited procedure outlined for banking cases; together, these procedures complement each other. Those cases that fail to proceed to default judgment or consent judgment through the expedited banking case procedure because an answer contesting the claim has been filed, undergo the initial scheduling procedure as a matter of course.

### *B. Step Two: The Initial Scheduling Conference Call*

Once the date for an ISC is selected, the case goes to the deputy clerk to send notice of the setting and time for the conference. The attorneys are mailed a prepared form of order known by our staff as the Initial Scheduling Conference Call.<sup>13</sup> By this order the plaintiff, the defendant, and the court are called together for the first time in order to have the attorneys apprise

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11. FED. R. CIV. P. 41(b) provides for involuntary dismissal of an action for failure of the plaintiff to prosecute. Rule 14(j) sets the 120-day time limit for service and mandates that, if service of the summons and complaint is not made within that time and no good cause is shown for the delay, the action should be dismissed without prejudice upon the court's own initiative.

12. In the United States District Court for the District of Puerto Rico, banking cases consist of mortgage foreclosure actions and claims on promissory notes brought by United States government agencies and federally insured loaning institutions. D.C.P.R. LOCAL R. 701.

13. The form for the Initial Scheduling Conference Call reads as follows:

Deeming it proper so to do, it is ADJUDGED and ORDERED that:

1. Unless already filed, answers to the complaint will be filed within ten (10) days of this date. Any such filing will not be deemed a waiver of any prior motions.

2. Counsel will meet with the Court in chambers at \_\_\_\_\_ on \_\_\_\_\_ for the purpose of informing the Court of their respective contentions and disclosing all facts pertinent to the case, including bringing in the evidence to show such facts and assessing any damages claimed. This conference will also serve the purposes of guid-

each other and their clients of the merits of their case. By meeting together with the court at this early stage, the parties must set forth their facts and, by so doing, confront the gaps in knowledge of their case. In addition, the call orders the defendant to answer the complaint within ten days of the date of the notice, without prejudice to or waiver of any prior motions, such as motions to dismiss.

To make the meeting productive, the parties must prepare and come to the conference with knowledge of the facts surrounding the pleadings and their consequences, including assessment of damages. Therefore, the call requires the parties to come ready and able to enter into agreements as to uncontroverted facts and principles of law applicable to the case.<sup>14</sup> In addition, counsel are required to be prepared to discuss settlement prospects. The call reminds the attorneys of their duty under Rule 16(f) of the Federal Rules of Civil Procedure.<sup>15</sup>

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ing and setting discovery procedure and scheduling this case for Status Conference, Pretrial and Trial.

3. All counsel should anticipate a trial date within ninety (90) days of this date except in cases of protracted litigation. Once a trial date has been set with the concurrence of counsel, no continuance will be granted except for good cause reasonably shown. Trial will not be continued solely because counsel have agreed to recommend a settlement. A trial date will be passed only if a settlement has been firmly bound so that, if it is not consummated, summary judgment on the stipulation will be appropriate.

4. All counsel are admonished to expedite discovery. Interrogatories shall be limited to no more than thirty (30) questions.

5. The objective of the conference scheduled herein is to simplify the issues and to reach agreement as to uncontroverted facts and accepted principles of law applicable to the case. Therefore, counsel attending are expected to be conversant enough with the facts and the law to enter into such agreements. Counsel should be ready to respond to such queries as the Court may deem appropriate, and be prepared to discuss settlement prospects. As required by FED. R. CIV. P. 16(c), “[a]t least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.” Counsel are reminded that failure to participate in good faith, or participation while being substantially unprepared, are noncompliant acts under FED. R. CIV. P. 16(f) which may result in sanctions, including the payment of reasonable expenses incurred by the noncompliance.

Let the Clerk send copies of this Order to counsel of record and to *pro se* litigants.

**IT IS SO ORDERED.**

14. See Rule 16(c), which reads in pertinent part as follows: “At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.” FED. R. CIV. P. 16(c).

15. FED. R. CIV. P. 16(f) reads as follows:

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

The ISC call also informs the parties of the scheduling objectives of this conference. Counsel are told to anticipate a trial date within ninety days of the ISC except in cases requiring protracted litigation.<sup>16</sup> The call further advises counsel that the trial date agreed upon at the ISC will be firm, and no continuance will be granted unless a stipulation of settlement is firmly bound.<sup>17</sup> Expedited discovery is advised, and interrogatories are limited to no more than thirty questions.<sup>18</sup>

### *C. Step Three: The Initial Scheduling Conference*

Upon the date set, the parties meet with me in chambers for the ISC. The meeting is informal and takes the atmosphere of a tête-à-tête where information, facts, and opinions are elicited from the parties candidly in order to reach a consensus. The conference follows an established sequence in which the parties first agree to facts, then state their positions of law, and finally outline their discovery plans.

#### *1. Nature of the Action*

First, the parties and I hear the plaintiff's version of the story upon which the action was brought. Then the defendant gives its version of the story and defenses. The purpose of this introductory stage is for all of us to understand how each side views its own case.

#### *2. Agreement of Facts*

This introduction sets the stage for me to direct the parties to the relevant facts to which they can or should agree. By so agreeing, the parties avoid the work associated with preparation of evidence on these particulars, and they come to understand their evidence and their limits. Many times the parties have come to realize there is no controversy as to the facts and then have settled or submitted the case for the court's application of the law. If a party comes without the knowledge required to either stipulate to a basic

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

16. *See supra* note 13.

17. *Id.*

18. *Id.*



fact or explain why it cannot be stipulated, the court includes the fact as conditionally stipulated, that is, as true unless denied within a specified time.

During the Initial Scheduling Conference, the parties are encouraged to identify the evidence or facts known by the other party that they would need to know. I order the party with knowledge of or access to the information to answer, to state, or to produce documents at a particular place and date. Such arrangements speed the proceedings and avoid a great deal of cost by preventing later conflicts on the matter.

### 3. *Controverted Facts and Legal Issues*

The next stage of the ISC follows naturally from the first. The parties identify for the record the relevant facts and legal issues in controversy. These controverted facts and issues may include jurisdictional questions as well as disputes on the merits. If a particular jurisdictional challenge appears likely to succeed, I may direct the planning of the discovery schedule to allow first for a decision on jurisdiction.

### 4. *Discovery*

The third stage of the conference requires the parties to outline their plans for discovery and to enter into an agreement that the discovery so outlined constitutes the only discovery required in the case. The plan for discovery, of course, is subject to variation according to the nature of the case itself. Usually, I set limits on the number of days for serving interrogatories, specify the time and place for taking depositions, and outline the conditions to be imposed, such as who is going to produce which witness and at whose expense. In addition, I may request the parties to state in writing by a certain date the names, addresses, and employment of their witnesses, with a short statement as to the subject matter of their testimony. My judicial determination of these matters saves a lot of time that often is incurred in extrajudicial determinations of dates and payment of expenses, matters which, if unsettled by counsel, become the subject of court motions and, possibly, hearings. The parties are advised that if noncompliance with the order of the court causes any problems with discovery, the party harmed by the noncompliance should inform me as soon as it is evident that counsel cannot resolve the dispute themselves. I then sanction the noncompliant party in a manner commensurate with the issue raised by the noncompliance.<sup>19</sup>

After the discovery plans have been established, I set a discovery deadline that is at least one month prior to the trial. By this deadline, all interrogatories and requests for admissions must be answered and all depositions and

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19. See *infra* text accompanying notes 22-23 for a discussion of sanctions.

examination taken. This means that interrogatories and requests for admissions must be served at least thirty days prior to the deadline. On occasion, when the parties agree, depositions not scheduled during the ISC may be taken if notice is given a reasonable time before the deadline and on the condition that those depositions do not result in the continuance of the trial date.

### 5. *Schedule with the Court*

The final stage of the ISC involves setting a schedule for further conferences and trial that fits into all parties' schedules. If settlement appears to be likely after some discovery has been had, or if the case is a complex one requiring close court monitoring, I set a status conference at a date timed to complement the completion of certain discovery. I then set a pretrial conference, at which the principals are ordered to be available by telephone, and a date for trial.

#### D. *Step Four: The Initial Scheduling Order*

Pursuant to the agreements and statements of the parties and the court orders given orally in the ISC, I prepare a written order, similar to the minutes of a meeting, recording the pertinent matters in an established sequence. The order begins with a brief introduction that covers the general nature of the case, the allegations of the parties, and the status of the case. Secondly, I include each relevant fact to which the parties have agreed. The plan for discovery that we agreed upon and dates for further conferences and trial also form part of the order. The order also contains a deadline for joinder of parties and amendment of pleadings. At the end of the order, I add admonitions regarding imposition of sanctions in the event of noncompliance and the requirement of a showing of good cause for changing any of the dates set by the order. This written order is sent to the parties within a week of the ISC.<sup>20</sup>

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20. A form of this order follows:

*Initial Scheduling Order:*

The parties met with the Court on \_\_\_\_\_ pursuant to an Initial Scheduling Conference, represented by their respective attorneys: \_\_\_\_\_ for plaintiff(s); and \_\_\_\_\_ for defendant(s).

(Summary of the case):

I. *Agreement of the Parties:*

(if applicable: "If not denied within 10 days, the statement of \_\_\_\_\_ will stand as true.")

II. *Controverted Facts and Issues:*

A. *Controverted Facts:*

*E. Step Five: Following Up the Initial Scheduling Order*

Effective follow-up of the Initial Scheduling Conference and order is critical to the success of the system. The key to this follow-up is a system of sanctions for noncompliance embedded in the ISC itself. During the ISC, when ordering a party to produce certain information or to submit a brief, I also may order a particular consequence or sanction for noncompliance. Depending on the nature of the ordered action, a sanction may be either automatically triggered or made effective upon the request and appropriate showing by the opposing party. In addition, as noted previously, the order issued after the ISC advises the parties that noncompliance with any order therein may result in the imposition of sanctions on the noncomplying party, attorney, or both.<sup>21</sup>

The conditional stipulation is an illustration of an automatically triggered consequence.<sup>22</sup> For example, in a diversity case for wrongful discharge and violation of right to privacy for opening an employee's personally addressed package, the defendant employer entered into a conditional stipulation re-

B. *Legal Questions:*

III. *Discovery:*

The parties have agreed that they are going to have only the following discovery: (Scheduling of depositions, interrogatories, examinations, etc.).

All discovery must be completed by \_\_\_\_\_. By this deadline, all interrogatories and requests for admissions must be answered and all depositions and examinations taken. This means that interrogatories and requests for admissions must be served at least 30 days prior to the deadline and notice of depositions given within a reasonable time of the deadline.

Parties will state in writing the names, addresses, and employment of their witnesses, with a short statement as to the subject matter of their testimony, on or before \_\_\_\_\_. (Or: the names of the witnesses to be called by the parties are the following: . . . .)

IV. *Schedule with the Court:*

A. Status Conference \_\_\_\_\_ at \_\_\_\_\_.

B. Pretrial \_\_\_\_\_ at \_\_\_\_\_.

The parties are ORDERED to have their principals available by phone during the Pretrial Conference under penalty of fine.

C. Trial \_\_\_\_\_ at 9:30 a.m.

V. Any motions for joinder of parties or for amendment for pleadings must be filed on or before \_\_\_\_\_. Noncompliance with any order herein may result in the imposition of sanctions on the noncomplying party, attorney, or both, which may include the imposition of a fine.

The dates specified herein shall not be changed unless parties agree in writing to do so and such change does not affect the subsequent course of the action as scheduled herein or the Court grants leave for good cause, adequately shown.

IT IS SO ORDERED.

21. See also *infra* text accompanying notes 22-23.

22. See *supra* part I(C)(2).

garding relevant rules of company procedure. The Court ordered, along with the stipulation, that if not denied within fifteen days, the facts of the stipulation would be taken as true. Thus, the matter was solely in the possession of the defendant, and the stipulation, once in effect, served to avoid prolonged production of documents and to narrow the evidence for trial.

Another type of order requires a party to produce clearly specified information or documents by a certain time. This type of order is useful in requiring a party to support its contention that a certain fact is in dispute. For example, in a case where the plaintiff alleged that he had been adjudged mentally incapacitated by state and federal administrative agencies, I ordered: "Plaintiff is to file with the Court, with a copy to the other parties, all such certificates adjudging plaintiff's mental incapacity and sworn statements by doctors on or before [specified date]. The defendant, if not satisfied, will state their position on or before [specified date, two weeks later]." An appropriate sanction for not producing the information requested would be to take as true the relevant factual theory espoused by the opponent. Whether this sanction is triggered can depend upon the opposing attorney's report, as in the example above, or can be fashioned to occur automatically upon noncompliance and failure to notify the court.

I use a similar type of embedded sanction in orders to submit briefs on contested legal issues. For example, in a suit in which the plaintiff alleged punitive damages for discharge from public employment, I ordered the plaintiff to file a brief, on or before a specified date, covering his right to punitive damages. The defendant was ordered to answer on or before a date set one month later. The sanctions for noncompliance with this order could have been, for the plaintiff, the dismissal of that particular claim and, for the defendant, the presentation of that claim before the jury.

Similarly, I have ordered plaintiffs to itemize their damage allegations. If the plaintiff fails to submit the itemizations as required, the dismissal of particular elements of damages results. Along the same line, I may disallow witnesses when a party fails to comply by a certain date with my order to submit the names, addresses, and employment of its witnesses, with a summary of the nature of their testimony. This type of order has proved extremely useful in directing discovery and preparing for trial. Another technique, used most often in commercial or complex cases, consists of requiring the parties to meet and stipulate further to specified quantifiable information. For example, in a state law claim for damages for termination of a franchise relationship, I ordered the parties to stipulate and submit by a specified date the exact figures for commissions and annual premiums used to compute damages under a state law formula. Such an order both obviates

the need for submitting this matter to formal discovery and provides the parties with an opportunity to see the amount of damages in perspective and thus consider settlement as a practical alternative. Since this type of order is to each party's benefit, the appropriate sanctions for noncompliance are developed on an ad hoc basis as attorneys report the circumstances of noncompliance to the court.

Some situations arise in which sanctions of necessity must be imposed ad hoc and in a manner not directly related to the matter over which noncompliance resulted. For example, in an action brought by the Federal Deposit Insurance Corporation (FDIC) for monies owed on promissory notes signed by a husband only, the FDIC failed to file a brief as ordered on whether the wife and the conjugal partnership were liable for the unpaid note under the state's community property law. To sanction this noncompliance by accepting as true the defense position of nonliability would have left the FDIC without recourse on an overdue note, which, even from the defendants' brief, appeared to have benefitted the conjugal partnership, thus rendering the partnership liable. In such situations, I prefer monetary sanctions, such as fines, to sanctions that distort the truth of the matter by striking pleadings or defenses or by presuming facts as to the matter under discovery.

In the area of monetary sanctions, I prefer to assess fines payable to the court rather than to require the noncomplying party to reimburse the other for expenses and fees incurred by the sanctionable conduct. In my opinion, fines serve several purposes that compensation to the other party does not. Not only do fines punish present misconduct, they also deter future misconduct. Both of these are primary goals of imposing sanctions. In addition, assessing fines eliminates satellite litigation as to the amount of attorneys' fees to be imposed, a collateral proceeding that defeats the goal of efficiency sought to be achieved through the ISC method. Finally, I have found that, in many instances, a fine imposed directly on the attorney rather than on the client is an appropriate sanction when the attorney rather than the client has caused the noncompliance.<sup>23</sup>

## II. A PROPOSAL FOR REVISING THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 16 of the Federal Rules of Civil Procedure, as amended in 1983, contains the rudimentary framework from which the Initial Scheduling Con-

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23. I have found little precedent directly on point regarding the imposition of fines on attorneys. Nevertheless, the practice is well within the spirit of the federal rules. *See, e.g.*, FED. R. CIV. P. 11 (imposition of fine on attorney, client, or both for signing in violation of the rule), and the recent approach to sanctions taken by the Supreme Court. *E.g.*, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (dictum).

ference system can be developed as a mandatory tool of judicial management.<sup>24</sup> The intention behind the rule, according to the advisory committee, was "to encourage forceful judicial management."<sup>25</sup> In my opinion, the ISC system effectively and efficiently serves the goals which the present Rule 16 espouses but, as yet, only partially implements through a system of pretrial procedure.

Rule 16(a) enumerates various purposes of pretrial conferences, namely: "(1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation, and; (5) facilitating the settlement of the case."<sup>26</sup> My experience is that the ISC serves all these purposes. For example, on many occasions, the parties realize that there are no differences of fact or law between them, and they consequently settle the case. In most instances, the parties become aware of the totality of relevant facts in the case as a whole for the first time. They then become more effective in searching for truth and finding a solution that leads to an early settlement of the case. The remaining cases that do not settle are tried promptly and with full knowledge of the parties' facts and allegations.

Under present Rule 16(b) and (c), within 120 days from the filing of the complaint, the court must issue a scheduling order that fixes deadlines for joinder of parties, amending pleadings, filing and hearing pretrial motions, and completion of discovery. The rule provides that the order may be entered by means of a conference, a telephone call, or mail. The order may, but need not, include the dates for further pretrial conferences and trial and the subjects of fact and law and discovery planning enumerated in Rule 16(c).<sup>27</sup>

By going only halfway, the rule presents as many problems as it solves. How can attorneys and the court agree on a deadline for completing discovery or adding parties or claims, without knowing which underlying facts are in dispute? How can deadlines for pretrial motions be set without discussing the applicable law? If the facts and law are essential to the schedule mandated in the rule, why not require them to be discussed, formulated, and simplified to the maximum extent possible? And finally, how can such tasks be achieved effectively and efficiently by letter or even in a telephone conference call? The advisory committee noted that "there is no reason why some of the procedural matters listed in Rule 16(c) cannot be addressed at the

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24. FED. R. CIV. P. 16.

25. *Id.* Rule 16(f) advisory committee note.

26. FED. R. CIV. P. 16(a).

27. *Id.* Rule 16(c).

same time [as the scheduling matters in subdivision (b)], at least when a scheduling conference is held.”<sup>28</sup> I submit that there is every reason why these matters should be addressed in a mandatory conference that incorporates the scheduling concerns of subdivision (b) with the procedural and substantive matters of subdivision (c), thus streamlining a process that otherwise is piecemeal and undirected.

In essence, my proposal is to consolidate subdivisions (b) and (c) of Rule 16 into one rule mandating that a scheduling conference be held within 120 days of the filing of the complaint in order to set the enumerated subdivision (b) deadlines and to take action on the subdivisions (c)(1), (c)(3), and (c)(5) matters. The new rule I envision would also require the court to consider, as appropriate, the matters outlined in subdivisions (c)(2), (c)(4), and (c)(6) through (c)(11).

In addition, this new rule would incorporate the concept of the discovery conference presently required by Rule 26(f) when an attorney moves the court to do so pursuant to that rule.<sup>29</sup> Rule 26(f) further requires a court, following such a discovery conference, to enter an order “tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action.”<sup>30</sup> As devised, my ISC order deals with this problem at the *outset* of the litigation, thus minimizing costly, time-consuming discovery fights. Under my proposed rule, the matters that are presently required to be discussed only upon motion of an attorney would become mandatory subjects of the ISC even absent a motion.

Objections to this proposal may arise from concerns that all these matters cannot be discussed and decided so early in the litigation. My experience at the bar and on the bench has been otherwise. By the time a complaint is filed, a plaintiff should know the case quite well; in fact, such knowledge is now required of counsel under Rule 11.<sup>31</sup> In many instances, the defendant has already engaged in prelitigation discussion with the plaintiff and is acquainted with some of the facts of the case. Even where this is not so, the ISC system as devised, gives the defendant sufficient time for a reasonable inquiry into the facts: there are twenty days to answer plus a fifteen-day extension, if granted, and then at least fifteen to twenty-five days thereafter before the ISC takes place. Furthermore, to be able to deal effectively with this new method of judicial management, the natural reluctance of lawyers

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28. *Id.* Rule 16(b) advisory committee note.

29. *Id.* Rule 26(f).

30. *Id.*

31. *Id.* Rule 11.

to engage in fruitful discussion with their opposition must be pierced. Throughout the years, lawyers rather than the courts have directed the course of cases through motions for continuance of conference or trial, motions for extension of time to file, and motions interposed for delay or harassment. To regain control of pretrial litigation, the courts must take the offensive in setting the pace.

All this does not mean that the new pace of litigation will run roughshod over the rights of litigants. The ISC rule I propose should include a proviso allowing the court to issue an abbreviated ISC order that states reasons for its brevity and the need to set an additional ISC at a later date. This proviso would ensure that the first ISC is held as scheduled, that the court has indeed asserted its role early in the case, and that further ISCs would complete the task more effectively and carefully in a case involving numerous parties or issues. The present Rule 16 already envisions the possibility of a series of multiple conferences.<sup>32</sup>

A second criticism of this proposed ISC rule is that it may cause over-administration of cases that simply do not merit such close judicial attention. I have not found this concern to be of practical import. First, as the advisory committee suggests, I exempt certain categories of cases from this system.<sup>33</sup> These categories include social security and bankruptcy appeals, miscellaneous cases, and habeas corpus petitions. Second, I have found that cases that do not need this type of judicial administration either terminate by consent or dismissal prior to the ISC date, or are resolved during the initial stages of the ISC itself. In other words, the ISC system has proved to be a useful mechanism in encouraging the early termination of cases that do not merit further attention.

Finally, I highly agree with the spirit of the 1983 amendment that added subdivision (f) on sanctions to Rule 16.<sup>34</sup> Only by reinforcing the concept of sanctions will lawyers maintain strict compliance with the schedule and court orders prepared in the ISC. As presently written, Rule 16(f) appears to require the judge to order the noncompliant party or attorney, or both, to pay the reasonable expenses incurred by noncompliance. I believe that this apparent limitation on the courts' power to impose fines is neither intended nor desirable. First, the rule provides for not ordering sanctions where "the judge finds that the noncompliance was substantially justified or that other

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32. *Id.* Rule 16(e) advisory committee note ("Since the amended rule encourages more extensive pretrial management than did the original, two or more conferences may be held in many cases.").

33. *Id.* Rule 16(b) advisory committee note.

34. For text of FED. R. CIV. P. 16(f), see *supra* note 15.



circumstances make an award of expenses unjust.”<sup>35</sup> Furthermore, in its discussion of this section, the advisory committee noted that “the Court has discretion to impose whichever sanction it feels is appropriate under the circumstances.”<sup>36</sup> Thus, I believe the court has power to exercise its discretion and should do so more frequently through fines payable to the court rather than through compensation to the opponent, an approach that necessitates a good deal of satellite litigation.<sup>37</sup> I propose that Rule 16(f) reflect the availability of sanctions in the form of fines deposited with the clerk of the court, to be set in an amount appropriate to the conduct being sanctioned. At present, Rule 16(f) specifically incorporates the sanctions provided in Rule 37(b)(2)(B), (C), (D), provisions that list foremost the most severe sanctions and those that distort the truth of the matter. It would be preferable in my opinion to emphasize the effectiveness and desirability of various monetary sanctions instead.

### III. CONCLUSION

Proper pretrial method can have a two-fold result. Either settlement is reached or trial is expedited because the parties have learned all the material facts early in the proceedings and have economized the time used for discovery. This method is attractive not only because it may eliminate trial; it also may eliminate much of the standard discovery and its costly manipulations.

The ICS method, which elicits the true facts of a case rather than the hearsay upon which pleadings are framed, does not destroy the rights of the parties to have the contested facts and issues litigated and resolved. On the contrary, the method preserves our constitutional system of separation of powers by enabling the judge to apply the law to discovered facts rather than to a set of facts which may not exist. The job of the judge, and indeed of our adversarial system in general, is to help the parties develop and clarify the facts through the crucible of question and answer, discussion and challenge, and through contradictory facts presented by the other parties. Then and only then can judges learn the true facts that will prevail in court. By this method, courts look at the facts in an objective, holistic manner, without the distortion, harassment, and adversarial selection of only those facts advantageous to one side.

We, the judges, must take control of pretrial procedure, learn the facts of our cases, and settle them equitably and economically. Forceful judicial management of cases can contribute to more efficient, more economical, and

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35. FED. R. CIV. P. 16(f).

36. *Id.* Rule 16(f) advisory committee note.

37. *See supra* note 23 and accompanying text.

more effective litigation. However, the judicial system still needs legal pioneers to test and perfect the application of the ICS system through experience and shared reflection. It is to this end that I have written. I hope these suggestions will aid all trial courts in their continuing progress on the first line of fire.

