

CIVIL TRIAL PRACTICE STANDARDS

AMERICAN BAR ASSOCIATION

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INTRODUCTION

Since the middle of the 20th Century, trials have been characterized by increasing complexity and transformed by accelerating technology, new causes of action, novel fields of expertise, and the adoption of vastly liberalized codes of evidence. As trials have become more complicated, state and federal courts have developed a multitude of innovative techniques to enhance juror comprehension.

In 1998, the American Bar Association adopted the Civil Trial Practice Standards to standardize and promote the use of these innovative trial techniques. The Standards were drafted by a Task Force of the ABA Section of Litigation that included four past and present Chairs of the Section of Litigation; distinguished plaintiffs' and defense counsel from around the country — from firms with as few as two lawyers to firms of several hundred; highly respected state and federal judges; and representatives of the Judicial Division of the ABA and the American College of Trial Lawyers. Before they were finalized, drafts of the Standards were distributed for public comment to every state and major local bar association; all sections of the ABA; other bar organizations; and hundreds of state and federal judges, and trial lawyers, across the country.

The Original Standards filled an important gap. They recommended procedures and otherwise furnished guidance that was not available elsewhere and were designed to foster and ensure a fair trial in both state and federal court. Critics of the jury trial have questioned the ability of jurors to decide complex cases fairly. The procedures recommended in the Civil Trial Practice Standards were particularly useful in complex cases and provided jurors the tools they needed to come to fair decisions in all cases.

In light of the passage of time since the Civil Trial Practice Standards were adopted as official ABA policy, a Task Force of the ABA Section of Litigation was formed for the sole purpose of reviewing and updating the Civil Trial Practice Standards. Consistent with the work of the original task force that drafted what became the Civil Trial Practice Standards, the Update Task Force reviewed and evaluated the existing Standards to consider whether they continued to address practical aspects of trial that were not fully addressed by rules of evidence or procedure and consider potential new Standards that would supplement and operate consistently with those rules.

A development of huge proportions in the updating of the original Civil Trial Practice Standards was the adoption in 2005 by the American Bar Association of the Principles for Juries and Jury Trials created by the American Jury Project. As noted in the preamble to the ABA Principles:

The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is

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preserved and juror participation enhanced. What follows is a set of 19 Principles that define our fundamental aspirations for the management of the jury system.

Significant core concepts included within Original Standards 1-10 were evaluated, refined and integrated into the aforementioned 19 Principles that comprise the ABA Principles for Juries and Jury Trials. As a result, in the Updated Standards that follow, five of the initial 10 Original Standards have been deleted and the remaining five have been revised consistent with the ABA Principles. In addition, based on the work of the Update Task Force, three additional revised and four new standards have been integrated into the Updated Civil Trial Practice Standards.

The civil jury trial lies at the foundation of the American system of justice. Promoting improvements in the jury trial is a core mission — and one of the highest priorities — of the American Bar Association and its Section of Litigation. Consistent with the Principles for Juries and Jury Trials, the Updated Civil Trial Practice Standards stand in the highest traditions of the American Bar Association in the service of the courts, both state and federal, and the civil jury system.

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PREFACE

These Updated Civil Trial Practice Standards have been developed as guidelines to assist judges and lawyers who try civil cases in state and federal court. The Updated Standards address practical aspects of trial that are not fully addressed by rules of evidence or procedure. They are not intended to be a substitute for existing evidentiary or procedural rules but rather to supplement and operate consistently with those rules. The Updated Standards are predicated on the recognition that, in an era of increasingly complicated evidence and litigation, there are methods for enhancing jury comprehension and minimizing jury confusion that merit wider consideration and use. These Updated Standards are designed to furnish practical guidance for the implementation and use of many of these methods.

The Updated Standards suggest a variety of approaches but recognize that ultimately the trial court must exercise its discretion in light of the circumstances before it, and nothing in these Updated Standards limits that discretion. The Updated Standards are drafted on the assumption that each litigant before the court is represented by counsel. The court's exercise of discretion will necessarily be affected if parties are appearing *pro se*.

These Updated Standards do not reflect any substantive legal doctrines. They are not comprehensive in the sense that many other issues arise at trial that are not addressed in the rules of evidence or procedure and yet have an impact on a jury's ability to perform its function. They are advisory only and, while they have been drafted to operate consistently with existing law, in the event of any conflict, the law governing in the jurisdiction prevails. It is hoped that, notwithstanding these limitations, these Updated Standards will prove useful to both bench and bar.

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PART ONE: THE JURY

1. Juror Notebooks.

- a. Use & Contents.** In appropriate cases where juror notebooks are used, they may include such items as the court's preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute, which may include:
- i. Photographs of parties, witnesses, or exhibits;
 - ii. Curricula vitae of experts;
 - iii. Lists or seating charts identifying attorneys and their respective clients;
 - iv. A short statement of the parties' claims and defenses;
 - v. Lists or indices of admitted exhibits;
 - vi. Glossaries;
 - vii. Chronologies or timelines; and
 - viii. The court's instructions.

The notebooks should include paper for the jurors' use in taking notes.

b. Procedure.

- i. **Conferral Requirement.** The court should require counsel to confer on the contents of the notebooks before trial begins.
- ii. **Parties Not in Agreement.** If counsel cannot agree, each party should be afforded the opportunity to submit its proposal and to comment upon any proposal submitted by another party.

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Comment

The ABA Principles for Juries and Jury Trials provide that jurors should, in appropriate cases, be supplied with identical trial notebooks, and set forth the procedures a court should follow in doing so. See Principle 13B. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This Standard elaborates on the appropriate contents of juror notebooks and the procedures for using them.

This Standard encourages the increasingly common practice of using juror notebooks to maximize comprehension of the evidence in appropriately complex cases. In addition to copies of the court's instructions, important exhibits (or salient excerpts from exhibits) and stipulations, contents may consist of any other aids to the understanding of the jury that the court finds appropriate in the circumstances. See, e.g., *United States v. Rana*, 944 F.2d 123, 126 (3d Cir. 1991), cert. denied, 112 S. Ct. 981 (1992); *ACandS, Inc. v. Godwin*, 340 Md. 334, 400 n.22, 667 A.2d 116, 148 n.22 (1995); *Gray v. Phillips Petrol. Co.*, No. 84-2107-S, 1990 U.S. Dist. LEXIS 5677 at *2-*3 (D. Kan. 1990); *United States v. Plitt Southern Theaters, Inc.*, 671 F. Supp. 1095, 1096 (W.D.N.C. 1987); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th §§ 12.32, 12.422 (2004); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, JURY TRIAL INNOVATIONS § 4.77 (Munsterman *et al.* eds., 2d ed. 2006); Hon. Robert M. Parker, *Streamlining Complex Cases*, 10 REV. LITIG. 547, 550 (1991); Robert E. Litan (ed.), VERDICT: ASSESSING THE CIVIL JURY SYSTEM 388 (Brookings 1993).

It lies within the court's discretion to decide not only whether but also when notebooks should be distributed. Ordinarily, if notebooks are to be provided, they should be distributed at or near the outset of trial for convenience of reference throughout the proceedings. Alternatively, the court may determine that distribution should follow the introduction of some or all of the exhibits or salient testimony. In either event, the court may permit the parties to supplement the notebooks with additional materials that the court rules admissible or includible later in the trial. Materials that have not specifically been approved by the judge may not be included in jury notebooks.

The court may suggest or, in appropriate cases, direct the parties to prepare notebooks for jurors. This should ordinarily be resolved prior to trial.

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2. Juror Note-Taking.

Cautionary Instructions. Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use, including that:

- i. Jurors are not required to take notes, and those who take notes are not required to take notes extensively;
- ii. Note-taking should not divert jurors from paying full attention to the evidence and evaluating witness credibility;
- iii. Notes are merely memory aids and are not evidence or the official record;
- iv. Jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced solely by the fact that other jurors have taken notes;
- v. Notes are confidential and will not be reviewed by the court or anyone else. They may not be disclosed to other jurors until deliberations begin; and
- vi. Jurors should also be instructed that after they have reached their verdict, all jurors' notes will be collected and destroyed.

Comment

This Standard is taken from Principle 13A (1-5) of the ABA Principles for Juries and Jury Trials. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

3. Juror Questions for Witnesses.

Cautionary Instructions. Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses including that:

- i. Questions should be reserved for important points only;

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- ii. The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it;
- iii. Jurors are not to argue with the witness;
- iv. Jurors are to remember that they are not advocates and must remain neutral fact finders;
- v. Jurors are not to reach any definite conclusions until the end of the case, after they have heard all of the evidence and arguments of counsel;
- vi. There are some questions that the court will not ask, or will not ask in the form that a juror has written, because of the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case;
- vii. Jurors are to draw no inference if a question is not asked -- it is no reflection on either the juror or the question;
- viii. Jurors are not to weigh the answers to their questions more heavily than other evidence in the case;
- ix. Questions will be accepted only in writing, at the court's invitation, and are not to be disclosed to other jurors; and
- x. Any question must be submitted in writing to the court, with the juror's signature or designated number affixed.

Instructions vi., vii. and viii. should ordinarily be reiterated in the final jury charge.

Comment

The ABA Principles for Juries and Jury Trials provide that jurors should ordinarily be permitted to submit written questions for witnesses and set forth procedures a court should follow in doing so. *See* Principle 13C. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This Standard sets forth the elements the court should include in its cautionary instructions on jurors' written questions.

Questioning is primarily the province of counsel, not jurors. With appropriate safeguards, however, juror questioning can materially advance

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the pursuit of truth, particularly when a jury is confronted with a complex case, complicated evidence or unclear testimony. *See, e.g.*, American Judicature Society, TOWARD MORE ACTIVE JURIES: TAKING NOTES & ASKING QUESTIONS 11-14 (1991); Heuer & Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996); Robert E. Litan (ed.), VERDICT: ASSESSING THE CIVIL JURY SYSTEM 358-60, 390-91 (Brookings 1993); Statement of Robert MacCoun, University of California at Berkeley Graduate School of Public Policy, before the Judiciary Committee of the California State Senate concerning Improving Jury Comprehension in Criminal and Civil Trials at 1 (July 27, 1995).

State and federal courts have overwhelmingly recognized that whether to allow juror questioning of witnesses is a matter vested in the sound discretion of the trial judge. *See, e.g.*, *United States v. Bush*, 47 F.3d 511, 514-15 (2d Cir. 1995); *United States v. Cassiere*, 4 F.3d 1006, 1017-18 (1st Cir. 1993); *United States v. George*, 986 F.2d 1176, 1178 (8th Cir. 1993); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985); *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *cert. denied*, 444 U.S. 26 (1979); *Spitzer v. Haims & Co.*, 217 Conn. 532, 546-47, 587 A.2d 105, 112-13 (1991); *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 555-56 (Iowa 1980); *State v. Hays*, 883 P.2d 1093, 1101-02 (Kan. 1994); *State v. Graves*, 907 P.2d 963, 966-67 (Mont. 1995); *People v. Bacic*, 202 A.D.2d 234, 608 N.Y.S.2d 452, 452 (1st Dept.), *appeal denied*, 616 N.Y.S.2d 483 (1994); 3 Wigmore, EVIDENCE § 784(a) (Chadbourn rev.).

The practice of jury questioning -- especially oral questioning -- has often been frowned upon, particularly in criminal cases, due to concern that it risks compromising jury neutrality, encouraging premature deliberations, and unduly delaying the proceedings. These concerns can be addressed with proper precautions, as adumbrated in this Standard, and a vigilant trial judge. Moreover, civil actions rarely present the same constitutional issues or liberty interests that foster judicial sensitivity in criminal cases.

Ordinarily, the court should not invite or entertain questions from jurors until after the parties' examination and cross-examination of a witness has concluded.

The Standard provides that jurors should identify themselves when submitting questions. This is designed to enable the parties and the judge to address any potential or apparent violations of the judge's instructions or the juror's duties.

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4. Instructing the Jury.

- a. **Notice to Parties.** Before delivering any instructions to the jury, the court should:
 - i. Inform counsel on the record of the content of the instructions it intends to deliver;
 - ii. Allow argument by counsel concerning the proposed instructions;
 - iii. Allow counsel to make a record of any objections; and
 - iv. Provide counsel with copies of the instructions.
- b. **Conferral Requirement.** The court should require counsel to confer on the substance of instructions before trial begins.

Comment

This Standard supplements Principles 6 and 14A through D of the ABA Principles For Juries and Jury Trials. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf

Judges should require counsel to confer and to seek agreement on substantive instructions before trial begins. Where counsel cannot agree, each party should be required to submit proposed instructions and objections to the opponent's instructions before trial. The judge should consider having a pretrial conference to rule on instructions prior to trial. At a minimum, where there is dispute over basic, relevant legal principles, the court should advise counsel as to its determination of the law, which will be reflected in its preliminary instructions, so that counsel can prepare their openings, and otherwise finalize preparation of their cases, based on the court's resolution of the governing law.

5. Exhibit Availability During Jury Deliberations.

- a. Aids.** The court may, in appropriate cases, provide the jurors with aids, in addition to an index, to facilitate their review of the evidence.
- b. Exhibits Offered for Limited Purposes.** If an exhibit that has been admitted for any limited purpose is provided for juror use during deliberations, the court should consider re-instructing the jury as to the limited purpose of which the exhibit was admitted.

Comment

The ABA Principles for Juries and Jury Trials provide that jurors should "ordinarily be provided" with exhibits admitted into evidence and with an index to those exhibits. *See* Principle 15B. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This standard describes several other steps that may facilitate jurors' use of exhibits during deliberations.

Subdivision a. recognizes that certain types of aids, in addition to an index, may be necessary for the jury to review evidence efficiently – or, in some cases, at all – during deliberations. Of particular importance are mechanical aids, such as videocassette recorders to review videotapes. The Standard is drafted broadly in view of the large number of items that fall within this category, including those to be developed in the future. In exercising its discretion in this regard, the court should take into account any risk that the aid sent to the jury room, coupled with whatever else is available to the jury, might be used for improper experimentation purposes.

Subdivision b. is drawn from the cases which find that certain admonitory instructions may be appropriate when evidence admitted for a limited purpose is sent to the jury room. *See, e.g., United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981); *State v. Lord*, 117 Wash. 2d 829, 856-57, 822 P.2d 177, 193-94 (1991).

PART TWO: JUDICIAL PARTICIPATION IN DEVELOPING EVIDENCE

- 6. Court-Appointed Experts.** The court may appoint an expert to serve as a judicial tutor as to esoteric subject matter or, in exceptional cases, as a witness to testify at a trial. The same expert may serve in both capacities.
- a. Selection.**
- i. The court should invite the parties to recommend jointly an expert to be appointed by the court.
 - ii. If the parties cannot agree, the court should invite them to submit names of a specified number of experts with a summary of their qualifications and an explanation of the manner in which those qualifications "fit" the issues in the case.
 - iii. The court may choose one or more experts recommended by each party; it may choose one or more experts from those recommended by any of the parties; or it may reject the experts recommended by the parties and select an expert unilaterally.
 - iv. Before selecting an expert, the court should:
 - A. Consider seeking recommendations from a relevant professional organization or entity that is responsible for setting standards or evaluating qualifications of persons who have expertise in the relevant area, or from the academic community, and
 - B. Afford the parties an opportunity to object to the appointee on the basis of bias, qualifications or experience.
- b. Scope of Expert's Duties.** The court should afford the parties the opportunity to participate in defining the scope of the expert's duties.
- c. Communications between Court and Expert.** The court should ensure that the parties are aware of all communications pertaining to the merits between the court and a court-appointed expert by:
- i. Permitting the parties to be present when the court meets or speaks with the expert;

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- ii. Providing that all communications between court and expert will be in writing with copies to the parties; or
 - iii. Recording oral communications between court and expert and making a transcript or copy of the recording available to the parties.
- d. Communications between Parties and Expert.** The court should ensure that every party is:
- i. Informed of, and afforded the opportunity to explore, in advance of trial, the findings and opinions of any court-appointed expert; and
 - ii. Aware of all communications between any party and a court-appointed expert by:
 - A. Permitting all parties to be present when any party meets or speaks with the expert, or
 - B. Providing that all communications between any party and the expert will be in writing with copies to all parties.
- e. Testimony at Trial.** If an expert witness appointed by the court testifies at trial:
- i. **Questioning.** The court ordinarily should not call and question the witness. The witness should be examined by counsel, in an order determined by the court.
 - ii. **No Identification as Court Appointee.** The witness should not ordinarily be identified as one appointed by the court.
 - iii. **If Identified as Court Appointee.** If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:
 - A. It is not to give greater weight to the testimony of a court-appointed expert than any other witness simply because the court chose the expert;
 - B. The jury may consider the fact that the witness is not retained by either party in evaluating the witness's opinion; and

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- C. The jury should carefully assess the nature of, and basis for, each witness's opinion.

Comment

Trial judges have inherent authority to appoint experts as technical advisors to assist the court. *See, e.g., Reilly v. United States*, 863 F.2d 149, 156-57 (1st Cir. 1988); Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 949-51 (1997). They may also appoint expert witnesses for testimonial purposes under Federal Rule of Evidence 706(c) and similar provisions in force in most states. ² Joseph & Saltzburg, *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* §§ 55.2, 55.3 (Supp. 1994). This Standard applies to experts appointed in either capacity.

Courts should be reluctant to have court-appointed experts testify in jury trials. Identification of an expert with the court may artificially enhance that expert's status and confer a false aura of authority and credibility.¹ It may be difficult for a jury to understand why a court-appointed expert was retained and how the expert is being compensated. The process through which a court-appointed expert arrives at an opinion is often one from which counsel have been excluded. The result may be that neither counsel is comfortable with the approach the expert has taken.

A court-appointed expert may aid both in decision-making and in settlement. Among the myriad services such an expert may provide are: to advise the court on technical issues, to provide the jury with background information, or to offer an opinion on disputed technical issues. The appointment of experts by the court is rare, among other reasons, because of: (1) the cost involved; (2) the difficulty of finding truly neutral experts; (3) the concern that testimony from a court-appointed expert -- if the fact of court appointment is disclosed to the jury² -- may be perceived as the court

¹ In European countries in which judges decide civil cases to the exclusion of juries, court-appointed experts are not uncommon and, according to a noted comparative law scholar, “[t]he fear is spreading that courts are covertly delegating decision-making powers to an outsider without political legitimacy. ... Regularly subjected to dueling experts, adjudicators need not surrender to the authority of science as blindly as those confronted with a single opinion of their chosen expert: they can decide whom to believe by engaging their ordinary judgments of witness[es]’ credibility.” Damaska, *EVIDENCE LAW ADRIFT* 151-52 (1997).

² It need not be, under Fed. R. Evid. 706(c) and analogous state provisions.

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taking sides in the controversy; (4) the potential delay involved; and (5) the recurring problem that, by the time the need is known, the appointment may entail significant delay in the proceedings. *See generally* Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 11.51 (2004); Cecil & Willging, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 (Federal Judicial Center 1993) ("Cecil & Willging, COURT-APPOINTED EXPERTS").

The court is not free to engage in substantive *ex parte* discussions with court-appointed experts on the merits of the case. Canon 3A(4) of the Code of Conduct for United States Judges, for example, provides: "A judge should ... except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Subdivision (c) of this Standard is designed to afford the court the latitude it needs to communicate with the court-appointed expert while preserving the parties' rights to be fully apprised of discussions between judge and expert pertaining to the merits.

The procedures suggested in this Standard are drawn from a variety of sources, including the *Reilly* case; the Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION 4th § 11.51 (2004); Cecil & Willging, COURT-APPOINTED EXPERTS; and Cecil & Willging, *Court-Appointed Experts*, in Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 525-71 (1994); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, JURY TRIAL INNOVATIONS § 4.4 (Munsterman *et al.* eds., 2d ed. 2006). *See also* Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 954-58 (1997).

Most evidence codes permit the trial court, in its discretion, to disclose the fact of the appointment of the expert witness by the court. *See, e.g.*, Fed. R. Evid. 706(c); Cal. Evid. Code § 722(a); and the numerous state evidence codes modeled on the Federal Rules. Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES at §§ 55.2, 55.3. However, this Standard reflects the view -- borne out by Federal Judicial Center research -- that, if the expert's court-appointed status is disclosed, "concern about undue influence [on the jury] seems reasonable." Cecil & Willging, COURT-APPOINTED EXPERTS at 51.

The court may prohibit *ex parte* communications between the parties and a court-appointed expert. This may be impractical where, for example, the expert needs to contact one or more parties for specimens to examine. Subdivision d. ii. is operative only if the court has not prohibited

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such contact. Subdivision d.i. contemplates that, if the court-appointed expert is to testify at trial, the expert will be subject to the same type and degree of discovery (*e.g.*, deposition, disclosure, interrogatories) as a party-proffered expert.

7. Use of Tutorials to Assist the Court

a. Pretrial Use of Tutorials. In cases involving complex technology or other complex subject matter which may be especially difficult for non-specialists to comprehend, the court may permit or require the use of tutorials to educate the court. Tutorials are intended to provide the court with background information to assist the court in understanding the technology or other complex subject matter involved in the case. Tutorials may, but need not, seek to explain the contentions or arguments made by each party with respect to the technology or complex subject matter.

b. Selection of Type of Tutorial.

- i. In any case in which the court believes one or more tutorials might be useful in assisting it in understanding the complex technology or other complex subject matter, the court should invite the parties to express their views on the desirability of one or more tutorials.
- ii. Once the court decides to permit or require one or more tutorials, it should invite the parties to suggest the subject matter and format of each tutorial.
- iii. If the parties cannot agree on the subject matter and format, the court should invite each party to submit a description of any tutorial it proposes and to explain how that tutorial will assist the court and why it is preferable to the tutorial proposed by another party. The court may approve one or more tutorials proposed by the parties, or the court may fashion its own tutorial after providing the parties with an opportunity to comment on the court's proposed subject matter and format.

c. Procedures for Presentation. A court may consider the following procedures for the presentation of tutorials:

- i. An in-court or recorded presentation by an expert jointly selected by the parties.

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- ii. An in-court or recorded presentation by one or more experts on behalf of each party.
 - iii. An in-court or recorded presentation by counsel for each party.
 - iv. A combined in-court or recorded presentation by counsel and one or more experts on behalf of each party.
 - v. An in-court or recorded presentation by an expert appointed by the court, which may include cross-examination by counsel for each party.
 - vi. Recorded presentations that have been prepared for generic use in particular kinds of cases by reliable sources such as the Federal Judicial Center.
- d. Trial Use of Tutorials.** In cases involving complex technology or other complex subject matter which may be especially difficult for non-specialists to comprehend, the court may permit or require the use of tutorials to educate the court or jury during one or more stages of the trial. Trial tutorials are intended to provide the court or jury with background information to assist in understanding the technology or other complex subject matter involved in the case. Tutorials may, but need not, seek to explain the contentions or arguments made by each party with respect to the technology or complex subject matter.
- e. Selection of Type of Tutorial.** The court should use the process set forth in 7.b. above.
- f. Procedures for Presentation.**
- i. In a bench trial, the court may consider using any of the procedures set forth in 7.b. above.
 - ii. In a jury trial, the court should consider the use of tutorials in connection with interim statements and arguments as provided in Standard 9.
 - iii. In both bench and jury trials, the court should provide parties with a full opportunity to present admissible evidence in support of their cases that may differ from or quarrel with information presented in a tutorial and to argue that the information presented in a tutorial should be rejected by the court or jury.

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Comment

In the context of patent cases, it is well recognized that the Court may conduct a tutorial, the purpose of which is to receive expert testimony for background and education on the technology implicated by the presented claim construction issues in assisting the Court in the task of construing the patent. *See, e.g., Starpay.com L.L.C. v. Visa Int'l Serv. Assoc.*, No. 3-03-CU-976-L, 2005 WL 1552769, at *1 (N.D. Tex.) (citing *Key Pharmaceuticals v. Hercon Laboratories, Corp.*, 161 F.3d 709, 716 (Fed. Cir. 1998)). Accordingly, tutorials are common in patent cases. *See, e.g., Uniloc USA, Inc. v. Microsoft Corp.*, 447 F. Supp. 2d 177, 181 (D.R.I. 2006); *Medtronic Navigation, Inc. v. Brainlab Medizinische Computersystems GMBH*, 417 F. Supp. 2d 1188, 1201 (D. Colo. 2006); *Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc.*, 417 F. Supp. 2d 341, 344 (S.D.N.Y. 2006); *Pergo, Inc. v. Faus Group, Inc.*, 401 F. Supp. 2d 515, 518 (E.D.N.C. 2005); *Honeywell Int'l, Inc. v. Universal Avionics Systems Corp.*, 343 F. Supp. 2d 272, 279 (D. Del. 2004).

The use of tutorials is not, however, limited to patent cases, or even to technology cases. For example, in *In Re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 67 (D. Mass. 2005), the Court received tutorials on the structure of the pharmaceutical markets.

Indeed, tutorials have been recognized to be so helpful in understanding complex subjects, that at least one Circuit Judge has expressed regret where the Circuit Court did not have the benefit of a tutorial that was presented to the District Court but not recorded:

I salute the district court and the parties for having held a tutorial on the technology. It was undoubtedly valuable to the district judge. The only problem is, it was unreported (which is understandable, as a principal benefit of a tutorial is the opportunity for informal exchange) and thus, it was unavailable to assist *us*. In future cases where such formats are used – and I encourage it, having benefited from similar tutorials when I served as a district judge – I urge district judges and litigants to consider the possibility of videotaping the tutorial for whatever assistance it may be to the court of appeals.

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Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1093 (9th Cir. 2005)
(Rymer, J., concurring).

PART THREE: JUDICIAL CONTROL OVER TRIAL PRESENTATION

8. Limits on Trial Presentation.

- a. Procedure.** Limits on trial presentation should be imposed only after the court has:

 - i. Made an informed analysis of the case and of the parties' plans for trial;
 - ii. Discussed with the parties the possibility of voluntary, self-imposed limits; and
 - iii. Afforded the parties the opportunity to be heard as to the amount of time, or number of witnesses or exhibits, they believe they require in order to present their positions fairly.

- b. Discretion.** Subject to the judge's ultimate responsibility to ensure a fair trial and to afford the parties a fair opportunity to be heard, the court should consider whether to enforce voluntary limits agreed to by the parties or to impose reasonable limits on trial presentation, including limits on:

 - i. The total time to be allowed each party or side for all direct and cross-examinations;
 - ii. The length of examination and cross-examination of particular witnesses;
 - iii. The number of witnesses or exhibits to be offered on a particular issue or in the aggregate; and
 - iv. The length of opening statements and closing arguments.

- c. Notice to Parties.** The court should notify the parties of any limits it intends to impose sufficiently in advance of trial to permit them to prepare their cases accordingly.

- d. Factors.** In fashioning trial presentation limits, the court should consider:

 - i. The complexity of the case;
 - ii. The claims and defenses of the parties;

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- iii. The respective evidentiary burdens of the parties;
 - iv. The subject matter of evidence that is considered for limitation; and
 - v. Whether proposed limits allocate trial time fairly.
- e. **Types of Limits.** If the court determines that limits are appropriate, it is generally preferable to limit the total amount of time allocated to each party or side, rather than to limit the number of witnesses or exhibits, or the duration of a particular examination.
- f. **Modification.** The court should reassess imposed limits in light of developments during trial, and may grant an extension upon a showing of good cause. After trial has commenced, the court ordinarily should not shorten imposed limits, in light of the parties' reliance thereon, absent disposition of claims or defenses as to which evidence or argument was planned.
- g. **Methodology.** If the Court determines to limit the total time allowed to each party, it should enter a written order setting forth those limits and describing the methodology for implementing them.
- i. The Order should make clear what activities are and are not included in the total time limit. Specifically, it should state whether the limit applies to opening statements, closing statements, all witness examinations (whether conducted live in Court or by the reading or playing of previously taken testimony), and time spent reading evidence into the record or publishing evidence to the jury. In general, the time limit should not apply to breaks, time spent arguing motions, objections or discussing other matters with the Court.
 - ii. The Order should designate a neutral person or persons who will be in charge of timing the proceedings. That person could be the Judge, the court reporter, or some designated courtroom official such as a courtroom deputy or clerk.
 - iii. The Order should state that at the end of each trial day, the Court should announce the total elapsed time to be charged to each party for that day and the total time remaining for each party. Those times should be noted for the record at the end of each trial day. The Order should require that any disputes about elapsed time should be raised and resolved immediately.

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Comment

The ABA Principles for Juries and Jury Trials provide that the Court “after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.” See Principle 12A.

Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This standard suggests for the Court several steps and procedures in furtherance of that objective.

The power of the court to impose reasonable time limits on a trial derives from the inherent power of the court and from codified sources such as Fed. R. Civ. P. 16(c)(4) and (15), Fed. R. Evid. 403 and 611(a), and analogous provisions in force in most states. *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1170-71 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. App. 1991); *Varnum v. Varnum*, 586 A.2d 1107, 1114-15 (Vt. 1990); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4TH §§ 11.644, 12.35 (2004); 2 Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 13.2, 13.3 (Supp. 1994); 2 *Id.* §§ 45.2, 45.3.

This Standard is premised on the principle that courts should be reluctant to interfere with counsel's control over the presentation of their case and should ensure that each side has the opportunity to present its case fully and fairly, and on the corollary that trial courts therefore "should not exercise this discretion as a matter of course," *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3d Cir. 1995), and witnesses should not be excluded "on the basis of mere numbers." *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1170-71 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). In many cases, efficient management of court time can obviate the need for the imposition of time limits. See generally FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA at Part D, Recommendations 31-34, pp. 66-68 (1993).

Tailored judicial scrutiny is necessary before any limits are imposed. The court should ascertain at the outset whether counsel can voluntarily satisfy the court's reasonable concerns about its docket and the jury since, by definition, they know the case far more intimately than the court. For the same reason, if limits are appropriate, it is generally preferable to limit the total amount of time allocated to each party or side, rather than to limit the number of witnesses or exhibits, or the duration of a

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particular direct or cross-examination. *See* Hon. Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, 12 LITIGATION No. 1 at 7 (Fall 1985); Hon. William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 579 (1990); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, JURY TRIAL INNOVATIONS § 4.1 (Munsterman *et al.* eds., 2d ed. 2006).

Before imposing limits, the court should indicate to counsel its own view of the time that should be required for trial in cases in which the court believes that counsel's assessment is unrealistic or that the time requested is so clearly excessive as to amount to an unacceptable drain on public resources and imposition on the jury. The court should provide counsel with an opportunity to reassess their time requirements and seek, where possible, to reach a consensus on a realistic trial schedule before imposing its own view. In no event should the court permit any party to be prejudiced because of arbitrary time limits.

The substance of this Standard is drawn in part from the case law (*see, e.g., General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1508 (9th Cir. 1995); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3d Cir. 1995)); the Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION 4th §§ 12.24, 12.35 (2004); and ABA TRIAL MANAGEMENT STANDARDS 1, 2 and 3 (1992).

9. Interim Statements and Arguments.

- a. **Discretion.** In cases of appropriate complexity, the court should afford counsel the opportunity during trial to address the jury to comment on, or to place in context, the evidence that has been, or will be, presented.
- b. **Factors.** In deciding whether to permit counsel to address the jury during trial, the court should consider:
 - i. The duration of the trial;
 - ii. The number and complexity of the legal and factual issues; and
 - iii. The volume and complexity of the evidence.
- c. **Procedure.**
 - i. The court should allow each side to address the jury.

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- ii. Time should be allocated equally to each side or equitably if there are conflicting interests among parties on the same side.
- iii. The court may:
 - A. Allocate to each party or side a total amount of time that may be used at counsel's discretion at any reasonable point during the trial;
 - B. Allocate to each party or side a certain amount of time that must be used within prescribed intervals or will be forfeited; or
 - C. Schedule interim addresses at prescribed points during the trial.
- iv. If timing is left to counsel's discretion pursuant to subdivision c. iii. A. or B., counsel may not choose a time that interferes with another party's presentation of evidence or with the court's schedule.
- v. Counsel's remarks should be confined to the meaning or significance of the evidence and its relationship to the issues.
- vi. The court should remind the jury of the difference between evidence and counsel's statements.

Comment

The ABA Principles for Juries and Jury Trials identify “mini-or interim openings and closings” as a trial technique to be considered by the parties and courts to enhance juror comprehension. *See* Principle 13G. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This standard outlines suggested procedures for implementing such openings and closings.

Permitting counsel to address the jury to comment on the evidence in long or complex cases, or cases dealing with particularly complicated evidence or issues, is endorsed by the Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION* 4th §§ 12.21, 12.34 (2004), and is not uncommon. *See, e.g., Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1008 (2d Cir. 1995); *ACandS, Inc. v. Godwin*, 340 Md. 334, 407-09, 667 A.2d 116, 152-53 (1995). *See also* Robert E. Litan (ed.), *VERDICT*:

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ASSESSING THE CIVIL JURY SYSTEM 389 (Brookings 1993); Hon. Robert M. Parker, *Streamlining Complex Cases*, 10 REV. LITIG. 547, 553-54 (1991); Hon. Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, 12 LITIGATION No. 1 at 66-67 (Fall 1985). This Standard adopts the flexible approach urged by these authorities, recognizing that juror comprehension may substantially be advanced by affording counsel the opportunity to summarize and place in context evidence that has been, or is to be, presented.

Whether these interim remarks to the jury should be characterized as "interim argument," which is the description frequently found in the cases (*see, e.g., Armstrong and ACandS, supra*), or "supplementary opening statements," which is the Federal Judicial Center's phrase (Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 12.34 (2004)), is less important than a clear recognition of the purpose: to afford counsel the opportunity to comment on the meaning and significance of evidence as it is presented. Highly inflammatory rhetoric is out of place. *See, e.g., ACandS*, 340 Md. at 407-09, 667 A.2d at 152-53.

10. **Order of Proceedings.** In cases of appropriate complexity, the court should exercise its discretion to alter the traditional order of trial where that will enhance jury comprehension and recollection or facilitate the effective presentation of evidence and argument, without unfair advantage to either side. Among the alternatives the court should consider are:
 - a. **Venire Panel.** In advance of voir dire, presenting to the entire venire panel:
 - i. Preliminary instructions
 - ii. Opening statements (in either abbreviated or complete form).
 - b. **Issue Organization.** Organizing the trial by issue, or clusters of issues, with each party presenting its opening statement and evidence on a designated subject matter before proceeding to the next.
 - c. **Interim Instructions.** Giving interim instructions.
 - d. **Interim Statements and Arguments.** Permitting interim statements and arguments (*see* Standard 9, *supra*).
 - e. **Sequential Verdicts.** Submitting issues or claims to the jury sequentially, if a decision on one issue may render others moot or may facilitate

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settlement, or if alternative claims involve differing or conflicting theories of liability or damages.

- f. **Post-Impasse Argument.** Permitting additional arguments by counsel after the jury has reached an impasse in deliberations.

Comment

The ABA Principles for Juries and Jury Trials further address the giving of preliminary instructions. *See* Principle 6C. 1. and 2, and Comment Subdivision C. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

The court is vested with the inherent power to control the mode and order of proceedings before it, a power that is codified in part in Fed. R. Civ. P. 16(c)(13)-(14), 42, 50 and 52, and Fed. R. Evid. 611(a), and analogous provisions in force in most states. *See, e.g.*, 2 Joseph & Saltzburg, *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* §§ 45.2, 45.3 (Supp. 1994).

This Standard is drawn from a variety of sources in addition to the general precepts of Fed. R. Civ. P. 16(c)(13)-(14), 42, 50 and 52, and Fed. R. Evid. 611(a), including Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION* 4th §§ 12.34, 12.432 (2004) (sequencing of evidence and arguments; sequential verdicts; preliminary instructions); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, *JURY TRIAL INNOVATIONS* § 6.11 (Munsterman *et al.* eds., 2d ed. 2006) (post-impasse argument); Hon. William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 594-96 (1990) (issue organization; interim statements or summations); and Saltzburg, *The Quality of Jury Decisionmaking*, in Robert E. Litan (ed.), *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 361 (Brookings 1993) (sequential verdicts).

11. Demonstrative Evidence.

- a. Preview.** As with all other exhibits, the court should afford each party an adequate opportunity to review, and interpose objections to, demonstrative evidence before it is displayed to the jury.
- b. Unwieldy Evidence.** Voluminous, complicated or other information that cannot conveniently be examined in court should be presented, when practicable, in the form of a chart, diagram, graph or other demonstrative evidence. At the request of a party, the court should provide guidance concerning admissibility before substantial expense is incurred.

Comment

Demonstrative evidence is the generic label applied to exhibits that share the common characteristic of visualizing for the factfinder data that have been, or can be, admitted into evidence. Common types include diagrams, charts, graphs, models, photographs, maps, plats, videotapes, animations, and computer simulations. Although demonstrative evidence has occasionally been contrasted with "real" evidence, most courts now hold that in some circumstances, and with a proper foundation, demonstrative evidence may be admitted for all. For example, a chart that summarizes voluminous, admissible data may be independently admissible into evidence under Rule 1006 of the Federal Rules of Evidence and analogous provisions in force in most states (2 Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 70.2-70.3 (Supp. 1994)). Similarly, photographs are admissible as substantive evidence. *United States v. May*, 622 F.2d 1000, 1007 (9th Cir.), cert. denied, 449 U.S. 984 (1980); *State v. Pulphus*, 465 A.2d 153, 161 (R.I. Sup. Ct. 1983); 3 Wigmore, EVIDENCE § 790 (Chadbourn rev.).

Subdivision a. Because demonstrative evidence can be quite potent, it should not be shown to the jury until the court is satisfied that the evidence is admissible. This Standard therefore articulates the practical necessity that the opponent be afforded the opportunity to view the exhibit - - and raise any objection -- before it is shown to the jury. This Standard reflects the procedure suggested by the case law and the Federal Judicial Center. See, e.g., *Robinson v. Missouri*, 16 F.3d 1083, 1088 (10th Cir. 1994); *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981); *Mills v. Nichols*, 467 So. 2d 924, 930-31 (Miss. Sup. Ct. 1985); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 12.31 (2004). Under the 1993 amendments to the Federal Rules of Civil Procedure, Rules

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26(a)(2)(B)-(C) and 26(a)(3)(C) require the pretrial disclosure of all non-impeachment exhibits, including demonstrative evidence. *See also* Standard 20 (Motions in Limine).

Subdivision b. Generally, "[c]ourts look favorably upon the use of demonstrative evidence because it helps the jury understand the issues raised at trial." *People v. Burrows*, 148 Ill. App. 3d 208, 213, 498 N.E.2d 682 (1986). *See also* Hon. William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 588 (1990) ("Much evidence becomes more comprehensible when presented with visual aids, such as a chart summarizing data, a chronology, an enlarged picture of an object, a diagram of a building, or a map."). Exercising powers such as those codified in Federal Rule of Evidence 611(a), which most states have adopted (2 Joseph & Saltzburg, *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* §§ 45.2-45.3 (Supp. 1994)), the court should encourage counsel to package information in the most concise and understandable format. At the same time, because the reduction of voluminous or complicated data into demonstrative form can be expensive, the court should provide a requesting party with a preliminary ruling or at least parameters of admissibility before substantial expense is incurred. This subdivision reflects the view set forth in the Federal Judicial Center's *MANUAL FOR COMPLEX LITIGATION* 4th §§ 12.31, 12.32 (2004), and in American Bar Association Section of Litigation/Brookings Institution symposium report, *CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM* 22 (1992).

12. Summary Exhibits and Witnesses.

- a. **Discretion.** In cases of appropriate complexity, if it will assist the jury to understand the evidence or to determine a fact in issue, the court may receive for illustrative purposes
 - i. a summary of previously-introduced evidence in the form of a chart, diagram, graph or other demonstrative exhibit, and
 - ii. accompanying testimony explaining the exhibit and synopsising the evidence that it summarizes, provided that:
 - A. all of the summarized items have previously been received in evidence;

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- B. the preparer of the summary, or a person suitably knowledgeable as to its preparation and contents, is or has been made available for cross-examination; and
 - C. the summary and any accompanying testimony are offered in a party's case-in-chief or the court finds exceptional circumstances that warrant use of summary evidence during rebuttal.
- b. Factors.** Among the factors the court may consider in deciding whether to receive a summary pursuant to Subdivision a. are:
- i. The length of the trial;
 - ii. The number of the issues;
 - iii. The complexity of the issues;
 - iv. The number of witnesses;
 - v. The duration and contents of the testimony;
 - vi. The number and volume of the exhibits;
 - vii. The contents of the exhibits;
 - viii. The accuracy of the summary; and
 - ix. Whether the proponent has made the summary available for inspection by adverse parties sufficiently in advance of its offer into evidence to provide the adverse parties with a fair opportunity to challenge it.
- c. Marked as Exhibit.** The summary should be marked as an exhibit whether or not the court admits the summary into evidence. If an objection to the summary is made and overruled, either party should be permitted to make the summary part of the record on appeal.
- d. Cautionary Instructions.** Prior to receiving a summary pursuant to Subdivision a, the court should instruct the jury that:
- i. The summary is not independent evidence but provided only to assist them in evaluating the evidence;

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- ii. The jury should closely examine the evidence that is summarized and the accuracy of the summary; and
- iii. The jury should disregard the summary to the extent that it finds the summary inaccurate or rejects the underlying evidence that is summarized.

Comment

This Standard addresses illustrative, not substantive, summaries. Accordingly, it does not address exhibits that are admissible for substantive purposes pursuant to Federal Rule of Evidence 1006 or analogous provisions in force in most states. An exhibit offered pursuant to Rule 1006 must satisfy the requirements of that rule — namely, the underlying exhibits (i) must be "voluminous," (ii) must consist of "writings, recordings, or photographs," and (iii) must be admissible, but (iv) need not actually have been admitted into evidence as long as they have reasonably been "made available for examination or copying, or both" in advance of trial.

This Standard deals instead with illustrative exhibits offered pursuant to such rules as Fed. R. Evid. 611(a) (and state counterparts in force in most jurisdictions) to summarize the evidence that has previously been offered in evidence at trial. It is both broader and narrower than a Rule 1006 summary. An illustrative summary under this Standard is broader than a Rule 1006 summary in that it need not, for example, summarize only "writings, recordings, or photographs" but may also summarize prior trial testimony, including expert opinion. An illustrative summary under this Standard is narrower than a Rule 1006 summary in that, for example, the items summarized must actually have been received in evidence, while the items summarized in a Rule 1006 summary need merely be admissible and have been made available to the opposition.

This Standard is derived from substantial case law addressing the use, for illustrative purposes, of summary exhibits and witnesses. As reflected in the Standard, the cases generally require that the summarized evidence be received for substantive purposes before the summary is allowed; that the summary be offered during the case in chief— rather than as an anticipatory closing shortly before deliberations begin; and that an appropriate limiting instruction be given to the jury. The cautionary instruction is also drawn from the case law. See generally *United States v. Casas*, 356 F.3d 104 (1st Cir. 2004); *United States v. Fullwood*, 342 F.3d 409, 413-414 (5th Cir. 2003); *United States v. Buck*, 324 F.3d 786, 790-92

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(5th Cir. 2003); *United States v. Griffin*, 324 F.3d 330, 348-350 (5th Cir. 2003); *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001) cert. denied, 535 U.S. 1016 (2002); *United States v. Johnson*, 54 F.3d 1150, 118 (4th Cir. 1995); *United States v. Sutherland*, 929 F.2d 765, 779-90 (1st Cir. 1991); *United States v. Lewis*, 759 F.2d 1316, 1329 n.6 (8th Cir. 1985); *United States v. Radseck*, 718 F.2d 233, 237-238 (7th Cir. 1983), cert. denied 465 U.S. 1029 (1984); *United States v. Lemire*, 720 F.2d 1327, 1346-1350 (D.C. Cir. 1983); *United States v. Atchley*, 699 F.2d 1055, 1059 (11th Cir. 1983); *United States v. Behrens*, 689 F.2d 154, 161 (10th Cir.), cert. denied 103 S. Ct. 573 (1982). See generally Joseph, MODERN VISUAL EVIDENCE § 9.2 (Supp. 2003).

- 13. Multiple Parties & Questioning.** In a case involving multiple parties, the court should encourage the parties to cooperate in, coordinate, and streamline, the presentation of evidence and the making of objections, and it should be receptive to their efforts to do so. Unless the parties agree to the contrary, the court should permit each separately-represented party to develop the testimony of each witness, subject to reasonable time limitations and avoidance of repetition.

Comment

In any case involving multiple plaintiffs, defendants or other parties on the same side of the caption, there is sometimes an understandable temptation to restrict counsel for co-parties from independently exploring the same subject matter. There is an inherent tension between the systemic need to avoid the needless presentation of cumulative evidence and the parties' need to ensure that salient evidence has been adequately elucidated. Because the parties are most familiar with the evidence, it is sensible in the first instance to encourage them to attempt to reach agreement on procedures that will facilitate the presentation of evidence -- *e.g.*, by designating principal examiners or cross-examiners for particular witnesses -- and to permit an objection made by one party to extend to all parties on the same side of the caption. Except in unusual circumstances, and subject to reasonable time limitations and avoidance of repetition, the court should ordinarily be receptive to the parties' efforts in this regard.

While it is appropriate and necessary for the judge to be vigilant about avoiding waste of court time, the judge should simultaneously be sensitive to arguments that certain subject matter has not been covered, or has been only inadequately covered, by prior questioning. The court should also take into account the existence of any differences in position among parties that are ostensibly aligned in interest (whether or not those differences are in the nature of, or have matured to, cross-claims, third-

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party claims or any other sort of formal adversity) and the risk of potential prejudice if apparent coordination by counsel on questioning might generate an inference on the part of the jurors going to the merits (*e.g.*, in a case alleging civil conspiracy). Hence, if the parties are unable to reach agreement, each party should presumptively be afforded an opportunity to examine each witness in a non-repetitive, expeditious fashion.

With respect to voir dire in cases involving multiple parties, *See* Principle 11B. 2. of the ABA Principles for Juries and Jury Trials. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

PART FOUR: EXPERT AND SCIENTIFIC EVIDENCE

14. **"Qualifying" Expert Witnesses.** The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.

Comment

It is not uncommon for a proponent of expert testimony to tender an expert witness to the court, following a recitation of the witness's credentials and before eliciting an opinion, in an effort to secure a ruling that the witness is "qualified" as an expert in a particular field. The tactical purpose, from the proponent's perspective, is to obtain a seeming judicial endorsement of the testimony to follow. It is inappropriate for counsel to place the court in that position.

A judicial ruling that a proffered expert is "qualified" is unnecessary unless an objection is made to the expert's testimony. If an objection is made to an expert's qualifications, relevancy of expert testimony, reliability or any other aspect of proffered expert testimony, the court need only sustain or overrule the objection. When the court overrules an objection, there is no need for the court to announce to the jury that it has found that a witness is an expert or that expert testimony will be permitted. The use of the term "expert" may appear to a jury to be a kind of judicial imprimatur that favors the witness. There is no more reason for the court to explain why an opinion will be permitted or to use the term "expert" than there is for the court to announce that an out-of-court statement is an excited utterance in response to a hearsay objection.

Because expert testimony is not entitled to greater weight than other testimony, the practice of securing what may appear to be a judicial endorsement is undesirable. As United States District Judge Charles R. Richey has observed in a related context, "It may be an inappropriate judicial comment ... for the court to label a witness an 'expert.'" Hon. Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 554 (1994). The prejudicial effect of this practice is accentuated in cases in which only one side can afford to, or does, proffer expert testimony.

When the Advisory Committee on the Federal Rules of Evidence recommended what became the December 1, 2000 amendment to Fed. R.

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Evid. 702, it cited Judge Richey and ended the Advisory Committee Note accompanying the amendment with the following paragraph:

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts.'" Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials) .

This Standard suggests that the court should not use the term "expert" and that the proponent of the evidence should not ask the court to do so. The party objecting to evidence also has a role to play in assuring that the court does not appear to be anointing a witness as an "expert." A party objecting that a witness is not qualified to render an opinion or that a subject matter not the proper subject of expert testimony should avoid using the word "expert" in the presence of the jury. Any objection in the presence of the jury should be "to the admissibility of the witness' opinion." If the objecting party objects that testimony is inadmissible "expert" testimony and the court overrules the objection, it may appear that the judge has implicitly found the witness to be an "expert." When an objection is made, if the proponent wishes to argue the matter, it should be outside the hearing of the jury. *See* Fed. R. Evid. 103 (c) (providing that inadmissible evidence should not be heard by the jury).

The utility of the Standard can be undermined if the court is not careful to excise the term "expert" from the instructions it gives to the jury before it deliberates. Juries can be fully instructed on their role in assessing credibility without any mention of the term. The following instruction is illustrative:

Some witnesses who testify claim to have special knowledge, skill, training, experience or education that enable them to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience

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or education does not require you to believe the witness, to give such a witness's testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And, it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.

6 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual 144 ((8th ed. 2002) .

PART FIVE: MOTIONS IN LIMINE

15. **Motions & Rulings.**

- a. **Timing & Subjects.** In advance of trial, counsel should seek, and the court should provide, judicial resolution of significant evidentiary and legal issues that are susceptible of pretrial adjudication and are likely to have an impact of consequence on the trial. Counsel should refrain from making, and the court should defer ruling on, any motion in limine if the nature of the evidence at issue cannot fairly be discerned, or its relevance or significance determined, prior to trial.
- b. **Conferral Requirement.** Counsel should be required to confer in an effort to resolve motions in limine before filing any with the court.
- c. **Rulings.** The court should issue its ruling before opening statements begin, stating for the record whether its decision is final or whether it prefers to revisit the issue during trial if the objection or proffer is renewed.

Comment

The use of the motion in limine (literally a "threshold motion") to secure a ruling on the admissibility of evidence prior to trial is firmly established in state and federal court. *See generally* Fed. R. Civ. P. 16(c)(3)-(4) and analogous state provisions; Saltzburg, *Tactics of the Motion in Limine*, 9 LITIGATION No. 4 at 17 (1983); Hyde, *The Motion in Limine*, 27 U. FLA. L. REV. 531 (1975). This Standard is predicated on the recognition that certain types of evidentiary rulings often require context -- e.g., whether certain evidence is: (1) relevant; (2) more probative than prejudicial; (3) cumulative; (4) unduly delaying, time-consuming or confusing; and (5) sufficiently trustworthy to fall within certain hearsay exceptions.

The Standard also operates to mitigate some of the practical problems associated with the fact that the rules as to the appealability of *in limine* decisions are far from clear. *Compare United States v. Vest*, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), *cert. denied*, 488 U.S. 965 (1988); *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a

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formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider"); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear").

This issue can largely be resolved if the court makes it clear whether its pretrial ruling is final. *See, e.g., Rosenfeld v. Basquiat*, 78 F.3d 84, 90 (2d Cir. 1996) ("Because the district court at the outset made a definitive ruling ... on the admissibility..., there was no need ... to challenge admissibility again during the trial when plaintiff asked to introduce the testimony."). This is consistent with the trend toward efficient judicial case management through effective and meaningful pretrial proceedings. A clear record not only permits parties to plan their trial strategy -- and, potentially, their approach to settlement -- but also avoids unnecessary appellate issues relating to appealability.

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PART SIX: BENCH TRIALS

16. Submissions & Rulings.

- a. **Ruling from Bench.** In deciding the appropriateness of ruling from the bench at the conclusion of a trial to the court, the judge should consider the duration of the trial, the complexity of the legal and factual issues involved, the trial briefs, pretrial order or other submissions previously received from the parties, and the prospective advantage afforded by an opportunity to review the transcript, and to receive post-trial submissions from the parties, before ruling. Rulings should be made in a timely fashion.
- b. **Submissions from Counsel.** Prior to rendering its decision, the court should permit counsel to furnish an oral or written statement of position on the law and facts. If complicated legal or factual issues are involved, and depending on the nature and extent of other submissions previously received, the court should ordinarily invite the parties to submit proposed findings of fact and conclusions of law (or like submissions however denominated under applicable law).

Comment

The desire to issue decisions promptly should be tempered by the realization that, as a trial progresses, it is not necessarily a great deal easier for the court than for a jury to keep in mind all of the evidence, and to apply the law to it, particularly where complex legal and factual issues are involved. The present Standard urges the court to permit the parties to submit proposed findings and conclusions to facilitate the decisional process. At the same time, this Standard recognizes that, in particular cases, the parties' prior submissions may suffice and the cost and additional delay will not offset the potential benefit of written post-trial submissions.

17. **Continuity of Proceedings.** Subject to the exigencies of its calendar and the needs of the parties, the court should endeavor to hear bench trials without lengthy continuances and interruptions in the proceedings, striving for the same level of continuity it insists on in jury trials.

Comment

Jury trials are ordinarily tried continuously, from opening statement to closing argument, in deference to the schedules of the jurors and in recognition of the adverse effect that lengthy continuances have on jury

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comprehension. Bench trials, in contrast, are sometimes tried very sporadically, with days or weeks intervening between witnesses or in the midst of a single witness's testimony. This approach not only causes hardship to the parties -- who must pay for constant refreshers of counsel -- and to the witnesses, whose schedules may repeatedly be interrupted by readiness alerts, but can also have an adverse effect on the judicial finder of fact.

This Standard takes the position that, subject to the exigencies of its calendar, the court should endeavor to try bench trials in the same continuous fashion that it tries jury trials. It recognizes, however, that in some circumstances the needs of the parties -- *e.g.*, the availability of witnesses or the most expeditious sequencing of the proceedings (*see* Standard 10) -- may warrant an exception to the presumption that bench trials ought to be tried continuously. *See generally* FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA at Part D, Recommendation 31, pp. 66-67 (1993).

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PART SEVEN: GENERAL

18. **Electronic Filing.**

The court should consider the use of electronic filing processes as recommended by the American Bar Association in its Standards Relating to Court Organization, Standard 1.65, "Court Use of Electronic Filing Processes."

Comment

This Standard formerly related to computer-readable submissions and provided "the Court should consider requiring the parties to serve and file court papers in computer readable form in addition to, or in lieu of, hardcopy, unless doing so would work undue hardship on a party."

On February 9, 2004, the ABA House of Delegates adopted Standard 1.65, pertaining to Court use of electronic filing processes. That Standard provides in pertinent part:

Because of the benefits accruing to the courts, the Bar and the public from the use of electronic records, courts should implement electronic filing processes. In doing so, they should follow certain general principles, adopt rules and implement electronic filing processes as follows..."

The Updated Standard has been updated to comport with the ABA Standard Relating to Court Organization, Standard 1.65.

19. **Televised Court Proceedings.** In deciding whether or in what respects to permit a court proceeding to be televised, where that is permitted by applicable law, the court should consider all relevant factors, including:

- a. The identity of the parties;
- b. The nature and subject matter of the proceeding, including any significant social, political or legal issues involved, and any public interest served by televising it;
- c. The identity of participants to the proceeding, including whether witnesses, jurors or minors are involved;
- d. The extent and duration of contemplated television coverage, including:

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- i. Whether the entirety of the proceeding, or only portions, would be televised; and
 - ii. What the broadcast equipment should, and should not, disseminate;
- e. The impact of television coverage on the proceeding and any prospective later proceeding (such as trial), including any potential prejudice to:
 - i. The importance of maintaining public trust and confidence in, and promoting public access to, the judicial system;
 - ii. The advancement of a fair trial;
 - iii. The ability to impanel an impartial jury at the time or subsequently; and
 - iv. The rights of any party, prospective witness, victim, juror or other participant, including any right to privacy, confidentiality or witness sequestration.
- f. The impact of television coverage on any law enforcement activity;
- g. The objections of any party, prospective witness, victim, juror or other participant in the proceeding; and
- h. The physical structure of the courtroom, including whether broadcast equipment can be installed and operated without disturbance to the proceeding or any other proceeding in the courthouse.

Comment

Debate has long raged over whether televising of court proceedings should be permitted. *See, e.g.,* Hunt, *Cameras in the Courts After O.J.--A Mixed Legacy*, 22 LITIGATION NEWS No. 2 at 16 (Jan. 1997); Note, *Electronic Media Access to Federal Courtrooms: A Judicial Response*, 23 U. MICH. J.L. REF. 769 (1990); Note, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827 (1996). Many state courts permit the practice, in the discretion of the trial judge. *See, e.g.,* Cal. Rule 980; McKinney's 1996 New York Rules of Court § 131. Although the Judicial Conference of the United States in March 1996 adopted a resolution "strongly urging" each federal judicial council to adopt an order prohibiting television coverage of district

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court proceedings, some federal judges permit it, and one has found a "presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings." *Katzman v. Victoria's Secret Catalog Div.*, 923 F. Supp. 580, 589 (S.D.N.Y. 1996).

It is not the intent of these Standards to take a position on the pros and cons of televising judicial proceedings, but simply to articulate the factors to be considered if the court is weighing whether to do so. The criteria set forth in this Standard are drawn from the cases and from a variety of court rules. Cal. Rule 980; McKinney's 1997 New York Rules of Court § 131.4(c); former S.D.N.Y./E.D.N.Y. Gen. Rules, App. D., R. 4(c); *Katzman*, 923 F. Supp. at 587-88; *Marisol A. v. Giuliani*, No. 95 Civ. 10533 (RJW), 1996 WL 91638 (S.D.N.Y. Mar. 1, 1996).

In implementing this Standard, the Court should be mindful of Principle 7C. of the ABA Principles for Juries and Jury Trials that provides:

If cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors' faces.

Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

20. Courtroom Technology.

- a. **Receptivity.** Judges should be receptive to using technology in managing the trial and the presentation of evidence.
- b. **Hardware.** The parties should be encouraged to agree on common courtroom hardware, consistent with their rights to confidentiality of, and exclusive access to, work product and privileged information.

Comment

Subdivision a. of this Standard is modeled on ABA TRIAL MANAGEMENT STANDARD 9 (1992). It is also the recommendation made in the American Bar Association Section of Litigation/Brookings Institution symposium report, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 19-20 (1992). See Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th §§ 11.645, 12.32 (2004).

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Subdivision b. recognizes that there is a finite amount of space available in any courtroom and that certain hardware can be shared by the parties without risk of divulging privileged or protected information -- *e.g.*, videotape recorders, monitors, and easels. To the extent that the amount of hardware can be contained, it is in the interests of all concerned to limit it.

21. Videotaped Testimony.

a. Edited by Subject Matter.

- i. If it will assist the jury to understand the evidence or to determine a fact in issue, the court should permit the parties to edit and present videotaped testimony by subject matter.
- ii. The testimony of a single witness, or of multiple witnesses, relating to designated subject matter may be combined into a single presentation.

b. Advance Ruling. Objections to, and rulings on, the admissibility of videotaped testimony should be made sufficiently in advance of its presentation to the jury to permit it to be edited to reflect the court's rulings.

Comment

This Standard operates to apply the same rules to videotape that already apply to textual depositions. It is well settled that "[v]ideotape is generally more effective [than reading a transcript] for the presentation of deposition testimony, for impeachment and rebuttal, and for reference during argument." Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION* 4th § 22.333 (2004), *citing* Michael J. Henke, *The Taking and Use of Videotaped Depositions*, 16 AM. J. TRIAL ADVOC. 151, 165 (1992) and Joseph, *MODERN VISUAL EVIDENCE* § 3.03[2][f] (1984; Supp. 1997). *See, e.g., Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 259 n.6 (5th Cir. 1985); *United States v. Tunnell*, 667 F.2d 1182, 1188 (5th Cir. 1982); *Weiss v. Wayes*, 132 F.R.D. 152, 154-55 (M.D. Pa. 1990); *Rice's Toyota World v. S.E. Toyota Dist.*, 114 F.R.D. 647, 649 (M.D.N.C. 1987). This Standard addresses only one of the myriad of issues associated with the introduction of videotaped deposition evidence.

This Standard is drawn from a variety of sources, including *MANUAL FOR COMPLEX LITIGATION* 4th § 12.333 (2004); *MODERN VISUAL EVIDENCE* § 3.03[2][c]; and Hon. Robert M. Parker, *Streamlining Complex Cases*, 10 REV. LITIG. 547, 552 (1991).

22. Organizing the Complex Case for Trial.

- a. Effective Pre-Trial Management.** In complex cases, it will assist the ultimate decision-making by the trier-of-fact, whether in a jury or bench trial, if the parties and the Court work closely together from the inception of the case to encourage prompt and meaningful judicial involvement in organizing the complex case for trial through effective pre-trial management.
- b. Cooperation Amongst Counsel and the Court.** Complex litigation places burdens on both the Court and litigants in terms of proper management of both judicial resources and the resources of the parties. Court supervision and control should be dispensed in the context of mutual cooperation and input between the Court and the attorneys that addresses and is reflective of the needs of both the Court and the parties.
- c. Input to the Court.** Counsel for the parties should assist the Court in becoming familiar with the substantive issues involved in the complex case at an early date.

 - i. The Court should request and the parties should submit at an early date a joint status report that includes a proposed Case Schedule and Litigation Plan that outlines the nature and complexity of the case, and
 - ii. Prior to the issuance of a scheduling order in the case, the Court should conduct a scheduling conference during which the Court and counsel discuss implementation of an appropriate Case Schedule and Litigation Plan.
- d. Case Schedule Milestone Dates.** The Case Schedule and Litigation Plan entered by the Court should include sequential milestone dates for the parties' submission and the Court's determination of substantive motions well in advance of any trial required pretrial statements or pretrial orders.
- e. Periodic Monitoring and Conferences.** The Case Schedule and Litigation Plan should provide for the Court's continuing monitoring of the complex case's progress through periodically scheduled status conferences, which may be telephonic for purposes of convenience, efficiencies and economics. In addition, the Court should allow the parties to request a status conference at any time during the pendency of the action.

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- f. **Early and Timely Judicial Rulings.** The Court should endeavor to familiarize itself with substantive issues in the early stages of the complex case and render timely decisions regarding disputes and motions, particularly those involving issues that can alter the course of the litigation including the costs and burdens experienced by the litigants.

Comment

This Standard is designed to provide guidance in the application and implementation of Fed. R. Civ. P. 16 in furtherance of organizing the complex case for trial. The purpose of Rule 16 is to provide for judicial control over a case at an early stage in the proceedings. The preparation and presentation of cases is thus streamlined, making the trial process more efficient, less costly, as well as improving and facilitating the purposes for settlement. Fed. R. Civ. P. 16 Advisory Committee Notes.

This Standard stresses the importance of cooperative efforts between the Court, the attorneys and their clients to prepare the complex case for trial. As courts have noted:

The purpose of Rule 16 is to maximize the efficiency of the Court system by insisting that attorneys and clients cooperate with the Court and abandon practices which unreasonably interfere with the expeditious management of cases.

Newton v. A.C. & S., Inc., et al., 918 F.2d 1121, 1126 (3d Cir. 1990).

Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the Court. The complexity of factual and legal issues makes judges especially dependent on the assistance of counsel.

Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 10.21 (2004)

The effective assistance of counsel in organizing the complex case for trial will be advanced when the court's supervision and control is dispensed in the context of mutual cooperation and between the Court and counsel. The Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 10.13 (2004) states:

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The attorneys – who will be more familiar than the judge with the facts and issues in the case – should play a significant part in developing the litigation plan and should have primary responsibility for its execution. Court supervision and control should recognize the burdens placed on counsel by complex litigation and should foster mutual respect and cooperation between the Court and the attorneys and among attorneys.

Implementation of the Standard's suggested use of milestone schedule dates and periodic monitoring conferences is in furtherance of the objectives of Fed. R. Civ. P. 16 to manage the preparation of cases for trial. In *Mulvaney v. Rivair Flying Service, Inc.* 744 F.2d 1438, 1440 (10th Cir. 1984), the Court observed:

It is enough to note that the management of cases from the time of filing the complaint until the beginning of trial had become unacceptably long, necessitating amendment of Rule 16. While on the whole, Rule 16 is concerned with the mechanics of pretrial scheduling and planning, its spirit, intent and purpose is clearly designed to be broadly remedial, allowing courts to actively manage the preparation of cases for trial.

The Standard's encouragement of periodic monitoring and conferences is consistent with the use of conferences following the initial conference in complex litigation to help the Court monitor the progress of the case and to address problems as they arise. Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION* 4th §, 11.22 (2004).

The Standard's encouragement of early and timely judicial ruling is consistent with the spirit behind Updated Civil Trial Practice Standard 16 pertaining to submissions and rulings in bench trials and the proposition that "rulings should be made in a timely fashion."

23. Judicial Involvement With Settlement.

- a. Communication of Availability of Settlement Assistance.** The court should advise the parties of available forms of settlement assistance at the first opportunity, whether at the initial case management or other hearing or in the initial scheduling or administrative order.
- b. Conferral Requirement.** The court should direct the parties to confer regarding whether and what forms of settlement assistance are appropriate

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for the case and when such assistance should be provided. The court should direct the parties to advise the court of the results of their conferral and identify any alternative dispute resolution mechanisms in which all parties consent to participate and the agreed timing of such participation.

- c. Parties in Agreement.** The court should accommodate the parties, to the extent resources are available, by providing any settlement assistance requested, including referral to available alternative dispute resolution mechanisms, such as mediation or settlement conference with a private mediator, senior, magistrate or other judge, or participation by the presiding judge in a settlement conference.
- i. If the parties prefer to proceed with a settlement conference before the presiding judge, the court should require the parties to waive recusal as a condition of the presiding judge's participation. The parties should not be offered a settlement conference with the presiding judge in the context of an expected bench trial.
 - ii. No party should be required to consent to participation by the presiding judge in a settlement conference. If consent is given, any party should be permitted to withdraw consent at any time, and notice of withdrawal of consent should be made by notice from all parties, without identification of which party is withdrawing consent. The withdrawal of consent does not affect the parties' earlier waiver of recusal.
- d. Parties Not in Agreement.** If the parties cannot agree on the use of available settlement assistance or the timing of such assistance, the court may order the parties to participate in one or more available alternative dispute resolution mechanisms, other than participation by the presiding judge in a settlement conference.
- e. No Ex Parte Contact With Third-Party Neutral.** The court should not communicate *ex parte* with any third-party neutral, including a senior, magistrate or other judge, involved in an alternative dispute resolution mechanism about the course of negotiations or the merits of the case.
- f. No Delay of Proceedings.** The court ordinarily should not delay proceedings or grant continuances to permit the parties to engage in settlement negotiations.
- g. Final Pretrial Proceedings.** Whether or not a case has previously been the subject of settlement talks or assistance, the court should ordinarily raise

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the question of settlement assistance with the parties during final pretrial proceedings. At this point, the parties should have a grounded sense of the strengths and weaknesses of their respective cases that could contribute to a resolution by settlement.

- h. Confidential Settlements.** Unless contrary to law, if the parties agree to confidentiality, the court should not require the settlement terms to be on the record, even if the court or a court-appointed third-party neutral participated in the conference leading to the settlement.

Comment

The power of a court to direct parties to participate in settlement discussions is explicitly set forth in the Federal Rules of Civil Procedure. Pursuant to Rule 16(c), a United States District Judge may, in connection with a pretrial conference, “require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.” Fed. R. Civ. P. 16(c). Failure to make a qualified representative available may result in sanctions. Fed. R. Civ. P. 16(f); *Schwartzman, Inc. v. ACF Indus., Inc.*, 167 F.R.D. 694 (D.N.M. 1996).

Consistent with the above Standard, at least on commentator, a sitting Justice of the Massachusetts Superior Court, has recently recognized the importance of obtaining the parties’ consent in the event that a judge who intends to preside over the trial of a case proposes to participate personally in a settlement conference, and has proposed the adoption of an ethical rule requiring such consent. Hon. John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices*, *Dispute Resolution Magazine* 16, 18 (2006).

Also, consistent with the Standard, the inadvisability of having a presiding judge participate in settlement negotiations in the context of a non-jury trial has been widely recognized. See *Federal Trade Commission v. Freecom Communications, Inc.*, 401 F.3d 1192, 1208 n.9 (10th Cir. 2005) (District judges assigned to hear a non-jury case should be especially hesitant to involve themselves in settlement negotiations.); Laura M. Warshawsky, *Objectivity and Accountability: Limits on Judicial Involvement in Settlement*, 1987 U. Chi. Legal F. 369; Wayne D. Brazil, *Settling Civil Suits: Litigators’ Views About Appropriate Roles and Effective Techniques for Federal Judges*, 84-99 (1985).