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Many litigants are increasingly willing to experiment with new forums for resolving their disputes. There is much interest in "alternative dispute resolution" ("ADR"), as well as increasing insistence on greater cost control for disputes which have to be litigated in a more traditional manner. Overall, many litigants are developing a more progressive mind-set which requires searching for more practical, less expensive and more effective ways of resolving litigable disputes.

Our court system has not yet developed the tools needed to implement fully this new mind-set. ADR seeks alternatives to the courts and has developed novel and cost-efficient ways to settle cases short of trial. Yet ADR has been successfully implemented in relatively few cases, leaving the vast majority of disputes to be resolved in traditional judicial forums.[1] Similarly, while new methods for controlling litigation costs have proven effective in certain instances, these methods treat symptoms rather than causes of a more fundamental problem. In a system which allows cases capable of resolution in a period of months to continue for years, even the most sophisticated cost management techniques are unlikely to prevent the inevitable multiplication of the actual costs to the litigants.

What is needed, therefore, is a new option—a faster track judicial system—which takes the basic principles of the ADR movement, i.e., that parties can voluntarily agree to much less costly procedures for resolving disputes if given the opportunity, and applies such principles to traditional court-supervised litigation. Under this proposal, if codified in proposed amendments to the Federal Rules of Civil Procedure, litigants would be permitted by mutual agreement to take a limited time and spend a limited amount of money to prepare their cases for trial. They would then

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1 Chief Justice Burger, commenting upon the need for legislative action and judicial innovation to enable the courts to handle their future responsibilities, noted caseloads for the year ended June 30, 1984 increased 7.4% for the district courts and 6.2% for the courts of appeals over the previous year. *See* Theuman, *Current Awareness Commentary*, 83 L.Ed.2d I-J (advance sheets Jan. 28, 1985).

be guaranteed a trial date within a set period of time, in most cases within twelve months of filing.

I. Background

In order to appreciate the dynamics of the fast-track option, it is necessary to examine briefly the impetus for ADR and the many other attempts to provide alternatives to the traditional litigation process. Like many difficult issues of public policy, the problem is easily stated: court litigation takes too long and is too expensive.[2] The solution, however, has proven elusive.

The causes of the excessive delay and cost in the litigation process are well known. Abuse of discovery rules,[3] misuse of pretrial motions practice,[4] laissez faire[5] judicial management,[6] and insufficient judicial manpower[7] and resources[8] are a few of the frequently

2 Hufstedler & Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965, 966 (1980); Janofsky, *Facing the Crises of Court Costs and Delay—Initiatives for the Bar*, B. LEADER Jan.-Feb. 1982, at 22. *See* Justice Powell's observation that "[l]itigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system." Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

3 Courts and commentators discuss widespread abuse of discovery. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (Discovery is "not infrequently exploited to the disadvantage of justice."); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1304 (1978) (It is naive to expect discovery to "resist the inroads of advanced and competitive pressures that dominate its surroundings."); Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264 (1979) (Abuse of the judicial process is widespread and "occurs most often in connection with discovery.").

4 *See, e.g.*, Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984) (assessing sanctions for violating Rule 11 because counsel for the defendant misrepresented the existing state of the law); SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984) (sanctions imposed on plaintiff for ill-founded motion for summary judgment); Wells v. Oppenheimer & Co., 101 F.R.D. 358 (S.D.N.Y. 1984) (no need to show bad faith if there is no objective basis for the belief that a summary judgment motion was well-founded).

5 Empirical studies reveal that when trial judges do intervene personally and assume control over a case at an early stage of the litigation by scheduling dates for completion of principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay. S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 17-43 (1977) (Federal Judicial Center District Court Studies Series, FJC-R-77-6-1).

6 For excellent discussions of the managerial tasks of federal district court judges, see Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469 (1983); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

7 District court caseloads continue to rise. In 1983, civil cases were filed in record numbers in U.S. district courts as 241,842 actions were docketed. This represented a 17.3% increase over the number of cases filed in 1982 and an 85.2% increase in filings over 1976. 1983 ANN. REP. OF THE DIRECTOR OF THE AD. OFF. OF THE U.S. CTS. 4.

8 Even a single case can generate extraordinary demands on a district court. *See, e.g.*, *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1073 (3d Cir. 1980), *vacating* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979) (The Third Circuit, reversing a pretrial order granting a jury trial, noted that the "trial would last

mentioned villains. Whatever the causes, however, judges, legal scholars, and members of the bar have uniformly concluded that court litigation can no longer serve as the preeminent method for resolving every dispute and that other less costly methods must be developed. Derek Bok of Harvard University recently proposed a major restructuring of legal education to counteract what he terms "the familiar tilt in law curriculum toward preparing students for legal combat."[9] He proposes that we turn our attention from the courts to "new voluntary mechanisms" for resolving disputes.[10] Dean Bok's call for change echoes the long-standing views of Chief Justice Burger who has repeatedly called for increased emphasis on alternative methods for resolving disputes,[11] and admonished the bar to "use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community to shape new tools [to resolve disputes formerly resolved exclusively in the courts]."[12] Thus, the issue today is not merely whether there is a need to reduce reliance on formal litigation as it has been historically practiced as the dominant method for resolving disputes;[13] rather, a separate question is how best to assure cost-conscious and efficient processing of litigable disputes, whatever the procedure or forum.

Two types of approaches have evolved over the past decade: (1) privately sponsored dispute resolution, principally through ADR, and (2) efforts to reform the formal litigation process through improved management and simplified court procedures, reform of the rules of civil procedure, and use of innovative trial techniques in certain categories of civil cases.[14] A brief overview of each

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for a full year" and that nine years of discovery had produced "millions of documents and over 100,000 pages of depositions.").

9 Bok, *A Flawed System, reprinted in* 55 N.Y. ST. B. J., Oct. 1983, at 8 (part 1), 55 N.Y. ST. B.J., Nov. 1983, at 31, 32 (part 2).

10 *Id.* at 32.

11 *See, e.g.*, Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93-96 (1976) (Keynote Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice).

12 Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (1982).

13 A recently commissioned national panel studying the problem concluded:

> Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.

National Inst. for Dispute Resolution, Paths to Justice: Major Public Policy Issues of Dispute Resolution 1 (1984) (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, sponsored by the U.S. Dep't of Just., Federal Justice Research Program).

14 Although ADR was originally thought of as an extrajudicial process, it has been used

follows.

A. *Alternative Dispute Resolution*

ADR proposals seek novel and case-specific solutions to the psychological problems that often interfere with reasonable settlements. Within this general definition are a multitude of potential procedures intended to provide a greatly shortened version of the trial presentation and to enhance the prospects for settlement. No one of these methods is superior in the abstract, and each must be specifically adapted to particular needs and particular disputes. Successful applications of ADR have included mini-trials;[15] information exchanges; referrals to experts; presentations of argument, evidence, live witnesses, affidavits, or some combination, to various types of "neutral advisors"; binding exchanges; non-binding exchanges; contingent exchanges; arbitration; mediation; and almost unlimited combinations of the foregoing.[16]

The strength of ADR, however, is more than the sum of these various procedures; the key is the new mind-set which has developed among disputants who have engaged in ADR-type proceedings. If parties commit themselves to the proposition that a mutually acceptable settlement can be achieved, their ability to devise procedures to enhance the accomplishment of that settlement increases accordingly; and enhanced settlement procedures in turn enhance settlement prospects.[17]

But while certain organizations and commentators have actively promoted the ADR movement[18] and it has enjoyed a number of celebrated successes,[19] ADR has yet to have much impact on the vast majority of disputes. There are a variety of factors which explain this, some psychological, and some logistical. Litigants often perceive acceptance of ADR as a sort of anticipatory settlement in

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in conjunction with formal court litigation at both the federal and state levels. According to the report of the Ad Hoc Panel, "[a]n increasing number of jurisdictions have established court-annexed dispute resolution programs in which cases are referred to mediation or non-binding arbitration before they are tried. Other courts are experimenting with innovative ways to facilitate settlement." *Id.* at 1.

15 For an excellent example of how an ADR procedure, a non-binding "mini-trial," was used to achieve a settlement after the parties had spent hundreds of thousands of dollars preparing for trial and settlement offers had stagnated, see Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A.L. REV. 493, 501-06 (1978).

16 These various approaches are discussed more fully in CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGEMENT (1982).

17 *See* Green, Marks & Olson, *supra* note 15, at 503-06 (example of how comprehensive settlement procedures in turn enhance settlement prospects).

18 *See* Green, *Reading the Landscape of ADR—The State of the Art of Extra-Judicial Forms of Dispute Resolution*, 100 F.R.D. 499, 513-20 (1983).

19 *See* Green, *The CPR Legal Program Mini-Trial Handbook, reprinted in* CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGEMENT, MH1-126 (1982).

which they agree prospectively to settle on as yet unknown terms.[20] Moreover, ADR may be perceived as sending an unacceptable message of weakness to the other side. "[R]eal men don't mediate"[21] is the instinctive reaction[22] of many to the ADR concept.[23]

Finally, ADR imposes a much higher degree of accountability on both lawyers and clients for the ultimate outcome of any dispute. Despite the arbitrariness of many court-imposed resolutions, there is an instant legitimacy to the simple phrase "the court ordered us to do it," and traditionally even the most unpalatable litigation outcomes are understood and ultimately accepted on this basis.[24] Once litigants move from the judicial arena into a voluntary ADR forum, the built-in legitimacy of the outcome disappears and accountability for the net results achieved increases correspondingly.[25]

In sum, ADR shows great promise and has already exerted a major influence on the way disputes are resolved or evaluated in this country. Nevertheless, a variety of factors—some psychological and some related to strategic and practical considerations—make it unlikely that ADR will divert a substantial number of cases from the court system in the near future. It seems, therefore, that while the ADR movement goes forward, substantial efforts must continue to be directed toward reforming traditional court litigation in order to halt the overall cost spiral for parties engaged in litigable disputes.

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20 This problem may be further complicated by the fact that an agreement to utilize ADR requires, in and of itself, detailed negotiations. From the range of possible procedures, one set must be chosen. Parties who are not sure what they might be getting into often cannot convince themselves up front to agree on the series of interim issues which would make ADR a reality.

21 Comments of Edward A. Dauer, *Annual Judicial Conference, Second Judicial Circuit of the United States*, 101 F.R.D. 161, 229 (1983).

22 Correspondingly, ADR lacks the capacity to satisfy a manager's desire to "get even" or punish an opponent who caused the dispute. Often, once a dispute reaches the point where lawyers are called in, clients adopt a personal stake in the outcome and are not really interested in the most rational or reasoned approach. In such cases, only service of a complaint seeking substantial recovery is likely to satisfy the visceral need to "win." In this mind-set, ADR has no place.

23 A related proposition is that the dispute must be one which both parties honestly seek to resolve. Thus, a lawsuit filed for strategic reasons (delay, cost to the other side, etc.), to prompt legislative action, or simply to focus public attention on a particular issue, stands little chance of successful ADR application. ADR only works where *both* sides have a *bona fide* interest in resolving the substantive merits of a dispute. Comments of Edward A. Dauer, *supra* note 21, at 232.

24 Comments of Edward A. Dauer, *supra* note 21, at 229-30.

25 ADR also deprives lawyers of the near absolute control they have long exerted over the conduct of the dispute resolution process. Comments of Edward A. Dauer, *supra* note 21, at 231. In an ADR proceeding, business disputes essentially remain business problems unencumbered by the layer of legalistic formalism which inevitably follows when a lawsuit is filed. Managers retain proportionally more control over ADR, a phenomenon threatening to some outside counsel.

B. *Efforts to Reform the Formal Litigation Process*

Substantial efforts have already been made to reform the formal litigation process. These efforts encompass a variety of strategies, all aimed at streamlining the process and making it more cost-effective in one way or another. There has been experimentation with improved management techniques and simplified court procedures,[26] as well as attempts to rationalize the process by amending the Federal Rules of Civil Procedure. The most recent amendments to the Rules attempt to cut unnecessary cost and delay through heightened judicial involvement and management of civil cases,[27] and through increased control over abusive tactics of lawyers—whether by discovery,[28] motions, or other written submissions.[29] Further, significant changes are being debated over the extent to which the system should encourage early termination of civil cases through the use of court-monitored settlement offers[30]

26 For a recent discussion of attempts to reduce costs in the formal litigation process through use of innovative management techniques, see Final Report of the Action Commission to Reduce Court Costs and Delay, AMERICAN BAR ASSOCIATION, ATTACKING LITIGATION COSTS AND DELAY (1984).

27 *See* FED. R. CIV. P. 16. Rule 16 was significantly amended in 1983 based on the premise that more active judicial involvement over all phases of the pretrial process will inevitably result in more effective case management. *See* FED. R. CIV. P. 16 advisory committee notes (1983). To this end, the amended rule requires a mandatory scheduling order within 120 days of the filing of the complaint and encourages discussion of a wide variety of issues at pretrial conferences. FED. R. CIV. P. 16(c). The rule contemplates that these pretrial conferences will fundamentally narrow the triable issues and otherwise facilitate the expeditious resolution of the case, e.g., by serving as a forum for formulating and simplifying issues, thereby avoiding unnecessary proof at trial, FED. R. CIV. P. 16(c)(1), and identifying a need for adopting special procedures for managing difficult or protracted actions. FED. R. CIV. P. 16(c)(10). Overall, the rule creates numerous opportunities for substantive judicial involvement at a stage which can meaningfully streamline the litigation process.

28 *See* FED. R. CIV. P. 26. The rule "is designed to encourage district judges to identify instances of needless discovery and to limit the use of various discovery devices accordingly." FED. R. CIV. P. 26(a) advisory committee notes (1983). Rule 26 also provides added sanctions for those who abuse the discovery rules. FED. R. CIV. P. 26(g).

29 *See* FED. R. CIV. P. 7, 11. Rules 7 and 11 have been amended to impose a duty of reasonable inquiry on those who file any motion, pleading or other paper. Rule 11 sets out a duty of reasonable inquiry designed to "reduce frivolous claims, defenses or motions by leading litigants to stop, think and investigate more carefully before serving and filing papers." COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE U.S. DISTRICT COURTS, H.R. DOC. NO. 54, 98th Cong., 1st Sess. 31 (1983) [hereinafter cited as AMENDMENTS TO THE RULES OF CIVIL PROCEDURE]. Rule 11 also mandates sanctions for violations in an effort to provide a healthy deterrent to costly, meritless maneuvers.

30 *See* proposed FED. R. CIV. P. 68, 102 F.R.D. 432 (1984). Substantial debate is ongoing on a proposed amendment to FED. R. CIV. P. 68, a rule designed to encourage serious consideration of settlement offers, but which, as currently constituted, is thought to be largely ineffectual. *See* 102 F.R.D. at 432-37 (advisory committee notes). Under the proposed rule, any party could make an offer of settlement. If the offer is rejected and the court finds upon consideration of a post-trial motion that rejection of the offer was unreasonable, resulting in unnecessary delay and needless increase in the cost of the litigation after taking into account all relevant circumstances at the time of the rejection, then the

and preliminary debate is ongoing regarding the conduct of class action litigation.[31] Finally, federal courts are increasingly integrating certain ADR techniques in the formal court procedures.[32] Summary jury trials,[33] mandatory mediation[34] and mandatory arbitration[35] are now part of the federal court landscape.

All these changes seek to make the system more cost-efficient and give litigants a chance to secure a final resolution in a more timely fashion by eliminating abuses which historically have caused delay. Yet most of these changes, however laudatory, rely on the court system's ability to make good on the commitments of legislators or judicially promulgated rules. Because of large differences in docket size, judicial manpower and expertise, complexity of caseload and a variety of other variables, litigants often still find themselves in court systems generally unresponsive to cost,[36] and the useful innovations which have been made are often limited to a handful of jurisdictions.[37] Moreover, the effectiveness of any innovation is all too often a function of the management skill and commitment of the particular judge to whom the case is assigned or the capacity of the particular jurisdiction in which the dispute is filed to carry out the mandates of a specific rule or procedure.

These problems cannot be solved merely by asking our judicial system to "try harder." Recent amendments to the Federal Rules have tended to fall short because they merely permit rather than require better case management by judges.[38] Judges have been too

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court could impose an appropriate sanction upon the offeree, including award of attorney's fees.

31 *See Major Changes in Rule 23 Urged by Special Committee*, LITIGATION NEWS, Fall 1984, at 1.

32 *See The New ADR Rules in the Western District of Michigan*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Oct. 1984, at 10. For example, W.D. MICH. R. 41 provides in pertinent part as follows: "The Judges of this District favor initiation of alternative formulas for resolving diputes, saving costs and time, and permitting the parties to utilize creativity in fashioning non-coercive settlements. . . ." *Id.* at 11.

33 *See* W.D. MICH. R. 44. For a thoughtful discussion of summary jury trials, see T. LAMBROS, THE SUMMARY JURY TRIAL AND OTHER ALTERNATIVE METHODS OF DISPUTE RESOLUTION, (rev. ed. Oct. 1984) (A Report to the Judicial Conference of the United States, Committee on the Operation of the Jury System).

34 *See* W.D. MICH. R. 42.

35 *See* E.D. PA. R. 8; Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983).

36 *See* note 2 *supra*.

37 Fast-track treatment is available in certain jurisdictions when particularly innovative local rules are combined with outstanding judicial managers. In the Eastern District of Virginia, for example, Judge Albert Bryant has provided litigants with institutionalized fast-track treatment for many years. The local rules severely limit the discovery options of both parties, *see, e.g.*, E.D. VA. R. 11-1(A) (limiting both parties to 30 written interrogatories), 11-1(b) (limiting both parties to five depositions), and when these limitations are combined with Judge Bryant's rigorous adherence to pretrial timetables, litigants are virtually guaranteed a fast and cost-efficient resolution.

38 The one exception to this is FED. R. CIV. P. 16(b) which requires the district judge,

easily diverted from exercising their new discretionary authority.[39] As a result, quicker and cheaper justice continues to be dispensed erratically, if at all, in many jurisdictions. This is an institutional problem, which no amount of well-intentioned exhortation is likely to correct.

C. *The Need For a New Option—A Fast-Track Under the Federal Rules*

A middle ground exists between alternative dispute resolution and the various strategies for reforming traditional litigation which to date remains substantially unexplored. ADR posits much more rapid disposition of cases, but eschews using courts to accomplish that objective. Judicial reformers tend (at least tacitly) to envision cases moving on a more traditional timetable, but hope the cases can be "better" managed and shortened somewhat using reformed procedures. Most cases, however, fall in the gap between these two approaches. For a substantial number of litigants, ADR is not practically achievable, and traditional litigation, however "improved," is still much too expensive and too time-consuming. Our judicial system has yet to posit a one year solution for the three year case.

There should be a workable alternative. Our court system must offer a new option: a fast-track option which merges the goals of ADR with necessary changes in court rules to make those goals achievable within the context of our existing judicial system. Litigants must, in short, be permitted to resolve their disputes in court not just a little faster, but many times faster than the current system allows. As discussed in Part II, this article contends that a not too radical adjustment to traditional court procedures can accomplish this radical result.

Permitting litigants to pursue truly fast-track litigation might yield results comparable to ADR. Like ADR, the parties would resolve their disputes rapidly, cost-effectively and without the typical war of attrition. Fast-track court litigation, however, would not necessarily be burdened by the drawbacks of ADR.[40] Litigants need

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within 120 days after filing of the complaint, to enter a mandatory scheduling order regarding joinder, motions practice, completion of discovery or other matters deemed appropriate by the court.

39 *See, e.g.*, Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976) (Address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice). Kirkham, discussing the problem of controlling discovery in complex civil litigation, stated: "Judges throw up their hands and ask how they can examine a million documents and say whether they are relevant, and the problem is all too often solved by simply giving plaintiffs access to all of defendant's files and records, relevant and irrelevant."

40 Moreover, in contrast to ADR, the proposal would be free to litigants. Because the fast-track option operates within the structure of the existing court system, no additional fees would have to be expended to pay neutral advisors, mediators, or arbitrators.

not commit initially to any willingness to compromise; they are promised their day in court. They need not negotiate the procedures by which that compromise will be achieved; judicial rules are already in place. Finally, the parties need not overcome psychological hurdles of agreeing prospectively to an "acceptable" resolution because they will obtain a verdict if they choose to litigate the case to a conclusion. Once on a fast-track, however, they could achieve that verdict in a compressed time frame at a much reduced cost.

What should be the characteristics of an acceptable fast-track option? There are many possibilities, and Part II of this article proposes a specific solution. Whatever the specific approach, any workable fast-track option must have, at a minimum, the following attributes.

1. It must be faster.

In a very real sense, the ills of our present litigation system are attributable to the simple phenomenon that if a lawyer is given five years to do everything he can to win his case, he will think of five years' worth of activity to improve the chances. The fallacy in this approach is that the outcome probably would not change much if the same case were completed in three years or one year. Only the level of ultimately nondispositive detail would be altered.

The solution seems all too obvious: litigation deadlines must be shortened. If parties can agree, for example, on discovery cutoff six months from the date the suit is initiated, our judicial system should not stand in the way of the substantial time and cost savings which such an approach can achieve. Establishing hard, fast, and speedy case management deadlines will have a tremendous impact on the management of cases.[41] Parties could no longer litigate for "as long as it takes." Rather, there would be a structure which required all parties to evaluate their case, set priorities, and adopt the best litigation strategy which could be accomplished in the time available.[42]

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41 The effectiveness of strict time limits in expediting the processing of civil cases is well established. The National Commission for Review of Antitrust Laws and Procedures found that "in districts having strong time controls, cases were resolved as much as 50% faster than similar actions in other districts with weaker controls." REPORT OF THE NATIONAL COMMISSION FOR REVIEW OF ANTITRUST LAWS AND PROCEDURES 28 (1979) [hereinafter cited as ANTITRUST COMMISSION REPORT].

42 The Antitrust Commission Report specifically acknowledged the effectiveness of this approach in finding that:

> The value of time limits lies in their simplicity and their capacity to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.

ANTITRUST COMMISSION REPORT, *supra* note 41, at 28.

2. There must be incentives to make the system work.

Could our judicial system continue to work if it were suddenly required that all cases proceed three times as quickly? Probably not, unless federal legislators provided many additional judgeships and courthouses to manage the increased workload. As this seems unlikely, alternative solutions must be found. One possibility is to permit litigants to elect a fast-track strategy. In exchange, those making such an election could be required to assent to preconditions that would make it painful to engage in activities that might interfere with the fast-track approach. Because of these penalties and other reasons, only a percentage of litigants would make the fast-track election, so that the system would be burdened only to that extent. Moreover, once the election was made, the appropriate penalty provisions would ensure greater cooperation of the parties in meeting the fast-track schedule without imposing excessive demands on the judiciary.

3. It must be compatible with management of the existing docket.

To ensure that the fast-track option does not overburden the judiciary or otherwise interfere with effective case management, ultimate authority over use of accelerated procedures must reside with the trial judge. Thus, the fast-track option must provide trial judges with the option, to be exercised within relatively narrow limits, to consider overall docket management needs prior to sanctioning expedited treatment. Similarly, setting the specific trial date must ultimately be at the court's discretion, although boundaries on that discretion might be established.

4. It must be universally available to all litigants.

Litigants today are faced with wide disparities among the hundreds of court systems operating throughout this country. Some courts have made truly innovative use of cost-cutting procedures,[43] utilized the expanded opportunities provided by the Federal Rules to manage litigation,[44] and experimented regularly with new techniques for increasing the efficiency of the litigation process. Other courts, however, have made little progress in streamlining the conduct of litigation, and parties forced to prosecute or defend in these jurisdictions quickly realize that they have little or no control over the litigation process. Any proposed amendment must therefore be universally applied and must fundamentally establish the right of fast-track litigants to expedited results not entirely dependent on

43 *See* note 26 *supra*.
44 *See* notes 27-29 *supra*.

the skill of any particular judge or efficiency of any particular court system.

II. Proposed Amendments to the Federal Rules of Civil Procedure

The premise for the amendments proposed in this article is that some institutionalization of the fast-track option—institutionalization which does not depend entirely on the skill, good intentions, time availability and cooperative spirit of the lawyers, judges and clients involved—is essential if accelerated case management is to become a reality. This article proposes that institutionalizing the fast-track option be accomplished by four specific amendments to the Federal Rules of Civil Procedure. These are set forth in full text in the Appendix. Three new subsections to Rule 16 are proposed, under which the parties, by stipulation, can elect to proceed on an accelerated schedule, with trial guaranteed within twelve months. The Rule 16 amendments also provide mechanisms to ensure that accelerated processing does not interfere with effective management of the balance of the district court docket. These amendments permit appropriate judicial control over exercise of the fast-track option and create strong incentives for a reduced motions practice to prevent unnecessary delay in the system or increased burdens on the judiciary. A fourth amendment, to Rule 37, is designed to reduce discovery disputes by imposing mandatory sanctions on the losing party to any such dispute.

These carefully balanced proposals would represent a major step forward in reform of this area. The new fast-track option would save both time and money for litigants who selected it. It would also include sanctions and safeguards both to ensure the continued cooperation of the parties and to protect judges from the increased burdens which accelerated case management might otherwise impose. The expectation is that, on the average, the overall burden on the judiciary would actually decrease as cases settle faster and dockets are correspondingly reduced.

A. *Proposed Rule 16(f)—Election Of Accelerated Procedures*

A new Rule 16(f) would establish the basic ground rules for the fast-track election:

> 16(f) *Election Of Accelerated Procedures*
> Upon stipulation of all parties filed in any action within 20 days after filing of answers to the complaint, the court as provided in the stipulation shall order accelerated scheduling of such action, set a date for completion of all discovery, set an approximate trial date, and make such other scheduling orders as the parties may suggest. The trial date shall be no later than 12 months

> from the date of the stipulation. The election of accelerated procedures pursuant to this section may not be withdrawn except by order of the court for good cause shown.

Under proposed Rule 16(f), the choice of a fast-track option is by election of the parties. To trigger accelerated procedures, all parties must agree by stipulation to at least two deadlines: a discovery cutoff and a recommended trial date. The stipulation may also contain any additional scheduling deadlines to which the parties agree. Subject to court approval of the stipulation under Rule 16(g) (discussed below), accelerated procedures would be implemented automatically and trial would be guaranteed within twelve months of the stipulation. Once accelerated procedures are elected, however, the parties could not withdraw the election except for good cause shown.

1. Stipulating to Accelerated Procedures

The election of accelerated procedures could theoretically be accomplished in either of two ways: by order of the court over the opposition of one or more parties, or by agreement of the parties. Court-ordered acceleration poses various difficulties. First, accelerated procedures should not be a vehicle for permitting one party to achieve mere tactical advantage. If one party could force another to accept accelerated procedures by filing a motion with the court, there is substantial risk that the moving party's motivation would be unrelated to the efficiency and cost saving principles that underlie the fast-track approach. Courts are not equipped at the outset of litigation to assess accurately where the tactical advantages might lie. Accordingly, judicially-ordered accelerated procedures create some risk of unfairness.

Second, court-ordered accelerated procedures might not prove workable over the opposition of parties to the case. It certainly would not work without imposing substantial burdens on the judiciary. If dispute after dispute reaches the court, or motion after motion is filed, this burden could become quite substantial.

Third, completing discovery and pretrial tasks within twelve months will not be possible, in many cases, unless both parties to the litigation limit their discovery and motions practice to some extent. In a sense, the parties give up their right to avail themselves of the full panoply of procedural options available under the current rules in exchange for the opportunity to secure the cost and time economies associated with accelerated processing under the proposed rules.

Accordingly, proposed Rule 16(f) cannot be implemented without agreement of all parties. Such agreement presumably will not be reached unless the tactical advantages of accelerated proce-

dures are roughly equal among the parties, or the benefits of accelerated procedures are viewed as sufficiently attractive to justify certain tactical risks.[45] Requiring stipulated election provides greater assurance that when the inevitable difficulties arise during the course of the litigation, cooperative solutions can be achieved without increasing the overall burden on the judiciary.[46]

2. Timing: Within Twenty Days of the Answer

The proposed rule permits the parties to file their stipulation seeking accelerated procedures within twenty days of answering the complaint. Because the answer date in many cases is or can be routinely extended for a reasonable time, tying the stipulation to the answer date provides some degree of flexibility. If the parties wish to have more detailed discussion of the utility of accelerated procedures or negotiate the provisions of the stipulation, they need only extend the answer date.[47]

Moreover, because the stipulation need not be filed until after the answer is filed, the parties will have notice of counterclaims, cross-claims, and third-party claims asserted at the time of stipulation. This is important, because if substantially new claims could be added without prior notice to the stipulating parties, there would be considerable potential for unfairness to parties surprised by the new complexion of the case.[48] The proposed procedure therefore ensures more informed ratification of the stipulation.

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45 In cases with multiple parties, stipulations of "all parties" may be particularly difficult. On the other hand, accelerated procedures in multiple party cases will be particularly difficult to achieve if all parties do not support the concept of accelerated procedures. Accordingly, the proposed rule requires that all parties, rather than some smaller subset of parties, stipulate to accelerated procedures.

46 It is difficult to predict the sorts of litigants who might find accelerated procedures most attractive. It does seem probable that a number of companies with frequent litigation problems, which are already chafing at the increasing costs and delays of the current system, would find accelerated procedures attractive. In particular, a number of companies have signed the so-called "ADR Pledge," committing the company to investigate alternative dispute resolution in all cases. Companies as diverse as A T & T, Chrysler, Eli Lilly, Goodyear, J.C. Penney, Standard Oil of California, Union Carbide, and Westinghouse have signed the pledge. *See* Barnette, *The Importance of Alternative Dispute Resoluton: Reducing Litigation Costs as a Corporate Objective*, 53 ANTITRUST L.J. 277, 280 (1984). A similar pledge to consider accelerated procedures whenever possible might be attractive to some companies under the new proposed rules.

47 In addition, there may be delays in retention of counsel or, once retained, delays in counsel's ability to evaluate the applicable facts and law in the case. In cases involving multiple parties, the mechanics of reaching agreement on a stipulation for accelerated procedures might be cumbersome. Accordingly, the parties have greater flexibility if the time for the stipulation is keyed to the answer date.

48 Although it is possible that other parties or claims might be added when responsive pleadings are filed to third-party claims, cross-claims or counterclaims, the initial answer date should trigger the stipulation. On balance, the parties will be on notice at this point as to the general contours of the litigation, i.e., whether it is a simple two-party action, or whether counterclaims will be asserted. Waiting until all possible issues and parties are

As currently drafted, the proposed rule requires the stipulation to be filed after the answer, even if the answer date has been substantially delayed by the filing of Rule 12 motions. This creates some potential for delay, but is necessary for two reasons. First, the parties will not be aware of counterclaims, cross-claims and third-party claims until the answer is filed. Second, Rule 12 motions involving issues of process, jurisdiction or other inadequacies in pleadings may need to be resolved, as a practical matter, before the parties are prepared to stipulate to accelerated processing of the litigation on the merits.[49] Thus, the parties should be permitted to resolve those issues prior to filing the stipulation and to avail themselves of additional time for considering the stipulation in cases where Rule 12 motions are filed.[50]

On the other hand, permitting the parties to file a stipulation for accelerated procedures at any stage in the proceeding would not be appropriate. Such an approach would create a risk that the parties would use the rule merely to manipulate the court's schedule when the case was being readied for trial. In addition, the impact of such a procedure on the court's ability to manage the balance of its docket would be untenable. Finally, parties who are unwilling to stipulate to accelerated procedures at a relatively early stage in the proceedings are not demonstrating the interest in accelerated procedures which is an appropriate predicate for triggering those procedures. Accordingly, unless the election is made near the outset of the case—or at least once it is clear that the case will require a "merits" resolution—accelerated procedures would not be available under the proposed rule.

3. Contents of the Stipulation

The proposed rule requires that the parties stipulate to a discovery cutoff date, recommend an approximate trial date no later than twelve months from the date of stipulation, and suggest other scheduling orders as the parties deem appropriate. The discovery cutoff is probably the most essential element in the scheduling process. The parties are permitted to set any date upon which they

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joined is unnecessary in most cases and would build in an unacceptable potential for substantial delay.

49 Parties who believe that they will use expedited procedures if dispositive Rule 12 motions are denied could advise the court of such intention and request expeditious resolution of such motions and interim relief from any standing orders or local rules of procedure which would impose burdens on the litigants inconsistent with fast-track processing.

50 For similar reasons, requiring the stipulation within a set time period, such as 60 or 90 days from service of the complaint, is inappropriate. While such an approach places finite limits on possible delays and has the advantage of certainty, it lacks the flexibility to accommodate cases involving Rule 12 motions or delayed answers, counterclaims, cross-claims or third-party claims.

agree. The more accelerated and foreshortened discovery they are prepared to accept, the earlier the discovery cutoff they may choose. Once set, the expedited discovery cutoff ordinarily has the beneficial effect of ensuring that the case proceeds expeditiously toward trial or informal resolution.[51]

The stipulation should also recommend a trial date. This second crucial scheduling deadline is essential to permit the parties to focus on completing necessary pretrial tasks other than discovery. While a final trial date will necessarily depend on the court's calendar, the rule anticipates that most courts would attempt to set a date in roughly the time frame recommended by the stipulation for accelerated procedures.

Finally, proposed Rule 16(f) contemplates that the parties may include in the stipulation "such other scheduling orders" as they may deem appropriate. This provision permits the parties to establish interim deadlines for discovery or other pretrial tasks. Some interim scheduling will probably be desirable in all but the most unusual cases. Accordingly, the parties, if they choose, may include in the stipulation further scheduling provisions dealing with production of documents, depositions, exchange of witness and exhibit lists and other matters which, if scheduled properly, may improve the expeditious handling of the case.[52]

4. The Twelve Month Trial Date

Proposed Rule 16(f) provides that, subject to modifications under proposed Rule 16(g) to accommodate the court's calendar, trial must be scheduled within twelve months of submitting the stipulation. This mandatory requirement cannot be varied except by the procedures in proposed Rule 16(g).

A mandatory twelve month deadline accomplishes a number of purposes. First, it defines the contours of the fast-track option. If

51 The report of the Advisory Committee to the newly promulgated amendments to the Federal Rules of Civil Procedure recognized, in an analogous situation, the crucial importance of an early and expeditious issuance of a scheduling order to the overall management of a district judge's docket: "Based on empirical studies our Committee is satisfied that early intervention and management by a judge is important to the prompt and efficient movement and disposition of litigation on his calendar . . . including the power, with knowledge of his trial calendar, to fix deadlines for motions, completion of discovery and trial . . . ." AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, *supra* note 29, at 3. *See also* Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 463 (8th Cir. 1983) ("In almost all cases the key to avoiding excessive costs and delay is early and stringent judicial management of the case.").

52 For example, in cases involving substantial numbers of documents, it may be essential that the parties agree on an early date for mutual and complete exchange of documents. If such a date were missed, it might prove practically infeasible to meet subsequent deadlines, including the discovery cutoff deadline. Moreover, including such dates in certain cases might reassure the court of the practical feasibility of the parties' fast-track election.

the parties believe they can complete the case in less than twelve months, they are free to establish a quicker schedule. On the other hand, if the parties are unwilling to compress their litigation activity into at least a twelve month time frame, then one of two things seems likely: either the parties lack the desire or determination to make the sacrifices necessary to achieve accelerated case management, or the case is of such magnitude that completing trial and pretrial within twelve months is not really feasible. In the latter instance, it seems desirable to permit alternative forms of case management which can be fashioned under existing Rule 16.[53]

5. Withdrawal of Stipulation on Good Cause Shown

Once the court accepts the stipulation for accelerated procedures, it may not be withdrawn except by order of the court for good cause shown. As the accelerated litigation proceeds, it is foreseeable in some cases that the party whose case is suffering the most may attempt to decelerate the litigation or otherwise impede the progress of the opposing parties. This should ordinarily not be permitted.[54] The use of accelerated procedures should not degenerate into a tactical battle; the parties should understand from the outset that once they commit to accelerated procedures, they will be bound by that commitment.

The provision of Rule 16(f) preventing voluntary withdrawal of the stipulation is similar in purpose to the provisions of proposed Rules 16(h) and 37(h), which limit motions practice and impose sanctions for unnecessary discovery disputes. All three

53 For example, large cases typically require sophisticated management schemes. Under newly promulgated Rule 16(c)(10), the district court is to consider "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems." Guidelines for the management of large cases are already available in the MANUAL FOR COMPLEX LITIGATION (1982), and other sources. Thus, in cases which cannot be compressed within a 12 month time frame, it seems desirable to rely on the existing framework of Rule 16 procedure.

54 The "good cause" standard for withdrawing a stipulation is somewhat analogous to the standard governing voluntary dismissals pursuant to FED. R. CIV. P. 41(a)(2). Both seek to articulate a standard of review for district court evaluation of a litigant's request to change litigation directions. Under Rule 41(a)(2), in deciding whether to permit voluntary dismissal, the court has the power to weigh the equities and do justice in each case, *see* Cone v. West Va. Pulp & Paper Co., 330 U.S. 212, 217 (1947), but should grant plaintiff's request "unless the defendant will suffer some legal harm." LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976). The "good cause" standard of proposed Rule 16(f) anticipates that the district judge will view requests to withdraw on a somewhat more critical basis. In order for the fast-track system to succeed, the overriding presumption must remain that parties are bound by their stipulation, absent circumstances which could not reasonably have been anticipated at the time of execution. Thus, some fundamental change in the posture of the case might justify a finding of good cause. The burden of the party seeking withdrawal, however, would be to demonstrate why the particular "fundamental change" at issue could not have been anticipated at the time the stipulation was filed.

provisions are designed to indicate clearly to litigants that accelerated procedures involve some potential hardship. Parties unwilling to sacrifice some of their traditional rights and remedies under the existing rules to secure litigation economies may not wish to utilize the fast-track option. Those who elect accelerated procedures will be required to exercise litigating discipline and will be forewarned of the risks they face if they fail in that responsibility.

B. *Proposed Rule 16(g)—Grounds For Denial Of Accelerated Procedures*

Proposed Rule 16(g) defines the supervisory role which the court must play in connection with accelerated procedures. New Rule 16(g) would provide as follows:

> 16(g) *Grounds For Denial Of Accelerated Procedures*
> The court may reject a stipulated election of accelerated procedures only if the court finds that (i) the court's docket cannot reasonably accommodate such accelerated procedures, or (ii) the action is too complex to be suited to accelerated procedures or can be better managed in other ways. Denial of accelerated procedures under this subsection shall only be made within 30 days of filing of the stipulation, after full hearing.

Rule 16(g) in effect permits the court to exercise veto authority over the parties' stipulated election of accelerated procedures. Although the rule anticipates that this authority will be used sparingly and that courts will generally honor the parties' election, the grounds upon which the court may reject the stipulation are expressed in broad terms to allow each judge the flexibility to respond to the exigencies of the case and his docket. Rejection, if it occurs, must be within thirty days of filing of the stipulation and can only be made after full hearing. These procedural requirements further emphasize the rule's primary intent—that judges exercise this veto authority conservatively.

1. Rejection on Grounds of Incompatibility with the Court's Docket

The first basis on which accelerated procedures may be denied is incompatibility with the court's docket. The degree of incompatibility will vary both as a function of the specific jurisdiction and judge involved, and as a function of the particular schedule suggested by the parties' stipulation.

Some jurisdictions or judges have heavy criminal dockets and, because of the requirements of the Speedy Trial Act of 1974,[55] ex-

55 The Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1982), provides specific time limits for the initial stages in the federal criminal process, enforceable by dismissal of the indictment. In addition, the courts are empowered to sanction prosecutors and defense attorneys for deliberate dilatory tactics by imposing fines, suspension, forfeiture of a percentage

pedited treatment of civil cases may not be feasible. Some judges already will be committed to extended trials in complex cases during the period selected by the parties in an accelerated case. In either instance, it may be impossible to accommodate the proposed acceleration of a particular case.

Accommodation with the court's docket would likely be most difficult when the schedule suggested by the parties is most compressed. Parties seeking a trial date within six months may be less likely to succeed than parties seeking a trial date within twelve months. Rather than rejecting the stipulation completely, the court would have discretion to deny the early trial date in favor of a subsequent trial date still within the twelve month time frame.[56]

2. Rejection Based on Type of Case

A second ground for denial of accelerated procedures is a finding by the court that the action is too complex or can otherwise be managed in better ways. Some actions are so complex that no matter how determined the parties might be, compression of the case into something less than twelve months would either not be practicable or would require such constant attention by the court as to be unreasonably burdensome. Large antitrust cases,[57] multiparty commercial disputes and class actions[58] may fit this description in particular instances.[59]

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of compensation (in this case of defense attorneys) and other disciplinary measures. *See* Frose, *Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667 (1976) (exhaustive treatment of the subject).

The Speedy Trial Act, however, has not caused the disruption some judges and commentators feared at the time of its enactment. *See Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary on S. 754, H.R. 7873, H.R. 4807*, 93rd Cong., 2d Sess. 241 (1974) (testimony of Hon. John Feikens, Judge, U.S. District Court, Eastern District of Michigan). Two recent studies of the Act's impact on civil litigation in district court suggested that the Act has had little independent effect on the flow or volume of civil litigation. N. Ames, K. Carson, T. Hammett & G. Kennington, The Processing of Federal Criminal Cases Under the Speedy Trial Act of 1974 (as amended 1979), at 102-18 (1980) (Federal Justice Research Program, FJRP-80/002); Ad. Off. of the U.S. Cts., Implementation of Title I of the Speedy Trial Act of 1974, C1-C16 (Sept. 30, 1980).

56 In particular cases, even a recommended trial date 12 months in the future might conflict with some previously scheduled trial date in another case. This might require rejection of the stipulation, or modification to permit an even more accelerated schedule.

57 For a useful treatment of the problems associated with expediting antitrust trials, see ABA Antitrust Section, *Expediting Pretrials and Trials of Antitrust Cases* (Monograph No. 3, 1979).

58 Provisions amending Rule 23 have recently been recommended in an effort to make the class action device more useful and manageable. *See* LITIGATION NEWS, *supra* note 31, at 1.

59 In order to avoid rejection of a stipulation in a complex case, the parties could set forth in the stipulation interim procedures to reassure the court that the case would be manageable within the recommended time frame. For example, the parties might agree in the stipulation that each party be limited to a maximum number of depositions which could be accommodated within the suggested schedule.

Even if a case is not too complex technically, the court may find that it would be better managed in ways other than accelerated procedures. The standard—whether it can "be better managed in other ways"—is intentionally somewhat general. The court's discretion is restrained in only one way: the court must have in mind and be willing to implement a "better" way of managing the case than the accelerated procedures proposed by the parties. Although the generality of this guideline creates uncertainty for the litigants, it would be difficult to set forth more rigid criteria applicable to the great range of cases to which this rule would be applied.

3. Denial After Fixed Time Period Based on Full Hearing

Notwithstanding the somewhat flexible substantive standards by which the court may evaluate a stipulation for accelerated procedures, denial of the stipulation is subject to significant procedural restrictions. In addition to the rule's generalized presumption in favor of allowing accelerated procedures, these procedural requirements should help ensure that denial of the stipulation occurs in only a limited number of cases.

Proposed Rule 16(g) requires that denial be made only after some appropriate hearing.[60] In addition, the denial must occur within thirty days of filing the stipulation. This should ensure that the parties are notified quickly if their stipulation is to be denied and reduce the reliance factor in those cases where the stipulation to accelerated procedures has involved the commitment by one or more parties to a heavy allocation of resources in the particular case.[61]

C. *Proposed Rule 16(h)—Limited Motions Practice*

Proposed Rule 16(h) and proposed Rule 37(h) (discussed below) are designed to deal with different aspects of the need to ensure limited reliance on the courts to resolve pretrial disputes that may arise during accelerated procedures. Rule 16(h), perhaps the most controversial of the proposals, would provide as follows:

16(h) *Accelerated Procedures—Limited Motions Practice*

60 The precise nature of the required hearing is not defined and is subject to the reasonable discretion of the trial judge. This is consistent with the approach used in other rules. *See, e.g.*, FED. R. CIV. P. 37(a)(4).

61 In drafting proposed Rule 16(g), a statement that denial of a stipulation could only be made in "extraordinary circumstances," or some similar provision was considered. There were various problems with this approach. "Extraordinary circumstances" might prove difficult to define. It seemed inadvisable, given the range of different cases which might confront the courts, to so severely limit the discretion of the courts in denying accelerated procedures. Finally, in view of the procedural restrictions, it seemed unlikely that additional restrictions would be necessary to ensure meaningful compliance with the goal of denying accelerated procedures in only limited cases.

> Parties who elect accelerated procedures shall restrict to the extent possible the filing of pretrial motions with the court. If any party filing more than one pretrial motion (other than a Rule 37(a) motion to compel) does not substantially prevail in any such motion, the court may order such party, after opportunity for hearing, to pay to the opposing party the reasonable expenses, including attorney's fees, incurred in opposing such motion.

Rule 16(h) does not cover discovery motions, which are addressed by proposed Rule 37(h). It does cover every other kind of pretrial motion, from routine motions for time extension to motions for summary judgment. Parties are urged to restrict the use of such nondiscovery motions and are subject to sanctions if they use such motions too frequently and unsuccessfully.

1. Limiting Motions Practice to the Extent Possible

The first sentence of Rule 16(h) sets forth the goal of this rule—to restrict pretrial motions to the extent possible. This general statement of purpose is intended to make the objective explicit in the rule. In addition, parties who violate the spirit of this provision are put on express notice and will have fewer grounds for complaint if they are subsequently disciplined by the court for excessive use of pretrial motions.[62]

2. Applicability to any Pretrial Motion

With the exception of discovery motions covered by proposed Rule 37(h), Rule 16(h) would apply to any type of pretrial motion—long or short, substantive or procedural, simple or complex. The rule allows each party only one such motion; the filing of subsequent motions, if unsuccessful, subjects the party to payment of reasonable expenses, including attorney's fees, at the court's discretion.

At first blush, it seems somewhat draconian to treat a simple motion for time extension in the same vein as more complex substantive motions. On the other hand, simple motions for time extensions are precisely the sort of matter which the parties should be able to resolve themselves if accelerated procedures are to work effectively. Moreover, simpler motions expose the moving party only to the presumably more modest costs necessary to oppose the motion. Accordingly, there are good reasons for considering all pretrial motions the same for purposes of this rule.

62 This might include not only an award of attorney's fees as provided in Rule 16(h) but other disciplinary sanctions, in the form of restricted procedural rights or otherwise, which the court in its inherent power to manage the litigation might impose. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

The proposed rule ultimately does not distinguish between complex and simple motions because imposing rigid limits on pretrial motions practice in accelerated cases is of such overriding importance. Under existing procedures, litigation schedules are regularly scuttled by overuse of motions. The briefing process can be time-consuming; the burden on the court can be substantial; and some judges simply cannot be relied upon to rule promptly on pending motions. Accordingly, the substantial use of pretrial motions could seriously undercut the workability of the accelerated procedures device.

Because the rule is a rigid one, arbitrarily permitting only one motion without threat of sanctions, the rule is open to potential abuses. Parties may entice the opposition to use up its free motion on unimportant issues. Alternatively, a party may save all pretrial issues for inclusion in one massive pretrial motion. The latter problem can be controlled effectively by the court,[63] and the former problem, though perhaps inevitable, does not seem of sufficient concern to change the rule.[64]

3. Grounds for Awarding Costs

Certain requirements must be fulfilled for sanctions to be available under Rule 16(h). First, the party against whom sanctions are sought must have filed at least one prior nondiscovery pretrial motion. For the first pretrial motion, the party is not subject to payment of any costs. For the second and any succeeding motion—regardless of whether the party prevailed on his first motion—the party may be ordered to pay the reasonable expenses if he does not "substantially prevail."

Second, in light of the potential for unfairness in this rule, granting costs is discretionary with the court.[65] Multiple pretrial motions may be unavoidable and, in fact, may be desirable in some cases.[66] Novel issues may arise during the course of a proceeding

63 For example, the court, either on its own initiative or at the suggestion of one party, could establish limits on the timing or length of motions that the court would be prepared to consider. This might preclude the filing of omnibus motions raising many unrelated issues.

64 Hopefully, most parties who had been able to agree on accelerated procedures would be prepared to use good faith to comply with those procedures. If tactical opportunities did arise they would hopefully be the same for both parties, i.e., more than one party could play the game of trying to force the opposition into needless motions practice. In light of these opportunities, both parties in the interest of the more paramount objective of accelerated procedures, have some incentive to avoid needless pretrial motions.

65 If the party did prevail in his first motion, this would certainly be a discretionary factor which the court might consider in evaluating whether to award costs and fees for a subsequent motion.

66 In certain cases pretrial motions may be the most expeditious and cost-effective way of resolving a dispute.

which neither party could foresee and which require the court's guidance, or the court may sense that one party's motions practice is the result of tactical maneuvering by the other party. In these cases, the court may decline to award costs and attorney's fees. In any event, costs and fees may be awarded only after opportunity for hearing.[67]

4. "Reasonable" Expenses, Including Attorney's Fees

Because awarding attorney's fees under proposed Rules 16(h) and 37(h) might occur with greater frequency than in nonaccelerated litigation, the courts should pay particular attention to the reasonableness of the requested fee. In this regard, it might be desirable at the outset to establish fixed hourly rates applicable to attorneys for both parties for purposes of Rule 16(h) or 37(h) motions. This would serve two purposes. First, it would put the parties on express notice of their potential exposure. Second, it would equalize potential inequalities that might exist if the hourly rates by one party substantially exceeded rates charged by counsel for the other party. While establishing the same fixed rates for all parties is only one alternative, courts should be encouraged generally to give serious attention to the issue of reasonable fees at an early stage in accelerated procedures to prevent what could become a time-consuming satellite proceeding at a later stage.[68]

D. *Proposed Rule 37(h)—Noncooperation With Accelerated Procedures During Discovery*

Accelerated procedures will ordinarily result in compression of the discovery schedule with the consequent potential for increased frequency of discovery disputes. In order to encourage parties to resolve these disputes informally without resort to constant court supervision, Rule 37(h) requires *mandatory* payment of attorney's fees by the losing party in any discovery dispute brought to the court. New Rule 37(h) would provide as follows:

37(h) *Noncooperation With Accelerated Procedures*

67 This tracks the comparable requirement of FED. R. CIV. P. 37(a)(4).

68 Consideration of fee petitions in this context could itself become a significant drain on judicial resources. *See, e.g., In re* Int'l Sys. & Controls Corp. Sec. Litig., 94 F.R.D. 640 (S.D. Tex. 1982). In *International Systems*, the defendant moved for sanctions as a result of the plaintiff's failure to comply with discovery orders. The district court held that the plaintiff and his counsel had violated the court's discovery orders, the Federal Rules of Civil Procedure, and basic rules of ethics in connection with the failure to appear at a deposition and an abrupt suspension of another deposition. As a sanction, the court held the plaintiff and his counsel liable for additional attorney's fees and expenses connected with the aborted depositions. A review of the tables set forth in the opinion suggests the considerable difficulties encountered by a court attempting to establish an estimate of reasonable fees and expenses attributable to the dilatory conduct of the opposing party.

> In any action under Rule 16(f), the party who substantially prevails in any motion filed under Rule 26(c) or Rule 37(a) shall recover from the nonprevailing parties the reasonable expenses, including attorney's fees, incurred in obtaining or opposing the relief requested.

Courts must be prepared to insist on the cooperation of the parties throughout the course of accelerated procedures. As noted earlier, however, the initial good intentions of the parties may not be sufficient to accomplish this objective. To penalize parties whose good intentions fade during the course of inevitable discovery disputes, Rule 37(h) imposes mandatory sanctions on the losing party in any dispute brought to the court. Mandatory sanctions in the context of discovery are appropriate, because a high percentage of discovery disputes can ordinarily be avoided if the parties act reasonably.

1. Comparison of Rules 16(h) and 37(h)

To put the provisions of proposed Rule 37(h) in perspective, it is useful to compare them with the related provisions of proposed Rule 16(h), discussed above. First, Rule 37(h) applies only to discovery disputes. Discovery disputes are defined as any motion brought under Rule 26(c) (for a protective order) or Rule 37(a) (to compel discovery).

Second, under proposed Rule 37(h), both the moving and nonmoving parties are potentially at risk for paying attorney's fees and costs. By comparison, under Rule 16(h), only the moving party, if he does not substantially prevail, can be assessed expenses. Exposing either party to potential sanctions under Rule 37(h) is desirable, however, because the party instigating the discovery dispute may or may not be the moving party before the court. In this sense, proposed Rule 37(h) tracks the comparable provisions of existing Rule 37(a)(4).

Third, unlike Rule 16(h), the award of reasonable expenses under Rule 37(h) is mandatory for all discovery motions. The party who "substantially prevails" is entitled to reasonable expenses, including attorney's fees. Unlike existing Rule 37(a)(4), the test is not whether a motion was brought with "substantial justification." Rather, the winning party is entitled to reasonable fees in every instance. Parties who elect to file a stipulation for accelerated procedures will be on notice of these potential sanctions and should therefore have no grounds to object should sanctions subsequently be imposed. Without the threat of these sanctions, the efficient conduct of accelerated discovery could be jeopardized in many cases.

Finally, also by contrast to both Rule 16(h) and Rule 37(a)(4),

no hearing is required as a predicate to the award of expenses. The award is automatic and can be made simultaneously with granting or denying the Rule 37(h) motion. As with Rule 16(h), the court should be encouraged to establish, at an early stage of the case, an appropriate benchmark for awarding fees under either Rule 16(h) or Rule 37(h).

III. Conclusion

In 1938, the Federal Rules of Civil Procedure were adopted in order to secure for all litigants, "the just, speedy and inexpensive determination of every action."[69] As our technocratic society has evolved, however, the volume of litigation and the manner in which it is practiced have changed dramatically. The current system of rules promises efficiency and attentiveness to cost, but, in light of present day litigation realities, lacks the dependable tools to make good on these promises. Efforts at reform have been made but real progress has been slow. Moreover, many litigants today would gladly exchange some of their litigation freedom under the existing Federal Rules for a guaranteed "back to basics" approach to litigation.

If ultimately adopted, the proposed fast-track option would represent a major victory in the overall battle to secure in fact "the just, speedy and inexpensive determination of every action." In simple and straightforward terms, the proposal seeks to offer litigants a dramatically improved litigation process by ensuring meaningful reductions in both the length and cost of litigation. This proposal has the capacity to greatly improve the management of litigation in the federal courts, and we are anxious to begin debate on its implementation.

69 FED. R. CIV. P. 1.

Appendix

Proposed "Fast-Track" Amendments

16(f) *Election Of Accelerated Procedures*

Upon stipulation of all parties filed in any action within 20 days after filing of answers to the complaint, the court as provided in the stipulation shall order accelerated scheduling of such action, set a date for completion of all discovery, set an approximate trial date, and make such other scheduling orders as the parties may suggest. The trial date shall be no later than 12 months from the date of the stipulation. The election of accelerated procedures pursuant to this section may not be withdrawn except by order of the court for good cause shown.

16(g) *Grounds For Denial Of Accelerated Procedures*

The court may reject a stipulated election of accelerated procedures only if the court finds that (i) the court's docket cannot reasonably accommodate such accelerated procedures, or (ii) the action is too complex to be suited to accelerated procedures or can be better managed in other ways. Denial of accelerated procedures under this subsection shall only be made within 30 days of filing of the stipulation, after full hearing.

16(h) *Accelerated Procedures—Limited Motions Practice*

Parties who elect accelerated procedures shall restrict to the extent possible the filing of pretrial motions with the court. If any party filing more than one pretrial motion (other than a Rule 37(a) motion to compel) does not substantially prevail in any such motion, the court may order such party, after opportunity for hearing, to pay to the opposing party the reasonable expenses, including attorney's fees, incurred in opposing such motion.

37(h) *Noncooperation With Accelerated Procedures*

In any action under Rule 16(f), the party who substantially prevails in any motion filed under Rule 26(c) or Rule 37(a) shall recover from the nonprevailing parties the reasonable expenses, including attorney's fees, incurred in obtaining or opposing the relief requested.