INDIANA COMMERCIAL COURTS HANDBOOK

Modified 6/25/2018

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Background of the Indiana Commercial Courts Pilot Project

Modified 6/25/2018

1. Handbook Development

With consent of the National Judicial College, the Indiana Commercial Courts Working Group developed the Indiana Commercial Courts Handbook ("the Handbook"), based in large part on the National Judicial College's *Resource Guide on Complex Litigation* (the "Resource Guide"). The Resource Guide was originally created to assist state trial judges who are assigned Commercial Court civil cases. The Resource Guide is based upon the Federal Judicial Center's *Manual for Complex Litigation, Fourth*. *See* Appendix A for the cover page, copyright, and acknowledgements of the Manual for Complex Litigation.

The Handbook has six chapters: (1) General Considerations; (2) Case Management Conferences; (3) Discovery; (4) Trial Management Conference/Preparation for Trial; (5) Trial; (6) Managing Class Actions; and the Appendix. In Chapter One, the Handbook addresses general considerations such as the judge's role, counsel's role, appointing Commercial Court Masters, using court appointed experts, and it examines related litigation.

Chapter Two assists judges with the processes for scheduling initial conferences; identifies matters to address at those conferences, and provides a checklist of items to cover in the case management order; and provides suggestions for later conferences. Because managing discovery in Commercial Court litigation can be challenging, Chapter Three is devoted to the subject. It provides ideas for establishing discovery schedules; designating discovery procedures; managing electronic discovery; placing limits on discovery; resolving disputes; issuing protective and sealed orders; and disclosing expert opinions.

To achieve better management, in Chapter Four, the Handbook recommends the use of trial management conferences. At those conferences, the trial judge can assist counsel in identifying matters to address; develop a case management order; and rule on motions in limine and Indiana Evidence Rule 702 motions. Chapter Five addresses how Commercial Court trials differ from regular trials from the conduct of the trial, to presentation of evidence, managing the jury, and awarding attorney's fees.

Chapter Six will provide a roadmap regarding class actions. It will define how to pre-certify case management; determine the motion for certification of an action as a class action; determine notice to give to class members; review proposed settlements; and award attorneys' fees.

The Appendix contains a number of helpful documents for judges and attorneys.

The Indiana Commercial Court Pilot Project is an opportunity to encourage experimentation with effective and efficient ways to resolve complex commercial cases. The Handbook is not intended as a limitation on that experimentation.

2. History Of The Indiana Commercial Court Pilot Project

By Order issued January 20, 2016, the Indiana Supreme Court created the Indiana Commercial Court Pilot Project. The term of this pilot project is not to exceed three (3) years, and begins June 1, 2016. As described in the January 2016 Order, the purpose of Indiana's pilot Commercial Courts is to (1) establish judicial practices that will help all court users by improving court efficiency; (2) allow commercial disputes to be resolved efficiently with expertise and technology; (3) enhance the accuracy, consistency, and predictability of judicial decisions in commercial cases; (4) enhance economic development in Indiana by furthering the efficient resolution of commercial law disputes; and (5) employ and encourage electronic information technologies, and early alternative ADR interventions. The pilot courts will be located in six different counties, dispersed throughout the State. The pilot project judges are: Marion Superior Court Judge Heather Welch; Elkhart Superior Court Judge Stephen Bowers; Lake Superior Court Judge John Sedia; Floyd Superior Court Judge Maria Granger; Vanderburgh Superior Court Judge Richard D'Amour; and Allen Superior Court Judge Craig Bobay.

Brief historical background to the January 2016 Order is helpful to understand this development in Indiana. In 2013, the Indiana Supreme Court assigned the Problem Solving Courts Committee of the Indiana Judicial Conference the task of evaluating whether Indiana should consider implementing business or Commercial Courts in Indiana. The task was assigned to a newly created Business Courts Subcommittee, consisting of Judge Bobay, Judge Welch, and staff attorney Julie C.S. McDonald. Judges Welch and Bobay, along with Judges Granger and Bowers then attended the Great Lakes States Complex Commercial/Business Court Seminar in Dearborn, Michigan in October of 2013, which was co-sponsored by the National Judicial College and the Michigan Judicial Institute.

The Subcommittee learned and reported that Commercial Court dockets have been created in approximately half of the states across the country. Proponents claim the establishment of Commercial Courts is an embodiment of their state's efforts to attract corporations and other business entities to organize and operate in their states. The main goals of Commercial Courts are to provide early, comprehensive case management to avoid business interruption during pending litigation, close management of factually and/or legally complex commercial litigation, and consistency of decisions to enable business planning. Other goals include ensuring that legal disputes will be handled efficiently, competently, and predictably, and that businesses involved in litigation continue operations with minimal interruption. Commercial court cases are presided over by judges motivated to become involved, and who handle commercial cases with specific "hands on" case management tools. Those Commercial Court case management tools include:

- Involving the parties and counsel in developing and implementing an effective case management order.

- Jointly anticipating problems before they arise, rather than waiting until counsel present them to the court.
- Requiring cases to appear for periodic status conferences with joint status reports to promote effective case management.
- Having courts available for hearings on short notice.
- Scheduling early case management conferences with parties to streamline issues and determine if early settlement conferences would be productive.
- Encouraging parties to consolidate trial on the merits with preliminary injunction evidentiary hearings.
- Using electronic filing Orders to facilitate efficient and organized case management and discovery.

In 2014, Judges Welch and Bobay recruited several Marion and Allen County commercial business litigation attorneys and other representatives of the local and state bars to gather input and refine the proposed route for possible pilot projects. This became known as the Commercial Courts Working Group, to provide advice to the subcommittee. Justice Steven David, and IU Law Professor (Justice) Frank Sullivan joined the Working Group as well. After several months of meetings and drafting, the Commercial Courts Working Group and the subcommittee recommended that Indiana implement a pilot project of business courts. In that recommendation, the committee stated that the task of creating Commercial Courts for Indiana "requires very few essential resources: (1) an enabling rule or other authority; (2) a budget for law clerks to assist the judge in more quickly and efficiently researching and resolving the many issues that typically develop and consume the judge's limited resource of time in these types of cases; (3) authorizing the Commercial Court Master role; and (4) dedicated judges who are committed to this process."

After reviewing that recommendation, on June 2, 2015, the Indiana Supreme Court issued its "Order Establishing The Indiana Commercial Court Working Group." The Order enlarged the membership of the Working Group, assigned the group seven specific tasks, and set an October 1, 2015, deadline for the group to submit an initial report on its activities, and if appropriate, recommend guidelines for establishing and administering Commercial Court pilot projects. The larger group included most of the original appointees, along with Notre Dame Law Professor Jay Tidmarsh, Indiana Chamber of Commerce President and CEO Kevin Brinegar, two additional judges and several more lawyers from across the state. The group met throughout the summer, debating and crafting a proposed enabling rule, defining the recommended scope of the proposed project.

Specifically, the Group conducted a series of Indiana Commercial Court Working Group meetings to recommend Commercial Court guidelines, including case eligibility criteria and case management procedures; Conducted a series of Indiana Commercial Court Working Group meetings to recommend Commercial Court guidelines, including case eligibility criteria and case management procedures; Collaborated with the Judicial Conference's Judicial Education Committee to Recommend Commercial Court Education

Programs; Collaborated with the Division of State Court Administration to Recommend Procedures for Posting Commercial Court Opinions, Adopting Commercial Court Weighted Caseload Values, and Developing Guidelines for Appointing Commercial Court Masters; Consulted with the Indiana State Bar Association and Other Local Bar Associations and Business Groups Regarding Best Practices in Commercial court; Began educating the Community and Local Chambers of Commerce on the Commercial Court Model and its Benefits; Explored Potential Funding Sources for Commercial Courts; Recommended that participation by the parties should be Voluntary; Began developing case management techniques and forms, tailored for Indiana's proposed Commercial Court; and addressed the absolute need for Law Clerks (a significant benefit to litigating in a commercial Court for the businesses involved is that they receive the Orders and decisions of the Commercial Court Judge in a thorough and thoughtful, yet very timely manner. To accomplish this, the trial court judges presiding in the Commercial Court must have the support and essential tool of law clerks to assist in the research and writing of those Orders and decisions.) This process involved the hard work and extremely valuable input from all Working Group members who participated in this assignment. This process involved many lengthy discussions, debates, proposals, counterproposals, drafts, and redrafts, and reflects hundreds of hours of hard work of the exceptionally gifted men and women attorney members, as well as the efforts of the judicial members and staff who made up the Working Group. The Group met its October 1, 2015 deadline for reporting these to the Supreme Court.

On January 21, 2016, the Indiana Supreme Court issued its order authorizing a Commercial Court pilot project beginning June 1, 2016. Since January, 2016, the six pilot court judges and the Working Group have been meeting to fine-tune case management procedures, determine how orders will be made available to the public, and how the pilot project will be evaluated. Each judge will have access to a law clerk to assist with legal research and drafting orders, which will increase the courts' efficiency in handling these Commercial Court cases. Parties may file cases in one of the pilot courts beginning June 1, 2016. The Working Group will submit biannual status reports to the Supreme Court for the three year period and provide recommendations to improve, enhance, or expand the pilot project. Our pilot project judges have joined and collaborated with the American College of Business Court Judges.

On April 27, 2016, the Indiana Supreme Court has adopted Interim Commercial Court Rules to govern the Indiana Commercial Courts Pilot Project. The rules address case eligibility and assignment, the use of Commercial Court masters, and other relevant matters.

The Commercial Court project promises to be an exciting and challenging adventure in transforming the way Indiana's courts address commercial and businesses litigation in our State. It is an opportunity to encourage experimentation with effective and efficient ways to resolve complex commercial cases. This project has been a unique and fruitful collaboration of the Supreme Court, the trial bench, in house corporate counsel, commercial litigators who represent small businesses and large corporations, Indiana's

law schools, the Indiana legislature, the National Judicial College, and nationally renowned business court judges. This report and entire process would not have happened without the perpetual support and insight of Indiana Judicial Center staff Mary Kay Hudson and Julie McDonald, and for that, they have the respect and gratitude of the entire Working Group. Finally, the Working Group expresses its appreciation to the five justices of the Indiana Supreme Court for their willingness to initiate this potential enhancement to the Indiana civil justice system.

3. Order Establishing the Indiana Commercial Court Pilot Project

In the
Indiana Supreme Court

IN RE THE INDIANA COMMERCIAL COURT PILOT PROJECT	))	Supreme Court Case No. 94S00-1601-MS-31

ORDER ESTABLISHING THE INDIANA COMMERCIAL COURT PILOT PROJECT

After a study of commercial and business courts throughout the country, this Court determined that Indiana should encourage practices improving the management of cases involving Indiana businesses. Thereafter, the Indiana Commercial Court Working Group recommended guidelines for establishing and administering a commercial court pilot project.

The purpose of commercial courts is to (1) establish judicial structures that will help all court users by improving court efficiency; (2) allow business and commercial disputes to be resolved with expertise, technology, and efficiency; (3) enhance the accuracy, consistency, and predictability of decisions in business and commercial cases; (4) enhance economic development in Indiana by furthering the efficient, predictable resolution of business and commercial law disputes; and (5) employ and encourage electronic information technologies, such as e-filing, e-discovery, telephone/video conferencing, and also employ early alternative dispute resolution interventions, as consistent with Indiana law.

Accordingly, there is hereby CREATED the Indiana Commercial Court Pilot Project. The term of this pilot project shall not exceed three (3) years, commencing June 1, 2016.

It is ORDERED that the following judges shall participate in the Commercial Court Pilot Project:

- Judge Craig Bobay, Allen Superior Court – Civil Division
- Judge Stephen Bowers, Elkhart Superior Court 2
- Judge Richard D'Amour, Vanderburgh Superior Court
- Judge Maria Granger, Floyd Superior Court 3
- Judge John Sedia, Lake Superior Court
- Judge Heather Welch, Marion Superior Court, Civil Division 1

It is ORDERED that the Indiana Commercial Court Working Group established by order of this Court will continue to provide guidance throughout the Pilot Project. Specifically, the Pilot Project will operate pursuant to guidelines adopted by the Working Group addressing case eligibility, assignment, and transfer; caseload and workload; commercial court masters; the publication of commercial court orders and statistics; and other relevant matters. The Working Group will provide biannual updates to the Court on the guidelines.

It is further ORDERED that Indiana Judicial Center shall provide staff support to the Commercial Court Working Group.

This Order is effective immediately.

DONE at Indianapolis, Indiana, on 1/20/2016.

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.
1/20/2016

4. Interim Commercial Court Rules[1]

The Indiana Supreme Court adopts these Interim Commercial Court Rules for the Indiana Commercial Courts Pilot Project. The purpose of these rules is to (1) promote the efficient resolution of commercial disputes; (2) improve court efficiency for all court users; (3) employ and encourage early alternative dispute interventions; (4) enhance the accuracy, consistency, and predictability of judicial decisions in commercial cases; and (5) enhance economic development in Indiana by furthering the efficient resolution of commercial law disputes.

Interim Rule 1. Introduction and Definitions

Consistent with the Indiana Supreme Court Order establishing the Indiana Commercial Court Pilot Project (issued January 20, 2016), the following Interim Rule shall apply to all the cases on the Commercial Court Docket. As used in this Interim Rule**:**

(A) **Business entity.** "Business entity" means a for-profit or nonprofit corporation, partnership, limited partnership, limited liability company, limited liability partnership, professional association, professional corporation, business trust, joint venture, unincorporated association, or sole proprietorship, or any other legal entity recognized by any state and doing business in the State of Indiana.

(B) **Commercial court.** "Commercial court" means a court with a specialized Commercial Court Docket as described, organized, and administered under these Interim Commercial Court Rules and any applicable Indiana Supreme Court Order.

(C) **Rule.** "Rule" as used in these Interim Commercial Court Rules means any rule promulgated by the Indiana Supreme Court, or by administrative district rule or local rule.

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[1] On January 20, 2016, the Indiana Supreme Court issued an order establishing the Indiana Commercial Court Pilot Project and charging the Indiana Commercial Court Working Group with "provid[ing] guidance throughout the Pilot Project." Our order further provided that "the Pilot Project will operate pursuant to guidelines adopted by the Working Group addressing case eligibility, assignment, and transfer; caseload and workload; Commercial Court masters; the publication of Commercial Court orders and statistics; and other relevant matters."

Pursuant to that order, the Working Group recommended interim guidelines for operation of the Pilot Project. In light of those recommendations, the Indiana Supreme Court adopted the Interim Commercial Court Rules for the Indiana Commercial Courts Pilot Project on April 27, 2016.

Commentary: Commercial Courts employ and encourage electronic information technologies, such as e-filing, e-discovery, telephone/video conferencing, and also employ early alternative dispute resolution interventions, as consistent with Indiana law.

Interim Rule 2. Cases Eligible for the Commercial Court Docket

Any civil case, including any jury case, non-jury case, injunction, temporary restraining order, class action, declaratory judgment, or derivative action, shall be eligible for assignment into the Commercial Court Docket pursuant to Interim Commercial Court Rule 4 if the gravamen of the case relates to any of the following:

(A) The formation, governance, dissolution, or liquidation of a business entity;

(B) The rights or obligations between or among the owners, shareholders, officers, directors, managers, trustees, partners, or members of a business entity, or rights and obligations between or among any of them and the business entity;

(C) Trade secret, non-disclosure, non-compete, or employment agreements involving a business entity and an employee, owner, shareholder, officer, director, manager, trustee, partner, or member of the business entity;

(D) The rights, obligations, liability, or indemnity of an owner, shareholder, officer, director, manager, trustee, partner, or member of a business entity owed to or from the business entity;

(E) Disputes between or among two or more business entities or individuals as to their business activities relating to contracts, transactions, or relationships between or among them, including without limitation the following:

(1) Transactions governed by the Uniform Commercial Code, except for claims described in Interim Commercial Court Rule 3(B) and 3(O);

(2) The purchase, sale, lease, or license of; a security interest in; or the infringement or misappropriation of patents, trademarks, service marks, copyrights, trade secrets, or other intellectual property;

(3) The purchase or sale of a business entity, whether by merger, acquisition of shares or assets, or otherwise;

(4) The sale of goods or services by a business entity to a business entity;

(5) Non-consumer bank or brokerage accounts, including loan, deposit, cash management, and investment accounts;

(6) Surety bonds and suretyship or guarantee obligations of individuals given in connection with business transactions;

(7) The purchase, sale, lease, or license of or a security interest in commercial property, whether tangible or intangible personal property or real property;

(8) Franchise or dealer relationships;

(9) Business related torts, such as claims of unfair competition, false advertising, unfair trade practices, fraud, or interference with contractual relations or prospective contractual relations;

(10) Cases relating to or arising under antitrust laws;

(11) Cases relating to securities or relating to or arising under securities laws;

(12) Commercial insurance contracts, including coverage disputes;

(13) Environmental claims arising from a breach of contractual or legal obligations or indemnities between business entities;

(14) Cases with a gravamen substantially similar to the foregoing (1 - 13) and not otherwise encompassed by Interim Commercial Court Rule 3.

(F) Subject to acceptance of jurisdiction over the matter by the Commercial Court Judge, cases otherwise falling within the general intended purpose of the Commercial Court Docket wherein the parties agree to submit to the Commercial Court Docket.

Interim Rule 3. Cases Not Eligible for the Commercial Court Docket

A civil case shall not be eligible for assignment into the Commercial Court Docket pursuant to Interim Commercial Court 4 if the case does not relate to any of the topics provided under Interim Commercial Court Rule 2, or the gravamen of the case relates to any of the following:

(A) Personal injury, survivor, or wrongful death matters;

(B) Consumer claims against business entities or insurers of business entities, including breach of warranty, product liability, and personal injury cases and cases arising under consumer protection laws;

(C) Matters involving only wages or hours, occupational health or safety, workers' compensation, or unemployment compensation;

(D) Environmental claims, except as described in Interim Commercial Court Rule 2(E)(13);

(E) Matters in eminent domain;

(F) Employment law cases, except those as described in Interim Commercial Court Rule 2(C);

(G) Discrimination cases based upon the federal or state constitutions or the applicable federal, state, or political subdivision statutes, rules, regulations, or ordinances;

(H) Administrative agency, tax, zoning, and other appeals;

(I) Petition actions in the nature of a change of name of an individual, mental health act, guardianship, or government election matters;

(J) Individual residential real estate disputes, including foreclosure actions, or non-commercial landlord-tenant disputes;

(K) Any matter subject to the jurisdiction of the domestic relations, juvenile, or probate divisions of a court;

(L) Any matter subject to the exclusive jurisdiction of a city court, a town court, or the small claims division of a court;

(M) Any matter required by statute or other law to be heard in some other court or division of a court;

(N) Any criminal matter, other than criminal contempt in connection with a matter pending on the Commercial Court Docket;

(O) Consumer debts, such as debts or accounts incurred or obtained by an individual primarily for a personal, family, or household purpose; credit card debts incurred by individuals; medical services debts incurred by individuals; student loans; tax debts of individuals; promissory notes not primarily associated with purchasing an interest in a business; personal automobile loans; legal fees incurred for family or household purposes (such as probate, divorce, child custody, child support, criminal defense, negligence, and other tortious acts); and other similar types of consumer debts.

Interim Rule 4. Assignment of Case to the Commercial Court Docket

Notwithstanding the case assignment requirements of any applicable Rule, the following shall apply to cases in a court that has a Commercial Court Docket.

(A) If a case is eligible for assignment to a Commercial Court Docket pursuant to Interim Commercial Court Rule 2, and a party seeks to have the case assigned to the Commercial Court Docket, the attorney representing that party shall identify the case as a "Commercial Court Docket Case" by filing with the clerk of the court a "Notice Identifying Commercial Court Docket Case" ("Identifying Notice").[2]

[2] Appendix B. *See also* Appendix C for a Notice of Consent to the to Commercial Court Docket, Appendix D for a Stipulated Notice Identifying Commercial Court Docket Case

(B) If a party does not consent to assigning the case to the Commercial Court Docket, the attorney representing that party shall file with the clerk a "Notice of Refusal to Consent to Commercial Court Docket" ("Refusal Notice").[3]

(C) A "Refusal Notice" must be filed not later than the latter to occur of the following: (1) thirty (30) days after service of the Identifying Notice; or (2) the thirty (30) days after the date the non-consenting party first appears in the case.

(D) If an Identifying Notice is filed by the party initiating the case and no other party has appeared in the case: (1) the clerk of the court shall assign the case to the Commercial Court Docket, which assignment is deemed a provisional assignment; (2) if no Refusal Notice is timely filed by any party that has appeared in the case, the assignment of the case is deemed permanent; and (3) if a Refusal Notice is timely filed, the clerk shall transfer and assign the case to a non-Commercial Court Docket in accordance with applicable Rule.

(E) If more than one party has already appeared in a case when an Identifying Notice is filed: (1) the clerk shall notify the court in which the case is pending that an Identifying Notice has been filed and the case is subject to transfer and assignment to the Commercial Court Docket if no Refusal Notice is timely filed; (2) if no Refusal Notice is timely filed, the clerk shall transfer and assign the case to the Commercial Court Docket, which assignment is a permanent assignment; and (3) if a Refusal Notice is timely filed, the clerk shall notify the court in which the case is pending that a Refusal Notice has been filed and the case will not be transferred to the Commercial Court Docket.

(F) If, after a case has been permanently assigned to a Commercial Court Docket pursuant to subsections (D)(2) or (E)(2), a new party appears in the case as a result of a cross-claim, counterclaim, third-party complaint, amendment, or otherwise: (1) the assignment of the case to the Commercial Court Docket becomes provisional, subject to the new party's right to file a Refusal Notice pursuant to subsections (B) and (C)(2); (2) if no Refusal Notice is timely filed by the new party, the assignment of the case is permanent; and (3) if a Refusal Notice is timely filed, the clerk shall transfer and assign the case to a non-Commercial Court Docket in accordance with applicable Rule.

(G) **Special Situations.**

(1) Temporary restraining orders and other emergency matters. As to any case described in subsections (D), (E), and (F) that the clerk is required to transfer,

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filed by plaintiff and defendant and Appendix E for a similar Stipulated Notice filed by multiple parties.

[3] Appendix F.

the original court and judge retains jurisdiction to hear and determine requests for temporary restraining orders and other emergency matters until the transferee court has assumed jurisdiction.

(2) New Trial; After Remand. If, in a case assigned to a Commercial Court Docket, the trial court or a court on appeal orders a new trial, or if a court on appeal otherwise remands the case such that a further hearing and receipt of evidence are required to reconsider all or some of the issues heard during the earlier trial, (a) the clerk shall again assign the case to the Commercial Court Docket, which assignment is deemed a provisional assignment; (b) if no party files a Refusal Notice on or before thirty (30) days after the date the case is assigned to the Commercial Court Docket, the new assignment of the case is deemed permanent; and (c) if a Refusal Notice is timely filed, the clerk shall transfer and assign the case to a non-Commercial Court Docket in accordance with applicable Rule.

(3) Review of assignment to the Commercial Court Docket. If a Commercial Court Judge determines at any time that a case is or was not eligible for assignment to a Commercial Court Docket, the judge shall order the case assigned, and the clerk shall transfer the case to a non-Commercial Court Docket in accordance with applicable Rule. The judge's determination shall not be subject to appeal.

(H) Any and all decisions of a party to file an Identifying Notice or not to file timely a Refusal Notice are binding and irrevocable except upon the agreement of all parties and the court. A party that files an Identifying Notice or does not file timely a Refusal Notice waives (a) any right to apply for a change of judge or county under Trial Rule 76 except as provided in Trial Rule 76(A) or (C)(6) and (b) any right to contest, at any time during the proceedings or on appeal, the eligibility for assignment of the case to the Commercial Court Docket.

Commentary:

1. A crucial feature of Interim Rule 4 is that any party can seek to have a case placed on the Commercial Court Docket at any time, even after the case has been pending on a non-Commercial Court Docket for an extended period of time. Since every other party has an absolute veto, no transfer of a well-underway proceeding can occur unless all parties agree.

2. Permitting any party to seek to have the case placed on the Commercial Court Docket at any time accommodates the case that is not initially eligible for assignment to the Commercial Court Docket but subsequently becomes eligible as a result of a cross-claim, counterclaim, third-party complaint, amendment, or otherwise.

3. These Interim Commercial Court Rules are limited to cases filed after June 1, 2016. Cases already pending on this Interim Rule's effective date cannot be transferred

to the Commercial Court Docket, even if all parties consented.

4. Interim Commercial Court Rule 4(B) is an "opt-out" provision. The default is that a case identified by one party as a Commercial Court Docket case is assigned to the Commercial Court Docket unless another party timely objects to the assignment (or, as provided elsewhere in the Interim Commercial Court Rules, the judge determines that the case is not eligible for the Commercial Court Docket).

5. Interim Commercial Court Rule 4(C)(2) accommodates a new party who is added to the litigation later as a result of a cross-claim, counterclaim, third-party complaint, amendment, or otherwise.

6. The language of Interim Commercial Court Rule 4(C)(2) "first appears in the case" is the same as used in Trial Rule 3.1(B) governing the filing of the appearance form by responding parties.

7. The provisions of Interim Commercial Court Rule 4(G)(1) concerning emergency matters are intended to operate in the same way as Trial Rule 79(O), which provides: "Emergencies. Nothing in this rule shall divest the original court and judge of jurisdiction to hear and determine emergency matters between the time a motion for change of judge is filed and the appointed special judge accepts jurisdiction."

8. The provisions of Interim Commercial Court Rule 4(G)(2) concerning assignment to the Commercial Court Docket after remand are intended to operate in the same way as Trial Rule 76(C)(3), which provides: "[I]f the trial court or a court on appeal orders a new trial, or if a court on appeal otherwise remands a case such that a further hearing and receipt of evidence are required to reconsider all or some of the issues heard during the earlier trial, the parties thereto shall have ten days from the date the order of the trial court is entered or the order of the court on appeal is certified."

9. Interim Commercial Court Rule 4(H) references Trial Rule 76(A) and (C)(6), which provide a limited change of venue and judge right for cause.

Interim Rule 5. Commercial Court Masters

(A) Appointment and Compensation. A Commercial Court Judge may appoint a Commercial Court Master in a pending Commercial Court Docket case, if all parties to the case consent to the appointment of the Commercial Court Master. As used in these rules, the term "Commercial Court Master" includes without limitation an attorney, a senior judge, or a non-attorney agreed upon by the Commercial Court Judge and the parties who has special skills or training appropriate to undertake to perform the tasks that may be required. The compensation to be allowed to a Commercial Court Master shall be reasonable, and in an amount paid by the parties as agreed by all parties and the Commercial Court Master. However, if the parties seek appointment of a senior judge as a Commercial Court Master, that appointment must be with the concurrence of the

Indiana Supreme Court, and compensation for that Commercial Court Master shall be as provided in Trial Rule 53(A). Nothing in this rule restricts a Commercial Court Judge from appointing a Commercial Court Master in a Commercial Court Docket case under Trial Rule 53 without the need for the consent of the parties; such an appointment shall be governed by Trial Rule 53 and not this rule.

(B) Powers. The order of reference to the Commercial Court Master shall specify the Commercial Court Master's powers and may direct the Commercial Court Master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the Commercial Court Master's report. Subject to the specifications and limitations stated in the order, the Commercial Court Master has and shall exercise the power to regulate all proceedings in every hearing before the Commercial Court Master and to do all acts and take all measures necessary or proper for the efficient performance of the duties assigned under the order. The Commercial Court Master may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto, including electronic media. The Commercial Court Master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses under oath and may examine them and may call the parties to the action and examine them under oath. When a party so requests, the Commercial Court Master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided for a court sitting without a jury.

Commentary: The Commercial Court Judge must issue an Order specifying the powers delegated to the Commercial Court Master. The Court may direct counsel for the parties to submit a proposed order setting forth those proposed powers, and/or the Court may wish to craft the Order in conference with counsel. However, the ultimate scope of the Order is dictated by that which is necessary and appropriate under the circumstances, and is left to the sound discretion of the Court.

(C) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the Commercial Court Master with a copy of the order of reference. Upon receipt thereof, unless the order of reference provides otherwise, the Commercial Court Master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within twenty (20) days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the

Commercial Court Master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the Commercial Court Judge for an order requiring the Commercial Court Master to expedite the proceedings and to make a report. If a party fails to appear at the time and place appointed, the Commercial Court Master may proceed ex parte or, in the discretion of the Commercial Court Master, may postpone the proceedings to a future day, giving notice to the absent party of the postponement.

(2) Witnesses. The parties may procure the attendance of witnesses before the Commercial Court Master by the issuance and service of subpoenas as provided in Trial Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished for contempt by the Commercial Court Judge and may be subjected to the consequences, penalties, and remedies provided in Trial Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue, the Commercial Court Master may prescribe the form in which the accounts shall be submitted, and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the Commercial Court Master may require a different form of statement to be furnished, or the accounts or specific items thereof to be provided by oral examination of the accounting parties or upon written interrogatories or in such other manner as directed.

(D) Report.

(1) Contents and Filing. The Commercial Court Master shall prepare a report upon the matters submitted by the order of reference and, upon request of any party or the Commercial Court Judge, shall submit the report prior to hearing or the taking of evidence. The Commercial Court Master shall file the report with the clerk of the court, and in an action to be tried without a jury, shall file with it a transcript of the proceedings and of the evidence and the original exhibits, unless otherwise directed by the order of reference. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Nonjury Actions. In an action to be tried without a jury, the Commercial Court Judge shall accept the Commercial Court Master's decision or findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the Commercial Court Judge for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Trial Rules 5 and 6. After hearing, the Commercial Court Judge may adopt the

report, reject it in whole or in part, receive further evidence, or recommit it to the master with instructions.

(3) In Jury Actions. In an action to be tried by a jury, the Commercial Court Master shall not be directed to report the evidence. The Commercial Court Master's findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the Commercial Court Judge upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. When the parties stipulate that a Commercial Court Master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing the report, a Commercial Court Master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

5. Indiana Commercial Court Discovery Guidelines

INDIANA COMMERCIAL COURT DISCOVERY GUIDELINES

1. Statement of Purpose.
    A. The Indiana Commercial Court Discovery Guidelines ("Discovery Guidelines") have been adopted by the Indiana Commercial Court Working Group, consistent with the authority granted by the Indiana Supreme Court to establish guidelines for the Commercial Court Pilot Project.
    B. The Discovery Guidelines are designed to be implemented in the pilot project commercial courts in Indiana.
    C. The Discovery Guidelines apply to all cases on the commercial court docket, unless otherwise ordered.
    D. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ***and proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
    E. The Discovery Guidelines are derived in part from the Federal Rules of Civil Procedure that were in effect as of June 1, 2016. The developing case law concerning the 2015 amendments to those federal rules are helpful to the Indiana Commercial Courts in applying the Discovery Guidelines. Additionally, the Discovery Guidelines derive from the Indiana Supreme Court's January 20, 2016 Order Establishing The Indiana Commercial Court Pilot Project, and from the second paragraph of Indiana Trial Rule 26 (B)(1). In relevant part, the January 20, 2016 Order provides: "Specifically, the [Indiana Commercial Court] Pilot Project will operate pursuant to guidelines adopted by the Working Group addressing case eligibility, assignment, and transfer; caseload and workload; commercial court masters; the publication of commercial court orders and statistics; and other relevant matters." In relevant part, T.R. 26 (B) provides: "Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:" … The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden or expense of the

proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(C).

F. Matters not addressed in the Discovery Guidelines are governed by the Indiana Rules of Civil Procedure and other local rules that are applicable in the Commercial Courts.

2. Initial Discovery / Required Initial Disclosures.
   A. The information and documents identified in the initial disclosures are those most likely to be automatically requested by experienced counsel in a similar case and which will most likely to be useful in narrowing the issues. These initial disclosures are not intended to be exhaustive of what should be shared by the parties or to preclude other necessary discovery.
   B. A party must, without awaiting a discovery request, provide the other parties the following:
      1. The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
      2. A copy or description by category and location of all documents, electronically stored information, and tangible documents/items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
      3. A computation of each category of damages claimed by the disclosing party who must also make available for inspection and copying the documents or evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
      4. For inspection and copying any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in an action or to indemnify or reimburse for payments made to satisfy the judgment.
      5. Documents that support any irreparable harm being alleged by the Plaintiff or any concerning any damages that Plaintiff is seeking in the Complaint.
      6. A party must make the above initial disclosures no later than twenty-one (21) days before the initial case management conference, unless a different time is set by agreement of the parties or court order.

C. The parties should also submit a discovery plan within 14 days after the parties' initial case management conference, unless a different time is set by agreement of the parties or court order.

D. Generally, the relevant time period for all Initial Disclosures is a period of six (6) years prior to the date of the adverse action that forms the basis of the claim/counterclaim or defense, unless a different time is set by agreement of the parties or court order.

3. General Discovery Requirements.
   A. If a party objects to a discovery request, either in whole or in part, the objecting party must concisely state in detail the basis for the objection. If a party provides a partial or incomplete answer or response to a discovery request, the responding party must state specifically the reason that the answer or response is partial or incomplete.
   B. All Discovery, including Initial Disclosures, shall be supplemented in accordance with Rule 26(E) of the Indiana Rules of Trial Procedure.
   C. Before seeking a protective order from the court, the parties must confer in an effort to agree to a stipulated protective order regarding the disclosure and exchange of any discovery documents. The court will not consider any protective order unless: (1) the parties verify to the court that they have personally or telephonically conferred regarding the need for and form of the protective order, or (2) the party seeking the protective order can demonstrate that through good faith efforts it was not possible to confer and time is of the essence in considering the need for a protective order. An exchange of emails or letters alone is insufficient.
   D. Requests to seal information from public access must conform with Administrative Rule 9(G).

4. Limitations on Discovery.
   A. No party shall serve more than 25 interrogatories, including sub-parts, unless otherwise agreed to by agreement of the parties or court order.
   B. Each party is limited to not more than ten depositions, with a seven-hour limit for each deposition, unless otherwise agreed to by agreement of the parties or court order.

5. Electronically Stored Information Preservation.

   Consistent with Rule 37(e) of the Federal Rules of Civil Procedure, the following applies to the duty of litigants to preserve electronically stored information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable

steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

A. upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
B. only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

1. presume that the lost information was unfavorable to the party;
2. instruct the jury that it may or must presume the information was unfavorable to the party; or
3. dismiss the action or enter a default judgment.

6. Resolving Discovery Disputes.

Strict compliance with the Ind. T.R.26 (F) meet and confer requirements in resolving discovery disputes is mandatory. This includes actual face-to-face or telephonic meetings. An exchange of emails or letters alone is insufficient. Prompt ruling on discovery disputes deters unreasonable and obstructive conduct, and prevents the frustration of existing discovery deadlines and the delay of ongoing discovery while a ruling is pending. The discovery plan must include specific provisions for the fair and efficient resolution of discovery disputes, including:

A. A requirement that counsel seeking relief first specify to opposing counsel a concise statement of the alleged deficiencies or objections and then meet in good faith to try to effectuate a written resolution of the dispute before submission to the court for resolution.
B. A mechanism for the expedient submission to the court of discovery disputes which counsel were not able to resolve, including submissions via conference call or email.
C. Restrictions on the length of motions, memoranda and supporting materials, and time limits for their submission.
D. Prohibiting in all but extraordinary circumstances the conduct of discovery with respect to a discovery dispute itself.
E. The appointment of a special master to resolve discovery disputes.

General Considerations

§ 1.1 Judge's Role

To address the needs of a Commercial Court case, judges must consciously think about case management. While each Commercial Court case has its own distinctive demands, appropriately applying certain actions, principles and truths will enhance judge's ability to provide timely justice in cases on the Commercial Court docket.

The foundational concepts discussed in the *Handbook* have been utilized in other states and have been proven effective in achieving justice in complex, business and commercial cases. These courts have been utilizing the following principles: (1) identify whether the case is eligible for the Commercial Court docket as early as possible; (2) assume immediate control of the case; (3) involve counsel and/or litigants in discussing issues and the elements of a case management order; (4) actively supervise the progress of the case utilizing meaningful and monitorable case events scheduled at appropriate intervals; (5) apply supervision consistently and fairly toward all parties with deviation from the case management order for good cause, which may include reasonable accommodation of lawyers, litigants, and other participants; and (6) revisit barriers to the resolution of issues including appropriate settlement initiatives throughout supervision of the case.

The following suggestions are offered for Commercial Court judges' consideration in formulating the best approach to preside over a Commercial Court case.

To resolve Commercial Court litigation fairly, efficiently, and effectively, the judge should actively supervise all proceedings. In doing so, the judge should:

- Have mechanisms in place for early identification of Commercial Court litigation;
- Require counsel to identify major issues and any difficulties early;
- Anticipate problems before they arise rather than wait for counsel to present them;
- Decide disputes promptly, particularly those that may materially affect the course or scope of the litigation;
- Monitor continuously the progress of the case to confirm that the attorneys are meeting the deadlines set forth in the case management order and to determine whether the plan needs modification;
- Use the court's rule-based, statutory and inherent authority to manage the litigation; and
- Adopt special procedures, as necessary, to manage potentially difficult or protracted actions that may involve complex issues, difficult legal questions, or unusual trial or proof problems.

The judge should also begin supervision early in the proceedings through these mechanisms:

- Become familiar with the issues in the case as soon as it is assigned;
- Schedule an Initial Case Management Conference as soon as practical;
- Take action that may be necessary before the conference (e.g., to preserve evidence);

- Work with counsel to develop and implement a comprehensive case management order that is tailored to the particular circumstances of the case and the resources available to the parties;
- Consider counsels' suggestions and concerns;
- Establish a schedule to complete pretrial proceedings in the case that gives direction and order to the case; and
- Set firm dates for the completion of procedural steps in the case and requiring counsel to adhere to these dates.

Exercise continuing control over the proceedings through these methods:

- Require counsel to meet and confer promptly before court intervention to attempt to resolve any disputes informally;
- Be available to counsel when they cannot reach agreement;
- Schedule case management conferences at regular intervals to review the progress of the case and to address any problems that may have arisen since the previous conference;
- Require counsel to prepare a joint agenda of matters to be discussed or separate agendas, if appropriate, before any case management conference;
- Impose appropriate sanctions for counsel's or a party's improper tactics or failure to comply with court orders or rules (on a party's motion or *sua sponte*); and
- Consider whether a Commercial Court Master should be appointed to resolve discovery and other pretrial matters.

Explore settlement as appropriate. The court may:

- Encourage the settlement process by asking counsel at the Initial Case Management Conference whether settlement discussions have occurred or might be scheduled;
- Help the parties to assess their cases realistically;
- Suggest that the parties reexamine their positions in light of current or anticipated developments as the case progresses;
- Facilitate negotiations by removing obstacles to compromise;
- Focus the parties' attention on the likely cost (e.g., legal fees and lost opportunities) of litigating the case to conclusion;
- Suggest and arrange for another neutral person to assist negotiations, including another judge or a Commercial Court Master;
- Consider whether other alternative dispute resolution techniques (e.g., mediation, arbitration, a summary jury trial) may assist the parties in valuing their cases for settlement purposes;
- Target discovery at information needed to further settlement negotiations;
- Promptly decide motions that will facilitate settlement;
- At the "appropriate time," set a firm trial date to motivate the parties to settle; and
- Ensure adequate staffing to assist the court in effectively and efficiently managing the litigation.

(*Note*: Experience in some other jurisdictions has found that early rulings on motions in limine and discussion of verdict forms/jury instructions may lead to a narrowing of issues and settlement.)

§ 1.2 Counsel's Role

Counsel, who will be more familiar with the facts and issues in the case than the judge, should play a significant role in developing the case management order, as they are primarily responsible for its execution.

The judge should:

- Develop a realistic timeline, with counsel's input, for resolving the case;
- Provide supervision and maintain control over the case in a manner that recognizes the burdens placed on counsel by Commercial Court litigation; and
- Foster mutual respect and cooperation between the court and counsel, as well as between the attorneys for the various parties.

  (*Note*: The judge should let the attorneys know that the court recognizes the added demands and burdens that Commercial Court litigation places on them; however, the judge should emphasize that the court expects them to (1) fulfill their obligations as advocates in a manner that will foster and sustain good working relations among themselves and with the court; (2) communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible; (3) avoid unnecessary contentiousness; and (4) limit the controversy to material issues that are genuinely in dispute.)

To facilitate the orderly resolution of a Commercial Court case involving numerous parties with separate counsel, the judge may consider designating certain attorneys to act on behalf of other counsel and parties in addition to their own clients with respect to specified aspects of the litigation.

A judge may designate counsel to act as lead counsel, charged with formulating and presenting positions on substantive and procedural issues to court during the litigation. Such issues may include:

- Working with opposing counsel in developing and implementing a case management order;
- Initiating and organizing common discovery requests and responses;
- Preparing motions and briefs on pretrial matters;
- Arguing motions on behalf of a particular side;
- Meeting and conferring on behalf of a particular side to resolve areas of dispute;
- Conducting the principal examination of deponents and designating other counsel who may examine a particular deponent;
- Employing experts and consultants; and
- Ensuring that schedules are met.

A judge may likewise designate liaison counsel, charged with administrative matters for a particular side, such as:

- Receiving and distributing communications (including notices, motions, and orders) between the court and other counsel;
- Managing the document depository;
- Convening meetings of counsel;
- Resolving scheduling conflicts;
- Advising parties of developments; and
- Assisting in coordinating activities.

When designating lead or liaison counsel, the judge should:

- Invite submissions and suggestions from all counsel;
- Ensure that counsel appointed to leading roles in the litigation are qualified and responsible, and will fairly and adequately represent all parties on their side, and that their charges will be reasonable;
- State the functions of lead and liaison counsel in a court order that informs other counsel and the parties of the scope of the designated counsel's authority; and
- Address how lead and liaison counsel will be paid for their work on behalf of non-clients whom they represent.

  (*Note*: It is usually impractical and even unwise for the judge to specify in detail the functions assigned or the particular decisions that designated counsel may make unilaterally and those that require an affected party's concurrence. To avoid controversy, designated counsel should seek the consensus of the affected parties when making decisions that may have a critical impact on the litigation.)

§ 1.3 Appointing a Commercial Court Master

Early in the litigation, the judge should consider the advisability of appointing a Commercial Court Master to supervise specified aspects of the litigation, enabling the judge to devote time to more urgent matters. *See* Appendix G for an order appointing a commercial court master. Appointing a Commercial Court Master to supervise discovery may be appropriate when the amount of activity required would impose undue burdens on the judge, and the parties' financial stake in the case justifies imposing on them the expense of a Commercial Court Master. *See* Appendix H for an order appointing a commercial court discovery master.

A judge may also appoint a Commercial Court Master to:

- Supervise specified discovery issues or disputes, particularly those that may be time-consuming or require an immediate ruling, including resolving deposition disputes by telephone;
- Make preliminary rulings on claims of privilege;
- Hear and determine motions for protective orders;
- Assist counsel in reaching stipulations;
- Facilitate settlement discussions; and
- Perform other talks as permitted in the Indiana Commercial Court Interim Rules.

A Commercial Court Master may only be appointed with the parties' consent, except as otherwise permitted in the Commercial Court Interim Rules. The specific authority delegated to the Commercial Court Master should be stated in a court order, along with the procedure for review by the judge and provisions for payment of the Commercial Court Master's compensation. Regular reports by the Commercial Court Master are advisable.

Factors militating against the appointment of a Commercial Court Master are:

- The parties do not agree to the appointment of a Commercial Court Master;
- The substantial cost as compared to other expected litigation costs; and
- Possible delay in the proceedings resulting from using a Commercial Court Master.

§ 1.4 Using Court-Appointed Experts

Early in the litigation, if permitted by Indiana law, the judge should also consider the advisability of using one or more court-appointed experts. Such an expert could, but need not be, appointed as a Commercial Court Master.

These experts may serve a number of purposes. They may:

- Advise the judge on technical issues;
- Provide the jury with background information to aid its comprehension of the evidence presented by the parties; and
- Offer a neutral opinion on disputed technical issues.

Before appointing an expert, it is advisable to consider whether there are adequate alternatives, such as directing the parties to clarify, simplify, and narrow the differences between them. Court-appointed experts have been used in mass tort litigation to help resolve disputed causation issues and screen cases to determine whether individual plaintiffs or groups of plaintiffs can establish a threshold level of injury.

Such an appointment may be helpful in cases involving:

- A highly disputed subject in which strong evidence appears to support the contentions of both sides of the litigation;
- A technical complexity that taxes the capacity of the adversary system;
- A likelihood that scientific evidence will determine the course of the litigation; and
- A need to develop criteria to decide the admissibility of evidence, as in cases involving novel claims.

The principal disadvantages to appointing experts include the possibility that their participation may:

- The expert might not be agreed upon by the parties;
- Increase the already high cost of complex litigation;
- Delay the trial when the need for a court-appointed expert does not become apparent until the case is ready for trial; and
- Lengthen the trial, although there may be offsetting savings by narrowing the issues, reducing the scope of the controversy and, perhaps, promoting settlement.

Early consideration of expert disclosure and discovery can assist the judge in deciding whether to appoint an independent expert. When the judge decides to appoint an expert, the judge should make every effort to select a person who is acceptable to the litigants.

The best candidate is one whose fairness and expertise in the field cannot reasonably be questioned and who can communicate effectively as a witness. The order appointing the expert should specify the terms on which the expert serves; the nature of the functions the expert is to perform; the extent of discovery that is permitted; whether the expert must provide a written report to the parties before trial; whether ex parte communications with the judge are permitted; and how the jury should be instructed.

§ 1.5 Related Litigation

Counsel should be directed to inform the court, as early in the litigation as possible, of all related cases that are pending or may be filed in any court. The judge should also ask, at the Initial Case Management Conference, whether there are any related cases.

When the related cases are in the same court:

- They should be assigned to the same judge, if possible, to determine whether they should be consolidated after considering:
    - The extent to which the cases involve the same parties, issues, and evidence;

- Whether consolidation will save time and money for the court and the parties without undue prejudice to any party;
- Whether any party opposes consolidation;
- Whether trying the cases together may confuse the jury;
- Whether there is a possibility that the results reached in the cases will conflict if they are tried separately; and
- Whether the cases will be ready for trial at the same time.

- The judge may then order the consolidation of the pretrial proceedings in these cases, including discovery proceedings, to avoid conflicts and duplication. At a later point in the litigation, the court, with the input of counsel, should determine whether:
  - The cases should be consolidated for all purposes, so that they become a single case in which a single verdict and judgment will be issued for all parties on all issues; or
  - The cases should be consolidated with respect to the trial of specified issues only to avoid duplication of evidence on those issues and where the evidence presented on the common issues will apply to each case; the other issues particular to each case will be tried separately; and a separate verdict and judgment will be issued in each case.

  (*Note*: Whether consolidation for trial is desirable depends largely on the identity of the primary issues and the amount of common evidence on these issues among the cases. Consolidated trials may confuse the jury rather than promote efficiency, unless common evidence predominates. To avoid this problem, the judge may consider severing for a joint trial those issues on which common evidence predominates and reserving the issues that are not common for subsequent individual trials. For example, in mass tort litigation, liability issues could be consolidated for joint trial and damage issues reserved for later individual trials. If most of the proof will be common, but some evidence admissible in one case should not be heard in others, the judge may consider a multiple-jury format. Cases with major conflicts between the basic trial positions of the parties should not be consolidated. Consolidation is also inappropriate if it will enlarge the dimensions of the litigation.)

When the related cases are in other courts in Indiana, the judge should determine whether the cases should be coordinated after considering:

- Whether common questions of fact or law predominate;
- The convenience of parties, witnesses, and counsel;
- The relative development of the actions;
- The efficient utilization of court facilities and personnel;
- The courts' calendars;
- The disadvantages of duplicate and inconsistent rulings, orders, or judgments; and
- The likelihood of settlement of the actions without further litigation if coordination is denied.

When cases are coordinated, the judge may:

- Order the separate trial of any issue or defense;
- Conduct hearings at various sites in the interest of convenience; and
- Sever cases or claims from the coordinated proceedings and transfer them back to their original venue.

When the related cases are in the courts of another state:

- Determine whether the court has personal jurisdiction over all parties, as well as venue over all causes of action;
- Establish an appropriate means to communicate with the judges presiding over related cases in other venues to discuss management issues;
- If each court has jurisdiction, consider whether jurisdiction should be yielded to a particular court under the inconvenient forum doctrine or applicable rule/statute; and
- When filing all cases in a single court is not possible or warranted, consider using informal means to coordinate proceedings in these cases with the cooperation of all judges and counsel involved:
    - To the extent possible;
    - To reduce duplication of effort and potential conflicts; and
    - To coordinate and share resources.

  (*Note*: At a minimum, the judges involved should exchange information and copies of orders they have entered that might affect proceedings in the other courts.)

When the related cases are in federal court:

- Determine whether the state court action will be removed to federal court;
- Consider issuing a stay of the state court action until the federal court action is resolved;
- Coordinate and share resources;
- Cooperate with the federal court judge to coordinate discovery and other pretrial proceedings by:
    - Exchanging case management orders, master pleadings, and discovery plans;
    - Considering the joint appointment of lead or liaison counsel to coordinate activities between the courts;
    - Jointly appointing a Commercial Court Master or expert to assist both courts with specified aspects of the litigation;
    - Minimizing duplicative discovery activity, including consolidating the depositions of experts who will testify in both cases, ordering coordinated document production, maintaining a document depository, and coordinating rulings on discovery disputes*;*
- Resolve how the attorneys in the state court action who cooperate with federal MDL attorneys will be compensated;
- Attorneys should be encouraged to resolve fee disputes among themselves and to seek judicial intervention only if necessary; and

- The federal and state judges may enter orders establishing rates of compensation for attorneys who settle their cases using coordinated state-federal discovery.

  (*Note*: Increasingly, complex litigation involves related cases brought in both federal and state courts and often involves a mass tort. No single forum has exclusive jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. The Judicial Panel on Multidistrict Litigation (MDL) has no power over cases pending in state courts but has facilitated coordination by transferring federal cases to a district where related cases are pending in the state courts.)

Case Management Conferences

§ 2.1 Scheduling Initial Conference

Case management (or pretrial) conferences are the judge's primary means of establishing and maintaining control over a Commercial Court case.

To establish control at the outset of the litigation, the judge should:

- Hold an Initial Case Management Conference as early in the case as practical.
    - The Initial Case Management Conference should be held within thirty (30) to sixty (60) days after the case is filed. The order for initial case management conference will be served contemporaneously with the complaint and summons.
    - Formal discovery shall not occur prior to the Initial Case Management Conference unless counsel agree to conduct such discovery, except as in accordance with the discovery guidelines.
    - Informal discovery must typically occur before the Initial Case Management Conference in accordance with the Indiana Commercial Court Discovery Guidelines § 2, Initial Discovery / Required Initial Disclosures. Those Discovery Guidelines, at § 2 (B)(6), require the parties to make the initial disclosures "no later than ten (10) days before the Initial Case Management Conference, unless a different time is set by agreement of the parties or court order."

- The order scheduling the conference (*see* Appendix I, Order for Initial Case Management Conference) should at a minimum address the following:
    - A requirement that counsel meet and confer before the conference to discuss claims and defenses, a plan for disclosure and discovery, any stipulations, and early settlement;
    - A list of the matters the judge intends to address at the conference and a requirement that counsel be prepared to discuss these matters;
    - An invitation to counsel to suggest other matters they would like the judge to address at the conference;
    - A direction to counsel to provide information about any related litigation pending in this court or any other court(s); and
    - A direction to counsel to submit a joint statement made in good faith that:
        - identifies agenda items,
        - specifies disputed issues,
        - includes a brief statement of the case,
        - includes proposed schedules for conducting the litigation, including
            - a discovery plan,
            - a dispositive motion plan,
            - proposed alternative dispute resolution, and
            - appointment of Commercial Court Masters.

§ 2.2 Attendance at Conference

Counsel for all parties are required to attend the Initial Case Management Conference in person absent leave of court. This conference is the judge's first opportunity to meet the attorneys, hear their views of the factual and legal issues, and obtain their input regarding a case management order. The judge should discuss the ways in which the Commercial Court process is unique and set the expectations in a Commercial Court case. Whether attendance in person should be required at subsequent conferences will depend upon the purpose of the conference.

§ 2.3 Matters to Cover at Conference

The principal objective of the Initial Case Management Conference is to develop a proposed case management order that will guide the course of the litigation. See Appendix J, Initial Case Management Proposed Order. To develop this order, the judge and counsel should consider the following matters:

Parties and Pleadings:

- Have all parties been served and appeared?
    - If not, set deadlines for service; or
    - Consider dismissing or severing unserved parties.
- Have any parties been dismissed?
- Are essential parties missing?
- Will any other parties be added?
    - Set deadlines for amending pleadings to add these parties and for service on these parties; or
    - Set a deadline for filing and service of motion for joinder.
- Will any additional pleadings be filed?
    - Set deadlines for filing and service.
- Will any pleadings be amended?
  (*Note*: Any amendments may depend upon the results of discovery.)
    - Set deadlines for filing and service.
- Will any pre-answer motions be filed?

Counsel:

- Should lead and liaison counsel be appointed?
- What is the best way of communicating with counsel (e.g., by e-mail, or a website for the case or party)?
- If electronic filing is not available, secure agreement for electronic submissions and acceptance of electronic notices.

Jurisdictional Matters:

- Have the parties agreed that the case will be on the Commercial Court Docket?
- Are there any matters, such as a party's bankruptcy, which might affect the court's jurisdiction over the case?

Issues:

- What are the primary factual and legal issues?
    - Ask for specific information about the parties' claims and defenses;
    - Require the attorneys to describe the material facts they intend to prove and how they intend to prove them;
    - Obtain stipulations as to matters that are not genuinely in dispute; and
    - Encourage voluntary dismissal of tenuous claims or defenses after probing into the likelihood of success and the potential disadvantages of pursuing them.
- What amount of damages is claimed?
    - How will damages be proved?
    - How have damages been computed?
- What other relief is sought?

Motions:

- What motions are anticipated?
- Are there any motions that should be heard before other motions (i.e., because determination of a particular motion might preclude the need for other motions)?
- Are there any motions that should be heard and determined at the same time?
- Should the time for filing and service of any motion be shortened or extended?

Discovery:

- Have all parties complied with mandatory initial disclosure requirements?
- What is the status of discovery?
- What further discovery is anticipated?
- How will the parties approach the discovery of electronically stored information?
- What discovery disputes are anticipated (e.g., will any protective orders be sought or privileges asserted)?
- Should a Commercial Court Master be appointed to supervise all discovery or specified discovery issues and disputes?
- Should the judge enter an order requiring the parties to preserve and retain documents, files, data, and records that may be relevant to the case?
  (*Note*: Because a preservation order may interfere with the parties' normal business operations and impose unforeseen burdens, the judge should discuss with counsel the need for such an order and, if one is needed, the scope, duration,

method of data preservation, and other terms that will best preserve relevant evidence without imposing undue burdens.)

- Should a central document depository be created for the case?
- Should a uniform numbering system for documents be required?
- Will the parties agree to informal discovery and other cost-reduction measures?
- Should discovery be conducted in a particular sequence?
- Should any limitations be imposed on discovery?

Alternative Dispute Resolution (ADR):

- Are the parties willing to participate in ADR?
- What type of ADR is appropriate?

Settlement:

- Have any settlement discussions occurred, or have any settlement offers or demands been made?
- Are the parties willing to discuss settlement now?
- Are the parties willing to participate in an early settlement conference?
- What other steps might be taken to facilitate settlement, if appropriate?

Related cases:

- Are there any related cases pending in this court or another court that should be consolidated or coordinated with this case?

Bifurcation or severance:

- Should consideration be given to bifurcating (or trifurcating) the trial of the case, (to try issues separately, specified defenses first, or the issue of liability before the issue of damages)?
- Should consideration be given to severing any claims (e.g., a cross-complaint that is not ready to be set for trial or claims that are required to be arbitrated)?

  (*Note*: Severance of certain issues for separate trial can reduce the length of the trial, particularly if determination of the severed issue may resolve the entire case or improve the jury's comprehension of the other issues and related evidence. Disadvantages, however, may include increased cost, delay, inconvenience (e.g., if the same witnesses may be needed to testify at both trials), and potential for unfairness if the result is to prevent a party from presenting a coherent case to the jury.)

Trial:

- When to set trial (after completing discovery)?
- When do the parties anticipate the case will be ready for trial?
- Are there any dates on which the parties or attorneys will not be available for trial?
- What is the estimated length of the trial?
- Is a jury trial requested?

  (*Note*: As a case management tool, some judges advise counsel that each side will have a reasonable time for presenting its case, ask counsel to estimate the time needed for each witness, and impose a time limit. Although such an action may seem Draconian, it can be effective to force each side to hone its case and think through with great clarity what the real issues are and how its case can be presented at trial in its most cogent form. Such an action may also be effective to encourage meaningful settlement discussions.)

§ 2.4 Case Management Order

At the conclusion of the Initial Case Management Conference, the judge should enter a case management order that sets a schedule for subsequent proceedings and otherwise provides for management of the case. This order will control the subsequent course of the case unless it is modified by a subsequent order. *See* Appendix J.

The order should memorialize all rulings, agreements, or other actions taken at the conference and include the following provisions, as appropriate:

- A schedule for discovery;

(*Note*: The judge should construct a discovery plan for the case after identifying the primary issues, at least preliminarily, based upon the pleadings and the parties' positions at the Initial Case Management Conference. Discovery may then provide information for further defining and narrowing issues, which may lead to revision and refinement of the discovery plan and case management order.)

- Whether the trial will be a jury trial or a nonjury trial;
- The estimated length of the trial;
- Whether all parties have been served or have appeared;
- Referral of the case to mediation or other appropriate form of ADR, and set the date for completion of this process;
- The dismissal or severance from the action of the unserved or non-appearing defendants;
- Deadlines for joining any additional parties, amending pleadings, and filing motions;
- The date, time, and place of any settlement conference;
- The date, time, and place of the next case management conference;

- Whether dates should be reserved in advance of a scheduled hearing to address unanticipated motions or discovery disputes; and
- All other significant items discussed at the Initial Case Management Conference.

§ 2.5 Holding Subsequent Conferences

A judge should hold periodic case management conferences to:

- Monitor the progress of the case, including the parties' compliance with deadlines for completing discovery and other procedures that are contained in the existing case management order;
- Resolve any problems the parties are having in adhering to the schedule set forth in the case management order;
- Become familiar with the disputed issues in the case as they are clarified through discovery;
- Address any unanticipated events in the case, such as the belated addition of any new parties, newly discovered evidence, or a change in the law affecting a material issue in the case;
- Explore possible settlement; and
- Determine whether any change in the trial setting/date is warranted.

Discovery

§ 3.1 Establishing Schedule for Discovery

As early in the case as possible, the judge and counsel must establish a specific schedule and deadlines for discovery. This schedule must be made part of the case management order.

- Counsel must review the Indiana Commercial Court Initial Discovery Guidelines, incorporated under the Background section of this handbook, above.
- Counsel are required to comply with those guidelines, which are similar to FRCP 26.
- Section 11 of the Indiana Commercial Court Discovery Guidelines includes required initial disclosures.
- Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
- The Discovery Guidelines are derived in part from the Federal Rules of Civil Procedure that were in effect as of June 1, 2016. The developing case law concerning the 2015 amendments to those federal rules are helpful to the Indiana Commercial Courts in applying the Discovery Guidelines. Additionally, the Discovery Guidelines derive from the Indiana Supreme Court's January 20, 2016 Order Establishing The Indiana Commercial Court Pilot Project, and from the second paragraph of Indiana Trial Rule 26 (B)(1). In relevant part, the January 20, 2016 Order provides: "Specifically, the [Indiana Commercial Court] Pilot Project will operate pursuant to guidelines adopted by the Working Group addressing case eligibility, assignment, and transfer; caseload and workload; Commercial Court masters; the publication of Commercial Court orders and statistics; and other relevant matters." In relevant part, T.R. 26 (B) provides: "Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:". The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(C).

- The Court prefers that discovery disputes be handled promptly and informally. As such, counsel must meet and confer, in person or by telephone, in a good faith manner before filing any discovery related motion to compel.
- Any motion raising a discovery dispute must contain a statement setting forth the efforts taken to resolve the dispute, including the date, time and place of any discovery conference and the names of all participating parties. The Court reserves the right to deny any motion raising a discovery dispute that does not contain such a statement.
- It is the policy of the Court to be readily available to address such disputes with counsel.

Depending upon the circumstances, the schedule may:

- Prescribe the sequence for particular types of discovery (e.g., interrogatories may be used to identify needed discovery and documents, followed by requests for production of documents, depositions, and finally requests for admission).
- Allow a party to vary the order for good cause (e.g., to take the deposition of a witness in ill health or of a witness who is about to leave the jurisdiction). The order should be flexible enough, so the parties do not have to go to court at all. Most judges will approve the parties' stipulations regarding discovery, but the parties should keep the judge informed about the status of discovery.
- Require initial discovery on matters (witnesses, documents, or information) that:
    - Appear pivotal and may make other discovery unnecessary or provide leads for further necessary discovery;
    - Might facilitate settlement negotiations; or
    - Might provide the foundation for a motion that will resolve the case.
- Set a discovery cut-off date by which all depositions must be completed and all discovery responses served.

§ 3.2 Designating Discovery Procedures

Managing discovery in Commercial Court cases will require special procedures, including the following:

Initial discovery / Required Informal disclosures:

- A party must, without awaiting a discovery request, provide the other parties the following:
    - The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
    - A copy or description by category and location of all documents, electronically stored information, and tangible documents/items that the disclosing party has in its possession, custody, or control and may use to

support its claims or defenses, unless the use would be solely for impeachment;

- A computation of each category of damages claimed by the disclosing party who must also make available for inspection and copying the documents or evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
- For inspection and copying any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in an action or to indemnify or reimburse for payments made to satisfy the judgment;
- Documents that support any irreparable harm being alleged by the Plaintiff or any concerning any damages that Plaintiff is seeking in the Complaint.
- A party must make the above initial disclosures no later than twenty-one (21) days before the Initial Case Management Conference, unless a different time is set agreement of the parties or court order;
- A party has a continuing duty to promptly supplement these disclosures. The duty to supplement these disclosures is the same duty described in Indiana Trial Rule 26(E); and
- The judge will encourage the parties to exchange information informally, particularly relevant documents. The parties should also submit a discovery plan within 14 days after the parties' Initial Case Management Conference, unless a different time is set by agreement of the parties or court order.

Information from other sources:

When information is available from public records or other litigation, or from discovery conducted by others in the same litigation, the judge should consider requiring the parties to review those materials before undertaking additional discovery and limiting the parties to supplemental discovery.

Joint discovery requests and responses:

- The judge may consider requiring parties with similar positions to submit a combined set of interrogatories, requests for production, or requests for admission.
- If voluminous materials are to be produced in response to a discovery request, the judge may relieve the responding party of the requirement of furnishing copies to each discovering party and, instead: (1) require the parties to share copies to save costs, and/or (2) require the parties to open and maintain a document depository for the case (*see* "Document depository," below).

Numbering system for documents:

- The judge may require the parties to use a uniform numbering system for documents, so they can be accessed and retrieved more readily.

- To reduce the risk of confusion, each document should be assigned a single identifying designation for use by all parties for all purposes throughout the case, including at depositions and trial. Parties must agree to the identifying designation for all documents.
- Consecutive numbering is usually the most practical method, with blocks of numbers assigned to each party in advance. This makes the source of each document immediately apparent.
- To avoid later disputes, the judge will encourage the parties to maintain a log of each document that is produced that indicates: by whom the document was produced; to whom it was produced; and on what date it was produced.
- Creating a log can take a disproportionate amount of time, so it may not be appropriate for all cases. When the parties believe a log would be useful, they should agree on the format. The log will normally be kept at the document depository.

The judge may order an identification system for electronically stored information that complements or integrates with the system adopted for paper documents.

Document depository:

- A document depository can promote efficient and economical management of voluminous documents in multiparty litigation and is frequently used in Commercial Court cases. In most cases, the document depository will be electronic, but in other cases (e.g., construction defect cases involving architectural plans), the document depository may consist of documents in paper form.
- A document depository can facilitate a determination of which documents have been produced and what information is in them.
- It can help ensure that newly joined parties have access to the product of prior discovery and hold demands for additional discovery to a minimum.
- Before ordering or approving a document depository, the judge should determine that the substantial cost of establishing and maintaining a depository is justified by the anticipated savings and other benefits.
- The judge's order establishing a document depository for the case may require the production of all discovery materials in common, computer-readable format, when these materials can be reasonably and cost-efficiently produced in this format. The order may also require that these materials be made available through a secure Internet website or some other means agreeable to the parties. This substantially reduces the expense and burden of document production and inspection.
- In consultation with counsel, the judge should allocate costs fairly among the parties, taking into account their resources, the extent of their use of the depository, and the benefit they derive from it.
- To ensure fair access, the judge may consider special arrangements for less affluent or technologically sophisticated parties.
- The judge should direct counsel to collaborate in establishing procedures for acquiring, formatting, numbering, indexing, and maintaining discovery materials;

- The judge should also direct counsel to decide when and by whom documents may be accessed for examination or copying.
- The judge should direct that discovery material be submitted to the depository in computer-readable format, unless impossible or impracticable. Paper documents should be imaged or scanned if at all possible.
- The judge and counsel may agree on a computer service provider to administer the depository. The depository should be at a neutral site with regulated access.
- The judge and counsel should determine what will happen to the depository once the case is resolved.

Interrogatories:

- No party shall serve more than twenty five (25) interrogatories, including sub-parts, unless by leave of the Court or agreement of the parties.
- Similarly situated parties should confer and develop a single or master set of interrogatories to be served on an opposing party.
- If a party has asked an interrogatory, other parties are prohibited from propounding the same interrogatory. Any party may use the answers to interrogatories served by another, regardless of who propounded the interrogatory.
- If some questions will require substantially more investigation than others, counsel may stipulate that the responding party will provide answers in stages as the information is obtained instead of seeking additional time for the first response.
- When interrogatories seek information that the responding party lacks, or can obtain only with a significant expenditure of time and money, the parties should meet and confer to reach an agreement, rather than first objecting.
- The judge may require the parties to object to interrogatories before the expiration of the time for submitting answers. If the parties cannot resolve the objections by modifying or clarifying the interrogatories, they should present their dispute to the court in a clear and concise joint statement in which each side presents its facts and legal arguments. The judge should rule promptly to avoid disrupting the progress of the litigation. If the dispute involves one or two discrete issues that are not overly complicated, counsel should be allowed to present the dispute to the judge in a telephone conference without submitting a joint statement.
- When a party seeks discovery from an organization but does not know the identity of the individuals with relevant knowledge, the judge may permit the party to name the organization as the deponent and identify with particularity the subjects on which the party desires to examine the organization. The judge may then require the deponent to designate the person(s) to testify on these subjects. This process may avoid the need to serve interrogatories to discover the identities of knowledgeable individuals and then to depose them individually.
- The discovery plan may schedule one or more periodic dates for review and amendment of interrogatory responses to include new information that makes any previous response incomplete or incorrect.

Depositions:

- Each party is limited to not more than ten (10) depositions, with a seven-hour limit for each deposition, unless the parties agree otherwise or the Court has set other limits.
- Counsel shall observe rules for the fair and efficient conduct of depositions (e.g., by prohibiting speaking objections and requiring that objections be stated concisely and in a non-argumentative manner). When abuses occur, the judge may:
    - Direct that one or more depositions be supervised in person by a judicial officer or Commercial Court Master, with costs taxed to the party whose abuse required the supervision;
    - Direct that future depositions be taken in the courthouse (near the judge's courtroom), so the judge can hear and rule promptly when difficulties arise; and/or
    - Impose sanctions, including the costs associated with any motions or briefing of counsel's abuses.
- Counsel should stipulate regarding who may attend depositions, where the depositions are to be taken, who may question the witness, and how the parties are to allocate costs.
- To make depositions proceed more smoothly, the discovery plan should address whether exhibits should be exchanged in advance of the deposition. The judge may order that all documents used as exhibits in depositions be assigned an exhibit number that will belong exclusively to that document in all subsequent depositions, motion hearings, and at trial. This will prevent any confusion that may arise when a document is referenced by different exhibit numbers.
- The judge may consider the use of depositions against persons who may become parties to the litigation by later amendment of the pleadings or the transfer of related cases.
    - The case management order may state that the court will consider allowing all previously taken depositions to be deemed binding on new parties; however, new parties may move to show cause why these depositions should not be deemed binding on them within a specified period of time after their appearance in the case. Counsel should notify new parties of the depositions that have been taken.
    - The judge may limit the resumption of earlier depositions to questioning relevant to the new parties.

Stipulations:

- Counsel should stipulate to facts that are not genuinely in doubt after an appropriate opportunity for discovery is afforded.
- Counsel should seek stipulations with respect to matters that affect the admissibility of evidence, such as the authenticity of documents and the foundation requirements for exceptions to the hearsay rule. If counsel cannot agree on whether a particular item of evidence is admissible, the judge may encourage them to submit an early motion in limine to address the matter.

- The judge may consider appointing a Commercial Court Master to assist the parties in arriving at stipulations.

Requests for admission:

- Counsel shall not deny a requested admission on the basis of a trivial disagreement with a statement or without indicating the portions of the statement that are true.

§ 3.3 Managing Discovery of Electronically Stored Information

Managing the discovery of electronically stored information (ESI) in Commercial Court cases will generally require special procedures. The judge should encourage the parties to work together, particularly in connection with the completion of ESI discovery. No party should be permitted to use ESI discovery to harass or unnecessarily burden an opposing party, or to unreasonably increase the costs of the litigation.

(*Note*: ESI includes, but is not limited to, e-mails, word processing files, databases, spreadsheets, web pages, cloud-based products, instant messages, text messages, and social media. It includes current, back-up, archival, legacy computer files, and data systems as well as metadata, which is the information embedded in an electronic file about that file, such as the date of its creation, author, source, and history. It also includes magnetic disks (such as computer hard drives and floppy disks), optical disks (such as DVDs and CDs), flash memory (such as "thumb" or "flash" drives), printers, fax machines, voicemail systems, instant messaging systems, personal digital assistants, cellular telephones, smart phones, tablet devices, pagers, and cloud-based systems.)

Issues unique to the discovery of ESI, which are covered in this section, include:

- Its scope:

(*Note*: The volume and multiple sources of ESI may lead to disputes about the scope and cost of discovery. Data privacy issues may also arise, including medical or human resources records or personal e-mail, or regarding company data that is subject to privacy laws in other countries.)

- The form in which ESI is produced (e.g., in native format or some other form agreed to by the parties) (*see* "Form of production of ESI," *infra*);
- Whether the costs of production should be shifted from the producing to the requesting parties or otherwise allocated between the parties (*see* "Shifting costs of producing ESI," *infra*);
- Whether inadvertent production of ESI will lead to the waiver of the attorney-client privilege or work product protection; and

(*Note*: The volume and multiple sources of ESI may make the review to identify and segregate privileged information more difficult, increasing the likelihood of its unintentional production. As a result, the court should encourage the incorporation of a "claw back" agreement in the case management order. *See* "Waiver of privilege or work-product protection," *infra*. Other factors that may contribute to the problem are the use of "tracked changes," reviewer's comments, and other program features, and the production of certain metadata fields (e.g., file path).)

- The preservation of ESI.

(*Note*: The obligation to preserve ESI requires reasonable and good faith efforts to retain information that may be relevant to the case. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant ESI. The dynamic, changeable, and ephemeral nature of ESI typically makes it necessary for a party and its counsel to take proactive steps to preserve information that may be discoverable. Accordingly, preservation of ESI should be addressed prior to, and at the Initial Case Management Conference or as soon as it is clear that the case involves ESI. *See* "Preservation of ESI," *infra*.)

General considerations:

- The judge should encourage the parties to discuss the scope of proposed discovery of ESI early in the case, particularly any discovery of ESI beyond what is available to the responding parties in the ordinary course of their business. This discussion should include:

    - What information each party has in electronic form and where that information is located;

(*Note*: This may include identifying ESI systems that are likely to have relevant information and providing a general description of each system, including the nature, scope, character, organization, and formats employed in each system. The parties should also discuss any issues with regard to production of the data, including, but not limited to, proprietary or commercially available databases that require unique software to view data and data systems that encounter problems when extracting data.)

    - The identity of individuals who are most knowledgeable about the parties' ESI systems and who can facilitate the location and identification of discoverable ESI;

(*Note*: To facilitate discovery, the judge may require each party to designate a single individual through whom all ESI discovery requests and responses will be made. This individual will generally be a party's employee or an attorney. In some cases, the party may wish to designate a third-party consultant. He or she must

be: (1) familiar with the party's ESI systems and capabilities in order to explain these systems and answer relevant questions; (2) knowledgeable about the technical aspects of ESI discovery, including electronic document storage, organization, and format issues; (3) prepared to participate in ESI discovery dispute resolutions; and (4) responsible for organizing the party's ESI discovery efforts to ensure consistency and thoroughness.)

    - Any nonparties from whom discovery of ESI will be sought, to the extent known at the conference;
    - The method of search, and the words, terms, and phrases to be searched, as well as time frames, metadata, fields, and document types of searches if the parties intend to employ an electronic search to locate relevant ESI;
    - The anticipated schedule for production of ESI and the form of that production;
    - The difficulty and cost of producing the information and reallocation of costs, if appropriate;
    - The responsibilities of each party to preserve ESI proportional to the needs of the case; and
    - Agreements about privilege or work-product protection for ESI (e.g., a possible "claw back" or "quick peek" agreement, or an agreement on the scope, form, or content of privilege logs).

- To allow formulation of a realistic electronic discovery plan, the judge should require:
    - The requesting parties identify the ESI they need as narrowly and precisely as possible; and
    - The responding parties be forthcoming and explicit in identifying what ESI is available from what sources.

- The judge should discourage costly, speculative, duplicative, or unduly burdensome discovery of ESI by exercising the judge's authority to limit or modify the extent of otherwise allowable discovery when proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Scope of discovery of ESI:

- Electronic discovery burdens should be proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Given the unique nature and large and growing volume of ESI, relevant costs include the

costs of data preservation, retrieval, review, and production, as well as the possible costs associated with the disruption of routine business processes.

- To keep the scope of discovery reasonable, the judge should consider allowing the producing party to do the following:

    - Collect ESI from key individuals rather than searching broadly through large electronic systems;
    - Limit the number of custodians from which ESI must be produced; and

    (*Note*: This does not change the parties' responsibilities with regard to ensuring that relevant data is preserved or that all relevant custodians are aware of their obligations to preserve relevant data.)

    - Use electronic tools and processes, such as sampling, search terms, and date restrictions to identify relevant information.

- Assuming the requested information is relevant to the claims or defenses or the subject matter of the litigation, and is not subject to a claim of privilege or protection, requests for the production of active data available to the responding party in the ordinary course of business should generally be approved.

    (*Note*: Active electronic records are generally those currently being created, received, or processed, or that need to be accessed frequently or quickly.)

- When hard-to-access information is of potential interest, the judge should encourage the attorneys to negotiate a two-tiered approach in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the less accessible sources.

    (*Note*: These sources may include metadata. They may also include systems data, which refers to computer records regarding the computer's use, such as when users logged on and off the computer or network, the applications and passwords they used, web sites they visited, and the documents they printed or faxed. Other types of data are even more removed from what is available in the ordinary course of business and may involve substantial cost and time, as well as active intervention by computer specialists. These types of data include offline archival media; backup tapes designed for restoring computer systems in the event of disaster deleted files; and legacy data that were created on now-obsolete computer systems with obsolete operating systems and computer software. Even active data may involve substantial burdens to produce (e.g., when vast amounts are requested or when data are requested in a form that requires the reprogramming of databases).)

- The requesting party may need discovery to test the responding party's assertion that the requested information is not reasonably accessible, which may include:

- Taking depositions of those knowledgeable about the responding party's information systems;
    - Inspection of the data sources; and
    - Requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible.

      (*Note*: Sampling of the less-accessible source can help refine the search parameters and determine the benefits and burdens associated with a broader search.)

- The judge should order production of ESI that is not reasonably accessible only if the requesting party has made a showing of need and relevance that outweigh the costs and burdens. To determine whether such an order is warranted, the judge should require the requesting party make a specific and tailored discovery request and may order:
    - The parties to examine the information that is available from reasonably accessible sources before requiring discovery into sources that are identified as not reasonably accessible;
    - Sampling of the sources identified as not reasonably accessible to assess the costs and burdens of production and the likelihood of finding responsive information and its usefulness to the litigation;

- Limited discovery into the costs and burdens of accessing the information from the sources identified as not reasonably accessible and into the basis for believing that they do or do not contain information likely to be important to the case and not available from other accessible sources, which may include deposing the responding party's computer system personnel; and
- The requesting party to pay all or part of the reasonable costs of producing the information from sources identified as not reasonably accessible.

Form of production of ESI:

- The judge will encourage the parties to discuss the issues of production forms early in the litigation, prior to the Initial Case Management Conference, to avoid the waste and duplication of producing the same data in different formats.

    - The relatively inexpensive production of computer-readable images may be sufficient for the vast majority of requested ESI.

      (*Note*: ESI may be produced as a TIFF (tagged image file format) or PDF (portable document format) file, which is essentially a photograph of an electronic document. These forms of electronic production can be coupled

with additional linked electronic information about each document that readily allows the documents to be searched and reviewed in an electronic database.)

- Other data may need to be produced in native format (e.g., the form in which the data was created and is used in the normal course of operations), or in a modified format in which the integrity of the data can be maintained while the data can be manipulated for analysis (e.g., excel spreadsheets).
- If raw data are produced, appropriate applications, file structures, manuals, and other tools necessary for the proper translation and use of the data must be provided (e.g., proprietary and commercially available databases).

- In resolving disputes over the form of production, the judge should consider:

  - What alternatives are available?
  - What are the benefits and drawbacks for the requesting and responding parties?
  - If the responding party is not producing information in a form in which it is ordinarily maintained, is the party producing it in a form that is reasonably usable to the requesting party?
  - If the requesting party disputes that the proposed form of production is reasonably usable, what limits its use?
  - Has the responding party stripped features such as search features or embedded data that may be important and, if so, what is the claimed justification?

Shifting costs of producing ESI:

- The usual rules for allocating the costs of discovery generally apply when the ESI is in a reasonably accessible format.
- When the ESI is not available from reasonably accessible sources, the judge may shift at least some of the production costs from the producing party to the requesting party after considering:
  - The extent to which the discovery request is specifically tailored to discover relevant information;
  - Whether this information is available from other sources;
  - The total cost of production compared to the amount in controversy;
  - The total cost of production compared to the resources available to each party;
  - How best to provide incentives to each party to control costs;
  - The importance of the issues at stake in the litigation; and
  - The relative benefits to the requesting party of obtaining the information.

Waiver of privilege or work-product protection:

- Because broad database searches may be necessary, safeguards against exposing confidential or irrelevant data to the opponent's scrutiny are necessary.

    - Fear of the consequences of inadvertent waiver of privilege may add cost and delay to the discovery process for all parties by requiring the responding party to screen vast quantities of ESI for privilege before production.
    - Unintentional disclosure of privileged or protected material during production is a substantial risk that persists even if expensive and time-consuming steps are taken to identify and segregate it.
    - To address this risk, the judge should consider encouraging the parties to enter into a "claw back" agreement, under which they typically review the material for privilege or protection before it is produced, but agree to a procedure for returning privileged or protected information that is unintentionally produced within a reasonable time from its discovery without any waiver of applicable privileges.
    - In the event that a document protected by the attorney-client privilege, the attorney work product doctrine or other applicable privilege or protection is unintentionally produced by any party to this proceeding, the producing party may request that the document be returned. In the event that such a request is made, all parties to the litigation and their counsel shall promptly return all copies of the document in their possession, custody, or control to the producing party and shall not retain or make any copies of the document or any documents derived from such document. The producing party shall promptly identify the returned document on a privilege log. The unintentional disclosure of a privileged or otherwise protected document shall not constitute a waiver of the privilege or protection with respect to that document or any other documents involving the same or similar subject matter.

      (*Note:* The judge may include the parties' "claw back" agreement in the case management order or in a separate order. For example, it is quite common to include a "claw back" provision in a protective order or confidentiality stipulation. Entry of the "claw back" order by the court generally affords the parties greater protection of their privileged information and minimizes the risk that third parties will be able to claim a privilege waiver for inadvertently produced privileged information.)

    - In rare circumstances, for example, when the volume of ESI is large and the value of the case is small, the judge should consider encouraging counsel to enter into a "quick peek" agreement. With a "quick peek" agreement, the responding party provides the requested material without a thorough review for privilege or protection with the explicit understanding that its production does not waive any privilege or protection. The requesting party then designates the specific documents it would like produced and the

responding party has the opportunity to review these documents and withhold those that are privileged or protected.

(Note: "Quick peek" agreements may be viable when large volumes of records are produced that are likely to contain little or no privileged information or when any disclosure of privileged information is likely to be harmless to the producing party. Often, though, these agreements are problematic and understandably tend to be viewed skeptically by parties and counsel because of the problem of possible waiver privilege in related proceedings and because it can be difficult to "un-ring the bell" once the opposing party has seen a party's privileged documents.)

- In determining whether a party has waived the attorney-client privilege due to an unintentional disclosure of attorney-work product or other privileged ESI, the judge should consider:
  - The total volume of information produced by the responding party;
  - The amount of privileged information disclosed;
  - The reasonableness of the precautions taken to prevent inadvertent disclosure of privileged information, including the time and resources reasonably available to the responding party to screen the requested material given the amount in controversy in the case;
  - The promptness of the actions taken to notify the receiving party and otherwise remedy the error; and
  - Counsel's reasonable expectations and any agreements entered into when the information was exchanged with counsel or other entities.

- The usual practice for testing an assertion of privilege is an *in camera* inspection of the material by the judge. In cases involving ESI, the judge may consider whether the sheer volume of information requires new methods of review, such as sampling or the use of a Commercial Court Master.

Preservation of ESI:

- Generally, each party has the responsibility to preserve relevant ESI. This requires the parties to actively discharge their duty to ensure the parties' custodians acknowledge and comply with preservation obligations. Further, attorneys, or their designees who are knowledgeable about ESI in the litigation construct, should ensure that the party's IT department, manager, or contractor turns off any automatic deletion functions and suspends routine destruction pursuant to a document retention schedule. The judge should not issue a preservation order defining the scope of a party's preservation obligation, unless the party requesting the order can demonstrate its necessity. *See* The Sedona Conference, *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2007), Section 5f (www.thesedonaconference.org).

- In some cases, a preservation order may aid the discovery process by helping the parties to define the specific scope of their preservation obligations.
- The judge should discuss with counsel the possible need for a preservation order at the first conference at which ESI is addressed and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant ESI without imposing undue burdens.
- In crafting such an order, it is important to know from the responding party what data-management systems are routinely used, the volume of data affected, and the costs and technical feasibility of implementing the order. The parties should meet and confer about these issues and the overall scope of a preservation order before the Initial Case Management Conference.
- Routine system backups may preserve ESI subject to discovery, but recovery of relevant ESI from nonarchival backups is costly, inefficient, and potentially disruptive. A data-preservation order that requires the accumulation of these backups beyond their usual short retention period may needlessly increase the scope and cost of discovery.
- To the extent a preservation order may cause hardship when the records are stored in data-processing systems that automatically control the period of retention, the judge should consider alternatives, such as having the parties duplicate relevant data on removable media or retaining periodic backups.

Spoliation and sanctions:

- If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

  (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

  (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

    (A) presume that the lost information was unfavorable to the party;

    (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

    (C) dismiss the action or enter a default judgment.

Identification system for ESI:

- The judge may order an identification system for ESI that complements or integrates with the system adopted for paper documents.
- At a minimum, computer tapes, disks, or files, whether local, network based or cloud based, containing numerous email messages or word-processed documents should be broken down into their component documents for identification.
- Special consideration should be given to how the various elements in any databases should be identified.

§ 3.4 Placing Limitations on Discovery

The judge is responsible for controlling discovery. Discovery control in a Commercial Court case may take a variety of forms, including time limits, sequencing, and restrictions on the scope and quantity of discovery (e.g., limiting the number and length of depositions, the number of interrogatories, and the volume of requests for production, as well as entering protective orders and ruling on motions to compel.) *See* Appendix K for a stipulated protective order. The judge may set presumptive limits early in the case, before discovery has begun, after consulting with counsel, and with the understanding that the limits are binding until further order.

The judge should not hesitate to ask counsel why particular discovery is needed and whether information can be obtained more efficiently and economically by other means.

The judge may limit discovery:

- When the discovery sought is cumulative or duplicative;
- When it is more convenient, less burdensome, or less expensive to obtain the discovery from another source;
- When the discovery seeks information the party has had ample opportunity to obtain; or
- When the discovery seeks privileged work product or attorney-client communications.

The judge must employ proportionality principles to determine the scope of discovery, including:

- The importance of the issues at stake in the action;
- The amount in controversy;
- The parties' relative access to relevant information;
- The parties' resources;
- The importance of the discovery in resolving the issues; and
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

Actions the judge can take with respect to specific types of discovery include:

- *Documents*: Prohibiting indiscriminate, overly broad, or unduly burdensome requests for documents and directing counsel to frame requests for production of a proportionally sound amount of documents. At the same time, the judge must be cognizant of the tendency for responding parties to read requests in the narrowest terms possible. These potential problems should be resolved at informal conferences between the parties without court intervention.
- *Depositions*: Using information provided by the parties about the need for proposed depositions, the subject matter to be covered, and the available alternatives in determining any limitations. The judge may place limits on the number of attorneys for each party or each side which may attend depositions, particularly when fees may be awarded or approved by the court. The judge should be careful about limiting the number of attorneys, however, because in many Commercial Court cases more than one attorney's presence is justifiable. The judge may consider requiring counsel to identify the documents about which the witness will be questioned a number of days before the deposition (e.g., three days).
- *Interrogatories*: Restricting the number of interrogatories to: (1) force counsel to make the best use of the limited number of interrogatories through skillful and thoughtful drafting designed to accomplish a legitimate purpose; (2) determine the existence, identity, and location of witnesses, documents, and other tangible evidence as a prerequisite to planning further discovery; and (3) require a party to disclose any facts that it believes raise a triable issue with respect to particular elements of a claim or defense. Before allowing contention interrogatories, the judge should consider whether they are likely to be useful at that stage of the proceeding and ensure that they will not be argumentative. In multi-party cases, the judge may consider having each side propound a number of joint interrogatories and, after these are answered, allow individual parties to propound their own follow-up questions.

§ 3.5 Resolving Discovery Disputes

Strict compliance with the Ind. T.R. 26(F) meet and confer requirements in resolving discovery disputes is mandatory. This includes actual face-to-face or telephonic meetings. An exchange of email or letters is insufficient. Prompt ruling on discovery disputes deters unreasonable and obstructive conduct, and prevents the frustration of existing discovery deadlines and the delay of ongoing discovery while a ruling is pending. The discovery plan must include specific provisions for the fair and efficient resolution of discovery disputes, including:

- A requirement that counsel seeking relief first specify to opposing counsel a concise statement of the alleged deficiencies or objections and then meet in good faith to try to effectuate a written resolution of the dispute before submission to the court for resolution.

- A mechanism for the expedient submission to the court of discovery disputes which counsel were not able to resolve, including submissions via conference call or email.
- Restrictions on the length of motions, memoranda and supporting materials, and time limits for their submission.
- Prohibiting in all but extraordinary circumstances the conduct of discovery with respect to a discovery dispute itself.
- The appointment of a Commercial Court Master to resolve discovery disputes.

§ 3.6 Issuing Protective Orders

The need for procedures to accommodate claims of privilege or protection of material from discovery based upon work product, trade secrets or privacy must be addressed at the Initial Case Management Conference to avoid disruption of the discovery schedule. Protection should be given only to material for which a clear and significant need for confidentiality has been shown. Consideration must be given to:

- Balancing concerns among the parties for confidentiality against the needs of the litigation.
- The rights and needs of the parties, the interests of non-parties, individual privacy, the commercial value of the information, and the public interest in the fruits of discovery.
- Establishing a procedure for the resolution or avoidance of claims of privilege by agreement or appropriate sequencing of discovery.
- Reviewing alleged privileged material *in camera* or referring the dispute to a Commercial Court Master.
- Use of the Indiana Commercial Court Stipulated Protection Order (Appendix M) is approved and strongly encouraged.
- Issuing an umbrella order that all alleged confidential material disclosed is presumptively protected unless challenged in cases where the volume of the discoverable confidential material is large in order to expedite production and reduce costs. Care should be taken that an umbrella order does not delay the litigation by merely postponing rather than eliminating the need for close scrutiny of discovery material when a challenge to the order is made.

§ 3.7 Issuing Sealing Orders

The public policy of the State of Indiana, as enunciated by IC § 5-14-3-1, that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees, limits the exclusion of materials from public access that are filed with the Court. A list of the materials automatically excluded from public access is found in IC § 5-14-3-4(a) and Administrative Rule 9(G). The policy and procedure set forth in IC § 5-14-3-5.5 and Administrative Rules 9(G)(4) and (5) must be followed to exclude court filings and records not automatically excluded from public access.

§ 3.8 Disclosure and Discovery of Expert Opinions

Reasonable judicial control over the use of expert witnesses is required for effective management of Commercial Court litigation, including:

- Conferring with counsel before testifying experts are retained to determine whether the proposed testimony will be necessary and appropriate.
- Limiting the number of expert witnesses that may be called at trial and the subjects they will cover.
- Setting deadlines for the parties' disclosure of the identity of expert witnesses to be called at trial.
- The appointment of a neutral expert by the court in cases where strong evidence appears to support the contentions of all the litigants, the technical evidence is particularly complex, and it is likely that scientific or technical evidence will determine the outcome of the case. Notwithstanding the cost to the parties, the appointment of a neutral expert might be helpful to:
    - Provide opinions on scientific or technical issues.
    - Provide background information to the finder of fact to aid comprehension.
    - Offer a neutral opinion on disputed scientific or technical issues.
    - Comment on the opinions of the parties' experts.
    - Facilitate stipulations and possibly settlement.
- The order appointing the neutral expert by the court should set forth:
    - The cost of the appointment of the expert and its allocation among the parties;
    - The function the expert will perform, including whether or not the expert will testify at trial and, if not, how the expert's testimony will be presented;
    - The extent of discovery permitted regarding the expert's testimony;
    - The provision of a written report by the expert to the parties before trial;
    - The extent to which, if any, that ex parte communication will be permitted between the judge and the expert and, if so, the method by which the substance of the ex parte communications will be disclosed; and
    - Jury instructions regarding the expert's role in the proceedings and the weight to be given to the expert's opinion.

- Requiring the parties to disclose for each expert, subject to any statutory limitations, the following:
    - A signed, written report stating all opinions, the specific bases for the opinions, and the information considered in forming the opinions to which the expert will testify;
    - Exhibits to be introduced in support of the opinions;
    - The expert's qualifications;
    - The compensation the expert is to receive; and
    - A list of cases in which the expert has testified.

Early and full disclosure of expert reports is an effective means to define and narrow the issues in a Commercial Court case, provided that the reports specifically set forth: (1) the underlying assumptions and facts upon which they rely; (2) the methods, tests or research employed by the experts; and (3) why those methods, tests or research support the expert's proposed testimony. Disclosure also facilitates rulings in advance of trial on objections to the qualifications of an expert; the relevance and reliability of opinions to be offered; and the reasonableness of an expert's reliance on particular information to the end of identifying and narrowing the grounds of disagreement between opposing experts.

Other considerations:

The adoption of a cooperative approach among experts and the production of a joint report setting forth areas of agreement and areas of disagreement which cannot be resolved. These reports must include:

- The experts' qualifications;
- The literature and significant material upon which the experts relied in reaching their opinions;
- Identification and qualifications of all persons who have carried out data selection, data inspections, tests or experiments upon which the reports rely;
- All data, assumptions and methods upon which the reports rely;
- The bases of the expert opinions expressed in the reports;
- Any qualifications to any of the expert opinions expressed in the reports; and
- A statement at the conclusion of all reports to the effect that the expert authoring the report confirms that the matters stated as facts in the report are true to the expert's best knowledge and belief and that the opinions expressed in the report are the expert's true and complete professional opinion.

Counsel and the court should have a pre-hearing discussion among the experts in the preparation of the joint report. An agenda shall be prepared by the attorneys, with input from the parties and the experts and guidance from the court, with sufficient time afforded to prepare for the discussion, setting forth:

- The identification and discussion of expert issues in the proceedings and either reach agreement on the issues or narrow them; and
- A summary of the reasons for disagreement on any issue and identify what action, if any, may be taken to resolve the disagreement.

The attorneys may be present at the discussions among the experts only by order of court or consent of the parties. Even if permitted to attend, the attorneys should not participate except to answer legal questions posed by the experts. The contents of the discussion may be referred to at trial only by consent of the parties.

The issuance of a joint statement resulting from pre-hearing discussion among the experts signed by all parties to the discussion should be considered.

Any agreements reached during the pre-hearing discussion among the experts do not bind the parties unless otherwise expressed in the joint statement; however, given the goal of the cooperative approach to reduce costs, any party refusing to be bound is required to explain the refusal to the court on the record.

The disclosure of any other experts appointed by any party not previously disclosed as a "shadow expert" acting as an advisor to the court and not an advocate of any party should be addressed.

The expert must attach to the expert report a copy of all written instructions and notes of oral instructions provided by the attorney or party which hired the expert.

The expert must also attach to the expert report a written acknowledgment that the expert's role is that of an advisor to the court and not an advocate for any party.

Trial Management Conference/ Preparation for Trial

§ 4.1 Matters to Cover at Conference or Conferences

A trial management conference or conferences should be held to formulate a plan for the trial and to facilitate the admission of evidence. It may also be used as an opportunity to discuss settlement. This conference or conferences should be held as close to the time of trial as is reasonable under the circumstances. All attorneys who will conduct the trial should be required to attend the conference. Any individuals with final settlement authority should be required to attend the conference or to be available by telephone.

(*Note*: In Commercial Court cases, a trial management conference may turn into several "final" conferences (e.g., a final conference lasting more than one court session). This is particularly true if the judge will rule on numerous motions in limine at the final conference. In such Commercial Court cases, the court may wish to set the initial trial management conference thirty (30) days before trial, the second conference twenty (20) days before trial, and the "final" conference ten (10) days before trial.)

Setting Trial

The court should issue an order Setting and Governing (Bench/Jury) Trial. Several months prior to trial, the court should conduct a pretrial conference to set the trial date, a Final Pretrial Hearing date, the close of discovery, pretrial motion deadlines, expert disclosure deadlines, etc. A non-exhaustive list of items to be addressed at that time is set out in the Order Setting and Governing (Bench/Jury) Trial forms, which are Appendix N and O; below is another list of agenda items for that pretrial conference.

At the conference or conferences, the judge should:

- Explore the possibility of settlement with the parties;
- Point out the strengths and weaknesses of each party's case;

  (*Note*: In cases in which resistance to settlement arises from unreasonable or unrealistic attitudes of the parties and counsel, the judge may help them reexamine their premises and assess their cases realistically.)

- Focus the parties' attention on the likely cost of litigating the case to conclusion in fees, expenses, time, and other resources;
- Allude to comparable cases the judge has settled and why the results reached were deemed to be fair by both sides; and
- If another judge is available, consider asking the other judge to conduct the settlement negotiations.

  (*Note*: In this way, negotiations can continue even during the trial, and the trial judge stays insulated from them. The trial judge should not engage in settlement discussions if any party objects. In some jurisdictions, trial judges are specifically prohibited from discussing settlement with the parties. In jurisdictions that permit

trial judges to do so, the parties' and attorneys' agreement to discuss settlement with the judge should be obtained and placed on the record. Their waiver of any right to disqualify the judge based on the settlement discussions should also be obtained and placed on the record. The agreement and waiver should be sufficiently broad to permit the judge to discuss the anticipated evidence, as well as the settlement amounts offered and demanded not only in the presence of all of the attorneys, but also with each separately and in confidence. When a trial judge is allowed to discuss settlement with the parties, the judge will often become better informed about the case, which may be useful to the judge in trying the case if it does not settle.)

At the conference or conferences, counsel should submit to the judge, and exchange with opposing counsel, the following:

- A final list identifying the witnesses to be called, including:
    - the anticipated time for presentation of each witness's testimony;
    - the subject of their testimony, including a designation of any deposition excerpts to be read; and
    - a summary of any legal problems or conflicts with the potential witnesses;

      (*Note*: The judge may caution counsel that these lists should not be inflated to disguise from opposing counsel which witnesses will actually be called.)

- Copies of all proposed exhibits and visual aids, including illustrative exhibits and computer-generated evidence;

  (*Note*: Digital evidence and illustrative aids should be submitted in the same format that will be used at trial.)

- A list of all equipment and software to be used at trial and suggestions as to possible shared use of equipment and operators;
- Proposed voir dire questions;

  (*Note:* In jurisdictions that allow liberal and probing voir dire in civil cases, submission of proposed voir dire questions is generally unnecessary. However, the judge should encourage the attorneys to think about appropriate open-ended voir dire questions and should tell them that if there are "sensitive" questions that might be difficult for them to ask (e.g., have any of you filed for bankruptcy?), they should submit these questions to the judge and the judge will ask them.)

- Concise memoranda on important unresolved legal issues;
- Non-argumentative statements of facts/issues to be read to the jury, unless the judge will allow counsel to give "mini opening statements" before voir dire begins;
- Proposed jury instructions and verdict forms, or proposed findings of fact and conclusions of law in a nonjury case;

(*Note*: Some judges require counsel to confer and submit a set of jury instructions on which there is no disagreement and a set of those in dispute. Many judges then use the parties' submissions as a starting point for preparing their own substantive instructions and find that they are generally accepted by counsel with little argument. Proposed instructions can be submitted electronically to enable the judge to make revisions on his or her computer.)

- Any motions in limine;
- Any Rule 702 motions; and
- Juror notebooks, containing a glossary of technical terms, note paper for taking notes, and other helpful information.

At the conference or conferences, the judge should also:

- Discuss with counsel approaches for structuring the trial that will improve the trial process.
- Set the trial schedule after consulting with counsel and making appropriate accommodations for the time demands of the participants. Some judges ascertain how much time each side needs and then limit each side to its estimate subject to modification if good cause is demonstrated.
- Eliminate, to the extent possible, irrelevant, immaterial, cumulative, and redundant evidence, by defining the issues to be tried.
- Encourage counsel to stipulate to relevant background facts, the authenticity of documents, offers of proof, and other noncontroversial matters.
- Identify motions that require evidence and defer ruling until trial but rule on any motions in limine, and attempt to resolve other objections to evidence and to cure technical defects, such as a lack of foundation.

  (*Note*: The judge should weigh the benefits of advance rulings on objections against the potential for wasteful pretrial efforts by the court and counsel. For example, ruling on objections in a deposition may require the judge to read it before trial, even though the deposition or objections may become moot or be withdrawn because of developments during trial. Some judges prefer to make pretrial rulings only on objections that counsel consider sufficiently important—either because of their significance to the outcome of the case or because of their effect on the scope or form of other evidence.)

- Consider receiving exhibits into the record to save time at trial by avoiding the need for formal offers of proof.
- Discuss with counsel fair, effective, and innovative ways of presenting proof that may include presenting voluminous data through summaries or sampling; presenting summaries of deposition testimony; offers of proof; and presenting expert testimony by reports on videotape, videoconferencing, or all at once.

- Determine whether written or video depositions are appropriately edited; whether any issues need to be addressed in an in camera hearing or special proceeding; and whether the in camera hearing or special proceeding needs to take place during the trial and how and when such hearings will be held.
- Address any objections to digital evidence or illustrative aids, such as computer animations and simulations; any digital alteration of the matter presented; the treatment of any narration; the need for limiting instructions; the authenticity and reliability of the underlying data; and the assumptions on which the exhibit is based.
- Determine whether any limits on evidence should be imposed when the parties' pretrial estimates suggest that the trial will be excessively long. For example, the judge may:
    - Limit the number of witnesses or exhibits that may be offered on a particular issue or in the aggregate;
    - Control the length of examination and cross-examination of particular witnesses or limit the total time allowed to each side for all direct and cross-examination; or
    - Narrow issues by order or stipulation.
- Emphasize the purpose of opening statements and, perhaps, set a time limit.
- Review the parties' proposed jury instructions and discuss with counsel which instructions should be given to the jury as pre-instructions.

  (*Note*: Judges may wish to rule on any objections to jury instructions which address matters of law; judges should also request the parties clarify their positions on instructions that must be ruled upon after the evidence is received. Judges who have followed this procedure indicate that most of the instructions can be settled at this conference, leaving the trial judge free to concentrate on those which pose questions of fact or law. The same is true for the verdict form, leaving only the determination of whether to include or exclude a few issues.)

- Review any special verdict forms to ensure that the questions are arranged in a logical and comprehensible manner (e.g., by asking questions common to several causes of action or defenses only once and grouping related questions together).
- Assess whether interpreters are needed.
- Identify the procedure to be followed during voir dire, along with questions the judge will ask and any special areas the attorneys wish to review, so the court can determine the appropriateness of the questions.

§ 4.2 Motions in Limine

The judge should require counsel to file all motions in limine well in advance of trial.

Addressing these motions well before the trial begins:

- Affords the judge and counsel the opportunity to give more careful consideration to the issues raised by the motions than when raised for the first time during trial;
- Reduces the need to interrupt the trial for sidebar or chambers conferences to address the issues raised by the motions; and
- Avoids prejudice to any party that may arise when evidence is offered that is ruled inadmissible and then stricken.

When a judge grants a motion in limine to exclude evidence at trial, the judge's order should:

- Specify the excluded evidence;
- Instruct the attorneys to avoid mentioning this evidence in front of the jury; and
- Direct the attorneys to instruct their clients and witnesses not to mention it.

§ 4.3 Ind. Rule of Evid. 702 Motions (*Daubert* or *Frye* Motions)

Indiana Authority

Indiana Rule of Evidence 702 (b) provides that:

> Expert scientific testimony is admissible only if the Court is satisfied that the expert testimony rests upon reliable scientific principles.

In *McGrew v. State*, 682 N.E. 2d 1289 (Ind. 1997), the Supreme Court set forth the factors to be considered in evaluating the reliability of the scientific principles proposed: (1) empirical testing of the science; (2) peer review in scientific journals; (3) whether the potential error rate is too high to be reliable; (4) the existence of standards controlling a particular test or procedure; (5) whether the science has achieved widespread acceptance.

McGrew further held that although the *Daubert* decision was consistent with Rule 702(b), it was not controlling.

Federal Authority

The judge should require counsel to submit all *Daubert* (*see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) or *Frye* (*see Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) motions no later than at the trial management conference. A *Frye* motion asks the court to determine the admissibility of expert testimony concerning a new or novel scientific technique. A *Daubert* motion asks the court to determine the admissibility of any type of expert testimony.

Court decisions in *Kumho Tire Co.*, *Ltd. v Carmichael*, 526 U.S. 137 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (altogether known as the "*Daubert* trilogy"), apply to federal courts. Among the states that have adopted *Daubert*, there is

considerable variation in how *Daubert* is defined and applied. Other states have developed their own tests. A few general principles are discussed, *infra*. For a thorough discussion of the *Daubert* trilogy, *see* David L. Faigman, Michael J. Saks, Joseph Sanders & Edward K. Cheng, Modern Scientific Evidence: Standards, Statistics, and Research Methods (2008).

Motions under Frye: Scientific evidence is admissible under *Frye* if it is based on a scientific technique that is generally accepted as reliable in the scientific community.

Motions under Daubert: Instead of general acceptance in the scientific community, *Daubert* requires an independent judicial assessment of reliability. A judge may not admit evidence based on innovative or unusual scientific knowledge unless this evidence is shown to be reliable and scientifically valid. It prescribes four tests for reliability: (1) testing; (2) peer review; (3) error rates; and (4) acceptability in the relevant scientific community. In *Kumho Tire*, the U.S. Supreme Court held that (1) the judge's gate keeping role identified in *Daubert* applies to all expert testimony, including testimony that is non-scientific, and (2) the reliability factors identified in *Daubert* do not constitute an exhaustive checklist or a definitive litmus test; judges may apply any useful factors that will assist them in determining the reliability of the proffered evidence that appear appropriate in the particular case. In *Joiner*, *id.*, the Court held that appellate courts must defer to a trial court's decision regarding the admissibility of expert testimony unless the trial court is "strikingly wrong." Rule 702 of the Federal Rules of Evidence was amended to conform to the *Daubert* trilogy and now provides that a witness may only testify if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Ruling on motions: The judge may rule on the motion (1) on the basis of the papers submitted, (2) on the basis of the papers submitted and oral argument, or (3) after a hearing at which expert testimony is presented. The judge should not assess the credibility of the expert's testimony or decide factual disputes among the parties, which are matters for the jury. In all cases, the judge should consider whether an extensive *Daubert/Frye* hearing is an effective use of the court's and the parties' resources.
The Federal Judicial Center's *Reference Manual on Scientific Evidence* (2d ed. 2000) discusses specific scientific areas (e.g., epidemiology and toxicology) which may arise in complex civil litigation and may be useful to a judge in ruling on particular *Daubert/Frye* motions. For the Federal Judicial Center publications catalog, *see w*ww.fjc.gov.

§ 4.4 Final Pretrial Hearing and Final Pretrial Hearing Order for (Bench/Jury) Trial

At about one month before trial, the court should conduct the Final Pretrial Hearing. At that time, the judge should enter an order confirming all actions taken and rulings made at the Final Pretrial Hearing. A non-exhaustive list of items to be addressed at that time

is set out in the Final Pretrial Hearing Order for (Bench/Jury) Trial forms, which are Appendix N and O; below is another list of agenda items for that Final Pretrial Hearing.

Matters that should be included in the order are:

- The starting date of the trial and the trial schedule;
- The issues to be tried;
- The witnesses to be called and the exhibits to be offered by each side, other than for impeachment;
- Whether additional undisclosed or other specified evidence is precluded;
- The objections that are deemed waived;
- Procedures for presenting testimony and exhibits and the use of technology at trial;
- All stipulations/offers of proof by the parties;
- Formal rulings made on pending motions or identify those that have been deferred until trial which require additional evidence;
- Any time limits that have been set;
- Jury instructions, both agreed-upon and those that will be addressed during trial, along with the form of the verdict;
- Determination whether an interpreter(s) is necessary;
- The procedure to be used during voir dire; and
- Other administrative matters designed to expedite the trial.

Trial Management

§ 5.1 Addressing Administrative Matters

To ensure that the trial proceeds as smoothly as possible, the judge should:

- Arrange for any special accommodations that may be necessary, such as:
    - A larger courtroom because of the number of attorneys, parties, witnesses, and exhibits;
    - A courtroom that is technologically equipped (e.g., with computers and a screen on which enlargements of exhibits can be projected);
    - Physical modifications to the courtroom (e.g., to provide additional space for counsel, parties, files, exhibits, or persons whose presence may be needed, such as experts or consultants);
    - Jury accommodations, particularly in a lengthy trial;
    - Witness and attorney conference rooms, if available; and
    - Courtroom security.
- Require the parties to pre-mark all exhibits.
- Admit into evidence exhibits not objected to, or to which pretrial objections were overruled, without formal offer and ruling. Make sure objections are preserved in the record; otherwise, they will be deemed waived.
- Publish a trial schedule to be followed by all trial participants, including jurors. It is the judge's responsibility to adhere to the trial schedule, be punctual and prepared to proceed on schedule.

  (*Note*: A trial schedule is essential to the orderly conduct of a trial. The schedule should be set after consultation with counsel; it should address appropriate accommodations for other time demands of the court and participants. The schedule ordinarily should be modified only in urgent situations. Very lengthy trials may require periodic review and adjustment of the schedule.)

- Devote the trial day to the uninterrupted presentation of evidence, so the jury is not kept waiting.
- Set aside time before the jury members arrive or after they leave for the day to address objections, motions, and other matters with counsel, such as the next day's proceedings, and the order of witnesses and exhibits. Such advanced planning helps to avoid surprises and ensure that the parties do not run out of witnesses.
- Rule promptly on objections.

  (*Note*: When an objection is too complex for an immediate ruling, the judge may defer the matter until it can be resolved without taking the jury's time; the court can then proceed with the presentation of evidence. The judge may consider directing counsel to pursue a different line of questioning at that time.)

§ 5.2 Conduct of Trial

The judge's role at trial is to control the courtroom and proceedings; at the same time, the judge must respect the attorneys' rights to employ accepted and reasonable strategies and tactics that serve their clients' interests in the adversarial process. The judge should provide the parties, counsel, and jurors with prompt, firm, and fair rulings, and should keep the trial moving forward in an orderly and expeditious fashion; bar cumulative and unnecessary evidence; and hold all participants to high professional standards.

The judge should explain his or her courtroom procedures to counsel, such as the location from which counsel may examine witnesses, and the mechanics for submitting exhibits to witnesses, the clerk, or the jurors.

In a multiparty case, the judge should consider employing special procedures to minimize delay and confusion. The judge may:

- Provide that objections made by one party will be deemed made by all similarly situated parties unless disclaimed; and
- Permit other counsel to add further grounds of objection on behalf of all similarly situated parties unless disclaimed.

To enhance jury recollection and comprehension in a lengthy and complex trial, the judge may consider altering the traditional order of trial by employing the following sequencing techniques:

- Organize the trial in logical order, issue by issue, with both sides presenting their opening statements and evidence on a particular issue before moving to the next. This should be done only after careful consultation with counsel, as early in the litigation as possible – recognizing that counsel will frequently object to altering the traditional order of the trial and may have valid reasons for doing so. For example, one of the biggest costs of most trials is the cost of expert witnesses. Because expert witnesses will often be retained to testify on more than one issue, a party's litigation expenses may be increased substantially if the party is required to recall its experts. It may also be unreasonably difficult to schedule experts to testify on more than one occasion during a trial.
- Arrange closing arguments by issue, with both sides making their arguments on an issue before moving to the next. The entire case may be submitted to the jury at the conclusion of all arguments or the issues may be submitted sequentially.
- Allow counsel to intermittently summarize the evidence that has been presented and to outline forthcoming evidence.

§ 5.3 Presentation of Evidence

Although the presentation of evidence is generally controlled by counsel's trial strategies and tactics, Commercial Court litigation presents special concerns for the judge—primarily

the concern for jury comprehension due to the length of the trial, presence of multiple parties, and potentially complex issues.

The judge should encourage, or even direct, counsel to use techniques that facilitate comprehension and expedition (e.g., simplification of facts and evidence, use of plain language, and use of visual and other aids). The judge should determine which exhibits and demonstrative material, such as charts and graphs, if any, may be used in opening statements.

The following techniques improve the trial process:

- Require counsel (jointly, unless that is not feasible) to furnish the jurors with the following: glossaries of important terms, names, dates, and events; indexes of exhibits to assist in their identification and retrieval; and timelines of important events in the case.
- Display exhibits so the jurors, judge, and counsel can view them while hearing the related testimony by:
    - Projecting the exhibit on a screen that is easily visible to the witness, judge, and jurors;
    - Using an evidence presentation system that displays evidence electronically and simultaneously to everyone in the courtroom; and/or
    - Providing jurors with individual binders containing indexed copies of selected exhibits.
- Pre-mark exhibits and receive them into evidence before trial to avoid cumbersome and time-consuming exhibit handling.
- Require counsel, when possible, to present voluminous or complicated data through summaries, including compilations, tabulations, charts, graphs, and extracts.
- Ask questions of a witness after the attorneys have finished their examinations when it appears to the judge that certain matters require clarification for the jurors.
- Encourage stipulations or offers of proof to avoid testimony about uncontested matters such as the date of a document.
- Require the attorneys to provide photographs of their witnesses to help the judge and jurors recall who testified during a lengthy trial. These photographs may be included in notebooks provided to the jurors.

§ 5.4 Management of Jury Trial

A jury trial requires the judge to consider the following matters:

- *Number of jurors*: In a Commercial Court case, it is particularly important to seat enough jurors to minimize the risk of a mistrial; therefore, give special consideration to the length of the trial and the probability of incapacity, disqualification, or other developments that may require the judge to excuse jurors during trial.

- The judge should determine the number of alternate jurors that should safely be required (e.g., one alternate for each week of trial).
- The judge should ask the attorneys if they will stipulate to accept a verdict returned by fewer than the number of jurors required by state law if there are no remaining alternate jurors.
- The judge should ask the attorneys if they will stipulate to the use of undesignated alternates (e.g., the alternates will be selected at the end of the trial by lot from the jury like when twelve (12) jurors are required, fourteen (14) jurors are selected, but the two jurors who will be the alternates are not designated until the case is submitted to the jury).

  (*Note*: Sometimes jurors who are selected as alternates do not pay close attention to the proceedings, believing that they will not be called on to deliberate. This procedure is designed to keep all of the jurors engaged in the proceedings.)

- *Juror questionnaires*: The judge should review any proposed juror questionnaires submitted by counsel.

  (*Note:* Juror questionnaires can help expedite jury selection. Some judges require counsel to review the completed questionnaires together and agree on which prospective jurors should be excused for cause. This may substantially reduce the number of prospective jurors who must actually be questioned in voir dire.)

- *Voir dire*: The judge should conduct the initial voir dire of the jury and then allow the attorneys to ask their questions.
  - Thorough questioning by the judge can make jury selection proceed more expeditiously and can also prevent the attorneys from arguing their cases to the jurors by their questions. The judge should invite the attorneys to submit questions they would like the judge to ask.
  - To shorten the time required for jury selection, the judge may require the attorneys to address their questions to the jurors as a group and permit follow-up questions to particular jurors as necessary.
  - The judge may impose reasonable time limits on counsel's examination or scope of inquiry, including the form and subject matter of their questions.
  - The judge should inform prospective jurors of the expected length of the trial, the trial schedule, and other facts that may affect a juror's ability and qualifications to serve.

    (*Note*: The prospect of a long trial may produce many requests to be excused. A judge may reduce these requests by emphasizing the responsibilities of citizenship and the importance of representative juries and by describing the challenge of litigation and the opportunity to learn more about the judicial process. Another way to reduce the number of requests to be excused is to allow counsel to make mini opening

statements, subject to a time limitation of generally no more than five minutes). These statements frequently make prospective jurors more interested in the case.

- *Peremptory challenges*: The judge may consider whether to grant additional peremptory challenges when parties on the same side of the case have divergent or conflicting interests.
    - Each side should be given the same number of challenges, although the number and position of the parties on each side will be important factors in allocating the challenges among them.
    - A judge should grant additional challenges sparingly because they will increase the size of the venire and lengthen the jury-selection process.

- *Note taking*: The judge should encourage the jurors to take notes during the trial. Note taking by jurors may be particularly important in a long and complicated trial.
    - The court should provide the jurors with paper (or notebooks with space for notes) and pens;
    - The judge should advise the jurors of the following: (1) notes are only for their individual use and may not be shown or read to others; (2) note taking should not distract them from observing the witnesses; (3) they must leave their notes in the courtroom during recesses; and (4) they are entitled to take their notes with them into the jury room once they begin deliberations; and
    - *See* Indiana Model Civil Jury Instructions, Preliminary Jury Instruction No. 119, Juror Note-taking.

- *Juror Notebooks*: The judge may encourage (or require) counsel in Commercial Court cases to provide notebooks for the jurors to use during the trial to help them organize and retain information. At the outset of the trial, the notebooks should include:
    - The schedule for the trial, including days the court will not be in session;
    - A glossary of important scientific or technical terms the jurors are likely to hear during the trial;
    - Note paper; and
    - Instructions and blank forms if jurors are allowed to ask questions.
- As the trial progresses, the following items may be added to the jurors' notebooks, as appropriate:
    - Key admissions, offers of proof, or stipulations;
    - A chronology or timeline of important events in the case;
    - An exhibit list and copies of key exhibits that have been admitted;
    - A witness list and pictures of witnesses who have testified; and
    - Preliminary instructions.

    (*Note*: The judge should review the notebooks before the trial begins and should control the amount of material in them to ensure that they remain

clear and useful. The notebooks should not be so large that they become unmanageable. The judge should advise the jurors of the purpose of the notebooks (e.g., that they are intended to help the jurors understand and recall what happens during the trial and to help familiarize them with the parties, attorneys, witnesses, basic terminology that will be used in the case, and the evidence). The judge should advise the jurors that the judge will direct their attention to specific items in their notebooks that they may refer to while a witness is testifying (e.g., an exhibit about which the witness is being questioned) but that they should otherwise give their complete attention to what the witnesses are saying and should not be referring to their notebooks while the witnesses are testifying. The judge should admonish the jurors that they must leave their notebooks in the courtroom during recesses but may take their notebooks with them into the jury room once they begin deliberations.)

- *Juror questions*: The judge should determine whether to allow jurors to ask questions. Some judges do not allow juror questions; most allow jurors to submit questions in writing for consideration by the judge and counsel. When allowing questions, the judge should:
    - Inform the jurors that they may submit written questions at any time, e.g., if they do not understand a word or a phrase used by the witness or simply did not hear the witness.
    - Caution jurors that questions occurring to them during one witness's examination may later be covered by another witness.
    - Explain that certain matters may be inadmissible under rules of evidence which the judge will determine.
    - *See* Indiana Model Civil Jury Instructions, Preliminary Jury Instruction No. 121, Juror Questions – Procedure.

- *Jury Instructions*: A complex and lengthy trial makes understandable jury instructions particularly important. The judge should carefully review the instructions drafted by counsel to ensure:
    - They are in plain English, concise and simple, and accurately reflect the law.

      (*Note*: The judge should discuss with counsel why and when an approved pattern jury instruction is not sufficient. Use of pattern jury instructions is preferred in most cases.)

    - They are organized in a logical sequence.
    - Substantive instructions are tailored to the facts of the case and are not argumentative.

(*Note*: The judge should explain propositions of law with reference to the facts and parties in the case. Illustrations familiar to jurors may also be helpful.)

- *When to instruct*: The judge may give the jurors instructions in installments at different stages of the trial with a comprehensive set of final instructions at the end of the trial. The judge may give:
    - Preliminary instructions at the beginning of the trial, immediately before opening statements, to guide the jurors in properly discharging their duties, such as: (1) the role of the judge and the jury; (2) the difference between evidence and argument (including what is and is not evidence); (3) the difference between direct and circumstantial evidence; (4) the assessment of witness credibility; and (5) the burden(s) of proof. The judge should also give the jurors instructions that are intended to avoid a mistrial, such as: (1) the jurors may not discuss the case with any other persons; (2) the jurors may not read or listen to any news media accounts of the case; (3) the jurors may not visit or view the scene of any occurrence in the case; (4) the jurors may not conduct any independent investigation of, including use of the Internet to obtain information on, the facts or the law; and (5) the jurors may not converse with any trial participants.

      (*Note*: The purpose of preliminary instructions is to point out to the jurors the significant matters in the trial of the case and what the jury should look for during the course of the trial. Jurors can deal more effectively with the evidence in a lengthy trial if they are provided with a factual and legal framework to give structure to what they see and hear. The judge should emphasize that these instructions are preliminary and that instructions given at the conclusion of the case will govern their deliberations. Some judges pre-instruct at the beginning of jury selection to confirm the prospective jurors' willingness to follow the law as given by the judge, even if they disagree with it, and to confirm that they understand as jurors that they may not discuss the case with any other person and may not conduct any research or investigation of the case.)

    - Interim and limiting instructions during the trial when evidence is admitted that is admissible as to some but not all parties or for a limited purpose only.

      (*Note*: The judge may give instructions at any point in the trial when they may be helpful to the jury. For example, an explanation of applicable legal principles may be more helpful when the issue arises than if deferred until the end of the trial.)

    - Final instructions before or after closing arguments.

      (*Note*: Although, traditionally, instructions have been given after counsel's closing arguments, there are advantages to giving the majority of the

instructions before argument. Instructions on the law may make closing arguments easier for the jurors to understand, and counsel can refer to the instructions in arguing their application to the facts. The judge should reserve the final closing instructions, however, until after arguments—reminding the jurors of the instructions given previously and instructing them about the procedures to follow during deliberations.)

- *Jury deliberations*: To aid the jurors in their deliberations, the judge should:
  - Suggest to the jurors procedures they may employ in conducting their deliberations. *See* Indiana Model Civil Jury Instructions, Preliminary Jury Instruction No. 543, Jury Deliberations.
  - Allow the jurors to take their notes and juror notebooks into the jury room.
  - Furnish the jury with a copy of all jury instructions (some judges provide a single copy while others provide multiple), and a copy of all verdict forms.
  - Decide which exhibits the jurors may take into the jury room.

    (*Note*: Some judges send all exhibits received into evidence (except items such as currency, narcotics, weapons, and explosive devices) to the jury room for the jurors' reference during deliberations. Other judges wait for a request from the jurors or withhold some items, such as those received for impeachment or another limited purpose, unless requested by the jury. If the exhibits are voluminous, the jurors should be given an index or other aids to assist their examination during deliberations. *See* Jury Management Benchbook for Indiana Judges (1st ed. 2011).)

  - Determine, after consulting with counsel, the appropriate response to any request by the jury for supplemental instructions during deliberations.

    (*Note*: The judge should allow counsel to object to the proposed response on the record. Any supplemental instructions may be given orally in open court or in writing. The judge should admonish the jury to consider these instructions as part of those previously given and that they remain binding.)

  - Determine, after consulting with counsel, the appropriate response to any request by the jury for a read-back (or playback) of testimony.

    (*Note*: The judge should instruct the jurors to make their requests as specific and narrow as possible, to avoid excessively long read-backs (or playbacks). The judge should then confer with the attorneys to seek their agreement on the portions of the testimony to be read (or played) and should permit them to state any objections on the record. Read-backs (or playbacks) should not unduly emphasize any part of the evidence.)

- *Verdicts:* The judge should:

- Review the completed verdict forms with counsel before instructing the jurors, to confirm that they are complete and consistent;
- Ensure that the verdict forms are concise, clear, and comprehensive;
- Review the verdict forms with the jurors during closing arguments and advise the jurors that these are the questions they will need to answer;
- Instruct the jurors on how to complete the verdict forms properly; and
- Be prepared to determine what appropriate action to take if the jurors are deadlocked.

  (*Note*: Although the large investment in a long trial makes a mistrial costly, the judge should not apply undue pressure on the jury to reach an agreement. The judge may ask the jurors what might assist them in reaching a verdict, such as a read-back (or playback) of testimony, further instructions, or additional argument by counsel if allowed under local law, and may encourage them to continue to deliberate for additional time.)

§ 5.5 Management of Nonjury Trial

Before the beginning of the trial, the judge may require counsel to:

- Submit agreed-upon proposed findings of fact and conclusions of law.
  - The judge may ask counsel to exchange proposed findings and conclusions (if unable to agree) before submitting them to the court and mark the disputed portions for the court;
  - The judge may ask counsel to submit their proposed findings in electronic form, so the judge may more easily revise them; and
  - The judge should advise counsel to draft the findings in neutral language, avoiding argument and conclusions, and to identify the evidence expected to establish each finding.

    (*Note*: Proposed findings allow the judge to follow the evidence during trial and to adopt, modify, or reject findings as the trial proceeds. This process simplifies the judge's final preparation of findings of fact and conclusions of law.)

- Present the direct testimony of witnesses under their control through offers of proof, stipulations, or written statements.
  - At trial, the witness is sworn; adopts the testimony; may supplement the proffered testimony orally; and is then cross-examined by opposing counsel and perhaps questioned by the judge.
  - The statement may be received as an exhibit and is not read into the record.
  - Objections to exhibits should be resolved before trial.

    (*Note*: This procedure may be particularly useful when a witness's testimony is complicated or technical, and credibility or recollection is not at issue. It

may be appropriate for expert witnesses, witnesses called to supply factual background, or witnesses needing an interpreter. It has the following advantages: (1) the judge and opposing counsel, having read the statement, are better able to understand and evaluate the witness' testimony; (2) the proponent can ensure he or she has made a clear and complete record; (3) opposing counsel can prepare for more effective cross-examination; and (4) the reduction in live testimony saves time.)

§ 5.6 Awarding Attorneys' Fees

Because of the amounts involved, calculating a fee award in Commercial Court cases is often complicated, burdensome, bitterly contested, and leads to additional litigation. Establishing guidelines and ground rules early in the litigation helps ease the judge's burden and helps prevent later disputes.

Early in the case, the judge should make an initial determination as to whether the recovery of court-awarded attorneys' fees will be an issue.

When an award of fees is a possibility, the judge may discuss with the attorneys early on in the litigation:

Fee guidelines:

- The judge may advise the parties at the outset of the litigation about the method the judge will use in calculating fees.

Staffing:

- The judge may discuss guidelines for counsel and staffing that may affect an award of attorneys' fees.

Time records:

- The judge may advise counsel of the documentation the judge will require to support any fee request.

Class Actions

§ 6.1 Precertification Case Management

Because the stakes and scope of class action litigation can be immense, class actions require closer judicial oversight and more active judicial management than other types of litigation. These actions present many of the same problems and issues inherent in other types of complex litigation; however, the aggregation of a large number of claims, and the ability to bind individuals who are not named parties, tend to magnify those problems and issues; increase the stakes for the named parties; and create potential risks of prejudice or unfairness for absent class members.

These issues impose special responsibilities on the judge and counsel and make case management particularly important. If the action proceeds as a class action, the judge will be responsible for reviewing any proposed settlement of the action to determine whether it is fair, reasonable, and adequate – even when the settlement is unopposed. *See* § 6.4, *infra*.

Before ruling on class certification, the judge should address the following matters at an early stage in the case, typically at the initial case management conference:

- *Jurisdiction:* The judge should make sure the Commercial Court has jurisdiction over the subject matter and the parties.
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- *Motions*: The judge should decide whether to hear and determine threshold dispositive motions – particularly motions that do not require extensive discovery – before hearing and determining a class certification motion. These matters can be addressed as part of the Commercial Court judge's Initial Case Management Conference with the parties.

    - The judge may decide motions such as challenges to jurisdiction and venue; motions to dismiss for failure to state a claim; and motions for summary judgment before a motion to certify the class, although any precertification rulings will only bind the named parties.

  (*Note*: Early resolution of these motions may avoid expense for the parties and burdens for the court and may minimize use of the class action procedure for cases that are not meritorious.)

    - If the judge decides to hear any threshold motions, the judge should set a timetable for their submission..

- *Related cases*: The judge should determine whether there are related cases pending in any other court. If there are such cases pending, the judge should note the status of these cases, including pretrial preparation, schedules, and orders. *See* § 1.5, *supra*.

- *Discovery*: The judge should ascertain whether any discovery is necessary prior to making a determination on the issue of class certification.

    - The judge should confer with counsel to determine the type and scope of discovery necessary to decide any certification issues, which may or may not overlap with discovery related to the merits of the litigation.

    (*Note*: Discovery that is only relevant to the merits delays the certification decision and may be unnecessary. Judges are generally liberal in allowing discovery that pertains to both the question of certification and the merits.)

    - When facts relevant to any of the certification requirements (*see* § 6.2, *infra*) are disputed, or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues, some discovery may be necessary.

    (*Note*: Although the judge should not decide or even attempt to predict the weight or outcome of the claims and defenses at this early stage, a strong understanding of the parties' positions and nature of the proof is necessary to decide whether the claims and defenses can be presented and resolved on a class-wide basis.)

    - The judge should encourage counsel to confer and stipulate as to relevant facts that are not genuinely disputed; to reduce the extent of precertification discovery; and to refine the pertinent issues for deciding class certification.
    - The judge may require the parties to submit a specific and detailed precertification discovery plan which identifies the depositions and other discovery contemplated from other parties, as well as the subject matter to be covered and the reason it is material to determining class certification.
    - With regard to discovery involving trade secret or potentially sensitive information, the judge should also establish the timetable for any motion to seal hearings in compliance with Administrative Rule 9.

- *Precertification communications with proposed class members*: The judge should determine whether there is a need to regulate communications with potential class members before certification.

    - Some courts have held that, absent specific evidence of abuse, requiring the parties to obtain a judge's prior approval of precertification communications is an impermissible prior restraint on protected speech.
    - Judicial intervention is generally justified only on a clear record and with specific findings which reflect that the judge has weighed the need for a limitation against the potential interference with the parties' rights.
    - Actions the judge might take to prevent abuse include:

(1) requiring the parties to communicate with potential class members only in writing;
(2) requiring the parties to file with the court copies of all non-privileged communications with class members:
(3) correcting any inaccurate prior communications;
(4) reminding plaintiff's counsel that even before certification or a formal attorney-client relationship, class counsel must act in the best interests of the class as a whole; and
(5) reminding defendant's counsel that while the defendant may communicate with potential class members in the ordinary course of business, the defendant may not give false, misleading, or intimidating information; conceal material information; or attempt to influence the decision about whether to request exclusion from the class.

- These matters can be addressed as part of the Commercial Court judge's Initial Case Management Conference with the parties.

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 21.11 (Initial Case-Management Orders), 21.12 (Precertification Communications with the Proposed Class), 21.14 (Precertification Discovery), 21.15 (Relationship with Other Cases Pending During the Precertification Period), and 21.25 (Multiple Cases and Classes: The Effect on Certification).

§ 6.2 Determining Motion for Certification of Action as Class Action

The judge should determine whether an action should be certified as a class action at the earliest practicable time, i.e., when the judge has sufficient information to decide whether the case meets the criteria for being certified as a class action. At the initial case management conference, the judge and counsel should address all issues bearing on certification and establish a schedule for the work necessary to permit an informed ruling on any class certification motion.

Class actions in Indiana are governed by Rule 23 of the Indiana Rules of Trial Procedure. To certify a class, proponents must first satisfy the requirements of Rule 23(a).

§ 6.3 Determining Notice to Be Given to Class Members

Certification notice: Notice to class members that the action has been certified as a class action (*see* § 6.2, *supra*) may be required.

- The notice should specify the nature of the action; the definition of the class and any subclasses; and the claims, issues, and defenses for which the class has been certified.

(*Note*: On its website, the Federal Judicial Center has numerous illustrative forms of class action notices that counsel (and the judge) may refer to in drafting a sufficient notice. *See* www.fjc.gov.)

  - The notice should be stated concisely and clearly, in plain, easily understandable language. The judge should review the proposed notice to ascertain that it complies with this element.
  - Counsel for the class and the defendants should confer as early as possible to determine potential language of a notice should the case be certified and present to the judge an agreed upon notice, if possible. If no agreement on the form of a notice can be reached, each party should be ready to present alternative forms for the judge's consideration.
  - The judge should discuss with counsel whether class members are likely to require notice in a language other than English or in any other accessible form (e.g., in Braille or large print for the visually impaired).

- The certification notice should convey the information absent class members need to decide whether to be excluded from or opt out of the class and the opportunity to do so.
  - To enable absent class members to make an informed decision, the notice should describe succinctly the positions of the parties; identify the opposing parties and their counsel; describe the relief sought; and explain the risks and benefits of retaining class membership and opting out, while emphasizing that the court has not ruled on the merits of any claims or defenses. They should be advised that they can object and still participate in the class action if their objection is denied.
    - Opt out procedures should be simple and clearly described in the notice.

- Notice is generally given in the name of the court, although one of the parties typically prepares and distributes it.
    - The plaintiff ordinarily has the responsibility of providing notice and, in most cases, must bear the cost of doing so when certification is granted.
    - The judge may, however, require the defendant to bear or share the cost of providing notice in certain circumstances, including when the defendant has the ability to provide notice easily and at relatively little cost, or when the defendant's conduct has unnecessarily complicated the problems of identifying and notifying class members.

- The certification notice should generally be given by mail when the names and addresses of most class members are known although notice by email is widely accepted.
    - Posting notice on Internet sites likely to be visited by class members (including the defendant's web site) and linked to more detailed certification information may be a useful, cost-effective supplement to individual notice.

- Publication of the notice in magazines, newspapers, or trade journals may be necessary when individual class members are not identifiable after reasonable effort or at reasonable cost, or as a supplement to other notice efforts. The judge may ask counsel why they have chosen a particular publication in which to give notice.
- Posting notice in public places likely to be frequented by class members may also be an appropriate alternative.

Settlement notice: Notice of any proposed settlement of the class action (*see* § 6.4, *infra*) must be given to all class members who will be bound by the settlement.

- Settlement notice should define the class and any subclasses, clearly describe the options open to the class members and the deadlines for taking action; describe the essential terms of the proposed settlement; disclose any special benefits provided to the class representatives; provide information regarding any claim for attorney's fees (see § 6.5, *infra*); indicate the time and place of the hearing to consider approval of the settlement; describe the method for objecting to or opting out of the settlement; explain the procedures for allocating and distributing settlement funds; explain how nonmonetary benefits were valued if the settlement includes them; provide information that will enable class members to calculate or at least estimate their individual recoveries; and give the address and phone number of class counsel and describe how to make inquiries.
- The settlement notice should be delivered or communicated to class members in the same manner as the certification notice.
- The defendant generally pays for the cost of giving notice of the settlement,, although the parties may decide or the court may order otherwise.

  (*Note*: The parties generally use the settlement agreement to allocate the costs of the settlement notice. These costs are often assessed against a fund created by the defendants or to the defendant, in addition to any funds paid to the class.)

Other notices – The judge may require other notices for the protection of class members. For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 21.31 (Notices from the Court to the Class), 21.311 (Certification Notice, 21.312 (Settlement Notice), and 21.313 (Other Court Notices).

§ 6.4 Reviewing Proposed Settlement

The judge must review any proposed settlement of a class action to determine whether it is fair, reasonable, and adequate. In general, the judge must examine whether the interests of the class are better served by settlement than by further litigation.

The judge's role in reviewing a proposed settlement is critical, but is limited to approving the settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the settlement agreement, although the judge's statement of conditions for approval, reasons

for disapproval, or discussion of reservations about proposed settlement terms may lead the parties to revise the agreement.

The court must be aware, in the context of settlement, that both sides have a common interest in obtaining the court's approval. Thus, there will not be the ordinary adversarial presentation, and the court must make at least a rough assessment of the merits of the plaintiffs' case in order to assess the fairness of the settlement.

In general, fairness calls for a comparative analysis of the treatment of class members with respect to each other and with respect to similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims, and the responsiveness of the settlement to those claims. Adequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained through continued class action litigation.
Many factors may be considered in determining, fairness, reasonableness, and adequacy, including the following:

- The advantages of the proposed settlement versus the probable outcome of a trial on the merits. The judge may consider:
    - The strength of the plaintiffs' case;
    - The probable time, duration, and cost of a trial; and
    - The probability that the class claims, issues, or defenses could be maintained through trial on a class basis.

- The extent of participation in the settlement negotiations by class members or class representatives, and by a judge or a Commercial Court Master.

- The number and force of objections by class members.
    - The judge should consider the number of objections in light of the individual monetary stakes involved in the litigation.

    (*Note*: When each class member's recovery is small, a minimal number of objections may reflect apathy rather than satisfaction. When each class member's recovery is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class's sentiments toward the settlement.)

    - The judge should distinguish between meritorious objections and those advanced for improper purposes.
    - Individual terms more favorable than those applicable to other class members should be approved only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from other class members.

- The fairness and reasonableness of the procedure for processing individual claims under the settlement.
    - The judge should determine whether the persons chosen to administer the claims procedure are disinterested and free from conflicts arising from representing individual claimants.
    - The judge should confirm that the eligibility conditions are not so strict and the claims procedures so cumbersome that class members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the fund will revert to the defendant.
    - Completion and documentation of the claims forms should be no more burdensome than necessary.
    - Any release of liability should be narrowly tailored.

- The provision for disposition of undistributed or unclaimed funds under Rule23(F).
    - Judicial approval is required for this disposition.
    - The funds may be returned to the settling defendant, paid to other class members, or distributed to a charitable or nonprofit institution, or to a government agency. To avoid any appearance of impropriety, the judge should not suggest the charitable recipient.
    - The judge should allow adequate time for late claims before any refund or other disposition of settlement funds occurs and might consider ordering a reserve for late claims.
    - Indiana Trial Rule (F) requires that 25% of the residual funds shall be disbursed to the Indiana Bar Foundation to support pro bono work.

- The reasonableness of any provisions for attorney's fees. The judge may consider:
    - The terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;
    - Whether attorney's fees are based on a very high value ascribed to nonmonetary relief awarded to the class, such as coupons;
    - Whether attorney's fees are based on the allocated settlement funds rather than the funds actually claimed by and distributed to class members;
    - Whether attorney's fees are so high in relation to the actual or probable class recovery that they suggest a strong possibility of collusion; and
    - Whether a portion of the fee award should be withheld until all distributions to class members have been made.

- The apparent intrinsic fairness (or unfairness) of the settlement terms. For example, the judge may consider:
    - Whether the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large.

  Note: Such differences are not necessarily improper, but call for judicial scrutiny. Compensation for class representatives may sometimes be merited based on a factual showing of the time spent meeting with class members or responding to discovery and of the risks assumed. For example, in an employment discrimination

case, a named plaintiff may deserve extra compensation because by serving as a named plaintiff, this individual may have made himself or herself less attractive to prospective employers.

- Whether objectors receive better settlements than other class members.
- Whether an agreement that grants class members nonmonetary benefits, such as discount coupons for more of the defendant's product, while granting a substantial monetary attorney's fee award, is inherently unfair.
- Whether nonmonetary relief, such as coupons or discounts, is likely to have much, if any, market or other value to the class, and the likelihood that they will be used.
- Whether the settlement amount is much less than the estimated damages incurred by class members as indicated by preliminary discovery or other objective measures.
- Whether the settlement was reached at an early stage of the litigation without substantial discovery and with significant uncertainties remaining.

- Whether another court has accepted or rejected a substantially similar settlement for a similar class.

For further discussion, *see Manual for Complex Litigation, Fourth*, §§ 21.61 (Judicial Role in Reviewing a Proposed Class Action Settlement), 21.62 (Criteria for Evaluating a Proposed Settlement), 21.63 (Procedures for Reviewing a Proposed Settlement), 21.643 (Role of Objectors in Settlement), 21.66 (Settlement Administration), and 22.92 (Review of Settlement in Mass Tort Class Actions).

§ 6.5 Awarding Attorneys' Fees

In class actions involving a monetary recovery, the judge must determine and/or approve any attorneys' fees. The judge has considerable discretion to regulate an attorney's fee award in a class action, whether as part of the settlement of the action or after trial. Calibrating the amount of attorney's fees to a reasonable share of the benefits of a class settlement or award is an appropriate and effective means of managing class action litigation and preventing abuses of the class action procedure.

Non-exclusive examples of what the judge can do:

- When fees are based on a percentage of the recovery, decrease this percentage as the amount of the recovery increases on the theory that a mega fund recovery is generally due merely to the size of the class and may have no relationship to the attorney's efforts.

- Refuse to allow fees based on an inflated or arbitrary evaluation of the benefits to be delivered to class members.

(*Note*: It might be appropriate to require the attorneys to share in the risk of fluctuations in the value of an in-kind settlement, either by taking all or part of their fees in in-kind benefits or by deferring the collection of fees and making them contingent on the value of in-kind benefits that are actually delivered to the class members.)

- Use the lodestar - multiplier method (hours x hourly rate x risk factor at the time of taking the engagement) rather than the percentage-of-recovery method to determine the amount of fees to which the attorneys are entitled when the benefit to the class is speculative.

  (*Note*: Using the lodestar method may also be appropriate when the primary relief obtained is injunctive or declaratory relief and the value of this relief cannot be reliably determined or estimated.)

- Reduce the parties' estimates of the dollar value of the benefits delivered to the class members and base the fee award on the reduced amount.

- Withhold a portion of the fee until a distribution is complete.
- Any other action that the judge determines is just and reasonable under the circumstances.

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The party seeking fees has the burden of submitting sufficient information to justify the requested fees. Even in common fund cases, judges may require an estimate of the number of hours spent on the litigation and a statement of the hourly rates for all attorneys and paralegals who worked on the case. This information can serve as a "cross-check" on the determination of the percentage of the common fund that should be awarded as fees. In lodestar or statutory fee award cases, applicants must provide full documentation of hours and rates. However, the Seventh Circuit no longer supports this approach. See, e.g, "The use of a lodestar cross-check is no longer recommended in the Seventh Circuit." *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *3 (**S.D. Ill. July 17, 2015**).

- For general factors to consider in awarding attorney's fees in complex cases, *see* § 5.6, *supra*.

For further discussion, *see Manual for Complex Litigation, Fourth*, Chapter 14, Attorney Fees, and §§ 21.7 (Attorney Fee Awards) and 22.927 (Awarding and Allocating Attorney Fees).