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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

# Southern District Launches Pilot Project for Complex Civil Cases

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Complex cases, almost by definition, have become synonymous with sprawling, some would even say out-of-control discovery, where parties produce terabytes of documents, double track dozens, if not hundreds of depositions, and spend years engaged in motion practice often unrelated to the merits. In an effort to tame these monster cases and impose some proportionality on the time and resources spent by the courts and parties alike, the U.S. District Court for the Southern District of New York has launched a Pilot Project—now in its second month—aimed at improving pretrial case management of complex civil cases. The project establishes detailed recommended procedures for initial, interim and final pretrial conferences, discovery and motion practice that call for substantial input from counsel and active court oversight. We highlight below some of the key aspects of the project.[1]

## Genesis and Scope

The project grew out of a conference at Duke University sponsored by the Judicial Conference Advisory Committee on Civil Rules. The Duke conference was attended by members of the bar, in-house counsel and judges from across the country, including Southern District Judges John G. Koeltl, who chaired the Conference Planning Committee, and Shira A. Scheindlin. The lawyers at the conference expressed a strong desire for more hands-on judicial case management.

At the suggestion of Judges Scheindlin and Koeltl, the Judicial Improvements Committee for the Southern District of New York (chaired by Judge Scheindlin), aided by an Advisory Committee made up of leading members of the bar—both public and private—developed recommended procedures for use in complex litigation to be implemented during an 18-month experimental period. As Judge Koeltl explained in a recent interview with the authors, "lawyers and judges have a shared commitment to reducing cost and delay, and through cooperation should be able to find the best way to get cases to the point where they can be settled or tried with the least amount of cost."

In addition to class actions and multi-district litigations generally, the pilot project expressly targets securities and derivative actions, products liability, patent, trademark, antitrust and environmental cases as well as cases challenging the constitutionality of state statutes.[2] The project already includes more than 100 complex cases filed since Nov. 1, 2011.

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The lawyers and judges who developed the pilot project worked through four subcommittees (Initial Pretrial Case Management; Discovery; Motions; and Final Pretrial Conference), each of which contributed recommendations incorporated into the final Project Report.[3]

## Pretrial Case Management

The pilot project envisions that cases will be conferenced more quickly, with more robust and detailed input from the parties, leading to a more comprehensive case management order than required under the Federal Rules of Civil Procedure. Where Rule 16(b) provides that the court should issue an initial scheduling order 90 days from the appearance of a defendant (or 120 days after service of a complaint), cases in the project will be conferenced twice as quickly—within 45 days of service of the complaint.

Like Rule 26(f), the pilot project requires the parties to meet and confer and to submit a report to the court at least seven days before the initial conference, but lawyers in pilot project cases must provide greater detail in their pre-conference report with the express purpose of assisting the court in ensuring that discovery is proportionate to the amount in controversy, the importance of the issues at stake and the parties' resources.

Specifically, in cases involving electronically stored information (ESI), the procedures call for the submission of a separate Joint Electronic Discovery Submission and Proposed Order (the form of which is attached as an exhibit to the project report) which, in addition to requiring that the parties identify preservation plans, search, review and production protocols, procedures for dealing with privilege and open issues requiring court resolution, also addresses questions of cost and proportionality. Judge Scheindlin—a leading authority on electronic discovery—considers this e-discovery protocol one of the project's important innovations, explaining in an interview with the authors that by "requiring the parties to address early in the process issues which frequently arise, the e-discovery protocol will reduce disputes."

The recommended procedures also require counsel to report their positions on topics enumerated on an Initial Pretrial Conference Checklist, which identifies 21 potential areas, some with multiple subparts. The topics covered range from proposed deadlines typically included in a case management schedule, to a series of considerations expressly aimed at curtailing the time and costs of discovery, including limitations on ESI preservation or restoration obligations, Rule 26(a) mandatory disclosures, and the use of various discovery devices including interrogatories, requests for admission and expert depositions.

One proposal that appears on the checklist, and in several other places throughout the Project Report,[4] is that the parties agree (or the court consider ordering) that witnesses who were not deposed prior to filing the Final Pretrial Report, but who appear on the trial witness list, can be deposed immediately before trial. Permitting parties to defer depositions of individuals until after they have been designat-

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ed as trial witnesses may prompt attorneys to notice and take fewer "protective" depositions, but will also require active court supervision to ensure that parties do not use this safety valve as an end run around discovery cut-offs.

The initial case management procedures also contain guidelines for the court in conducting the conference and fashioning the case management order, primarily devoted to scheduling concerns. Of note, the procedures suggest that the court consider limiting adjournments, both in number and duration, regardless of whether the parties jointly request the adjournment.

## Discovery Procedures

The procedures devoted to discovery recommend consideration of a partial stay of discovery after the filing of a motion to dismiss, permitting only document or other Rule 34 discovery to proceed pending resolution of the motion. (Securities cases are independently governed by the Private Securities Litigation Reform Act's more robust automatic stay,[5] which halts document production as well).

In recognition of the often disproportionate burden and expense of preparing privilege logs, the discovery procedures contain two provisions aimed at trimming voluminous privilege logs. First, they set out categories of privileged documents presumptively not to be included in a privilege log, including communications exclusively between a party and its counsel; work product (other than that created by the party itself) created after the commencement of the action; and internal communications within a firm, legal department or legal organization. Second, they instruct that e-mail threads constituting an uninterrupted dialogue may be contained in a single log entry providing the beginning and ending dates and times of the thread.

The recommended procedures chart a path for resolving discovery disputes quickly and with limited fanfare. Absent contrary instruction from the court, discovery disputes are to be submitted to the court by letter (with each side limited to a three-page single-spaced letter, or two pages for a reply) on a tight schedule under which the entire dispute is to be presented in six business days. Under the recommended procedures, the court may rule on the application even before it receives the responsive letter so long as the party opposing the application has an opportunity to be heard, and should make its best effort to render a decision on the dispute within 14 days.

The discovery procedures contain two other provisions of note: First, they impose a presumptive limit on the number and length of requests for admission, providing that unless otherwise stipulated or ordered by the court, requests for admission (other than those directed at the genuineness of a document) be limited in number to no more than 50 and in length to no more than 25 words. Second, the procedures require that absent a contrary order, a party who receives information pursuant to a subpoena must promptly produce or make that information available for copying to all parties. Although many lawyers already follow this practice, the absence of a rule on point has resulted in needless wrangling over how and under what conditions subpoenaed documents should be shared.

## Non-Discovery Motions

In pilot project cases, almost all motions (other than discovery motions) require a pre-motion conference. Except for motions to dismiss (subject to special rules discussed below), the party wishing to make a motion must submit a single-spaced letter of no more than three pages requesting a conference, to which the opposing party has three days and three pages to respond. The procedures disallow further submissions and provide that the court will hold the pre-motion conference as soon as possible.[6]

For motions to dismiss, the procedures suggest three potential avenues for the court, ranging from proceeding without any pre-motion conference, to requiring that the parties exchange letters addressing the deficiencies in the complaint so that they can be addressed in an amended complaint, to holding a conference after the motion is filed at which the plaintiff may elect between amending the complaint or opposing the motion.

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The procedures express a preference for oral argument on motions and impose a presumptive 25-page limit for initial briefs and 10-page limit for reply briefs. The motion procedures also reflect widespread dissatisfaction from the bar with the statement of material facts required on summary judgment motions under Local Rule 56.1. The recommended procedures provide that with the court's consent, no 56.1 statements need be filed, and if filed, such statements be limited to 20 pages.

## Post-Fact Discovery

The pilot project breaks the Final Pretrial Report process into two separate reports—a Joint Preliminary Trial Report ("Preliminary Report") to be filed within two weeks of completing fact discovery, and a Joint Final Trial Report ("Final Report") to be submitted no later than 28 days before the date set for commencement of trial. The Preliminary Report is to contain basic case information including the claims and defenses to be tried, the governing law and any choice of law disputes, and a statement of whether the parties consent to having a magistrate judge try the case—although the procedures pointedly caution against identifying which parties have taken what position on this question. In addition, the Preliminary Report should contain a brief description of any summary judgment motion a party intends to file, including identification of expert testimony that will be offered in support of the motion.

Within two weeks of receiving the Preliminary Report, the court should hold a case management conference to finalize a schedule for the remainder of the case, including deadlines for expert discovery, summary judgment, *Daubert* motions, the date for the Final Report and a firm trial date. The procedures suggest that the court provide the parties with an estimate of when it will decide summary judgment motions, and that the dates for the Final Report and trial be pegged to that date, allowing at least 28 days for the filing of the report and at least eight weeks between the summary judgment decision and trial.

The Final Report is designed to frame issues and disputes pertaining specifically to the trial including those relating to jury selection and instruction, evidentiary disputes and time limits and allocations. Because many evidentiary issues are resolved through summary judgment or voluntary narrowing of potential trial issues, deferring motions in limine and disputes regarding deposition designations until trial is imminent will avoid time wasted when such matters come before the court at an earlier stage.

## Conclusion

The pilot project is an experiment designed to address concerns with cost and delay voiced by a broad spectrum of clients and the bar. Practitioners in the Southern District should accept the court's invitation to engage actively with the court on case management issues of concern to judges and lawyers alike.

1. The authors appreciate the assistance of Judges John G. Koeltl and Shira A. Scheindlin in preparing this article.

2. The Standing Order designates class actions, MDL cases and cases listed on the Southern District Civil Cover Sheet in Nature of Suit categories 160 (stockholder suits), 245 (tort product liability), 315 (airplane product liability), 355 (motor vehicle product liability), 365 (personal injury product liability), 385 (property damage product liability), 410 (antitrust), 830 (patent), 840 (trademark), 850 (securities/commodities/exchange), 893 (environmental) and 950 (constitutionality of state statutes). Any case falling into one of these nature of suit categories will automatically be included in the project.

3. http://www.nysd.uscourts.gov/cases/show.php?db=notice_bar&id=261.

4. See, e.g., Initial Case Management Procedures 1.A.2.e; 1.B.9; IV.C.2; Initial Pretrial Conference Checklist 7.e.

5. 15 U.S.C. §§77z-1(b)(1); 78u-4(b)(3)(B).

6. Where the law imposes a deadline for filing a motion, the pre-motion conference procedures will not apply. In other circumstances, the filing of a pre-motion letter automatically stays the time by which a motion must be made.