10.2 Role of Counsel

10.21 Responsibilities in Complex Litigation

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

Greater demands on counsel also arise from the following:

- the amounts of money or importance of the interests at stake;
- the length and complexity of the proceedings;

53. *See* Fed. R. Civ. P. 11(c)(2)(B) & committee note.

54. *See* Fed. R. Civ. P. 11(c)(3).

55. The standard of review is abuse of discretion. Buford v. United States, 532 U.S. 59, 64 (2001); Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991) (inherent power); Cooter & Gel v. Hartmax Corp., 496 U.S. 384, 405 (1990) (Rule 11); Blue v. United States Dep't of the Army, 914 F.2d 525, 539 (4th Cir. 1990) (28 U.S.C. § 1927).

56. Fed. R. Civ. P. 11 committee note. Only the First Circuit has held to the contrary. *See* Metrocorps, Inc. v. E. Mass. Junior Drum & Bugle Corps Ass'n, 912 F.2d 1, 3 (1st Cir. 1990); Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 195 (1st Cir. 1990).

- the difficulties of having to communicate and establish effective working relationships with numerous attorneys (many of whom may be strangers to each other);
- the need to accommodate professional and personal schedules;
- the problems of having to appear in courts with which counsel are unfamiliar;
- the burdens of extensive travel often required; and
- the complexities of having to act as designated representative of parties who are not their clients (see section 10.22).

The added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly. The certification requirements of Federal Rules of Civil Procedure 11 and 26(g) reflect some of the attorneys' obligations as officers of the court. By presenting a paper to the court, an attorney certifies in essence that he or she, based on reasonable inquiry, has not filed the paper to delay, harass, or increase costs.[57] A signature on a discovery request, response, or objection certifies that the filing is not "unreasonable or unduly burdensome or expensive" under the circumstances of the case.[58] These provisions encourage attorneys to "stop and think" before taking action.

Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible. Even where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute. Model Rule of Professional Conduct 3.2 requires lawyers to make "reasonable efforts to expedite litigation consistent with the interests of the client."[59]

57. Fed. R. Civ. P. 11(b)(1). Fed. R. Civ. P. 26(g) contains substantially similar language. Case law in the circuit interpreting these provisions should be considered.

58. Fed. R. Civ. P. 26(g)(C).

59. *See also* Model Rules of Prof'l Conduct R. 3.1 (2002) (meritorious claims and contentions); Model Code of Prof'l Responsibility DR 7-102(A)(1) (1981) (action taken merely to harass).

10.22 Coordination in Multiparty Litigation—Lead/Liaison Counsel and Committees

Complex litigation often involves numerous parties with common or similar interests but separate counsel. Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and examines witnesses, may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily. Instituting special procedures for coordination of counsel early in the litigation will help to avoid these problems.

In some cases the attorneys coordinate their activities without the court's assistance, and such efforts should be encouraged. More often, however, the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation. To do so, invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable. Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel.

10.221 Organizational Structures

Attorneys designated by the court to act on behalf of other counsel and parties in addition to their own clients (referred to collectively as "designated counsel") generally fall into one of the following categories:

- *Liaison counsel.* Charged with essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions. Such counsel may act for the group in managing document depositories and in resolving scheduling conflicts. Liaison counsel will usually have offices in the same locality as the court. The court may appoint (or the parties may select) a liaison for each side,

and if their functions are strictly limited to administrative matters, they need not be attorneys.[60]

- *Lead counsel.* Charged with formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.
- *Trial counsel.* Serve as principal attorneys at trial for the group and organize and coordinate the work of the other attorneys on the trial team.
- *Committees of counsel.* Often called steering committees, coordinating committees, management committees, executive committees, discovery committees, or trial teams. Committees are most commonly needed when group members' interests and positions are sufficiently dissimilar to justify giving them representation in decision making. The court or lead counsel may task committees with preparing briefs or conducting portions of the discovery program if one lawyer cannot do so adequately. Committees of counsel can sometimes lead to substantially increased costs, and they should try to avoid unnecessary duplication of efforts and control fees and expenses. See section 14.21 on controlling attorneys' fees.

The types of appointments and assignments of responsibilities will depend on many factors. The most important is achieving efficiency and economy without jeopardizing fairness to the parties. Depending on the number and complexity of different interests represented, both lead and liaison counsel may be appointed for one side, with only liaison counsel appointed for the other. One attorney or several may serve as liaison, lead, and trial counsel. The functions of lead counsel may be divided among several attorneys, but the number should not be so large as to defeat the purpose of making such appointments.

60. *See In re* San Juan Dupont Plaza Hotel Fire Litig., MDL No. 721, 1989 WL 168401, at *19–20 (D.P.R. Dec. 2, 1988) (defining duties of "liaison persons" for plaintiffs and defendants).

10.222 Powers and Responsibilities

The functions of lead, liaison, and trial counsel, and of each committee, should be stated in either a court order or a separate document drafted by counsel for judicial review and approval.[61] This document will inform other counsel and parties of the scope of designated counsel's authority and define responsibilities within the group. However, it is usually impractical and unwise for the court to spell out in detail the functions assigned or to specify the particular decisions that designated counsel may make unilaterally and those that require an affected party's concurrence. To avoid controversy over the interpretation of the terms of the court's appointment order, designated counsel should seek consensus among the attorneys (and any unrepresented parties) when making decisions that may have a critical impact on the litigation.

Counsel in leadership positions should keep the other attorneys in the group advised of the progress of the litigation and consult them about decisions significantly affecting their clients. Counsel must use their judgment about limits on this communication; too much communication may defeat the objectives of efficiency and economy, while too little may prejudice the interests of the parties. Communication among the various allied counsel and their respective clients should not be treated as waiving work-product protection or the attorney–client privilege, and a specific court order on this point may be helpful.[62]

10.223 Compensation

See section 14.215 for guidance on determining compensation and establishing terms and procedures for it early in the litigation.

10.224 Court's Responsibilities

Few decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel. There is often intense competition for appointment by the court as designated counsel, an appointment that may implicitly promise large fees and a prominent role in the litigation. Side agreements among attorneys also may have a significant effect on positions taken in the proceedings. At the same time, because appointment of designated counsel will alter the usual dynamics of client representation in important ways, attorneys will have legitimate concerns that their clients' interests be adequately represented.

61. *See* Sample Order *infra* section 40.22.
62. *See id.* ¶ 5.

For these reasons, the judge is advised to take an active part in the decision on the appointment of counsel. Deferring to proposals by counsel without independent examination, even those that seem to have the concurrence of a majority of those affected, invites problems down the road if designated counsel turn out to be unwilling or unable to discharge their responsibilities satisfactorily or if they incur excessive costs. It is important to assess the following factors:

- qualifications, functions, organization, and compensation of designated counsel;
- whether there has been full disclosure of all agreements and understandings among counsel;
- would-be designated attorneys' competence for assignments;
- whether there are clear and satisfactory guidelines for compensation and reimbursement, and whether the arrangements for coordination among counsel are fair, reasonable, and efficient;
- whether designated counsel fairly represent the various interests in the litigation—where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests;
- the attorneys' resources, commitment, and qualifications to accomplish the assigned tasks; and
- the attorneys' ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court—experience in similar roles in other litigation may be useful, but an attorney may have generated personal antagonisms during prior proceedings that will undermine his or her effectiveness in the present case.

Although the court should move expeditiously and avoid unnecessary delay, an evidentiary hearing may be needed to bring all relevant facts to light or to allow counsel to state their case for appointment and answer questions from the court about their qualifications (the court may call for the submission of résumés and other relevant information). Such a hearing is particularly appropriate when the court is unfamiliar with the attorneys seeking appointment. The court should inquire as to normal or anticipated billing rates, define record-keeping requirements, and establish guidelines, methods, or limitations to govern the award of fees.[63] While it may be appropriate and possibly even beneficial for several firms to divide work among themselves,[64] such an ar-

63. *See infra* section 14.21.

64. *See In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 77 (S.D.N.Y. 2000); *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 584 (3d Cir. 1984).

rangement should be necessary, not simply the result of a bargain among the attorneys.[65]

The court's responsibilities are heightened in class action litigation, where the judge must approve counsel for the class (see section 21.27). In litigation involving both class and individual claims, class and individual counsel will need to coordinate.

10.225 Related Litigation

If related litigation is pending in other federal or state courts, consider the feasibility of coordination among counsel in the various cases. See sections 20.14, 20.31. Consultation with other judges may bring about the designation of common committees or of counsel and joint or parallel orders governing their function and compensation.[66] Where that is not feasible, the judge may direct counsel to coordinate with the attorneys in the other cases to reduce duplication and potential conflicts and to coordinate and share resources. In any event, the judges involved should exchange information and copies of orders that might affect proceedings in their courts. See generally section 20, multiple jurisdiction litigation.

In approaching these matters, consider also the status of the respective actions (some may be close to trial while others are in their early stages). Counsel seeking a more prominent and lucrative role may have filed actions in other courts.

10.23 Withdrawal and Disqualification

In view of the number and dispersion of parties and interests in complex litigation, the court should remind counsel to be alert to present or potential conflicts of interest.[67]

It is advisable to deny motions for disqualification that claim the attorney may be called as a witness if such testimony probably will not be necessary and prejudice to the client will probably be minor. Disqualification on the ground that an attorney is also a witness may sometimes be denied where it would cause "substantial hardship" to the client. This exception is generally invoked

65. *See, e.g., In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000); Smiley v. Sincoff, 958 F.2d 498 (2d Cir. 1992); *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in part and rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

66. *See infra* section 40.51.

67. *See* Model Rules of Prof'l Conduct R. 1.7–1.9 (2002); Model Code of Prof'l Responsibility DR 5-101(A), 5-104(A), 5-105(A) (1981); *see also* Model Rules of Prof'l Conduct R. 3.7 (2002); Model Code of Prof'l Responsibility DR 5-102 (1981) (lawyer as witness).

when disqualification is sought late in the litigation, and it requires the court to balance the interests of the client and the opposing party. The motion may also be denied when the likelihood that the attorney would have to testify should have been anticipated earlier in the case.[68] Motions for disqualification should be reviewed carefully to ensure that they are not being used merely to harass,[69] and disqualification should be ordered only when the motion demonstrates a reasonable likelihood of a prohibited conflict.[70]

The court should promptly resolve ancillary legal issues requiring research into applicable circuit law, because uncertainty as to the status of counsel hampers the progress of the litigation. Additional delays may result if counsel seeks appellate review[71] or if replacement counsel are precluded from using the work product of the disqualified firm. While disqualified counsel usually must turn over their work product to new counsel upon request, it is possible that counsel will deny the request when there is a danger that confidential information will be disclosed.[72] Issues raised by disqualification motions include whether disqualification of counsel extends to the entire firm,[73] whether co-

68. Model Rules of Prof'l Conduct R. 3.7(a)(3) (2002); Model Code of Prof'l Responsibility DR 5-10(B)(4) (1981). *See* General Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704 (6th Cir. 1982).

69. Harker v. Comm'r, 82 F.3d 806, 808 (8th Cir. 1996); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 433–36 (1985); Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1050–51 (9th Cir. 1985); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577–80 (Fed. Cir. 1984).

70. Though often premised on violations of state disciplinary rules, disqualification in federal court is a question of federal law. *In re* Am. Airlines, Inc., 972 F.2d 605, 615 (5th Cir. 1992); *In re* Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992).

71. The denial of a motion to disqualify counsel in a civil case is not immediately appealable as a matter of right. Cunningham v. Hamilton County, 527 U.S. 198, 207 (1999); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Nor is an order granting such a motion in a criminal case, *Flanagan v. United States*, 465 U.S. 259 (1984), or in a civil case, *Richardson–Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). A petition for a writ of mandamus may be filed even if there is no right of appeal, see Fed. R. App. P. 21, but the standard of review may be more stringent. *See In re Dresser*, 972 F.2d at 542–43.

72. *See* First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201, 207–11 (7th Cir. 1978) (en banc), *and* Int'l Bus. Machs. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (the request to turn over work product may be denied when there is a danger that confidential information will be disclosed (EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459, 1463–64 (Fed. Cir. 1984))).

73. *See* Model Rules of Prof'l Conduct R. 1.10 (2002) (imputation of conflicts of interest); Model Code of Prof'l Responsibility DR 5-105(D) (1981). *Compare Panduit*, 744 F.2d at 1577–80, *with* United States v. Moscony, 927 F.2d 742, 747–48 (3d Cir. 1991), *and* Atasi Corp. v. Seagate Tech., 847 F.2d 826, 830–32 (Fed. Cir. 1988). Timely erection of a "Chinese wall" to screen other firm members from the attorney(s) possessing confidential information may avoid imputed disqualification. *See, e.g.*, Blair v. Armontrout, 916 F.2d 1310, 1333 (8th Cir. 1990);

counsel will also be disqualified,[74] and whether counsel may avoid disqualification based on consent,[75] substantial hardship,[76] or express or implied waiver.[77] If a disqualification motion is filed in order to harass, delay, or deprive a party of chosen counsel, sanctions may be appropriate under 28 U.S.C. § 1927 or Federal Rule of Civil Procedure 11 (see section 10.15).

Kennecott Corp. v. Kyocera Int'l, Inc., 899 F.2d 1228 (Fed. Cir. 1990) (per curiam) (unpublished table decision); United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990); Manning v. Waring, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); *Atasi*, 847 F.2d at 831 & n.5; *Panduit,* 744 F.2d at 1580–82; LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257–59 (7th Cir. 1983) (screening not timely). Disqualification of an attorney on the ground that he or she will be called as a witness generally does not require disqualification of the attorney's firm. *See Optyl Eyewear*, 760 F.2d at 1048–50; Bottaro v. Hatton Assocs., 680 F.2d 895, 898 (2d Cir. 1982).

74. Disqualification of counsel generally does not extend to cocounsel. *See, e.g.*, Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 174 (5th Cir. 1979); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 607–10 (8th Cir. 1977); Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 543–44 (3d Cir. 1977); Am. Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971). But disqualification is proper when information has been disclosed to cocounsel with an expectation of confidentiality. *See* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235 (2d Cir. 1977); *cf.* Arkansas v. Dean Food Prods. Co., 605 F.2d 380, 387–88 (8th Cir. 1979); *Brennan's*, 590 F.2d at 174.

75. *See, e.g.,* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345–46 (9th Cir. 1981); Interstate Props. v. Pyramid Co., 547 F. Supp. 178 (S.D.N.Y. 1982); *cf.* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978).

76. Disqualification on the ground that an attorney is also a witness may be denied where it would cause "substantial hardship" to the client. Model Rules of Prof'l Conduct R. 3.7(a)(3) (2002); Model Code of Prof'l Responsibility DR 5-101(B)(4) (1981). This exception is generally invoked when disqualification is sought late in the litigation, and it requires the court to balance the interests of the client and those of the opposing party. Model Rules of Prof'l Conduct R. 3.7 cmt. ¶ 4 (2002). It may be rejected when the likelihood that the attorney would have to testify should have been anticipated earlier in the case. *See* Gen. Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704 (6th Cir. 1982).

77. *See, e.g.,* United States v. Wheat, 486 U.S. 153, 162–64 (1988) (court in criminal case may decline waiver of conflict); Melamed v. ITT Cont'l Baking Co., 592 F.2d 290, 292–94 (6th Cir. 1979) (waiver found); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 205 (N.D. Ohio), *aff'd*, 573 F.2d 1310 (6th Cir. 1977) (same); *cf. In re* Yarn Processing Patent Validity Litig., 530 F.2d 83, 88–90 (5th Cir. 1976) (waiver and consent).