THE FEDERAL JUDICIAL CENTER
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June 11, 2001

RESEARCH DIVISION

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Toby D. Slawsky
Circuit Executive
22409 U. S. Courthouse
601 Market Street
Philadelphia, PA 19106-8656

Re: Task Force on Selection of Counsel

Dear Ms. Slawsky:

During my testimony on June 1, I indicated that Judge Vaughn Walker had been assigned at least 69 cases that had been filed as securities class actions. Afterwards, someone raised a question about whether some of these cases might have been consolidated cases. I indicated that the 69 cases may have included consolidations.

On my return to D.C., I looked for more specific data and discovered that, indeed, the 69 cases included a considerable number of consolidations. As a result, we found that the 69 cases boiled down to 16 separate cases or litigations (i.e., sets containing more than one securities class action filed against the same defendant). I enclose a complete list of those cases. In four of the litigations, Judge Walker used bidding to select counsel.

Thus, it is not accurate to say that Judge Walker did not employ bidding in 94% of the securities class actions assigned to him. Without further refinements, these data indicate that the correct figure is 75%. It is interesting to note that many of the cases in which bidding was not used were individual actions. That may be one of the factors that helps explain the difference between Judge Walker's treatment of the two groups of cases.

Please circulate this letter to members of the Task Force. I will also send a revised electronic version of my testimony in the hope that you will be able to substitute it for my previous statement. The only change is to the last two sentences of the second full paragraph on page 3.

Thank you.

Sincerely,

Thomas E. Willging

cc Professor Dan Capra

Securities Class Actions Assigned to
Honorable Vaughn Walker (N.D. Cal.)
1991-2000

CAPTION	FILE DATE(S)
1.) Greg Cronin v. Arthur Anderson	4/2/91
2.) Gerald Gaynor v. American First	6/19/91
3.) **Wells Fargo Litigation*** (Two Original Filings)**	6/25/91
Wells Fargo Litigation* (Three Reopened Cases)	4/13/94
4.) Ronald E. Kaplan v. Philippe Kahn	1/8/93
5.) Douglas Mason Litigation* (Two Cases)	3/23/93-4/9/93
6.) **California Micro Devices** (Four Cases)**	8/12/94-11/22/94
7.) Stuart T. Crook v. Philippe Kahn	2/28/95
8.) Syed H. Iftikan Litigation* (Two Cases)	4/2/96-5/24/96
9.) S3 Inc. Litigation* (Three Cases)	11/5/97-11/7/97
10.) Kassover v. Aspec Technology, Inc.	7/1/98
11.) Schier v. Bankamerica Corp.	10/16/98
12.) **Cylink Corp. Litigation*** (Seven Cases)**	11/6/98-12/14/98
13.) Patriot American Hospital Litigation* (Seven Cases)	5/7/99-4/26/00
14.) Desmond v. Bankamerica	12/16/99
15.) Copper Mountain Litigation* (20 Cases)	10/20/00-12/11/00
16.) **Quintus Corp. Litigation*** (12 Cases)**	11/15/00-12/1/00

TOTAL NUMBER OF CASES = 69

* The term "Litigation" is used to describe two or more cases filed as securities class actions against the same defendant within a one year time period.

** Bidding was used to select counsel

(Source: Administration Office Statistics, FJC Integrated Data Base)

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June 1, 2001

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Third Circuit Task Force on Selection of Class Counsel
Statement of Thomas E. Willging*

Judge Becker and panel members: Thank you for inviting me to testify today. I am glad to share data that I and my colleagues at the FJC have uncovered while researching class action issues for the Advisory Committee on Civil Rules. In 1994, the committee asked the Center to study class actions. Laural Hooper, Bob Niemic, and I examined case files in 407 terminated class actions from the Eastern District of Pennsylvania, the Northern District of Illinois, the Northern District of California, and the Southern District of Florida and published a report and law review article describing our findings.[1] As described in more detail in my memo of May 15, which is attached, my testimony draws on data obtained while looking for something other than the role of bidding in class action litigation. While I think you will find our data useful, they are the equivalent of the minutes of the last meeting, a meeting called for a different purpose. The work that my colleagues Laural Hooper and Marie Leary are presently conducting for the Task Force promises to be more instructive and useful because it focuses on many of the questions of interest to the Task Force.

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* The views expressed are my own and not necessarily those of the Federal Judicial Center. This statement supplements the memorandum submitted to the Task Force on May 15, 2001, a copy of which is attached.

[1] The report is published as Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal Districts* (Federal Judicial Center 1996) ("FJC Study") and Thomas E. Willging, Laural L.

Today, I want to look at two aspects of the limited data we have relating to selection of class counsel. First, I will take a look at the big picture and place the cases we are discussing within the landscape of civil litigation. Second, I will narrow the focus and look at some characteristics of cases that might be candidates for selection of counsel by bidding.

Looking at the incidence of bidding practices from a distant perspective— imagine yourself as an astronaut looking back at earth from space—we can see that the cases in which judges have found bidding to be appropriate are few and distinct. They are not the oceans of litigation or even the smaller land masses of class actions. Rather, they are an island or two, smaller than Ireland or Bermuda, maybe an uninhabited island in an archipelago, a dot on the planet.

Class actions themselves are rare events. In the FJC study, which was based on 1992-94 terminated cases, class actions amounted to fewer than 1 percent of all civil cases. Overall, the incidence of class actions was 0.68% of all civil cases during that time period in the four district courts we studied; in the Eastern District of Pennsylvania, the incidence of class actions was 0.54%. In the 407 class action cases we studied, one judge had used bidding to select counsel. That was Judge Vaughn Walker in the *Oracle Securities* case. In numerical terms, 1/4 of 1% [0.25%] of class actions used a bidding process during that time period. Combining these figures yields an estimate that the rate at which judges have used bidding processes is about two cases per hundred thousand civil cases [0.0017%].

The above assumes, though, that the use of bidding has remained constant since Judge Walker's innovative 1990 order in *Oracle Securities*. This, we know, is not true. Instead of one case every two years, bidding has occurred recently at a rate of one to two cases per year, with some evidence that the rate may be increasing, perhaps as a result of recent attention. Extrapolating from an estimated two cases per year yields a rate of seven cases per hundred thousand civil cases.

Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74 (1996). The FJC version includes complete tables and figures.

We could assume that bidding potentially applies to all of the types of cases in which it has been applied to date. Securities and antitrust cases make up that universe. Such cases constituted almost 30% of the class actions in our study. If bidding had been invoked in each securities and antitrust class action in our study, we would have seen approximately 120 cases during a two year period in the four courts we studied.[2] The incidence would be 0.2% of all civil actions, or two cases per 1,000. Even at that rate, a typical district judge would be assigned such a case less than once every two years (applying the year 2000 national figure of 479 weighted filings per district judgeship).[3]

These data suggest that bidding cases may be so infrequent that district judges will need clear guidelines to identify the cases in which bidding might be appropriate. This bring us to my second point: how to identify the type(s) of case(s) that might be viable candidates for bidding.

Looking just at historical data, one should not expect widespread use of bidding. For example, Judge Walker testified that he has used bidding in four securities class actions over a span of more than 10 years. A relevant question, though, is: What is the denominator? How many class actions had been assigned to Judge Walker during that same time period? Using data that probably underestimate the amount of class action activity,[4] we found that during the ten year period from January 1, 1991 to December 31, 2000, Judge Walker was assigned at least 135 cases that had been filed as class actions. Sixty-nine of those cases had been filed as securities class actions. Those 69 cases boil down to 16 when one groups together cases filed against the same defendant within a one year period. In other words, Judge Walker, a leading proponent of bidding, exercised his

[2] Some of you may be curious as to how many class actions are in the system now. Unfortunately, data in this area have been notoriously difficult to collect. We recently looked at electronic docket sheets for cases with an entry for class actions and, on that basis, estimated that 2,700 class actions were filed during 1997 (representing approximately 1% of all civil filings for that year) and 3,200 cases during 1998 (representing approximately 1.2% of all civil filings for that year). Certified class actions, of course, are far fewer. In our study, 152 (37%) of the 407 cases filed as class actions were certified as such. FJC Study at 9.

[3] Administrative Office of the United States Courts, 2000 Federal Court Management Statistics 167.

[4] In our 1996 study, we found that statistical data reported to and by the Administrative Office include about half of the class action activity detected via electronic docket searches. FJC Study at 198-99. For the electronic search reported in note 1, *supra*, 51% to 54% of the cases appeared in the Administrative Office statistics.

judgment that 75% of securities class actions were not conducive to using bidding to select counsel.

Those data compel us to consider the question: "What are the characteristics of cases in which Judge Walker and other district judges have chosen *not* to use the bidding process to select counsel?" Hopefully, we will learn more about this aspect of the judges' experience from interviews that my colleagues Laural Hooper and Marie Leary will be conducting with judges and counsel.

These data lead us to what in my opinion is the central question for the Task Force: "In what type of case is bidding likely to be viable?" Data from the 1996 FJC study shed some light on this question, while suggesting the need for further study. As I noted at the outset, the question asked in the FJC study differs from the Task Force's question. We asked: "In what types of class actions did district judges get involved in selecting lead or liaison counsel, appointing committees of counsel, or otherwise organizing counsel?" We found that judges engaged in such selecting and organizing counsel in approximately one case in five. What distinguished those cases?

- Most (90%) of the cases in which judges became involved in selecting class counsel were securities or labor cases (ERISA or FLSA). Civil rights cases were a far smaller proportion of these cases than in our sample as a whole;
- A clear majority (82%) had survived motions to dismiss compared to only half of the other cases;
- The vast majority (95%) sought and successfully obtained certification as a (b)(3) opt-out class while the other cases were far more likely to have sought a (b)(2) class for injunctive relief and were less likely to have been successful in having any type of class certified (63% failed);
- Nine-tenths of the cases in which the court selected counsel resulted in a settlement proposal, typically (77% of the time) creating a fund from which the

class and their counsel might be paid. Predictably, most of those cases (74%) resulted in an application for attorneys' fees and expenses.

- For cases that resulted in settlement proposals, the median gross settlement amount for cases in which the court selected counsel was $2,875,000, and 25% of such cases produced gross settlements amounts of $7,499,000 or greater. By way of contrast, in cases in which the court did not select counsel, the median gross settlement amount was $135,056, and the top 25% of such cases produced gross settlement amounts of $487,000 or more.

- Again, for cases that resulted in settlement proposals, the median attorneys' fee award for cases in which the court selected counsel was $820,000, with 25% of such cases having awards of $2,125,000 or more. In contrast, in cases in which the court did not select counsel, the median attorneys' fee award was $113,145, and 25% of such cases produced median attorneys' fee awards of $434,000 or more. In the latter cases, most of the monetary settlement was allocated to attorneys' fees. In the former cases, on average, 30% of the settlements were allocated to attorneys' fees.

Roughly summarizing the above data, the cases in which judges became involved in the selection of class counsel were distinguished by a convergence of merits and money. By merit, I mean sufficient merit to achieve class certification[5] and to survive dispositive motions,[6] which we found to have preceded the certification ruling relatively frequently.[7] By money, I mean sufficient stakes in the litigation to produce a common fund sufficient to support fee awards typically exceeding $800,000.[8]

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[5] As the 7th circuit recently announced, class certification decisions may involve a judge considering the merits, *Eisen* notwithstanding. See Szabo v. Bridgeport Machines Co, 2001 WL 476574, May 4, 2001. This decision suggests a practice that parallels a practice we found in the FJC study, namely that district judges frequently consider the merits, in the form of ruling on dispositive motions, before deciding whether to certify a class. FJC Study at 29-34.

[6] Two out of three cases in the FJC study had a ruling on either a motion to dismiss or a motion for summary judgment, resulting in dismissal of 40% to 60% of the cases in the four districts. FJC Study at 32-33.

[7] In the four districts, between 61%-82% of the motions to dismiss preceded class certification rulings and between 22%-67% of the motions for summary judgment preceded class certification rulings. Id at 29-32.

[8] FJC Study at 68-69 and 148-49.

Statistically, we were unable to find sufficient data to test whether the amount at stake would predict the likelihood of a judge getting involved in selecting counsel. We simply have no data about what the judge may have known from the outset about the amount at stake, and we have little data about the settlement amounts in cases in which counsel were not selected. We are left with an informed but untested hunch that an educated estimate of the amount at stake will be a major factor in a judge's decision about whether to become involved in selecting counsel.[9] The balance of my testimony, then, is based on inferences that I draw from the data reviewed above. Others might well draw different conclusions.

Based on our data, I feel quite confident in saying that the merits matter. A case needs sufficient promise that it will be able to survive dispositive motions and to merit certification under Rule 23(b)(3). I also feel reasonably confident in saying that money matters. Our data on the gross settlement amounts suggest that either the judge had some idea of the stakes in the litigation or that the process of selecting counsel somehow yielded higher settlements. On the basis of these data, we cannot discern the direction or cause of any correlation between the selection of counsel and the higher settlement amounts, but the correlation definitely exists at a statistically significant level.

My hunch is that the merits and the amount at stake both matter. This hunch is based in part on the above data and in part on imagining the perspectives of counsel deciding whether to file a class action and, more importantly, whether to submit a bid. Counsel in that position would, it seems, need to have some basis for estimating the merits of the action in terms of the viability of the underlying legal theory, the ability to satisfy the demanding procedural prerequisites of Rule 23, and the likely amount of damages that might be recovered.

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[9] A judge might become informed about the value of the case by reviewing the complaint, discussing in pretrial conferences the size of the class and the scope of damages claimed by counsel, or otherwise pursuing information in the process of discussing selection of counsel. Judges also might use surrogates for value, perhaps inferring from the competition among counsel that there is sufficient value in the case to attract competitive bids. By starting the bidding process, a judge could gain information about attorneys' assessments of the value of the case.

In the FJC study we found that securities cases "exhibited a number of standard characteristics that suggest routineness in the way they are litigated and adjudicated."[10] Specifically, securities cases "were more likely to be certified, to be subject to [adequacy of representation] objections, to involve larger class sizes than nonsecurities cases, and to contain boilerplate allegations. Finally, numerosity objections were unlikely to occur in securities cases, but more likely to occur in other cases."[11] Securities cases, then, would generally seem predictable as to their merits.

Counsel would also need a basis for estimating the amount of damages. Securities cases seem quite suited to bidding in that the number of shares traded during the class period and the amount by which the stock decreased in value during the same period are both determinable. One would expect that having high, predictable stakes would be a prerequisite to eliciting bids from counsel. Again, securities cases seem to meet these criteria.

In short, data from the FJC study of class actions, along with reasonable inferences from those data, suggest that selection of counsel through bidding, though rare, may be suitable to a high-stakes subset of the relatively routine and predictable securities class actions. Whether other types of cases have comparable characteristics remains an open question for the Task Force to address, using whatever data and information it can obtain.

[10] FJC Study at 7.
[11] Id.

Federal Judicial Center
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memorandum

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To: Third Circuit Task Force on Selection of Counsel

From: Tom Willging

Date: May 15, 2001

Subject: FJC Materials relating to selection of counsel and attorneys' fees

In response to the Task Force's invitation, I am planning to testify at the June 1, 2001 hearing. In discussing the appointment of counsel to represent a class and related matters—including pretrial methods of controlling and determining attorneys' fees—I expect to rely on the sources of empirical data and other information summarized below. Subsequent to my memorandum dated March 7, 2001, we have analyzed further the data from our class action study. Accordingly, item 1, below, has been changed. The other items remain the same. Please substitute this memorandum for the March 7 document.

1. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts* (Federal Judicial Center 1996); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74 (1996)

Summary. The following data appear to be relevant to the Task Force's consideration of factors affecting the selection of counsel in class actions. Using published data from the Center's 1996 study of class actions, we found that courts rarely used competitive bidding to select counsel, that median attorney-fee awards ranged from 27% to 30%, and that courts generally used the percentage-of-recovery method to calculate fees. Using unpublished data from the same study, we found that judges generally did not appoint counsel in class actions (other than counsel who filed the action).[1] Appointments or other organizing actions took place in approximately one in five cases.

[1] In reviewing the record in the cases studied, we asked whether the court at any time designated lead counsel for the class, appointed a steering committee, appointed liaison counsel, or "otherwise directed the organization of counsel." Under this schema, we did not consider a reference to counsel who filed the case and served as attorney for a class representative to be such a designation or appointment, even if the court certified a class and referred to that attorney as counsel for the class. We were looking for evidence that the court took some action regarding the organization of counsel for the class.

Cases in which appointments occurred were distinctly different from cases without appointments. Differences revolved around the nature of suit, the likelihood of surviving a motion to dismiss, the likelihood of being certified as a class action, the remedy sought (injunctive relief versus damages), the likelihood of creating a settlement fund, and the likelihood of having an application for attorneys' fees.

Data and analyses. In the 1996 study, which the Center conducted at the request of the Advisory Committee on Civil Rules, we examined 407 cases filed as class actions in four federal districts that were terminated between July 1, 1992 and June 30, 1994.[2] We found, in our published report, that:

- in one case in N.D. Cal., the court used competitive bidding to calculate attorneys' fees (FJC Report, Fig. 71). This represents approximately 1% of the 107 monetary settlements included in the study and fewer than 1/4 of 1% of the 407 cases in the study;
- the attorney fee-recovery ratio (gross settlement amount divided by attorneys' fee awards) "infrequently exceeded the traditional 33.3% contingent fee rate." (FJC Report, p. 69 and Figs. 67-68) . In the four districts we studied, median attorney fee awards ranged from 27% to 30% of the gross monetary settlement (not including the value of any nonmonetary features and not including cases with exclusively nonmonetary relief);
- in three of the four districts studied, judges used the percentage of recovery method of calculating attorneys fees in class action settlements far more frequently than the lodestar method; in the other district (E.D. Pa.) judges used the lodestar method slightly more often than the percentage of recovery method (FJC Report, pp. 71-72 and Fig. 71); and
- fee-recovery rates as a percentage of the monetary settlement differed little in relation to the method for calculating fee awards; regardless of the method used, median awards in the four districts fell within the same 27% to 30% range described above (FJC Report, p. 72 and Fig. 68).

To assist the Task Force, we recently examined unpublished data extracted from the database created in conducting the above study. These data show that

- most class actions did not involve judicial selection of counsel (beyond a judge's expressly or implicitly ratifying representation of a newly certified class by counsel who filed the case). Judges took action to appoint lead, liaison, or committees of counsel in 78 (19%) of the 407 cases in the database (20% in E.D. Pa., 11% in S.D. Fla., 19% in N.D. Ill., and 25% in N.D. Cal.).

[2] Note that the districts (N.D. Cal., S.D. Fla., N.D Ill., and E.D. Pa.) were chosen because of their level of class action activity, not randomly. The data in this study describe a snapshot of activities in those courts and are not presented as representative of national class action activity.

- A majority (60%) of the 78 cases in which judges appointed lead counsel or a steering committee to represent the class were securities cases. Another 30% were divided equally among labor cases (e.g., Fair Labor Standards Act or ERISA) and a catchall category of "other (federal) statutory actions." Although civil rights cases accounted for 26% of all class actions, such cases accounted for 6% of the cases in which judges organized counsel to represent the class. A sprinkling of other case types were found among the 78 cases.

In general, the 78 cases in which the court selected class counsel appear to have been distinctly different from class actions in which the court did not organize counsel. Note that all of the following differences are statistically significant. For example

- 18% of the cases in which the court selected counsel had a motion to dismiss granted and the entire complaint dismissed, while 50% of the cases without court-selected counsel had such action taken;
- 95% of the cases in which the court selected counsel resulted in certification of a class, while 37% of the cases without selected class counsel had a class certified;
- 16% of the cases in which the court selected counsel were seeking certification of a (b)(2) class to obtain injunctive relief, while 52% of the cases in which the court did not select counsel sought such a class;
- in 85% of the cases with court-selected counsel sought an opt-out (b)(3) class, while in 43% of the cases with non-selected counsel sought an opt-out (b)(3) class;
- similarly, in 11% of the cases in which it had selected counsel, the court certified a (b)(2) class seeking injunctive relief, while in 38% of the cases in which it had not selected counsel the court certified such a class;
- in 79% of the cases in which it selected counsel, the court certified an opt-out (b)(3) class, while in 34% of the cases in which it had not selected counsel, the court certified such a class;
- 90% of the cases in which the court selected counsel resulted in a settlement proposal, while 33% of the cases without selected class counsel produced a settlement proposal;
- 77% of the cases in which the court selected counsel produced a settlement fund, while 9% of the cases without selected class counsel produced such a fund;
- 74% of the cases in which the court selected counsel involved an application from counsel for reimbursement of attorneys' fees and expenses while 19% of the cases without selected class counsel included an application for fees (probably because many of the latter cases did not lead to a common fund settlement).

In summary, cases in which counsel were selected were far more likely to be securities class actions that survived motions to dismiss, that sought and obtained certification of a (b)(3) opt-out class rather than a (b)(2) class for injunctive relief, and that resulted in a settlement proposal which included a fund from which attorneys' fees could be paid. This is not to say that court selection of counsel caused those differences in outcomes. Indeed, any causal relationships may well work in the other direction. That is, differences in the cases as filed or as they developed through the pretrial process may have led the court to select counsel.

One theory is that courts appointed counsel—and counsel sought appointment—in cases that appeared to have sufficient merit to be likely to survive the litigation process and to have sufficiently high stakes to result in a settlement fund large enough to warrant administration of individual claims and to support payment of attorneys' fees. Using multiple regression analysis, we attempted to determine whether information available to the judge at the time of appointment might explain the appointments. Our primary data, however, mainly related to events that took place after the appointment and the analyses did not produce any compelling explanations of why judges selected counsel in some cases and not in others. We found some indication that the distinction between requests for monetary relief and injunctive relief was a significant factor. When only injunctive relief was sought, such as in civil rights cases, class counsel typically was not appointed. Counsel was much more likely to be appointed when monetary relief was sought, such as in securities cases.

One might speculate that an experienced judge can intuitively recognize characteristics of cases that warrant appointment of counsel, but data from the 1996 study do not suffice to test that theory. For example, when a judge knows the amount of damages at stake in the litigation and the general viability of plaintiffs' legal theories and defendants' defenses, that judge might be able to surmise that law firms would be interested in bidding for the right to represent a class. Unfortunately, our data did not estimate the stakes in the litigation, and we were not always able to find information about the ultimate stakes, the gross amount of the settlement.

One might also speculate that a common sense factor—whether there was competition for appointment of class counsel—might drive the process. Again, our 1996 study did not focus on this aspect of the appointment, leaving us without data to test this common sense observation. Without the appearance of multiple law firms in a case and the possibility of competing applications to represent a class, a judge seeking to invoke the bidding process would have to take active steps to bring the auction process to the attention of likely bidders. Some judges might find that taking such actions is not in keeping with their conception of the judicial role and might limit use of bidding to cases in which competition is evident.

Speculation aside, our data show distinct differences between cases in which counsel are appointed and those in which they are not. Our analyses show that the primary indicators of appointment were whether the cases sought monetary relief in a

context like securities litigation. Seeking injunctive relief in a civil rights context appears to have counterindicated an appointment.

2. Federal Judicial Center, *Manual for Complex Litigation, Third* (1995).

The *Manual* contains extensive discussion of processes, purposes, and criteria for judicial selection and organization of counsel in the context of a class action or other multiparty litigation. Section 20.22 (attached) spells out the general approach of the *Manual* on this subject and includes a favorable reference to Judge Walker's opinions on competitive bidding in the *Wells Fargo* and *Oracle* cases (p. 26, n. 58).

The *Manual* also devotes considerable attention to regulating the award of attorneys' fees. Section 24.21, "Setting Guidelines and Ground Rules" (attached) specifically addresses staffing the cases and compensating designated counsel.

Note that the Center is currently revising the *Manual.* The Board of Editors has identified the sections on attorneys fees as candidates for revision and I expect to turn to drafting proposed revisions within the next few months.

3. Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* (Federal Judicial Center 1994).

In preparing a manual to guide judges in administering attorney-fee matters, including establishing rates or selecting counsel through competitive bidding at the pretrial stage, Hirsch and Sheehey interviewed selected judges who were known to have experience with the methods being considered. Their findings, which are qualitative, not quantitative, include:

- one judge had used bidding on more than one occasion and found that it works well because it places the burden of making trade-offs between effort and expense on the lawyers rather than the judge. This judge also found the bidding process to be flexible enough to allow the judge to consider quality as well as price (pp. 99-100);
- other judges have established a percentage rate at an early stage of the litigation, either through direct judicial interaction with attorneys for the class or through appointment of experienced counsel to serve as a guardian for the class to negotiate a fee for the anticipated work. One judge found the process to save a considerable amount of judicial time and another found that this approach generally works well (pp. 100-01 and nn. 443-44); and
- some judges have considered using a budgeting approach at the pretrial process whereby they would require counsel, probably under seal, to submit an estimate of the work they anticipate the case will require. Such an estimate would become a presumptive ceiling on the amount of fees that could be recovered (pp. 97-98). Because these judge had not used this approach, they could not, of course, comment on its effectiveness.

4. Alan J. Tomkins & Thomas E. Willging, *Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts* (Federal Judicial Center 1986).

In this study, FJC researchers interviewed judges and other decision makers and examined court rules and orders to determine the range of practices used to assess attorneys' fees in English, Alaskan (state), and U.S. federal courts. Most of the lengthy report deals with determining fees after the litigation had ended. Several observations may be relevant to the Third Circuit Task Force's focus on selection of counsel by virtue of their emphasis on activities that occurred during the pretrial process. None of the judges interviewed for this project discussed competitive bidding, indicating perhaps that this novel process had not yet surfaced, even as a glimmer in the eyes of experienced judges.

In relation to pretrial methods for controlling fees, the report indicated that

- presumptive fee schedules for various types of cases or presumptive hourly attorney-fee rates were found to have facilitated post-litigation review of fee applications in some instances in U.S. federal courts (p. 71), in Alaska (pp. 33-34), and in England (prior to 1986) (pp. 15-16);
- federal judges interviewed for this study said they did not invest pretrial time managing attorneys' fees because most cases settle (p. 72);
- pretrial management of attorneys' fees tended to take the form of requiring attorneys to file periodically throughout the course of the litigation materials supporting attorneys' fees (p. 72); and
- several judges indicated recording and using their pretrial evaluation of the "worth" of a case as a benchmark against which to measure later fee requests (p. 72).

5. Thomas E. Willging & Nancy A. Weeks, *Attorney Fee Petitions: Suggestions for Administration and Management* (Federal Judicial Center 1985).

Based primarily on a review of published decisions, this work devotes the opening chapter (pp. 5-14) to methods of controlling attorneys' fees through actions taken during the pretrial process. The authors discuss approaches that might be taken to select lead counsel and review any proposed committee structure for the litigation. They also discuss guidelines for fee awards that a court might promulgate at the outset to prevent excessive fees. Finally, they present approaches judges have taken to control attorneys' fee by controlling the scope of pretrial litigation.

6. Thomas E. Willging, *Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial*(Federal Judicial Center 1984).

In *In re Continental Illinois Securities Litigation*, 572 F. Supp. 931 (N.D. Ill. 1983), District Judge John F. Grady issued a pretrial order setting forth guidelines that would govern his review of counsel fees in that complex multidistrict litigation. His order specifically limited fees for conferring with co-counsel and promised to monitor the organization of counsel and limit the roster of attorneys who might be compensated. Interviews with thirty-nine experienced federal practitioners across the country yielded a prediction that such an order could save about 50% of attorneys' fees and expenses in such litigation. Attorneys saw appointing lead counsel and monitoring the plaintiffs lawyers' organizational structure to be key elements of the order. Attorneys questioned whether the single law firm model implicitly called for in the order was practical (pp. 32-34).

7. Arthur R. Miller, *Attorneys' Fees in Class Actions* (Federal Judicial Center 1980).

In this comprehensive circuit-by-circuit review of the rules and practices governing awards of attorneys' fees in class action litigation (based in part on surveys administered to judges and attorneys), Professor Miller propounded the following recommendation regarding the organizational structure for attorneys:

> When a number of attorneys are likely to be filing fee petitions in a particular case, the judge should direct, at the pretrial conference, that an organizational structure and fee procedure be set up so that there is some understanding as to what functions the various lawyers will perform, and what will be expected of them. The structure should include selection of lead and liaison counsel (p. 343).

Professor Miller indicates that in some cases, "the attorneys involved will agree among themselves to establish a reasonable structure and present it to the court. Otherwise, the judge should appoint lead counsel or establish any other organizational plan conducive to the management of the case." (p. 344).

In response to questionnaires, district judges and attorneys indicated that preference was always or often given to lead or liaison counsel in awarding fees. Usually such preferences took the form of an increased contingency or quality multipliers; in extreme cases, the court might award fees exclusively to lead and liaison counsel (pp. 247-49).

I hope you find the above material helpful. If you have any questions, please do not hesitate to contact me. I look forward to appearing before the Task Force on June 1.

Please let me know if you would like additional copies of any of the documents or if you would like me to send a copy of this memorandum and the enclosures to members of the Task Force.