THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

Volume 13 | Issue 2 Article 7

2012

Trial-Court Discretion: Its Exercise by Trial Courts and Its Review by Appellate Courts

Joseph T. Sneed

TRIAL-COURT DISCRETION: ITS EXERCISE BY TRIAL COURTS AND ITS REVIEW BY APPELLATE COURTS

Joseph T. Sneed*

I. SCOPE OF THE PROBLEM

The pervasiveness of this topic is illustrated by Appendix A,[1] a survey of volumes 658 and 659 of the Federal Reporter, Second Series. Statistical data at the conclusion of Appendix A indicate that approximately one-fourth of the total number of cases reported contained one or more issues in which trial-court discretion was subjected to scrutiny by appellate courts. As a result of this scrutiny, approximately seventy percent of the trial courts' actions were approved and approximately thirty percent were disapproved. These data correspond to other similar surveys undertaken.

Considerable discretion on the part of district *and* appellate courts is provided in the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Appellate Procedure, which include approximately fifty provisions that either explicitly or implicitly recognize the existence of discretion.

---

*Judge, United States Court of Appeals for the Ninth Circuit, 1973–2008. Judge Sneed used this outline when speaking at a Federal Judicial Center workshop for the district judges of the Second Circuit on May 8, 1982. The outline has been edited where appropriate to convert its seminar-podium shorthand to prose. The editors are grateful to the Archives of the United States Court of Appeals for the Ninth Circuit, the repository of Judge Sneed's papers, for making it available to the Journal and for authorizing this first print appearance of Judge Sneed's thoughtful consideration of trial-court discretion.

1. Appendices A and B appear on pages 209–29, *infra*. Judge Sneed pointed out that Appendices A and B are "not a complete list," that "[n]o such list [is] possible," and that there is "nothing scientific about either" appendix. The editors caution the reader in addition that neither of the appendices has been updated; some authorities cited in them have doubtless been superseded.

Thus, the topic of trial-court discretion is very wide. But the question remains: "Is it very deep?" My answer is equivocal: Good sense tells me that it ought to be. Surely a topic as pervasive as the exercise of judicial discretion is not an area about which it can be said that there is "no law at all" worth talking about. Nonetheless, it is true that judicial opinions almost invariably discuss the exercise of discretion by a court in a particular area as a discrete topic unrelated to other situations in which judicial discretion is recognized and exercised. Thus, while it is difficult to assert that general law pertaining to the exercise of judicial discretion exists, it is true that a great deal of particular law exists. Nonetheless, my purpose is to suggest that perhaps some useful generalizations are possible.

II. THE MEANING OF DISCRETION

To have *discretion* is to have *choice*. To have choice is to be able to choose one course of action over one or more others with *immunity* from reversal by a higher court because of the course selected. The range of choice is determined by the number of permissible courses of action that exist. This number may be as small as two or innumerable. The fewer the number of permissible choices, the more narrow the discretion; the greater the number, the wider the discretion.

This definition of discretion suggests a distinction between what might be called de jure discretion and de facto discretion: Immunity from reversal may exist because the choice made was permissible or because even though the choice was impermissible, reversal would be improper. An example of the former is the proper exercise of discretion in response to a request for a continuance. An example of latter is an application of the harmless error doctrine. Our concern is with de jure discretion.

III. WHY MUST THE TRIAL COURT BE GIVEN DISCRETION?

Discretion is indispensable, first, because rules for every contingency cannot, and should not, be formulated. It is also indispensible because the trial court is better able to fashion the appropriate response to a specific fact situation than is an

appellate court acting either before (by having fashioned a general rule in prior cases raising a similar issue) or after (by fashioning a general rule in the course of its present review) the trial court's exercise of its discretion.[2] And finally, discretion is indispensible because it contributes substantially to a proper division of labor between trial courts and appellate courts.

IV. SOME TYPES OF ISSUES BEST LEFT TO TRIAL-COURT DISCRETION

Issues that pertain to the details of the management of a trial are one example of those best left to the discretion of the trial court, and might include motions to sever; whether to permit use of expert testimony; management of voir dire; and time of proof of conspiracy where a co-conspirator statement is offered as an admission under Rule 801(d)(2) of the Federal Rules of Evidence. Issues that pertain to the credibility of witnesses are another example, and might include findings of fact and motions to reopen for new evidence. Issues that strongly resist efforts to standardize a response are a third example, and might include dismissal of a juror; declaration of a mistrial; and use of, or refusal to use, special interrogatories.

Yet another example might be issues that arise infrequently, such as reopening a case after close of a criminal trial and setting aside judgment following a bench trial and ordering a new trial by the judge who conducted the trial. Also included would be issues the resolution of which requires assessment of the general fairness of trial, which might include determination of the effectiveness of counsel in a trial at which the trial judge presided and denial of motion for mistrial because of alleged juror misconduct.

Issues that do not affect fundamental rights are an additional example of those best left to trial-court discretion. These can best be understood by comparing an issue such as *forum non conveniens* with any one of the following issues:

---

2. This is particularly true where proper decision requires someone who was there, as Professor Rosenberg has put it, *see* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 663 (1971), or someone with a "feel of the case," as Judge Friendly has put it, *see Noonan v. Cunard SS. Co.*, 375 F.2d 69, 71 (2d Cir. 1967) (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)).

whether a *Denno*-type hearing[3] should be held on the trustworthiness of eyewitness identifications;[4] whether to grant or deny a motion to reveal the identity of a confidential informer; and whether a stop is based on founded suspicion.

V. SOME TYPES OF ISSUES WITH RESPECT TO WHICH TRIAL-COURT DISCRETION SHOULD NOT BE RECOGNIZED

Issues that pertain to determining the scope and nature of constitutional rights and duties are one example of those that fall into this category, which might include whether the Fifth Amendment privilege against self-incrimination has been violated and whether a search or seizure conforms to the Fourth Amendment. Similarly, issues that pertain to interpretation of statutes and judicial precedents, such as whether there has been a deprivation of property without due process for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983, are in this category as well. Finally, issues that pertain to fashioning a rule intended to apply to all substantially similar cases in the future—such as when counsel should be disqualified or when a class should be decertified—are a third example of those with respect to which the appellate court need not defer to the discretion of the trial court.

VI. PITFALLS FOR TRIAL AND APPELLATE COURTS MANAGING THEIR DIVISION OF LABOR

Trial courts sometimes regard the protection of fundamental rights as discretionary. They might, for example, be unduly sensitive to the cumulative weight of numerous decisions pertaining to discretionary matters adverse to a defendant in a criminal case that imperils the fairness of the trial.

Appellate courts sometimes impose a general rule in an area best left to trial court discretion, at least in large part. They might, for example, establish rigid rules to govern dismissals for failure to prosecute or fix precise rules to be followed in computing allowable attorneys' fees.

---

3. *See Jackson v. Denno*, 378 U.S. 368 (1964).

4. *See Watkins v. Sowders*, 449 U.S. 341 (1981).

Trial courts might leave no record of reasons for exercising discretion as they did. This might occur in cases that involve, for example, rulings pursuant to Rules 404(b) and 609(a)(1) of the Federal Rules of Evidence or dismissals for failure to prosecute.

Appellate courts sometimes reverse trial courts in areas in which their discretion has been recognized without either (1) a finding that the discretion has been abused, or (2) the establishment of a general rule. Instead the appellate court merely finds that the trial court was wrong.[5]

Trial courts might exercise their discretion in an apparently injudicious manner. This creates an atmosphere of arbitrariness that invites appellate court intervention even when discretion was, in fact, exercised properly.

Appellate courts might narrow the permissible limits of discretion for all judges when reviewing and reversing the actions of the occasional "bad" trial judge.

Trial courts might permit their discretion to be exercised consistently in a manner that favors the side that the court thinks should win. This pattern invites reversal even though no individual exercise is demonstrably an abuse of discretion.

Appellate courts might reduce the scope of discretion, frequently inadvertently, by so emphasizing the particulars of the situation in which the trial court exercised its discretion as to suggest that hereafter only the presence of those circumstances will justify action such as that being reviewed. In this manner discretion, in an area in which it is legitimate, is eliminated and a general rule replaces it.

Trial courts might fail to analyze as carefully as circumstances require when aware that their resolution of issues is subject to their own discretion.

Appellate courts might affirm judgments made by trial courts without adequate review when issues on appeal turn on whether the trial court exercised its discretion properly.

Trial courts might manipulate the application of general rules of law by expanding the category of facts to embrace mixed law and fact issues in which there is more law than fact. In a similar way, appellate courts might (1) review findings of

5. *See Mack v. Smith*, 659 F.2d 23 (5th Cir. 1981); *Matter of Bankers Trust*, 658 F.2d 103, 110–11 (3d Cir. 1981).

mixed law and fact with the same deference properly accorded findings of historical facts and (2) clothe trial courts with considerable discretion in applying a rule of law by treating its application and the determination of historical facts as merely findings of fact. Failings of this type might include a trial court's finding of probable cause to search and exigent circumstances justifying a search without a warrant as a fact and the appellate court's deferring to that finding as it would to a finding of historical fact.

VII. LESSONS THAT THESE PITFALLS TEACH

Preservation of the proper division of labor between trial and appellate courts requires careful consideration by both of the situations in which discretion is exercised, and also requires mutual respect and deference. What constitutes a proper division changes over time in response to, *inter alia*:

- An expansion of fundamental rights, such as comment on the failure of the defendant in a criminal case to take the stand.[6]

- Voir dire examination in cases in which the crime victim's racial or ethnic group differs from the defendant's.[7]

- A decision by the appellate courts that equal justice requires a uniform response to a given situation.[8]

- The cumulative force of repeated reviews by appellate courts of a particular type of exercise of discretion by trial courts. This situation can be

6. *Griffin v. Cal.*, 380 U.S. 609 (1965) (holding that, although comment by the court was previously discretionary, it was now prohibited).

7. *Rosales-Lopez v. U.S.*, 451 U.S. 182, 191 (1981) (holding that discretion was not eliminated, but significantly restricted).

8. *U.S. v. Cook*, 608 F.2d 1175 (9th Cir. 1979) (en banc) (appearing to impose a virtual requirement that ruling on admissibility of prior convictions be made before defendant takes stand).

illustrated by application of the abstention doctrines.

VIII. SCOPE OF DISCRETION

Trial court discretion may be wide, narrow, or somewhere in between. The characteristics of issues particularly suitable to being subject to trial-court discretion and those suitable for resolution by appellate courts, as well as the pitfalls into which both types of courts sometimes fall, make clear that the number of choices available to a trial court will not be the same with respect to all issues. A spectrum, reflecting a large number of choices which will enjoy immunity at one end, and a very small number (sometimes only one) at the other, can be discerned.[9]

Several appellate courts' formulations of the standard of review for the exercise of discretion by trial courts implicitly recognize that the scope of trial court discretion varies from issue to issue. This definition, for example, recognizes *broad* discretion:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.[10]

This definition recognizes *less broad* discretion:

> "Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.[11]

---

9. This spectrum is reflected in the materials collected in Appendix B, *infra* pp. 215–29.

10. *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942).

11. *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954).

And this definition recognizes only *narrow* discretion:

> We do not much like the term "abuse" in this context. It has pejorative connotations not here appropriate. But it has become the customary word. Perhaps "misuse" is milder. What we mean, when we say that a court abused its discretion, is merely that we think that it made a mistake. There are, however, cases in which the term abuse is appropriate.[12]

IX. CONCLUSION

Responses by trial and appellate courts to the existence of trial-court discretion are quite unsystematic and reflect no predictable methodology. The fundamental issue, to the solution of which the existence of trial-court discretion contributes, is the proper division of labor between the trial and appellate courts: Trial courts must recognize that their discretion has limits and appellate courts must recognize that trial-court discretion serves useful purposes and should be respected.

12. *Pearson v. Dennison*, 353 F.2d 24, 28 n. 6 (9th Cir. 1965).

APPENDIX A

Table 1
Types of Trial-Court Discretion Reviewed
Volumes 658 and 659 of the Federal Reporter, Second Series

Type of Discretion*	Exercise Approved	Exercise Disapproved
Denial of motion for evidentiary hearing, 25, 571, (23)	x	xx
Sentencing of criminal defendant, 33, 411, (17, 39, 535, 547)	xxxxxx	
Granting of permanent injunction, 47, 1098, (723)	xx	x
Refusal to permit objections to special questions out of jury's hearing, 54		x
Refusal to admit evidence of post-accident warning, 54	x	
Appoint civil plaintiff's counsel to prosecute criminal action, 60	x	
Order denying issuance of preliminary injunction, 76, 359	x	x
Denial of motion to vacate conviction because of ineffective assistance of counsel, 80		x
Motion for new trial based on newly discovered evidence, 90, 598, 759	xxx	
Denial of prejudgment interest and award of post judgment interest, 103, 399	xxx	
Denial of motion to vacate sentence, 130	x	
Grant of defendant's motion to disclose identity of confidential informant, 194		x
Criminal contempt citation, 211	x	
Denial of motion to sever, 203, 337, 624, (624, 1306)	xxxx	x
Finding of fact, 239, (285, 695)		xxx
Reduction in attorney fee award, 246		x
Failure to use expert testimony, 260		x
Denial of request for renewed voir dire of jurors, 279		x

*Numbers without parenthesis indicate page numbers in Volume 658, while numbers in parentheses indicate page numbers in Volume 659.

Table 1 (continued)

Type of Discretion*	Exercise Approved	Exercise Disapproved
Permission to raise statute of limitation defense, 298	x	
Denial of request for jury trial, 300, 1362	x	x
Admission of evidence, 317, (70, 569)	xxx	
Refusal to allow impeachment of witness, 352	x	
Ruling that no juror misconduct had occurred, 369	x	
Adequacy of form of special interrogatories to jury, 377	x	
Refusal to grant continuance, 386, (562)	xx	
Refusal to grant motion to discharge counsel, 386	x	
Replacement of juror with alternate, 411	x	
Denial of request for injunctive relief, 416	x	
Refusal to admit testimony, 317, 416		xx
Gag order on intra-class communications, 430		x
Denial of request for attorney fees, 437, 1021, (77, 86)	xx	xx
Denial of motion to suppress testimony, 455	x	
Award of attorney fees, 479, 613, 1137, 1088, (531, 736)	xxxx	xx
Failure to excuse a juror for cause, 494, (562)	xx	
Refusal to grant further discovery in summons-enforcement proceeding, 526	x	
Reiteration of original findings after appellate remand for new findings, 544		x
Denial of FRCP 60 motion, 522		x
Denial of award of liquidated damages and of apportionment of liquidated damages, 562		x
Award of liquidated damages, 1088, 1217, 369	xxx	
Admission of pretrial and in-court identification, 588	x	
Denial of motion to vacate sentence, 598	x	
Denial of request for lesser-included offence instruction, 644	x	

*Numbers without parenthesis indicate page numbers in Volume 658, while numbers in parentheses indicate page numbers in Volume 659.

Table 1 (continued)

Type of Discretion*	Exercise Approved	Exercise Disapproved
Finding of competence to stand trial, 598	x	
Dismissal of juror, 654	x	
Award for cost of storage, 697	x	
Grant of preliminary injunction, 797, (150, 273)	x	xx
Declaration of mistrial, 835	x	
District court decision in case inappropriately removed from state court, 874		x
Juror-misconduct allegation, 1010, 1225	xx	
Refusal to permit criminal defendant to represent self, 1015		x
Denial of class certification, 1065, (46, 554)	xx	x
Denial of motion to suppress on basis of relevance, prejudice, 1120	x	
Awards of treble damages, 1137	x	
Postponement of claim payment in bankruptcy reorganization proceeding, 1149	x	
Denial of motion to recuse, 1176	x	
Granting of JNOV, 1256	x	
Refusal to grant JNOV, (306)	x	
Denial of motion to present special interrogatories to jury, 1319	x	
Admission of items into evidence, application of FRE 401, 1337	x	
Order disqualifying counsel, 1335, (1259, 1341)	xx	x
Admission of co-conspirators' statements, (15, 1301)	xx	
Finding of voluntariness of confession, (118, 769)	xx	
Grant of subpoena of documents, (154, 1376)	x	x
Permitting amendment of an indictment, (163)	x	
Denial of motion to intervene, (203)	x	
Failure to impose sanctions for non-compliance with discovery, (234)		x

*Numbers without parenthesis indicate page numbers in Volume 658, while numbers in parentheses indicate page numbers in Volume 659.

Table 1 (continued)		
Type of Discretion*	**Exercise Approved**	**Exercise Disapproved**
Dismissal of suit for failure to join party, (234)	x	x
Denial of motion for a new criminal trial, (254)	x	
Admission of arrest record, (306, 960)	x	x
Scope of injunction, (306)	x	
Failure to instruct, (524)	x	
Motion to reduce sentence, (549)		x
Denial of motion to compel government to disclose witness names, (549)	x	
Dismissal of suit for lack of prosecution, (554)		x
Admission of evidence of witness's plea bargain, (562)	x	
Court's interrogation of witness to clarify a point, (562)	x	
Court's interruption of counsel during closing arguments, (562)	x	
Denial of F.R. Crim. P. 48(a) motion to dismiss, (624)		x
Dismissal for refusal to comply with discovery orders, (655)	x	
Failure to conduct individual voir dire of jurors, (684)	x	
Refusal to admit evidence–Rule 803(8), (721)	x	
Admission of expert testimony, (569, 750)	x	x
Refusal to admit evidence, (730, 769, 1376)	xxx	
Refusal to make grand jury files available to state attorney general, (800)	x	
Back-pay award, (736)	x	
Award of damages under FTCA, (863)	x	
Dismissal for failure to state a claim, (875)		x
Abstention, (880)		x
Refusal to admit testimony against penal interest, (884)	x	

*Numbers without parenthesis indicate page numbers in Volume 658, while numbers in parentheses indicate page numbers in Volume 659.

Table 1 (continued)

Type of Discretion*	Exercise Approved	Exercise Disapproved
Admission of former testimony, (884)	x	
Conditioning a stay pending appeal on a waiver, (932)	x	
Award to attorneys in bankruptcy appeal on a waiver, (951)	x	
Certification of a sub-class, (1000)		x
Dismissal of suit for failure to comply with order requiring joinder of party, (1168)	x	
Failure to hold an evidentiary hearing before denying class certification, (1259)		x
Admission of evidence, Rule 803(6), (1314)	x	
Denial of motion for relief of final judgment, (1320)	x	
Approved of settlement in antitrust case, (1322, 1337)	xx	
Refusal to compel government to present exculpatory evidence to grand jury, (1376)	x	

*Numbers without parenthesis indicate page numbers in Volume 658, while numbers in parentheses indicate page numbers in Volume 659.

Table 2 **Statistical Data, Volumes 658 and 659** **Federal Reporter, Second Series**	
Total number of cases	427
Total number of cases where abuse of discretion appears to have been used as part of the standard of review	123
Percentage of cases appearing to have used abuse-of-discretion standard	28.8%
Number of issues for which discretion appears to have been exercised	149
Percentage of total issues where exercise was approved	71.8%
Percentage of total issues where exercise was disapproved	28.2%

Table 3 **Statistical Data for Volume 658 Only**	
Percentage of cases in which standard of review is explicitly stated to be abuse of discretion or arbitrary and capricious, or the reviewing court states that the lower court had "discretion" to arrive at its decision	59.1%
Percentage of cases in which the standard is applied sub silentio	40.9%
Where abuse of discretion or similar standard is stated	
Exercise approved	69.2%
Exercise disapproved	30.8%
Where standard is applied sub silentio	
Exercise approved	61.3%
Exercise disapproved	33.5%

APPENDIX B

I. SOME AREAS OF TRIAL COURT DISCRETION OUTLINED

A. De Jure Discretion

1. Wide Discretion to:

- Acquit.

  Authority: *Sanabria v. U.S.*, 437 U.S. 54 (1978); *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); Fed. R. Crim. P. 29.

  Limits on Exercise:

  Must represent a resolution of facts in defendant's favor. *U.S. v. Scott*, 437 U.S. 82, 97 (1978).

- Sentence.

  Authority: *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978); *Dorszynski v. U.S.*, 418 U.S. 424, 431 (1974).

  Limits on Exercise:

  Includes discretion to consider defendant's refusal to cooperate with officials investigating criminal conspiracy in which he was a confessed participant as factor in imposing sentence. *Roberts v. U.S.*, 445 U.S. 552 (1980).

  Statutory limits. *Id.*

"Plain showing of abuse." *U.S. v. Santiago*, 582 F.2d 1128, 1137 (7th Cir. 1978).

Use of untrue or "improper" facts. *Townsend v. Burke*, 334 U.S. 736 (1948) (untrue facts); *U.S. v. Stoddard*, 553 F.2d 1385, 1390 (D.C. Cir. 1977) (improper facts).

- Grant a Continuance.

Authority: *U.S. v. Tissi*, 601 F.2d 372 (8th Cir. 1979); *U.S. v. Albert*, 595 F.2d 283 (5th Cir. 1979); *Abramson v. U. of Hawaii*, 594 F.2d 202 (9th Cir. 1979).

Limits on Exercise:

Clear abuse; trial court may not preclude "a just determination of the cause." *U.S. v. Fearwell*, 595 F.2d 771, 780 (D.C. Cir. 1978); *see also U.S. v. West*, 607 F.2d 300 (9th Cir. 1979).

- Allow or Deny Cross-Examination.

Authority: *Davis v. Alaska*, 415 U.S. 308, 318 (1974); *Brookhart v. Janis*, 384 U.S. 1, 3 (1966); *U.S. v. Salsedo*, 607 F.2d 318 (9th Cir. 1979).

Limits on Exercise:

Did the jury have sufficient information? *Salsedo*, 607 F.2d 318; *U.S. v. Leja*, 568 F.2d 493 (6th Cir. 1977); *U.S. v. Palmer*, 536 F.2d 1278 (9th Cir. 1976).

- Reopen Trial for Additional Evidence.

  Authority: *U.S. v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979); *U.S. v. Larson*, 596 F.2d 759 (8th Cir. 1979).

  Limits on Exercise:

  Ramirez, 608 F.3d 1261; *U.S. v. Marino*, 562 F.2d 941(5th Cir. 1977); *U.S. v. Sisack*, 527 F.2d 917 (9th Cir. 1975).

- Determine Scope of Voir Dire.

  Authority: *U.S. v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979); *U.S. v. Jackson*, 542 F.2d 403 (7th Cir. 1976).

  Limits on Exercise:

  Sound judicial discretion. *U.S. v. Colacurcio*, 659 F.2d 684 (5th Cir. 1981); *Baldwin*, 607 F.2d 1295; *U.S. v. Gibbons*, 602 F.2d 1044 (2d Cir. 1979); *U.S. v. Clabaugh*, 589 F.2d 1019 (9th Cir. 1979); *U.S. v. Segal*, 534 F.2d 578 (3d Cir. 1976).

  Voir dire on racial or ethnic bias must be conducted when requested by defendant accused of violent crime against victim who is member of different ethnic group. *Rosales-Lopez v. U.S.*, 451 U.S. 182, 192 (1981).

- Grant Discovery in Civil Cases.

  Authority: *Hickman v. Taylor*, 329 U.S. 495 (1947); *see Dept. of Energy v. Brett*, 659 F.2d

154 (Temp. Emer. Ct. App. 1981); Abraham E. Freedman, *Discovery as an Instrument of Justice*, 22 Temp. L.Q. 174 (1948).

Limits on Exercise:

> Discovery materials must be relevant to issues in case; qualified immunity for attorneys' work product. *Hickman*, 329 U.S. 495; *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350–56 (1978).

- Establish Local Rules Pursuant to Fed. R. Civ. P. 83.

Authority: *Martinez v. Thrifty Drug & Discount Co.*, 593 F.2d 992 (10th Cir. 1979).

Limits on Exercise:

> Rules must be adopted by majority of judges and must not conflict with other rules of civil procedure, must be consistent with constitutional due process, and must not constitute an abuse of discretion. *Bernard v. Gulf*, 596 F.2d 1249 (5th Cir. 1979); *Lee v. Dallas Co. Bd. of Educ.*, 578 F.2d 1177 (5th Cir. 1978).

- Grant Discovery Sanctions.

Authority: *Natl. Hockey League v. Metro. Hockey Club*, 427 U.S. 639 (1976) (holding that sanctions must be available to court for purposes of deterrence); *U.S. ex rel. U.S. Naval Ship Pvt. Joseph F. Merrell v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365 (9th Cir. 1980).

Limits on Exercise:

> *Sibbach v. Wilson*, 312 U.S. 1 (1941) (no imprisonment or other contempt penalty for refusal to submit to physical or mental examination, but dismissal discretionary).

- Grant Permission to Amend Pleadings.

  Authority: Fed. R. Civ. P. 15(a) (court encouraged to look favorably on requests to amend); *Shows v. Harber*, 575 F.2d 1253 (8th Cir. 1978); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964).

  Limits on Exercise:

  > *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[O]utright refusal to grant the leave without any justifying reason. . . is . . . abuse . . . of . . . discretion").

- Grant Permission to Implead After Ten-Day Deadline.

  Authority: *Laffey v. N.W. Airlines*, 567 F.2d 429 (D.C. Cir. 1976); *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 439 n. 6 (3d Cir. 1971) (indicating that duplication and circuity justify denial of motion).

- Recuse.

  Authority: 28 U.S.C. § 455 (1976) (directed to judge, self-enforcing); *Davis v. Bd. of Sch. Commns.*, 517 F.2d 1044, 1051 (5th Cir. 1975).

Limits on Exercise:

U.S. v. Schreiber, 599 F.2d 534, 536 (3d Cir. 1979) (no *per se* rule exists).

- Determine Competency of Witnesses.

Authority: *Crawford v. Worth*, 447 F.2d 738 (5th Cir. 1971).

Limits on Exercise:

Chateaugay Ore & Iron Co. v. Blake, 144 U.S. 476, 484 (1892) ("clearly erroneous" standard is applicable).

- Use General Verdict Forms.

Authority: *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1982).

- Certify Class In Class Action

Authority: *Adashunas v. Negley*, 626 F.2d 600, 605 (7th Cir. 1980).

Limits on Exercise:

May be exercised to certify a nationwide class. *Califano v. Yamasaki*, 442 U.S. 682, 701–03 (1979). Scope of injunctive relief is dictated by the extent of the violation established, not by geographical limit.

- Deny or Award Costs.

Authority: District judge has discretion to deny prevailing party costs under Fed. R. Civ. P. 54(d). *Delta Air Lines v. August*, 450 U.S. 346,

353–55 (1981) (noting that Rule 68 does not affect this discretion.).

- Review Suppression-Hearing Findings of Magistrate.

  Authority: 28 U.S.C. § 636(b)(1)(B), (C) (granting district courts broad discretion to accept, reject, or modify the magistrate's proposed finding, including the hearing of live witnesses to resolve conflicting credibility claims); *U.S. v. Raddatz*, 447 U.S. 667, 680 (1980).

- Impose Contempt Charges and Penalties.

  Authority: *Wash.–Balt. Newspaper Guild, Local 35 v. Wash. Post Co.*, 626 F.2d 1029 (D.C. Cir. 1980); *U.S. v. Asay*, 614 F.2d 655 (9th Cir. 1980).

  Limits on Exercise:

  "[L]east coercive sanction . . . reasonably calculated to win compliance" with court order. *U.S. v. Flores*, 628 F.2d 521, 527 (9th Cir. 1980).

2. Less Wide Discretion to:

- Find facts.

  Authority: Fed. R. Civ. P. 52(a); *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 394–95 (1948).

  Limits on Exercise:

  Must not be clearly erroneous (i.e., appellate court must not be left with a definite and firm conviction that a mistake

has been made), must not be based on erroneous conception of local law, and must be a finding of fact and not a conclusion of law. *Marshal v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979).

- Grant Motion for New Trial for Improper Conduct of Judge, Attorney, Witness, or Juror.

  Authority: *Lutz v. Commr.*, 593 F.2d 45 (6th Cir. 1979) (impropriety must deprive litigant of a fair trial); *County of Maricopa v. Maberry*, 555 F.2d 207 (9th Cir. 1977).

  Limits on Exercise:

  U.S. v. Read, 658 F.2d 1225 (7th Cir. 1981); *Draper v. Airco, Inc.*, 580 F.2d 91 (3d Cir. 1978).

- Grant Motion for New Trial Because of Inadequate or Excessive Damages.

  Authority: *Schultz v. Lamb*, 591 F.2d 1268 (9th Cir. 1978); *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978); *Ajax Hardware Mfg. Corp. v. Indus. Plants Corp.*, 569 F.2d 181 (2d Cir. 1977); *Givens v. Lederle*, 556 F.2d 1341 (5th Cir. 1977).

  Limits on Exercise:

  Varies with setting of the issue. Where issue is failure to provide damages for a compensable injury, a question of law. Where issue is consistency with the evidence, a question of fact, or one of mixed law and fact. Where issue concerns "pain and suffering" or punitive damages, discretion is wide.

Fully reviewable where issue of law; reviewable where clearly erroneous where issue of fact or mixed law and fact; and reviewable only where "conscience is shocked" in other instances.

- Admit Prior Convictions to Impeach Credibility.

Authority: Fed. R. Evid. 609; scope differs as to defendant and other witnesses, type of crime for which convicted, lapse of time since conviction, and probative value of prior conviction. *U.S. v. Cook*, 608 F.2d 1175 (9th Cir. 1979) (en banc); *U.S. v. Hendershot*, 614 F.2d 648 (9th Cir. 1980).

Limits on Exercise:

Fairly narrow, particularly with respect to defendant. Probative value in such case must be shown to be strong to overcome prejudice. *U.S. v. Gross*, 603 F.2d 757 (9th Cir. 1979); *U.S. v. Fearwell*, 595 F.2d 771 (D.C. Cir. 1978).

- Admit Character Evidence and Evidence of Other Crimes.

Authority: Fed. R. Evid. 404 limits admissibility to specific purposes. *U.S. v. Mohel*, 604 F.2d 748 (2d Cir. 1979); *U.S. v. Hernandez-Miranda*, 601 F.2d 1104 (9th Cir. 1979).

Limits on Exercise:

Fairly narrow grounds for admission but if related sufficiently to those ends discretion reasonably broad. *U.S. v. Calhoun*, 604

F.2d 1216 (9th Cir. 1979); *U.S. v. Phillips*, 599 F.2d 134 (6th Cir. 1979).

- Consolidate Cases.

  Authority: *Am. Employers' Ins. Co. v. King Resources Co.*, 545 F.2d 1265 (10th Cir. 1976).

  Limits on Exercise:

  Garber v. Randell, 477 F.2d 711 (2d Cir. 1973) (prejudice to party).

- Dismiss for Failure to Prosecute.

  Authority: *Schmidt v. Herrman*, 614 F.2d 1221 (9th Cir. 1980); *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976) (failure to prosecute to be considered in exercising discretion).

- Admit Expert Testimony.

  Authority: *U.S. v. Burreson*, 643 F.2d 1344 (9th Cir. 1981); *Reno-West Coast Distrib. Co. v. Mead Corp.*, 613 F.2d 722 (9th Cir. 1979).

  Limits on Exercise:

  Expert must rely on established or accepted technology. *U.S. v. Tranowski*, 659 F.2d 750 (7th Cir. 1981).

3. Narrow Discretion to:

- Hold Persons in Summary Criminal Contempt.

  Authority: 18 U.S.C. § 401; *U.S. v. Wilson*, 421 U.S. 309, 319 (1975). *See* Richard B. Kuhns,

The Summary Contempt Power: A Critique and a New Perspective, 88 Yale L.J. 39, 90–91 (1978); Fed. R. Crim. P. 42(a).

Limits on Exercise:

Conduct must be contumacious and take place in presence of the court. Arguably, conduct must be an open, serious threat to orderly procedure. *In re Gustafson*, 650 F.2d 1017, 1022 (9th Cir. 1981) (limited en banc).

- Grant Motions for Directed Verdict or Judgment N.O.V.

Authority: Proper when evidence against the verdict is overwhelming after viewing it in the light most favorable to the prevailing party. *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977) (non-moving party when motion for directed verdict involved).

Limits on Exercise:

Trial court may not assess credibility of witnesses. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171 (3d Cir. 1976).

- Decline to Exercise Jurisdiction on Abstention Grounds.

Authority: *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 839 (9th Cir. 1979).

Limits on Exercise:

R.R. Commn. of Tex. v. Pullman Co., 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Juidice v. Vail*, 430 U.S. 327 (1977).

- Certify to State Court.

Authority: *Clay v. Sun Ins. Off. Ltd.*, 363 U.S. 207 (1960); *Lee v. Frozen Food Express, Inc.*, 592 F.2d 271 (5th Cir. 1979).

Limit of Discretion:

See "Decline to exercise jurisdiction on abstention grounds," *supra* pp. 225–26.

- Grant Attorney Fees.

Limits on Exercise:

District court may not award fees premised on acts or omissions for which appellants enjoy absolute legislative immunity. *S. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 737–39 (1980).

District court may award attorney fees to defendant in an action under 42 U.S.C. § 1983 only if court finds that plaintiff's action was "frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam).

- Appoint Counsel in In Forma Pauperis Action.

  Limits on Exercise:

  > District court may not deny counsel when doing so would result in fundamental unfairness impinging on due process rights. *Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978); *cf. Gordon v. Leeke*, 574 F.2d 1147, 1153 (4th Cir. 1978) (district court should appoint counsel if pro se litigant has colorable claim and lacks capacity to present it); *Shields v. Jackson*, 570 F.2d 284, 286 (8th Cir. 1978) (remand to district court to appoint counsel appropriate where indigent prisoner is in no position to investigate his case, prisoner states a cause of action, and appointment of counsel will advance the administration of justice); *see also Hyman v. Rickman*, 446 U.S. 989 (1980) (dissent from denial of certiorari).

- Enter Final Judgment under Fed. R. Civ. P. 54(b).

  Limits on Exercise:

  > Must be exercised "in the interest of sound judicial administration." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1,10 (1980).
  >
  > "Clearly unreasonable" exercise of discretion required to justify disturbing trial court's assessment of the equities. *Id.*

B. De Facto Discretion

- Harmless Constitutional Error.

  Authority: *Chapman v. Cal.*, 386 U.S. 18 (1967) (standard for immunity from reversal).

  Limits on Exercise:

  Error must be harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

  Application of *Chapman* standard may focus upon whether

  the error contributed to the guilty verdict,

  there remains enough to support the verdict if the evidence flowing from the error is excluded,

  the constitutionally tainted evidence was merely cumulative.

  See Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15 (1976).

- Final Judgment Rule.

  Authority: 28 U.S.C. § 1291 provides jurisdiction to hear appeals from all final decisions of the district courts. An improper exercise by a district court of its discretion prior

to final decision may become immune from review either because final judgment favored the disadvantaged party, or the issue became greatly reduced in importance in view of final decision, or a settlement prior to final judgment rendered the issue moot. Thus, there is a fairly large area for maneuver by trial court and attorneys.

Limits on Exercise:

Jurisdiction to hear interlocutory appeals exists in various situations. *See* 28 U.S.C. § 1292; 28 U.S.C. § 1651 (the "all writs" statute); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Fed. R. Civ. P. 54(b) authorizes final judgment on "fewer than all the claims or parties" under specific circumstances.