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MODEL CIVIL JUSTICE

EXPENSE AND DELAY REDUCTION PLAN

Adopted by the

Judicial Conference of the United States

September , 1992

Introduction

The Judicial Conference has developed a model civil justice expense and delay reduction plan pursuant to the requirements of the Civil Justice Reform Act of 1990. See 28 U.S.C. § 477. The Act requires each United States district court to implement a civil justice expense and delay reduction plan. The court may devise its own plan or adopt a plan developed by the Judicial Conference of the United States. 28 U.S.C. § 471.

The model plan or plans developed by the Judicial Conference must be based on the plans devised by the United States district courts designated as "early implementation district courts" pursuant to 103(c) of the Act. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may also make recommendations to the Judicial Conference regarding the development of a model plan. 28 U.S.C. § 477(a)(2).

Thirty-four district courts implemented plans by December 31, 1991, and qualified for designation as early implementation districts. The 34 courts included 10 "pilot" courts, 4 "demonstration" courts, and 20 other courts. The pilot courts were required under section 105 of the Act to include in their plans the six principles and guidelines of litigation management and cost and delay reduction identified in 28 U.S.C. § 473(a). In addition, the pilot courts were required to at least "consider" including in their plans the techniques for litigation management enumerated in 28 U.S.C. § 473(b).

The demonstration courts were designated by Congress to include in their plans and demonstrate various methods of reducing cost and delay in civil litigation. Some courts were designated to demonstrate systems of differentiated case management that provide for the assignment of cases to appropriate processing tracks. Other courts were designated to demonstrate other possible methods of reducing cost and delay, including alternative dispute resolution (ADR).

The model plan developed by the Judicial Conference reflects the collective efforts of the early implementation courts, the Federal Judicial Center, the Administrative Office of the U.S. Courts, the members of the Judicial Conference and its committees. It includes the principles, guidelines, and techniques of civil litigation management set forth in 28 U.S.C. § 473, which must be considered carefully by the district courts in devising their plans. It also includes many new and creative techniques developed by the early implementation courts and their advisory groups.

The Conference recognizes that no single method of case management is suitable for all courts. For this reason, the model plan appears in the form of a "menu," which allows the courts to select the provisions most responsive to each court's needs. The advantages and disadvantages of the various alternative approaches to the Act's guidelines, principles and techniques are discussed in the accompanying commentary. The commentary also explains the manner in which the model plan complies with

28 U.S.C. § 473 and thus serves as the report required by 28 U.S.C. § 477(a)(1).

The plan provisions selected from various courts were chosen for being representative of differing case management procedures and techniques. The choice of the provisions from certain plans is not intended to imply that other plans do not contain effective procedures and techniques. A review of all the plans is recommended to those with the time and energy to do so.

Model Plan Layout

The five sections of the model plan cover the entire reach of the statute, and add a number of unique initiatives undertaken by individual courts to address special problem areas. Following the Act's presentation order, the concept of Differential Case Management (§473(a)(1)) is presented in Section One. This stand-alone concept of an integrated, programmatic case management process is unique, and can provide a framework into which most aspects of a court's existing case management tools could be incorporated. Sections Two and Three present most of the Act's case management concepts in more traditional terms. Section Two, Early and Ongoing Control of the Pretrial Process, places a number of the Act's elements (§473(a)(2), (b)(1-3), (5)) within the context of the familiar case management process landmarks of conferences, scheduling orders, and trial planning.

Section Three, Discovery Control; Motions Practice, segregates a subject area that is decidedly controversial, and deemed by most observers to be essential to civil justice reform. It addresses pre-discovery disclosure, extensions of deadlines, discovery controls and limits, certifications and motions practices. This Section integrates elements of §§ 473(a)(2-5), and (b)(1) and (3). Section Four, Alternative Dispute Resolution Programs (ADR); Additional Dispute Resolution Techniques, addresses §473(a)(5) of the Act. In its first part, it presents familiar ADR program approaches involving the use of non-judicial neutrals: early neutral evaluation, mediation, and arbitration. The second part of Section Two offers various non-program voluntary techniques requiring judicial intervention in the dispute resolution process: summary jury trials, summary bench trials, mini-trials, and settlement weeks. The final part of the model is Section Five, Other Features. This section highlights a number of the initiatives of individual courts designed to address common problem areas not covered by any particular statutory section.

The attachments to this model plan offer expanded definitions of plan concepts, provisions regarding plan preparation, and existing standards for plan review. The attachments are:

A. Language of Proposed Rule 26 of the Federal Rules of Civil Procedure

B. General Considerations in Designing an ADR Program

C. Provisions Regarding the Preparation of Civil Justice Expense and Delay Reduction Plans

D. Guidelines for Preparing CJRA Plans That Are Responsive to the Statute and Useful to the Bar and Other Users (Judicial Conference Memorandum of July 21, 1992)

The model plan is intended for use by courts that have not developed plans as well as those that already have. The process of managing cases is dynamic. It changes from court to court and from year to year. It is hoped that the model plan will serve as a useful reference tool not only in developing new plans but in modifying plans already in place.

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SECTION ONE: DIFFERENTIATED CASE MANAGEMENT (DCM)

Statutory Requirements: The Civil Justice Reform Act requires that all courts consider incorporating into their plans a case management system based upon the "systematic, differential treatment of civil cases...." The Act calls for a system that "tailors the level of...case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case." 28 U.S.C. § 473(a)(1).

I. General Provisions

A. Purpose

Alternative #1 - Tennessee Western

The goal of this plan is to achieve a speedier, less expensive disposition of civil cases in this district without forfeiting the careful and studied analysis required for the just resolution of litigant disputes. We, the judges of this district, with the continued assistance of our Civil Justice Reform Act Advisory Group, expect to satisfy this goal:

(1) by adopting the principles of litigation management required by 28 U.S.C. § 473(a) for pilot districts and specific procedures consistent with those principles;

(2) by using other litigation management techniques, as outlined in this plan, which will address the particular problems of this district in managing its caseload; and

(3) by concluding the ongoing revision of our local rules.

In developing our plan, we have considered each of the Advisory Group recommendations. We have considered each of the cost and delay reduction and litigation management techniques specified in 28 U.S.C. § 473(b). We have also received input from our Local Rules Committee. Finally, we have reviewed the suggestions of a case management audit performed a few months ago, at the district's request, by a team sent by the Administrative Office of the United States Courts, Court Administration Division.

Alternative #2 - Ohio Northern

The DCM system adopted by the court is intended to permit the court to manage its civil docket in the most effective manner, to reduce costs and to avoid unnecessary delay, without compromising the independence or the authority of either the judicial system or the individual judge. The underlying principle of the DCM system is to make access to a fair and efficient court system available and affordable to all citizens.

COMMENTARY

"Differentiated case management," or "DCM," melds two trends in case management into one cohesive system: 1) the monitoring of case events; and 2) the supervision of time periods between case events through the establishment of case processing "tracks" keyed to serve broad case types. Each track (usually 3-6 in number) carries with it a specific set of procedures and case event time lines based on estimated resources available and judicial time needed for disposition. The track assignements are based upon case complexity or the usual needs of particular types of cases or both. Track designations can be as simple as "expedited, standard, and complex." However designated, they are designed to maximize the use of judicial and court resources through the systematic targeting of case categories for graded applications of only those public resources necessary for disposition. This contrasts DCM to case management approaches which treat each case on an entirely individual basis, with no systematic procedural or management recognition of differences in cases over broad categories. The premise is not to deny individual justice, but to conserve resources for those cases most in need, and achieve the greatest returns in efficiency, effectiveness, and reductions in cost and delay.

Similar concepts of differential case management techniques, without the systematized "tracks" that have characterized DCM at the state level, have long prevailed within the federal system. Since at least the first publication of the federal Manual for Complex litigation and its predecessors in 1960, federal judges have employed differential case management concepts for the two management tracks of simple or standard and complex cases, with accompanying procedures and rules keyed to them. These management tools, coupled with the individualized calendaring systems that typify the federal courts, have provided a strong management milieu within which to adjudicate federal cases. The CJRA has thus provided both pilot and EID courts with an incentive to marry long practiced differential case management concepts with the more expansive, systematized approach recommended in the Act.

Of the 34 courts that have submitted plans, 26 have adopted some form of DCM. The approaches to DCM differ from court to court.

Alternative #1 above is intended for courts that have no systematized method of case management currently in force. The language of Alternative #2 , or some variation thereof, could be used by courts with some form of DCM presently in place.

B. Definitions

Ohio Northern

1. Differentiated case management" ("DCM") refers to a system providing for management of cases based on case characteristics. This system is marked by the following features: the court reviews and screens civil case filings and channels cases to processing "tracks" that provide an appropriate level of judicial, staff and attorney attention; civil cases having similar characteristics are identified, grouped and assigned to designated tracks; each track employs a case management plan tailored to the general requirements of similarly situated cases; and provision is made for the initial track assignment to be adjusted to meet the special needs of any particular case.

2. "Judicial Officer" refers to either a United States District Judge or a United States Magistrate Judge.

3. "Case Management Conference" refers to the conference conducted by the judicial officer within fifteen calendar days after the time for the filing of the last permissible responsive pleading where the track assignment, alternative dispute resolution ("ADR") and discovery are discussed and where discovery and motion deadlines and the date of the status hearing are set.

4. "Status Hearing" refers to the mandatory hearing that is held approximately midway between the date of the case management conference and the discovery cut-off date.

5. "Case Management Plan" ("CMP") refers to the plan adopted by the judicial officer at the case management conference. The plan shall include the determination of track assignments, whether the case is suitable for reference to an ADR program, the type and extent of discovery, the setting of a discovery cut-off date, deadline for filing motions, and the date of the status hearing.

6. "Court" refers to the United States District Judge, the United States Magistrate Judge, or Clerk of Court personnel, depending on the role each is assigned to perform with respect to any given case.

7. "Dispositive Motion" refers to a motion to dismiss pursuant to Civil Rule 12(b), motion for judgment on the pleadings pursuant to Civil Rule 12(c), motion for summary judgment pursuant to Civil Rule 56, or any other motion which, if granted, would result in the entry of judgment or dismissal, or would dispose of any claims or defenses, or would terminate the litigation.

8. "Discovery Cut-Off" refers to the date by which all responses to written discovery shall be due according to the Federal Rules of Civil Procedure and by which all depositions shall be concluded. Counsel must initiate discovery requests and notice or subpoena depositions sufficiently in advance of the discovery cut-off date so as to comply with this rule, and discovery requests that seek responses or schedule depositions after the discovery cut-off are not enforceable except by order of the court for good cause shown. Notwithstanding the foregoing, a party seeking discovery will not be deemed to be in violation of the discovery cut-off if all parties consent to delay furnishing the requested discovery until after the cut-off date or, for example, a deposition that was commenced prior

to the cut-off date and adjourned cannot reasonably be resumed until an agreed date beyond the discovery cut-off; provided, however, that the parties may not, by stipulation and without the consent of the court, extend the discovery cut-off to a date later than ten (10) days before the final pretrial conference.

C. Date of Application

Alternative #1 - Tennessee Western

The plan is effective December 31, 1991. It will apply to all cases filed after that date and may, in the discretion of individual judges, apply to earlier filed cases. Local rules changes required by this plan will take effect as of the date of adoption of the rule.

Alternative #2 - Ohio Northern

This section shall apply to all civil cases filed on or after January 1, 1992, and may be applied to civil cases filed before that date if the assigned judge determines that inclusion in the DCM system is warranted and notifies the parties to that effect.

D. Conflicts with Other Rules

Ohio Northern

In the event that the rules in this section conflict with other local rules adopted by the district, the rules in this section shall prevail.

COMMENTARY

Subsections B, C, and D above are devised to avoid ambiguity in implementation of a DCM system. A "Definitions" subsection, of the sort set forth in subsection B above, may avoid conflicts as to the meaning of terms in the DCM system. Subsections C and D may minimize disputes regarding the effective date of the system and potential conflicts with other local rules.

II. Tracks, Evaluation, and Assignment of Cases

A. Number and Types of Tracks

Alternative #1 - Ohio Northern

1. "Expedited" - Cases on the expedited track shall be disposed of nine (9) months or less after filing, and shall have a discovery cut-off no

later than 100 days after filing of the case management plan ("CMP"). Discovery guidelines for this track include interrogatories limited to fifteen (15) single-part questions, no more than one (1) fact witness deposition per party without prior approval of the court, and such other discovery, if any, as may be provided for in the CMP.

2. "Standard" - Cases on the standard track shall be disposed of fifteen (15) months or less after filing, and shall have a discovery cut-off no later than 200 days after filing of the case management plan. Discovery guidelines for this track include interrogatories limited to thirty-five (35) single-part questions, no more than three (3) fact witness depositions per party without prior approval of the court, and such other discovery, if any, as may be provided for in the CMP.

3. "Complex" - Cases on the complex track shall have the discovery cut-off established in the case management plan and shall have a case completion goal of no more than twenty-four (24) months.

4. "Administrative" - Cases on the administrative track shall be referred by court personnel directly to a magistrate judge for preparation of a report and recommendation. Generally, there will be no discovery for this track without prior leave of court. Further, such cases shall normally be determined on the pleadings or by motion.

5. "Mass Torts" - Cases on the mass torts track shall be treated in accordance with the special management plan adopted by the Court.

Alternative #2 - Missouri Western

1. "Super Fast Track" - Voluntary; few legal issues, parties; agreement to waive trial before Article III judge, forego alternative dispute resolution ("ADR"), and participate in speedy pre-discovery disclosure.

2. "Fast Track" - Cases historically concluded in less than nine months; litigants and legal issues relatively few; ADR use rare; discovery limited in number of depositions and interrogatories; case may be assigned to an alternate Article III judge to preserve the trial date if necessary.

3. "Standard Track" - Cases historically concluded in nine months to a year; decision on assignment to this track to rest with judge and litigants; mediation and arbitration frequently used; summary jury trials rarely used; discovery tailored to the individual case.

4. "Complex Track" - Cases that historically take more than two years to resolve; involve complicated legal issues or a large number of parties; evaluated by a judicial officer and parties to require extended processing time; will almost always be subjected to range of ADR techniques; discovery tailored to the individual case.

5. "Highly Complex Track" - Cases that historically take two or more years to complete; are exceptionally complex; involve large numbers of parties, extensive pre-trial motions or proceedings; includes class actions; a magistrate judge will normally be assigned to make reports, recommendations, and assist in resolving pre-trial and discovery disputes; very few cases will be placed on this track.

6. "Minimally Managed Track" - Approximately 10% of all cases will be randomly assigned as a control group for the system; judicial involvement minimal and reactive; extensive pre-trial statements, joint case management orders, or other documentation are not contemplated; ADR used only on motion or agreement of the parties; the judicial officer will not be directly involved in supervising discovery or managing trial preparation.

COMMENTARY

Management tracks are the heart of the DCM system. The examples above illustrate the broad range of options available. The second alternative above integrates track characteristics with methods of assigning cases to tracks. Tracks can establish general case categories that reflect past experience, or may create entirely new categories. From time to time the court may wish to modify the categories to reflect practical experience.

The design of individual management tracks should include specific processes, procedures, time frames, and management tools necessary for disposition. For example, in the fast or expedited track often designed to encompass habeas corpus cases, prisoner petitions, bankruptcy appeals, and tax cases, a formal case management conference or ADR technique may not be desirable. In addition, broad pretrial disclosure may be mandated, and time frames for trial on such tracks may be abbreviated. Pretrial conferences may be eliminated entirely or limited to brief initial telephone conferences. In contrast, increasing case complexity may give rise to track requirements embodying increasing levels of judicial time and court resources. Complex tracks may encompass the entire array of management conferences (initial pretrial, scheduling, case management, and periodic status), the mandatory submission of joint discovery and case management plans, and various forms of ADR techniques.

Track design is often the product of case complexity, and is represented by track designations of "simple" or "expedited," "standard," and "complex." Track designations can also reflect particular case types (i.e., Social Security or asbestos) or the broad areas of case characteristics that are assigned to them (i.e., "administrative" - to include cases emanating from agencies or subject to a statutory hearing or disposition scheme).

Designations denoting complexity may be employed alone, or in conjunction with case types or characteristics. Eight of the 26 courts that adopted DCM systems chose the former option, while ten courts adopted a combination of both complexity and other designations. Two courts chose case characteristics only. Elements of an "administrative" track can be found in 11 systems.

A total of 16 courts designed or were in the process of designing standardized rules, procedures, and orders keyed to specific case tracks. In four of these courts, the least complex, or most expedited, tracks were assigned no specific discovery devices. Three courts incorporated an experimental track for randomly assigned or "control group" cases. Two courts established tracks for discovery only. Two of the 26 courts that established DCM systems decided not to use formalized "tracks" for case management. The remainder established tracks numbering from two to six. Three and six track systems were the most favored, representing eight and seven of the subject courts, respectively. Four courts chose two tracks, three courts chose four tracks, and two courts chose five.

B. Evaluation and Assignment of Cases

Alternative #1 - Ohio Northern

1. Evaluation Criteria - The court shall consider and apply the following factors in assigning cases to a particular track:

a. Expedited:
   (1) Legal Issues: Few and clear
   (2) Required Discovery: Limited
   (3) Number of Real Parties in Interest: Few
   (4) Number of Fact Witnesses: Up to 5
   (5) Expert Witnesses: None
   (6) Likely Trial Days: Less than 5
   (7) Suitability for ADR: High
   (8) Character and Nature of Damage Claims: Usually a fixed amount.

b. Standard:
   (1) Legal Issues: More than a few, some unsettled
   (2) Required Discovery: Routine
   (3) Number of Real Parties in Interest: Up to 5
   (4) Number of Fact Witnesses: Up to 10
   (5) Expert Witnesses: Two or three
   (6) Likely Trial Days: 5-10
   (7) Suitability for ADR: Moderate to high
   (8) Character and Nature of Damage Claims: Routine

c. Complex:
   (1) Legal Issues: Numerous, complicated and possibly unique

(2) Required Discovery: Extensive
(3) Number of Real Parties in Interest: More than 5
(4) Number of Fact Witnesses: More than 10
(5) Expert Witnesses: More than 3
(6) Likely Trial Days: More than 10
(7) Suitability for ADR: Moderate
(8) Character and Nature of Damage Claims: Usually requiring expert testimony.

d. Administrative:
(1) Cases that, based on the court's prior experience, are likely to result in default or consent judgments or can be resolved on the pleadings or by motion.

e. Mass Torts:
(1) Factors to be considered for this track shall be identified in accordance with the special management plan adopted by the court.

2. Assignment Procedures - The court shall evaluate and screen each civil case in accordance with this section. Recommended track requirements will be sent to counsel with the notice of the date of the case management conference to give counsel advance notice of what procedural requirements are contemplated by the court and to reach agreement on a specific track assignment. The court will assign each case to one of the case management tracks at the case management conference, to be held within 15 days after the receipt of the last responsive pleading.

Alternative #2 - Pennsylvania Eastern

1. Evaluation Criteria

a. Habeas Corpus - Cases brought under 28 U.S.C. §§ 2241 through 2255.

b. Social Security - Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security benefits.

c. Arbitration - Cases designated for arbitration under Local Civil Rule 8.

d. Asbestos - Cases involving claims for personal injury or property damage from exposure to asbestos.

e. Special Management - Cases that do not fall into tracks a. through d. that need special or intense management by the court due to one or more of the following factors:
   (1) large number of parties, claims, defenses, or volume of evidence;
   (2) complex factual issues;
   (3) problems locating or preserving evidence;
   (4) extensive discovery;
   (5) exceptionally long time needed to prepare for depositions;
   (6) decision needed within an especially short time; and
   (7) need to decide preliminary issues before final disposition.

f. Standard Management - Cases that do not fall into any one of the other tracks.

2. Assignment Procedures

a. The clerk of court will assign cases to tracks a. through d. based upon the initial pleading.

b. In all cases not appropriate for assignment by the clerk of court to tracks a. through d., the plaintiff shall submit to the clerk of court and serve with the complaint on all defendants a case management track designation form specifying that the plaintiff believes the case requires Standard Management or Special Management. In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff, and all other parties, a case management track designation form specifying the track to which that defendant believes the case should be assigned.

c. The court may on its own initiative or on the request of any party, change the track assignment of any case at any time.

d. Nothing in this plan is intended to abrogate or limit a judicial officer's authority in any case pending before that

judicial officer, to direct pretrial and trial proceedings that are more stringent than those of the plan and that are designed to accomplish cost and delay reduction.

e. Nothing in this plan is intended to supercede Local Civil Rules 3 or 7, or the procedure for random assignment of Habeas Corpus and Social Security cases referred to magistrate judges of the court.

COMMENTARY

The initial decisions to be made in a DCM system upon the filing of a case involve its evaluation and assignment to a track. In DCM systems where some or most track designs are based on specific case types (i.e., asbestos, prisoner petitions, etc.) case evaluation can be an abbreviated process accomplished by the Clerk, supporting staff, or the parties. In such systems, the parties can designate, or the Clerk can assign cases to appropriate tracks with no initial judicial intervention, subject to later party objection and judicial review. A number of such systems are represented among the courts adopting DCM.

A more common approach is to tie all case evaluations and track assignment functions to an initial pretrial conference. This first pretrial event can range from an informal telephone conference limited to confirmation of track assignment and subsequent scheduling, to a full-blown case management conference requiring detailed preparation by counsel and submission of joint discovery or case management plans for judicial approval. The choice of conference devices to fulfill the evaluation and assignment functions will vary due to the preferences of individual judges, the general approach of the plan (e.g., heavy emphasis on formal conferences), as well as perceived case needs (e.g., plans limiting conference use to particular tracks). Requests for intermediate forms of relief, such as temporary restraining orders and preliminary injunctions, should not alone determine the track to which a case is assigned. In most systems, specific provision has been made for the parties to motion, or a judge to order, a change in track assignment to reflect initial track selection error or subsequent changes in case status or character. Action on these matters is generally reserved for the initial pretrial, scheduling or early teleconference closely following track assignment and notification.

The DCM systems adopted to date display a variety of assignment procedures. Nine courts rely on judges alone to make the assignment, usually through the vehicle of an early case management conference. In other systems, the assignment is made by a judge in conjunction with a clerk (two courts); with staff attorneys (one court); with the parties (one court); and through pleadings (one court). Three plans specified that the "court" should make the case assignment, one court designated the clerk of court, and one left the designation to the parties. In those systems not dependant on an early judicial track assignment decision, greater reliance was placed upon the specificity of track characteristics to facilitate clerical or party selection of tracks. In these instances, procedures for appeal from an initial track assignment were usually established. Most courts have specifically established the ability of the assigned judge to alter track assignment as case needs or judicial discretion dictate.

SECTION TWO: EARLY AND ONGOING JUDICIAL CONTROL OF THE PRETRIAL PROCESS

Statutory Requirements: The Civil Justice Reform Act requires that all courts consider incorporating into their expense and delay reduction plans various procedures relating to the pretrial management of cases. Each court must consider adopting the following guidelines, principles, and techniques set forth in 28 U.S.C. § 473:

1. The "early and ongoing control of the pretrial process through involvement of a judicial officer...." 28 U.S.C. § 473(a)(2). Such judicial involvement includes: 1) assessing and planning the progress of a case; 2) setting early, firm trial dates; 3) controlling the extent of discovery and the time for completion of discovery; and 4) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition.

2. The monitoring of complex and any other appropriate cases through a discovery-case management conference or a series of conferences at which a judicial officer: 1) explores the parties' receptivity to settlement; 2) identifies the principal issues in contention; 3) prepares a discovery schedule and plan; and 4) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition. 28 U.S.C. § 473(a)(3).

3. Encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices. 28 U.S.C. § 473(a)(4).

4. Conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion. 28 U.S.C. § 473(a)(5).

5. A requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so. 28 U.S.C. § 473(b)(1).

6. A requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters. 28 U.S.C. § 473(b)(2).

7. A requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request. 28 U.S.C. § 473(b)(3).

I. Planning the Progress of the Case

A. Early Assessment/Pre-trial Case Management

Alternative #1 - California Northern[1]

A. Meet and Confer re Case Management. No later than 100 days after the complaint was filed, lead counsel for each party shall meet and confer regarding the following matters. The meet and confer session shall be conducted in a face-to-face meeting unless the offices of the parties' lead trial counsel are separated by more than 100 miles, in which case counsel may conduct the conference by telephone.

1. Principal Issues and Evidence

   a. Identify the principal factual and legal issues that the parties dispute.
   b. Discuss the principal evidentiary bases for claims and defenses.

2. Alternative Dispute Resolution. Discuss utilization of alternative dispute resolution procedures.

3. Jurisdiction by a Magistrate Judge. Discuss whether all parties will consent to jurisdiction by a Magistrate Judge under 28 U.S.C. § 636(c).

4. Additional Disclosure. Discuss whether additional disclosure of documents or other information should be made and, if so, when.

5. Motions. Identify any motions whose early resolution would likely have a significant effect on the scope of discovery or other aspects of the litigation.

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[1] The plan for the Northern District of California originally presented a preliminary description of the court's pilot case management plan. Subsequently, the court finalized the pilot program in the form of General Order 34. The text included here is from the general order.

6. Discovery

a. Plan at least the first phase of discovery, specifically identifying areas of agreement and disagreement about how discovery should proceed.
b. Recommend limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.
c. Recommend protective orders, if appropriate.

7. Scheduling

a. Recommend dates by which discovery should be completed, expert witnesses disclosed, motions directed to the merits of all or part of the case filed, the papers required for the final pretrial conference filed, the final pretrial conference held, and the trial commenced.

b. Recommend the dates or intervals for supplementation of disclosures.

These items also are set forth on the Form for Case Management Statement.

B. The Case Management Statement. No later than 110 days after the complaint was filed, counsel shall serve and file a concise, joint Case Management Statement, in the Form attached, which shall:

1. Principal Issues. Identify the principal factual and legal issues that the parties dispute.

2. Alternative Dispute Resolution. Identify the alternative dispute resolution procedure which counsel intend to use, or report specifically who no such procedure would assist in the resolution of the case.

3. Jurisdiction by a Magistrate Judge. Indicate whether all parties consent to jurisdiction by a magistrate judge under 28 U.S.C. § 636(c).

4. Disclosure

   a. List by name and title the persons whose identities have been disclosed.
   b. Describe by category the documents that have been disclosed or produced.
   c. Describe each additional category of documents that will be disclosed without imposing on other counsel the burden of serving a formal request for production of documents.
   d. Set forth the computation of damages.

5. Motions. Identify any motions whose early resolution would likely have a significant effect on the scope of discovery or other aspects of the litigation.

6. Discovery

   a. Describe all discovery completed or in progress.
   b. With respect to at least the first phase of discovery, describe the areas of agreement and disagreement, and identify the reasons for any disagreement. (The areas of disagreement will be resolved, if possible, at the case management conference).
   c. Recommend limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.

7. Scheduling

   a. Recommend dates by which discovery should be completed, expert witnesses disclosed, motions directed to the merits of all or part of the case filed, the papers required for the final pretrial conference filed, the final pretrial conference held, and the trial commenced.
   b. Recommend the dates or intervals for supplementation of disclosures.

C. The Initial Case Management Conference. Within 120 days of the filing of the complaint, or on the first date thereafter available on the judge's calendar, the judge will conduct the initial case management conference, which shall be attended by lead trial counsel for each party. The judge may enter an order requiring the parties to participate, in person or by telephone, in the conference. At the conference the court will:

1. Principal Issues. Identify, at least tentatively, the principal factual and legal issues in dispute.

2. Alternative Dispute Resolution. Consider referring the case to an alternative dispute resolution procedure.

3. Jurisdiction by a Magistrate Judge. Determine whether all parties consent to jurisdiction by a magistrate judge under 28 U.S.C. § 636(c).

4. Disclosure

   a. Review the parties' compliance with their disclosure obligations.
   b. Consider whether to order additional disclosures.

5. Motions. Determine whether to order early filing of any motions that might significantly affect the scope of discovery or other aspects of the litigation.

6. Discovery

   a. Determine the plan for at least the first stage of discovery.
   b. Impose limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.

7. Scheduling

   a. Fix time limits to join other parties and to amend the pleadings, to complete any additional disclosures, to conclude discovery, and to file motions.
   b. Fix the dates or intervals for supplementation of disclosures.
   c. Fix the date for the next conference with or hearing by the court.
   d. Fix the date for filing the papers required for the final pretrial conference.
   e. Fix the date or the time period (by month and year) for commencement of the trial.

D. The Initial Case Management Order. No more than ten calendar days after the initial case management conference, the judge will enter the

initial case management order that will address all of the matters covered in the initial case management conference.

E. Sanctions. The court has the authority to impose sanctions for violation of any provisions of this General Order, including violations of the duty to disclose and/or supplement.

Alternative #2 - Massachusetts

A. Early Assessment of Cases

1. Scheduling conference in civil cases. In every civil action, except in categories of actions exempted by district court rule as inappropriate, the judge shall convene a scheduling conference as soon as practicable, but in no event more than ninety (90) days after the appearance of a defendant or the time that is specified in Rule 16, Federal Rules of Civil Procedure, if it is shorter. In cases removed to this court from a state court or transferred from any other federal court, the judge shall convene a scheduling conference within sixty (60) days after removal or transfer.

2. Obligation of counsel to confer. Unless otherwise ordered by the judge, counsel for the parties shall confer no later than ten (10) days prior to the date for the scheduling conference for the purpose of:

   a. Preparing an agenda of matters to be discussed at the scheduling conference;
   b. Preparing a proposed pretrial schedule for the case that includes a plan for discovery; and
   c. Considering whether they will consent to trial by magistrate judge.

3. Settlement proposals. Unless otherwise ordered by the judge, the plaintiff shall present written settlement proposals to all defendants no later than ten (10) days prior to the date for the scheduling conference. Defense counsel shall have conferred with their clients on the subject of settlement prior to the scheduling conference and be prepared to respond to the proposals at the scheduling conference.

4. Joint statement. Unless otherwise ordered by the judge, the parties are required to file, no later than five (5) business days

prior to the scheduling conference, a joint statement containing a proposed pretrial schedule, which shall include:

a. A joint discovery plan scheduling the time and length of discovery events, that shall
   (1) Conform to the obligation to limit discovery set forth in Rule 26, Federal Rules of Civil Procedure, and
   (2) Consider the desirability of conducting phased discovery in which the first phase is limited to developing information needed for a realistic assessment of the case and, if the case does not terminate, the second phase is directed at information needed to prepare for trial; and
b. A proposed schedule for filing motions;
c. Certifications signed by counsel and by an authorized representative of each party affirming that each part and that party's counsel have conferred with a view to establishing a budget for the costs of conducting the full course - and various alternative courses - of the litigation.

To the extent that all parties are able to reach agreement on a proposed pretrial schedule, they shall so indicate. To the extent that the parties differ on what the pretrial schedule should be, they shall set forth separately the items on which they differ and indicate the nature of that difference. The purpose of the parties' proposed pretrial schedule or schedules shall be to advise the judge of the parties' best estimates of the amounts of time they will need to accomplish specified pretrial steps. The parties' proposed agenda for the scheduling conference, and their proposed pretrial schedule or schedules, shall be considered by the judge as advisory only.

5. Conduct of the scheduling conference. At or following the scheduling conference, the judge shall make an early determination of whether the case is "complex" or otherwise appropriate for careful and deliberate monitoring in an individualized and case-specific manner. The judge shall consider assigning any case so categorized to a case management conference or series of conferences. The factors to be considered by the judge in making this decision include:

   a. The complexity of the case (the number of parties, claims, and defenses made, the legal difficulty of the issues pres-

ented, and the factual difficulty of the subject matters);

b. The amount of time reasonably needed by the litigants and their attorneys to prepare the case for trial;

c. The judicial and other resources required and available for the preparation and disposition of the case;

d. Whether the case belongs to those categories of cases that:
   (1) Involve little or no discovery,
   (2) Ordinarily require little or no additional judicial intervention, or
   (3) Generally fall into identifiable and easily managed patterns;
   (4) The extent to which individualized and case-specific treatment will promote the goal of reducing cost and delay in civil litigation; and
   (5) Whether the public interest requires that the case receive intense judicial attention.

In other respects, the scheduling conference shall be conducted according to the provisions for a pretrial conference under Rule 16, Federal Rules of Civil Procedure and for a case management conference under this provision.

6. Scheduling orders. Following the conference, the judge shall enter a scheduling order that will govern the pretrial phase of the case. Unless the judge determines otherwise, the scheduling order shall include specific deadlines or general time frameworks for:

   a. Amendments to the pleadings;
   b. Service of, and compliance with, written discovery requests;
   c. The completion of depositions, including, if applicable, the terms for taking and using videotape depositions;
   d. The identification of trial experts;
   e. The disclosure of the information regarding experts, as contemplated by Federal Rule of Civil Procedure 26(b)(4)(A)(i);
   f. The filing of motions;
   g. A date for settlement conference, to be attended by trial counsel and, in the discretion of the judge, their clients;
   h. One or more case management conferences and/or the final pretrial conference;
   i. A date for a final pretrial conference, which shall occur within eighteen months after filing of the complaint;
   j. The joinder of any additional parties;

k. Early and binding disclosure of expert witnesses;
l. Submission of an affidavit of the expert witness' statement in advance of his or her deposition; and
m. Any other procedural matter that the judge determines is appropriate for the fair and efficient management of the litigation.

7. Modification of scheduling order. The scheduling order shall specify that its provisions, including any deadlines, having been established with the participation of all parties, can be modified only by order of the judge, or the magistrate judge if so authorized by the judge, and only upon a showing of good cause supported by affidavits, other evidentiary materials, or references to pertinent portions of the record.

B. Case Management Conference.

1. Conduct of case management conference. The case management conference shall be presided over by a judicial officer who, in furtherance of the scheduling order required by A. above may:

a. Explore the possibility of settlement;
b. Identify or formulate (or order the attorneys to formulate) the principal issues in contention;
c. Prepare (or order the attorneys to prepare) a discovery schedule and discovery plan that, if the presiding judicial officer deems appropriate, might:
(1) Identify and limit the volume of discovery available in order to avoid unnecessary or unduly burdensome or expensive discovery;
(2) Sequence discovery into two or more stages; and
(3) Include time limits set for the completion of discovery;
d. Establish deadlines for filing motions and a time framework for their disposition;
e. Provide for the "staged resolution" or "bifurcation of issues for trial" consistent with Civil Rule 42(b); and
f. Explore any other matter that the judicial officer determines is appropriate for the fair and efficient management of litigation.

2. Obligation of counsel to confer. Prior to the case management conference, the judicial officer may require counsel for the parties

to confer for the purpose of preparing a joint statement containing:

a. An agenda of matters that one or more parties believe should be addressed at the conference; and
b. A report advising the judicial officer whether the case is progressing within the allotted time limits and in accord with the specified pretrial steps.

This statement is to be filed with the court no later than five (5) business days prior to the case management conference.

3. Additional case management conferences. Nothing in this rule shall be construed to prevent the convening of additional case management conferences by the judicial officer as may be thought appropriate in the circumstances of the particular case. In any event, a conference should not terminate without the parties being instructed as to when and for what purpose they are to return to the court. Any conference under this rule designated as final shall be conducted pursuant to Rule 16(d) of the Federal Rules of Civil Procedure.

Alternative #3 - Montana

A. Pretrial Activity

1. Assertive Judicial Management. The judicial officer to whom a civil case is assigned shall manage the pretrial activity of the case through direct involvement in the establishment, supervision, and enforcement of a case-specific plan for discovery and a schedule for disposition of the case. The judicial officer shall:

a. Timely convene and conduct a preliminary pretrial conference as contemplated by Rule 16, Federal Rules of Civil Procedure;
b. Assess the complexity of the case and the anticipated discovery attendant to the case, and in consultation with counsel for the parties, implement a case management plan which establishes, to the extent possible, deadlines for: joinder of additional parties; amendment of pleadings; filing motions; identification of expert witnesses; completion of discovery; filing proposed final pretrial order; trial; and any other dates necessary for appropriate case management.

2. Informed Participation by Counsel for All Parties at Preliminary Pretrial Conference

   a. Pretrial Statement - Counsel for all parties shall be required to file a written statement in advance of the preliminary pretrial conference that specifically addresses all matters critical to the development of a realistic and efficient case management plan and which are specifically set forth in Rule 235-1(c) of the Rules of Procedure of the United States District Court for the District of Montana.

   b. Mandatory Pre-discovery Disclosure Statement - In order to facilitate the implementation of an informed case management plan, every party shall, not later than fifteen (15) days prior to the date set for the preliminary pretrial conference, serve a pre-discovery disclosure statement, identified in Rule 200-5(a) of the Rules of Procedure of the United States District Court for the District of Montana. (The text of Rule 200-5(a) appears in Appendix I.)

   c. Representation by Attorney With Requisite Authority - Where a party is represented at a preliminary pretrial conference by an attorney, the attorney shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. See Rule 235-8, Rules of Procedure of the United States District Court for the District of Montana.

3. Pretrial Scheduling Order. The judicial officer who presided over the preliminary pretrial conference shall immediately enter an order summarizing the matters discussed and action taken in establishing the case management plan, which establishes time limits for the accomplishment of those pretrial matters referred to in Rule 235-1(a) of the Rules of Procedure of the United States District Court for the District of Montana. The order shall specifically designate whether the case has been placed upon the court's expedited trial docket pursuant to Rule 235-4(a) of the Rules of Procedure of the United States District Court for the District of Montana.

COMMENTARY

The purpose of this part is to present models of early, individualized, and ongoing management of civil cases outside the context of the formal differentiated case tracking systems as defined and described in Section One above. Thus, in the districts included here, cases receive differential treatment based on their particular needs, as determined by counsel and a judicial officer, but without reference to a formal tracking

system.

The three models presented above are from the plans of the Northern District of California, the District of Massachusetts, and the District of Montana. A substantial number of the early implementation plans include comprehensive provisions for managing the pretrial process. The reader may wish to refer to other plans, including the Southern District of Florida, the District of Idaho, the Southern District of Indiana, the District of New Jersey, the Western District of Oklahoma, the Eastern District of Texas, and the Southern District of Texas.

The pretrial provisions of the early implementation plans vary in their particulars, such as the timing of the initial pretrial conference, the types of cases exempted from the conference requirement, the topics to be discussed at the conference, and the occasion on which the trial date is to be set. But most plans, including the three models presented above, have in common requirements for a series of discussions among counsel and a judicial officer and preparation of certain written documents.

Most plans require counsel to confer and then to draft a joint discovery/case management plan, generally within a specified time period. Some plans, such as that for the Northern District of California included above, specify the topics to be discussed by the attorneys and to be addressed in the discovery/case management plan.

After the attorneys have made this preliminary effort to become familiar with their case, a judicial officer generally convenes an initial pretrial conference - again, often within a specified time from filing. Most plans indicate whether the parties are expected to be present at this conference and also list the topics to be discussed.

Subsequent to the initial pretrial conference, the judicial officer usually issues a scheduling order. Discovery deadlines, motions deadlines, and the trial date are common topics for the scheduling conference and order. The plans also generally provide for additional conferences as needed.

One of the principal variations in the plans' case management provisions is in the length of time permitted for various stages of the pretrial process. Two of the plans included here, the Northern District of California and the District of Massachusetts, adhere closely to the requirements of Rule 16, Federal Rules of Civil Procedure. In contrast, the plan for the Western District of Wisconsin requires that the initial pretrial conference be held no later than 60 days after the case is filed, while the Southern District of Texas permits the scheduling conference to be held as late as 140 days after filing. These different time spans reflect in part the conditions in these two courts - i.e., the Western District of Wisconsin currently disposes of cases faster than does the Southern District of Texas, with its larger criminal caseload.

Many courts have followed the statute's suggestion that they require counsel to prepare a joint case management/discovery plan prior to the initial pretrial conference. See 28 U.S.C. § 473(b)(1)). At least one court, the Southern District of Indiana, provides for waiver of the initial pretrial conference if the court finds the case management plan sufficient for guiding the case's progress. At this point, little is known about the usefulness and cost-effectiveness of this relatively new case management device.

A few plans note the relationship of the expense and delay reduction plan to the local rules. Courts that have yet to adopt a plan should consider including information about this relationship. For examples see the plans for the District of Massachusetts and the Southern District of Florida which include, at the conclusion of each plan provision, a summary of the local rules relevant to that provision. See also the plan for the District of Montana set out above, which refers the user to the local rules rather than incorporating into the plan details that are already available in the local rules.

Several other items from the Massachusetts plan are also noteworthy. First, the plan requires

plaintiff's counsel to present written settlement proposals to the defendant prior to the initial case management conference. This diminishes the concern often expressed by counsel that initiation of settlement discussions conveys a weakness in one's case. For another example, see the plan for the Western District of Oklahoma, which includes in the scheduling order a date by which plaintiff's counsel is to open settlement discussions.

The second noteworthy item in the Massachusetts plan is the requirement that attorneys discuss the costs of litigation with their clients. The plan for the Eastern District of Texas also includes such a provision. Third, the Massachusetts plan provides extensive commentary after each provision to explain the court's reasoning in adopting the provision. The plans for the Districts of Montana and New Jersey also provide such commentary.

Two of the plans included here require discussion of the trial date at the time of the initial case management conference, which is a common feature of the early implementation plans. For courts, however, that do not wish to combine the trial setting and case management provisions, see Part II of this section for stand-alone provisions regarding the setting of trial dates. Part II also provides examples of backup systems for judges who cannot meet a scheduled trial date.

B. Setting Early and Firm Trial Dates

Alternative #1 - Pennsylvania Eastern

A. Early, Firm Trial Dates

1. Time of Trial

   a. Except for asbestos cases and cases on the Special Management Track, the court accepts as a guideline that trial should take place within 12 months of filing.

   b. For cases on the Special Management Track and for asbestos cases, except for those cases certified as exempt under the provisions of 28 U.S.C. § 473(a)(2)(B)(i) and (ii),[2] the court accepts as a guideline that trial should take place within 18 months of filing.

2. Time for Scheduling the Trial Date

   a. For most cases, the trial date should be set in the scheduling order entered under Rule 16 of the Federal Rules of

[2] A case is exempted by the statute from the requirement of a trial within 18 months if a judicial officer certifies that "the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice," or that "the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases."

Civil Procedure.

b. For cases on the Special Management Track, the trial date should be set after a settlement conference, which would occur within approximately six months after the filing of the complaint.

c. For all cases, the trial date should be set initially for a specific month. The exact date for trial shall be set at a later time by the court. Once the trial date has been set, no continuances should be granted without compelling reasons.

3. Procedure When the Court Cannot Adhere to the Date

a. When the demands of the judge's criminal docket, or the unanticipated length of a civil trial, or some other emergency or unanticipated situation prevents the court from adhering to a trial date, counsel should be advised as soon as practicable after the impediment appears.

b. If, at the time the impediment to trial appears, the judge to whom the case is assigned is able to schedule a new trial date on which all counsel expect to be available and which date will occasion no undue hardship or expense to the litigants, the case will be rescheduled to begin trial on the alternate date.

c. If the assigned judge cannot schedule a suitable alternate date in accordance with section (2), and if an identified magistrate judge will be available on that date to preside over the trial, and if all parties and their counsel consent that the identified magistrate judge may do so, the case may be assigned to such magistrate judge, in accordance with the procedure detailed below. An appropriate consent form shall be available from the office of the clerk of court, which shall be signed by the parties and their counsel. It shall be appropriate for the parties to withhold consent until learning of the availability of an identified magistrate judge.

Where appropriate and in conformity with Local Civil Rule 7, I, (h), assignment to a magistrate judge may be made by the judge to whom the case is assigned. In all other cases,the judge to whom the case is assigned may refer the case to the chief judge for assignment to a magistrate judge. All such assignments and any further procedures shall be in conformity with the provisions of and the policies articulated in Local Civil Rules 3 [case assign-

ment], 6 [calendar review and reassignment], and 7 [magistrate judge responsibilities].

Alternative #2 - Montana

A. Trial Scheduling. Consistent with the concept of individualized case management adopted by the plan, the judicial officer presiding at the preliminary pretrial conference shall determine whether a trial date is appropriately established at the time of the preliminary pretrial conference.

1. Expedited Trial Docket. The court shall establish an expedited civil trial docket. A case placed upon the expedited trial docket shall be placed on the trial calendar for a date certain not later than six (6) months from the date of the preliminary pretrial conference. At the time of the preliminary pretrial conference, any party may request placement of the case upon the expedited trial docket. After considering the demands of the case and its complexity, the judicial officer, in consultation with all parties, or their counsel, shall determine if placement of the case upon the expedited trial docket is appropriate under the circumstances.

2. General Trial Docket

   a. In those cases where a trial date is not established at the time of the preliminary pretrial conference, the judicial officer to whom the case is assigned shall within thirty (30) days of the submission of a proposed final pretrial order, convene a status conference for the purpose of determining the readiness of the case for trial and establishing a trial date.
   b. The date established for trial shall <u>not be more then sixty (60) calendar days from the date of the status conference</u> unless the assigned judicial officer's trial docket precludes accomplishment of trial within that time frame.
   c. In the event the trial date established is beyond eighteen (18) months from the date the complaint was filed, the judicial officer to whom the case is assigned shall enter an order certifying that:
      (1) The demands of the case and its complexity render a trial date within the 18-month period incompatible with serving the ends of justice; or
      (2) The trial cannot be reasonably held within the

18-month period because of the status of the judicial officer's trial docket.

3. Maintenance of Trial Setting

   a. An established trial date shall not be vacated unless there exists a compelling reason necessitating the continuances.
   b. It shall be the policy of the court to utilize all available judicial resources to allow the court to adhere to an established trial date.
   c. When the judicial officer to whom a civil case has been assigned is unable to convene a trial as scheduled, the judicial officer shall, as soon as practicable, take the following action:
      (1) Determine the other judicial officer of the district that would be available to preside over the trial on the date scheduled;
      (2) Convene a status conference for the purpose of advising counsel and the parties of the necessity to consider vacation of the trial date;
      (3) Establish a new trial date which will not unnecessarily inconvenience either counsel or the parties;
      (4) Advise the parties of the availability of any other judicial officer of the district to preside over trial on the date originally established; and
      (5) Determine whether a consensus exists among counsel and the parties regarding reassignment of the case to another specifically identified judicial officer of the district. Where a consensus on reassignment exists, the assigned judicial officer shall effect reassignment of the case to the judicial officer identified by counsel and the parties.

COMMENTARY

This part presents two models for setting early, firm trial dates. The provisions, from the Eastern District of Pennsylvania and the District of Montana, are noteworthy because they provide a backup system for judges who cannot meet a scheduled trial date.

Under both provisions counsel and the judicial officer may set the trial date at the time of the initial case management conference or at another time if the needs of the case demand it. Both courts initially set the trial date for a specific month, later changing the date to a specific day.

C. Settlement Conferences

Statutory Requirements: The Civil Justice Reform Act requires "for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer -- (A) explores the parties receptivity to and the propriety of, settlement or proceeding with the litigation;..." 28 U.S.C. § 473(a)(3)(A). Settlement conferences have long been used in federal courts as an alternative means of resolving disputes. In the plans excerpted below, the courts use different means of determining which cases will be subject to settlement conferences.

The Act also requires each court to consider adopting "a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference...." 28 U.S.C. § 473(b)(5).

Alternative #1 - Illinois Southern

A. Except as otherwise provided [in section exempting certain cases from settlement conferences], a settlement conference shall be held within forty-five days after the cut-off date for discovery before a judicial officer other than the judge assigned to try the case. An earlier settlement conference may be requested by a party at any time.

B. In addition to the lead counsel for each party, a representative of each party or the party's insurance company with authority to bind that party for settlement purposes shall be present in person.

C. The notice of the settlement conference shall set forth the format of the conference, any requirement for information that must be submitted to the presiding judicial officer prior to the conference, and the types of documents or other information that must be brought to the conference.

D. The statements or other communications made by any of the parties or their representatives in connection with the settlement conference shall not be admissible or used in any fashion in the trial of the case or any related case.

Alternative #2 - Wisconsin Eastern

At the conference held pursuant to rule 16 of the Federal Rules of Civil Procedure, the judicial officer shall determine whether a case is an appropriate one in which to invoke one of the following settlement procedures:

A. A conference with the judge or a magistrate judge to be held within a reasonable time;

B. The appointment of a special master; or

C. The referral of the case for neutral evaluation, mediation, arbitration, or some other form of alternative dispute resolution.

Judges may make referrals under this section to those persons or entities who, in the opinion of the referring judge, have the ability and skills necessary to bring parties together in settlement. The reasonable fees and expenses of persons designated to act under this section shall be borne by the parties as directed by the court.

All cases subject to mandatory discovery under [this court's rules] will presumptively be subject to one of the settlement procedures authorized by this rule.

At settlement conferences, the parties may be required to attend in person or to be available for consultation by telephone. Any documentation or proposal submitted under this rule shall not become part of the official court record.

Alternative #3 - Montana

A. Mandatory Consideration: The judicial officer to whom a case is assigned shall consider, both at the time of the preliminary and at any subsequent conference, the advisability of requiring the parties to participate in a settlement conference to be convened by the court. Any party may also file a request for a settlement conference.

B. Mandatory Attendance by Representatives With Full Authority to Effect Settlement: Each party, or representative of each party with authority to participate in settlement negotiations and effect a complete compromise of the case, shall be required to attend the settlement conference.

C. Presiding Judicial Officer: Any judicial officer of the district may preside over a settlement conference convened by the court. The judicial officer to whom the case is assigned for disposition may, in his or her discretion, preside over the settlement conference.

COMMENTARY

In the first plan set forth above (from the Southern District of Illinois), the court specifically exempts 16 categories of cases, such as prisoner and collection cases, from the requirement that a settlement conference and a final pretrial conference be held in every case. In the Eastern District of Wisconsin, all

cases subject to mandatory disclosure are presumptively subject to the settlement conference requirement. Certain categories of cases, however, are exempted from mandatory disclosure. In the District of Montana, the judicial officer must consider directing the parties to take part in a variety of types of settlement conferences, but no particular categories of cases are specifically exempted from settlement conferences or specifically designated as requiring settlement conferences.

Another difference in approach relates to whether the judge presiding in the case should take part in the settlement proceedings. The provision from the Southern District of Illinois explicitly requires that a judicial officer other than the judge assigned to the case preside over the settlement conference. The plan from the Eastern District of Wisconsin is silent on this issue. In the District of Montana, the judge to whom the case is assigned has discretion to determine whether to preside over the settlement conference.

The confidentiality provision contained in section D of the provision from the Southern District of Illinois is consistent with Rule 408 of the Federal Rules of Evidence. Rule 408 provides that evidence of offers to compromise and evidence of conduct or statements made in compromise negotiations are inadmissible. The provision is also consistent with Rule 68 of the Federal Rules of Civil Procedure, which provides that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The provision from the Southern District of Illinois actually goes beyond the rules cited above. The provision mandates that any statements made in connection with a settlement conference "shall not be admissible or used in any fashion in the trial of the case or any related case." Rule 408 of the Federal Rules of Evidence does not require exclusion of evidence relating to a compromise "when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Rule 68 of the Federal Rules of Civil Procedure allows the admissibility of the offer in a proceeding to determine costs when the judgment obtained by the offeree is not more favorable than the offer.

The provisions from the Southern District of Illinois and the District of Montana include the requirement that a representative of the parties with authority to bind them be present at the settlement conference. 28 U.S.C. § 473(b)(5). The Eastern District of Wisconsin grants discretion to the judicial officer to require the parties' attendance at the settlement conference or to require their availability by telephone.

The Act provides that "[n]othing in a civil justice and delay reduction plan relating to the settlement authority provisions of this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General." 28 U.S.C.§ 473(c). The Senate Report accompanying the Act explains: "... those courts that choose to adopt the requirement set forth in subsection (b)(5) should account for the unique situation of the Department of Justice. The Department does not delegate broad settlement authority to all trial counsel, but instead reserves that authority to senior officials in the United States Attorneys' Offices or in the litigating divisions in Washington. Clearly, the Department cannot realistically send officials with full settlement authority to each settlement conference." Sen. Rep. 101-416 at 59.

None of the provisions above explicitly recognizes the "unique situation" of the Department of Justice. The plan of the District of New Jersey, however, contains such a provision, not only as to Department of Justice employees but as to "governmental parties" in general. The term "government parties" could include attorneys from federal agencies with independent litigating authority, such as the Environmental Protection Agency or the National Labor Relations Board, as well as state attorneys general and attorneys representing state or local governmental agencies. Under the provisions of the New Jersey plan, government parties are allowed to send "knowledgeable delegates" to attend settlement conferences. Government attorneys should be prepared to discuss the settlement terms that they will recommend to those with final decision-making authority.

D. Representation by Attorney with Authority to Bind At the Initial and Interim Pretrial Conferences

Statutory Requirement: The Civil Justice Reform Act requires each court to consider incorporating into its plan "a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters." 28 U.S.C. § 473(b)(2).

Indiana Northern

A. Authority to bind on specific topics. Participating attorneys will be required to have authority to bind the parties on the following matters, which may be discussed at the initial pretrial conference:

1. Whether any issue exists concerning jurisdiction over the subject matter or the person, or concerning venue;

2. Whether all parties have been properly designated and served;

3. Whether all counsel have filed appearances;

4. Whether any issue exists concerning joinder of parties or claims;

5. Whether any party contemplates adding further parties;

6. The factual bases and legal theories for the claims and the defenses involved in the case;

7. The type and extent of damages being sought;

8. Whether any question exists concerning appointment of a guardian ad litem, next friend, administrator, executor, receiver, or trustee;

9. The extent of the discovery undertaken to date;

10. The extent and timing of anticipated future discovery, including, in appropriate cases, a proposed schedule for the taking of depositions, serving of interrogatories, and motions to produce, etc.;

11. Identification of anticipated witnesses or persons then known to have pertinent information;

12. Whether any discovery disputes are anticipated;

13. The time reasonably expected to be required for completion of all discovery;

14. The existence and prospect of any pretrial motions, including dispositive motions;

15. Whether a trial by jury has been demanded in a timely fashion;

16. Whether it would be useful to separate claims, defenses, or issues for trial or discovery;

17. Whether related actions in any court are pending or contemplated;

18. The estimated time required for trial;

19. Whether special verdicts will be needed at trial and, if so, the issues verdict forms will have to address;

20. A report on settlement prospects, including the prospect of disposition without trial through any process, the status of settlement negotiations, and the advisability of a formal mediation or settlement conference either before or at the completion of discovery;

21. The advisability of court-ordered mediation or early neutral evaluation proceedings, where available;

22. The advisability of use of a court-appointed expert or master to aid in administration or settlement efforts; and

23. Whether the parties are willing to consent to trial by a magistrate judge.

B. Additional matters by specific order. By specific order, a judge also may require participation in a settlement conference immediately after the pretrial conference and may require preparation to discuss any other matter that appears to be likely to further the just, speedy, and inexpensive resolution of the case, including notification to the parties of the estimated fees and expenses likely to be incurred if the matter proceeds to trial.

C. Attendance of party. The judge may require the attendance or availability of the parties, as well as counsel.

COMMENTARY

The provision above identifies a number of matters for discussion at the conference regarding which the attorney should have binding authority. Some courts prefer to have the matters identified in pretrial orders issued by each judge.

With respect to government attorneys at pre-trial conferences the Senate Report states: " For those districts that choose to adopt such a requirement, it will be necessary to provide some form of an exemption for Department of Justice (and, perhaps, other government) attorneys. Absent such an exemption, this requirement -- despite the Attorney General's delegation of specific authorization through the offices of United States Attorneys and Assistant Attorneys General -- might be construed to mandate that Department attorneys undertake actions not authorized by the Attorney General. For example, pretrial conference on discovery could raise issues of attorney-client privilege, which frequently require decisions by high-ranking Department officials after consultation with the affected agencies. The need for an exemption under such circumstances is clear." Sen. Rep. 101-416 at 58.

Although the provision above contains no express exemption for government attorneys, the court's comments accompanying the provision acknowledge the provisions of 28 U.S.C. § 473(c) as being applicable to pretrial conferences. The court does not engage in statutory construction, but "urges the government, at the least, to assure that its counsel are vested with as much binding authority as is feasible at all pretrial conferences." As described above on page 32, the court, in recognition of the special circumstances of government attorneys, may specify that "government parties" be represented by a "knowledgeable delegate."

II. Final Pretrial Conference

A. Scheduling

Alternative #1 - Idaho

A pretrial conference shall be held if deemed necessary by the court and counsel. Such conferences shall be held no later than 30 days prior to the date scheduled for trial.

Alternative #2 - Illinois Southern

Except as otherwise provided in subsection (a) [which excludes certain types of cases],a final pretrial conference will be held before the judicial officer assigned to try the case not less than seven days prior to the presumptive trial date.

COMMENTARY

There are two basic issues with respect to final pretrial conferences: 1) whether to hold the conference; and 2) when to hold the conference. The plan for the Eastern District of New York requires that

a final pretrial conference be held in every case. Alternative #1 above leaves such conferences to the discretion of the court in consultation with counsel. Scheduling the conference no later than 30 days prior to trial encourages the parties to prepare for trial early. A thorough knowledge of the strengths and weaknesses of the case early in the litigation may perhaps encourage the attorneys to settle at an early date.

Alternative #2 moves the final pretrial conference date closer to the day of trial. Such practice may avoid the expense of preparing for and attending a pretrial conference if the case settles. Alternative #2 will work best when coupled with a comprehensive settlement conference provision to ensure the parties are engaging in good faith settlement negotiations at an early stage. The provision includes a presumption that a pretrial conference will be held unless the judge orders otherwise. An alternative is to provide, as does the Eastern District of Arkansas, that conferences will be held when requested and when they will save the attorneys, parties, or the court time or expense.

B. Individuals Attending

Statutory Requirement: The Civil Justice Reform Act requires each court to consider incorporating into its plan "a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters." 28 U.S.C. § 473(b)(2). The rationale behind this provision is straightforward. The final pretrial conference cannot be meaningful unless the court and the parties reach agreement on the issues presented, the approximate length of the trial, the number of witnesses to be called, etc. Therefore lead counsel with authority to bind must be present.

Alternative #1 - Illinois Southern

Lead trial counsel for each party with authority to bind the party shall be present at the final pretrial conference.

Alternative #2 - Massachusetts

Unless excused by the judicial officer, each party shall be represented at the final pretrial conference by counsel who will conduct the trial. Counsel shall have full authority from their clients with respect to settlement and shall be prepared to advise the judicial officer as to the prospects of settlement.

COMMENTARY

Alternative #2 goes a step beyond Alternative #1 above by requiring that the attorneys attending the final pretrial conference must be the ones who will conduct the trial and who are authorized to settle the case. Another section of the plan for the District of Massachusetts requires opposing counsel to confer prior to the conference for the purpose of preparing a pretrial memorandum. The contents of the memorandum are discussed in the next section.

The Act and its legislative history make clear that the "authority to bind" provision should allow for the special circumstances of the United States Attorney in litigation involving the United States. 28 U.S.C. § 473(c). An example of such accommodation appears in the plan of the District of New Jersey, which

provides that "governmental parties" may be represented by "knowledgeable delegates."

C. Written Submissions

Alternative #1 - Massachusetts

A. Pretrial Memorandum. Unless otherwise ordered by the judicial officer, the parties are required to file, no later than five (5) business days prior to the scheduling conference, a pretrial memorandum that shall set forth:

1. A concise summary of the evidence that will be offered by plaintiff, defendant, and other parties with respect to both liability and damages (including special damages, if any;

2. The facts established by pleadings and by stipulations or admissions of counsel;

3. Contested issues of fact;

4. Any jurisdictional questions;

5. Any questions raised by pending motions;

6. Issues of law, including evidentiary questions, together with supporting authority;

7. Any requested amendments to the pleadings;

8. Any additional matters to aid in the disposition of the action;

9. The probable length of the trial;

10. The names of witnesses to be called (expert and other); and

11. The proposed exhibits.

Alternative #2 - Wisconsin Eastern

A. All parties are required to prepare and file pretrial reports. Reports are due 10 days before the scheduled start of the trial or, if a final pretrial conference is scheduled, 3 days before the conference. The report must be signed by the attorney (or a party personally, if not represented by counsel) who will try the case. Sanctions, which may include the dismissal

of claims and defenses, may be imposed if a trial report is not filed.

The report must include the following:

1. A short summary statement of the facts of the case and theories of liability or defense. The statement should not be longer than two pages.

2. A statement of the issues.

3. The names and addresses of all witnesses expected to testify. A witness not listed will not be permitted to testify absent a showing of good cause.

4. If expert witnesses are to be used, a narrative statement of the experts' background.

5. A list of exhibits to be offered at trial.

6. A designation of all depositions or portions of depositions to be read into the record at trial as substantive evidence. Reading more than five pages from a deposition will not be permitted unless the court finds good cause for permitting such readings.

7. Counsel's best estimate on the time needed to try the case.

8. If scheduled for a jury trial:

    a. All proposed questions that counsel would like the court to ask on voir dire.
    b. Proposed instructions on substantive issues.
    c. A proposed verdict form.

9. If scheduled for a court trial, proposed findings of fact and conclusions of law. See Rule 52 of the Federal Rules of Civil Procedure.

COMMENTARY

Alternative #1 requires an extensive pretrial memorandum covering a wide range of topics. The effect of this provision should be to focus each attorney's attention on the case. The results should be the narrowing of issues, the elimination of redundant testimony, stipulations of fact, and early disposition of motions and evidentiary problems. The requirement that the memorandum be filed 5 days prior to the conference provides the judicial officer with an opportunity to become familiar with any problems in the case

before the conference is held.

Alternative #2 is similar to the provision from the District of Massachusetts. It includes, however, a section on voir dire and proposed jury instructions. By addressing these issues at the final pretrial conference, the trial may be less time-consuming. For more provisions that assist in trial management, see Section II.E., below, of the this document ("Trial Planning").

D. Final Pretrial Order

Illinois Southern

A. The following issues shall be discussed at the final pretrial conference and shall be included in the final pretrial order:

1. The firm trial date;

2. Stipulated and uncontroverted facts;

3. List of issues to be tried;

4. Disclosure of all witnesses;

5. Listing and exchange of copies and all exhibits;

6. Pretrial rulings, where possible, on objections to evidence;

7. Disposition of all outstanding motions;

8. Elimination of unnecessary or redundant proof, including limitations on expert witnesses;

9. Itemized statements of all damages by all parties;

10. Bifurcation of the trial;

11. Limits on the length of trial;

12. Jury selection issues;

13. Any issue that in the judge's opinion may facilitate and expedite the trial, for example, the feasibility of presenting testimony by a summary written statement;

14. The date when proposed jury instructions shall be submitted to the

court and opposing counsel, which, unless otherwise ordered, shall be the first day of the trial.

COMMENTARY

The pretrial order provides guidelines for trying a case much as a scheduling order provides guidelines for preparing the case. In the provision from the Southern District of Illinois set forth above, the pretrial order simply memorializes the agreements and issues reached and discussed at the final pretrial conference. The order includes the issues to be tried, witness lists, limitations on expert witnesses, limitations on the length of trial, etc. Further discussion of trial planning is contained in the following section.

E. Trial Planning

Wisconsin Western

A. Final Pretrial and Trial. Final pretrial conferences will be used to resolve as many issues as possible prior to the commencement of trial. Prior to the final hearing before trial the parties are required to submit to the court their proposed jury instructions, voir dire, and form of special verdict.

1. Motions in Limine. The court will rule on motions in limine concerning exhibits, testimony, and the use of depositions at trial, and may require resolution of such disputes at the final pretrial conference or hearing.

2. Jury Instructions. The court will distribute to the parties prior to the final hearing before trial the standard procedural jury instructions to be used by the court. At the final hearing each party will be afforded an opportunity to object to and comment upon the court's standard instructions or to proposed substantive instructions of the opposing party. Giving consideration to the submissions of the parties and comments of opposing counsel, the court will prepare the substantive instructions and present them to counsel so that a final jury instruction conference may be held prior to submission of the case to the jury.

3. Trial Practice. Trial will be conducted in such a manner that the conferences outside the presence of thee jury are minimized. Because of the emphasis on resolving issues prior to trial, fewer interruptions will be necessary. The court will carefully apply Rule 611(a)(2), Federal Rules of Evidence, to limit the introduction of cumulative evidence that would extend the trial needlessly. The court will apply Rule 702 carefully to limit expert testimony to

those circumstances in which it will assist the trier of fact and in which the expert is properly qualified.

COMMENTARY

The final pretrial conference in this district is used to resolve disputes that often arise at trial. Disputes over exhibits and testimony are dealt with through motions in limine to avoid interrupting trials with objections and conferences outside the presence of the jury. Jury instructions are also discussed at the conference, thereby preventing delay at trial and allowing the attorneys to decide which evidence might best bear relation to the instructions. Further, the introduction of cumulative evidence is limited and expert testimony is carefully controlled.

Other courts also use the final pretrial conference to control the trial. The plan for the Eastern District of New York requires exhibits to be premarked; and objections as to the admissibility of evidence must be made by motion in limine. The plan for the Southern District of Texas provides for time limits on trials and witnesses.

Other topics ripe for discussion at the final pretrial conference as it relates to trial planning include: special equipment needs for presentation of evidence (e.g., easels, flip charts, video screens, etc.), security considerations based on the nature of the case, media interest, and bifurcation of the trial according to issue (e.g, liability and damages).

SECTION THREE: DISCOVERY CONTROL; MOTIONS PRACTICE

I. Controlling the Extent and Timing of Discovery

A. Pre-Discovery Disclosure of Core Information/Other Cooperative Discovery Devices [28 U.S.C. § 473(a)(4)]

For this section, the court could adopt the language of proposed Rule 26 of the Federal Rules of Civil Procedure. See Attachment A to this model plan.

COMMENTARY

Many of the courts that have submitted plans fashioned their pre-discovery disclosure requirements after the then-existing proposed changes to Rule 26 of the Federal Rules of Civil Procedure. Since that time the language of the proposed rule has been changed by the Judicial Conference's Committee on Rules of Practice and Procedure. Assuming the current proposed language becomes effective December 1, 1993, continuity and consistency can be achieved by adopting that language in the courts' expense and delay reduction plans.

Certain districts limit mandatory disclosure to specific types of cases or require different information to be disclosed depending on the type of case. For example, the plan for the District of Delaware requires disclosure only in personal injury, medical malpractice, employment discrimination, and civil RICO cases and the Northern District of Indiana is experimenting with three different levels of disclosure. Several districts have also altered slightly the timing of disclosures from that contained in proposed Rule 26. For instance, the District of Delaware requires the information to be provided with the pleadings.

The court in the Eastern District of Wisconsin adopted an approach slightly different from proposed Rule 26. The court's plan requires the parties to answer interrogatories disclosing much of the same information provided under proposed Rule 26. The plaintiff's answers to the interrogatories are due within 30 days after an answer is filed in the case. The defendant must answer the interrogatories within 30 days after the date of service of the plaintiff's answers to the interrogatories. The parties have a continuing obligation to amend prior responses if new information becomes available. The plan still requires the disclosure of expert testimony in the form of a written report.

B. Setting Discovery Deadlines

Alternative #1 - Texas Southern

1. Initial Pretrial Conference Scheduling Order. Within [120] days after a party files a complaint or notice of removal, the judge to whom the case is assigned will conduct an initial pretrial conference under Rule 16, Federal Rules of Civil Procedure, and enter a scheduling order, except in the following types of cases: a) prisoner civil rights actions; b) state and federal habeas corpus actions; c) student and veteran loan actions; d) social security appeals; e) bankruptcy appeals; and f) complaints to forfeit seized assets.

A judge may in his discretion conduct an initial pretrial conference and enter a scheduling order in any of the types of cases excepted.

The Rule 16 scheduling order setting cut-off dates for new parties, motions, expert witnesses and discovery, setting a trial date, and establishing a time framework for disposition of motions will be entered at that conference.

Additional pretrial/settlement/discovery conferences will be scheduled by the court as the need is identified in specific cases.

By individual notice, the court will require attendance at all pretrial/settlement conferences "by an attorney who has the authority to bind that party regarding all matters...," 28 U.S.C. § 473(b)(2), and require that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request." 28 U.S.C. § 473(b)(3).

2. Discovery-Case Management Order - A general order requiring the preparation of a discovery-case management plan by counsel prior to the initial pretrial conference will be entered in each case that is not placed in the following case management tracks: a) bankruptcy appeals; b) social security appeals; c) FDIC, RTC, and FSLIC cases; d) pro se plaintiff cases; and e) removed cases. 28 U.S.C. § 473(b)(1).

3. Complex Cases - Cases identified by the court as complex in nature following the initial pretrial conference will be managed by the court as follows:

a. Discovery - In cases so identified, consideration will be given to necessary discovery conferences and sequencing of discovery in "waves" identified in the Manual for Complex Litigation, Second, § 21.421 (1985).

b. Bifurcation - Consideration of the applicability of Rule 42 of the Federal Rules of Civil Procedure ("Consolidation; Separate Trials") will be given at the initial pretrial and subsequent conferences held by the court. **(TX-S)**

Alternative #2 - Georgia Northern

1. Unless otherwise provided by the court, discovery in the following types of cases shall be completed within eight months: antitrust,

patent, and securities/commodities exchange cases.

2. No specific time frames for discovery apply to the following types of cases: student loan and veteran's benefits overpayment cases, prisoner petitions, bankruptcy appeals, and social security appeals.

3. Unless otherwise provided by the court, discovery in all other types of civil cases shall be completed within four months.

Alternative #3 - Wisconsin Western

Based upon the materials submitted to the court and upon the representations of counsel at the preliminary pretrial conference, the court will set a deadline for the completion of discovery. In most cases, the parties will regulate their own discovery within the bounds of the Federal Rules of Civil Procedure. In an appropriate case, counsel may move pursuant to Rule 26(f), Federal Rules of Civil Procedure, for the development by the court of a discovery plan that will limit and schedule discovery as appropriate.

COMMENTARY

The discovery cut-off date in Alternative #1 is set after a meeting with the attorneys and the judicial officer. In most cases, the attorneys are required to prepare a discovery-case management plan prior to the conference. The plan also requires attendance at the conference by "an attorney who has the authority to bind that party regarding all matters." 28 U.S.C. § 473(b)(2). The application of this provision to government attorneys is discussed in detail at page 32, supra. By ensuring that the parties plan their discovery prior to the conference and are to be bound by the schedule agreed on at the conference there should be very few instances where parties will need to request extensions of time to complete discovery. An additional advantage of this provision is that the judicial officer still has control over the discovery schedule through the issuance of the Rule 16 scheduling order. An interesting aspect of the plan is the provision for sequenced discovery in complex cases.

Alternative #1 however, has two possible drawbacks. First, the discovery cut-off date is not set until 120 days after the complaint is filed. (The provision as it appears in the plan for the Southern District of Texas calls for the initial pretrial conference to be held within 140 days after the complaint is filed. In order to comply with Rule 16, Federal Rules of Civil Procedure, we have changed this time frame to 120 days.) Thus, over four months elapse before firm deadlines for discovery are established. Second, the plan grants broad discretion to the attorneys to control the course of discovery through case management plans. Such discretion may or may not be desirable, depending on the nature of individual districts, their attorneys, and their judges. Consequently, alternative provisions should be considered.

Alternative #2 is ambiguous as to the time at which the discovery period begins. The period could commence upon the filing of the complaint, upon service of the complaint, or upon the filing of the first responsive pleading. Each court should consider which time frame seems reasonable in light of its existing caseload.

The main feature of Alternative #2 is that it divides all cases into three discovery tracks and sets limits according to tracks. A major advantage of this system is that the parties know at the outset of the

litigation when the discovery cut-off dates will be. It provides for certainty of the time and cost for discovery.

A problem with Alternative #2 may be the mechanical nature of classifying cases. Not all cases of a particular type will have the same discovery needs. Therefore, a method of determining exceptions may have to be developed. Too many exceptions, however, may render the case classifications meaningless.

A variation on Alternative #2 adopted by the court in the Southern District of Florida may alleviate the problem. The Florida system classifies cases by level of complexity as opposed to case type and then gives a range of discovery cut-off dates for each class.

Alternative #3 calls for the judicial officer to set the deadlines based on representations of counsel. It is similar to Alternative #2 but seems to give the judicial officer slightly more control over the discovery process.

C. Attorney/Party Signatures for Requests to Extend Discovery Deadlines [28 U.S.C. § 473(b)(3)]

Texas Southern

All requests for extensions of deadlines for completion of discovery shall be signed by the attorney and the party making the request.

COMMENTARY

The rationale behind this provision is to ensure that the parties understand why cases are delayed and are involved in the decision to take an action that may delay it. To date, only a few courts have adopted such a procedure. A slight variation of this provision can be found in the plan for the District of Alaska that requires the parties' signatures on any secondary or tertiary requests for continuances of a discovery deadline. The Northern District of California has a plan provision which requires notice to the parties prior to counsel requesting a continuance.

The legislative history accompanying 28 U.S.C. § 473(b)(3) states as follows: "The committee hopes that many district courts will choose to adopt the requirement...that all requests for extension of deadlines for completion of discovery or for trail [sic] be signed by the attorney and the party making the request. Such a requirement, which would supplement the existing requirements of Rule 11 of the Federal Rules of Civil Procedure, is warranted in the current litigation environment, in which requests for continuances are pervasive and often lead to substantial additional expenditures. It is anticipated that the number and frequency of such requests would be reduced by requiring attorneys to obtain the written consent of their clients." Sen. Rep. No. 101-416, 101st Cong. 2d Sess. 58 (1990).

D. Limits on the Use of Discovery (Interrogatories, Depositions, etc.) [28 U.S.C. § 473(a)(2)(C)]

Texas Eastern

Upon the filing of each case, the court will assign the case to one of six tracks. Each track will carry presumptive discovery limits as set forth below. These limits shall govern the case and may not be changed by the parties or their attorneys by agreement

or otherwise. The judicial officer to whom the case is assigned may, upon good cause shown, expand or limit the discovery.

TRACK ONE: No discovery

TRACK TWO: Disclosure only

TRACK THREE: Disclosure plus 15 interrogatories, 15 requests for admission, depositions of the parties, and depositions on written questions of custodians of business records for third parties.

TRACK FOUR: Disclosure plus 15 interrogatories, 15 requests for admissions, depositions of the parties, depositions on written questions of custodians of business records for third parties, and three other depositions per side (i.e., per party or per group of parties with a common interest.)

TRACK FIVE: A discovery plan tailored by the judicial officer to fit the special management needs of the case.

TRACK SIX: Specialized treatment and program as determined by the judicial officers.

COMMENTARY

The above provision places limits on interrogatories and depositions and ties them directly to track assignments. Each track has its own limits on discovery. The limits are guidelines only and the judicial officer has in his or her discretion the authority to modify them as appropriate in the individual case. The provision also governs other methods of discovery such as requests for admissions and document requests. A provision in the plan for the Northern District of Ohio, set out at pages 7-8, above, is similar in nature.

A variation of the above provisions may be found in the plan of the Eastern District of New York, which provides that the number of interrogatories and depositions shall be established by agreement of the parties or by court order. In the absence of agreement or court order, the number of interrogatories shall be presumptively limited to 15 and the number of depositions shall be presumptively limited to ten per side. Such a provision allows the court maximum flexibility in designing limits to fit the individual case. It also, however, sets presumptive limits if the parties cannot reach agreement or if the court does not reach a decision.

The plan in the District of Idaho sets limits on the number of interrogatories but not depositions. Apparently in that district interrogatories are a greater source of discovery abuse than depositions. The plan illustrates the differences between the courts and underscores the need for flexibility in discovery provisions.

E. Methods of Resolving Discovery Disputes/Certification of Efforts to Resolve Disputes [28 U.S.C. § 473(a)(5)]

Alternative #1 - Oklahoma Western

Every motion or other application relating to discovery made under the Federal Rules of Civil Procedure or local court rules or under this plan must include certification by counsel that the parties have made a reasonable, good faith effort to resolve the discovery dispute to which the motion or application pertains. Good faith efforts to resolve discovery disputes must include a face-to-face meeting between counsel.

Alternative #2 - Texas Eastern

Discovery Hot Line - The court shall provide a judicial officer on call during business hours to rule on discovery disputes. Counsel may contact the judicial officer by dialing the hot line number listed above for any case in the district and get an immediate hearing on the record and ruling on the discovery dispute.

Alternative #3 - Montana

Peer Review of Discovery Practices - The court shall, not later than March 30, 1993, establish in each division in the district a standing committee comprised of not less than five (5) practicing members of the district bar, which shall sit to review the discovery practices and other litigation conduct of attorneys practicing before the court in the particular division where the committee is established. The members of the committee shall be appointed by majority vote of the Article III judges of the district in regular active service.

A request for review may be submitted to the committee by any judicial officer of the district. In presenting the request for review, the judicial officer shall provide a statement that delineates the discovery or litigation practice submitted to the committee for review. Upon consideration of the record in the case, the committee shall present the judicial officer with an advisory opinion stating whether the practice or conduct falls within the bounds of accepted discovery or litigation practice.

COMMENTARY

Alternative #1 appears particularly effective because it requires a face-to-face meeting between counsel. Such meetings may not be possible in districts covering large geographical areas.

A variation on Alternative #1 has been adopted by the Southern District of New York. The plan in that district provides that discovery disputes that remain unresolved after a good faith effort by counsel shall be decided on oral motion or on the basis of memoranda not to exceed two typewritten, double-spaced pages. The plan also urges the court to reach a decision promptly. The provision thus goes beyond the point of "good faith effort to resolve" to describe the next step in the process, that is, a prompt decision by a judicial

officer based upon informal hearing or memoranda.

Alternative #2 represents yet another approach to the prompt and inexpensive resolution of discovery disputes. The Chief Judge of the Eastern District of Texas reports that the court has experienced great success with this technique. The very existence of an expedited method for resolving disputes has reduced the amount of posturing by attorneys at depositions.

Some districts use magistrate judges to provide immediate access to a judicial officer. Regardless of the judicial officer employed, the court may wish to satisfy itself at the outset that the parties have made a good faith effort to resolve the dispute before resorting to the "hot line."

Alternative #3 is intended to supplement the requirement that the parties have made a good faith effort to resolve the discovery dispute. The provision may be invoked in instances where a novel approach to discovery has arisen and the judicial officer is uncertain as to whether the practice "falls within the bounds of acceptable discovery or litigation practice."

The details of this innovative technique have not been finalized. The reader may wish to contact the District of Montana for clarification.

II. Motions Practice

Statutory Requirements: Section 473(a)(2)(D) of title 28, United States Code, requires the district courts to consider "setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition."

A. Motions Practice in the Context of the Discovery - Case Management Process

Montana

At the discovery-case management conference, the judicial officer to whom a case is assigned shall develop a case management plan that: 1) establishes a time frame for disposition of pretrial motions that is conducive to the orderly and efficient disposition of the case; and 2) establishes a deadline by which all pretrial motions must be presented to the court for determination.

COMMENTARY

The above provision places the duty of establishing motions deadlines squarely upon the judicial officer. The plan for the Northern District of California requires the parties to provide substantial assistance to the judicial officer in establishing deadlines and ensuring the prompt resolution of motions. The plan for the Northern District of California provides that "[t]he parties shall agree upon special procedures or schedules for expediting resolution of motions (e.g., letter briefs simultaneously exchanged on stipulated shortened schedules) and a recommended date for motions cut-off."

The Eastern District of Pennsylvania, the Southern District of Indiana, and the District of Kansas have adopted specific positions on the cut-off dates for case-dispositive motions. The plans in these courts provide that such motions should be filed as early as possible in order to avoid unnecessary cost and delay.

B. Form and Length of Motions

Ohio Northern

1. All motions, unless made during a hearing or trial, shall be in writing.

2. The moving party shall serve and file with its motion a memorandum of the points and authorities on which it relies in support of the motion.

3. Each party opposing a motion shall serve and file a memorandum in opposition within ten (10) calendar days after service of the motion.

4. The moving party may serve and file a reply memorandum in support of its motion within five (5) calendar days after service of the memorandum in opposition.

5. Without prior approval of the judicial officer for good cause shown, memoranda relating to case-dispositive motions shall not exceed ten (10) pages in length for expedited and administrative cases, twenty (20) pages for standard cases, thirty (30) pages for complex cases, and forty (40) pages for mass tort cases. Memoranda relating to all other motions shall not exceed fifteen (15) pages in length. All memoranda exceeding fifteen (15) pages in length shall have a table of contents, a table of authorities cited, a brief statement of the issue(s) to be decided, and a summary of the argument presented. Appendices of evidentiary, statutory, or other materials are excluded from these page limitations and may be bound separately from memoranda.

6. The judicial officer may rule on unopposed motions without hearing at any time after the time for filing an opposition has expired. The judicial officer may also rule on any opposed motion without hearing at any time after the time for filing a reply memorandum has elapsed.

7. Any party may waive oral argument by giving notice of such waiver to the court and all counsel at least three (3) days in advance of the hearing. Unless oral argument is waived, the moving party and all parties filing an opposition to the motion shall attend the

hearing. The judicial officer may hear oral argument on any motion by telephone conference. The judicial officer may grant or deny the requested relief for failure by any party to attend the hearing.

8. Any motion (other than motions made during hearings or at trial) served and filed beyond the motion deadline established by the court may be denied solely on the basis of the untimely filing.

9. Memoranda required to be filed under this rule that are not timely filed by a party may not be considered and may be deemed by the court to constitute the party's consent to the granting or denial of the motion, as the case may be.

10. Filing a frivolous motion or opposing a motion on frivolous grounds may result in the imposition of appropriate sanctions including the assessment of costs and attorneys' fees against counsel and/or the party involved.

COMMENTARY

Variations on some of the provisions listed above have been adopted. The plan for the Eastern District of Texas, for example, provides that leave of court must be obtained before a motion may be filed. A copy of the proposed motion must accompany the motion for leave to file. Certain types of motions are exempted from the rule, such as motions that may dispose of the case altogether.

The courts differ slightly as to the length of memoranda in support of motions. The District of Montana has imposed a 20-page limit (exclusive of exhibits, table of contents, and cover page). The Eastern District of Texas has adopted an 8-page limit. The Eastern District of Wisconsin imposes a 30-page limit for the principal motion and a 15-page limit for replies. In most jurisdictions adopting a page limitation, the judicial officer is granted discretion to modify the limitation on a showing of good cause.

C. Case-Dispositive Motions

Alternative #1 - Ohio Northern

(In General)

Motions that dispose of any claim or defense shall usually be heard and determined by the district judge assigned to the case. When such judge concludes that final adjudication of such motion will be expedited if it is referred to a Magistrate Judge for report and recommendation, such motion may be referred to the Magistrate Judge, whose report and recommendation shall be filed not later than thirty (30) days after the date of reference.

Alternative #2 - Montana

(Form of Motion and Response)

All motions for summary judgment shall be accompanied by a statement that specifically identifies the facts the movant believes are uncontroverted. The response of an adverse party shall specifically identify the facts the adverse party believes establishes a genuine issue of material fact. In the alternative, the parties may file a joint stipulation that sets forth a statement of the stipulated facts if the parties agree there is no genuine issue of any material fact.

Alternative #3 - West Virginia Northern

(Duty of the Clerk)

Upon receipt by the Clerk of the Court of motions to dismiss filed pursuant to Rule 12(b)(6) or motions for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure or motions relevant to the discovery process, the clerk shall promptly bring said motions to the court's attention.

If such motion is not ruled upon by the court within thirty (30) days of its service, then the discovery period established for the case shall be tolled to the extent the ruling on said motion exceeds thirty days from the service. The discovery period for the case shall resume upon entry of an order on the pending motion.

Alternative #4 - Wyoming

(Prompt Ruling Required)

The judges shall rule on dispositive motions at the conclusion of oral hearings and have an order prepared immediately thereafter by the prevailing party, when possible. A dispositive motion shall be taken under advisement only when complex issues exist.

COMMENTARY

Many courts have recognized that case-dispositive motions should be filed and decided promptly in order to avoid unnecessary expense and delay. The above provisions set forth various ways of dealing with the issue. The time frames listed are flexible and entirely within to the discretion of each court. The provision of subsection 3, dealing with the role of the clerk, may be controversial in some jurisdictions.

Similarly, the language of subsection 4 may be controversial because it touches upon the decision-making practices of individual judges.

D. Rulings on Motions

Alternative #1 - Ohio Northern

(Tentative Rulings)

At any oral hearing, the judicial officer may announce his or her intended preliminary ruling and rationale or grounds for such decision at the outset of the hearing on a motion, and that the parties will be asked to limit their oral arguments to the reasons why the preliminary ruling is correct or incorrect. In that event, the party that stands to lose on the motion if the preliminary ruling is entered will be invited to argue first, followed by the party in whose favor the preliminary ruling has gone. In all cases, the moving party will be entitled to have the final opportunity, if desired, to address the court at the hearing. It is to be expected that the judicial officer will then rule from the bench.

Alternative #2 - Texas Eastern

(Time Frames for Ruling on Motions)

Motions filed by the parties shall be determined by the judicial officer as soon as practicable, and in any event within 30 days after filing of the response for non-dispositive motions. The court shall employ its best efforts to dispose of dispositive motions such as summary judgment within sixty days.

Alternative #3 - Montana

(Status Reports)

In any civil case where a motion has been pending for determination for a period in excess of sixty (60) days, the clerk of court shall, in writing, advise the judicial officer to whom the case is assigned of the pendency of the motion. If the judicial officer does not render his decision within thirty (30) days of the clerk's advisement, the judicial officer shall immediately issue a written report as to the status of the pending motion. A copy of the written report from the judicial officer shall be provided to the chief judge of the district.

COMMENTARY

The time frames for rulings on motions may vary from court to court. The plan for the District of Idaho, for instance, provides that all motions, whether dispositive or non-dispositive, should be decided within 60 days after all memoranda have been filed. An alternative may be to simply provide, as three courts did (the Eastern District of Pennsylvania, the Eastern District of New York, and the Southern District of New York), that "[m]otions shall be decided promptly to reduce unnecessary costs to the litigants."

With regard to status reports, New York Eastern's plan provides that the clerk's office shall contact chambers when a motion has been pending more than six months to find out the status of the motion. The clerk's office will continue to contact chambers at three month intervals until the motion has been decided.

The requirement of motions status reports raises sensitive issues regarding the relationship of the clerk of court to the judges and the relationship between the judges themselves. An alternative to subsection 3 above has been adopted in two districts:

A list of motions that have been heard but not ruled upon beyond the time limits set forth in this rule shall be published by the court once a month that shall include the case caption, the name of the judicial officer, and the type of motion pending. Discovery shall be suspended during the pendency of any such motions beyond the time limits set forth in this rule, and track deadlines may be adjusted accordingly at the request of a party where the interests of justice so require.

SECTION FOUR: ALTERNATIVE DISPUTE RESOLUTION PROGRAMS (ADR) AND ADDITIONAL DISPUTE RESOLUTION TECHNIQUES

Statutory Requirements: The Civil Justice Reform Act requires each court to consider incorporating into its plan "authorization to refer appropriate cases to alternative dispute resolution programs that (A) have been designated for use in a district court; or (B) the court may make available, including mediation, mini-trial, and summary jury trial." 28 U.S.C. § 473(a)(6). In another provision, 28 U.S.C. § 473(b)(4), the statute directs each court to consider adopting "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a non-binding conference conducted early in the litigation." This section sets out models for different types of court-annexed ADR programs and additional dispute resolution techniques from among those adopted by the early implementation districts. They have been divided into two sections here both for reasons of logic and conceptual distinction. The Early Neutral Evaluation, Mediation, and Arbitration programs of subsection I are generally perceived as adjuncts for intervention in traditional litigation processes conducted by non-judicial neutrals. This contrasts to the techniques of subsection II, (summary bench, jury and mini trials; settlement weeks) which may be less common, but represent more traditional court processes generally conducted by sitting judicial officers. The former programs therefore present greater planning and implementation challenges to the existing structure and culture of litigation management. They also require potentially larger investments of court staff and resources to construct adequate program monitoring, evaluation and administrative frameworks for their integration into existing practices and case management routines. For general considerations in designing ADR programs and techniques and definitions of these programs and techniques included in this Model Plan, see Attachment B.

I. Alternate Dispute Resolution Programs (ADR)

A. Early Neutral Evaluation (ENE)

Early Neutral Evaluation. Early in the case, the litigants meet with an outside neutral, who is expert in the subject matter of the case, to discuss all aspects of the case. ENE's major purpose is to reduce the cost and duration of litigation by enhancing communication, narrowing issues, structuring the discovery process, and facilitating settlement.

Alternative #1 - Ohio Northern

A. Eligible Cases. Any civil case may be referred to ENE.

B. Selection of Cases. A case may be selected for ENE:

1. By the Court at the case management conference (See Local Rule 8:1.2(c)); or
2. At any time:
   a. By the Court on its own motion;
   b. By the Court, on the motion of one of the parties; or
   c. By stipulation of all parties.

C. Administrative Procedure

1. Upon notice that a case has been referred to ENE, the parties may notify the ADR Administrator, not later than ten (10) days after the date of the written notice, of their agreed selection of an evaluator from the available neutrals on the Federal Court Panel. If the parties fail to notify the ADR Administrator of a selection within that period, the ADR Administrator shall select from the Federal Court Panel an evaluator who is qualified to deal with the subject matter of the lawsuit. The ADR Administrator shall make a preliminary determination that the Evaluator has no conflict of interest and that the Evaluator can serve.

2. After receiving notice of the parties' selection or after making the selection of the Evaluator, the ADR Administrator shall give or send to counsel for all parties (or to parties not yet represented by counsel) a Notice of Designation (which shall include the name and address of the Evaluator) and any other materials which may facilitate the process. The ADR Administrator shall send a copy of the Notice of Designation to the Evaluator. If, after Notice of Designation is given or sent, a new party is joined in the action, the ADR Administrator shall promptly send that new party a copy of the Notice of Designation and other materials.

3. Promptly after receiving the Notice of Designation, the Evaluator shall schedule the evaluation session. The Evaluator shall send written notice to all parties and to the ADR Administrator of the time and place of the session.

4. The evaluation session shall be held within thirty (30) days of the receipt by the Evaluator of Notice of Designation unless otherwise ordered by the Court for good cause shown. A request for postponement of a scheduled evaluation session must be presented to the ADR Administrator, not to the Evaluator.

D. Neutrality of Evaluator. If at any time, the Evaluator becomes aware of or a party raises an issue with respect to the Evaluator's neutrality because of some interest in the case or because of a relationship or affiliation with one of he parties, the Evaluator shall disclose the facts with respect to the issue to all of the parties. If a party requests that the Evaluator withdraw because of the facts so disclosed, the Evaluator may withdraw and request that the ADR Administrator appoint another evaluator. If the Evaluator determines that withdrawal is not warranted, the Evaluator may elect to continue. The objecting party may then request the ADR Administrator to remove the Evaluator. The ADR Administrator may remove the Evaluator and choose another from the Federal Court Panel. If the ADR Administrator decides that the objection is unwarranted, the evaluation session shall proceed as scheduled, or, if delay was necessary, as soon after the scheduled date as possible.

E. Written Submissions to the Evaluator

1. No later than ten (10) days before the evaluation session, each party shall submit to the Evaluator and serve on all other parties a written evaluation statement. The statement shall not exceed ten (10) pages and shall conform to local rule. The statement shall:
   a. Identify the person, in addition to counsel, who will attend the session as a representative of the party with decision making authority;
   b. Identify any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute to settlement; and
   c. Describe discovery which is contemplated.

   The statement may include any other information the party believes useful in preparing the Evaluator and other parties for a productive session. The statement may identify individuals connected to another person (including a representative of an insurer) whose presence would be helpful or necessary to make the session productive. The Evaluator shall determine whether any person so identified should be requested to attend and may make such request.
2. Written evaluation statements shall not be filed and shall not be shown to the Court.
3. In addition to submitting the written evaluation statement, the parties shall prepare to respond fully and candidly in a private caucus to questions by the Evaluator concerning:

a. The estimated costs, including legal fees, to that party, of litigating the case through trial;
b. Witnesses (both lay witnesses and experts);
c. Damages, including the method of computation and the proof to be offered; and
d. Plans for discovery.

F. Attendance at the Evaluation Conference

1. All parties shall be present, except that when a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of such party or insurance company, with full authority to act and to settle, shall attend. Willful failure of a party to attend the evaluation conference shall be reported by the Evaluator to the ADR Administrator for transmittal to the assigned Judge who may impose appropriate sanctions.
2. Each party shall be represented at the session by the attorney expected to be primarily responsible for handling the trial of the case.

G. Procedure at Evaluation Conferences

1. Each ENE conference shall be informal. The Evaluator shall conduct the process in order to help the parties to focus the issues and to work efficiently and expeditiously to make the case ready for trial or settlement.
2. At the initial conference, and at additional conferences as the Evaluator deems appropriate, the Evaluator shall:
   a. Permit each party to make a brief oral presentation of its position, without interruption, through counsel or otherwise;
   b. Help the parties to identify areas of agreement and, if feasible, enter stipulations;
   c. Determine whether the parties wish to negotiate, with or without the Evaluator's assistance, before evaluation of the case;
   d. Help the parties identify issues and assess the relative strengths and weaknesses of the parties' positions;
   e. Help the parties to agree on a plan for exchanging information and conducting discovery which will enable them to prepare expeditiously for the resolution of the case by trial, settlement, or dispositive motion;

f. Help the parties to assess litigation costs realistically;

g. Determine whether one or more additional conferences would assist in the settlement or case development process and, if so, schedule the conference and direct the parties to prepare and submit any additional written materials needed for the conference;

h. At the final conference (which may be the initial conference), give an evaluation of the strengths and weaknesses of each party's case and of the probable outcome if the case is tried, including, if feasible, the dollar value of each claim and counterclaim;

i. Advise the parties, if appropriate, about the availability of ADR processes that might assist in resolving the dispute; and

j. Report, promptly and in writing, to the ADR Administrator: the fact that the ENE process was completed, any agreements reached by the parties, and the Evaluator's recommendation, if any, as to future ADR processes that might assist in resolving the dispute.

3. The Evaluator may, subject to the requirements stated in this Local Rule:

a. Determine how to structure the evaluation conference;

b. Hold separate, private caucuses with any party or counsel but may not, without the consent of that party or counsel, disclose the contents of that discussion to any other party or counsel; and

c. Act as a mediator or otherwise assist in settlement negotiations either before or after presenting the evaluation called for in this Local Rule.

H. Confidentiality. The entire ENE process is confidential. The parties and the Evaluator shall not disclose information regarding the process, including settlement terms, to the Court or to third persons unless all parties otherwise agree. Parties, counsel, and evaluators may, however, respond to confidential inquiries or surveys by persons authorized by the Court to evaluate the E.N.E. program. Information provided in such inquiries or surveys shall remain confidential and shall not be identified with particular cases.

The ENE process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence.

The Evaluator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the ENE process.

Alternative #2 - Idaho

A. Early Neutral Evaluation. Upon the consent of all parties, any civil case, including those matters involving injunctive relief, may be referred to a court-authorized neutral evaluator who possesses expertise and experience in that particular subject area.

The evaluator will seek to identify the primary issues in dispute, clarify the areas of agreement, articulate a frank assessment of the relative strengths and weaknesses of the respective parties' positions, assess the value of the case, assist in the formulation of a cost-effective case plan, and explore the possibility of settlement.

Cases can be referred to neutral evaluation at any time. There shall be a $500 fee for the evaluation, to be split between the parties. The clerk's office will assist with the administrative aspects of this program.

The neutral evaluator shall conduct an informal, non-binding conference attended by all parties and their counsel, where the factual and legal basis for the case will be presented. In cases involving insurance carriers, company representatives with settlement authority shall attend. The Federal Rules of Evidence will not apply and there will be no direct or cross-examination of witnesses. Confidentiality will be maintained. The judge to whom the case had been assigned will have no access to any of the written material used or oral statements made during the course of the neutral evaluation. Any communication made in connection with or during early neutral evaluation sessions may not be disclosed to anyone who is not involved in the litigation, nor may any such communication be used for any purpose, including impeachment, in any pending or future proceeding. No transcripts or record of the proceedings will be allowed without the consent of all parties. The evaluation session should take place in a neutral setting or the courthouse.

Prior to the session, each party shall submit a written evaluation summary of no more than ten pages, together with any relevant documentation. At the evaluation session, each party, through counsel or otherwise, will be permitted to make an oral presentation of their position. The evaluation session should promote communication and

information sharing between the parties. The evaluators will have considerable discretion in structuring the sessions.

The evaluator's assessments and recommendations will be purely advisory. They will not be communicated to the Court and will have no binding effect on discovery, motion practice, or other aspects of trial preparation. The evaluator will also determine what, if any, follow-up measures will contribute to case development or settlement.

Alternative #3 - California Southern

A. Early Neutral Evaluation ("ENE") Conference: Within forty-five days of the filing of an answer, counsel and the parties shall appear before the assigned Judicial Officer supervising discovery for an ENE Conference; this appearance shall be made with authority to discuss and enter into settlement.

1. At the ENE Conference, the Judicial Officer and the parties shall discuss the claims and defenses and seek to settle the case.
2. The ENE Conference will be informal, off the record, privileged, and confidential.
3. Attendance may be excused only for good cause shown and by written order. Sanctions may be appropriate for an unexcused failure to attend.

COMMENTARY

Early neutral evaluation can help parties avoid substantial litigation costs by early settlement or by helping them focus on the issues early in the case. If the program uses attorneys as the neutrals, rather than judicial officers, it can also provide time savings to judicial officers. ENE may, however, require the attorney neutrals to spend a significant amount of time without compensation.

ENE Model I above provides detailed information about the ENE program in the Northern District of Ohio, including the procedures to be followed and the matters to be addressed in the ENE session. Model II, from the District of Idaho plan, provides fewer details but also covers those that are essential for understanding how the ENE program functions in that court. ENE Model III provides few details but is noteworthy because ENE is mandatory and because judicial officers rather than attorneys will serve as the ENE neutrals. Each judicial officer will establish his or her own procedures and requirements.

Both the Northern District of Ohio and Idaho plans include guidelines for the selection and referral of cases, preparation of written materials to be submitted by the parties, attendance at the ENE session, and confidentiality of the proceedings. The Northern District of Ohio plan provides additional helpful information about administrative procedures, including notification to parties and selection of the evaluator.

The Northern District of Ohio plan refers to the "ADR administrator." The court created this position to provide for full-time management of the extensive array of ADR programs offered by the court.

Several courts with multiple ADR programs have recently created such positions. Although more modest programs will make fewer demands on court staff, courts considering adoption of ENE should carefully determine the human and monetary resources needed to administer a sound program.

B. Mediation

Mediation. The litigants meet with an outside neutral, appointed by the court or selected by the litigants, for in-depth settlement discussions. Frequently the mediators are experts in the subject matter of the case, but they need not be. Mediators facilitate discussions among the litigants to assist them in identifying the underlying issues and in developing a creative and responsive settlement package, but do not render a decision. The purposes are to increase the chances of settlement, help the litigants devise better settlements, and improve relationships among the litigants.

Alternative #1 - Ohio Northern

A. Eligible Cases. Any civil case may be referred to mediation.

B. Selection of Cases

1. When Selected. A case may be selected for mediation:
   a. When the status of discovery is such that the parties are generally aware of the strengths and weaknesses of the case; or
   b. At any earlier time by agreement of the parties and with the approval of the Court.
2. How Selected. A case may be selected for mediation:
   a. By the Court on its own motion;
   b. By the Court, on motion of one of the parties; or
   c. By stipulation of all parties.

C. Objection to Mediation

1. For good cause, a party may object to the referral to mediation by the Court on its own motion by filing a written request for reconsideration within ten (10) days of the date of the Court's order.
2. Mediation processes shall be stayed pending decision on the request for reconsideration, unless otherwise ordered by the court.

D. Arbitration. If all parties advise the court that they would prefer court-annexed arbitration to mediation, the court may order the case to arbitration under these local rules.

E. Private ADR. If all parties advise the court that they would prefer to use a private ADR process (including private arbitration or mini-trial), the court may permit them to do so at the expense of the parties, subject to:

1. The submission to the court of an agreement, executed by the parties, providing for the conduct of the ADR process;
2. The filing with the court, within ten (10) days of the completion of the ADR process, of a written report, signed by the neutral, or by the parties if no neutral was used.

F. Administrative Procedure

1. When a case is referred to mediation, the ADR Administrator shall promptly notify the parties in writing and shall include the names of three (3) proposed mediators taken from the Federal Court Panel. Each party shall then rank the mediators in order of preference and shall, within seven (7) days of the date of the written notice, return the ranked list to the ADR Administrator who shall:
   a. Choose one party's list at random and "strike" the least preferred name on that list from consideration;
   b. Go to the other party's list and "strike" the least preferred remaining name on that list from consideration; and
   c. Select the remaining name as the Mediator.
2. In the event of multiple parties not united in interest, the ADR Administrator shall add the name of one proposed mediator for each such additional party, and shall process the returned lists in the manner provided in section 1. above.
3. The ADR Administrator, after conferring with the selected Mediator concerning potential conflicts of interest and scheduling, shall give or send written notice to the parties and the Mediator advising them as to:
   a. The identity of the Mediator;
   b. The date and time of the mediation conference, which shall be not more than thirty (30) days from the date of the written notice; and
   c. The place of the mediation conference.
4. Nothing in this section shall limit the right of the parties, with

the consent of the court, to select a person of their own choosing to act as a mediator hereunder.

G. Neutrality of Mediator. If at any time, the Mediator becomes aware of or a party raises an issue with respect to the Mediator's neutrality because of some interest in the case or because of a relationship or affiliation with one of the parties, the Mediator shall disclose the facts with respect to the issue to all of the parties. If a party requests that the Mediator withdraw because of the facts so disclosed, the Mediator may withdraw and request that the ADR Administrator appoint another mediator. If the Mediator determines that withdrawal is not warranted, the Mediator may elect to continue. The objecting party may then request the ADR Administrator to remove the Mediator. The ADR Administrator may remove the Mediator and choose another from the Federal Court Panel. If the ADR Administrator decides that the objection is unwarranted, the mediation conference shall proceed as scheduled, or, if delay was necessary, as soon after the scheduled date as possible.

H. Written Submissions to Mediator

1. At least ten (10) days before the mediation conference, the parties shall submit to the Mediator:
   a. Copies of relevant pleadings and motions;
   b. A short memorandum stating the legal and factual positions of each party respecting the issues in dispute; and
   c. Such other material as each party believes would be beneficial to the Mediator.
2. Upon reviewing such material, the Mediator may, at his or her own discretion or on the motion of a party, schedule a preliminary meeting with counsel.

I. Attendance at Mediation Conference. The attorney who is primarily responsible for each party's case shall personally attend the mediation conference and shall be prepared and authorized to discuss all relevant issues, including settlement. The parties shall also be present, except that when a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of such party or insurance company, with full authority to settle, shall attend. Wilful failure of a party to attend the mediation conference shall be reported by the Mediator to the ADR Administrator for transmittal to the assigned Judge who may impose appropriate sanctions.

J. Procedure at Mediation Conference

1. The mediation conference, and such additional conferences as the Mediator deems appropriate, shall be informal. The Mediator shall conduct the process in order to assist the parties in arriving at a settlement of all or some of the issues involved in the case.
2. The Mediator may hold separate, private caucuses with any party or counsel but may not, without the consent of that party or counsel, disclose the contents of that discussion to any other party or counsel.
3. If the parties have failed, after reasonable efforts, to develop settlement terms, or if the parties request, the Mediator may submit to the parties a final settlement proposal which the Mediator believes to be fair. The parties will carefully consider such proposal and, at the request of the Mediator, will discuss the proposal with him or her. The Mediator may comment on questions of law at any appropriate time.
4. The Mediator may conclude the process when:
   a. A settlement is reached; or
   b. The Mediator concludes, and informs the parties, that further efforts would not be useful.
5. The Mediator shall report the results of the mediation to the ADR Administrator.
   a. If a settlement agreement is reached, the Mediator, or one of the parties at the Mediator's request, shall prepare a written entry reflecting the settlement agreement, which entry shall be signed by the parties and filed with the ADR Administrator for approval by the court.
   b. If a settlement agreement is not reached, the Mediator shall report in writing to the ADR Administrator that mediation was held, any agreements reached by the future processing of the case.

K. Confidentiality.The entire mediation process is confidential. The parties and the Mediator may not disclose information regarding the process, including settlement terms, to the court or to third persons unless all parties otherwise agree. Parties, counsel, and mediators may, however, respond to confidential inquiries or surveys by persons authorized by the court to evaluate the mediation program. Information provided in such inquiries or surveys shall remain confidential and shall not be identified with particular cases.

The mediation process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. The Mediator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the mediation process.

Alternative #2 - Montana

A. Mediation Services. The court shall establish and maintain a list of court-approved mediation masters available to assist a party in formally mediating civil disputes. Applications of individuals seeking placement upon the list shall be received by the Clerk of Court and presented to the Article III judges on active service for review. Upon approval by a majority of the Article Ill judges on active status, the applicant shall be placed upon the list. A current listing of court-approved mediation masters shall be maintained by the Clerk of Court.

Alternative #3 - Massachusetts

A. Mediation.

1. The judicial officer may grant mediation upon the agreement of all parties, either by written motion or their oral motion in court entered upon the record.
2. A mediator may be selected and assigned to the case who shall be qualified and knowledgeable about the subject matter of the dispute, but have no specific knowledge about the case. The mediator shall be compensated as agreed by the parties, subject to the approval of the judicial officer.
3. The mediator shall meet, either jointly or separately, with each party and counsel for each party and shall take any other steps that may appear appropriate in order to assist the parties to resolve the impasse or controversy.
4. The mediation shall be terminated if, after the seven (7) day period immediately following the appointment of the mediator, any party, or the mediator, determines that mediation has failed or no longer wishes to participate in mediation.
5. If an agreement is reached between the parties on any issues, the mediator shall make appropriate note of that agreement and refer the parties to the judicial officer for entry of a court order.

6. Mediation proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the mediation by any participant, mediator, or any other person present at the mediation shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

Alternative #4 - Virgin Islands

A. Certification of Mediators. For certification, a mediator:

1. Must complete a minimum of 20 hours in a training program approved by the District Court; and
2. Must observe a minimum of four district or other mediation conferences conducted by a certified mediator and conduct four district court mediation conferences under the supervision and observation of a Court certified mediator;
3. Standing: A mediator must also meet one of the following minimal requirements:
   a. The mediator may be a member in good standing of the Virgin Islands Bar with at least five years of Virgin Islands practice, and be an active member of the Virgin Islands Bar within one year of application for certification; or
   b. Paragraph a. notwithstanding, the chief judge, upon written request setting forth reasonable and sufficient grounds, may certify as a district court mediator a retired judge who was a member of the bar in the state in which the judge presided. The judge must have been a member in good standing of the bar of another state for at least five years immediately preceding the year certification is sought and must meet the training requirements of subsection A. 1.; or
   c. The mediator may be the holder of a master's degree and be a member in good standing in his or her professional field with at least five years of practice in the Virgin Islands; and
   d. Notwithstanding the foregoing procedures which are the preferred method of certification, the Court may, in the absence of an available pool of certified mediators, appoint as a mediator a qualified person acceptable to the Court and the parties. Also, a person certified as a

mediator by the American Arbitration Association, or any other national organization approved by the District Court shall be deemed to qualify under this section as a District Court Mediator.

COMMENTARY

Mediation can provide an opportunity for parties to discuss in a nonadversarial way the issues between the parties. Mediation has been considered especially useful for cases where parties want to preserve ongoing business or personal relationships.

Alternative #1 above provides a detailed description of the mediation program in the Northern District of Ohio and specifies the procedures and duties of the participants. In addition to providing the parties an opportunity to opt out of the program, it also provides that the parties may request court annexed arbitration instead of mediation.

Alternative #2 simply provides that the court will maintain a panel of neutrals selected after application to the Clerk of Court. This is a more informal program and leaves the procedures and deadlines to the participants.

The rules of Alternative #3 construct mediation as a settlement conference. Participation and withdrawal is informal. It also provides for compensation to the mediator "as agreed by the parties." This may reduce the prohibitive effect of a fee.

Alternative #4 is an excerpt from the mediation program for the District of the Virgin Islands which specifically sets forth the requirements for certification as a mediator. A court may wish to add such a section to its mediation rules. Note that this plan provides for non-lawyer mediators, due to the unique caseload of this federal court, which also handles some territorial cases.

There is no deadline for selection of cases or participation in the program in any of these models. A court may wish to specify a deadline for participation in or referral to the program.

C. Arbitration

Arbitration provides the parties an advisory adjudication of their case. The litigants briefly present their case to an outside neutral or panel of neutrals, who then give the litigants an opinion of the judgment value of the case. The presentations of each side may be quite formal, but generally arbitration sessions are more informal than a trial and the rules of evidence are suspended.

Alternative #1 - Idaho

A. Arbitration. Any contract or tort case where the amount in controversy is less than $150,000, excluding punitive damages, interest and costs, is eligible for referral to arbitration at any point during the litigation upon the consent of all party litigants. Parties will be notified of this option upon the filing of the initial complaint and answer. The eligibility for

this form of ADR will be noted in the scheduling order. Cases involving constitutional rights, civil rights, elective franchise or substantial non-monetary relief generally will not be considered for arbitration, unless requested by all parties.

Arbitrators will conduct a hearing under relaxed rules of evidence and render a non-binding, advisory opinion on the merits of the case, and where appropriate, determine an award. A party dissatisfied with the arbitration decision will have 30 days to demand a trial de novo, which would automatically return the case to the regular docket. If such a demand is not made within the prescribed time limit, the arbitration award becomes a non-appealable judgement of the Court. The content of the arbitrator's decision and award shall be sealed and not be known until the district court action is ultimately terminated.

The arbitration hearing shall be conducted informally. The Federal Rules of Evidence shall be a guide, but shall not be binding in all regards. Presentation of evidence shall be kept to a minimum. It is contemplated that cases shall be presented primarily through the written statements and oral arguments of counsel. At least ten days prior to the hearing, a summary or brief of factual and legal positions, together with relevant documents and materials supporting the respective claims, will be provided to the arbitrator and other parties. Individual litigants and representatives of corporate parties shall attend unless otherwise excused. No recording or transcription of the proceedings will be made without the knowledge and consent of the parties. The arbitrator can use his or her own discretion as to the format, rules and procedures necessary for the fair and efficient conduct of the hearing. Arbitration hearings can take place at any appropriate site designated by the arbitrator that is convenient to the parties and witnesses. With sufficient notice, courthouse facilities may be used depending upon availability.

The arbitrators will consist of a select group of federal practitioners with subject matter expertise in contract and tort cases. A single arbitrator or a panel of three will be selected by the parties from an authorized list provided by the Court. Arbitrators shall be compensated at a rate of $100 per hour, not to exceed $800 per case. The parties will be solely responsible for payment of the arbitrator's fees.

Alternative #2 - Pennsylvania Eastern

A. Certification of Arbitrators

1. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.
2. Any individual may be certified to serve as an arbitrator if: (1) he/she has been for at least five years a member of the bar of the highest court of a state or the District of Columbia; (2) he/she is admitted to practice before this court; and (3) he/she is determined by the Chief Judge to be competent to perform the duties of an arbitrator.
3. Any member of the bar possessing the qualifications set forth in subsection 2. desiring to become an arbitrator, shall complete the application form obtainable in the office of the Clerk and when completed shall file it with the Clerk of Court who shall forward it to the Chief Judge of the Court for his determination as to whether the applicant should be certified.
4. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as an arbitrator.
5. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.
6. Any member of the Bar certified as an arbitrator may be removed from the list of certified arbitrators for cause by a majority of the judges of this Court.

B. Compensation and Expenses of Arbitrators. The arbitrators shall be compensated $100 each for services in each case assigned for arbitration. Whenever the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated $100 for services. In the event that the arbitration hearing is protracted, the court will entertain a petition for additional compensation. The fees shall be paid by or pursuant to the order of the Director of the Administrative Office of the United States Courts. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

C. Case Eligible for Compulsory Arbitration.

1. The Clerk of Court shall, as to all cases filed on or after May 18, 1989, designate and process for compulsory arbitration all civil cases (including adversary proceedings in bankruptcy,

excluding, however (a) social security cases, (b) cases in which a prisoner is a party, (c) cases alleging a violation of a right secured by the U.S. Constitution, and (d) actions in which jurisdiction is based in whole or in part on 28 U.S.C. § 1343 wherein money damages only are being sought in an amount not in excess of $100,000.00 exclusive of interest and costs. All cases filed prior to May 18, 1989, which were designated by the Clerk of Court for compulsory arbitration shall continue to be processed pursuant to this Rule.

2. The parties may by written stipulation agree that the Clerk of Court shall designate and process for arbitration pursuant to this rule any civil case (including adversary proceedings in bankruptcy) wherein money damages only are being sought in an amount in excess of $100,000.00, exclusive of interest and costs, unless:

3. For purposes of this rule only, damages shall be presumed to be not in excess of $100,000.00, exclusive of interest and costs, unless:

   a. Counsel for plaintiff, at the time of filing the complaint, or in the event of the removal of a case from state court or transfer of a case from another district to this court, within ten (10) days of the docketing of the case in this district filed a certification that the damages sought exceed $100,000.00, exclusive of interest and costs; or

   b. Counsel for a defendant, at the time of filing a counterclaim or cross-claim filed a certification with the court that the damages sought by the counterclaim or cross-claim exceed $100,000.00, exclusive of interest and costs.

   c. The judge to whom the case has been assigned may "sua sponte" or upon motion filed by a party prior to the appointment of the arbitrators to hear the case pursuant to section 4(c), order the case exempted from arbitration upon a finding that the objectives of an arbitration trial (i.e., providing litigants with a speedier and less expensive alternative to the traditional courtroom trial) would not be realized because (1) the cases involve complex legal issues; (2) because legal issues predominate over factual issues; or (3) for other good cause.

D. Scheduling Arbitration Trial.

1. After an answer is filed in a case determined eligible for arbitration, the arbitration clerk shall send a notice to counsel

setting forth the date and time for the arbitration trial. The date of the arbitration trial set forth in the notice shall be a date about one hundred twenty (120) days (5 months for cases filed prior to May 18, 1989) from the date the answer was filed. The notice shall also advise counsel that they may agree to an earlier date for the arbitration trial provided the arbitration clerk is notified within thirty (30) days of the date of the notice. The notice shall also advise counsel that they have ninety (90) days (120 days for cases filed prior to May 18, 1989) from the date the answer was filed to complete discovery unless the judge to whom the case has been assigned orders a shorter or longer period for discovery. In the event a third party has been brought into the action, this notice shall not be sent until an answer has been filed by the third party.

2. The arbitration trial shall be held before a panel of three arbitrators, one of whom shall be designated as chairperson of the panel unless the parties agree to have the hearing before a single arbitrator. The arbitration panel shall be chosen through a random selection process by the clerk of the court from among the lawyers who have been certified as arbitrators. The clerk shall endeavor to assure insofar as reasonably practicable that each panel of three arbitrators shall consist of one arbitrator whose practice is primarily representing plaintiffs, one whose practice is primarily representing defendants, and a third panel member whose practice does not fit either category. The arbitration panel shall be scheduled to hear not more than four (4) cases on a date or dates several months in advance.

3. The judge to whom the case has been assigned shall at least thirty (30) days prior to the date scheduled for the arbitration trial sign an order setting forth the date and time of the arbitration trial and the names of the arbitrators designated to hear the case. In the event that a party has filed a motion to dismiss the complaint, a motion for summary judgment, a motion for judgment on the pleadings, or a motion to join necessary parties, the judge shall not sign the order until the court has ruled on the motion, but the filing of such a motion on or after the date of said order shall not stay the arbitration unless the judge so orders.

4. Upon entry of the order designating the arbitrators, the arbitration clerk shall send to each arbitrator a copy of all the pleadings, including the order designating the arbitrators, and the guidelines for arbitrators.

5. Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. § 144, and shall disqualify themselves in any action in which they would be required under Title 28, U.S.C. § 455, to disqualify themselves if they were a justice, judge, or magistrate.
6. The arbitrators designated to hear the case shall not discuss settlement with the parties or their counsel, or participate in any settlement discussions concerning the case which has been assigned to them.

E. The Arbitration Trial

1. The trial before the arbitrators shall take place on the date and at the time set forth in the order of the Court. The trial shall take place in the United States courthouse, in a room assigned by the arbitration clerk. The arbitrators are authorized to change the date and time of the trial provided the trial is commenced within thirty (30) days of the trial date set forth in the Court's order. Any continuance beyond this thirty (30) day period must be approved by the judge to whom the case has been assigned. The arbitration clerk must be notified immediately of any continuance.
2. Counsel for the parties shall report settlement of the case to the arbitration clerk and all members of the arbitration panel assigned to the case.
3. The trial before the arbitrators may proceed in the absence of any party who, after notice, fails to be present. In the event, however, that a party fails to participate in the trial in a meaningful manner, the Court may impose appropriate sanctions, including, but not limited to the striking of any demand for a trial de novo filed by that party.
4. Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at the trial before the arbitrators. Testimony at the trial shall be under oath or affirmation.
5. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the trial and the arbitrators shall receive such exhibits into evidence without formal proof unless counsel has been notified at least five (5) days prior to the trial that the adverse party intends to raise an issue concerning the

authenticity of the exhibit. The arbitrators may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered prior to trial to the adverse party, as provided herein.

6. A party may have a recording and transcript made of the arbitration hearing at the party's expense.

F. Arbitration Award and Judgment. The arbitration award shall be filed with the court promptly after the trial is concluded and shall be entered as the judgment of the court after the thirty (30) day time period for requesting a trial de novo has expired, unless a party has demanded a trial de novo, as hereinafter provided. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal. In a case involving multiple claims and parties, any segregable part of an arbitration award concerning which a trial de novo has not been demanded by the aggrieved party before the expiration of the thirty (30) day time period provided for filing a demand for trial de novo shall become part of the final judgment with the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

G. Trial De Novo

1. Within thirty (30) days after the arbitration award is entered on the docket, any party may demand a trial de novo in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties. Withdrawal of a demand for a trial de novo shall not reinstate the arbitrators' award and the case shall proceed as if it had not been arbitrated.

2. Upon demand for a trial de novo and the payment to the Clerk required by paragraph 5, infra, the action shall be placed on the trial calendar of the court and treated for all purposes as if it had not been referred to arbitration. In the event it appears to the judge to whom the case was assigned that the case will not be reached for de novo trial within ninety (90) days of the filing of the demand for trial de novo, the judge shall request the Chief Judge to reassign the case to a judge whose trial calendar will make it possible for the case to be tried de novo within ninety (90) days of the filing of the demand for trial de novo. Any right of trial by jury which a party would otherwise have shall be preserved inviolate.

3. At the trial de novo, the court shall not admit evidence that there had been an arbitration trial, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence.
4. To make certain that the arbitrators' award is not considered by the Court or jury either before, during or after the trial de novo, the arbitration clerk shall, upon the filing of the arbitration award, enter onto the docket only the date and "arbitration award filed" and nothing more, and shall retain the arbitrators' award in a separate file in the Clerk's office. In the event no demand for trial de novo is filed within the designated time period, the arbitration clerk shall enter the award on the docket and place it in the case file.
5. Upon making a demand for trial de novo, the moving party shall, unless permitted to proceed in forma pauperis, deposit with the Clerk of Court a sum equal to the arbitration fees of $100.00 for each arbitrator as provided in Section B above. The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. In the event the party demanding a trial de novo does not obtain a judgment more favorable than the arbitration award, the sum so deposited shall be paid to the Treasury of the United States.

Alternative #3 - Ohio Northern

A. Assessment of Costs

1. The party requesting a trial de novo shall deposit with the ADR Administrator a sum equal to the Arbitrator(s)' fees as advance payment for such costs, except that this requirement does not apply to parties proceeding in forma pauperis or to the United States, its officers or agencies.
2. Any sum deposited under section 2 above shall be returned to the party demanding trial de novo if:
   a. The party obtains a final judgment more favorable than the arbitration award; or
   b. The assigned Judge determines that the demand for trial de novo was made for good cause.
3. Any sum deposited as provided in section 1 above and not returned to the party as provided in section 2 above shall be taxed as costs

of the arbitration and paid to the Treasury of the United States.

4. In any trial de novo, the assigned Judge may assess costs of that trial, as provided in 28 U.S.C. § 1920, against the party who demanded trial de novo if:
   a. That party fails to obtain a judgment, exclusive of interest and costs, which is substantially more favorable to that party than the arbitration award; and
   b. The assigned Judge determines that the party's conduct in seeking a trial de novo was in bad faith.

   For the purpose of this section 4, a verdict may be considered substantially more favorable if it is more than 10 percent (10%) better for the party than the arbitration award. This section 4 does not apply to any party in cases involving the United States or one of its agencies as a party.
5. Except as provided in this local rule, no penalty shall be assessed against any party for demanding a trial de novo.

COMMENTARY

Arbitration may be either mandatory or voluntary. When arbitration is mandatory, with provisions for opting out for cause, it enables parties to benefit from time and cost savings without concern for showing signs of "weakness." Mandatory referral also ensures that one side of the litigation is not harmed by the other side's use of refusal as a delaying tactic. Courts can also benefit from mandatory referral because it ensures a sufficient number of cases for the program to reduce a court's caseload burden.

Mandatory referral of cases, however, coupled with disincentives for rejecting awards, may interfere with the right to trial. Arbitration programs can also be labor intensive for a clerk's office.

Finally, it is not clear whether courts other than the ten authorized by Congress may adopt mandatory arbitration. The Judiciary has asked Congress to extend to all courts the option of adopting mandatory arbitration. The matter is pending.

In a summary style, Alternative #1 identifies cases for referral to arbitration and provides general rules and duties of the participants. It also specifies hourly compensation for arbitrators and limits such compensation. The hearing is informal.

Alternative #2 gives a detailed description of the procedures, responsibilities of the participants, and cases eligible for arbitration. The Federal Rules of Evidence will serve as a guide. Arbitrator compensation is a one-time fee with provisions for additional fees and reimbursement for expenses where warranted. This model also provides strict referral deadlines and arbitration trial scheduling. Parties will proceed before a panel of arbitrators or, if agreed upon, a single arbitrator.

Alternative #3 provides an excerpt from the plan of the Northern District of Ohio. This arbitration program, which is voluntary, provides for costs to be imposed on parties that reject the arbitration award and do not do better at trial.

II. Additional Dispute Resolution Techniques

A. Non-binding Summary Jury Trials

Because of the substantial court and litigant resources consumed, this procedure is most suitable for cases poised for lengthy trial. The litigants briefly present their case to a jury that has been randomly selected from the court's jury pool. The jury returns an advisory verdict on liability and damages, which is used as a spur for settlement discussions. Lawyers are generally permitted to question the jurors about their decision.

Alternative #1 - Massachusetts

A. The judicial officer may convene a summary jury trial:

1. With the agreement of all parties, either by written motion or their oral motion in court entered upon the record, or
2. Upon the judicial officer's determination that a summary jury trial would be appropriate, even in the absence of the agreement of all the parties.

B. There shall be six (6) jurors on the panel, unless the parties agree otherwise.

C. The panel may issue an advisory opinion regarding:

1. The respective liability of the parties, or
2. The damages of the parties, or
3. Both the respective liability and damages of the parties.

Unless the parties agree otherwise, the advisory opinion is not binding and it shall not be appealable.

D. Neither the panel's advisory opinion nor its verdict, nor the presentations of the parties, shall be admissible as evidence in any subsequent proceeding, unless otherwise admissible under the rules of evidence. Additionally, the occurrence of the summary jury trial shall not be admissible.

Alternative #2 - Ohio Northern

A. Eligible Cases. Any civil case triable to a jury may be assigned for summary jury trial.

B. Selection of Cases. A case may be selected for summary jury trial:

1. By the Court at the Case Management Conference; or
2. At any time:
   a. By the Court on its own motion;
   b. By the Court, on the motion of one of the parties; or
   3. By stipulation of all parties.

C. Procedural Considerations. Summary jury trial is a flexible ADR process. The procedures to be followed should be determined in advance by the assigned Judge in light of the circumstances of the case. The following matters should be considered by the assigned Judge and counsel in structuring a summary jury trial.

1. Scheduling. Ordinarily a case should be set for summary jury trial when discovery is substantially completed and conventional pretrial negotiations have failed to achieve settlement. In some cases, settlement prospects may be advanced by setting the case for an early summary jury trial. To facilitate an early summary jury trial, limited and expedited discovery should be obtained to accommodate earlier settlement potential. The summary jury trial should usually precede the trial by approximately sixth (60) days.
2. Presiding Judge. The summary jury shall be conducted by the United States District Judge or United States Magistrate Judge to whom the case is assigned or referred.
3. Submission of Written Materials. It is generally advantageous to have various materials submitted to the Court before the summary jury trial begins. These could include a statement of the case, stipulations, exhibits, and proposed jury instructions.
4. Attendance. Each individual who is a party should attend the summary jury trial in person. When a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of the party or insurance company, with full authority to settle, should attend.
5. Size of Jury Panel. Usually the jury shall consist of six (6) jurors. To accommodate case concerns, the size of the jury panel may vary. Because the summary jury trial is usually concluded in a day or less, the judge may choose to use the challenged or unused panel members as a second jury. This procedure can provide the Court and counsel with additional juror reaction.

6. Voir Dire. Parties should ordinarily be permitted some limited voir dire. Whether challenges are to be allowed ought to be determined in advance.
7. Opening Statements. It is helpful if each party has a chance to make a brief opening statement to help put the case into perspective. It may be possible to combine voir dire and the opening statement into one procedure, and fifteen (15) minutes may be sufficient time for each party.
8. Transcript or Recording A party may cause a transcript or recording to be made of the proceedings at the party's expense, but no transcript of the proceedings should be submitted in evidence at any subsequent trial unless the evidence would be otherwise admissible under the Federal Rules of Evidence.
9. Case Presentations. As this is not a full trial, it is expected that counsel will present a condensed narrative summarization of the entire case consisting of an amalgamation of an opening statement, evidentiary presentations, and final arguments. In this presentation, counsel may present exhibits, read excerpts from exhibits, reports and depositions, all of which evidentiary submissions should be subject to the approval of the presiding Judge by addressing motions in limine at a reasonable time in advance of the scheduled summary jury trial. This advanced consideration permits the summary jury trial proceedings to proceed uninterruptedly without objections. Generally, live witnesses should not be permitted, although an exception may be made by the assigned Judge. An attorney certifies that offering any such summary of testimony or evidence is based upon a good faith belief and a reasonable investigation that the testimony or evidence would be available and admissible at trial.
10. Jury Instructions. Jury instructions should be given. They will have to be adapted to reflect the nature of the proceeding.
11. Jury Deliberations. Jury deliberations should be limited in time. Jurors should be encouraged to reach a consensus verdict. If that is not possible, separate verdicts may give the parties a sense of how jurors view the case.
12. De-briefing the Jurors. After the verdict, the presiding Judge should initiate and encourage a discussion of the case by the parties and the jurors.
13. Settlement Negotiations. Within a short time after the summary jury trial, the presiding Judge and the parties should meet to see whether the matter can be compromised. A sufficient period between the end of the summary jury trial and the meeting is necessary to allow the parties to evaluate matters, but the

assigned Judge should exercise care not to allow too much time to elapse.

14. Trial. If the case does not settle as the result of the summary jury trial, it should proceed to trial on the scheduled date.

15. Limitation on Admission of Evidence. The assigned Judge shall not admit at a subsequent trial any evidence that there has been a summary jury trial, the nature or amount of any verdict, or any other, matter concerning the conduct of the summary jury trial or negotiations related to it, unless:
    a. The evidence would otherwise be admissible under the Federal Rules of Evidence; or
    b. The parties have otherwise stipulated.

COMMENTARY

Summary jury trials provide litigants their "day in court" and the benefit of a lay jury's perspective. This procedure also makes attorneys and parties take a hard look at their evidence and can help them narrow the issues and prepare for a better trial should settlement not occur. When used for cases that would have had a lengthy trial and when settlement is reached, both the parties and the court realize substantial savings of cost and time.

Where summary jury trial is mandatory, however, parties have expressed resentment at having to prepare for both the summary trial and the regular trial, with attendant concerns about work product privilege. Questions have also arisen about whether the judge who presides over the summary jury trial can be impartial during the traditional trial and whether the court should expend such substantial resources on what is essentially a settlement procedure. Finally, summary jury trials may over-emphasize the skill of attorneys because the decision is based on attorney performance and not witnesses.

Alternative #1 is brief, authorizing a summary jury trial and providing for the panel of jurors to issue an advisory opinion regarding all or bifurcated issues. While not specifically stating time limits for trial procedures, Alternative #2 addresses and emphasizes a need for brevity in each component of the trial.

B. Non-binding Summary Bench Trials (SBT)

The litigants briefly present their case to a judicial officer, who returns an advisory verdict. As with summary jury trials, the purpose of a summary bench trial is to prompt settlement discussions in cases that would require a lengthy trial.

Ohio Northern

A. Eligible Cases. Any case not triable to a jury may be assigned for a summary bench trial. A summary bench trial is a court-annexed pretrial procedure intended to facilitate settlement consisting of a summarized presentation of a case to a Judicial Officer whose decision and subsequent factual and legal analysis serves as an aid to settlement negotiations.

B. Selection of Cases. A case may be selected for summary bench trial:

1. By the Court at the Case Management Conference; or
2. At any time:
   a. By the Court on its own motion;
   b. By the Court, on the motion of one of the parties; or
   c. By stipulation of all parties.

C. Procedural Considerations

1. Presiding Judge. The summary bench trial shall be conducted by a Judicial Officer other than the Judicial Officer who will ultimately preside at the binding trial.
2. Proposed Findings of Fact and Conclusions of Law. The parties shall submit proposed findings of fact and conclusions of law in advance of the summary bench trial.
3. Procedural Considerations. Where appropriate, the same procedural considerations applicable to summary jury trials may be adapted to summary bench trials to reflect the nature of the proceedings.

COMMENTARY

Summary bench trials, like summary jury trials, provide litigants their "day in court" and makes attorneys and parties take a hard look at their evidence, narrow the issues, and prepare for a better trial should settlement not occur. As with summary jury trials, if this procedure is used for cases that would have had a lengthy trial and if settlement is reached, both the parties and the court can realize substantial savings of cost and time.

Parties may, however, feel resentment at having to prepare for both the summary trial and the regular trial. Out of concern about bias, they may also want to have another judge try the case if it goes to a traditional trial. Courts should also consider the substantial resources that may be expended on what is essentially a settlement procedure.

Only one alternative is presented above. It provides substantial detail about the procedures to be followed in the Northern District of Ohio.

C. Non-binding Mini-trials

The attorneys in commercial litigation each present their best case to high-level officers of all the party companies and, in some cases, to a neutral advisor. After the presentation, the parties meet to discuss settlement. The purpose is to increase the corporate officers' understanding of the case and thus to increase the chances of settlement.

Massachusetts

A. Mini-trial

1. The judicial officer may convene a mini-trial upon the agreement of all parties, either by written motion or their oral motion in open court entered upon the record.
2. Each party, with or without the assistance of counsel, shall present his or her position before:
   a. Selected representatives for each party, or
   b. An impartial third party, or
   c. both selected representatives for each party and an impartial third party.
3. An impartial third party may issue an advisory opinion regarding the merits of the case.
4. Unless the parties agree otherwise, the advisory opinion of the impartial third party is not binding.
5. The impartial third party's advisory opinion is not appealable.
6. Neither the advisory opinion of an impartial third party nor the representations of the parties shall be admissible as evidence in any subsequent proceeding, unless otherwise admissible under the rules of evidence. Additionally, the occurrence of the mini-trial shall not be admissible.

COMMENTARY

The mini-trial allows high-level executives who are paying for the litigation to assess for themselves the strengths and weaknesses of their and their opponents' cases. The program used in the District of Massachusetts is presented above.

D. Settlement Weeks

The court designates a specific time period during which many cases are referred to settlement discussions with neutral attorneys. Cases are generally referred after discovery has been completed. The purpose of settlement week is to increase the chances of settlement and to prompt earlier settlements in cases that are ready for trial.

Alternative #1 - West Virginia Northern

"Settlement Week Conferences" should be scheduled at regular intervals and not less than three times in a calendar year.

All civil cases in which discovery is completed, except for Type I civil cases, and those cases exempted pursuant to the provisions hereof, will be referred to a "Settlement Week Conference." A case will be exempted from "Settlement Week Conferences" if the parties, with the consent of the court, agreed to some other form of alternative dispute resolution, such as arbitration, summary jury trial, mini-trial, or mediation with a magistrate judge or settlement judge. A case will also be exempt if the court finds there would be no beneficial purposes served by requiring the case to be submitted to a "Settlement Week Conference."

At any time after service of an answer, the parties may request that the case be referred for early neutral evaluation, by an evaluator agreed upon by the parties, or to some other agreed upon method for alternative dispute resolution. For the purpose of this provision, contract negotiations of a labor contract are considered an alternative form of dispute resolution. If the request is granted by the court, the running of the discovery time periods established for the case shall be tolled until the early neutral evaluation is completed, or it is reported to the court that the alternate dispute resolution has been unsuccessful, or the court determines that one or more of the parties are no longer participating in the alternative process in good faith.

"Settlement Week Conferences" should be conducted pursuant to the rules and procedures developed for the "Settlement Weeks" currently used in this district.

For the cases exempted from a "Settlement Week" because the court has determined there would be no beneficial purpose served by such a referral, and for those cases not settled as a request of the "Settlement Week Conference," the court should set for each such case a date for the submission of a pretrial order/or conference and a "firm" date of trial.

Alternative #2 - Idaho

A. Settlement Weeks. Depending upon the volume of appropriate cases, the Court will periodically schedule a settlement week. The timing, location, and frequency of settlement weeks will be at the discretion of the Court. The selection of cases will be at the discretion of the Court or upon the request of one or more of the litigants. The cases considered most appropriate are those in which a significant amount of discovery has been completed and in which there are no dispositive motions pending.

Neutral attorneys who have received specialized training in the state settlement week program and who practice in and are familiar with federal court actions will be randomly assigned cases. The neutral attorney will serve as a settle-

ment master or mediator. This third party neutral does not decide the case or adjudicate the dispute, but rather, participates in the discussions that may improve the resolution of the parties' differences.

The costs of the required training sessions, postage, copying fees and administration will be borne by the Court. The court will also attempt to provide the conference rooms, jury rooms, or courtrooms that are available. Settlement masters shall either serve on a volunteer basis or be paid a nominal fee, such as $100 per case, to be split among the respective parties. It is also suggested that the Administrative Office appropriate funds for these kinds of ADR programs.

COMMENTARY

Settlement weeks can provide parties an opportunity for settlement discussions without either side having shown "weakness" by initiating such discussions themselves. A settlement week program also permits judges to focus on their trial obligations while attorney neutrals mediate the cases. This procedure may be especially useful for courts that have a heavy criminal caseload and consequently cannot schedule civil trials.

Referral to settlement week generally occurs after discovery has been completed, so settlement is reached, if at all, only after significant litigation expenditures have been incurred. Also, to ensure maximum success, the court should provide follow-up work by either the mediator or a judicial officer.

Two alternatives are presented above. The first, from the Northern District of West Virginia, is a mandatory program held three times a year. In contrast, the second plan, which is from the District of Idaho, provides that the court may hold settlement weeks as the caseload requires, and cases will be referred to settlement week at the judges' discretion. Idaho's plan also provides for payment to the attorney neutrals from court funds. The Southern District of Illinois held two successful educational seminars covering their entire CJRA plan.

III. Other ADR Provisions

A. Education and Information About ADR Programs

Commentary: Although no alternatives are provided here, note that several plans have called for continuing education for the bar regarding ADR procedures and for publication of an ADR brochure to inform attorneys and litigants of their ADR options. One court, the Northern District of California, prepared such a brochure several years ago. The court sends the brochure to attorneys at filing and asks the attorneys to give it to the litigants. The court's CJRA plan calls for the parties to certify that they have received the brochure and discussed it with their attorney.

B. Administration of ADR Programs

Alternative #1 (Administrator) - Ohio Northern

A. The ADR Administrator. The "ADR Administrator" is the person appointed by the Court with full authority and responsibility to direct the programs described in this Section. The ADR Administrator shall be a person with training and experience in the administration of ADR Programs. The ADR administrator shall:

1. Administer the selection, training, and use of the Federal Court Panel;
2. Collect and maintain biographical data with respect to members of the Federal Court Panel to permit assignments commensurate with the experience, training, and expertise of the panelists and make the list of panelists and the biographical data available to parties and counsel;
3. Prepare applications for funding of the ADR Program by the United States government and other parties;
4. Prepare reports required by the United States government or other parties with respect to the use of funds in the operation and evaluation of the program;
5. Develop and maintain such forms, records, docket control, and data as may be necessary to administer and evaluate the program;
6. Periodically evaluate, or arrange for outside evaluation of, the ADR Program and report on that evaluation to the Court, making recommendations for changes in this Section, if needed; and
7. Develop, and make available upon request, lists of private or extra-judicial ADR providers.

Decisions of the ADR Administrator, acting within the authority conferred in this Section, shall be orders of the Court for purposes of enforcement and sanctions.

Alternative #2 (Federal Court Panel) - Ohio Northern

A. Federal Court Panel. There is hereby authorized the establishment of a Federal Court Panel consisting of persons who, by experience, training, and character, are qualified to act as evaluators, mediators, arbitrators, or other neutrals in one or more of the processes provided for in this Section.

1. Appointment to the Panel. The Federal Court Panel shall consist of persons nominated by the Court's Advisory Group and confirmed by the Judges of the Court.
2. Qualifications and Training
   a. Panelists shall be lawyers who have been admitted to the practice of law for at least five (5) years and are currently either members of the bar of the United States District Court for the Northern District of Ohio or members of the faculty of an accredited Ohio law school. The Court may waive these requirements to appoint other qualified persons with special expertise in particular substantive fields or experience in dispute resolution processes.
   b. All persons selected as panelists shall:
      (1) Undergo such dispute resolution training as the Court may prescribe;
      (2) Take the oath set forth in 28 U.S.C. § 453; and
      (3) Agree to follow the provisions of this Section.
   c. Each person shall be appointed as a Federal Court Panelist for a period of three (3) years. Appointment may be renewed upon a demonstration of continued qualification.
3. Compensation of Panelists
   a. Mediators and evaluators shall receive no compensation for the first four and one half (4 1/2) hours of services. Thereafter the parties shall be equally responsible for the Panelist's compensation at the rate of $150 per hour. A compensation schedule for arbitrators shall be published by the Court.
   b. No Panelist may be assigned in one calendar year to more than one case which falls within the Complex Case Track (See Local Rules Section 8, Chapter Two), nor to a total of more than five (5) cases, without the consent of the Panelist.

COMMENTARY

The two alternatives above are from the plan from the Northern District of Ohio. The first provides for an ADR administrator, the second establishes a panel of federal court neutrals to handle the cases referred to the court's ADR programs.

Depending upon the size of the court, the ADR program, the number of cases referred, and resource availability, a court may wish to appoint an ADR administrator. The first alternative above describes such a position, its duties, and its responsibilities.

The second alternative above sets forth criteria for ADR panelist qualifications, training, selection, and compensation, where authorized. The court or the advisory group may select and appoint a panel of attorneys to serve as ADR neutrals, mediators, or arbitrators, as in the example above, or the court may wish to appoint a committee to select the panel of neutrals.

SECTION FIVE: OTHER FEATURES

Statutory Requirements: The Civil Justice Reform Act provides that an expense and delay reduction plan may include "such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title." 28 U.S.C. § 473(b)(6). This section of the Model Plan suggests provisions or "other features" that have appeared in the plans adopted thus far. These additional subjects offer innovative or unusual approaches to a variety of topics deemed important by the EID courts.

I. Prisoner/Pro Se Cases

Alternative #1 - Idaho

A. The court, in conjunction with the federal bar, will develop a comprehensive handbook that will be distributed at no cost to all pro se litigants. This handbook may include the following subject matter:

1. The importance of legal counsel;
2. Alternatives to going to court;
3. A description of the federal court system;
4. Rules, procedures and forms;
5. The necessity for exhausting administrative and non-adjudicatory remedies;
6. Trial procedures; and
7. The functions of the judge and jury.

B. The court will coordinate prisoner pro se settlement weeks to include volunteer attorneys, pro se inmates and representatives of the state Department of Corrections in a concerted effort to resolve these cases.

C. The court will enter scheduling orders on a timely basis for all pro se cases.

D. The clerk's office deputy designated to administratively handle pro se filings will receive specialized training.

Alternative #2 - Tennessee Western

A. The pro se staff attorney will compile a handbook for pro se litigants that will provide information on subjects of frequent inquiry or misunderstanding. The court anticipates that the handbook will reduce the need for individualized replies to many inquiries and will free more staff

attorney time, thus resulting in quicker processing for pro se litigation.

B. The court will encourage uniform grievance procedures at correctional facilities within the district.

C. The clerk of court will compile information regarding types and sources of pro se cases filed in the district as an aid in anticipating trends in this litigation.

Alternative #3 - New York Southern

A. All cases brought by an individual pro se plaintiff shall be referred to the same magistrate judge.

B. Mandatory standardized discovery shall be required in prisoner pro se cases.

COMMENTARY

Pro se cases, and specifically prisoner cases, present special problems to courts in terms of both volume and litigation type. Those districts containing a number of correctional facilities often find themselves inundated with petitions. As these petitions are often novel in drafting, form, and content, they present special burdens in screening, analysis and disposition. A number of courts have adopted broad approaches to these burdens that include educational programs and materials; also prominent are institutional outreach efforts to the correctional facilities themselves to enhance the institutional climate that produces these cases. The encouragement of reform in existing inmate grievance procedures represents such an initiative.

Another suggested avenue for cooperative state executive branch/court policy change would be the provision of touch-screen video terminals in both the court and correctional institutions. These devices, providing guided, pictorial instructions in procedures, forms use and filing, would produce a more manageable and uniform filing, in addition to their service in general public education for both inmates and other pro se plaintiffs.

II. Practitioner's Handbooks

Alternative #1 - Arkansas Eastern

The court will publish and distribute to all lawyers and litigants in federal court cases a pamphlet informing them of their rights and obligations in federal court litigation and will make it required reading for each party in every lawsuit. The court will include a code of professional courtesy or similar guidelines for attorney conduct in this pamphlet.

Alternative #2 - Michigan Western

A. The court should arrange for the production of a series of video tapes on subjects including, but not limited to, general court and trial procedures, discovery, alternative dispute resolution, differentiated case management and tracking, and the responsibilities and expectations of plaintiffs and defendants. The content of the tapes should be understandable to lay persons, and should be produced under the auspices of the judges of the district, taking into account the practices and procedures unique to the district. One or more of the judges should appear on the tape as providers of information, thus offering a tangible sign of their support of the continuing education program.

B. A written and illustrated document or brochure should be produced to explain in detail the court's differentiated case management plan and its connection to the Civil Justice Reform Act. This publication should be aimed at both practitioners and lay persons, and should include a description of conferencing procedures, how track assignment decisions are made, and other relevant practices and procedures. The state and local bar associations throughout the district should be requested to assist in its dissemination.

COMMENTARY

Bar association education, through the use of pamphlets, handbooks and videotapes, is an integral and indispensable element of any successful court reform program. Change in practice and procedure of the magnitude contemplated in many cost and delay reduction plans must be preceded by the meaningful communication of both the contemplated reforms and their underlying purpose and goals. The production of handbooks or videos can accomplish this task, especially if the materials are the product of joint court/bar efforts. An example of bar education programs in video format is available from the Eastern District of Wisconsin.

The increasing size of the bar, and the growing lack of personal contact between judges and practitioners has given rise to the perceived need for formal or informal court rules of decorum. Such rules could be included in the practitioner's handbook.

III. Relationship of Federal Courts to State Courts

Idaho

A. A committee of clerk's office staff and bar practitioners will be appointed to develop a manual which explains clerk's office procedures and the differences between state and federal court rules.

B. The court suggests that the state retain an attorney whose sole responsi-

bility is to assist inmates and inmate law clerks with legal matters.

C. The court suggests that the state create a statewide appellate public defender who would insure that all state avenues are exhausted prior to the filing of petitions for writs of habeas corpus.

COMMENTARY

Declining court budgets and the increasing demands for court services have necessitated consideration of joint ventures between federal and state courts. In some areas, such as jury selection and planning, the use of common selection pools and databases has already been pioneered. Other areas that remain to be explored are the joint use of state bar/state court system ADR programs, certification standards, training, and support services; traffic/DWI screening, assessment, and enforcement support services; cooperative policy planning regarding prisoner pro se filings; federal policy input regarding the restructuring of, and broadened access to, state criminal justice information system databases for federal and state use; attorney scheduling; the joint development of specialized training programs for staff and technical support personnel; and cooperative exchanges regarding case management practices.

The constitutional and statutory separation of state and federal jurisdictions should not prevent cooperative efforts. The technical or managerial innovations of one governmental entity could be of valuable assistance to other entities, especially in more rural or geographically isolated areas.

IV. Role of the Courtroom Clerk

Alternative #1 - Tennessee Western

A. Persons occupying courtroom deputy positions will assume the full range of case management and other functions described in the job description attached to this plan. Within the court the title for these positions will be courtroom deputy/case manager. The occupants of these positions will be selected jointly by the clerk of the court and the judge to whom the courtroom deputy/case manager will be assigned, with the judge having veto power over whether a particular courtroom deputy/case manager is assigned to that judge. The courtroom deputy/case manager will have an office near that of the judge to whom he/she is assigned and the judge will direct his/her work. The clerk of the court and chief deputy clerk will act as expediters, with general oversight for all case management functions in the court. Buzzers and speaker box systems will be installed in the courtrooms so that the courtroom deputies/case managers can be excused from the courtroom for periods of time to work on case management responsibilities. Courtroom deputies/case managers will be trained on the computerized Integrated Case Management System (ICMS). Current occupants of these positions will be given an opportunity for on-site training in districts that currently utilize courtroom deputies in the manner

described in this section.

Alternative #2 - Delaware

The courtroom clerks shall be trained to participate in case management through a series of adopted procedures starting with the duty to provide routine notices with regard to at least the following: notices for inactivity of a case for over three (3) months; periodic notices during discovery; notices when briefs are more that five (5) days late; orders to show cause for failure to answer; and notices for Rule 16 conferences.

COMMENTARY

The emphasis placed on the courtroom deputy in the provisions above attests to the central role this position can be assigned in the fulfillment of a range of case management functions. The courtroom deputy can facilitate communications, data entry, work flow and litigation support functions during court sessions. Effective use of this employee of the clerk's office is a key ingredient in the development of a successful case management team.

V. Procedures for Monitoring the Court's Caseload

Alternative #1 - Arkansas Eastern

The court will consult with the advisory group to develop quantitative, objective criteria and non-quantifiable, subjective criteria by which to measure the court's success in reducing delay and cost. The court will expect the advisory group to monitor such success and to advise the court as to its findings and any additional recommendations. In compliance with 28 U.S.C. § 475, and in consultation with its advisory group, the court will annually assess the conditions of its civil and criminal dockets with a view toward reducing cost, delay and improving litigation management practices.

Alternative #2 - California Southern

A. The clerk of court shall make regular monthly reports to the Chief Judge of all civil cases pending more than eighteen (18) months on the dockets of each judge, and of all criminal cases pending more than six (6) months, in order to assist the court in assessing the effect of the various recommendations of the plan.

B. The Chief Judge shall supervise the development of a questionnaire to debrief parties and their counsel at the close of each civil case filed after January 1, 1992. The questionnaire should be fashioned to seek information evaluating the effectiveness of the system retrospectively.

C. Accurate information shall be generated about the civil caseload and how it is processed through the courts. To this end, an administrator will be employed to implement and supervise this monitoring system.

D. At the conclusion of a case, the judicial officer shall debrief the parties and counsel in an informal setting to evaluate candid comments, criticism and suggestions. The judicial officer will prepare a confidential report to the Chief Judge as to the comments made during this debriefing. This information is to be used by the Chief Judge as an internal management tool to assess and track the success or failures of the new civil case management features.

Alternative #3 - Montana

A. Case Status Information

The clerk of the court shall develop and maintain an information and reporting system which allows ready access to the current status of every active case on the courts civil docket. The information system shall provide the following information relative to each active case upon the courts civil docket:

1. Date of filing;
2. Date of preliminary pretrial conference;
3. Deadline established for discovery completion;
4. Date for submission of proposed final pretrial order;
5. Dates of any amendments to pretrial scheduling order;
6. Date of trial; specific identification of cases not scheduled for trial within 18 months of filing; and
7. Pending motions; date motion taken under advisement.

B. Report to Judicial Officers

The clerk of court shall prepare a monthly report that sets forth the case specific information referenced above for every active civil case pending before each judicial officer. A copy of the report shall be provided to the particular judicial officer, as well as the chief judge.

C. Case Monitoring System

The clerk of court shall have the responsibility to monitor every active civil upon the docket of the court it ensure:

1. Compliance with the service of process requirements prescribed by the Federal Rules of Civil Procedure;
2. A preliminary pretrial conference is scheduled in accordance with local rules;
3. Compliance with the deadlines established by the pretrial order implemented in this case; and
4. Compliance with local rules of procedure regarding the establishment of a trial date.

The clerk shall note those cases where compliance with the referenced deadlines has not occurred and immediately notify the judicial officer to whom the case is assigned.

D. Aggregate Case Inventory

The clerk of court shall prepare a monthly report that inventories the caseload of each judicial officer of the district by summarizing the number of civil and criminal cases pending before each judicial officer at the close of each calendar month. The report shall categorize each judicial officer's pending civil caseload according to the following categories:

1. One year or less;
2. One to two years; and
3. More that two years.

COMMENTARY

The Civil Justice Reform Act requires each court to assess its civil and criminal dockets annually, in consultation with its advisory group, to determine whether the goals and purposes of the Act are being met. 28 U.S.C. § 475.

Further, the Act requires the Director of the Administrative Office of the United States Courts to prepare a semiannual report showing, by district judge and magistrate judge, a list of motions pending for more than six months, a list of bench trials submitted for more than six months and a list of civil cases pending for more than three years. 28 U.S.C. § 476. These reports have been published and are available in each court.

The above provisions are designed to ensure that courts develop the procedures, statistical tools and methods necessary to monitor civil case management and case management program evaluation.

VI. Use of Visiting Judges

Alternative #1 - Tennessee Western

The court will utilize visiting judges to assist when appropriate. In the past, visiting judges have generally handled civil matters. The court believes visiting judges could be even more helpful if they handled criminal matters and thus enabled the judges in this district to devote time to the civil docket, where the ongoing management of a single judge is very important in a case's progress.

Alternative #2 - California Southern

The Chief Judge shall increase her efforts to find visiting judges to come to this district to preside over criminal trials.

COMMENTARY

Visiting and senior judges can provide invaluable assistance to a court making the transition from traditional case management methods to the new methods developed in its cost and delay reduction plan. Visiting and senior judges may be utilized to help the court meet its civil trial schedule or to keep the criminal caseload under control while the regular members of the court are adjusting to new civil case management procedures.

VII. Telephone Conferencing and Video Depositions

Alternative #1- Missouri Western

It is recommended that the judicial officer conduct a telephone conference with counsel for all litigants within two weeks after the appearance of the defendant or defendants. The principal purpose of the telephone conference is to advise the attorneys of the district's differentiated case management plan and to acquire information from which a preliminary determination can be made by the judicial officer as to whether an early status conference under Rule 16, Federal Rules of Civil Procedure, is needed. The telephone conference also provides a preliminary determination of the appropriate track assignment.

A plan should be devised to determine the nature and circumstances of cases requiring personal appearances, video, or telephonic conferences and/or hearings, and systems put in place to conduct such procedures when appropriate.

unusually protracted criminal trial, Judge Todd, Judge McRae or a visiting judge will be asked to handle the regular rotation docket.

6. Cases will be set for trial at arraignment. The setting will be for the first Monday during a criminal rotation docket that falls at least forty days after the date of the arraignment, unless the Speedy Trial Act requires a earlier setting. Continuances will be handled by the judge to whom the case is assigned.
7. On a Monday during the criminal rotation docket, the order of trial will be determined by the age of the case, whether defendants are in custody, and any speedy trial problems. The order of trial will be determined by the clerk on the Wednesday before the first Monday of a criminal rotation docket, in consultation with a designated judge-coordinator. The judges will rotate the responsibility for being the judge-coordinator.
8. Juries will be handled as they are under the current system, with a pool coming in on Monday, a staggered selection system, and such other panels as are necessary on days other than Monday during the two-week period. Judges will try to pick most juries on Monday, selecting two juries on the same day if necessary.
9. Judges will swap assignments as necessary to accommodate business trips, vacations and protracted civil trials.

Alterative #2 - California Southern

Be it, therefore,

Resolved that we, the Judges of the Southern District of California, adopt the following plan to reduce the cost and delay associated with civil litigation in this District:

We order that each district judge be excluded on a rotating basis from the criminal draw for a two month period each year so that the judge will be afforded two full months of uninterrupted civil case management time.

COMMENTARY

The expense and delay reduction plans provided above include alternative methods for assigning criminal cases. Tennessee Western and California Southern have heavy criminal dockets and wanted a method that would enable each judge to schedule civil trials without interruption by a criminal trial. Thus, both courts adopted plans that provide for rotation of the criminal docket.

IX. Control of Legal Fees

Texas Eastern

ARTICLE FIVE: ATTORNEYS FEES

The assumption that underlies the substance of the Civil Justice Reform Act is that implementation of a plan that substantially reduces legal activity during discovery will result in cost reduction for litigants who pay for legal services by the hour. Whether such presumed reductions become a reality remains to be seen. The court shall adopt methods to evaluate the effectiveness of the court's plan in this respect. However, no such reduction from these measures will inure to the benefit of litigants who retain counsel on a contingency fee basis. the court, therefore, adopts the following maximum fee schedule for contingency fee cases (whether filed originally in this court or removed form state court):

(1) Contingent fees in non-statutory cases:

A fee of 33-1/3% of the total award or settlement.

(2) Expenses:

Expenses incurred by attorneys that are directly related to the costs of litigation of individual cases shall be deducted from the award or settlement before any calculation or distribution is made for attorneys fees. No deduction is permitted for general office overhead expenses. Moreover, attorneys are prohibited form charging interest on any money advanced for expenses.

(3) The court may modify the fee in exceptional circumstances.

(4) In cases where statutory attorneys fees are recoverable, such as civil rights cases, the court shall approve a reasonable fee.

COMMENTARY

Provisions relating to the capping or controlling of contingent fees are intended to balance, and serve as a logical corollary to the presumed impacts of delay reduction on fees assessed on an hourly basis. It is intended to duplicate the impacts of similar statutory fee control schemes embodied in the U.S. Code, such as those relating to the following sections: the Federal Tort Claims Act (28 U.S.C. §2678); Civil Actions under the False Claims Act (31 U.S.C. §3730(d)(1)); or Veterans Benefits (38 U.S.C. §5904(d)(1)). The broader contingent fee controls contained in the state codes of New Jersey, New York, and the Commonwealth of Puerto Rico serve a similar intention and could support this initiative in the federal courts of those districts without specific plan language.

The court finds Congressional intent for such an approach to controlling litigant costs within §102(2) of the Act:

> *"...that the litigants attorneys...share responsibility for cost and delay in the in civil litigation and its impacts on access to the courts..."*

and further, in §102(3), the court notes the finding of Congress that:

> *"...[t}he solutions to problems of cost and delay must include significant contributions by ...the litigants attorneys..."*

The lack of any specific reference to the concept of contingent fee controls in the Act was not seen by the court to limit a more direct approach to the stated aims of the legislation to reduce litigant costs. A memo from the Office of the General Counsel of the Administrative Office concludes such provisions may be questionable in the absence of specific linkage to the goals of the Act; it does note, however, that such fees are imposed by judges in individual cases, and have been adopted by state legislatures (Memorandum, "The Civil Justice Reform Act and Contingent Fees"; S. Thomas, Office of the General Counsel, to Duane Lee, Chief, Court Administration Division; October 28, 1991).

Federal Rules of Civil Procedure

Rule 26. General Provisions Governing Discovery; *Duty of Disclosure*

(a) *Required Disclosures;* ~~Discovery~~ Methods *to Discover Additional Matter.*

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by the court, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made

at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) **Pretrial Disclosures.** In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by

the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property *under Rule 34 or 45(a)(1)(C),* for inspection and other purposes; physical and mental examinations; and requests for admission. *Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.*

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,

General Considerations in Designing an ADR Program

When considering adoption of an ADR program, a court will want to consider a number of questions, such as the goals of the program; whether multiple programs are necessary; whether the program should be mandatory or voluntary; whether judicial officers or non-court persons should serve as neutrals; how non-court neutrals should be recruited, trained, and compensated; and what resources are available to administer the program. A few of these questions are addressed in more detail below.

A. Deadlines for referral of cases

Some of the models do not specify deadlines for referral or selection of cases for the various programs. Since one purpose of ADR is to provide an earlier resolution of the case, courts adopting various programs may wish to establish a deadline for the selection and referral of cases to ADR. The plan might state, for example, that the early neutral evaluation session ("ENE") should be scheduled no later than 150 days after the case is filed, as did the Northern District of California in the ENE program it created several years ago, or 45 days after answer as in the Southern District of California.

B. Type of case which may be referred to certain programs

Note, too, that some of the plans below do not specify the types of cases that may be referred to a particular ADR program, stating, rather, that any case is eligible. Some courts have excluded cases in which the relief sought is other than monetary, i.e., equitable. Others have specifically excluded civil rights, antitrust, and securities cases (but some courts automatically order such cases into ADR). The circumstances of each court, its case types, and its caseload should be carefully considered when determining the type of case to include in an ADR program.

C. Selection and Training of "Neutrals"

Several of the programs require the participation of a "neutral", an expert in the subject matter of the case, or a disinterested party. How the neutrals will be recruited, what qualifications they should have, or whether the court will provide training for the neutrals is not specified in several of the models. One court, the Northern District of Ohio, has created a single Federal Court Panel from which it draws neutrals for all the ADR programs offered by the court. Less extensive programs will require fewer neutrals, but all courts must solve the problem of establishing and maintaining rosters of qualified neutrals.

D. Mandatory or Voluntary

Participation in a program may be either mandatory or voluntary. Voluntary programs have generally not been successful because few parties volunteer to participate. A number of concerns have been raised, however, about mandatory programs. Courts should consider the belief of some participants that mandatory referral deprives them of a "right to trial." Structuring an ADR program with sufficient opportunity to opt out for cause and non-binding results minimizes this apprehension. Note, however, that mandatory participation in certain programs has been challenged in some jurisdictions.[1] Therefore, the legal ramifications of mandatory participation should be considered by each court.

E. Fees

A program may impose a fee on parties for payment of the neutral, such as the plan for the District of Idaho which imposes a $500 fee on parties for payment of the ENE neutrals. For some parties, this fee will prohibit use of ADR. Absence of compensation, however, may discourage attorneys from serving as neutrals. Several courts, however, have successfully recruited attorneys to act a neutrals pro bono. The issue of compensation must be addressed by any court adopting an ADR programs.

F. Relationship Between ADR Programs and Case Management Procedures

A court should also address the question of the relationship between the ADR program and the court's other case management procedures. The plan, the local rules, or orders adopting an ADR program should clarify this relationship for the bench and bar. The two examples below are from courts that have already adopted CJRA plans.

In its plan, the Southern District of California states: "As the ENE procedures proceed, no stay in discovery may occur unless specifically ordered by the judicial officer on good cause shown."

In General Order 34, adopted pursuant to the Case Management Pilot Program described in its CJRA plan, the Northern District of California states:

Cases Assigned to Arbitration: Except as may be otherwise ordered in individual matters, counsel in cases that are subject to this General Order and that are assigned to arbitration under Local Rule 500 shall comply with the provisions of both that Local Rule and of this General Order. In addition, the assigned judge shall hold a status and trial

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[1] For example, in the Sixth Circuit, parties challenged mandatory participation in summary jury trials. Strandell v. Jackson County, 838 F.2d 884 (6th Cir. 1988).

setting conference within 30 days of a timely filed demand for trial de novo after an arbitration hearing.

Cases Assigned to Early Neutral Evaluation (ENE): Except as may be otherwise ordered in individual matters, counsel in cases that are subject to this General Order and that are assigned to the ENE program shall proceed simultaneously in compliance with both this General Order and General Order No. 26 (governing ENE). No later than 105 days after the filing of the complaint, the ADR program directors shall communicate with the assigned judge concerning the timing of the ENE session. The assigned judge will then determine whether to proceed with the initial Case Management Conference on the schedule contemplated in this General Order or to postpone that conference for a short period to permit the litigants and the court to capitalize on the contributions that can be made through the ENE process.

For a comprehensive and insightful guide to the many decisions that must be made in selecting and establishing ADR programs, see the following publication: Wayne Brazil, "Institutionalizing ADR Programs in Courts," in Emerging Issues in State and Federal Courts, ABA Monograph, 1991.[2]

Definitions of the ADR Programs Included in the Model Plan

The model plan presents seven different types of ADR programs, each of which has been adopted by at least one early implementation district. To avoid confusion about the names given to the different types of ADR, we begin with a brief description of each program.

Early Neutral Evaluation. Early in the case, the litigants meet with an outside neutral, who is expert in the subject matter of the case, to discuss all aspects of the case. ENE's major purpose is to reduce the cost and duration of litigation by enhancing communication, narrowing issues, structuring the discovery process, and facilitating settlement.

Mediation. The litigants meet with an outside neutral, appointed by the court or selected by the litigants, for in-depth settlement discussions. Frequently the mediators are experts in the subject matter of the case, but they need not be. Mediators facilitate discussions among the litigants to assist them in identifying the underlying issues and in developing a creative and responsive settlement package, but do not render a decision. The purposes are to increase the chances of settlement, help the litigants devise better

[2] For those who attended the Federal Judicial Center seminar for non-EID districts, held in St. Louis, Missouri, in April, 1992, Judge Brazil's article was included in the materials distributed at the seminar.

settlements, and improve relationships among the litigants.

Arbitration. Arbitration provides the parties an advisory adjudication of their case. The litigants briefly present their case to an outside neutral or panel of neutrals, who then give the litigants an opinion of the judgment value of the case. The presentations of each side may be quite formal, but generally arbitration sessions are more informal than a trial and the rules of evidence are suspended.

Non-Binding Summary Jury Trials. Because of the substantial court and litigant resources consumed, this procedure is most suitable for cases poised for lengthy trial. The litigants briefly present their case to a jury that has been randomly selected from the court's jury pool. The jury returns an advisory verdict on liability and damages, which is used as a spur for settlement discussions. Lawyers are generally permitted to question the jurors about their decision.

Non-Binding Summary Bench Trials. The litigants briefly present their case to a judicial officer, who returns an advisory verdict. As with summary jury trials, the purpose of a summary bench trial is to prompt settlement discussions in cases that would require a lengthy trial.

Non-Binding Mini-Trials. The attorneys in commercial litigation each present their best case to high-level officers of all the party companies and, in some cases, to a neutral advisor. After the presentation, the parties meet to discuss settlement. The purpose is to increase the corporate officers' understanding of the case and thus to increase the chances of settlement.

Settlement Week. The court designates a specific time period during which many cases are referred to settlement discussions with neutral attorneys. Cases are generally referred after discovery has been completed. The purpose of settlement week is to increase the chances of settlement and to prompt earlier settlements in cases that are ready for trial.

ATTACHMENT C

PROVISIONS REGARDING THE PREPARATION OF CIVIL JUSTICE DELAY AND REDUCTION PLANS

I. Statement of Purpose/Introduction

Alternative #1 - Wisconsin Western

A. In General. The United States District Court for the Western District of Wisconsin adopts this Civil Justice Expense and Delay Reduction Plan pursuant to the requirements of § 471 of the Civil Justice Reform Act of 1990. In developing the plan, the court has considered carefully the report of the Civil Justice Reform Act Advisory Group for the Western District of Wisconsin and the recommendations in that report. The court has also considered the principles and guidelines of litigation management and cost and delay reduction set forth in § 473(a) of the Act as well as the litigation management and cost and delay reduction techniques contained in §473(b) of the Act.

The appendices to the plan contain a detailed discussion of the way in which the plan implements, or does not implement, these principles, guidelines, techniques and recommendations.

B. General Principles. This plan consists primarily of specific procedures and techniques that the court will implement to minimize unnecessary delay and expense in this district. The court recognizes that certain nonprocedural principles are vital to the effective reduction of delay and expense as well as to maintenance of a high level of quality in the administration of justice. Indeed without careful adherence to these principles, the adoption of specific procedures and techniques is unlikely to have significant impact on delay or expense. Accordingly, in implementing the specific procedures set forth in Parts II through VI below, the court will observe the following general principles.

1. Efficient Use of Resources. The court will strive to make the most efficient use of the resources available to it in implementing this plan recognizing that the effectiveness of the judicial officers depends heavily on the efforts and efficiency of the entire court staff. All of the court's work will be analyzed regularly to determine whether it is a kind that can be performed only by an Article III judge or whether it will be delegated to magistrate judges, deputy clerks, law clerks or secretaries. The clerk's office will have primary responsibility

for maintaining current dockets and files, for developing information essential to productive case management and for informing the court of statistical information necessary to assess the success of this plan.

The court will continue to develop its automation plan to increase the efficiency and accuracy of routine record keeping tasks in order to minimize the time spent on routine tasks by judicial personnel, and will continue to expend electronic interoffice communications.

2. Consistency and Flexibility. Consistent adherence to the procedures and scheduling deadlines of the court is essential to the reduction of delay and expense. Delay reduction techniques and firm deadlines are effective only if all participants in the process understand that they will be adhered to on a consistent basis.

   The court remains mindful, however, that exceptional circumstances may exist that will require deviations from the practices and deadlines imposed pursuant to this plan. Where such exceptional circumstances exist, the rigid enforcement of practices and deadlines may result in injustice or indeed may increase the expense of litigation.

   In implementing the provisions of this plan, the court will balance the needs for consistency and for flexibility in order to maximize the efficiency of the court while minimizing adverse effects that may result from rigid adherence to procedures and deadlines. Because counsel and litigants are most familiar with their case, the court must depend upon timely and appropriate motions to suggest when deviation from standard practices is appropriate.

3. Prompt Judicial Action. Reducing delay and expense requires hard work and organization on the part of counsel appearing before this court. The court recognizes that in order for these efforts to be effective, the judges must respond and rule promptly on the matters submitted to them.

4. Civility. Incivility among litigants and between litigants and the court poses a substantial barrier to the efficient, quality administration of justice. Incivility causes unnecessary and costly

motion practice, increasing the expenses of all parties. In addition, it decreases the quality of justice and increases dissatisfaction with the judicial system. In implementing this plan, the court will strive to maintain a high level of courtesy toward the litigants and parties appearing before it. The court encourages litigants and their counsel to maintain the same level of civility.

COMMENTARY

This section provides examples of several other matters that should be addressed in expense and delay reduction plans. Most of these issues are covered in the Judicial Conference Guidelines for Preparing CJRA Plans, which is included as Attachment _ to this Model Plan.

The plan will generally begin with an introduction. Some courts have used the introduction as an opportunity to make findings about the district or to state the purposes or principles of the plan. The statement of principle provided above is offered only as an example, not as an endorsement of the principles themselves, which may be suitable for some courts but not for others.

II. Consideration of the Requirements of 28 U.S.C. § 473

Alternative #1 - Wisconsin Western

Appendix I
Section 473 Considerations

Section 473 of the Civil Justice Reform Act specified certain principles and guidelines of litigation management and cost and delay reduction as well as litigation management and cost and delay reduction techniques. The court has considered carefully the provisions of § 473 and has included most of the principles in its plan. This appendix sets forth the specific principles, guidelines, and techniques contained in § 473 and discusses how they are incorporated into the court's plan or why they are not so incorporated.

§ 473. Content of Civil Justice Expense and Delay Reduction Plans.

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably

needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

The combination of actions taken by the clerk's office under Part II(C) of the plan and the individualized differentiation provided for in Part III of the plan fully implements this principle. The development of an order for the scheduling of discovery, motion deadlines, and trial after both written and oral submissions by the parties and consideration of the file by the court provides effective differential treatment and individualized deadlines.

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(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion;

The court implements this principle at Part IV(A) of the plan and in its local rule imposing the requirements found in § 473(a)(5).

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(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under § 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

The court has considered and rejected this technique. As set forth in Part III, the court's plan rarely permits the extension or postponement of its deadlines. When such a postponement occurs, it is only through a demonstration of exceptional circumstances applying the balancing discussed in Part I(B) of the plan. The court does not think that its plan would be enhanced by implementing this technique.

COMMENTARY

The statute directs all courts to consider adopting the provisions listed in 28 U.S.C. § 473(a) and (b). The Judicial Conference, in its Guidelines for Preparing CJRA Plans, urges the courts to explain in their plans what consideration they have given to these provisions. Comments on each provision may by made in the text of the plan as each provision arises, but it may be helpful as well to compile these comments in an appendix, as in the example above from the Western District of Wisconsin.

III. Consideration of Advisory Group Recommendations

Alternative #1 - Wisconsin Western

Appendix II
Consideration of Advisory Group Recommendations

Pursuant to § 473(b)(6) of the Civil Justice Reform Act of 1990, the court has considered carefully the recommendations of the Advisory Group for the Western District of Wisconsin.

Recommendation No. 1: The Advisory Group supports the court's present practices of case differentiation generally, but recommend more flexibility in the "complex" case.

Response: The court adopts Recommendation No. 1 and has incorporated it into its plan at Parts I(B) and III. The court concurs with the Advisory Group's conclusion that early and firm trial dates are an effective tool in minimizing cost and delay. The court considered the Advisory Group's recommendation for greater flexibility and has incorporated this concept at Part I(B) of the plan.

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Recommendation No. 6: The Advisory Group recommends adoption of the proposed amendment to Rule 702 of the Federal Rules of Evidence and the proposed amendment to Rule 26(a)(2) of the Federal Rules of Civil Procedure.

Response: The principal aspect of Recommendation No. 6, the adoption of the proposed amendments to Rule 702 and Rule 26(a)(2), is beyond this court's authority. However, the court does endorse and encourage in the plan the cooperative disclosure of discovery materials as well as the early disclosure of information pertaining to experts pursuant to a discovery plan at Part III(A). At Part V(C) the plan endorses Rule 702's limitation on expert testimony to only those experts who will assist the trier of fact and who are appropriately qualified. Of course experts can be barred from testifying pursuant to a motion in limine under Part V(A) of the plan. In summary, the plan is designed and will be implemented

to limit as much as possible the excessive use of expert witnesses, which contributes substantially to unnecessary expense in the development and trial of a civil case.

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Recommendation No. 10: Except when compelling factors exist in a particular litigant's case or litigation history, the court should discontinue its "same judge" policy in favor of random selection.

Response: The court has considered and rejects Recommendation No. 10. The court has found the same judge policy to result in fairer and more efficient resolution of cases by limiting the duplication of effort by the judges and ensuring that the judge most familiar with the factual background of a case will be assigned to it. The policy is not applied in a discriminatory fashion; it is applied both to pro se litigants and to represented parties. The policy permits consolidation of actions where appropriate. It facilitates consideration of motions to stay resolution of one case pending another. The policy also saves the litigants and the court the time of reeducating a different judge on the common factual background of the cases as well as the common legal issues. Accordingly the court's plan provides for the continued implementation of the same-judge rule at Part II(A).

COMMENTARY

The statute also requires the courts to consider the recommendations of the advisory group, 28 U.S.C. § 472(a), and the Judicial Conference Guidelines ask the courts to indicate in their plans how they responded to these recommendations. A court may wish to respond only to those recommendations it rejected, but users will find the plan most useful if the court states its response to each recommendation made by the advisory group, as the example above from the Western District of Wisconsin does.

IV. Implementation Schedule

Alternative #1 - Idaho

A. Due to the comprehensive nature of the programs which will be adopted by this Court, unless otherwise noted in this plan, the effective date of a majority of these programs will be March 1, 1992. This will give the Court and clerk's office sufficient time to test various procedures. This time frame also allows the Court to modify its ICMS system so that it can monitor all next action dates and generate valuable case management reports.

Furthermore, the implementation time frames above will coincide with the target date established for the arrival of the second full-time magistrate. As noted in the CJRA report, a two-judge, one-magistrate

district has virtually no flexibility. Such inherent judicial resource limitations, coupled with travel to divisional offices, make an earlier implementation of some of the proposed reforms impossible.

Alternative #2 - Delaware

The following Plan, designed to administer civil justice fairly and to reduce costs and time in civil litigation, is adopted by the United States District Court for the District of Delaware. The Plan shall forthwith be considered implemented as of this 23rd day of December, 1991, subject to modification as may hereafter be adopted pursuant to suggestions and requests of the committee composed of the Chief Judges of each district court within the Third Circuit and the Chief Judge of the Third Circuit Court of Appeals (the "Circuit Committee"), the Judicial Conference of the United States (The "Judicial Conference") and such other amendments as may be adopted by the Court to implement and promote the purposes of this Plan.

COMMENTARY

The plan should give a date for implementation of the procedures and programs provided by the plan, as shown in the two examples above. Note that the second example provides for future modifications of the plan.

V. Annual Assessments and the Future Role of the Advisory Group

Alternative #1 - Idaho

A. Future Assessment and Evaluation. Section 475 of the Civil Justice Reform Act requires an annual assessment of the condition of the civil and criminal docket to determine appropriate actions that will reduce cost and delay in civil litigation and that will improve the litigation management practices of the Court.

The CJRA advisory committee has agreed to meet on a quarterly basis, or more often if necessary, beginning in June 1992 to assist the Court in evaluating the effectiveness of the remedial measures being implemented and to recommend changes or modifications.

The reassessment and evaluation methodology which the Court will use parallels the means by which the committee identified and examined the causes contributing to cost and delay in civil litigation. This includes: statistical data; internal management reports; attorney questionnaires; client surveys; internal court studies; interviews with

judges, law clerks, courtroom deputies, and clerk's office personnel; input from representatives of selected groups and entities; public forums; and the personal experiences of CJRA advisory committee members.

The Court, through the clerk's office, will continue to analyze statistical data concerning the number and types of cases filed, the mean disposition times, the number of trials, judicial hours, the percentage of settlement or disposition before trial, cases referred to magistrate judges, and referral to ADR programs. Furthermore, through a series of periodic management reports, the Court will constantly monitor the occurrence and timing of all case event deadlines including return of service of process; answer; entry of scheduling orders; type, age and status of pending motions, discovery, and inactivity in the case for over 180 days.

Since most of the remedial measures are prospective in nature, the results might not be immediately measurable. An effort will be made to quantify and compare data generated on cases filed after the implementation date with the materials on which the CJRA advisory committee relied in the formulation of its findings and recommendations.

The remedial measures being adopted by the Court in connection with CJRA are intended to supersede any presently existing local rules to the extent they are inconsistent or incompatible. Unless otherwise stated, the effective date for all changes will be March 1, 1992. The actions taken herein may necessitate modification or an upgrade of the current automated system and to this extent the Court may not be able to conduct some of the evaluation and monitoring until these upgrades have been completed.

Any changes to the local rules will be held in abeyance pending preliminary evaluation of these proposed procedures. The Court will advise the bar of all changes which are in conflict with existing local rules.

If, after evaluation, these programs have sufficiently reduced cost and delay, the Local Rules Committee will examine the extent to which the local rules should be changed.

COMMENTARY

The statute directs courts, in consultation with their advisory groups, to carry out annual assessments of the dockets and to take additional actions as necessary to reduce cost and delay. 28 U.S.C. § 475. The plan should provide for these assessments and indicate how they will be carried out. In preparing such a statement, courts should consider carefully how they will evaluate the programs they are adopting. The example above from the District of Idaho addresses these matters.

ATTACHMENT D

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

JULY 21, 1992

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES DISTRICT COURTS
CLERKS OF COURT, UNITED STATES DISTRICT COURTS
CJRA ADVISORY GROUP CHAIRS

SUBJECT: GUIDELINES FOR PREPARING CJRA PLANS THAT ARE RESPONSIVE TO THE STATUTE AND USEFUL TO THE BAR AND OTHERS USERS

At its meeting in June, the Judicial Conference's Committee on Court Administration and Case Management, which I chair, discussed the cost and delay reduction plans that courts have already promulgated under the Civil Justice Reform Act of 1990. In reflecting on these plans, and after considering requests made by courts that have yet to adopt plans, the Committee decided to prepare a set of guidelines for writing expense and delay reduction plans. For courts that wish to consider the model plan suggested by § 477, the Committee expects to issue such a plan in the fall. These guidelines will accompany that document, which will take the form of sample provisions of various plan elements.

The Committee had several purposes in preparing the guidelines. For courts that have not yet written a plan, we believe these guidelines will help them prepare plans that meet the specific and implied requirements of the Civil Justice Reform Act. We hope these guidelines will be helpful, as well, to courts that have already adopted plans but who may be revising those plans in the future. Finally, we believe that plans produced pursuant to these guidelines will be easier for other courts to use and for Congress to review and analyze.

I would appreciate receiving any comments or suggestions you may have about the guidelines or any other aspect of the Act's implementation.

Robert M. Parker

cc: Chief Judges, U.S. Courts of Appeal

JUDICIAL CONFERENCE COMMITTEE ON
COURT ADMINISTRATION AND CASE MANAGEMENT

GUIDELINES FOR PREPARING CJRA EXPENSE AND DELAY REDUCTION PLANS

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1. **Does the plan, as directed by the statute, "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" (§ 471)?**

   - The statute makes explicit the purpose of the expense and delay reduction plans. In preparing its plan, each court should ensure that the plan's specific provisions satisfy the purpose stated in the statute. At a minimum, the plan should include provisions that control the extent of discovery and that control litigation costs for all classes of cases and all types of litigants.

2. **Has the court considered the recommendations of the advisory group, as required by § 472(a)?**

   - The statute is specific in directing the courts to consider advisory group recommendations in preparing their plans (§§ 472(a) and 473(b)(6), and it is important that the plans give evidence of that consideration. When a plan is silent with regard to one or more recommendations made in the advisory group report, the user and reviewer cannot determine whether the court considered the recommendation nor why the court rejected it. The court, for example, may have rejected the analysis on which the recommendation is based or may have acted on the basis of factors other than those considered by the advisory group, such as pre-existing local rules that cover the matters included in the recommendation. Whatever the cause for rejecting an advisory group recommendation, please explain the court's reasoning, either in the plan itself or in an appendix to the plan.

3. **Has the court considered each of the principles, guidelines, and techniques of litigation management described in §§ 473(a) and (b)?**

   - The statute directs the courts to *consider* six litigation management "principles and guidelines" and five litigation management "techniques." "Consideration of" does not mean "adoption of" and therefore plans are sometimes silent with regard to one or more of the provisions of §§ 473(a) and (b). Again, when the plan does not mention one of these provisions, users and reviewers cannot determine whether the court actually considered the absent provision. The court may, in fact, have rejected it as unhelpful or because the provision already exists by local rule. Whatever the reason for not adopting one of the provisions of §§ 473(a) and (b), please explain why the court has not adopted it.

   - Whether accepting or rejecting, the court's responses to these statutory provisions may be scattered throughout the plan. The court can make the plan more helpful to users and reviewers by compiling or summarizing both the accepted and rejected provisions in an appendix to the plan.

4. **Does the plan "adequately respond to the conditions relevant to the civil and criminal dockets..." (§ 474(b))?**

   - The analysis conducted by the advisory group should inform the court about the condition of the docket. When that analysis states a problem, such as a backlog in prisoner litigation, does the plan include provisions that will address this problem? Make sure the plan responds to the problems identified by the advisory group or explain why the court declines to address the problem (e.g., because it believes the advisory group's analysis is flawed or because there are insufficient resources to address the problem).

5. **Does the plan include an implementation schedule?**

   - Can the court, attorneys, litigants, and reviewing bodies determine from the plan when its provisions will be in effect and which cases will be subject to the plan?

6. **Does the plan, as anticipated by the CJRA's "Statement of Findings" (P.L. 101-650, Sec. 102 (3)) and by § 472(c) provide for contributions by the court, the attorneys, litigants, Congress, and the executive branch?**

   - Although most of the discussion about the Act has been about the courts, attorneys, and litigants, Congress has invited the courts to identify as well how Congress itself and the executive branch can help solve the problems of cost and delay. It is important that courts identify contributions expected of each of the five groups. These contributions, however, are at best implicit in many plans. To assist the users and reviewers in understanding the intended impact of the plans, make explicit the contributions expected from each group named in the statute.

   - Because these contributions may be mentioned at different points throughout the plan, it is helpful to compile or summarize them in an appendix (or you may wish to list them only in an appendix).

7. **Does the plan provide for potential revisions based on an annual assessment of the civil and criminal dockets by the district and on consultation with the advisory group, as required by § 475?**

   - The statute requires that the court, in consultation with its advisory group, conduct annual assessments of conditions in the district, which may lead to "additional actions" to reduce cost and delay. The plan, or the general order or local rules promulgating the plan, should state the procedures that will be followed for future assessments and revisions. You may want to include in this statement an explanation of the future role of the advisory group.

8. **Can the plan be relied on without reference to the advisory group report?**

   - The cost and delay reduction plan is an official statement of procedures adopted by the court. It should be able to stand on its own and provide all the information needed by attorneys and judges for complying with the procedures covered by the plan. For example, if the plan provides for referral to a mediation program, the user of the plan should not have to refer to the advisory group report to learn when and how the referral will be made.

9. Will the plan be adopted by local rule or general order?

- Either method is acceptable and both have advantages and disadvantages. Because of the notice and comment period required for local rule changes, some delay may occur if plans are adopted by local rule rather than general order. To avoid this problem, local rules may be adopted without comment on an emergency basis (28 U.S.C. § 2071(e)). However, because an opportunity for comment must ultimately be provided, provisional adoption may result in a period of uncertainty for practitioners and judges. Once adopted, however, local rules may provide more certainty than a plan promulgated by general order and are likely to be more accessible than a general order.

- The more general question is the relationship between the plan and the local rules, particularly when the plan is not incorporated into the rules and includes provisions that overlap with the rules. When adopting a CJRA plan, consider carefully its relationship to the local rules and what procedures the court should take to inform practitioners about the scope and impact of the plan.

10. Do practitioners and other interested parties have access to the plan?

- When a plan is adopted through local rule changes, the provisions of the plan become accessible through the regular channels available to interested parties. A general order is not as easily accessible. To provide litigants a copy of the plan, particularly when it has been promulgated as a general order, consider having the plan printed as a small booklet that can be sent to all parties at filing. Such a booklet is also useful in responding to others, such as researchers, who may request copies of the plan.

- Note that advisory group reports and court plans are currently available only through the clerks' offices. Neither the Federal Judicial Center nor the Administrative Office can provide copies. West Publishing Company and Mead Data have been asked to consider making the documents available through their electronic databases. Until they do - or if they decline - the clerks will be the only source for CJRA documents not issued as local rules.

11. Has the plan been submitted to the persons and bodies listed in § 472(d) in order to allow the reviews required by § 474?

- Please send copies of the plan to the Director of the Administrative Office, the judicial council of the circuit in which the court is located, and the chief judge of each district court in the circuit.

- Although the reviews by the Judicial Conference and the circuit review committees are important steps in the CJRA process, please note that implementation of a plan is not dependent on these reviews. The reviews are statutorily limited to "suggestions" and "requests" and do not constitute a "stamp of approval." Therefore, a court does not have to await completion of the review process to implement its plan. Likewise, although all courts must adopt a plan by December 1, 1993, the review process need not be complete by this date.