ANNUAL ASSESSMENT OF THE CIVIL JUSTICE ADVISORY GROUP SOUTHERN DISTRICT OF INDIANA

APPOINTED UNDER THE
CIVIL JUSTICE REFORM ACT OF 1990

December 31, 1993

CIVIL JUSTICE REFORM ACT

Annual Assessment Report for the Southern District of Indiana

The Civil Justice Reform Act, 28 U.S.C. § 475, states:

> After developing...a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

In its assessment, the Court has been guided by a memorandum from the Judicial Conference stating that the goals of the assessment are "(1) to inform the court itself of the impact of its CJRA plan so it can make adjustments and revisions as necessary; (2) to provide information to other courts and advisory groups who would benefit from analyses made by the courts; and (3) for use by the Judicial Council in reporting to Congress." [1]

The Southern District of Indiana is an Early Implementation District. Its Civil Justice Expense and Delay Reduction Plan ("CJRA Plan") was adopted on January 1, 1992. The Advisory Group has concluded and the Court agrees that because the CJRA Plan has been in effect for a relatively short time, it cannot draw firm

[1] Judicial Conference, Annual Assessments and Plan Revisions Under the Civil Justice Reform Act of 1990 (Feb. 5, 1993).

conclusions about the impact of the Plan on the cost or speed of civil cases in the district. This assessment primarily focuses on how the Plan has been implemented and on making recommendations for improvement.

I. Assessment of the Docket

A. Sources

In assessing the docket, the Court considered the following materials:

a. Statistics Prepared by the Administrative Office of the United States Courts.

b. Administrative Office of the United States Courts, "Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, SY 92 Statistics Supplement," (Sept. 1992) and "Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990; SY93 Statistics Supplement" (Sept. 1993).

c. JS-56 Reports of Motions and Bench Trials Pending for more than Six Months.

d. Administrative Office, 1992 Federal Court Management Statistics, Judicial Workload Profile.

e. The Judicial Business of the United States Courts of the Seventh Circuit, 1992.

B. Analysis

1. Criminal Caseload

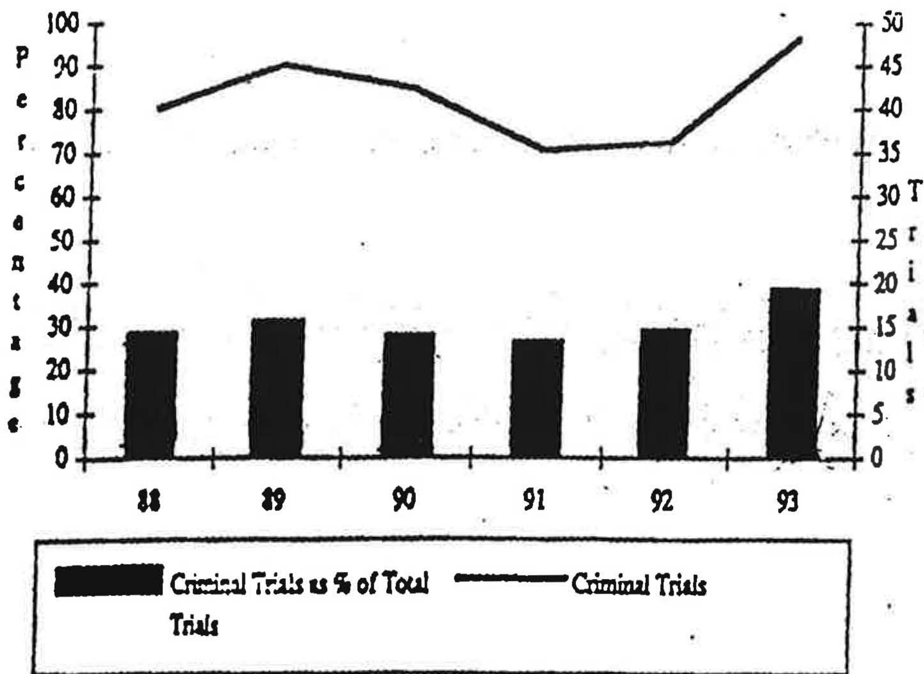
While the Civil Justice Reform Act is concerned with the civil caseload, criminal caseload necessarily limits the availability of judicial resources for civil matters. Criminal filings increased nationally during the past year by 4 percent, with an 8

percent increase nationally in the number of drug cases. In the Southern District in 1993, the number of criminal defendants decreased slightly from 1991, with drug defendants accounting for fewer than 20 percent of total defendants.

However, as the chart below demonstrates, criminal trials continue to place significant and growing demands on the Court.

Southern District of Indiana, Number of Criminal Trials and Criminal Trials as a Percentage of Total Trials, SY88-93 (p.3A):

Number of Criminal Trials and Criminal Trials as a Percentage of Total Trials, SY88-93.



2. Civil Caseload

a. General Information

The past year reversed a five-year period of decreasing civil filings in federal courts. Nationally during 1992, district court civil filings increased over the previous year by 9 percent.[2] In the Southern District, civil filings were up by 24.4 percent in 1992.[3]

In part, the increase in the local civil caseload may result from a change in Indiana Trial Rule 76, effective in February 1992, that eliminated an automatic right of change of venue from the county in cases filed in state court. In 1991, 189 cases were removed from state courts; in 1992, 247 were removed. Through November 1993, 259 were removed. This year's figure represents a 37% increase in removal filings over 1991, the last year during which Indiana's liberal venue provision was in effect.
In part, however, the increase reflects the national increase in civil rights cases and prisoner petitions, both of which were up in this district. As was true during the initial

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[2] Administrative Office of U.S. Courts, 1992 Federal Court Management Statistics p. c:

" District court filings increased dramatically in 1992, from 244,790 to 265, 612, a gain of almost 9 percent. Total weighted filings per judgeship, which had declined in 1991 as a result of 74 additional district judgeship positions, grew to 416 in 1992. The gain in civil filings arose primarily from increases in defaulted student loans, civil rights cases, and prisoner petitions. Criminal felony filings increased 4 percent to 35, 103 with drug cases growing 8 percent to 11, 884 case filings (excluding transfers)."

[3] In 1992, 2,586 civil cases were filed, as compared to 2,079 in 1991. Annual Report of the Director of the Administrative Office, 1992, Table C, "Civil Cases Commenced, Terminated and Pending During the Twelve Month Periods Ended June 30, 1991 and June 30, 1992.

docket assessment, prisoner petitions continue to be the largest single category of cases, accounting for over 27 percent of the case filings in the district during SY 91-93.[4]

Distribution of Case Filings and Filings by Case Type (p. 5A):

[4]Guidance to Advisory Groups, Sept. 1993, p. 9.

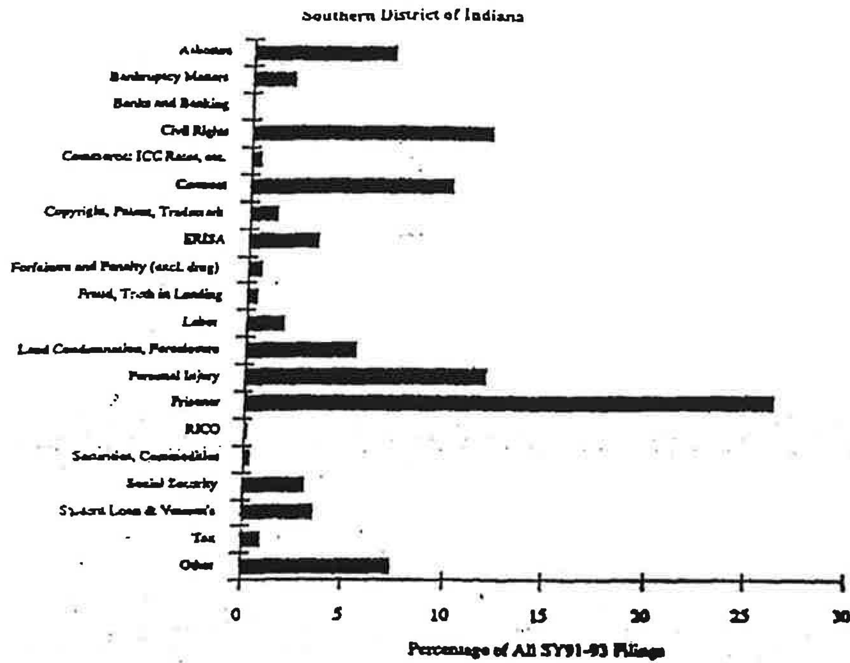


Chart 2: Filings By Broad Category, SY84-93
Southern District of Indiana

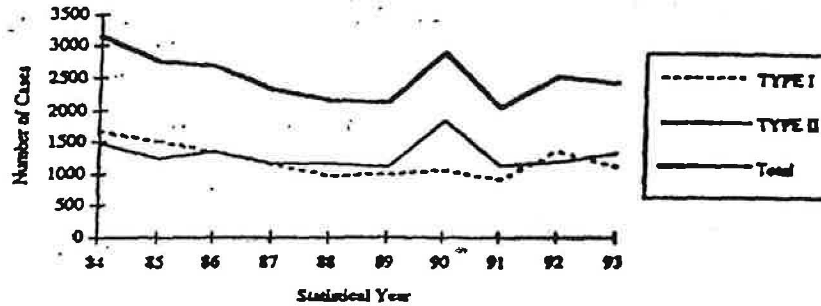


Table 1: Filings by Case Type, SY84-93

Southern District of Indiana	YEAR									
	84	85	86	87	88	89	90	91	92	93
Asbestos	1	2	1	7	6	3	138	25	380	87
Bankruptcy Matters	31	29	44	30	66	71	51	47	50	52
Banks and Banking	4	3	7	4	2	3	4	1	1	3
Civil Rights	212	180	181	174	201	180	176	221	261	339
Commerce: ICC Rates, etc.	20	18	10	3	5	8	846	18	11	13
Contract	347	399	379	317	329	324	233	237	223	242
Copyright, Patent, Trademark	45	37	32	27	31	47	32	31	36	36
ERISA	33	61	65	71	50	44	49	76	71	98
Forfeiture and Penalty (excl. drug)	21	21	11	11	12	20	23	29	19	5
Fraud, Truth in Lending	26	21	32	20	17	18	11	15	12	10
Labor	91	68	89	72	66	63	73	39	47	48
Land Condemnation, Foreclosure	181	166	264	299	193	181	142	127	119	134
Personal Injury	218	195	284	215	196	215	203	224	280	327
Prisoner	379	364	314	424	395	446	523	558	599	663
RICO	0	0	3	2	3	2	6	5	5	1
Securities, Commodities	41	22	24	21	18	18	12	11	9	9
Social Security	257	159	117	144	143	94	42	78	48	92
Student Loan and Veteran's	825	785	604	240	167	180	134	59	132	56
Tax	34	28	17	25	19	28	16	21	21	29
All Other	374	179	197	188	197	129	145	180	174	156
All Civil Cases	3137	2737	2675	2284	2116	2092	2866	2015	2496	2400

The district has had a judicial vacancy since April 1, 1993. The district is also the site of multi-district litigation over the drug Prozac; 53 cases have been consolidated before Judge Dillin. In addition, Judge Dillin has a second multi-district case involving patent rights; seven of these patent cases have been consolidated.

b. Weighted Filings

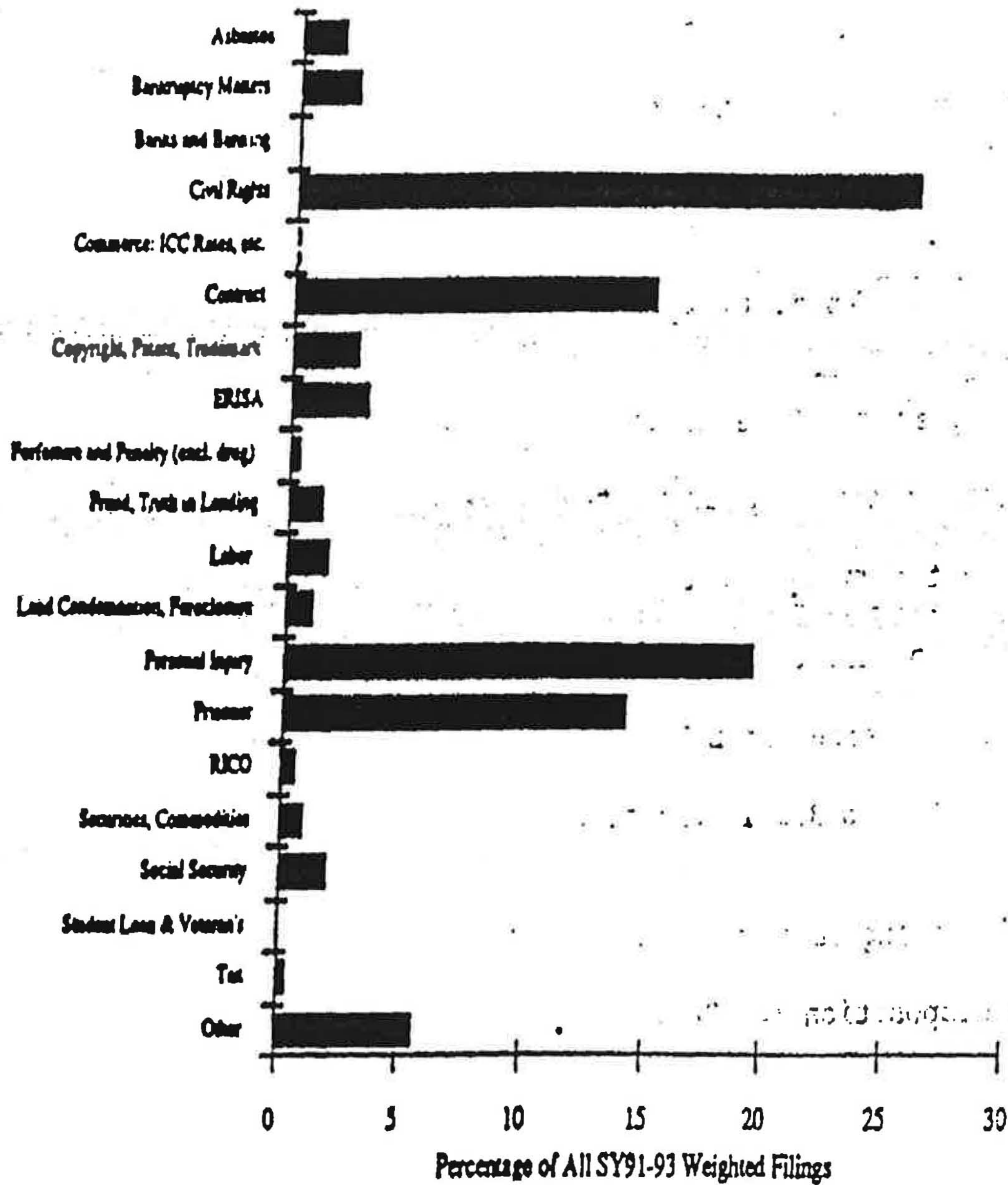
"Weighted filings" refers to the number of actions per judgeship adjusted for case difficulty. The figure includes both civil and criminal filings. Weighted filings increased dramatically in 1992 to 622 from 447 in 1991. This increase put the district first in the circuit in weighted filings, and third in the United States during 1992.[5] The chart below shows the distribution of weighted case filings. As was the case at the time of the initial docket assessment, civil rights cases are the largest category.

Distribution of Weighted Civil Case Filings, SY 91-93 (p. 6A):

[5] Administrative Office of the United States Courts, 1992 FEDERAL COURT MANAGEMENT STATISTICS at 105. Comparable figures for 1993 are not yet available.

Chart 3: Distribution of Weighted Civil Case Filings, SY91-93

Southern District of Indiana



c. Terminations

During the one year period ending Sept 30, 1992, 2,887 cases were terminated in the district. Terminations per judgeship increased from 558 to 577, making the Southern District first in the circuit and fifth in the country in terminations.[6] Of those terminations, 62 were during or after trial.[7]

d. Length of Time to Disposition

In 1990, at the time of the initial assessment, the median time in civil cases from issue to trial was 19 months. It has decreased in the two years since, to 16 months. Nationally, the median time from issue to trial in civil cases is 15 months. The district has increased from 7th in the circuit in time from issue to trial in 1990 to 3rd in the circuit in 1992.

The following table shows the length of time to termination by method of disposition (p. 7A):

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[6] In fact, terminations per judgeship have increased steadily in each of the last five years. Judicial Workload Profile, Indiana Southern.

[7] Judicial Business of the U.S. Courts for the Seventh Circuit, Table C-4 (excludes Land Condemnation Cases)

	BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	# OF CASES	10% LESS THAN	MEDIAN	10% MORE THAN	# OF CASES	10% LESS THAN	MEDIAN	10% MORE THAN	# OF CASES	10% LESS THAN	MEDIAN	10% MORE THAN
ILLINOIS NORTHERN	4,456	1	3	15	971	4	11	33	189	9	24	56
ILLINOIS CENTRAL	838	2	7	25	9	*	*	*	33	8	25	46
ILLINOIS SOUTHERN	740	2	8	24	112	4	18	34	52	11	25	47
INDIANA NORTHERN	538	1	5	24	425	4	11	26	60	9	15	35
INDIANA SOUTHERN	1,704	2	6	26	174	10	16	35	59	14	29	49
WISCONSIN EASTERN	459	1	7	28	44	11	17	47	52	11	22	61
WISCONSIN WESTERN	294	1	3	8	161	3	6	10	30	5	8	11
TOTALS	9,119	1	4	21	1,916	4	12	31	495	8	22	52

* *Time interval computed only where there are 10 or more cases.*

A smaller percentage of the court's docket is now over three years old than at the time of the original assessment. In 1991, 7.9 percent of the court's cases were three years old.[8] In 1992, the percentage had decreased to 5.7. This statistic places the Southern District 51 out of 94 in the country in the number of old civil cases.[9]

Finally, the CJRA requires all judicial officers to complete reports listing all of their submitted motions and bench trials over 6 months old. The following chart shows the figures reported by judicial officers in March, 1993. For comparison purposes, figures for pending motions and bench trials at the time of the initial assessment are shown in parenthesis:

	Year Pending								
Judicial Officer	Motions	Bench Trials	87	88	89	90	91	92	93
Endsley	0 (0)	0 (0)							
Foster	5 (2)	0 (0)	1				3	1	
Hussmann	1 (3)	0 (0)						1	
Godich	10 (30)	0 (3)					6	4	
Barker	15 (22)	1 (0)				1	2	12	
Brooks	23 (16)	0 (0)				1	4	18	
Dillin[10]	6 (2)	0 (0)			1	2		1	
McKinney	9 (1)	0 (0)					4	4	1
Steckler	10 (10)	0 (0)	1					4	5
Tinder	6 (63)	0 (3)					1	5	

[8] Judicial Workload Profile, 1992.

[9] Administrative Office, 1992 FEDERAL COURT MANAGEMENT STATISTICS at 105.

[10] Judge Dillin did not itemize motions or give dates for pending motions in cases involving Eli Lilly (patent case) and an MDL case.

As was the case at the initial assessment, summary judgment motions continue to be the most time-consuming.[11] However, the court has made significant progress in decreasing the number of pending motions.

e. Summary

The workload of the court has increased since the CJRA Plan went into effect, as demonstrated by the general increase in case filings and the substantial increase in weighted filings per judgeship. Moreover, the district has had an unfilled judicial vacancy since April. Nevertheless, the district has not lost ground in the speed with

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[11] As reported by the judges in March 1993, pending motions fell into the following categories:

1. Summary Judgment: 33
   - Social Security: 1 — Contract: 9
   - Civil Rights: 6 — Prisoner: 1
   - Patent/Copyright: 2 — Environment: 1
   - RICO:2 — U.S.Debt: 1
   - Tariff: 1 — Admin. App.: 1
   - Unclear: 3
2. Motions to Dismiss: 12
   - Statutory Action: 1 — Fraud: 1
   - Civil Rights: 3 — RICO: 2
   - Prisoner: 2 — Real Prop.:2
   - Labor: 1 — Unclear: 1
3. Petitions for Habeas Corpus: 5
4. Various: 10
   - Social Security Review: 2
   - Sanctions, Civil Rights: 1
   - Show Cause, Civil Rights: 1
   - Attorney's Fees: 1
   - Motion to Strike Brief, Bankruptcy: 1
   - Judgment on Pleadings, no subj.: 1
   - Motion to Vacate Arbitration: 1
   - Motion to Reconsider, no subj.:1
   - Bankruptcy Appeal: 1
5. Unclassified: 7

which it resolves cases, and has succeeded in decreasing the percentage of old cases as well as the number of pending motions.

II. Assessment of the CJRA Plan

A. Sources

In assessing the impact of the Plan, the Court consulted the following sources:

a. Analysis of 400 randomly-selected docket sheets conducted by the Advisory Group;

b. Advisory Group survey of attorneys who have participated in cases filed in the district since the adoption of the Plan.[12]

c. Summaries of Advisory Group interviews with judicial officers about their experiences under the Plan.

d. Summaries of Advisory Group interviews with Clerk's Office personnel.

B. Plan Implementation

1. Case Management Plans: Local Rule 16.1

LR 16.1(c) requires attorneys to file Case Management Plans (CMPS) in all cases not exempted from pretrial treatment under the rule. The full text of the Rule is set out in Appendix I. The CMP requirement was adopted on the view that attorneys should be required to focus their attention on planning the pretrial aspects of a case at an early stage, and in the hope that such attention would increase both attorney

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[12] Surveys were sent to 161 attorneys of record in cases that were randomly selected for docket sheet review. Sixty-one surveys had been returned at the time this assessment was written.

cooperation in managing the case efficiently and attorney compliance with deadlines that they had participated in establishing.

The Advisory Group reviewed two sets of randomly-selected docket sheets to assess compliance with the requirement that Case Management Plans be tendered.[13] The first set of cases was chosen from the period January-December, 1992. It revealed that CMPs were being tendered in fewer than half the cases in which they were required.[14] Because most of these cases had been filed when the CJRA Plan was new, the Group also reviewed randomly-selected cases filed in January-February, 1993 and in April-May 1993. The compliance rate during the first period was 72 percent; during the second, the compliance rate was 67%.[15] Most judicial officers estimated that the compliance rate was much higher (from 80-90%).

Attorneys gave various reasons for non-compliance with the requirement, including that the Court had entered an order without waiting for a CMP; the early settlement of the case, or the attorneys' belief that the case would settle and obviate the need for a CMP; the dismissal of the case; and the case's exemption from the requirement.

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[13] For purposes of this review, cases exempt from the CMP requirement under L.R. 16.1 were excluded.

[14]. The results of this review were bolstered by the attorney survey. Thirty-four attorneys reported filing a CMP that was approved by the Court; 3 reported filing a CMP that was not approved by the Court as submitted; 23 reported filing no CMP.

[15] For purposes of this review, cases from Judge McKinney were excluded. Judge McKinney issues scheduling orders in the great majority of cases assigned to him.

The docket sheet review also revealed that when there is a significant amount of early activity in a case, such as the filing of an early dispositive motion rather than an answer, or the filing of a motion for a preliminary injunction, it is much less likely that the case will follow the CMP procedure.

Nevertheless, the number of cases in which the CMP process is being followed is increasing as attorneys become increasingly familiar with the CJRA Plan's requirements.

a. Attorney Views on CMP Requirement

Through a survey, attorneys were asked whether the experience of constructing a CMP reduced total time or expense in the case.[16] Twenty-two respondents commented favorably on the CMP requirement.[17] Most of the positive comments suggested that CMPs were valuable because they forced attorneys to focus attention on the case in its early stages. Attorneys also appreciated establishing deadlines and a trial date early in the life of a case. This comment is typical:

> I believe that the early identification of the legal theories in the case saved time and expense by focusing the parties on the critical issues. Early discussion concerning discovery proved beneficial by forcing the parties and their counsel to critically review what discovery needs to be accomplished and establish a framework within which to get it completed.

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[16] If the attorney believed that it was still too early to tell, s/he was asked to predict whether the CMP would reduce total time and expense.

[17] See survey results in Appendix II.

Five of the comments were mixed. Generally, these attorneys believed that CMPs could work, but experienced problems that they attributed to inexperience or recalcitrance in opposing counsel, or to what they viewed as a lack of enforcement by the Court. Nine of the comments were negative. Respondents complained that CMPs are inefficient if opposing counsel do not comply with deadlines; that the CMP can itself be a breeding ground for petty disputes; and that the CMP is too complex for some simple cases.

Several respondents suggested that CMPs are inappropriate when one of the parties is proceeding pro se.

Respondents were asked whether the CMP process had other benefits, such as increased cooperation between attorneys. Seventeen respondents[18] saw such benefits, including earlier formulation of issues; early exchange of information; better organization; and better discussion of discovery issues. One attorney commented:

> There was already a considerable amount of cooperation between me and opposing counsel. However, constructing the CMP took further advantage of this cooperative spirit by assisting both sides in formalizing a plan for disposing of the case more efficiently and economically under the pressure of self-imposed deadlines.

A majority of respondents stated that neither they nor opposing counsel had adhered to the timetable adopted in the CMP.[19] In explaining their inability to comply with the deadlines, most respondents cited one of three reasons: opposing counsel's

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[18] Total number of respondents on this question: 28.

[19] Thirty-eight respondents said they had not (22 reported that they had complied); thirty-nine said their opponents had not (21 reported their opponents had complied).

non-responsiveness on discovery issues threw off the entire timetable; the timetable was unrealistic from the beginning; and settlement negotiations required that the timetable be extended in hopes of reaching agreement. Only one respondent stated that s/he and opposing counsel were both overwhelmed with other work, and agreed to extensions of deadlines for this reason.

In response to a question asking them to identify CMP requirements that posed compliance problems, few attorneys reported difficulty in complying with any of the CMP's required elements. Five respondents reported difficulty with discovery deadlines and three singled out trial deadlines. Respondents were asked to identify the most useful of the CMP requirements. They identified as most useful the requirement that the CMP set a discovery schedule (27); that it set a schedule for disclosure of witnesses and exhibits (26); that it set forth the parties' contentions (23); and that the parties discuss settlement (15). Respondents found least useful the requirement that they discuss bifurcation (4); that they discuss and schedule stipulations (5); that they discuss limits on depositions (5); that they discuss whether there is any question of a guardian ad litem, administrator, trustee, or receiver (4); and that they discuss whether the action should be consolidated with related pending suits (5).

Asked their overall assessment of the CMP requirement, respondents were overwhelmingly positive, with 28 positive comments out of 37 responses. Typical of such comments were that the requirement forces early evaluations of cases, provides structure, and moves the case along to trial or settlement expeditiously. Several respondents noted that attorneys' cooperation in setting up the schedule leads to

better control over the case and is superior to "automatic" scheduling orders. Two respondents did not find the CMP requirement useful in the case asked about, but volunteered that it had been useful in other cases. Four respondents had negative comments. Two suggested that the CMP was "one more thing for attorneys to fight about." One stated that it was "a waste of time [because] it is not enforced by the Court and is violated with impunity." One ventured, "One size cannot fit all."

Overall, however, the attorneys surveyed supported the CMP requirement and were grateful for the opportunity to structure the case themselves, within the limits set out in the CJRA Plan.

b. Judicial Officer Views on CMP Requirement

After a year of experience with the CMP requirement, most of the judicial officers interviewed supported it, with various degrees of enthusiasm.

The magistrate judges have primary responsibility for ensuring that the CMP is filed, and for reviewing the substance of the plans. Only one of the district judges suggested that he reviewed the plans substantively after they were sent to him. The magistrates differ in the scrutiny to which they subject the plans. Two of the magistrate judges stated that they gave particular attention to the connection between the dates for filing dispositive motions and the suggested trial date. All of the magistrate judges stated that attorneys are not always realistic in their deadlines, and that the magistrates will edit plans before they are approved. However, the interviews suggested that the magistrates differed in their willingness to change the attorneys' suggested dates.

The magistrates differed in their assessment of the quality of the plans they receive. One magistrate stated his belief that attorneys are not routinely devoting the time and analysis to the plans that would be required to achieve the goals of the CMP process. Others believed that attorneys liked the input into the process, and thought that this early input might decrease the amount of contentiousness between the lawyers. At least one magistrate thought attorneys were submitting better CMPs as they gained experience with the process.

The magistrates noted several benefits from the CMP requirement. Consents to magistrates have increased in the past year, and several magistrates attributed the increase to the CMP requirement that parties discuss such consents as part of creating a plan. Several magistrates also stated that they have more time to devote to other aspects of their work because they are rarely required to hold scheduling conferences.[20]

Each of the magistrate judges in the Indianapolis division has developed a CMP information sheet that is sent to the attorneys with the order setting an initial pretrial. While the sheets differ, each lists the required elements of a CMP. One of the sheets is a model CMP that has blanks for counsel to insert dates. Each sheet has a slightly different emphasis, and at least one includes far fewer elements than does L.R. 16.1(c).

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[20] One magistrate noted that it had not been his practice to hold scheduling conferences, and so he found that his workload had increased because he was now required to review case management plans, rather than to issue a scheduling order.

The Advisory Group has recommended, and the Court agrees, that these forms be standardized so that the same information is sent to all attorneys. A standard form should decrease costs and increase the likelihood that each element listed in L.R. 16.1(c) is addressed by the plans.[21]

The docket sheet review revealed significant differences between the magistrate judges in the amount of compliance with the CMP requirement each magistrate achieved. One magistrate judge received CMPs in only half of the eligible cases, while one received CMPs in all of the eligible cases. Two of the magistrate judges received CMPs in 75% of the cases.

In order to increase compliance rates, the Advisory Group recommended that the initial order setting the pretrial conference and advising the parties that the pretrial will be vacated if the parties submit a satisfactory case management plan be changed to include an order that such a plan be developed and submitted. An order directing the parties to submit a case management plan is contemplated by current L.R. 16.1(c)(2). The Court agrees with and adopts this recommendation

After the CMPs are received, three of the magistrate judges approve or recommend approval of the plans within a week; most of the time, the approval is even quicker. One of the magistrates routinely takes more than a week to approve the

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[21]Judicial officers would of course retain discretion to depart from the standard form in cases where it makes sense to do so (e.g., based on examination of the pleadings). However, based on current practice, the Advisory Group anticipates that a single, standardized form could and would be used in the great majority of cases.

CMP, and often significantly longer than one week. The relationship between the approval of the CMP and the setting of trial dates is discussed below.

2. Pretrial Conferences: Local Rule 16.1

Under Local Rule 16.1, the Court is required to issue an order setting an initial pretrial conference no later than 60 days after the filing of the complaint, unless the case is exempt.[22] A review of randomly-selected docket sheets from 1992 revealed that this order was issued within 60 days in 36 of the 70 cases that were not exempt.[23] The rule requires that the order set an initial pretrial (or more accurately, a Rule 16 scheduling conference) for no later than 120 days after the filing of the complaint. That deadline was met in thirty-seven of 70 cases.[24] The rule also requires that when the parties do not tender a case management plan, the court should hold a scheduling conference or issue a scheduling order within 120 days after filing. That order or conference occurred during the first 120 days in only seven of the cases where no CMP was tendered.

Interviews with the magistrates confirmed that the initial deadlines under L.R. 16.1 are often not met. There are several reasons for this. First, the magistrates wait at least until someone has appeared for the defendant in the case before sending out the initial pretrial notice that triggers the CMP process. That appearance may not

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[22] L.R. 16.1(c)(1).

[23] Review of docket sheets from January-February 1993 found that this deadline was met in 44 of 80 cases.

[24] In the January-February 1993 period, this deadline was met in 40 out of 64 cases.

occur within the first 60 days after the complaint is filed, since the plaintiff has 120 days in which to achieve service. Second, sometimes the practice is not to send the notice until the answer has been filed. The answer may be delayed for several reasons, including (1) delayed service of the complaint; (2) requests for extensions of time to answer; and (3) the filing of a motion to dismiss rather than an answer. In some instances, additional pleadings filed with an answer (e.g., third party complaint, counterclaim) will bring in additional defendants, who in turn must answer.

The deadlines in L.R. 16.1 were adopted to comply with Fed. R. Civ. P. 16, which required a scheduling order within 120 days after filing. However, an amendment to Rule 16 that became effective December 1, 1993, alters this initial period, requiring that a scheduling order "shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant."

The Advisory Group therefore recommended that L.R. 16.1 be amended in the following manner to reflect the change in its federal counterpart:

L. R. 16(c) Initial pretrial conference.

(1) In all cases not exempted pursuant to subsection (b) of this rule, the court shall order the parties to appear for an initial pretrial conference **within 90 days after the appearance of counsel for all defendants, and in any event** no more than 120 days after the **complaint has been served on a defendant**. The order setting the conference shall issue **within 30 days** following the appearance of

counsel for all defendants and in any event no later than sixty days after the **complaint has been served on a defendant.**

The Court adopts this recommendation, and will publish the proposed amendment for notice and comment.

3. Trial Settings: Local Rule 40.3

In compliance with the Plan, the Court adopted Local Rule 40.3, which states: "All trials shall commence within six to eighteen months after filing of the complaint unless the Court determines that, because of the complexity of the case, staging provided by the case management plan, or the demands of the Court's docket, the trial cannot reasonably be held within such time."

While it is too early to assess whether these goals are being met in practice, the docket sheet review revealed that with very few exceptions, where trial dates were set at all, they were set to occur within eighteen months of filing. The judges and magistrates all believed that trial dates no later than 18 months after filing of the complaint are realistic in the vast majority of cases.

Pursuant to L.R. 16.1, trial dates should be set at the time that the CMP is approved. If the parties do not tender a plan (or tender an unacceptable plan), the court may either continue with the scheduled pretrial conference or issue a scheduling order without a conference. Under either option, the result should be the setting of a trial date. One of these scenarios (approved CMP or scheduling conference) is supposed to occur within 120 days after the complaint is filed.

A review of 1993 docket sheets reveals that the active judges are setting early trial dates. Judge McKinney, who has generally issued scheduling orders rather than employing the CMP system, sets trial dates within six months in most of his cases.[25] Three of the judges (Barker, Brooks, and Tinder) set a trial date within days after the CMP is approved or recommended for approval in almost every case.[26] Thus, any delays in soliciting or approving the CMP will affect the speed with which these judges can set trial dates, and reduce the possibility of meeting the CJRA Plan's goal of "early, firm trial dates."

While Judge Dillin does not routinely set trial dates at an early stage of the case, he does set trial dates in about half of his cases within two months after the CMP is approved. Judge Steckler does not set trial dates at an early stage of the case.

The CJRA Plan is premised on trial dates that are both early and firm. All of the judges stated that they did not routinely allow continuances of pretrial dates if those continuances threatened a trial date.

After reviewing (and sometimes modifying) CMPs, the magistrate judges recommend trial dates to the district judges. L.R. 16(c)(3) now provides that the order adopting a CMP shall also set a firm trial date. However, some district judges prefer

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[25]Judge McKinney also stated that he is beginning to use the CMP procedures in the more complex cases.

[26] The CMP approval usually occurs 4-6 months after the case is filed, and the judges' trial settings are, for the most part, within this period. Docket sheet review reveals that the CMP approval triggers a trial date with these judges within a matter of days.

to set the trial date by separate entry. It is the Court's view that either procedure is acceptable so long as a firm trial date is promptly set.

4. Deadlines for Pretrial Motions and Trial Dates

The Report of the Advisory Group in 1991 concluded that there was a serious problem with delay in court rulings on pretrial motions. The Report recommended that motions should ordinarily be ruled upon within 30 days after completion of briefing in all but the most complex cases, and within 60 days in complex cases. It noted that delays in rulings on motions frequently increase the costs of litigation by requiring attorneys to conduct pretrial preparation, particularly trial preparation, when a dispositive motion is pending.

The Report recommended, and the Court adopted, a number of provisions to reduce the costs associated with delays in rulings on motions. First, case management plans and scheduling orders should set summary judgment and other dispositive motions to be filed and briefed as soon as reasonably feasible in the circumstances of the case. The Report and Plan noted that as an outer limit in complex cases, scheduling orders should set dispositive motions to be filed and completely briefed no less than 90 days before the scheduled trial date. As an outer limit in other cases, such motions should be ready for disposition no later than 60 days before the scheduled trial date. Second, in order to reduce the costs associated with trial preparation when a motion is pending, the Report and Plan state that if a summary judgment motion has not been resolved in a case scheduled for trial within 30 days, the motion should be decided by the scheduled trial date, and the trial should

be rescheduled to a date at least 30, but no more than 90, days after the previously scheduled trial date.

While docket sheet review does not reveal whether the Court is able to meet the goals of deciding fully-briefed motions in the ordinary case within 30 days, the Court has largely succeeded in eliminating the backlog of motions that existed during the initial docket review in 1991.

Most of the judges stated that they were occasionally required to reset a trial date because a dispositive motion had not been decided within 30 days of that date. Several of the judges also expressed some dissatisfaction with this aspect of the CJRA Plan, noting their belief that parties were asking for these extensions as a matter of right, and expressing the view that some attorneys failed to meet deadlines for briefing motions in order to derail a trial date. Finally, two of the judges suggested that the CJRA Plan, which states that motions should be fully briefed no later than 60 days before trial in the ordinary case, left them too little time to decide the motions before they had to move the trial date.

In conducting the annual assessment, the Advisory Group reiterated that under the Plan, CMPs should ordinarily provide that summary judgment and other dispositive motions be fully briefed far in advance of trial. The Plan states that the **outer limit** on such motions is 60 days in the ordinary case and 90 days in the complex case. In most cases, an appropriate and reasonable deadline would be much sooner.

In order for the system to work, however, a judicial officer must give close substantive scrutiny to the CMPs to assure that the deadlines they suggest leave a

reasonable amount of time for decisions on motions. The Advisory Group recommended, and the Court agrees, that the magistrate judges should routinely give the CMPs close scrutiny to assure that the deadlines for motions are in compliance with the CJRA Plan, and that, in the ordinary case, these deadlines occur much earlier than 60 days before the trial date. The Court also notes that under the CJRA Plan, motions to extend deadlines in case management plans should be granted only for good cause, and "[m]otions to extend the outer limit deadlines should be granted only for extraordinary cause."

In its original report, the Advisory Group recommended that in order to decide motions more quickly, the Court decide those motions with shorter opinions. It noted, however, that shorter opinions are not a realistic option for the Court if the United States Court of Appeals for the Seventh Circuit did not reconsider its view that detailed opinions on such motions are not only appropriate but necessary. Only one of the judges and two of the magistrates stated that they were writing shorter opinions as a result of the Advisory Group recommendation. None of the judges reported a response from the Seventh Circuit on the recommendation. The Advisory Group reiterated its recommendation to the Court and to the Court of Appeals for the Seventh Circuit.

5. Attorney Conferences to Discuss Certain Motions: Local Rule 7.1(c)

The CJRA Plan required the adoption of the following Local Rule 7.1(c):

The court may deny any motion for the award of attorney's fees, motion for sanctions, or motion for attorney disqualification (except those motions brought by a person appearing pro se) unless counsel for the

> moving party files with the court, at the time of filing the motion, a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion.
>
> This statement shall recite, in addition, the date, time, and place of such a conference and the names of all parties participating therein. If counsel for any party advises the court in writing that opposing counsel has refused or delayed meeting and discussing the problems covered in this Rule, the court may take such action as is appropriate to avoid unreasonable delay.

None of the judicial officers interviewed had noted any effect on the number of motions for sanctions, disqualification, or fees submitted since the rule was adopted.

6. Rules on Certain Aspects of Discovery Practice

In the Plan, the Court referred to the Local Rules Committee a recommendation that it promulgate new local rules regulating certain aspects of discovery, and publicizing the willingness of magistrate judges to hear and resolve discovery disputes telephonically.

The Local Rules Committee recommended, and the Court, after notice and comment, adopted new Local Rule 30.1---Conduct of Depositions:

> (a) An attorney who instructs a deponent at a deposition not to answer a question shall state, on the record, the reasons and legal basis for the instruction.
>
> (b) If a claim of privilege has been asserted as a basis for an instruction not to answer, the attorney seeking disclosure shall have reasonable latitude during the deposition to question the deponent to establish relevant information concerning the legal appropriateness of the assertion of the privilege, including (i) the applicability of the privilege being asserted, (ii) the circumstances that may result in the privilege having been waived, and (iii) circumstances that may overcome a claim of qualified privilege.

> (c) An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question except for the purpose of determining whether a claim of privilege should be asserted.
>
> (d) An attorney shall not, in the presence of a deponent, interpose objections to deposition questions which suggest answers to those questions.

The Committee also recommended, and the Court after notice and comment adopted, Local Rule 37.3--Mode of Raising Disputes with the Court:

> Where an objection is raised during the taking of a deposition which threatens to prevent the completion of the deposition and which is susceptible to resolution by the court without the submission of written materials, any party may recess the deposition for the purpose of submitting the objection by telephone to a judicial officer for a ruling *instanter*.

Interviews with the magistrate judges suggest that attorneys are aware of and use L.R. 37.3. Some favored expanding the rule to include other sorts of discovery disputes. However, other magistrate judges questioned whether such a change would be useful. They expressed the view that few discovery disputes that arise outside the context of depositions are appropriate for decision without review of some written materials. The Advisory Group recommended no change in the rule at this time.

7. Alternative Dispute Resolution

The Court rejected the Advisory Group's recommendation in 1991 that it promulgate a new local rule, patterned on a recent rule adopted by the Indiana Supreme Court but without mandatory provisions, to establish guidelines for the initiation and implementation of ADR methods. Members of the Advisory Group report that Indiana Supreme Court rule has encouraged the development of trained and competent ADR providers in Indiana, particularly in the area of mediation. Several of

the judges reported in interviews that they had recently seen difficult cases resolved through the use of mediation. The Advisory Group made no further recommendation regarding ADR procedures at this time. The Advisory Group believes, however, that this issue should be more thoroughly addressed during 1994.

The CJRA Plan adopted an Advisory Group recommendation that the Court include a description of ADR mechanisms and a discussion of their potential benefits in the Practitioner's Handbook for Southern District attorneys, patterned after a publication produced by the Northern District of California (attached to the Advisory Group report as an appendix). Clerk's Office personnel state that the Handbook is nearing completion.

8. Pro Se Clerk

The Advisory Group Report noted the existence of a large pro se caseload (currently 35% of the docket), and the effectiveness of the pro se law clerk, Michael Frische. The Report noted that the pro se caseload did not contribute significantly to cost and delay in the district because of Mr. Frische's efforts. In preparation for this Report, members of the Advisory Group again interviewed Mr. Frische and continue to be impressed with his creativity and dedication in shepherding the pro se cases in the district.[27] The Advisory Group reiterated its recommendation to the Judicial Conference and the Administrative Office of the United States Courts that the pro se law clerk position be made a career position with advancing salary grade.

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[27] Among other things, Mr. Frische has employed the case management plan procedure in non-exempt pro se cases when in his view the process of creating a plan would materially aid the efficient resolution of a case.

III. Summary

A. The Court will create a single, standard informational form for attorneys that describes the case management plan requirement.

B. The initial order setting the pretrial conference and advising the parties that the pretrial may be vacated if the parties submit a satisfactory case management plan will include an order that such a plan be developed and submitted.

C. The Court adopts, subject to notice and comment, the following amendment to L.R. 16.1 to reflect the change in its federal counterpart:

L. R. 16(c) Initial pretrial conference.

(1) In all cases not exempted pursuant to subsection (b) of this rule, the court shall order the parties to appear for an initial pretrial conference **within 90 days following appearance of counsel for all defendants, but in any event** no more than 120 days after the **complaint has been served on a defendant**. The order setting the conference shall issue **within 30 days** following the appearance of counsel for all defendants and in any event no later than sixty days after the **complaint has been served on a defendant**.

D. The magistrate judges should routinely give the CMPs close scrutiny to assure that the deadlines for dispositive motions are in compliance with the CJRA Plan, and that in the ordinary case, these deadlines occur much earlier than 60 days before the trial date established in the approved case management plan.

E. The Court notes the Advisory Group's recommendation that the United States Court of Appeals for the Seventh Circuit not require and the district court not issue lengthy opinions deciding motions.

F. The Court adopts the Advisory Group recommendation to the Judicial Conference and the Administrative Office of the United States Courts that the position of pro se law clerk be made a career position with advancing salary grade.

APPENDIX I

Local Rule 16.1 Pretrial Procedures

(c) Initial pretrial conference.

(1) In all cases not exempted pursuant to subsection (b) of this rule, the Court shall order the parties to appear for an initial pretrial conference no more than 120 days after the filing of the complaint. The order setting the conference shall issue promptly following the appearance of counsel for all defendants and in any event no later than sixty days after the filing of the complaint.

(2) The order setting the initial pretrial conference, in addition to such other matters as the Court may direct, shall require counsel for all parties to confer and prepare a case management plan and to file such plan by a date specified in the order, which date shall be at least fifteen days before the pretrial conference setting. The order may specifically provide that the pretrial conference setting shall be vacated upon the filing of a case management plan that complies with this rule and upon the approval of such plan by the Court.

(3) Upon the filing of an acceptable case management plan in compliance with the order and this rule, the Court may issue an order adopting the plan, ordering it performed, and vacating the initial pretrial conference setting. Any such order shall also set a firm trial date.

(4) If the parties do not file a case management plan, or file a plan that fails materially to comply with the order and this rule, or file a plan that reflects material disagreements among the parties, the Court may:

(A) Conduct the initial pretrial conference and, following such conference, enter an order reflecting the matters ordered and agreed to at the conference and setting a firm trial date; or

(B) Issue an order without further hearing adopting the acceptable portions of the plan, omitting unacceptable portions, supplying omitted matters, resolving disputed matters, vacating the pretrial conference setting and setting a firm trial date. The Court may choose to conduct a telephone conference with counsel prior to entering such an order.

(5) To the extent permitted by statute and rule, orders entered under subparagraphs (c)(3) and (c)(4) may set an alternative trial date in the event the parties thereafter consent to referral of the case to a magistrate judge.

(d) Contents of case management plan.

(1) The objective of the case management plan is to promote the ends of justice by providing for the timely and efficient resolution of the case by trial, settlement or pretrial adjudication. In preparing the plan, counsel shall confer in good faith concerning the matters set forth below and any other matters tending to accomplish the objective of this rule. The plan shall incorporate matters covered by the conference on which the parties have agreed as well as advise the Court of any substantial disagreements on such matters.

(2) The conference and case management plan shall address the following matters:

-- Trial date. The plan should be premised on a trial setting between six and eighteen months after the filing of the complaint and should recommend a trial date by month and year. If counsel agree that the case cannot reasonably be ready for trial within eighteen months, the plan shall state in detail the basis for that conclusion. The plan shall also state the estimated time required for trial.

-- Contentions. The plan shall set forth the contentions of the parties, including a brief description of the parties' claims and defenses.

-- Discovery schedule. The plan shall provide for the timely and efficient completion of discovery, taking into account the desirability of staged discovery where discovery in stages might materially advance the resolution of the case. The plan should also provide a schedule for the taking of the depositions of expert witnesses, together with (1) a designation whether the deposition is for discovery purposes only or is to be offered in evidence at trial, (2) a determination of the party responsible for the payment of the witness' fees, and (3) as to each witness designated, an order for the production of curriculum vitae and a list of all prior Court or administrative proceedings at which the witness has testified during the preceding five years;

-- Witnesses and exhibits. The plan shall incorporate a schedule for the preliminary and final disclosure of witnesses and exhibits.

-- Accelerated discovery. The parties shall discuss and seek agreement on the prompt disclosure of relevant documents, things and written information without prior service of requests pursuant to Fed. R. Civ. P. 33 and 34.

-- Limits on depositions. The parties shall discuss whether limits on the number or length of depositions should be imposed.

-- Motions. The plan will identify any motions which the parties have filed or intend to file. The parties shall discuss whether any case-dispositive or other motions should be scheduled in relation to discovery or other trial preparation so as to promote the efficient resolution of the case and, if so, the plan shall provide a schedule for the filing and briefing of such motions.

-- Stipulations. The parties shall discuss possible stipulations and, where stipulations would promote the efficient resolution of the case, the plan shall provide a schedule for the filing of stipulations.

-- Bifurcation. The parties shall discuss whether a separation of claims, defenses or issues would be desirable; and if so, whether discovery should be limited to the claims, defenses or issues to be tried first.

-- Alternative dispute resolution. The parties shall discuss the desirability of employing alternative dispute resolution methods in the case, including mediation, neutral evaluation, arbitration, mini-trials or mini-hearings, and summary jury trials.

-- Settlement. The parties shall discuss the possibility of settlement both presently and at future stages of the case. The plan may provide a schedule for the exchange of settlement demands and offers, and may schedule particular discovery or motions in order to facilitate settlement.

-- Referral to a magistrate judge. The parties shall discuss whether they consent to the referral or the case to a magistrate judge.

-- Amendments to the pleadings; joinder of additional parties. The parties shall discuss whether amendments to the pleadings, third party complaints or impleading petitions, or other joinder of additional parties are contemplated. The plan shall impose time limits on the joinder of additional parties and for amendments to the pleadings.

-- Other matters. The parties shall discuss (1) whether there is a question of jurisdiction over the person or of the subject matter of the action, (2) whether all parties have been correctly designated and properly served, (3) whether there is any question of appointment of a guardian ad litem, next friend, administrator, executor, receiver or trustee, (4) whether trial by jury has been timely demanded, and (5) whether related actions are pending or contemplated in any court.

-- Interim pretrial conferences. The parties shall discuss whether interim pretrial conferences prior to the final pretrial conference should be scheduled.