

**AO Review of Reports and Plans
For the Judicial Conference Subcommittee on Court Administration**

District: District of New Hampshire

Date: January 12, 1994

Upon reviewing the Advisory Group Report and the Expense and Delay Reduction Plan for the District of New Hampshire, staff has the following observations. The Advisory Group made a study of local and national court statistics and interviewed all judicial officers. Attorneys and parties surveyed. The Group also published its draft and held a public comment session. The Court carefully considered the Group's individual recommendations, and adopted almost all of them. The recommendations and the plan do address identified areas of concern relative to cost and delay. The Court did directly address all guidelines, principles and techniques of the Act, in addition to the Advisory Group's recommendations.

- This plan is responsive to the report of the Advisory Group, and adopts all of its recommendations for immediate implementation.
- The plan specifically provides for early and firm trial dates.
- The plan specifically addresses rules covering presumptive limits on the amount of discovery.
- The plan reaffirms specific certification burdens on counsel regarding continuance motions.
- The Court has expanded the scope of rules in place requiring that only counsel with authority to bind appear at pretrial conferences, and extended the requirement to all conferences.
- The plan departed from the Advisory Group approach to ADR, deciding not to adopt a formal ADR program. The Court will assist interested parties in obtaining their own neutral.
- The Advisory Group recommended, and the Court will create, a four track DCM system.

Frederick M. Russillo, Senior Program Analyst, CAD-CPB

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**District of New Hampshire
Report of the Advisory Group
Expense and Delay Reduction Plan**

Summary

PART ONE: REPORT OF THE ADVISORY GROUP

I. Assumptions; Miscellany; and Background

- A. The district serves the entire state.
- B. The district maintains one division, located in Manchester.
- D. The district has three authorized Article III judgeships, all of which are currently filled (i.e., no vacancies). There is one full-time magistrate judge, and two active senior judges.
- E. The Advisory Group conducted interviews of all judicial officers. It also surveyed members of the federal bar, litigants, jurors, and created special survey sub-samples for those involved in criminal and complex litigation. Data analysis was performed utilizing court and national data, as well as data generated by the Advisory Group. The draft report was published for comment; and a public comment meeting was held.
- F. The district has implemented CHASER and PIP, a customized public inquiry program. PACER is scheduled for implementation in January, 1994. The Clerk's Office will also soon test an automated assignment system for court-wide application.
- G. The district has a number of local rules in place which foster CJRA goals, including rules regarding a certification requirement for a joint conference prior to a motions filing and a requirement of the presence of an attorney with the authority to bind at pretrial conferences.

II. State of the Docket

- A. Overall Workload Statistics
 - 1. Filings in this district steadily declined from 1984 through 1987, and leveled off thereafter before surging in 1990-1992, rising by 45% in 1992 alone.

2. Civil filings increases are believed to result from increased FDIC and Social Security cases, as well as the general effects of the regional recession.
3. Tort cases consistently dominate the docket, constituting one quarter of the docket until 1992; contract cases have stood at approximately 17% of civil filings over the past twelve years; prisoner cases represent the third largest case category, comprising approximately 9% of civil filings.
4. Pending civil cases over three years old were less than 5% of the total caseload before 1984; these cases averaged over 11% of the caseload through 1989, declining to their present 8%. The filing surge from 1990, coupled with reduced judicial hours due to a bench vacancies, served to increase these older cases. Visiting judges have been extensively used to reduce this burden through the time of the appointment of the third Article III judge.
5. Civil case processing time increased substantially for the period of 1989-1991 before declining in 1992. Time from issue to trial declined in 1992 from 26 months to 23, ranking the district 75th on this indice nationally; time from filing to disposition declined drastically in the same period, from 13 to 8 months, dropping this districts national ranking in this indice from 81st to 15th.
6. Federal cases are growing more complex; Congress' impact on the federal court docket is significant through the creation of new causes of action, agency action reviews, the federalization of crime, and procedural initiatives (e.g., Sentencing Guidelines); and the judicial selection process.

III. Causes of Cost and Delay

- A. The current facilities are inadequate to provide a courtroom for each judge; judges must now share state courtroom facilities.
- B. Frivolous lawsuits or claims.
- C. Over-broad discovery requests.
- D. The conduct of clients.
- E. The lack of firm trial dates.

- F. The lack of civility displayed by a minority of the bar.
- G. The inability of the U.S. Attorney's Office to provide counsel at pretrial conferences with the ability to bind principals.
- H. The amount of time devoted to prison condition cases.
- I. The time devoted to implementing federal procedural initiatives such as Sentencing Guidelines, and state agency reviews.

IV. Recommendations

A. Court Resources

- 1. Congress and the GSA should proceed with the appropriation for m and the completion of, the new courthouse.
- 2. Until the new courthouse is complete, judicial non-courtroom time should be minimized through, among other means, the use of state courtroom facilities.

B. Court Procedures

- 1. Random case assignment procedures should be continued, and new statistical data should be added on the implementation of differential case management.
- 2. Only one extension of time to file an answer should be granted prior to Court review of subsequent requests; extensions should be for 40 days only.
- 3. Magistrate judges should screen pro se complaints by local rule, and the court should consider the following for magistrate judges:
 - a. assign more social security cases;
 - b. assign summary jury trials;
 - c. assign, by consent, part of the "rocket docket" to the magistrate judge;
 - d. consider trials by consent at the pretrial conference; and

- e. explore magistrate judge involvement in any ADR program considered.
- C. Senior and Visiting Judges: every effort should be made to accommodate visiting judges; the A.O. should have the ability to reassign staff and judges where temporary needs exist.
- D. Communications and coordination
 - 1. Local rules should be available on Lexis and CD ROM.
 - 2. Judges should continue to participate in CLE and bar association activities.
 - 3. Bar and public input should be sought in conjunction with the plan's 18 month evaluation.
 - 4. Judges should maintain their traditional collegiality and cooperation.
- E. Litigant and Attorney Practices
 - 1. Representatives with authority to bind should attend all pretrial conferences unless absent by motion.
 - 2. ADR timing and feasibility should be subjects at the preliminary pretrial conference.
 - 3. Judicial officers should handle all pretrial conferences.
- F. Page limits on memoranda: a 25 page limit for legal argument, and a 50 page limit on memoranda on dispositive motions in complex cases.
- G. Civility: lawyers should strive for civility.
- H. Pro se litigation
 - 1. Pro se cases should be screened by the magistrate judge before service.
 - 2. Pro se practice should be monitored by the Attorney General's Office and the bar under their state statutory authority to prevent unauthorized practice.
 - 3. The Court should consider a close relationship with the bar's Pro Bono Program to tap its resources to screen and resolve pro se complaints.

* Too Long
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4. The Clerk's Office and the bar should develop and distribute a pro se handbook.

I. U.S. Litigation

1. The state Corrections Commissioner should consider the adoption of an ombudsman-type system to review prisoner complaints.
2. Public officials and counsel should be aware of the changes advocated in this report to allow them to consider case impacts and settlement options before investing in litigation.

J. Impacts of new legislation on the Court

1. Congress should submit impact statements on new civil legislation.
2. Impact statements should always answer the following: "is there a private right of action?" and "if so, who is allowed to bring suit?"

K. Assessment of Criminal Docket and Legislation

1. Congress must balance resources in legislative initiatives between the courts, Justice Department, and enforcement agencies.
2. The sentencing guidelines and mandatory minimums should be reconsidered on the grounds of efficiency.
3. The Speedy Trial Act should be reconsidered for those not incarcerated.
4. The U.S. Attorney's Office should institute an open discovery policy.
5. The U.S. Attorney should work with the Probation Office to increase the use of pretrial diversion.

1. Alternate Dispute Resolution (ADR)

1. Summary jury trials (SJT) should be a last resort; when allowed, juror interviews should be permitted.
2. Bar examinations should be updated to include ADR matters; CLE should be offered on ADR subjects; an ADR pamphlet should be developed for litigants; and the new lawyer training program should include an ADR component.

J. Trial and its Antecedents

1. Pretrial statements should be detailed, accurate tools containing:
 - a. identified exhibits and lists of witnesses that will actually be called;
 - b. a brief, jointly stipulated statement of the case;
 - c. stipulations are binding on the parties;
 - d. prior statements should be updated at least 30 days before trial;
 - e. requests for jury instructions should be filed with the pretrial statement; and
 - f. motions in limine should be filed, whenever possible, with the pretrial statement for consideration at the pretrial conference.
2. Trial scheduling should continue to rely on the use of stacked cases for trial.
3. Final pretrial conferences should use uniform procedures; should continue to be held two weeks prior to trial to encourage settlement; and should not be limited to 30 minutes.
4. To reach settlements at pretrial conferences:
 - a. attorneys with authority to bind should be present;
 - b. attendance by clients, or telephone availability is required;
 - c. judges training should emphasize settlement promotion;
 - d. counsel should give more accurate estimates of trial length;
 - e. no continuances should be granted absent extraordinary circumstances; and
 - f. local rules and definitions should be clarified on exhibit-related issues such as disclosure versus marking, impeachment versus cross-examination exhibits, and rebuttal versus impeachment exhibits.

5. counsel drawing juries should reach court at least 45 minutes early on the day of the draw.

K. Systematic differential treatment of cases (DCM)

1. The present system for differential case treatment should be expanded into a formal system of three tracks;
2. These tracks are: a voluntary six month "rocket docket" track, a one year track from complaint to trial, and a two year complex track; and
3. Tracks should be phased in.

L. Involvement of judicial officers in the pretrial process:

1. Assessing and planning case progress should be accomplished under the auspices of FRCP Rule 16; judge hosted pretrial conferences should be held in all cases except those with any existing track assignment.
2. Early, firm trial dates should be the rule; complex case trial dates should be set after a settlement conferences held six months after the filing.
3. The tools of FRCP Rule 26 should receive attention in discovery control, and the preliminary pretrial conference form should require the discussion of discovery limits.

M. Deadlines for the filing and disposition of dispositive motions

1. The timing, filing, and oral argument of dispositive motions should be discussed at the pretrial conference.
2. A guideline of 60 days for ruling should be adopted by the court, and the Chief Judge should have the discretion to reassign motions to avoid late rulings.
3. Counsel should carefully consider the efficacy of dispositive motions.

N. Managing complex cases

1. Judges should explore settlement with the parties at preliminary pretrial conferences.

2. Up to five pretrial and status conferences would be held on the two-year complex case track under the DCM system proposed.
3. A case management order should issue at the end of the pretrial conference, and be revised only if necessary.
4. Appropriate sequencing and limitations on discovery should be considered.

O. Voluntary exchange of information

1. By local rule, the district should opt out of proposed Rule 26.
2. The Court should develop standing discovery orders for ^T case types to be considered at the preliminary pretrial.
3. The Court should reconsider its decision regarding Rule 26 after sufficient experience from other jurisdictions allows re-evaluation.

P. Meet and confer requirements on discovery motions: the requirements of the existing local rule should be continued.

Q. A system of alternate dispute resolution

1. This system should be utilized on a case by case basis.
2. Parties should fill out a simple ADR form in advance of the pretrial conference to expedite referral to an agreed upon neutral, unless otherwise ordered.
3. Parties without preference in neutrals should be referred to approved neutrals meeting certain specified criteria, and whose names are kept by the Clerk's Office.
4. Neutrals should be paid one half their fee by each party (with a reasonable cap), providing the neutral agrees to take some pro bono and half-fee cases.
5. Results should be confidential and inadmissible by rule.
6. Sessions should be held in the courthouse, if possible.
7. The ADR Program should be evaluated after 18 months, and annually thereafter.

8. Referrals to ADR should come from the Court or the parties.
9. ADR discussions should be scheduled at an intermediate pretrial conference if not possible at the preliminary pretrial conference.

R. Litigation management techniques

1. Joint presentation of discovery case management plans: the Court should opt out of this proposal, if congress adopts it.
2. Representation at each pretrial conference by a lawyer with authority: present Local Rule 10(a) should be amended to include attendance at all conferences.
3. All extensions signed by attorney and party: adopt modified state court rule requesting certification by attorney of client's consent, rather than client's signature.

PART TWO: THE COURT PLAN; PLAN PROVISIONS

I. Introduction, Principles, and Implementation

- A. **Statement of purpose: the Court adopts this Civil Justice Expense and Delay Reduction Plan (plan) pursuant to the CJRA, §471, after consideration of the report of the Advisory Group and its recommendations.**
- B. **Acknowledgement: the Court is grateful to the Advisory Group for its time and effort.**
- C. **General principles**
 - 1. **Efficient use of resources: success depends heavily on the efficient use of the Court's resources and Clerk's Office staff.**
 - 2. **Consistency and flexibility: plan provisions will be applied to balance the needs for both consistency and flexibility to avoid adverse consequences to parties.**
 - 3. **Contributions by all participants: the Court, counsel, and litigants must contribute to the success of the plan.**
 - 4. **Civility: the maintenance of civility is essential to the efficient and fair administration of justice; the court will strive to maintain a high level of courtesy toward all, and expects the same in response.**
- D. **Availability of the plan: the plan will be available to litigants and attorneys through the Clerk's Office, and electronically through the Court Information System (CIS).**
- E. **Implementation of plan**
 - 1. **Effective date: all provisions unless otherwise noted are effective 3-1-94; those involving rules amendments are effective on the date of those amendments.**
 - 2. **Annual assessments and the role of the Advisory Group: the Advisory Group will meet periodically to assist the Court in assessing the condition of the docket.**

II. Litigation Management Principles and Guidelines

A. Systematic differential treatment (DCM) of civil cases

1. The Court will create a four track DCM system; in most cases, trial dates will be set from the date of the preliminary pretrial conference, rather than the filing date.
2. The system will have four tracks: administrative, expedited, standard, and complex.
3. Definitions:
 - a. **administrative:** discovery not permitted without leave of court; cases resolved within six months of filing; case types include Social Security, student loans, bankruptcy appeals, etc.
 - b. **expedited:** voluntary agreement to trial in six months, and assignment with approval of a judicial officer; estimated trial length of five days or less.
 - c. **standard:** trial within 12 months of the preliminary pretrial conference; for the first two years of its use, this track will anticipate trial within 18 months, and the Court will evaluate this track's performance; and
 - d. **complex:** trial within two years of the preliminary pretrial conference.
4. **Evaluation and assignment:** cases will be assigned at the preliminary pretrial conference, and may be reclassified by the assigned judge.
5. **Initial case assignment:** the Clerk's Office will continue to randomly assign cases to judges, and will begin to keep caseload statistics by track.
6. **Date of application:** shall apply, with stated limitations, to all cases filed after 1-1-94; may be applied to other cases at the discretion of the judicial officer.

B. Involvement of judicial officers in pretrial process

1. Pretrial conferences

- a. judicial handling of conferences: judges will screen cases and determine if the assigned judge or a magistrate judge will handle the case conference;
- b. consideration of ADR: the ADR referral will not be to a formal ADR program, and will be the product of judicial consultation with attorneys and parties;
- c. contents of final pretrial statements:
 - 1) identified exhibits and lists of witnesses that will actually be called;
 - 2) a brief, jointly stipulated statement of the case;
 - 3) stipulations are binding on the parties;
 - 3) prior statements should be updated at least 30 days before trial;
 - 4) requests for jury instructions should be filed with the pretrial statement; and
 - 5) motions in limine should be filed, whenever possible, with the pretrial statement for consideration at the pretrial conference
- d. pretrial statements shall be filed 30 days prior to the pretrial conference.

2. **Setting of trial dates**

- a. **trial dates will be set at the preliminary pretrial conference.**
- b. the Court will continue to stack cases for trial, and will implement an integrated, automated calendar system accessible by the public and bar.
- c. the scheduling of judges for courtroom time, utilizing magistrate and state courtroom facilities, will be maximized.
- d. the Court supports the Advisory Group's call for the completion of a new courthouse.

3. Discovery and motions

- a. the Court will give increased attention to discovery limitations under Rule 26, and will discuss these limitations at the preliminary pretrial conference.
- b. the filing and timing of dispositive motions will be discussed at the preliminary pretrial conferences.
- c. the Court will weigh requests for oral argument on motions, and will allow them if helpful, with appropriate time limitations.
- d. the court will not accept a guideline of 60 days to rule on dispositive motions as recommended, but will continue to make efforts to reduce time to disposition.
- e. the Court recognizes, with the Advisory Group, that some dispositive motions are dilatory, and recommends that they be carefully considered.

4. Final pretrial conference

- a. final pretrial conferences governed by uniform procedures shall cover the following:
 - 1) the marking and exchange of exhibits;
 - 2) admissibility of exhibits not agreed upon by counsel prior to the conference;
 - 3) voir dire;
 - 4) special questions; special case problems;
 - 5) view arrangements;
 - 6) challenges, jury lists, and problems with specific jurors;
 - 7) motions in limine;
 - 8) order of witnesses (arrangements and scheduling problems);
 - 9) order of presentation in multi-party cases; and

- 10) jury instructions.
 - b. final pretrial conferences will be held two weeks before trial.
 - c. the length of the conference will not be limited, and will be at the judge's discretion.
 - d. judicial officers will place more emphasis on settlement, the court will develop an integrated scheduling system with the state courts, and adopts the following to facilitate settlement:
 - 1) attorneys with authority to bind should be present;
 - 2) attendance by clients, or telephone availability is required; and
 - 3) no continuances should be granted absent extraordinary circumstances.
5. Magistrate judge utilization
- a. magistrate judges will be assigned, by consent, part of the "rocket docket";
 - b. counsel/parties will be encouraged to consider trials by consent at the pretrial conference;
 - c. magistrate judges involvement in the ADR option adopted by the court will be considered; magistrates will be responsible for summary jury trials, at which jurors may be polled; and
 - d. Social Security cases will continue to be assigned to all judicial officers, but the court will review this practice at a later date.
6. Attendance by those with settlement authority: the court reserves the right to require party presence at pretrial conferences on a case by case basis; the presence of a representative of the U.S. or the state of New Hampshire may be required upon special notice.

C. Managing complex cases

1. The Court's DCM approach contemplates the use of a variety of case management devices.

2. Case Management Devices:

- a. preliminary pretrial conferences at which settlement is explored;
- b. multiple status and pretrial conferences held in a two year period per case, depending on circumstances;
- c. a case management order issued after the initial conference, and modified only as absolutely necessary; or, in the alternative, parties to prepare and submit a joint proposed case management order; and
- d. the consideration of the appropriate sequencing of, and limitations on, discovery.

D. Voluntary exchange of information

1. By local rule, the district should opt-out of proposed Rule 26;
2. The Court should develop standing discovery orders for ^T case types to be considered at the preliminary pretrial;
3. The preliminary pretrial conference form should specifically require that discovery limitations be discussed at the preliminary pretrial conference;
4. The Court should reconsider its decision regarding Rule 26 after sufficient experience from other jurisdictions allows re-evaluation; and
5. In each case, the court will pay increased attention to judicial limitations of discovery under FRCP Rule 26.

E. Reaching agreement before filing discovery motions: the court will not adopt a certification requirement; the court will, however, amend Local Rules to require the moving party to serve, and receive service from, the opposing party. The moving party will then be responsible for filing both motion and response. The Court feels that this amendment will compel parties to consider each others claims.

F. Alternative dispute resolution

1. The Court endorses the concept of ADR and will make a menu of ADR options available on a voluntary, case by case basis, primarily private providers. The magistrate judge will be available for the conduct of summary trials, as time permits.

2. The Court will not develop a formal ADR program at this time, but will review this decision in the course of its annual assessment.
3. The Court will promote settlement at every stage of the proceedings, but only insofar as is consistent with fairness to the litigants.

III. Litigation Management Techniques

- A. Joint presentation of discovery/case management plans: the Court will opt out of this provision if adopted by Congress.
- B. Representation at each pretrial conference by a lawyer with authority: local rules will be amended to include mandatory appearances by a lawyer with authority to bind at all conferences.
- C. All extensions signed by attorneys and parties: the Court adopts the state rule requiring counsel to certify that the client has been notified.
- D. Neutral evaluation program: the Court will not maintain a list of neutrals, but will encourage counsel to obtain their own.
- E. Availability of parties with authority to bind at settlement conferences: the Court will require party presence at final pretrial conferences.

IV. Miscellaneous Recommendations and Provisions

- A. Time limits to answer: the Clerk will grant only one extension of 40 days for filing an answer.
- B. Pro se/prisoner litigation:
 1. The magistrate judge will screen cases pre-service, according to a new rule.
 2. The Court will make use of various pro bono services available for possible referrals of pro se and prisoner litigants.
 3. The Court encourages the state to consider the establishment of a procedure for in-house, non-binding review of prisoner complaints before an independent board.
- C. Criminal docket

1. The Court has sought an expansion of the Massachusetts Defender Program, and it is scheduled to begin in early 1994.
2. The Court is now developing a standard discovery order to eliminate the need for many discovery motions.
3. The Court will continue to hold final pretrial conferences two weeks before trial.

D. Communications and coordination

1. The Court will make local rules available on Lexis, CD ROM, and the Court Information Service.
2. The Court will continue to participate in CLE, and to exchange ideas and concerns with the various committees of the bar.
3. The Court will seek input from the bar and the public prior to evaluation of the plan, and will do so as part of its annual evaluation.

F. Page limits on memoranda: the Court will impose a 25 page limit on memoranda for all motions, including dispositive motions; exceptions will be considered upon motion by counsel.