Federal Judicial Center
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memorandum

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DATE: December 19, 1990

TO: Judge Robert M. Parker and Duane R. Lee

FROM: William W Schwarzer

SUBJECT: Implementation of the Civil Justice Reform Act of 1990

Following up on our earlier discussions, I have prepared and am enclosing a memorandum entitled *Implementation of the Civil Justice Reform Act.* Its purposes are to serve (1) as a basis for discussion at the forthcoming meeting of the Court Administration Committee, and (2) taking into account what comes out of that discussion, as a framework for an advisory to the district courts.

Needless to say, this is only a draft prepared under pressure of time and will need more input from the AO, the Center, and the Committee, among others. I hope, however, that it will be useful to help one focus on the principal issues, provide some initial guidance to the discussion, and suggest directions for the implementation effort to follow.

Please let me know if you would like to discuss it or have any questions, comments or suggestions.

Implementation of the Civil Justice Reform Act

This memorandum provides initial assistance and guidance to the district courts as they approach the task of implementing the Civil Justice Reform Act of 1990 ("the Act"), signed by the President on December 1, 1990. The memo was prepared for the Case Management Subcommittee of the Judicial Conference Committee on Court Administration, with the assistance of the Administrative Office and the Federal Judicial Center.

The Act seeks reductions in the cost and delay of civil litigation in the United States District Courts through "significant contributions" by the courts and by "the litigants, the litigants' attorneys, and by the Congress and the executive branch." The Act thus contemplates a community effort, and it requires each district court to develop and adopt a civil justice expense and delay reduction plan ("the plan") as the primary means of mobilizing that effort. It would be wrong and counterproductive to view the plan as a device to add burdens for district judges or to shackle their discretion. Instead, the plan should incorporate principles, guidelines, and techniques suitable for a court's circumstances -- i.e., serve as a practical document that will focus the contributions of the entire legal community on the improvement of the civil litigation process.

Each district should see this Act as an opportunity to take control of its civil litigation process -- if it is not now in control of that process -- or, more likely, to strengthen the control it already exercises. The Act provides a statutory tool for the courts to use in asserting this control. Moreover, it encourages districts that are able to implement plans quickly to do so, while providing time for more study and analysis in districts that believe they need it. At the same time, courts should have in mind that the advisory

groups, which must be appointed by March 1, 1991, can be expected to recommend vigorously the early adoption and implementation of a plan. This is so because they will principally represent user interests and because the Act leaves it to the advisory groups to organize themselves and structure their work. Indeed, some districts are already receiving expressions of interest in advisory group participation.

The memorandum is in two parts. Part I addresses the implementation process and part II deals with the substantive content of the plan. The memorandum is based on the text of the Act, which consists of sections 101-106. Section 103(a) of the Act adds a new Chapter 23 ("Civil Justice Expense and Delay Reduction Plans") to Title 28. Chapter 23 contains §§ 471 through 482. Where the text is unclear or leaves relevant questions unanswered, the memo suggests an interpretation consistent with the stated purposes and the legislative history. The memorandum does not purport to be authoritative; experience under the Act may shed further light on its interpretation and implementation. Moreover, courts and advisory groups will no doubt generate ideas, approaches and programs in addition to those suggested here. It is hoped, however, that this memorandum will serve as a useful source of guidance, offering procedural and substantive ideas worthy of consideration as districts embark on the task of implementation.

The Center and the Administrative Office plan to provide further implementation assistance to the courts, including written materials and conferences and seminars.

I. Implementation Process

The Act imposes implementation duties on the courts, the Judicial Conference, the Administrative Office, and the Federal Judicial Center. This memo deals mainly with implementation duties of the courts. Those duties involve appointing an advisory group and perhaps a reporter or reporters, and developing and implementing a civil justice expense and delay reduction plan based on the work of the advisory group.

The Act imposes these implementation duties on all districts, but it also contemplates that some districts will serve as demonstration districts and others as pilot districts to allow tests of specific case management techniques. Moreover, it encourages all districts to implement the act early and holds out the prospects of increased resources for those that do.

The table below shows the main implementation deadlines for the courts. The Act's requirements for plan implementation (§§ 471-78) will sunset on December 1, 1997 (sec. 103(b)(2)).

	3/1/91	12/31/91	6/1/92	12/31/93
Early Impl'n. Districts (also includes pilot districts and demonstration districts who elect)	Appoint advisory groups	Implement plans		
JCUS			AO to distribute EID plans, reports, to all courts along with JCUS report on same; JCUS may prepare model plan(s)	
Other Courts	Appoint advisory groups			Implement Plans

A. Timing of Implementation

The Act divides the district courts into four categories, to which different timing requirements apply or may apply.

1. Pilot Districts (sec. 105)

Ten districts to be designated by the Judicial Conference must implement plans by December 31, 1991. Those districts must include in their plans six principles and guidelines specified in § 473(a) (discussed in Part II, below) These districts will also be included among the Early Implementation Districts.

2. Early Implementation Districts ("EID") (sec. 103(b))

Any district which develops and implements a plan between June 30 and December 31, 1991, will be designated by the Judicial Conference as an EID. As such, it becomes eligible to apply for supplemental funds, which at this date have been authorized but not appropriated.

3. Demonstration Districts (sec. 104)

Five districts (WD-MI, ND-OH, ND-CA, ND-WV, WD-MO) are designated to experiment with specified programs. They may become EIDs if they elect. They must, in an any event, implement plans under the general provisions of sec. 103(b).

4. Other Districts (sec. 103(b))

All districts that are not pilot or EIDs must implement plans by December 1, 1993.

B. Scope of District Plans

1. Although the Act is silent, the Report of the Senate Judiciary Committee on the Act states that it is not intended to apply to cases pending in the bankruptcy courts. (S. Rep. 101-416 on S. 2648, Aug. 3, 1990, "Senate Report," at p.51.)

2. While the Act presumes that a district should have only one group and one plan, if divisions of the district have distinct types of litigation and distinct needs, they may form separate groups and develop separate plans. (Senate Report at p.51.)

C Appointment of Advisory Groups (§ 478)

1. Timing (§ 478 (a))

By March 1, 1991, the chief judge of each district, after consultation with the other judges of the court, must appoint an advisory group.

2. Composition (§ 478 (b))

The Act requires the group to "be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge." The United States Attorney for the district or his/her designee shall be a permanent member. No other member may serve longer than four years.

Comment on membership and size of advisory group

(1) § 472, below, charges the group with difficult, complex and time-consuming tasks. To discharge them, its members must have knowledge, experience, skill, interest, time and resources such as they can, for example, analyze both quantitatively and qualitatively the demands of various kinds of litigation, common causes of cost and delay in litigation, discovery, motion, and trial practice, means of alternate dispute resolution, lawyers' and clients' practices affecting cost and delay, etc. Furthermore, the group should be representative so it can mobilize contributions from the entire community. Selections should reflect the profile of litigation in the district. Major categories of litigation should, to the extent feasible, be represented by plaintiff's and defense counsel. Litigants'

interests should be represented through major interest groups (e.g., civil rights groups), house counsel, and appropriate public members.

(2) The Act is silent as to membership by judges of the court. The group's need for experience and knowledge, however, coupled with the need to enhance mutual understanding between the group and the judges of the court who must eventually vote on its recommendations, argue for including at least some of the court's judges.

(3) The Act is also silent as to size, but it seems unlikely that a group of less than ten members can respond to the Act's requirements. Because of the wide interest already being expressed by various groups, it will not be easy to keep these groups small.

D. Advisory Group Reporter

1. Appointment and Compensation (§ 478 (e))

   a. The chief judge may designate a reporter for the group.

   b. The reporter may be compensated in accordance with guidelines established by the Judicial Conference.

2. Duties

   The Act does not specify the reporter's duties.

Comment on assistance that a reporter or reporters could provide the advisory group, whom to appoint, and compensation:

(1) The Act does not require appointment of a reporter but, the magnitude and complexity of the group's task militate in favor of appointing at least one. The reporters' duties are likely to fall into two categories.

First: the reporter may serve as secretary and facilitator, providing the group with statistical and other information about the court, keeping minutes, providing logistical support, etc. The clerk of the court, or his/her designee, could perform these duties and therefore should serve the group in some capacity, whether as reporter, co-reporter, or secretary.

Second: the reporter could serve the group as expert. Without expert support, the group is likely to produce little more than generalities and may indeed flounder. Expert assistance would be useful—if not essential—for the required assessment and analysis of the court's dockets, identification of causes of delay and cost, the development of solutions, including the design of court programs for alternate dispute resolution and the drafting of local rules or forms of case management orders, etc. Past experience in some districts shows that expert reporters (such as a professor with a mastery of procedure and administration) can render invaluable services to a court.

(2) Although the Act authorized appropriations, no funds have as yet been appropriated and no funds are now available in the courts' budget. Funds may become available through supplementary appropriation. In addition, funds may be available locally from unappropriated funds (library or attorney admission funds). Even if no funds are immediately available, a qualified person may be willing to serve the group on a pro bono basis, perhaps in return for appropriate use of data gathered in the reporter's own research projects.

E. Duties of Advisory Group.

1. Contents of report to the court (§ 472 (b)); timing of report.

The Act directs each group to provide the court a report, to be made public, which shall include

- an assessment of the matters discussed below;
- recommended measures, rules and programs for the plan;
- the basis for its recommendations;
- explanation for how the recommendations comply with the Act's provision regarding the content of the plan.

The Act does not specify when it is to submit the report but it does require that the group "shall promptly complete a thorough assessment of the court's civil and criminal dockets." (§ 472(c)(1)) .

Comment on timing of report:

In the EIDs, the group would have to submit the report in time for the court to give the required consideration to its recommendations and develop and implement a plan by December 31, 1991. Because the plan may require local rules changes, the group would probably have to submit its report by the end of July 1991. Other districts would have more time since their implementation deadline is December 1, 1993.

2. Duty to assess court's dockets (§ 472 (c)).

   a. In making "a thorough assessment of the state of the court's civil and criminal dockets," the group is to:

      (A) "determine the condition of the civil and criminal dockets"

      (B) "identify trends in case filings and in the demands being placed on the court's resources."

      (C) "identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and ways in which litigants and their attorneys approach and conduct litigation."

      (D) "examine the extent to which costs and delay could be reduced by a better assessment of the impact of new legislation on the courts."

Comment:

Determining the condition of the civil and criminal dockets could require review and analysis of court-wide and per judge caseload data, (though not necessarily analysis of individual judge's dockets), case aging, times to termination, etc.

Analysis in filing trends could include not only general trend data but also identification of categories of cases creating special burdens (e.g., death penalty , asbestos, prisoner, complex criminal, and RICO cases (see discussion at subpara. (D), below)). The advisory group may also want to explore the causes underlying filing trends, such as conditions giving rise to particular kinds of civil litigation, charging decisions by the United States Attorney, etc. The Senate Report notes that this would also include a determination of whether the court lacks sufficient resources, including judicial personnel and administrative staff. (Senate Report at p.52), or space, facilities and equipment.

Identifying "the principal causes of cost and delay" is a tall order and probably not something the advisory groups will be able to do with precision. They can, however, undertake a broad review of litigation practices and procedures both in and out of court with a view to how they could be modified to reduce cost and delay. The group could assess the rules, orders and practices of the court for processing litigation; examine practices of lawyers and clients, including pleading of excessive claims and defenses; the conduct of discovery; motion practice; the degree of cooperation and communication between lawyers, including voluntary sharing of information; clients' expectations and instructions; billing practices; the use of stipulations; settlement practices by private litigants and governments; etc.

The reference in (D) to "a better assessment of the impact of new legislation" addresses a role for Congress in reducing civil delay and expense. The group should study the impact of legislation on court dockets and burdens

(such as, e.g., existing statutory sentencing schemes, and the creation of new causes of action, e.g., RICO, FIERRA), procedural rules that encumber the courts and encourage litigation, failures of Congress to enact legislation that would ease the burden on courts, (e.g., authorizing mandatory court-annexed arbitration) or to clearly express its intent (e.g., with reference to private causes of action). It should also consider steps that the judicial branch as a whole, or individual courts, can take to improve their ability to adopt to new legislation.

b. (2) "In developing its recommendations, the advisory group shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys."

Comment:

The group will need to do more than come up with generalized findings and conclusions. It should draw from its assessments significant findings that identify the particular circumstances of the district affecting cost and delay and the resulting needs.

c. The group (3) "shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitate access to the courts."

Comment:

The assessment and recommendations of the group may fall into two categories:

First, what do judges in the district do or fail to do, such as failing to narrow issues early in the case, to control discovery, to limit motion practice and to encourage dispositive motions, to control the scope and length of the trial, and to prevent satellite litigation over discovery and sanctions?

Second, what do attorneys and clients do or fail to do, such as conducting excessive discovery, failing to narrow issues and use stipulations, failing to communicate effectively and cooperate, abusing motion practice, failing to make sufficient use of mediation and alternate means of dispute resolution, failing to exhaust settlement possibilities early, and conducting excessively long trials?

3. Recommendation that the court develop a plan (§ 472 (b)(2)).

Comment:

The group's report might adopt a format along the following lines:

First, a statement of the problem(s) or condition(s);

Second, recommended solution(s) for each problem or condition, supported by specific statements of the method of implementation, such as the text of proposed rules or forms of order (see discussion of plan's content in Part II, below).

Third, elaboration of the basis for the recommendations, including specific references to the assessments made and the supporting evidence or findings.

F. Development and Implementation Plan

1. The Act requires each district to implement a plan "developed by such district . . . or a model plan developed by the Judicial Conference." (§ 471)

   a. Timing - see para. A, above.

   b. Model plan - (see § 477 (a)(1)). The Judicial Conference may develop one or more model plans based on the plans developed and implemented by the EIDs. Because the EID's plans will not begin to operate until the end of 1991, no model plans could be expected until some time after that date.

2. Development of plan by district.

   Process - In developing and formulating a plan the court must

   - consult with the advisory group (§ 473 (a))

- consider the recommendations of the group (§ 472 (a)), and
- consider all of the principles, guidelines, and techniques set forth in § 437 (a) and (b).

(See discussion in Part II, below)

Comment:

The Act provides no additional direction concerning the formulation or adoption of the plan. It leaves to the court's internal governance the manner of adoption of the plan. It is likely that courts will vote on the adoption of a plan; that process will be facilitated if the advisory group includes judges among its members.

The Act does not call for public participation. However, it is likely that many plans will involve the adoption of local rules, in which event the public notice provisions of 28 USC § 2071 and Rule 83, F.R.Civ.P. will apply.

3. Implementation (§ 471, 472 (a))

   The Act contains no additional directions for implementation. Once the plan has been implemented, the chief judge must transmit copies of the plan and the group's report to

   - the Administrative Office,
   - the circuit judicial council,
   - the chief judge of each district in the circuit.

4. Review

   a. The chief judges of the districts in a circuit and the circuit chief judge, as a committee, shall review each plan and make appropriate suggestions for additional or modified actions. (§ 474 (a)).

   b. The Judicial Conference shall review each plan and request additional action if a plan does not adequately

respond to relevant conditions or to the advisory group's recommendations. (§ 474 (b)).

5. Annual district assessment (§ 474)

Each district shall annually assess dockets and consult its advisory group to determine appropriate additional actions that may be taken.

II. Content of the Plan

The statutory purpose of the plan is "to 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)

A. Overview

1. What must the plan include? Congress did not specify (except in the case of the ten pilot districts) what a plan must include. (sec. 105) What a court decides to include in its plan will depend on what it finds to be the needs and circumstances of its district. Congress did, however, specify certain principles, guidelines and techniques of litigation management and cost and delay reduction that courts are required to consider in formulating a plan (and that pilot districts are required to include). This part analyzes and discusses those principles, guidelines and techniques under six collective headings, and suggests approaches for addressing them in a plan.

While the Act (except as stated above) does not require any plan to incorporate specific provisions, Congress clearly expects courts to adopt plans to reflect a significant commitment to an effort to bring about cost and delay reduction. The commitment, of course, as previously discussed, is not limited to the court but includes the entire legal community, Congress and the executive branch. A plan should call for significant contributions from all of them; if courts are to succeed in the effort the Act contemplates, attorneys and litigants will have to play a major role. Nor need such contributions be limited to matters touching directly on the processing of litigation. A plan may, in addition, call for bar sponsorship of periodic

training programs for lawyers in federal practice, and of panels to provide representation to pro se litigants.

2. *Will the plans curtail judicial discretion?* Nothing in the Act suggests that judicial discretion should be displaced or that judges should be regimented in the way they manage litigation. Rather the Act calls for a plan that will energize and guide the exercise of discretion to advance the purposes of the Act. A soundly constructed plan, while establishing guidelines, checklists and procedures aimed at cost and delay reduction, will leave room for the exercise of individual judgment and discretion in their application in the light of the needs of the particular case and the parties.

3. *What if a court has an effective civil case management system in place already?* Implementation of a plan does necessarily require a court to change methods and techniques employed by judges of that court that have been effective in controlling cost and delay. The Act requires the advisory group to assess those methods and techniques to see if they are found wanting in any respect. To the extent existing methods or techniques are found to be effective, a plan should incorporate those methods and techniques to ensure that they become and remain a part of the court's established procedures. Congress viewed the problem of cost and delay as a national problem. But once the state of dockets is examined at the level of discrete districts, the assessments can be expected to differ widely. A problem may exist in some districts but not in others. Whether there is a problem at all in a district may be disputable; there may often be a question of "compared to what." And certainly the causes of a problem may not be obvious and may be much in dispute. For these and other reasons, it is important that courts, rather than adopting simplistic approaches, assess the dockets and examine the circumstances and needs of their district with

great care. The resulting decisions concerning the content of the plan should reflect the court's best judgment of a constructive, workable program to bring about improvements in the administration of civil justice in the district.

B. Elements of the Plan

The discussion that follows is intended to help the court begin to think about formulation of the plan. It is, of course, not intended to dictate what courts should do. The decision of how to formulate its plan is for each court to make.

With respect to the ten pilot districts, the Act provides that their plans "shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a)." Other courts "shall consider and may include" (§473(a)) the principles in their plan Paragraphs 1 through 6 that follow encompass those six principles and guidelines. (Paragraph 7 adds a principle and guideline that is implicit in the Act.) For ease of understanding, this memorandum aggregates the statutory provisions relevant to each of the major principles and guidelines under a single descriptive heading. The Act leaves it to each district how and in what form to include those principles and guidelines. Hence, the discussion that follows applies to pilot districts as much as to other districts.

The six principles and guidelines are not legislative innovations. They are, rather, well known to most federal judges and have formed the backbone of effective case management for many years. The Act represents Congress's recognition of those principles and a legislative requirement that all courts consider their application.

1. Differential Case Management

The Act requires a court to consider:

"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" (§ 473(a)(1))

Comment:

Differential case management was one of the key proposals in the Brookings Institution report, Justice for All, which was a precursor of the Act. As described in that report, it took the form of tracking. However, the concept of differential management is not limited to tracking, as shown in the description contained in the Senate report:

"A differentiated case management system combines three core elements. First, it is 'event-oriented,' so that certain events in each litigation are viewed as important benchmarks in ascertaining case progress. Second, it controls the periods of time between case events and incorporates methods to supervise and control these intervals in order to make them more predictable. Third, it recognizes that while cases may be classified by broad definitions, each case is unique; thus, procedures are accommodated to fit the characteristics of each case." (Senate Report, p. 24)

Differential case management therefore is characterized by flexibility and necessarily involves the exercise of judicial discretion in its implementation. It may be incorporated into a plan through a local rule which could, among other things, provide the following:

- that a case management conference be held before a judicial officer within 60 days of the filing of the action :

- that in advance of the conference counsel confer and prepare and submit to the court a case management plan conforming to the requirements set forth in statement quoted above and tailored to the needs of the particular

case, stating each anticipated litigation event in the case and the scheduled time for each, and addressing in appropriate fashion the matters discussed in the following paragraphs 2 though 7, below. (See § 473 (b)(1)).

The case management plan, and any objections to it, would be considered by the court at the conference and incorporated in a case management order.

A differential case management rule could also recognize certain categories of cases that involve little or no discovery and ordinarily require no judicial intervention, such as government collection cases, and establish an appropriate procedure for such cases. Similarly, appropriate procedures could be established for other categories of cases which generally fall within a standard pattern, such as prisoner, civil rights, and habeas corpus cases.

Courts with heavy asbestos dockets may establish specific management procedures for specified categories of asbestos injury claims, separating, for example those in which no significant disease has manifested itself from those involving serious diseases.

2. Early and ongoing judicial intervention

The Act requires a court to consider:

> "early and ongoing control of the pretrial process through involvement of a judicial officer in--assessing and planning the progress of a case" (§ 473 (2)(A))

Comment:

Enhanced case management through early and ongoing involvement by a judicial officer was among the key objectives Congress sought to achieve (Senate Report pp. 16-18). Such involvement is generally considered an essential element of case management, though the frequency and extent should be tailored to the needs of the particular case. (See para. 1, above) Active judicial involvement in the litigation is, of course, time consuming and needs to be managed to ensure that it results in a net gain to the courts and the litigants, i.e. that the benefits of

investing judicial time in a particular case can reasonably be expected to justify the cost. Judges who engage in such active management have found that the resulting savings justify the investment of time.

Judicial involvement may address a number of different aspects of the case. The subjects of judicial involvement are scattered through § 473 and in this memorandum have been aggregated under the five headings that follow (paragraphs 3 through 7).

One way in which a plan may make provision for early judicial involvement, and ongoing involvement as needed is through a rule providing for case management conferences in all cases except those exempted by rule, in accordance with para. 1, above.

Such conferences would be bifurcated. The first part of the conference would be conducted by the attorneys without the presence of the judicial officer, but with representatives of the litigants authorized to make decisions in the case. The attorneys would be required to address each item on the conference agenda prescribed in the rule and submit to the court a case management conference report stating the matters agreed on and those on which no agreement was reached. (See § 473 (b) (1)).

The second part of the conference would be conducted by the judicial officer on the basis of the attorneys' report, again with an authorized representative of the litigants present. The attorneys representing the parties would be required to have authority to bind their client regarding all matters on the agenda. (See § 473 (b) (2)). The items on the agenda would include the following:

(1) defining and clarifying issues of fact and issues of law genuinely in dispute (see § 473 (a)(3)(B));

(2) making stipulations of fact and law and otherwise narrowing the scope of the action to eliminate superfluous issues;

(3) scheduling cut-off dates for amendment of pleadings;

(4) scheduling filing, and, if necessary, hearing dates for motions, and, where appropriate, providing for the management of motion practice pursuant to para. 4, below;

(5) scheduling discovery cutoff dates and, where appropriate, providing for management of discovery pursuant to para. 4, below.

(6) scheduling dates for future management and final pretrial conferences, pursuant to para. 7, below (see § 473 (a)(3)(B));

(7) scheduling trial date(s), and providing, where appropriate, for bifurcation, pursuant to para. 3, below;

(8) adopting procedures, where appropriate, for the management of expert witnesses, pursuant to para. 7, below;

(9) exploring the feasibility of initiating settlement negotiations or invoking alternate dispute resolution procedures;

(10) determining the feasibility of reference to a magistrate judge or master;

(11) providing that all requests for continuances of discovery deadlines or trial dates be signed by counsel and the client (see § 473 (b)(3)); and

(12) considering and resolving such other matters as may be conducive to the just, speedy and inexpensive resolution of the case.

3. Setting early and firm trial dates

The Act requires the court to consider:

"setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that--(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or (ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number of complexity of pending criminal cases;" (§ 473(2)(b)).

Comment:

Congress considered the setting of early and firm trial dates one of the most effective tools of case management. To implement this guideline, a plan may provide for a rule along the following lines:

Counsel shall provide in their case management plan (para. 1, above) or their case management conference report (para. 2, above) for a trial date not more than 18 months after the filing of the action. If a later trial date is proposed, counsel shall explain the circumstances which preclude an earlier trial.

The court shall set a trial date to occur within 18 months of the filing of the action. If the court determines to set a later trial date, it shall issue an order stating its reasons why the case cannot be tried earlier, grounded on the complexity of the case or the state of the court's docket,.

4. Control of Discovery

The Act requires the court to consider:

"controlling the extent of discovery and time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; . . . {for complex or other appropriate cases] prepar[ation of] a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to --(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and (ii) phase discovery into two or more stages; and . . . (4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices; . . . (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;"(§ 473 (2)(C), (3) (C), (4), (5)).

Comment:

The Congress found a "compelling need for judicial officers to control discovery and its attendant costs." (Senate Report p. 22) There is wide agreement that excess discovery and discovery disputes are a major source of cost and delay in civil litigation. The limited resources of the courts, moreover, mandate that a system of judicial control be structured so as to minimize the burdens on the court and avoid imposition of costs exceeding the resultant gains. These objectives may be realized through a three-pronged approach in a rule, along the following lines:

a. Prediscovery disclosure.

Before any party may initiate any discovery, that party must submit to the opponent (1) the identity of all persons known or believed to have substantial discoverable information about the claims or defenses, together with a summary of that information; (2) a description, including the location, of all documents that are reasonably likely to bear substantially on the claims or defenses; (3) a computation of any damages claimed; (4) the substance of any insurance agreement that may cover any resulting judgment; and (5) a copy of any report of an expert who may be called at trial. The disclosure obligation is reciprocal and continues throughout the case. (Local rules incorporating the substance of this proposal are now in use in the Central District of California and the Southern District of Florida.)

b. Joint Discovery Plan

Counsel shall as part of their case management conference report or case management plan prepare and submit a joint discovery plan, scheduling the time and length for all discovery events. (See § 473 (b) (1)) The plan shall

conform to the obligation to limit discovery under Rule 26 (b) F.R.Civ. P. Discovery events shall, unless the court for a good cause orders otherwise, be limited for each side (or grouping of parties with common interest) to

5 depositions

15 interrogatories

2 requests for production.

Counsel's plan shall consider the desirability of conducting phased discovery, limiting the first phase to developing information needed for a realistic assessment of the case. If the case does not terminate, the second phase would be directed at information needed to prepare the case for trial. (Senate Report p.22)

c. Resolution of Discovery Disputes

Counsel shall meet and confer to resolve discovery disputes. Any dispute not so resolved shall be presented by telephone call to a judicial officer. No motion may be filed without leave of court.

5. Controlling Motion Practice

The Act requires the court to consider:

"setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition; (§ 473 (a)(2)(D), (3)(D)).

Comment:

Congress identified as a problem the undue delay often associated with the resolution of motions. (Senate Report pp. 26-27) This problem is a result of several factors: the making of too many, often unnecessary motions, the excessive volume of papers involved, the failure to make appropriate dispositive motions and to make them at the proper time, and the occasional delay in the resolution of motions. To address these problems, a rule along the following lines may be adopted:

Counsel shall submit as a part of their case management plan or their case management conference report an agreed schedule for the filing of motions, which may from time to time be amended as required by the progress of the case. No motion shall be filed unless counsel certify that they have conferred and in good faith attempted to resolve or narrow the issue. Memoranda in support of a motion (including a reply) shall not exceed 25 pages and the response 20 pages, unless otherwise ordered. Motions may be decided without hearing.

Whenever the court is unable to decide a motion within sixty days of submission, it shall issue an order reporting the motion under submission.

6. Alternate Means of Dispute Resolution, including settlement

The Act requires a court to consider:

"[in appropriate cases, having the judicial officer] explore the parties' receptivity to, and the propriety of, settlement . . .;

"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, minitrial, and summary jury trial. . . [and] 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 nonbinding conference conducted early in the litigation;" (§ 473 (a)(3)(A), (6), (b)(4)).

Comment:

Congress intended the courts to institute ADR techniques that best suit the preferences of the bench, bar and interested public in the district. (Senate Report p. 28) Achieving early termination of a case without resort to the panoply of litigation procedures is a major step toward reduction of cost and delay. Many different means toward that end have been developed. Though they are not

necessarily appropriate for every case and not invariably successful when employed, a plan should make provision for judicial consideration of the employment of an appropriate alternate dispute resolution procedure in a case (see para. 2, above), and means for facilitating resort to such procedures.

Such provisions fall into two categories: (2) court-wide programs, and (2) case specific measures. Provision may be made by a local rule along the following lines:

1. Case-specific measures.

a. At every conference, the court shall inquire as to the receptivity of parties to settlement negotiations, explore means of facilitating such negotiations, and offer such assistance as may be appropriate in the circumstances. Assistance may include reference of the case to another judicial officer for settlement purposes.

b. Whenever a settlement conference is held, a representative of each party with settlement authority shall attend or be available by telephone (see § 473 (b)(5)).

2. Court-wide programs.

The rule inform of the operation of one or more means of alternate dispute resolution established by the court, such as early neutral evaluation, mediation, arbitration, minitrial or summary jury trial and the procedures for invocation. (Models are available from a number of sources, including the Federal Judicial Center.)

7. Final Pretrial Conferences

The Act contains no express requirement concerning final pretrial conferences, but a comprehensive plan for the progress of a case (see § 473 (a)(2)(A)), to be effective in controlling cost and delay, should cover this aspect of case management.

Comment:

1. Trial Management. Although relatively few civil cases go to trial, implementation of a program of cost and delay reduction requires judicial control of the length, scope and complexity of trials. The longer and more complex the trial, the more expense and delay it entails and the more it obstructs access of other litigants to the courts. Final pretrial conferences can be an effective means of exercising control over the trial.

A rule may provide the following agenda for preparation for and conduct of the final pretrial conference:

(a) Final and binding definition of issues to be tried;

(b) Early disclosure of expected and potential witnesses and the substance of their testimony;

(c)) Early exchange of all proposed exhibits;

(d) Pretrial ruling, where possible, on objections to evidence;

(e) Elimination of unnecessary or redundant proof, including limitation of expert witnesses;

(f) Considering bifurcation of issues to be tried;

(g) Establishing time and other limits for the trial;

(h) Considering means of enhancing jury comprehension and simplifying and expediting the trial;

(i) Considering the feasibility of presenting direct testimony by written statement;

(j) Other means to facilitate and expedite the trial.

2. Special procedures for management of experts. A rule may provide for special procedures in cases where experts may play a significant role. Such a rule could contain the following elements:

(a) Early and binding disclosure of expert witnesses, precluding the appearance of witnesses not previously identified;

(b) Submission of a complete statement of the expert witness' proposed testimony in advance of his/her deposition;

(c) Preclusion of any trial testimony by an expert at variance with the written statement and any deposition testimony; and

(d) Ruling on the admissibility of expert testimony at the final pretrial conference.