PREAMBLE

The goal of the federal system of civil justice, as articulated in Rule 1 of the Federal Rules of Civil Procedure, is "to secure the just, speedy, and inexpensive determination of every action."

Several forces, apparently growing in intensity over the past few years, may be threatening the capacity of the federal judicial system to achieve this important goal. While there are considerable variations in the circumstances facing different districts, there are several national trends that seem to have had similar effects on many courts. The decade just ended witnessed a dramatic increase in the number of criminal prosecutions filed in federal courts. There also has been a substantial increase, during that same period, in the number of civil suits filed. As significant as these increases have been, they tell only part of the story. Simultaneously, there has been a comparably dramatic increase in the complexity of much of the litigation, both criminal and civil, that federal courts have been asked to process. A larger percentage of cases involve multiple parties, multiple counts or causes of action, longer lists of affirmative defenses, multiple counterclaims and cross-claims, or multiple third party claims. On the civil side, there seem to be more "mega-cases," for example, suits involving thousands of claimants or massive alleged harms to the environment. And in some instances legislative action has created new, more complex predicates both for criminal prosecutions and for civil entitlements.

During this same period there has been a dramatic increase in the number of lawyers and in their concentration in major metropolitan areas. Lawyers are less likely to interact repeatedly, less likely to know each other, less likely to feel a sense of professional community and restraint. Competition among lawyers may have become more intense. These trends among lawyers may reflect larger trends in our society, trends that are reflected in more intense economic competition in general, greater willingness to use the judicial process simply as a weapon in economic combat, and more pressure to appear firm in resolve not to compromise claims.

While the confluence of these developments has resulted in greater demands on judicial resources, and a greater need for the judiciary to play an active role as a source of economic discipline and common sense in the litigation process, federal courts have been given only a few additional judgeships. As the gap between judicial resources and demands placed on them has grown, so has the strain on the system. In part because of preferences that Congress has compelled district courts (through the Speedy Trial Act) to

give to criminal matters, a perception has grown that it is the cases on the courts' civil dockets that have been forced to bear the brunt of the shortfall in judicial resources. At least in some courts, the median time between the filing and the disposition of civil matters has increased in the last few years. And concern has grown that the cost of moving civil cases through the adjudicatory system has increased to clearly disproportionate levels.

The Judicial Conference of the United States, acting through its Advisory Committees and utilizing the Congressionally mandated rule-making process, promptly began responding to some of the perceived problems of cost and delay in 1980 by amending Federal Rule of Civil Procedure 26 so as to entitle parties who took prescribed steps to a judicially hosted "discovery conference," one purpose of which is to assure that the discovery process is limited and paced in a manner consistent with the particularized needs of individual cases. FRCP 26(f). The litigation bar, however, sought to employ this new tool only in a very small percentage of civil cases. In part for this reason, and in part because recent studies indicated the advisability of a broader, more multi-faceted approach to rationalizing and to containing the costs of the pretrial process, the Judicial Conference took much more significant steps in 1983, proposing to the Supreme Court and to Congress a battery of similarly spirited changes in the civil rules. As a result of Judicial Conference initiatives, major amendments to Rules 11, 16, and 26 became effective on August 1, 1983.

The changes in Rule 11 and some of the changes in Rule 26 [paragraph (g)] were designed to encourage more responsible, restrained, and cost-effective approaches by counsel to pleading, motion and discovery practices. The changes to Rule 16 and other changes to Rule 26 [paragraph (b)] were designed (1) to assure that judicial officers "will take some early control over the litigation" in all categories of cases save those routine matters that are exempted by local rule, (2) to encourage courts to devote the appropriate level of management attention to different kinds of cases (avoiding "over-regulation of some cases and under-regulation of others"), (3) to assure that judges and magistrates have the authority and the procedural tools necessary to move their cases through the pretrial process as efficiently as the needs of justice permit, (4) to encourage "greater judicial involvement in the discovery process" and (5) to provide both counsel and court with additional, more direct means for preventing or correcting "redundant or disproportionate discovery."

Perhaps in part because the changes reflected in the 1983 amendments were so substantial, it appears that their full potential has not yet been realized by courts or counsel in some districts. Thus some people feel that additional steps, complementary and supplemental to the national rule making processes, should be taken. To increase awareness of the potential

that inheres in the rules, to invigorate implementation their most recent amendments, and to search for measures or programs that might constructively supplement the formal processes dictated by the national rules, it would be helpful for groups of thoughtful, conscientious lawyers and client representatives to meet with representatives of district courts to consider how, in the circumstances specific to each particular district, bench, bar, and client groups could work together to attack the problems of cost and delay in civil litigation. Thoughtful, constructive dialogue between bench, bar, and client groups about these problems would be very healthy and could, in many districts, result in beneficial changes in or additions to local procedures and programs. Each district court should give careful consideration to recommendations submitted by its advisory group and should adopt appropriate measures through the procedures Congress has established for implementing new local rules.

Because the problems of cost and delay are so subtle, have so many sources, may vary so widely from district to district, and have yielded in the past so reluctantly to reform efforts, local attempts to attack these problems must be informed both by breadth of vision and carefully acquired, reliable data. Thus each local advisory group should begin by assessing systematically the state of the district's civil and criminal dockets, identifying not only current conditions, but also trends both in the nature of filings and in the kinds of demands being placed on the court's resources. In formulating recommendations, advisory groups must appreciate that the problems of cost and delay in civil litigation cannot be considered in isolation, but can be addressed constructively only in the context of the full range of demands made on the court's resources.

Acknowledging that all of the major players in the litigation community share responsibility for the problems of cost and delay, each local advisory group should search not only for steps the court could take, but also for ways that lawyers and clients could significantly contribute to solutions. Thus, while considering how judges and magistrates might manage cases more effectively, advisory groups also should consider how counsel and parties could contribute to the development of pretrial plans that are tailored to the needs of particular lawsuits and how they could exchange information and evidence more directly and efficiently. Advisory groups also might consider the extent to which stipulations by counsel to extend deadlines imposed by rule or court order affect the delay problem, and whether it would be advisable to require all such stipulations to be signed by the parties themselves and to be approved, on a standard of good cause, by the court.

Since only a small percentage of cases are disposed of by trial, and since processing criminal matters makes it difficult for many courts to offer early, firm trial dates to civil actions, it is essential that systems be designed that (1) move litigants to

acquire efficiently the information they need to resolve their case, and (2) then provide litigants with an opportunity either to resolve the matter by motion or to select an appropriate procedure through which to attempt promptly to settle their case. In this connection, each local group should consider whether bench, bar and client groups should work together to establish one or more of the alternative dispute resolution procedures that appear to have such promise as tools for reducing expense and delay, e.g., early neutral evaluation, mediation, court-annexed arbitration, non-binding summary jury or bench trials, panels of special masters with expertise in settlement techniques, and mini-trials.

Each district also should assess whether it is devoting appropriate judicial resources to hosting settlement conferences. The issues that should be addressed in such an assessment include, among others, how much judicial time should be devoted to settlement efforts, which are the most effective techniques and formats for settlement conferences, and which judicial officers should conduct such conferences: the assigned judge, a judge who would not preside at trial if the case were not settled, or a magistrate?

To generate deeper, more reliable data about the current conditions in district courts, and to develop a rich pool of ideas about how bench, bar and client groups might respond to the problems of cost and delay, each district court should submit a report to the Judicial Conference setting forth its assessment of its civil and criminal dockets and of trends in demands on judicial resources, as well as describing the steps it has decided to take to respond to the problems of cost and delay. The Judicial Conference will digest and analyze these reports, then prepare a comprehensive account of conditions in district courts and measures being taken to improve them. This account shall be made available to all district courts and to Congress. The Judicial Conference also will direct each of its advisory committees that has responsibility for matters covered by the district reports to consider whether the information they generate suggests that changes should be made in national rules or in Conference policies.

During the same period that each district court is working with its advisory group to assess local conditions and to consider appropriate responses to them, the Judicial Conference would undertake two related efforts. The first such effort would consist of describing a wide range of procedures and measures that districts might consider when deciding how to respond to cost and delay problems and preparing a series of model plans that would illustrate alternative ways that different discrete measures might be integrated into coherent programs. The second component of the Judicial Conference's work would consist of sponsoring demonstration or experimental programs in five volunteer districts of different sizes and case mixes. Each such demonstration would be designed to assess the relative effectiveness of different

methods that might be used to reduce cost and delay and of different case management techniques. The programs in the demonstration districts would be carefully monitored and evaluated, then the Judicial Conference would publish a report that described what was learned. Thereafter, the Congressionally-mandated rule making process would be used to implement any measures that were proven successful in the demonstration programs and that were suitable for national implementation by procedural rule. The Judicial Conference might implement other programs by Conference policy, and would recommend to Congress any legislation that might be appropriate. In considering whether to implement new rules, policies or programs on a national basis, the Conference and its committees, and the Congress, will bear in mind that conditions may vary dramatically between different districts and that no one single plan or set of prescriptions will be appropriately responsive to the needs of every district.

To coordinate the several different dimensions of the work contemplated in this statute, the Judicial Conference has decided to create a new Conference committee on Case Management and Dispute Resolution. The Conference has given this new committee a broad charge, directing it to assume direct responsibility for the implementation of this legislation and to study, on a continuing basis, how the legal community, drawing on contributions from courts, counsel, and clients, might better assure "the just, speedy, and inexpensive determination of every action."

Because of the intensified demands on judicial resources that have been described above, district courts cannot experiment with and identify the most effective and appropriate measures for reducing cost and delay, and cannot implement the most successful case management techniques, without infusions of substantial additional resources. It is essential that courts have fully automated dockets, ready access to more complete data about the status of each case, more support personnel, and an adequate number of new judicial officers. It also is essential that intensified commitments be made at both the national and local levels to training all judicial officers, clerks of court, and courtroom deputy clerks in case management techniques.

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