# UNITED STATES DISTRICT COURT
# FOR THE EASTERN DISTRICT OF PENNSYLVANIA

## CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

EFFECTIVE DECEMBER 31, 1991

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## INTRODUCTION

The United States District Court for the Eastern District of Pennsylvania, having been designated by the Judicial Conference of the United States as a "Pilot District" under Section 105(b) of the Civil Justice Reform Act of 1990, adopts the following Civil Justice Expense and Delay Reduction Plan[1] and directs that it be implemented as of December 31, 1991. It shall apply to all civil cases filed on or after that date and may, at the discretion of the court, apply to cases then pending.

Pursuant to the mandate of the statute,[2] the court has had the benefit of a detailed report prepared by an Advisory Group appointed by Chief Judge Bechtle after consultation with the other judges of the court. The court has been mindful of its obligation to undertake an independent review and assessment of the Advisory Group's recommendations, and it has done so.

The Advisory Group was broadly representative of the diverse mix of litigants who appear before the court,[3] including in its membership a former chairman of a major law firm, the United States Attorney for this district, the Director of the Philadelphia Volunteers for the Indigent Program, the Chief Counsel of the Public Interest Law Center of Philadelphia, the Chief Deputy Attorney General of the Commonwealth of Pennsylvania, and other active practitioners with rich and extensive experience.[4] It was, in addition, a group of unusually talented individuals. Under the able and dedicated leadership of Chairman Robert M. Landis and Reporter A. Leo Levin, they devoted themselves energetically to completing their initial assignment on an accelerated time schedule imposed by the strictures of the statute.[5] Moreover, they did

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1. See Section 105(b) of the Civil Justice Reform Act of 1990 and 28 U.S.C. Sections 471 and 472, reprinted in Appendix II.

2. 28 U.S.C. Sections 478 and 472(a).

3. 28 U.S.C. Section 478(b).

4. The biographies of the members of the Advisory Group are included in its report, pages 135-142.

5. Section 105(b)(1) of the Act requires that pilot districts implement their respective plans no later than December 31, 1991. Since the Eastern District of Pennsylvania is a metropolitan court with 23 judgeships and 11 senior judges, in addition to seven full-time magistrate judges, it was necessary to appoint a Task Force to assist in evaluating the

(continued...)

so without curtailing debate, without giving short shrift to any portion of their long agenda, and without sacrificing quality.

Five ex-officio members of the Group include the Chief Judge, two district judges, a magistrate judge, and the clerk of court, assuring the closest coordination consistent with independent judgment. More significantly, the Advisory Group set out to learn the views of lawyers and litigants more generally. The activities of the Group are detailed in Appendix II of its Report, which included a public hearing, questionnaires, interviews with judges in chambers, and presentations by judges in plenary sessions of the Group.

As a result of this process, which included vigorous debate over technical details as well as broader policy issues, the Advisory Group was able to achieve consensus and to deliver to the court a product that has shaped the broad outlines of the Plan being promulgated at this time.

Not all of the recommendations of the Advisory Group were addressed to the court, and as a result not all are appropriate for inclusion in the Plan. For example, the Advisory Group identifies vacancies in the authorized judgeships as the single most significant cause of delay and expense to litigants in this district and recommends that the Congress hold oversight hearings focused on the process of authorizing new positions and, thereafter, on the processes of selection, nomination, confirmation, and appointment.

Two simple facts underscore the significance of this finding and recommendation. First, the total number of vacancy months over the course of the last five years for which published data are available, 1986-1990, is almost exactly the equivalent of nine district judges, each sitting on the bench for one full year. Moreover, empty chairs on the bench often have negative effects far beyond what the simple data might show; vacancies make "firm" trial dates totally unpredictable and the credibility of court-imposed deadlines meaningless.

Second is the fact that the increase in the volume and complexity of criminal cases has exacerbated the impact of the vacancies. Indeed, the tentative findings of the Federal Judicial Center study of the demands imposed by criminal cases, undertaken as a part of its current review of weighted caseloads and reported to us by the Center in the late summer of the current year, justify an additional three judgeships in the Eastern District of Pennsylvania.

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5. (...continued)
Advisory Group Report and in shaping a plan for consideration of the court. As a result it was essential that the Advisory Group file its report no later than the beginning of August.

The judges of this court are in agreement with the analysis and the conclusions of the Advisory Group concerning vacant judgeships, but, as must be clear, the remedy does not lie with the court and can hardly find a place in the court's Plan.

Similarly, the Report of the Advisory Group calls attention to the provision in the national rules[6] that appears to allow a plaintiff, without reason or penalty, to delay service of process for a full 120 days after the filing of the complaint. Again, the basic remedy does not lie within the competence of the court, but we endorse the analysis and recommendation of the Advisory Group.

A list of recommendations of the Advisory Group not intended for inclusion in the Plan because they were not addressed to the court alone is set forth in Appendix IV.

The Requirements of the Act and the Structure of the Plan

The Civil Justice Reform Act of 1990 sets forth in great detail "principles and guidelines of litigation management and cost and delay reduction."[7] The statute provides that every district court "shall consider" these principles and guidelines in the development of its plan, but for the vast majority of district courts whether any or all of them is included in their respective plans is entirely discretionary.

This is not true of the respective plans of the Pilot Courts. Accordingly, each of the guidelines and principles is included in the Plan of the court, promulgated herein.[8] The full text of the relevant section is included in Appendix II, but it is useful to summarize these principles here. They are:

(1) systematic, differential treatment of civil cases that tailor "case-specific management" to specified criteria;

(2) early and ongoing control of the pretrial process by the involvement of a judicial officer;

(3) special treatment for cases identified as "complex," with particular attention to discovery;

(4) encouragement of cost-effective discovery through voluntary exchange of information;

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6. See Federal Rule of Civil Procedure 4(j).

7. 28 U.S.C. §473(a), reprinted in Appendix II.

8. Civil Justice Reform Act of 1990 §105(b).

(5) requiring good faith effort of the parties to resolve discovery disputes; and

(6) utilization of alternative dispute resolution.

The Act also includes a roster of litigation management techniques that are optional even for pilot courts.[9] The statute provides that the district courts "shall consider and may include" each of these techniques. Each has been considered by the Advisory Group and by the court. In the case of the suggested requirement for a joint discovery-case management plan, the proposal has been rejected in part by being limited to cases on the special management track.[10] The suggestion that clients as well as their lawyers be required to sign requests for extension of discovery deadlines, for example, is likewise rejected for the reasons given by the Advisory Group.[11] Finally, the suggestion that the court create a neutral evaluation program is not approved at this time, again for the reasons adequately expressed by the Advisory Group in its Report.[12]

## The Continuing Membership of the Advisory Group

Facilitating access to justice, reducing delay and expense in civil litigation, is a continuing process and the Act recognizes this. Periodic reassessment of the condition of the court's docket is required,[13] additional actions by the court are envisioned,[14] and the Advisory Groups are created as continuing bodies with individual memberships limited to four years, except the United States Attorney, who is a permanent member.[15]

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9. 28 U.S.C. §473(b).

10. 28 U.S.C. §473(b)(1), reprinted in Appendix II. This section requires the court to "explain the reasons" for failure to include this technique in the Plan. The reasons given by the Advisory Group for not making such joint plans a universal requirement, reprinted in Appendix III, are adopted by the Court.

11. 28 U.S.C. §473(b)(3), reprinted in Appendix II.

12. 28 U.S.C. §473(b)(4), reprinted in Appendix II. For the recommendations of the Advisory Group, see Appendix III.

13. 28 U.S.C. §475 calls for annual reassessment. Cf. §105b, which provides that the plans of the pilot districts shall remain in effect for three years.

14. 28 U.S.C. §475.

15. 28 U.S.C. §478(c) and (d).

## CHAPTER I. SYSTEMATIC, DIFFERENTIAL TREATMENT OF CIVIL CASES FOR PURPOSES OF CASE-SPECIFIC MANAGEMENT[16]

### Section 1:01 Case Management Tracks

Each civil case will be assigned to one of the following tracks:

(a) Habeas Corpus

(b) Social Security

(c) Arbitration

(d) Asbestos

(e) Special Management

(f) Standard Management

### Section 1:02 Management Track Definitions

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

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

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

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

(e) Special Management -- Cases that do not fall into tracks (a) through (d) that need special or intense management by the court due to one or more of the following factors:[17]

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16. See Chapter VI of the Advisory Group Report (pages 57-63) for a discussion of the rationale behind these recommendations, relevant statutory provisions, and an explanation of how this Plan satisfies the requirements of the statute. Excerpts are reprinted in Appendix III of this Plan (pages 51-56).

17. Special management cases will usually include that class of cases commonly referred to as "complex litigation" as that term has been defined in the Manual for Complex

(continued...)

(1) large number of parties;

(2) large number of claims or defenses;

(3) complex factual issues;

(4) large volume of evidence;

(5) problems locating or preserving evidence;

(6) extensive discovery;

(7) exceptionally long time needed to prepare for disposition;

(8) decision needed within an exceptionally short time; and

(9) need to decide preliminary issues before final disposition.

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

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17. (...continued)
Litigation. This definition is intended to include cases that present unusual problems and require extraordinary treatment. See § 0.1 of the Manual. It may include two or more related cases. Complex litigation typically includes such cases as antitrust cases; cases involving a large number of parties or an unincorporated association of large membership; cases involving requests for injunctive relief affecting the operation of large business entities; patent cases; copyright and trademark cases; common disaster cases such as those arising from aircraft crashes or marine disasters; actions brought by individual stockholders; stockholder's derivative and stockholder's representative actions; class actions or potential class actions; complex commercial cases; and other civil (and criminal) cases involving unusual multiplicity or complexity of factual issues. See § 0.22 of the Manual for Complex Litigation.

The Manual for Complex Litigation was originally prepared in 1967 by a sub-committee of the Judicial Conference of the United States, and successive revisions and editions of the Manual relied upon these definitions. The 1985 Manual for Complex Litigation Second (MCL2D, prepared by the Federal Judicial Center) is a complete updating and revision of the Manual and utilizes the definition of complex cases from the earlier Manual as the framework for current recommended procedures.

**Section 1:03 Assignment to a Management Track**

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

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

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

(d) Nothing in this Plan is intended to abrogate or limit a judicial officer's authority in any case pending before that judicial officer, to direct pretrial and trial proceedings that are more stringent than those of the Plan and that are designed to accomplish cost and delay reduction.

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

**Section 1:04 Management Track Procedures–Standard Track**

Cases that are assigned to the Standard Track shall be disposed of in accordance with the routine practices and procedures of this court. Pretrial procedure for Standard Track cases shall be conducted in accordance with Rule 16 of the Federal Rules of Civil Procedure and Local Civil Rules 21 and 47.

**Section 1:05 Management Track Procedures–Specialized Cases**

(a) Habeas Corpus Track -- Cases will follow the Federal Rules Governing Section 2254 Cases or, in cases brought under 28 U.S.C. §2255, the Federal Rules Governing Section 2255 Cases and Local Civil Rule 44. The court may, at its discretion, refer the case to a magistrate judge pursuant to 28 U.S.C. §636(b).

(b) Social Security Track -- Immediately after assigning a case to the Social Security Track, the clerk will enter and serve on all parties an order stating:

(1) Within 10 days after the date of entry of the order the plaintiff shall cause the summons and complaint to be served on the defendant in the manner specified by Federal Rules of Civil Procedure 4(d)(4) and 4(d)(5).

(2) Within 60 days after service of the complaint, defendant shall serve an answer and a certified copy of the administrative record.

(3) Within 45 days after service of the entry of appearance by the defendant, plaintiff shall file and serve a motion for summary judgment and supporting brief.

(4) Within 30 days after service of plaintiff's motion and brief, defendant shall file and serve a cross-motion for summary judgment and supporting brief.

(5) Plaintiff may serve a reply brief within 15 days after service of defendant's motion and brief.

The court may, at its discretion, refer the case to a magistrate judge pursuant to 28 U.S.C. § 636(b).

(c) Arbitration Track -- Cases will be managed in accordance with Local Civil Rule 8.

(d) Asbestos Track -- Cases will be managed in accordance with the Master Case Management Order issued December 16, 1987, as it may be amended from time to time.

(e) Special Management Track -- The clerk will notify the court immediately upon assignment of a case to the Special Management Track. Thereafter, management of the case will proceed in accordance with the provisions of this Plan unless determined otherwise by the court in consultation with the parties.

## CHAPTER II. INVOLVEMENT OF JUDICIAL OFFICERS IN THE PRETRIAL PROCESS[18]

### Section 2:01 Assessing and Planning the Progress of the Case

(a) Federal Rule of Civil Procedure 16 and Local Civil Rule 21 shall apply in all cases on the Standard Track (except those exempted by Local Civil Rule 47).

(b) It is the policy of the court that in most cases there shall be an initial pretrial conference, which may be conducted by telephone, prior to the entry of the scheduling order. Nothing in this section shall limit the discretion of any judicial officer with respect to dispensing with the initial pretrial conference or to ordering an in-person conference in any individual case pending before that judicial officer.

(c) Cases on the Standard Track that are exempt from a scheduling order under Local Civil Rule 47, such as student loan cases, normally do not require and are not advantaged by involvement of a judicial officer in the pretrial process. In the unusual case in which such involvement is appropriate, the judicial officer to whom the case has been assigned shall, in the exercise of his or her discretion, take whatever steps are appropriate to assure the just and speedy disposition of the case.

(d) Cases on the Special Management Track shall be governed in accordance with the provisions of Chapter III of this Plan.

### Section 2:02 Early, Firm Trial Dates

(a) Time of Trial

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

(2) For cases on the Special Management Track and for asbestos cases, except for those cases certified as exempt under the provisions of 28 U.S.C.

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18. See Chapter VII of the Advisory Group Report (pages 64-71), reprinted in Appendix III of this Plan (pages 57-63), for discussion of the rationale behind these recommendations, the relevant statutory provisions, and an explanation of how this Plan satisfies the requirements of the statute.

§473(a)(2)(B)(i) and (ii),[19] the court accepts as a guideline that trial should take place within 18 months of filing.

(b) Time for Scheduling the Trial Date

(1) For most cases, the trial date should be set in the scheduling order entered under Federal Rule of Civil Procedure 16.

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

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

(c) Procedure When the Court Cannot Adhere to the Date

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

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

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

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

Where appropriate and in conformity with Local Civil Rule 7, I, (h), assignment to a magistrate judge may be made by the judge to whom the case is assigned. In all other cases, the judge to whom the case is assigned may refer the case to the Chief Judge for assignment to a magistrate judge. All such assignments and any further procedures shall be in conformity with the provisions of and the policies articulated in Local Civil Rules 3, 6, and 7.

### Section 2:03 Dispositive Motions

(a) The initial scheduling order should include a deadline for filing dispositive motions, set sufficiently in advance of the trial date so as not to interfere with it.

(b) It is expected that dispositive motions will be decided promptly to reduce unnecessary costs to the litigants.

## CHAPTER III. TREATMENT OF CASES ON THE SPECIAL MANAGEMENT TRACK

In all cases on the Special Management Track the pretrial process shall be as set forth in this section unless otherwise directed by the trial judge.

### Section 3:01 Initial Pretrial Conference

In all such cases a scheduling conference shall be scheduled by the assigned judge or magistrate within 30-60 days after the filing of the complaint. Prior to such conference, the parties shall confer and provide the court with a proposed case management plan. The proposed plan should address the following items:

(1) designation of lead and liaison counsel and the roles and responsibilities of each;

(2) deposition guidelines;

(3) protective orders;

(4) if the case is a class action, a proposal for class discovery and a timetable for briefing together with a hearing date;

(5) identification of any summary discovery and its timing;

(6) possible Federal Rule of Civil Procedure 12 or summary judgment motions and a proposed timetable for briefing and hearing; and

(7) the possibility of bifurcation.

During the initial pretrial conference, counsel shall be prepared to discuss with the court procedures for resolving discovery disputes. The court shall determine the procedure for resolving discovery disputes -- for example, by attempting to resolve among the parties, by making a conference call to the judge's chambers, by bringing a motion to compel, or by imposing sanctions where one party has taken an unreasonable position.

Where it appears that cases are pending in several districts and a motion for consolidation has been filed before the Judicial Panel on Multi District Litigation, the court shall determine what discovery is pending in the other cases and require the parties to coordinate with such discovery.

At the conclusion of the first or initial pretrial conference, the court shall issue a case management order, set the date for the second pretrial conference and establish the due date for the next preconference statement. The second pretrial conference shall be held three to four months after the initial conference.

### Section 3:02 Second Pretrial Conference

The primary purpose of the second pretrial conference is to determine whether the case will settle. Prior to the conference, the parties shall submit to the court brief preconference statements that identify their claims and defenses with the evidentiary support obtained from discovery. The purpose of these statements is to enable the judicial officer conducting the conference to make an informed contribution to the settlement process; therefore, all statements should contain sufficient detail to accomplish that end.

The conference shall be attended by the attorneys of record as well as a party, or representative of a party, with authority to settle the case.

If the case does not settle during the conference, the court shall, at or shortly after the conference, set firm trial and discovery cutoff dates and order the parties to submit a plan to prepare for the trial of the case. The court should review the proposal and issue an order containing such a plan. The proposed plan shall include deadlines for all of the remaining events contemplated by the parties, such as:

(1) identification of summary judgment or other dispositive motions or issue-limiting motions, and a proposed schedule for briefing and hearing;

(2) a timetable for designation of experts and exchange of expert reports;

(3) any proposed bifurcation of issues for discovery or trial;

(4) any proposed use of alternative dispute resolution procedures; or

(5) proposals for the use of a special master or a magistrate judge for discrete discovery issues.

### Section 3:03 Subsequent Conferences

The court may continue to hold conferences on a frequent basis. The purpose of such conferences is to monitor discovery, allow continued opportunities to explore settlement, and allow continued consideration of alternative dispute resolution mechanisms.

## CHAPTER IV. DUTY OF SELF-EXECUTING DISCLOSURE[20]

### Section 4:01 - Discovery – Duty of Self-Executing Disclosure

(a) Required Disclosures

(1) Unless otherwise directed by the court, each party shall, without awaiting a discovery request, disclose to all other parties:

(A) the name and last known address of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

(B) a general description, including location, of all documents, data, compilations, and tangible things in the possession, custody, or control of that party that are likely to bear significantly on the claims and defenses;

(C) the existence and contents of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of the judgment that may be entered in the action, or indemnify or reimburse for payments made to satisfy the judgment, making available such agreement for inspection and copying as under Local Civil Rule 24;

(D) unless the court otherwise directs, these disclosures shall be made (i) by each plaintiff within thirty (30) days after service of an answer to its complaint; (ii) by each defendant within thirty (30) days after serving its answer to the complaint; and, in any event (iii) by any party that has appeared in the case within thirty

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20. See 28 U.S.C. §473(a)(4), reprinted in Appendix II, and Report of the Advisory Group (pages 78-80), reprinted in Appendix III of this Plan (pages 64-66).

(30) days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosure, or, except with respect to the obligation under clause (iii), because another party has not made its disclosures.

(b) Timing and Sequence of Discovery -- Except by leave of the court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1), and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party.

(c) Supplementation of Disclosures -- A party who has made a disclosure under subdivision (a) is under a duty to reasonably supplement or correct its disclosures if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.

(d) Signing of Disclosures -- Every disclosure or supplement made pursuant to subdivision (a) or (c) by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes the certification under, and is consequently governed by, the provisions of the Federal Rules of Civil Procedure, and, in addition, constitutes a certification that the signer has read the disclosure, and to the best of signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.

(e) Duplicative Disclosure -- At the time the duty to disclose arises it may cover matters already fully disclosed in the same civil action pursuant to an order of the court, to a requirement of law or otherwise.[21] In that event duplicative disclosure is not required and a statement that disclosure has already been made discharges the obligation imposed under this section.

**Section 4:02 Cooperative Discovery Devices**

(a) Cooperative discovery arrangements in the interest of reducing delay and expense are encouraged.

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21. Cf. Local Civil Rule 26, Mandatory Exchange of Medical Reports in Personal Injury Claims.

(b) The parties may, by stipulation, extend the scope of the obligation for self-executing discovery.

## CHAPTER V. REASONABLE AND GOOD FAITH EFFORTS OF PARTIES TO RESOLVE DISCOVERY DISPUTES[22]

### Section 5:01 Efforts of Parties to Resolve Discovery Disputes

No motion or other application pursuant to the Federal Rules of Civil Procedure, the Local Rules of this court, or the provision of this Plan governing discovery shall be made unless it includes a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute.[23]

## CHAPTER VI. ALTERNATIVE DISPUTE RESOLUTION[24]

### Section 6:01 Court-Annexed Arbitration

Local Civil Rule 8, Arbitration -- The Speedy Civil Trial, shall govern where applicable.[25]

### Section 6:02 Court-Annexed Mediation (Early Settlement Conference)

Local Civil Rule 15, Court-Annexed Mediation (Early Settlement Conference), shall govern where applicable.[26]

### Section 6.03 Other Mechanisms of Alternative Dispute Resolution

Any judge on his or her own motion, or any party to a civil law suit, may suggest the desirability of utilizing a means of alternative dispute resolution other than court-annexed arbitration and mediation.

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22. See 28 U.S.C. §473 (a)(5), reprinted in Appendix II, and Report of Advisory Group (page 81), reprinted in Appendix III of this Plan (page 67).

23. This provision is virtually identical with Local Civil Rule 26(f). It does, however, extend the provisions of that Rule to any applications that may be made under any section of this Plan.

24. See 28 U.S.C. §473(a)(5), reprinted in Appendix II, and Report of the Advisory Group (pages 82 - 85), reprinted in Appendix III of this Plan (pages 68-70).

25. Local Civil Rule 8 is reprinted in Appendix I (pages 31-36).

26. Local Civil Rule 15 is reprinted in Appendix I (pages 37-40).

## CHAPTER VII. JOINT DISCOVERY - CASE MANAGEMENT PLANS FOR CASES ON THE SPECIAL MANAGEMENT TRACK[27]

### Section 7.01 Development of a Joint Plan; Contents

In cases designated to be administered on the Special Management Track, the parties shall convene prior to the first pretrial conference for the purpose of developing a Joint Discovery-Management Plan. Included among the topics that the parties shall include in the Joint Plan are:

(1) the identification of lead and liaison counsel and the description of the responsibilities of each;

(2) suggestions for maintaining confidentiality;

(3) a Plan setting forth a description of, and the sequence of, discovery to be had under relevant provisions of the Federal Rules of Civil Procedure;

(4) in class action cases, a proposed timetable for class issue discovery, briefing, and hearing;

(5) a timetable for the filing and service of dispositive motions under Federal Rule of Civil Procedure 12 and/or Federal Rule of Civil Procedure 56;

(6) proposals relating to the addition of parties, bifurcation, and special needs concerning service of process; and

(7) subjects bearing upon the administration of the case, including consideration of the appointment of Special Masters to administer multi-track discovery, resolving initial discovery disputes, identifying a custodian of exhibits, and serving notices and court orders to multiple parties when necessary in consolidated cases.

### Section 7.02 Discovery to Proceed Simultaneously

It is contemplated that discovery in such a Plan will proceed simultaneously with the completion of other obligations of the parties under the Plan and the parties can only expect a stay of all or part of any discovery for the most extraordinary and compelling reasons.

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27. See 28 U.S.C. §473(b)(1), reprinted in Appendix II, and Report of the Advisory Group (page 87), reprinted in Appendix III of this Plan (page 71).

## CHAPTER VIII. REPRESENTATION BY ATTORNEY WITH POWER TO BIND[28]

### Section 8.01 Representation by Attorney with Power to Bind

When the court in its discretion determines that the efficient management of litigation so requires, each party shall be represented at each identified pretrial conference by an attorney who has authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters.

## CHAPTER IX. REPRESENTATIVES WITH AUTHORITY TO SETTLE[29]

Upon notice by the court, representatives of the parties with authority to bind them in settlement discussions shall be present or be available by telephone during any settlement conference.[30]

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28. See 28 U.S.C. §473(b)(2), reprinted infra Appendix II, and Advisory Group Report (page 88), reprinted infra Appendix III of this Plan (page 72).

29. See U.S.C. §473 (b)(5), reprinted infra Appendix II, and Advisory Group Report (page 92), reprinted infra Appendix III of this Plan (page 73).

30. This provision is similar to, but broader than Local Civil Rule 21(d) par. 3. The latter is limited to the final pretrial conference and hence is included in the present section.

# APPENDIX I

## LOCAL CIVIL RULES OF EASTERN DISTRICT OF PENNSYLVANIA TO WHICH THE PLAN REFERS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

# N O T I C E

It is noted that the Judicial Improvements Act of 1990, Pub L. No. 101-650 §321 changed the title of United States Magistrates appointed under 28 U.S.C. §631 to United States Magistrate Judge. All references to United States Magistrates in the Local Civil Rules of the Eastern District of Pennsylvania may be read as referring to United States Magistrate Judges.

Louis C. Bechtle
Chief Judge

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

# N O T I C E

It is noted that the Judicial Improvements Act of 1990, Pub L. No. 101-650 §321 changed the title of United States Magistrates appointed under 28 U.S.C. §631 to United States Magistrate Judge. All references to United States Magistrates in the Local Civil Rules of the Eastern District of Pennsylvania may be read as referring to United States Magistrate Judges.

Louis C. Bechtle
Chief Judge

**Rule 3 Assignment of Court Business**

(a) All civil litigation in this Court shall be divided into the following categories:

(1) Federal Question Cases:

A. Indemnity contract, marine contract and all other contracts.
B. FELA.
C. Jones Act -- Personal Injury.
D. Antitrust.
E. Patent.
F. Labor-Management Relations.
G. Civil Rights.
H. Habeas Corpus.
I. Securities Act(s) Cases.
J. All other federal question cases.

(2) Diversity Jurisdiction Cases:

A. Insurance Contract and other Contracts.
B. Airplane Personal Injury.
C. Assault, Defamation.
D. Marine Personal Injury.
E. Motor Vehicle Personal Injury.
F. Other Personal Injury.
G. Products Liability.
H. All Other Diversity Cases.

(b) Where it appears from the designation form filed by counsel, or from the complaint, petition, motion, answer, response, or other pleading in a civil case, that a plaintiff or defendant resides in or that the accident, incident, or transaction occurred in the counties of Berks, Lancaster, Lehigh, Northampton or Schuylkill, said cases shall be assigned or reassigned for trial and pretrial procedures to a Judge stationed in Reading or Allentown, who shall be given appropriate credit by category for any case so assigned, reassigned or transferred and, unless otherwise directed by the court, all trial and pretrial procedures with respect thereto shall be held in Reading or Allentown. All other cases, unless otherwise directed by the court, shall be tried in Philadelphia and as each case is filed, it shall be assigned to a judge, who shall thereafter have charge of the case for all purposes. The assignment shall take place in the following manner:

(1) There shall be a separate block of assignment cards for each category of civil cases. In each block of assignment cards for civil categories the name of each active judge shall appear an equal number of times in a nonsequential manner except that the name of the Chief Judge shall appear one-half the number of times of each of the other active judges. The sequence of judges' names within each block shall be kept secret and no person shall directly or indirectly ascertain or divulge or attempt to ascertain or divulge the name of the judge to whom any case may be assigned before the assignment. The case number shall be stamped on the assignment card at the time of filing and assignment, and all assignment cards shall be preserved.

(2) The assignment clerk shall stamp on the complaint, petition or other initial paper of every case filed, and on the file jacket, the number of the case and the initials (or other designation) of the judge to whom it is assigned. The numbering and assignment of each case shall be completed before processing of the next case is begun.

(3) Related Cases. At the time of filing any civil action or proceeding, counsel shall indicate on the appropriate form whether the case is related to any other pending or within one year previously terminated action of this court.

A. Civil cases are deemed related when a case filed relates to property included in another suit, or involves the same issue of fact or grows out of the same transaction as another suit, or involves the validity or infringement of a patent involved in another suit.

B. All habeas corpus petitions filed by the same individual shall be deemed related. All pro se civil rights actions by the same individual shall be deemed related.

(c) Assignment of Related Cases.

(1) If the fact of relationship is indicated on the appropriate form at the time of filing, the assignment clerk shall assign the case to the same judge to whom the earlier numbered related case is assigned, and shall note such assignment by means of a separate block of cards on which he shall place the case number and the category and the name of the judge. If the judge receiving the later case is of the

opinion that the relationship does not exist, he shall refer the case to the assignment clerk for reassignment by random selection in the same manner as if it were a newly filed case.

(2) If the fact of relationship does not become known until after the case is assigned, the judge receiving the later case may refer the case to the Chief Judge for reassignment to the judge to whom the earlier related case is assigned. If the Chief Judge determines that the cases are related, he shall transfer the later case to the judge to whom the earlier case is assigned; otherwise, he shall send the later case back to the judge to whom it was originally assigned.

(3) Whenever related cases require handling in such a way as to amount to substantially separate treatment of each case, and one or more of these related cases remain to be tried after disposition or trial of the other related case, the judge in question may call the matter to the attention of the Chief Judge and request leave to reassign a case of like category and approximately similar age. If the Chief Judge determines that such reassignment is desirable in promoting the substantially equal distribution of the work load, the Chief Judge shall reassign such equivalent case, either to the judge who originally transferred a later related case, or to a judge selected by lot (by reference to the assignment clerk), as the case may be.

Note: In addition to the requirements of Local Rule 3, and in order to conform with the request of the Judicial Conference of the United States, the Court, on December 19, 1974, effective January 1, 1975, ordered as follows:

1. The Clerk is authorized and directed to require a completed and executed AO Form JS44c, *Civil Cover Sheet, which shall accompany each civil case to be filed.

2. The Clerk is directed to reject the filing of a civil case which is not accompanied by a completed and executed Civil Covert Sheet.

3. At the time of filing a civil case, those persons who are in the Custody of the City, State or Federal institutions, and persons filing civil cases pro se, are exempt from the foregoing requirements.

* Forms and instructions are available in the Clerk's Office.

## Rule 6 Calendar Review

The Chief Judge (or, in case of the absence or disability of the Chief Judge, the next most senior active judge) shall serve as Calendar Judge, and as such shall have the following duties and responsibilities:

(1) The duties and responsibilities set forth in Rule 3 of these Rules.

(2) The Chief Judge may recommend to the Board of Judges the reassignment of substantial numbers of cases whenever a judge falls appreciably farther behind in his trial work than the other members of the Court, and in the interests of justice to litigants and fairness to the Court as a whole, such reassignments are deemed appropriate. No such reassignment of substantial numbers of cases shall take place without the approval of a majority of the Board of Judges.

(3) Where particular counsel or law firms are unable to keep reasonably current with their trial assignments, the Chief Judge may confer with counsel in an attempt to rectify the situation through voluntary action on the part of counsel. In extreme cases, he may recommend to the Board of Judges the adoption of a policy requiring reassignment of cases in excess of a certain number per lawyer beyond a certain age; or for the non-recognition of busy slips for cases in excess of a certain age, etc. No such mandatory reassignment or change in policy shall be effective unless approved by a majority vote of the Board of Judges.

## Rule 7 United States Magistrates

1. Authority of United States Magistrates

(a) Duties under 28 U.S.C. §636(a).

Each United States magistrate of this district is authorized to perform the duties prescribed by 28 U.S.C. §636(a), and may

(1) Exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;

(2) Administrator oaths and affirmations, impose conditions of release under 18 U.S.C. §3146, and take acknowledgements, affidavits, and depositions; and

(3) Conduct extradition proceedings, in accordance with 18 U.S.C. §3184.

(b) Disposition of Misdemeanor Cases -- 18 U.S.C. § 3401.

A magistrate may

(1) Try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. §3401;

(2) Direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and

(3) Conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

(c) Determination of Non-Dispositive Pretrial Matters -- 28 U.S.C. §636(b)(1)(A).

A magistrate may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in subsection I(d), infra, of these rules.

(d) Recommendations Regarding Case -- Dispositive Motions -- 28 U.S.C. §636(b)(1)(B).

(1) A magistrate may submit to a judge of the court a report containing proposed findings of fact and/or recommendations for disposition by the judge of the following pretrial motions in civil and criminal cases:

A. Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;

B. Motions for judgment on the pleadings;

C. Motions for summary judgment;

D. Motions to dismiss or permit the maintenance of a class action;

E. Motions to dismiss for failure to state a claim upon which relief may be granted;

F. Motions to involuntarily dismiss an action;

G. Motions for review of default judgments;

H. Motions to dismiss or quash an indictment or information made by a defendant;

I. Motions to suppress evidence in a criminal case; and

J. Motions seeking review of an action of an administrative agency.

(2) A magistrate may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this subsection.

(e) Prisoner Cases under 28 U.S.C. §§2254 and 2255.

A magistrate may perform any or all of the duties imposed upon a judge by the rules governing proceedings in the United States district

courts under §2254 and §2255 and title 28, United States Code. In so doing, a magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendation for disposition of the petition by the judge. Any order disposing of the petition may be made only by a judge.

(f) Prisoner Cases under 42 U.S.C. §1983.

A magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

(g) Special Master References.

A magistrate may be designated by a judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. §636(b)(2) and rule 53 of the Federal Rules of Civil Procedure. Upon the consent of the parties, a magistrate may be designated by a judge to serve as a special master in any civil case, notwithstanding the limitations of rule 53(b) of the Federal Rules of Civil Procedure.

(h) Conduct of Trials and Disposition of Civil Cases upon Consent of the Parties -- 28 U.S.C. §636(c).

With the consent of the parties, and upon referral by a judge, a full-time magistrate may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or non-jury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. §636(c). In the course of conducting such proceedings upon consent of the parties, a magistrate may hear and determine any and all pretrial and posttrial motions which are filed by the parties, including case-dispositive motions.

(i) Other Duties

A magistrate is also authorized to

> (1) Exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the judges;

(2) Conduct pretrial conferences; settlement conferences, omnibus hearings, and related pretrial proceedings in civil and criminal cases;

(3) Conduct arraignments in criminal cases not triable by the magistrate and take not guilty pleas in such cases;

(4) Receive grand jury returns in accordance with rule 6(f) of the Federal Rules of Criminal Procedure;

(5) Accept waivers of indictment, pursuant to rule 7(b) of the Federal Rules of Criminal Procedure;

(6) Conduct voir dire and select petit juries for the court;

(7) Accept petit jury verdicts in civil cases in the absence of a judge;

(8) Conduct necessary proceedings leading to the potential revocation of probation;

(9) Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

(10) Order the exoneration or forfeiture of bonds;

(11) Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. §1484(d);

(12) Conduct examinations of judgment debtors in accordance with rule 69 of the Federal Rules of Civil Procedure;

(13) Conduct proceedings for initial commitment of narcotics addicts under title III of the Narcotic Addict Rehabilitation Act;

(14) Perform the functions specified in 18 U.S.C. §§4107, 4108 and 4109, regarding proceedings for

verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein.

(15) Upon the request of the United States Attorney, authorize the installation of pen registers and execute orders directing telephone company assistance to the Government for such installation.

(16) Perform any additional duty as is not inconsistent with the Constitution and laws of the United States.

II. Assignment of Matters to Magistrates

(a) Misdemeanor Cases. All misdemeanor cases shall be assigned, upon the filing of an information, complaint, or violation notice, or the return of an indictment, to a magistrate, who shall proceed in accordance with the provisions of 18 U.S.C. §3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

(b) Felony Cases. Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk of court to a magistrate for the conduct of an arraignment, unless the judge to whom the matter is assigned shall otherwise direct.

(c) General. In accordance with procedures adopted by the Board of Judges, each district judge shall have an assigned magistrate. The assignment list shall be posted in the office of the clerk. Matters shall be referred to magistrates at the direction of the district judge to whom the case is assigned.

III. Procedures before the Magistrate

(a) In General.

In performing duties for the Court, a magistrate shall conform to all applicable provisions of federal statutes and rules, to the general procedural rules of this court, and to the requirements specified in any order of reference from a judge.

(b) Special Provisions for the Disposition of Civil Cases by a Magistrate on Consent of the Parties -- 28 U.S.C. §633(c).

1. Notice. The clerk of court shall notify the parties in all civil cases that they may consent to have a magistrate conduct any or all proceedings in the case and order the entry of a final judgment. Such notice shall be handed or mailed to the plaintiff or his representative at the time an action is filed and to other parties as attachments to copies of the complaint and summons, when served. Additional notices may be furnished to the parties at later stages of the proceedings, and may be included with pretrial notices and instructions.

2. Execution of Consent. The clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available nor will its contents be made known to any judge or magistrate, unless all parties have consented to the reference to a magistrate. No magistrate, judge, or other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.

3. Reference. After the consent form has been executed and filed, the clerk shall transmit it to the judge to whom the case has been assigned for approval and possible referral of the case to a magistrate. Once the case has been assigned to a magistrate, the magistrate shall have the authority to conduct any and all proceedings to which the parties have consented and to direct the clerk of court to enter a final judgment in the same manner as if a judge had presided.

IV. Review and Appeal.

(a) Appeal of Non-Dispositive Matters -- 28 U.S.C. §636(b)(1)(A).

Any party may appeal from a magistrate's order determining a motion or matter under subsection I(c) of these rules, supra, within 10 days after issuance of the magistrate's order, unless a different time is

prescribed by the magistrate or a judge. Such party shall file with the clerk of court, and serve on the magistrate and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A judge of the court shall consider the appeal and shall set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The judge may also reconsider sua sponte any matter determined by a magistrate under this rule.

(b) Review of Case-Dispositive Motions and Prisoner Litigation - 28 U.S.C. §636(b)(1)(B).

Any party may object to a magistrate's proposed findings, recommendations or report under subsections I(d), (e), and (f) of these rules, supra, within 10 days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

(c) Special Master Reports - 28 U.S.C. §636(b)(2).

Any party may seek review of, or action on, a special master report filed by a magistrate in accordance with the provisions of rule 53(e) of the Federal Rules of Civil Procedure.

(d) Appeal from Judgments in Misdemeanor Cases - 18 U.S.C. §3402.

A defendant may appeal a judgment of conviction by a magistrate in a misdemeanor case by filing a notice of appeal within 10 days after entry of the judgment, and by serving a copy of the notice upon the United States attorney. The scope of appeal shall be the

same as on appeal from a judgment of the district court to the court of appeals.

(e) Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties -- 28 U.S.C. §636(e).

1. Appeal to the Court of Appeals. Upon the entry of judgment in any civil case disposed of by a magistrate on consent of the parties under authority of 28 U.S.C. §363(c) and subsection I(h) of these rules, supra, an aggrieved party shall appeal directly to the United States Court of Appeals for the Third Circuit in the same manner as an appeal from any other judgment of this court.

2. Appeal to a District Judge.

A. Notice of Appeal. In accordance with 28 U.S.C. §633(c)(4), the parties may consent to appeal any judgment in a civil case disposed of by a magistrate to a judge of this Court, rather than directly to the court of appeals. In such case the appeal shall be taken by filing a notice of appeal with the clerk of court within 30 days after entry of the magistrate's judgment; but if the United States or any officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of the entry of the judgment. For good cause shown, the magistrate or a judge may extend the time for filing the notice of appeal for an additional 20 days. Any request for such extension, however, must be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.

B. Service of the Notice of Appeal. The clerk of court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel, to the party at his last known address.

C. Record on Appeal. The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to

render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. §363(c)(4).

D. Memoranda. The appellant shall, within 30 days of the filing of the notice of appeal, file a typewritten memorandum with the clerk, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellant shall also file a copy of the memorandum on the appellee or appellees. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

E. Disposition of the Appeal by a Judge. The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witnesses.

F. Appeals from other Orders of a Magistrate. Appeals from any other decisions and orders of a magistrate not provided for in this rule should be taken as provided by governing statute, rule, or decisional law.

## Rule 8 - ARBITRATION - THE SPEEDY CIVIL TRIAL

1. Certification of Arbitrators.

A. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

B. Any individual may be certified to serve as an arbitrator if: (1) he/she has been for at least five years a member of the bar of the highest court of a state or the District of Columbia, (2) he/she is admitted to practice before this court, and (3) he/she is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

C. Any member of the bar possessing the qualifications set forth in subsection B, desiring to become an arbitrator, shall complete the application form obtainable in the office of the Clerk and when completed shall file it with the Clerk of Court who shall forward it to the Chief Judge of the Court for his determination as to whether the applicant should be certified.

D. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28 U.S.C. §453 before serving as an arbitrator.

E. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

F. Any member of the Bar certified as an arbitrator may be removed from the list of certified arbitrators for cause by a majority of the judges of this Court.

2. Compensation and Expenses of Arbitrators.

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

3. Case Eligible for Compulsory Arbitration.

A. The Clerk of Court shall, as to all cases filed on or after May 18, 1989, designate and process for compulsory arbitration all civil cases (including adversary proceedings in bankruptcy, excluding, however (1) social security cases, (2) cases in which a prisoner is a party, (3) cases alleging a violation of a right secured by the U.S. Constitution, and (4) actions in which jurisdiction is based in whole or in part on 28 U.S.C. §1343) wherein money damages only are being sought in an amount not in excess of $100,000.00 exclusive of interest and costs. All cases filed prior to May 18, 1989 which were designated by Clerk of Court for compulsory arbitration shall continue to be processed pursuant to this Rule.

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

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

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

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

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

4. Scheduling Arbitration Trial.

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

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

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

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

E. Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. §144, and shall disqualify themselves

in any action in which they would be required under Title 28, U.S.C. §455 to disqualify themselves if they were a justice, judge, or magistrate.

F. The arbitrators designated to hear the case shall not discuss settlement with the parties or their counsel, or participate in any settlement discussions concerning the case which has been assigned to them.

5. The Arbitration Trial.

A. The trial before the arbitrators shall take place on the date and at the time set forth in the order of the Court. The trial shall take place in the United States courthouse in a room assigned by the arbitration clerk. The arbitrators are authorized to change the date and time of the trial provided the trial is commenced within thirty (30) days of the trial date set forth in the Court's order. Any continuance beyond this thirty (30) day period must be approved by the judge to whom the case has been assigned. The arbitration clerk must be notified immediately of any continuance.

B. Counsel for the parties shall report settlement of the case to the arbitration clerk and all members of the arbitration panel assigned to the case.

C. The trial before the arbitrators may proceed in the absence of any party who, after notice, fails to be present. In the event, however, that a party fails to participate in the trial in a meaningful manner, the Court may impose appropriate sanctions, including, but not limited to the striking of any demand for a trial de novo filed by that party.

D. Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at the trial before the arbitrators. Testimony at the trial shall be under oath or affirmation.

E. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the trial and the arbitrators shall receive such exhibits into evidence without formal proof unless counsel has been notified at least five (5) days prior to the trial that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered prior to trial to the adverse party, as provided herein.

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

6. Arbitration Award and Judgment.

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

7. Trial De Novo

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

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

C. At the trial de novo, the court shall not admit evidence that there had been an arbitration trial, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence.

D. To make certain that the arbitrators' award is not considered by the Court or jury either before, during or after the trial de novo, the arbitration clerk shall, upon the filing of the arbitration award, enter onto the docket only the date and "arbitration award filed" and nothing more, and shall retain the arbitrators' award in a separate file in the Clerk's office. In the event no demand for trial de novo is filed within the designated time period, the arbitration clerk shall enter the award on the docket and place it in the case file.

E. Upon making a demand for trial de novo, the moving party shall, unless permitted to proceed in forma pauperis, deposit with the Clerk of Court a sum equal to the arbitration fees of $100.00 for each arbitrator as provided in Section 2. The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. In the event the party demanding a trial de novo does not obtain a judgment more favorable than the arbitration award, the sum so deposited shall be paid to the Treasury of the United States.

## Rule 15 Court-Annexed Mediation (Early Settlement Conference)

Purpose--The court adopts this Rule for the purpose of determining whether a program of court-annexed mediation will provide litigants with a speedier and less expensive alternative to the burdens of discovery and the traditional courtroom trial. As hereinafter provided, commencing January 1, 1991, (and continuing until further action by the court) those cases which have been assigned an "odd" number by the Clerk of Court will be placed in the program with the understanding that thereafter a study will be made to determine whether this program should be continued in the interest of providing a more expeditious resolution of litigation.

1. Certification of Mediators

(a) The Chief Judge shall certify as many mediators as he determines to be necessary under this rule.

(b) An individual may be certified to serve as a mediator if: (1) he/she has been for at lest fifteen (15) years a member of the bar of the highest court of a state or the District of Columbia; (2) he/she is admitted to practice before this court; and (3) he/she is determined by the Chief Judge to be competent to perform the duties of a mediator.

(c) Any member of the bar possessing the qualifications set forth in subsection (b), and desiring to become a mediator, shall complete the application form obtainable in the office of the Clerk and when completed shall file it with the Clerk of Court who shall forward it to the Chief Judge of the Court for his determination as to whether the applicant should be certified.

(d) Each individual certified as a mediator shall take the oath or affirmation prescribed by Title 28, U.S.C. §453 before serving as a mediator.

(e) A list of all persons certified as mediators shall be maintained in the office of the Clerk.

(f) A member of the bar certified as a mediator may be removed from the list of certified mediators for cause by a majority of the judges of this Court.

2. Compensation and Expenses of Mediators

Mediators shall receive no compensation for services and shall not be reimbursed for expenses. The services and expenses of a mediator shall be

considered a pro bono service in the interest of providing litigants with a speedier and less expensive alternative to the burdens of discovery and a courtroom trial.

3. Cases Eligible for Mediation

The Clerk of Court shall, as to all cases filed on or after January 1, 1991, designate and process for mediation all civil cases to which the Clerk of this Court has assigned an "odd" (not "even") number, except (1) social security cases, (2) cases in which a prisoner is a party, (3) cases eligible for arbitration pursuant to Local Civil Rule 8, (4) asbestos cases, and (5) any case which a judge determines, sua sponte, or on application by an interested party (including the mediator) is not suitable for mediation.

4. Scheduling Mediation Conference

(a) After the first appearance for a defendant is made in a case determined eligible for mediation, the mediation clerk shall promptly send a notice to counsel and any unrepresented party setting forth a date, time and place for the mediation conference, and the name, address, and telephone number of the mediator. The date of the mediation conference set forth in the notice shall be a date within thirty (30) days from the date the first appearance for a defendant is made.

(b) The mediation conference shall be held before a mediator selected by a random selection process by the Clerk of Court from the list of lawyers certified as mediators.

(c) Upon mailing the notice pursuant to 4(a), the mediation clerk shall send to the mediator copies of the complaint and any motion(s) or pleading(s) that as of the date of the mailing of the notice have been filed in response to the complaint.

(d) A mediator is authorized to change the date and time for the mediation conference, provided the conference takes place within fifteen (15) days of the date set forth in the notice pursuant to 4(a), and the mediation clerk is notified. Any continuance of the conference beyond this fifteen (15) day period must be approved by the judge to whom the case is assigned.

(e) Persons selected as mediators shall be disqualified for bias or prejudice as proved by Title 28, U.S.C. §144, and shall disqualify themselves in any action in which they would be required under Title

28, U.S.C. §455 to disqualify themselves if they were a justice, judge, or magistrate.

5. The Mediation Conference

(a) The mediation conference shall take place on the date and at the time set forth in the notice pursuant to 4(a), or as changed pursuant to 4(d). The mediation conference shall take place in a courthouse, a courtroom in the United States Customs House, or at such other place designated by the mediation clerk.

(b) Counsel primarily responsible for the case and any unrepresented party shall attend the mediation conference, and shall be prepared to discuss: (1) all liability issues; (2) all damages issues; (3) all equitable and declaratory remedies if such are requested; and (4) the position of the parties relative to settlement. Counsel shall make arrangements with the client to be available by telephone or in person for the purpose of discussing settlement possibilities. Willful failure to attend the mediation conference shall be reported to the Court and may result in the imposition of sanctions.

(c) All proceedings at any mediation conference authorized by this Rule (including any statement made by a party, attorney, or other participants) shall not be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission. No party shall be bound by anything done or said at the conference unless a written settlement is reached and signed by the parties or their counsel.

(d) In the event the mediator determines that no settlement is likely to result from the mediation conference, he shall terminate the conference and promptly thereafter send a report to the mediation clerk and the judge to whom the case is assigned stating that there has been compliance with the requirements of this Rule, but that no settlement has been reached. In the event, however, that a settlement is achieved at the mediation conference, the mediator shall send a report to the mediation clerk and the judge to whom the case has been assigned stating that a settlement was achieved.

(e) No one shall have a recording or transcript made of the mediation conference.

(f) This rule shall not be construed as modifying the provisions of Federal Rule of Civil Procedure 16 or Local Civil Rule 21.

6. Revisions to this Rule

The court may, in order to further the purpose of court-annexed mediation, revise the text of this rule after consultation with the Federal Courts Committee of the Philadelphia Bar Association and the Lawyers' Advisory Committee for this court.

Rule 21 Pretrial Procedure

(a) Introductory Comments. Variations from the pretrial procedures established by this Rule may be ordered by the assigned judge to fit the circumstances of a particular case. In the absence of such specific order, however, the procedures outlined herein will be followed in all civil proceedings in this court except those exempt by Local Rule 47. In addition, the assigned judge or magistrate will issue a scheduling order in compliance with Federal Rule of Civil Procedure 16(b) in all civil cases, except those expressly exempt by Local Rule 47.

It is contemplated that each civil case will proceed through the following pretrial steps:

(1) A scheduling conference, as provided in section (b) of this Rule.

(2) Submission of pretrial memoranda, as provided in section (c) of this Rule.

(3) Such interim status calls, status reports, or interim conferences as the judge may direct.

(4) Completion of discovery.

(5) Submission of a Final Pretrial Order, if required (see section (d)(2), below).

(6) A final pretrial conference, as provided in section (d)(3) of this Rule.

(b) Scheduling Conference. In all cases except those exempt by Local Rule 47, a scheduling conference will ordinarily be held by the assigned judge or magistrate within 120 days after the filing of the complaint. Such conference may be by telephone, mail or other suitable means. The following matters, in addition to those set forth in Federal Rule of Civil Procedure 16, will be considered at the conference:

(1) Jurisdictional defects, if any.

(2) Prospects of amicable settlement.

(3) Setting a date for trial.

(4) Establishing schedules for remaining pretrial proceedings (discovery deadlines, pretrial memoranda filings, exchange of exhibits, exchange of experts' reports, etc.).

(5) Any other pertinent matters.

In all civil cases, except those exempt by Rule 47, a scheduling order will be issued as soon as practical, but in no event more than 120 days after filing of the complaint.

(c) Pretrial Memoranda. Pretrial memoranda shall be filed and served at such time as the court shall direct in the scheduling order or by any other express order.

Unless the order otherwise directs, the pretrial memorandum of each party shall contain the following:

(1) A brief statement of the nature of the action and the basis on which the jurisdiction of the court is invoked.

(2) Plaintiff's pretrial memorandum shall contain a brief statement of the facts of the case. Defendant's pretrial memorandum shall contain such counter-statements of the facts as may be necessary to reflect any disagreement with plaintiff's statement. All parties omit pejorative characterizations, hyperbole, and conclusory generalizations.

(3) A list of every item of monetary damages claims, including (as appropriate) computations of lost earnings and loss of future earning capacity, medical expenses (itemized), property damages, etc. If relief other than monetary damages is sought, information adequate for framing an order granting the relief sought shall be furnished.

(4) A list showing the names and addresses of all witnesses the party submitting the memorandum intends to call at trial. Liability and damages witnesses shall be designated separately.

(5) A schedule of all exhibits to be offered at trial by the party submitting the memorandum.

(6) An estimate of the number of days required for trial.

(7) Special comments regarding legal issues, stipulations, amendments of pleadings, or other appropriate matters.

(d) Final Preparation for Trial

1. Minimum requirements. In every case, counsel shall, before the commencement of trial:

(a) Mark and exchange all exhibits to be offered in evidence during case in chief. Authenticity of all exhibits will be deemed established unless written objection is filed (either in a pretrial memorandum or by motion) at least five (5) days before trial.

(b) Exchange lists of witnesses. No witness not listed may be called during case in chief. Requests during trial for offers of proof will not ordinarily be entertained with respect to listed witnesses; counsel are expected to clarify any uncertainties concerning the substance of proposed testimony in advance of trial, by conferring with opposing counsel.

2. Final Pretrial Order. If the case is unusually complex, or if the pretrial memoranda are inadequate, or if the judge determines that the circumstances of the litigation make it desirable to do so, the judge may require the parties to prepare and submit for approval a Final Pretrial Order. When a Final Pretrial Order is required, the following provisions shall apply:

(a) Instructions for Preparation of Proposed Final Pretrial Order. The proposed pretrial order shall consist of one document signed by all counsel, reflecting the efforts of all counsel. It is the obligation of plaintiff's counsel to initiate the procedures for its preparation, and to assemble, and to submit the proposed pretrial order to the judge.

Counsel may find it advantageous to prepare the proposed pretrial order jointly in one conference, or each attorney may prepare his section which will then be circulated with other counsel for review and approval. No explicit directions covering the mechanics of preparation are included in these instructions. However, after each counsel has submitted his respective proposed pretrial order suggestions to other counsel, all counsel must have a conference to attempt to reconcile any matters on which there is disagreement. Counsel are expected to make a diligent effort to prepare a proposed pretrial order in which will be noted all of the issues on which the parties are in agreement and all of those issues on which

they disagree. The proposed pretrial order shall be submitted by counsel for the plaintiff at chambers at least three days prior to the scheduled final pretrial conference, unless another date is specified by the judge.

The proposed pretrial order, if accepted by the judge, will become a final pretrial order and shall govern the conduct of the trial and shall supersede all prior pleadings in the case. Amendments will be allowed only in exceptional circumstances to prevent manifest injustice.

After the proposed pretrial order has been designated as the final pretrial order, the case will be considered ready for trial.

(b) Form of Proposed Pretrial Order. The proposed pretrial order shall be in the following form:

(CAPTION)

(1) Jurisdiction. A statement as to the nature of the action and the basis on which the jurisdiction of the court is invoked.

(2) Facts. A comprehensive written stipulation of all uncontested facts in such form that it can be read to the jury as the first evidence at trial.

(A) These facts should include all matters capable of ascertainment, such as ownership, agency, dimensions, physical characteristics, weather conditions, road surfaces, etc. Approximations and estimates which are satisfactory to counsel will be accepted by the judge.

(B) No facts should be denied unless opposing counsel expects to present contrary evidence on the point at trial, or genuinely challenges the fact on credibility grounds.

(C) The facts relating to liability and to damages are to be separately stated.

(D) The parties shall reach agreement on uncontested facts even though relevancy is disputed, if such facts are ruled admissible, they need not be proved.

(E) The parties shall also set forth their respective statements as to the facts which are in dispute, separating those referring to liability from those referring to damages.

(3) Damages or Other Relief. A statement of damages claimed or relief sought.

(A) A party seeking damages shall list each item claimed under a separate descriptive heading (personal injury, wrongful death, survival, loss of profits, loss of wages, deprivation of civil rights, false imprisonment, libel, slander, property damage, pain, suffering, past and future medical expense, balance due under a contract, performance due under a contract, interest, etc.), shall provide a detailed description of each item, and state the amount of damages claimed.

A party seeking relief other than damages shall list under separate paragraphs the exact form of relief sought with precise designations of the persons, parties, places, and things expected to be included in any order providing relief.

(4) Legal Issues. In separate paragraphs, each disputed legal issue that must be decided and the principal constitutional, statutory, regulatory, and decisional authorities relied upon.

(5) Witnesses. Under separate headings, and under separate headings for liability and damages, the names and addresses of all witnesses whom the plaintiff, defendant, and third-parties actually intend to call at trial, during their respective case in chief.

(A) Witnesses shall be listed in the order they will be called. Each witness shall be identified and there shall be a brief statement of the evidence which the witness will give.

(B) A detailed summary of the qualifications of each expert witness shall be submitted. This summary shall be in such form that it can be read to the jury when the expert takes the stand to testify.

(C) Only those witnesses listed will be permitted to testify at trial, except to prevent manifest injustice.

(6) Exhibits. A schedule of all exhibits to be offered in evidence at trial, together with a statement of those agreed to be admissible and the grounds for objection to any not so agreed upon.

(A) The exhibits shall be serially numbered, and be physically marked before trial in accordance with the schedule.

(B) Where testimony is expected to be offered as to geographical location, building, structure, waterway, highway, road, walkway, or parcel of real estate, plaintiff shall furnish an exhibit in such form that it can be used in the courtroom as an aid to oral testimony.

(i) Except in those cases where the issues require the use of exact scale, the exhibit may be a simple single-line hand-drawn sketch.

(ii) In most instances, it will not be necessary that the exhibit be to scale or contain other than reasonably accurate features of the geographical characteristics involved.

(iii) If of adequate size and clarity, this exhibit may be an existing drawing, plan or blueprint.

(C) Except for unusual circumstances, it is expected that the authenticity or genuineness of all exhibits, including non-documentary items, documents, photographs and data from business records from sources other than parties to the litigation, will routinely be stipulated to and will be received in evidence if relevant. Counsel likewise are expected to agree upon the use of accurate extracts from or summaries of such records. Life expectancy tables, actuarial tables, and other similar statistical and tabular data routinely used in litigation in the Federal Courts should also normally be stipulated.

(D) At trial, counsel shall furnish a copy of each exhibit to the judge, if the judge so requests.

(7) Legal Issues and Pleadings. Special comments regarding the legal issues or any amendments to the pleadings not otherwise set forth.

(8) Trial Time. An estimate of the number of trial days required, separately stated for liability and damages.

(9) Discovery Evidence and Trial Depositions. Each discovery item and trial deposition to be offered into evidence.

(A) Where the videotape or deposition of a witness is to be offered in evidence, counsel shall review it so that there can be eliminated irrelevancies, side comments, resolved objections, and other matters not necessary for consideration by the trier of fact. Counsel shall designate by page the specific portions of deposition testimony and by number the interrogatories which shall be offered in evidence at the trial.

(B) Depositions and interrogatories to be used for cross-examination or impeachment need not be listed or purged. (When a final order is required, the judge may nevertheless permit appropriate modification of the above form.)

3. Final Pretrial Conference. A final pretrial conference will ordinarily be held shortly before trial. It shall be attended by trial counsel, who must be either authorized and empowered to make binding decisions concerning settlement, or able to obtain such authority by telephone in the course of the conference. In addition to exploring the final positions of the parties regarding settlement, the court will consider at the conference some or all of the following:

The simplification of the issues, the necessity or desirability of amendments to the pleadings, the separation of issues, the desirability of an impartial medical examination, the limitation of the number of expert witnesses, the probable length of the trial, the desirability of trial briefs, evidentiary questions, the submission of points for charge, and such other matters as may aid in the trial or other disposition of the action.

4. Miscellaneous Provisions Relating to Trial and Preparation for Trial.

(a) Requests for Jury Instructions. Requests for jury instructions are not required with respect to familiar points of law not in dispute between the parties. As to such matters, counsel should consider simply listing the subject desired to be covered in the charge (e.g., negligence, proximate cause, assumption of risk, burden of proof, credibility, etc.), unless specific phraseology is deemed important in the particular case. With respect to non-routine legal issues, requests for instructions should be accompanied by appropriate citations of legal

authorities. All requests for instructions shall be submitted in writing, in duplicate, at chambers; unless the judge orders otherwise, such requests shall be filed at or before commencement of the trial, but amendments or supplements may be submitted at the close of the evidence.

(b) Special Interrogatories. Proposals concerning the form of special interrogatories to the jury shall be submitted at such time as may be specified by the judge; in the absence of specific direction, such proposals shall be submitted at the earliest convenient time, and not later than the close of the evidence.

(c) Requests for Findings in Non-Jury Cases. In non-jury cases, requests for findings of fact and conclusions of law shall be submitted in duplicate at chambers at the start of the trial, or as the judge may otherwise direct.

(d) Special Arrangements. Any counsel desiring special equipment, devices, personnel, or courtroom arrangements will be responsible for assuring that such items are available as needed. Court personnel should not be expected or depended upon to provide such service for any party or counsel, unless so ordered by the judge. Arrangements for daily copy shall be made at least two weeks in advance of trial, with the assigned Court Reporter Coordinator.

(e) Continuances. Trial will not ordinarily be continued because of the unavailability of a witness, particularly an expert witness. If a witness' availability for trial is doubtful, counsel will be expected to arrange for a written or videotaped trial deposition.

Rule 24 Discovery

(a) Interrogatories, requests for production and inspection and requests for admission under rules 33, 34 and 36, Federal Rules of Civil Procedure, answers, responses, and objections to interrogatories and to Rules 34 and 36 requests, notice of deposition and depositions under Rule 30 and 31, Federal Rules of Civil Procedure, shall not be filed with the court. The party serving the discovery material or taking the deposition shall retain the original and be the custodian of it.

(b) Every motion pursuant to the Federal Rules of Civil Procedure governing discovery shall identify and set forth, verbatim, the relevant parts of the interrogatory, request, answer, response, objection, notice, subpoena, or depositions. Any party responding to the motion shall set forth, verbatim, in that party's memorandum any other part that the party believes necessary to the court's consideration of the motion.

(c) If material in interrogatories, requests, answers, responses, or depositions is used as evidence in connection with any motion, the relevant parts shall be set forth, verbatim, in the moving papers or in responding memoranda. If it is used as evidence at trial, the party offering it shall read it into the record or, if directed to do so by the court, offer it as an exhibit.

(d) The court shall resolve any dispute that may arise about the accuracy of any quotation or discovery material used as provided in (b) and (c) and may require production of the original paper or transcript.

(e) The court, on its own motion, on motion by any party or on application by a non-party, may require the filing of the original of any discovery paper or deposition transcript. The parties may provide for such filing by stipulation.

(f) No motion or other application pursuant to the Federal Rules of Civil Procedure governing discovery or pursuant to this rule shall be made unless it contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute.

(g) A routine motion to compel answers to interrogatories or to compel compliance with a request for production under Federal Rule of Civil Procedure 34, wherein it is averred that no response or objection has been timely served, need have no accompanying brief, and need have no copy of the interrogatories or Rule 34 request attached. The court may summarily grant or deny such motion without waiting for a response.

## Rule 26 Mandatory Exchange of Medical Reports in Personal Injury Cases

(a) In General. In every civil action now pending or hereafter filed in this court involving a claim for damages on account of personal injuries allegedly sustained, counsel for all parties shall exchange copies of all reports of medical examinations of any person for whose alleged personal injuries damages are sought by any party at least ten days before the pretrial conference. A report later made, or a report of a later examination, shall be submitted to opposing counsel as soon as such report is made.

(b) Definitions.

(1) "Report," as used herein, shall include every written communication from a physician, medical practitioner, or any other person engaged in diagnosing and treating illness or injury, or from the agent of any such person, containing information respecting the medical history, condition, diagnosis, and/or prognosis of the person examined.

(2) "Medical Examination," as used herein, shall include any interview, observation, physical or mental examination, and any other scientific or medical technique or practice designed to obtain information respecting the medical history, condition, diagnosis, and/or prognosis of the person examined.

(c) Sanctions. Failure to comply with the terms of this Rule may, in the discretion of the judge, result in the exclusion of medical testimony relating to findings contained in reports which were not exchanged. The judge may also refuse to permit the testimony of any medical witness who has not made a written report of his examination in time for it to be exchanged in compliance with this Rule before the final pretrial conference.

## Rule 44 Petitions for Writs of Habeas Corpus and 2255 Motions

(a) All petitions for writs of habeas corpus and all motions pursuant to §2255 of Title 28, U.S.C. shall be filed on forms provided by the court and shall contain the information called for by such forms. The required information shall be set concisely and legibly. Ordinarily, the court will consider only those matters which are set forth on the forms provided by the court. Any attempt to circumvent this requirement by purporting to incorporate by reference other documents which do not comply with this Rule may result in dismissal of the petition.

(b) Any petition filed under §2254 or motion filed under §2255 of Title 28, U.S.C. which does not substantially comply with Rules 2 and 3 of the Rules governing petitions and motions filed under those sections may be returned by the clerk of the court to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. A copy of any petition or motion returned for failure to comply shall be retained by the clerk.

## Rule 47 Civil Cases Exempt From Issuance Of A Scheduling Order

The following categories of civil cases shall, unless the assigned judge directs otherwise, be exempt, as inappropriate, from the provisions of Federal Rule of Civil Procedure 16(b) that mandate the issuance of a scheduling order, and from the requirements of Local Rule 21:

1. Appeals from the final determination of the Secretary of Health and Human Services, 42 U.S.C. §405(g) (Social Security Appeals).

2. Habeas corpus petitions and actions pursuant to 28 U.S.C. §§2254 and 2255.

3. Actions eligible for or referred to arbitration pursuant to Local Rule 8.

4. Actions for review of administrative agency actions pursuant to 5 U.S.C. §702 (Administrative Procedure Act).

5. Actions by the United States for repayment of loans in default.

6. Actions to enforce rights under an employee welfare benefit plan pursuant to 29 U.S.C. §1132 (ERISA).

7. Internal Revenue Service proceedings to enforce civil summons pursuant to 26 U.S.C. §7402.

8. Bankruptcy Appeals.

9. Pro se prisoner civil rights actions.

10. Actions in which no pleadings or appearance has been filed on behalf of any party defendant within 120 days from the filing of the complaint.

11. Any action which the assigned judge may expressly exempt by order.

# APPENDIX II

# CIVIL JUSTICE REFORM ACT OF 1990

Public Law 101-650
101st Congress

# An Act

To provide for the appointment of additional Federal circuit and district judges, and for other purposes.

Dec. 1, 1990
[H.R. 5316]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Judicial Improvements Act of 1990".

Judicial Improvements Act of 1990.
Courts.
28 USC 1 note.

# TITLE I—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

Civil Justice Reform Act of 1990.

SEC. 101. SHORT TITLE.

28 USC 1 note.

This title may be cited as the "Civil Justice Reform Act of 1990".

SEC. 102. FINDINGS.

28 USC 471 note.

The Congress makes the following findings:

(1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

(3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.

(4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—

(A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;

(B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events;

(C) regular communication between a judicial officer and attorneys during the pretrial process; and

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(D) utilization of alternative dispute resolution programs in appropriate cases.

(6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.

SEC. 103. AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.—Title 28, United States Code, is amended by inserting after chapter 21 the following new chapter:

## "CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"Sec.



### "§ 471. Requirement for a district court civil justice expense and delay reduction plan

"There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are 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.

### "§ 472. Development and implementation of a civil justice expense and delay reduction plan

"(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

Reports.

"(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—

"(1) an assessment of the matters referred to in subsection (c)(1);

"(2) the basis for its recommendation that the district court develop a plan or select a model plan;

"(3) recommended measures, rules and programs; and

"(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

"(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—

"(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 the ways in which litigants and their attorneys approach and conduct litigation; and

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

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

"(3) The advisory group of a district court 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 facilitating access to the courts.

"(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to—

"(1) the Director of the Administrative Office of the United States Courts;

"(2) the judicial council of the circuit in which the district court is located; and

"(3) the chief judge of each of the other United States district courts located in such circuit.

**"§ 473. Content of civil justice expense and delay reduction plans**

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

"(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

"(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

"(A) assessing and planning the progress of a case;

"(B) 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 or complexity of pending criminal cases;

"(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

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

"(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

"(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

"(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

"(C) prepares 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

"(D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

"(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; and

"(6) 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.

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

"(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

"(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

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

"(4) 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;

"(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

"(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

"(c) Nothing in a civil justice expense and delay reduction plan relating to the settlement authority provisions of this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General.

**"§ 474. Review of district court action**

"(a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee—

"(A) review each plan and report submitted pursuant to section 472(d) of this title; and

"(B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

"(2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

"(b) The Judicial Conference of the United States—

"(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

"(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

**"§ 475. Periodic district court assessment**

"After developing or selecting 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.

**"§ 476. Enhancement of judicial information dissemination**

"(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer— Reports.

"(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

"(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

"(3) the number and names of cases that have not been terminated within three years after filing.

"(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a).

**"§ 477. Model civil justice expense and delay reduction plan**

"(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice expense and delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

Reports.

"(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

"(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

**"§ 478. Advisory groups**

"(a) Within ninety days after the date of the enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

"(b) The advisory group of a district court shall 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 of such court.

"(c) Subject to subsection (d), in no event shall any member of the advisory group serve longer than four years.

"(d) Notwithstanding subsection (c), the United States Attorney for a judicial district, or his or her designee, shall be a permanent member of the advisory group for that district court.

"(e) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

"(f) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely by reason of service on or for the advisory group, be prohibited from practicing law before such court.

**"§ 479. Information on litigation management and cost and delay reduction**

"(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives. Reports.

"(b) The Judicial Conference of the United States shall, on a continuing basis—

"(1) study ways to improve litigation management and dispute resolution services in the district courts; and

"(2) make recommendations to the district courts on ways to improve such services.

"(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual. Government publications.

"(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title, the demonstration program conducted under section 104 of the Civil Justice Reform Act of 1990, and the pilot program conducted under section 105 of the Civil Justice Reform Act of 1990.

"(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

**"§ 480. Training programs**

"The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies, and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

**"§ 481. Automated case information**

"(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

"(b)(1) In carrying out subsection (a), the Director shall prescribe—

"(A) the information to be recorded in district court automated systems; and

"(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

"(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

Records. "(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

"§ 482. Definitions

"As used in this chapter, the term 'judicial officer' means a United States district court judge or a United States magistrate.".

28 USC 471 note. (b) IMPLEMENTATION.—(1) Except as provided in section 105 of this Act, each United States district court shall, within three years after the date of the enactment of this title, implement a civil justice expense and delay reduction plan under section 471 of title 28, United States Code, as added by subsection (a).

(2) The requirements set forth in sections 471 through 478 of title 28, United States Code, as added by subsection (a), shall remain in effect for seven years after the date of the enactment of this title.

28 USC 471 note. (c) EARLY IMPLEMENTATION DISTRICT COURTS.—

(1) Any United States district court that, no earlier than June 30, 1991, and no later than December 31, 1991, develops and implements a civil justice expense and delay reduction plan under chapter 23 of title 28, United States Code, as added by subsection (a), shall be designated by the Judicial Conference of the United States as an Early Implementation District Court.

(2) The chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may provide such resources out of funds appropriated pursuant to section 106(a).

Reports. (3) Within 18 months after the date of the enactment of this title, the Judicial Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts.

(4) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and House of Representatives—

(A) copies of the plans developed and implemented by the Early Implementation District Courts;

(B) the reports submitted by such district courts pursuant to section 472(d) of title 28, United States Code, as added by subsection (a); and

(C) the report prepared in accordance with paragraph (3) of this subsection.

(d) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part I of title 28, United States Code, is amended by adding at the end thereof the following:

"23. Civil justice expense and delay reduction plans ..... 471".

SEC. 104. DEMONSTRATION PROGRAM. 28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a demonstration program in accordance with subsection (b).

(2) A district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENT.—(1) The United States District Court for the Western District of Michigan and the United States District Court for the Northern District of Ohio shall experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and timeframes for the completion of discovery and for trial.

(2) The United States District Court for the Northern District of California, the United States District Court for the Northern District of West Virginia, and the United States District Court for the Western District of Missouri shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.

(c) STUDY OF RESULTS.—The Judicial Conference of the United States, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall study the experience of the district courts under the demonstration program.

(d) REPORT.—Not later than December 31, 1995, the Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report of the results of the demonstration program.

SEC. 105. PILOT PROGRAM. 28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a pilot program in accordance with subsection (b).

(2) A district court participating in the pilot program shall be designated as an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENTS.—(1) Ten district courts (in this section referred to as "Pilot Districts") designated by the Judicial Conference of the United States shall implement expense and delay reduction plans under chapter 23 of title 28, United States Code (as added by section 103(a)), not later than December 31, 1991. In addition to complying with all other applicable provisions of chapter 23 of title 28, United States Code (as added by section 103(a)), the expense and delay reduction plans implemented by the Pilot Districts shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(2) At least 5 of the Pilot Districts designated by the Judicial Conference shall be judicial districts encompassing metropolitan areas.

(3) The expense and delay reduction plans implemented by the Pilot Districts shall remain in effect for a period of 3 years. At the end of that 3-year period, the Pilot Districts shall no longer be required to include, in their expense and delay reduction plans, the

6 principles and guidelines of litigation management and cost and delay reduction described in paragraph (1).

(c) PROGRAM STUDY REPORT.—(1) Not later than December 31, 1995, the Judicial Conference shall submit to the Committees on the Judiciary of the Senate and House of Representatives a report on the results of the pilot program under this section that includes an assessment of the extent to which costs and delays were reduced as a result of the program. The report shall compare those results to the impact on costs and delays in ten comparable judicial districts for which the application of section 473(a) of title 28, United States Code, had been discretionary. That comparison shall be based on a study conducted by an independent organization with expertise in the area of Federal court management.

(2)(A) The Judicial Conference shall include in its report a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(B) If the Judicial Conference recommends in its report that some or all district courts be required to include such principles and guidelines in their expense and delay reduction plans, the Judicial Conference shall initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

(C) If in its report the Judicial Conference does not recommend an expansion of the pilot program under subparagraph (A), the Judicial Conference shall identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and the Judicial Conference may initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

**SEC. 106. AUTHORIZATION.**

(a) EARLY IMPLEMENTATION DISTRICT COURTS.—There is authorized to be appropriated not more than $15,000,000 for fiscal year 1991 to carry out the resource and planning needs necessary for the implementation of section 103(c).

(b) IMPLEMENTATION OF CHAPTER 23.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to implement chapter 23 of title 28, United States Code.

(c) DEMONSTRATION PROGRAM.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to carry out the provisions of section 104.

## APPENDIX III

## SELECTED SECTIONS OF THE ADVISORY GROUP REPORT

## VI. SYSTEMATIC, DIFFERENTIAL TREATMENT OF CIVIL CASES FOR PURPOSES OF CASE-SPECIFIC MANAGEMENT

The Act directs this court, in consultation with its Advisory Group, to consider certain "principles and guidelines" including "systematic, differential treatment of civil cases."[36] A threshold issue is precisely what goal this particular principle should serve. In the existing state court differential case management systems, the primary emphasis appears to be on the management aspect of the system -- the systemic, differential treatment of cases is only secondary. For example, a study of the program in Ramsey County, Minnesota, observed that "prior to the DCM [differential case management] program, there were no required pretrial events or deadlines."[37] Most of the existing programs operate in master calendar systems without the discipline and tracking inherent in the individual calendar system. Because the focus in the existing programs is management, they are broad in scope, establishing requirements for case management orders, setting the time for and extent of discovery and establishing firm trial dates. Their ambitious scope requires the addition of staff to administer the program and prepare the paperwork to track it.

The Advisory Group believes that in the Eastern District the principle of differential case treatment should serve a slightly different goal: to distinguish, on a systematic basis, the cases that require more intensive, individual management by the court from those that can be handled in a more standardized manner. In this way scarce judicial time can be targeted to those cases in which judicial involvement is most necessary. It should reduce costs by identifying those cases that do not require time-consuming management techniques such as frequent conferences or detailed case management plans.

This interpretation of the principle is not intended to disregard the need for a scheduling order, firm trial dates and control of discovery. The way in which these concepts can be applied differently is discussed below in section VII. But narrowing the focus here to the degree of management appropriate in a given case ensures that this principle does not get lost in the larger, overriding question of docket management. An important corollary to this interpretation is that it does not require the additional layers of

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36. 28 U.S.C. §473(a)(1). This section provides for "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."

37. Bureau of Justice Assistance Pilot Differentiated Case Management Program, Program Summary No. 6; Second Judicial District Court of Ramsey County, Ramsey County (St. Paul), Minnesota (American University).

bureaucracy that appear to be necessary for the programs whose principal focus is to get the docket under control.

A second threshold issue arises in the Eastern District because differential case management already exists in two senses. First, the existing rules of procedure provide different treatment for the following types of cases: habeas corpus, social security cases, asbestos cases and cases in which money damages only are being sought in an amount not in excess of $100,000 (arbitration cases). In addition some, but not all of the judges review cases at the outset and treat the case differently depending upon whether it appears to be complex or standard. Thus, the Eastern District already provides for differential treatment of its cases and need do little more.

The Advisory Group believes that the court can and should go beyond what is already in place. A significant percentage of the cases does not fall within one of the four areas for which special rules of procedure currently exist. Moreover, the Act's use of the word "systematic" suggests that the group seek solutions beyond relying upon the existing ad-hoc differential treatment. The Advisory Group recommends that a program of systematic differential case treatment be adopted, which specifically includes the existing categories of cases, but also deals with the cases that do not fall within those categories.

The central feature of all the programs existing in the other courts we have studied are the case "tracks." Every existing program has three tracks, variously named, but that distinguish among simple cases, complex cases and all others. None of the programs appears to have attempted to divide cases by subject matter, an effort that the Advisory Group agrees would be futile because cases of like subject matter can be complex or simple, depending upon the facts or the legal issues involved.

The Advisory Group concludes that for this district these "tracks" should include those already in place for habeas corpus, social security, arbitration and asbestos cases. We considered, but decided not to recommend a separate track for cases brought by prisoners alleging violations of civil rights or other claims. Although such cases are treated differently at the outset because they are reviewed by staff attorneys to determine whether the court should appoint counsel, they otherwise are not treated differently as a group; nor should they be because they differ widely in their subject matter and complexity. We explored briefly the idea of expanding the social security track to include other on-the-record reviews of federal agencies but did not have sufficient time or information to reach well-supported conclusions. This may be an issue for further study.

The group also recommends that two additional tracks be established: a Special Management track and a Standard track. The Special Management track would include those cases that do not fall within one of the existing four tracks, cases that need special or intense management by the court due to one or more of the following factors: large number of parties, large number of claims or defenses, complex factual issues, large volume of evidence, problems locating or preserving evidence, large amount of discovery,

exceptionally long time needed to prepare for disposition, decision needed within a very short time and need to decide preliminary issues before final disposition. The Standard track would include all other cases.

We do not recommend a separate "simple" track because most of the simple cases are already covered by one of the four existing tracks. In addition, as discussed more fully below in connection with firm trial dates and ongoing judicial management, the group envisions the Standard track as more like the simple track in other programs; in Section VI it recommends some, but not extensive management procedures and in Section VII(B) of the report, the group recommends setting a relatively short goal for filing to disposition.

There are several ways in which the track assignment itself can be made. In some of the differential case management programs, the determination is made by an administrator based upon information provided by the litigants. We believe that this process is unnecessary; instead, we would leave the determination in the first instance to the parties who would designate the appropriate track on a designation form, which could be a separate piece of paper or a new section of the existing cover sheet. If there is any dispute, the final determination can be made by the court.[38] The programs using this method of determination report very little controversy over track assignment; and, in the view of the Advisory Group, the litigants and their attorneys are usually in the best position to evaluate the need for intensive management in a particular case.

Once a case is assigned to a particular track, the applicable procedures will vary. For habeas corpus, social security, arbitration and asbestos cases, we do not recommend changes in the current rules. Special, intensive management procedures would apply to cases assigned to the Special Management track. The procedures recommended by the Advisory Group for these cases are set forth and discussed separately in section VIII below. All other cases would be subject to the general management principles set forth below in the discussion of ongoing case management and early, firm trial dates (section VII(B)).

The Advisory Group recommends that the court adopt a local rule or plan to distinguish among cases that require different levels of treatment. This rule should be adopted in connection with others, proposed below, which provide for ongoing case management, special management for complex cases and the establishment of early, firm trial dates.[39] A proposed rule follows:

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38. This is consistent with the present practice for asbestos and arbitration cases in which the Clerk of Court assigns the cases to those tracks, based upon the allegations in the complaint.

39. The Clerk of Court has suggested a Bankruptcy Appeal track and a U.S. Government Collection and Enforcement track, but the group has not yet adopted them. In the continuing survey that the Act requires of us and the court, we shall keep them on the agenda.

## CASE MANAGEMENT

a. Management tracks -- Each civil case filed will be assigned to one of the following tracks: habeas corpus, social security, arbitration, asbestos, special management, standard management.

b. Management Track Definitions

(1) Habeas Corpus - Cases brought under 28 U.S.C. §§2241 through 2255.

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

(3) Arbitration - Cases designated for arbitration under Local Rule 8.

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

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

(6) Standard Management - Cases that do not fall into one of the other tracks.

c. Management Track Assignments

(1) The plaintiff will submit to the Clerk, and serve with the complaint on all defendants, a Designation Form designating the track to which plaintiff believes the case should be assigned. Each defendant will,

with its first appearance, submit to the Clerk, and serve on all other parties, a Designation Form designating the track to which that defendant believes the case should be assigned.

(2) If the plaintiff and the first defendant to appear agree on the management track, the Clerk will assign the case to that track. If the plaintiff and the first defendant disagree on the management track, or if a later appearing defendant disagrees with the plaintiff's track choice, the Clerk will refer the disagreement to the court and the court will make the track assignment.

(3) The court may, on its own motion or at the request of any party, change a case's track assignment at any time.

d. Management Track Procedures

(1) Habeas Corpus Track - Cases will follow the Federal Rules Governing Section 2254 Cases or, in cases brought under 28 U.S.C. §2255, the Federal Rules Governing Section 2255 Cases. The court may, in its discretion, refer the case to a magistrate judge pursuant to 28 U.S.C. §636(b).

(2) Social Security Track - Within 10 days after the Clerk has assigned a case to the Social Security Track, the Clerk will enter and serve on all parties an order stating:

(a) Within 10 days after the date of entry of the order the plaintiff shall cause the summons and complaint to be served on the defendant in the manner specified by Federal Rules of Civil Procedure 4(d)(4) and 4(d)(5).

(b) Within 60 days after service of the complaint, defendant shall serve an answer and a certified copy of the administrative record.

(c) Within 45 days after service of the answer, plaintiff shall file and serve a motion for summary judgment and supporting brief.

(d) Within 30 days after service of plaintiff's motion and brief, defendant shall file and serve a cross-motion for summary judgment and supporting brief.

(e) Plaintiff may serve a reply brief within 15 days after service of defendant's motion and brief.

(f) The case shall be deemed submitted for disposition 15 days after the service of defendant's motion and brief.

(3) Arbitration Track - Cases will be managed in accordance with Local Rule 8.

(4) Asbestos Track - Cases will be managed in accordance with the Master Case Management Order issued December 16, 1987.

(5) Special Management Track - The Clerk will notify the court immediately upon assignment of a case to the Special Management track. Thereafter, management of the case will proceed in accordance with the Guidelines for Complex Case Management [recommended below in section VIII], unless determined otherwise by the court in consultation with the parties.

(6) Standard Track - Cases assigned to the Standard track shall be disposed of in accordance with the routine practices and procedures of this court.

## VII. INVOLVEMENT OF JUDICIAL OFFICERS IN PRETRIAL PROCESS

A premise underlying many of the Act's provisions is the assumption that cost and delay in civil litigation will be reduced with increased judicial involvement in the pretrial process. Thus, the Act requires the court, with its Advisory Group, to consider and to include in its plan a program of "early and ongoing control of the pretrial process through involvement of a judicial officer" in planning the progress of a case, setting early and firm trial dates, controlling discovery and setting deadlines for motions and a schedule for their disposition.[40]

With the exception of the need to establish early, firm trial dates, the Advisory Group does not agree that indiscriminate involvement of a judicial officer in the planning, progress or discovery for every case is necessary, desirable or will meet the ultimate goals of reducing cost and delay in civil litigation. In our searching examination for a prudent balance in case management responsibility we encountered a wise concern expressed by both lawyers and experienced judges to avoid "judicial obtrusion," to recognize that planning litigation strategy is the lawyers' responsibility, and that lawyers who best understand the needs and objectives of their clients should have ample freedom to plan and try their own cases. As one experienced judge expressed it, judges as case managers should not be ordained as "super-lawyers," to sit astride the litigants' strategy and mastermind its development, with their own necessarily limited understanding about each of the many cases that comes before them.

Justice in America, for better or for worse, is based on the adversary system, and this system rests on the professional responsibility of the lawyers. This fundamental principle underlies all of our recommendations; and by our emphasis on assertive judicial management we do not intend to detract from the essential responsibility of lawyers to plan and try their cases as their clients' interests demand.

Nonetheless, in some instances judicial control is appropriate and will effectively reduce cost and delay. The group thus concluded that complex cases most often do require sustained and ongoing judicial management. The group therefore recommends that complex cases be segregated from the other cases requiring such intensive management and sets forth in section VIII the procedures recommended for complex cases. The other specific points at which we recommend judicial involvement are here set forth below.

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40. 28 U.S.C. §473(A)(2).

### A. Assessing and Planning the Progress of the Case

The initial scheduling order required by Fed.R.Civ.P. 16 already requires most of the essential elements for efficient management of most cases. The rule requires the court to enter a scheduling order setting deadlines to join other parties, amend the pleadings, file and hear motions and complete discovery. The rule leaves to the discretion of the court the setting of a trial date in that order and allows it to add any other matters. The rule permits, but does not require, a scheduling conference, allowing the order to be issued "after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means."[41] The rule provides examples of the issues that may be discussed at a conference, if the judge decides to hold one.[42]

The Advisory Group believes that, generally, the existing rule adequately balances the need for judicial control in some cases with a reluctance to impose unnecessary cost and delay for cases that do not need intensive management. As discussed more fully below in section VII(B), we recommend that the court set the trial date in the scheduling order, with some exceptions. We believe that in most cases a pretrial conference is useful because it allows the court and the lawyers to consider, and perhaps resolve, a broader range of issues than those presently required by the rule. Thus we urge that this court adopt a policy or guideline that, in most cases, an initial pretrial conference will be held. To alleviate the concern expressed by some of the lawyers that these conferences add to their costs, and by the judges that they do not have time for such conferences, we suggest that, as a general rule, the conferences be convened by telephone and that the court require personal appearances only when special circumstances justify the added cost to the litigants.

### B. Early, Firm Trial Dates

The single most effective tool in resolving cases and resolving them quickly is a firm trial date set relatively promptly after the complaint is filed. The trial date works because many lawyers, whether by choice or circumstance, are "fire-fighters" who focus their efforts on cases that have a deadline. The firm trial date helps to resolve cases because the prospect of trial is the primary force that focuses the attention of the litigants on the risks they face and, thus, makes them pursue settlement seriously. A firm date also results most often in cost savings because witnesses and lawyers need only prepare once. And, of course, expert witnesses need not incur costs in waiting for trial in hotel rooms or incur multiple travel expenses.

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41. Fed.R.Civ.P. 16(b).

42. Fed.R.Civ.P. 16(c).

The benefits of an early, firm trial date in reducing costs and delays was a theme we heard over and over again from judges, litigants and their lawyers, with a unanimity that rarely occurred on other issues. This assessment is reflected in the Act in requiring the plan to include the involvement of a judicial officer in "setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint."[43]

Notwithstanding the universal acclaim of the concept, it is applied unevenly. Many judges do not establish trial dates at all or until very late in the process. As a result, the salutary effect of moving the case is lost. Lawyers without realistic targets devote their attention to other, more immediate problems. Litigants are not forced to evaluate their cases realistically because "the day of reckoning" has not been fixed.

A separate and difficult problem frequently confronts those judges who do try to set firm trial dates. Pressed with conflicting trial schedules of busy litigators, criminal cases that must be tried within specified time periods under the Speedy Trial Act and the certainty that a large percentage of the civil cases will settle on the "eve of trial," judges who do attempt to set firm trial dates have difficulty maintaining them. Take, for example, a group of 12 civil cases that a judge in January, 1991 sets for trial during the three-month period commencing January, 1992. Assume further that five criminal cases are filed in November and December, 1991, which must be tried within 70 days, i.e., within the same three-month period when the civil trials are scheduled. Or suppose that instead of the five criminal cases, only one is filed, in October, 1991, but it is a multiple-defendant case in which trial lasts for the entire period when the civil cases were to be tried. Many judges, particularly new ones, indicated that the difficulty of setting a real, firm trial date is a virtually insoluble problem. They tread a fine line between setting a firm trial date that everyone will believe is firm, and letting litigants know when the date is not firm so they will not be forced to incur unnecessary costs in travel, time and preparation.

The recommendation of this group deals with both aspects of the problem: the need to establish a trial date that does not draw out the litigation and the need, once a date is set, to maintain that date. We offer these suggestions mindful, of course, of the statistics in this district that show that we are already resolving the vast majority of cases -- 70 percent of those required to attend a trial and a far greater percentage of all civil cases -- within 18 months of filing. Moreover, it is <u>not</u> our purpose to create a second Speedy Trial Act for Civil actions. For these reasons, our recommendations here are framed as "guidelines" or "goals," rather than inflexible rules.

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43. 28 U.S.C. §473(2)(B).

We have concluded that a reasonable guideline or goal in establishing a trial date in most cases, except asbestos cases, is a date 12 months from the date of filing. We selected 12 months and not the 18 recommended by the statute because it is our judgment that for Standard Track cases 18 months is too long; a trial date that long from filing would merely be a self-fulfilling prophesy. As discussed above in section VI and below in section VIII of this report, however, the Advisory Group has concluded that complex cases on the Special Management track may warrant more intensive management and may take longer to prepare for trial. It has similarly concluded that asbestos cases may take longer to prepare for trial. For those cases, with the certification exception recognized by the Act, we recommend that the court set as a goal a trial date within 18 months after the complaint is filed.

The trial date should be established early in the litigation. For most cases, the date can be established in the initial scheduling order under Fed.R.Civ.P. 16. For complex cases, we recommend that the trial date be set after a settlement conference, which would occur approximately six months after the complaint is filed. (The procedures for ongoing judicial involvement contemplated for complex cases are discussed below in section VIII.) Because a precise date some 12 or 18 months hence is unrealistic, given the unpredictability of a judge's docket that far in advance, the trial date set during this initial phase should not be a specific day but, rather, a specific month. The precise day on which trial will begin should be set as the trial month approaches, after consultation with the attorneys to determine their availability and that of their key witnesses, and accounting for preexisting demands on court time. Once the trial date is set, there should be no continuances unless there are compelling reasons.

The second prong of our recommendation deals with the instances in which, because of the demands of the judge's criminal docket or because of a longer than anticipated civil trial, or because of some other emergency or unanticipated situation, it appears that it will be impossible to begin the civil trial on the previously established date. For those instances, we recommend that the court adhere to a protocol that will meet the needs of the litigants and maintain the sense of inevitability that the case will in fact be tried.

If the judge to whom the case is assigned is able to reschedule the trial for a time that is acceptable to the attorneys and their witnesses (i.e., will not cause undue hardship or expense), the trial date will be so rescheduled for some date in the near future. If that is not feasible, the protocol should encourage alternatives, such as trial on the date originally set or a suitable alternate near that date before a magistrate judge or before another judge. We understand that some judges presently undertake this approach informally. We believe the process should be formalized but leave to the court the precise details of such a program.

An example of such a protocol is as follows:

1. Counsel in each such case will be advised immediately (i.e., as soon as practicable after the impediment to trial appears) by the judge or by the deputy clerk so that counsel may advise their clients and witnesses.

2. If, at the time the impediment to trial appears, the judge to whom the case is assigned is then able to schedule a new trial date, and all counsel expect to be available to begin trial on the alternate date without undue hardship or expense to the litigants, the case will be rescheduled to begin trial on the alternate date.

3. If the judge cannot fix a suitable alternate date or if counsel will not be available to begin trial on the alternate date, or if any party is unable to begin trial at that time without undue hardship or expense; and if a magistrate judge is available to preside over the trial on that date, and if all counsel stipulate that a specific magistrate judge may do so, the case will be reassigned to such a magistrate judge for trial.

4. If there is no magistrate judge available or if all parties will not stipulate to an available magistrate judge, and if another judge of the district is or can be available to preside over the trial on the date originally set, the case will be reassigned to that judge for trial.

### C. Control of Discovery

The Advisory Group has concluded that the most effective technique to control discovery is one already available through Rule 37 of the Federal Rules of Civil Procedure; that is, the availability of sanctions in appropriate cases coupled with advance notice to the parties that the court is willing to use them. We recognize the reluctance to impose sanctions in this district because of the perception that it engenders satellite litigation, but, to some extent, this reluctance is a self-fulfilling prophesy. If, instead, the court made clear that sanctions will be imposed when necessary, as some judges already do, it is more likely that they would be needed less often.

The Advisory Group considered and rejected a second possible means for controlling the volume of discovery; that is, a limitation on the number of discovery requests or on the time of a deposition. The group considered the fact that such limitations are prescribed by local rule in a large number of districts with anecdotal evidence that they do not cause controversy in those districts. Nonetheless, we rejected an across-the-board limitation because we are not convinced that such a rule would reduce costs or delay without at the same time limiting the right of the litigant to prepare its case fully. If the limitation were set at a relatively high level so as not to curtail the efforts of most litigants, the limitation would not likely reduce costs and might increase costs by encouraging litigants to increase the number of requests to meet that limit. If the limitation were low, a party could have serious difficulties developing all aspects of its case. The group was further concerned

that limitations on one form of discovery could well lead to increased use of other types of discovery; for example, substitution of document requests or depositions under Fed.R.Civ.P. 30(b)(6) for interrogatories.

Two related means for controlling discovery do require limited judicial involvement, but we believe they would result in a net saving of time and money to the court and the litigants. First, we encourage all judges to use informal means to resolve discovery disputes, such as telephone conferences without briefing. Some judges already do this. We also suggest that, in the pretrial conference, the judge should in most cases discuss discovery issues with the lawyers, to set the tone for discovery and explore whether any limitations on the extent of discovery are appropriate to that particular case.

A final source of control over discovery is the litigants and their lawyers. Many of the more sophisticated litigants in this district insist upon approving major projects undertaken by their attorneys and monitor the progress of the case carefully with their attorneys. Some litigants control their own discovery costs by using in-house personnel to perform time-consuming tasks, such as document searches. The Act recognizes that litigants themselves have a responsibility in this process, and the Advisory Group concurs. Of course, the lawyers themselves have a professional responsibility to the court to avoid discovery that is interposed for the purposes of burden or harassment and to comply with discovery for which no reasonable objection can be raised. The Advisory Group recommends that the court develop, in the context of its ongoing educational partnership with the Bar, educational programs directed to discovery management programs and to educating litigants and lawyers about discovery management practices and their responsibilities.

### D. Dispositive Motions

The report discusses above the inherent tension between the views of the litigants and their lawyers that dispositive motions are useful means to reduce cost and delay but are often eviscerated by the fact that judges do not rule on them promptly or with due consideration, and the views of some judges that many such motions are time consuming, burdensome, frivolous and crafted for delay or to avoid later criticism.

These concerns are not easily reconciled. The Advisory Group considered and rejected one proposal, which provided that the parties confer with the court before making such dispositive motions, in the hope that the court offer advance guidance on the motion. We did not think this would effectively resolve the problem: The court would not necessarily have enough information to provide effective guidance; and a lawyer who did not submit to the guidance might be inhibited from filing a motion that was genuinely believed to be in the client's interest.

We do suggest several principles that are not novel and are already provided for in the rules or practices of this court. First, in the initial scheduling order the court should set a deadline for making dispositive motions sufficiently in advance of the trial date so as not to interfere with it. Once a party as filed a dispositive motion, the court should resolve it promptly to save litigants the cost of unneeded discovery if the motion is granted and to prevent the inevitable delay as the parties await the outcome. We frame this as a general policy suggestion and decline to recommend any fixed time for decision of motions. To do so would interfere with the essential flexibility of each judge to manage the docket.

Finally, we recommend that the court consider using oral argument more frequently to assist it in separating those motions with merit from those that are frivolous. Federal Rule of Civil Procedure 56(c) contemplates oral arguments for motions for summary judgments: "[t]he motion shall be served at least 10 days before the time fixed for the hearing."[44] And, as the Third Circuit noted twenty years ago:

> In the usual case, it is more appropriate to set a motion for summary judgment down for hearing as Rule 56(c) provides, and to make the date of hearing the time limit for both sides in the presentation of their factual claims.[45]

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44. There is consensus, however, that Fed.R.Civ.P. 78 gives the court the power to order summary judgment without a hearing. See 10A Wright & Miller §2720.1 at 37 (1983).

45. Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S., 425 F.2d 34, 40 (3rd Cir. 1970). This is still the preferred practice. See 10A Wright & Miller § 2720.1 at 37 (1983).

## IX. USE OF VOLUNTARY DISCLOSURE OF INFORMATION AND COOPERATIVE DISCOVERY DEVICES

The point most strenuously debated, both within the Advisory Group and among the lawyers from whom we solicited comments, was the statute's mandate that the plan encourage cost-effective discovery through "voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."[47] The group agreed early and quickly that if the principle is to meet the goals of the statute, it must be given content that goes beyond that which is merely voluntary. While we have pointed out in other parts of the report that both lawyers and their clients have responsibility to ensure that discovery is conducted in a responsible and cost-effective manner, it is apparent from the pervasive criticism of current discovery practices that such exhortations fall short of addressing the entire problem.

The solution to which we addressed ourselves, therefore, is a concept already recommended by the Advisory Committee on Civil Rules in its proposed amendments to Fed.R.Civ.P. 26, i.e., required disclosure shortly after the defendant files an answer to the complaint, of witnesses and documents that "bear significantly" on the claims or defenses. The initial reaction among a large number of lawyers was negative. Would a party be required to disclose documents or witnesses that are harmful as well as helpful? Does the automatic nature of the disclosure preclude objections, such as objections to providing telephone numbers of former employees of a corporate party? What happens when a party, at the preliminary stage of the litigation, has not yet identified documents or witnesses that bear significantly on his claim? How, in this context, can the gamesmanship that arises in discovery be avoided?

Notwithstanding these bristling questions, the Advisory Group concluded that, in this pilot district, the concept should be tried. We reached this conclusion for several reasons. First, and most important, we believe that summary, initial disclosure offers significant promise to hasten the resolution of the dispute and to reduce costs. The process should reduce cost by eliminating the exchange of paper that currently precedes the disclosure of any information. Moreover, there will no longer be the costs and delays caused by unwarranted objections to basic requests.

In the intensive colloquy of our debate over this seemingly revolutionary proposal there were genuine concerns expressed by experienced lawyers from both sides of the civil litigation bar about gamesmanship that would be involved in disclosing or withholding crucial information in this phase of initial disclosure and the difficulties in deciding what witnesses and documents "bear significantly" on the claims and defenses. We debated them exhaustively and concluded that in reality those decisions are no different from

47. 28 U.S.C. §473(a)(4).

decisions on routine discovery disclosures that are already a part of a lawyer's responsibility in discovery. In the end they depend on the same professional responsibility that controls the response to any legitimate discovery demand. Such decisions are no more or less compelling whether demanded in an established summary disclosure procedure or in a later requirement of disclosure in existing obligations under discovery requests.

Besides, the concept of self-executing discovery is not new to this district. Some judges already require it for certain types of cases, for example, RICO or class action cases. Local Rule 26 requires that certain medical information be exchanged in personal injury cases. We are also told that a similar rule or practice was in use in the past; it was discontinued because of concern about the authority to enact this proposal as a local rule. Finally, certain lawyers, especially those who litigate complex cases, already agree among themselves to the exchange of categories of documents and information in informal conferences to organize the case.

Beyond this, the draftsmen of the proposed amendment to Rule 26 have considered many of these objections and resolved them. Summary disclosure is already a part of pretrial procedures in a number of other districts. The experience in those districts demonstrates the utility of summary disclosure in reducing ritualistic formalities of interrogatory practice, now an inevitable but needless burden on the litigants and the courts. The comments to the proposed amendment make clear that a party who discovers additional information after the initial disclosure will not be penalized or sanctioned. The party would, however, have a continuing obligation to supplement the initial disclosure. The comments also make clear that where a litigant does not comply, the sanctions in Rule 11 and 37 are available.

The Advisory Group recommends that the court adopt a local rule that requires early summary disclosure of certain information for all cases. Consistent with the recommendation that the court treat cases differentially, we recommend differential treatment for information to be exchanged and applicable procedures, depending upon the track in which the case falls. For example, for asbestos cases, there is already a procedure for summary exchange of certain information. For those cases, that procedure would apply. In civil RICO cases many judges in this district already require plaintiffs to respond to a standard set of interrogatories to particularize the elements of RICO application that sometimes eliminate the RICO counts. That procedure would be continued.

Complex cases often present many possibilities for categories of information that can be exchanged early and without the need to exchange requests, responses and objections. In section VIII, we have already set forth a recommended procedure for identifying such categories of documents through voluntary efforts by the parties and then incorporating their agreement into a pretrial order after an initial meeting with the judge.

For cases in all other tracks, the information to be exchanged should be the identification of witnesses and documents that "bear significantly" on the claims and defenses

asserted and insurance agreement -- essentially the same information as would be required in the proposed amendment to Rule 26. For these tracks, the local rule should adopt the language and the comments of the proposed amendment in most respects.[48] We would not, as the proposed amendment does, require the parties to exchange damages calculations because, at this early stage, they may not be meaningful because parties might attempt to obscure them to avoid prejudicing their positions later in the litigation. We are also concerned that the rule as drafted precludes all other discovery pending this disclosure, which could delay rather than hasten the progress of the case. While there is much to commend the foreclosure of additional discovery until summary disclosure has been accomplished, as the proposed amendment would do, a majority of the Advisory Group decided that this might impede rather than expedite the forward movement of the litigation. In our experimental role as a pilot court, we have chosen to move prudentially here.

48. The Act, especially as applied to pilot courts, provides authority for innovations that might appear to conflict with the national rules in the area specified. For this reason, we have no hesitation in recommending that the court seize the initiative for significant reform by issuing new local rules in accordance with established rule-making procedure.

## X. REASONABLE AND GOOD FAITH EFFORT OF PARTIES TO RESOLVE DISCOVERY DISPUTES

The fifth principle to be incorporated into the court's plan is one that requires only passing reference here because it is already well established in this court's practice. The local rules already prohibit discovery motions or other applications with respect to discovery unless the motion "contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute."[49]

49. Local Rule of Civil Procedure 24(f).

## NATIVE DISPUTE RESOLUTION

The Eastern District of Pennsylvania has been a recognized leader in using pute resolution ("ADR") to reduce cost and delay in civil litigation. It was one rst federal courts to adopt a program of court-annexed arbitration.[50] The felicitous experience under this program, documented by carefully kept statistics since the program's inception, has proved to be influential in persuading Congress to expand the program to other district courts.

The Civil Justice Reform Act requires in section 473(A)(6) that each pilot court program include "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..." The Report of the Senate Committee on the Judiciary that accompanied the legislation discusses a number of familiar forms of alternative dispute resolutions, but makes clear that identification of these particular techniques "is not intended to signal any disapproval of other excellent techniques also currently employed."

As this legislative history implies, it is appropriate for a court to make available a variety of ADR programs so that each case might be matched with an appropriate mechanism. In doing so, the court must balance the time and resources required by each program against the anticipated reduction in cost and delay for the litigants. It is, of course, critical that the court avoid too many attempts to resolve any particular case short of trial, while still maintaining flexibility for litigants to take advantage of any program likely to be beneficial, and to do so at various stages of the litigation. It is also important for the court to evaluate the cost to the judicial system of administering alternative dispute resolution programs.

Different types of ADR include the following kinds of programs: early neutral evaluation, settlement judges or magistrates, mediation, settlement weeks, valuation, arbitration, mini-trials and summary jury trials.

As set out in the Court-Based Dispute Resolution Programs materials published by the Federal Judicial Center, the general benefits and general concerns of ADR are these:

General Benefits

1. Parties get a neutral evaluation without risk of compromising the perceived neutrality of the trial judge.

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50. Senior Judge Raymond J. Broderick has been nationally recognized for his role in furthering this program since its beginning.

2. Trial judges should experience a reduction in caseload burden because some cases are diverted from the normal processing track.

3. The setting of a firm date for the procedure should stimulated earlier settlements.

4. Both sides are put in the position of operating on the same information that may narrow the issues and spur more settlements or shorter, more focused trials.

General Concerns

1. Inaccurate neutral intervention may translate into unrealistic client expectations and a hardening of positions.

2. Some litigants and attorneys object to an early disclosure of their cases.

3. Such programs may simply add another costly layer to the litigation process unless they replace other procedures that would have been used.

4. There is a question in some circuits whether district courts may require the attendance of parties at alternative dispute resolution hearings or conferences.

All of these programs structure the pretrial process to encourage parties to resolve their disputes more quickly themselves and provide for timely court or other neutral intervention if they do not.

Before proceeding further, we must consider the ADR programs this court currently offers. The established mandatory, non-binding arbitration program of this court, described above, is a nationally recognized mode. It deals effectively with more than 20 percent of the civil litigation caseload.

Early this year, the court instituted a mediation program to supplement its successful arbitration program. Preliminary reports suggest that the mediation program is proving even more successful in inducing settlements than had been anticipated. Of the 955 cases eligible for mediation since January, 1991, 145 have settled. Of the like number of cases not eligible for mediation, only 76 have settled. This two-fold increase is promising. The program will be thoroughly evaluated at the end of the one-year trial period. More significantly, because the court set up the program as a random experiment, we can expect more reliable information than is normally available in assessing the desirability of continuing, modifying or discontinuing this form of ADR in this court.

With both the arbitration program and the mediation program already in place, functioning well and working toward the twin goals of reducing cost and delay in civil litigation, it would not be useful to adopt additional ADR programs at this time. While other ADR options can and should be made available to appropriate litigants, such as early neutral evaluation, which will later be addressed, we believe our current ADR programs are particularly effective for diversity cases, which continue to be the largest group of cases on our docket. Cases that have a high settlement potential are already on an ADR track. Proliferating alternative dispute resolution programs can add to cost and delay. Thus, the mediation rule wisely excludes cases that are eligible for the arbitration program.

If the mediation program, now in its experimental stage, proves to be successful, a plan of modest compensation should be instituted for the mediators. This is especially so since the program has just been modified to provide three-case assignments to the mediators, just as the arbitration program does. The Bar is presently involved in numerous pro bono programs with the court. These programs shift the burden of increasing costs from the court to the Bar. To balance this burden, mediators should be compensated. To accomplish this payment, funds may be reprogrammed from the money available for payment of arbitrators' fees.

The Advisory Group has heard from the Center for Public Resources in substantial detail concerning its programs and its services to the judiciary. It has also heard from the American Arbitration Association. We note, for example, specialized publications concerning environmental dispute resolution, with pollution issues treated separately from toxic-related matters under federal law, arbitration of construction cases, intellectual property disputes and insurance coverage disputes.

We recommend that there be a resource within the court, possibly a committee of judges serviced by the Clerk's Office and working in conjunction with a Bar committee, that would keep current on available programs of specialized ADR. Such a committee would be in a position to respond to requests for information made by any judicial officer.

We are under no illusion that any such program will have a major impact, and possibly not even a discernible impact, on the court's docket. However, if a handful of cases each year and the litigants involved in those cases benefit from heightened sensitivity to ADR, the program would be worthwhile.

## XII. JOINT DISCOVERY - CASE MANAGEMENT PLANS

The statute requires the Advisory Group to consider, but does not compel it to implement, a requirement "that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so."[53]

The theme we have repeated throughout this report of different treatment for different cases applies here. We do not believe such a requirement, applied indiscriminately, would reduce costs. More likely, it would increase costs for litigants with simple cases and a short period from complaint to trial. For those cases an early, firm trial date and a discovery cutoff are sufficient.

For complex cases, however, we believe that a plan addressing discovery management is useful. We have already proposed, in the discussion of complex cases in section VIII, that the parties be required to prepare for the initial pretrial conference a case management plan. The plan should include, among other elements, identification of categories of documents or information that can be exchanged summarily, without objection and by order of the court; deposition procedures that could include limitations on the time for the deposition or establish agreed-upon locations; and any necessary confidentiality orders.

We recommend that the court adopt this requirement as an element of its plan as a procedure for cases that are assigned to the Special Management track.

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53. 28 U.S.C. §473(b)(1).

## XIII. REPRESENTATION BY ATTORNEY WITH POWER TO BIND

The Act requires each district court to consider adopting a provision in its plan that would require "each party to be represented at each pretrial conference by an attorney who has authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters."[54]

This provision, separate and distinct from a provision relating to the presence at settlement conferences of representatives authorized to bind their principal,[55] would make explicit the authority of the district judge to announce such a requirement, limited to matters previously identified by the court.

The Advisory Group recommends implementation of such a provision. We note that although the text of the statute is couched in terms of attendance of an attorney with such authority at "each pretrial conference," the requirement is not operative except as to matters previously identified by the court. This vests an appropriate discretion in the court and should be invoked only when required for the efficient management of the litigation.

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54. 28 U.S.C. §473(b)(2).

55. 28 U.S.C. §473(b)(1).

## XVI. REPRESENTATIVES WITH AUTHORITY TO SETTLE

The Act invites promulgation of a requirement that "upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference."[60] The legislative history emphasizes the value of client participation in settlement conferences:

"The committee believes that cases are more likely to be settled when the clients themselves are present, in person or by telephone, during any court-sponsored settlement conference. The presence of the client makes it difficult, if not impossible, for the attorneys to delay settlement discussions--often for weeks or months--by asserting that they must get back to their clients."[61]

The proposal embodied in the statute is similar to Local Rule 21(d) par. 3 of the local rules of the Eastern District of Pennsylvania. That rule, limited to the final pretrial conference, provides that it "shall be attended by trial counsel, who must be either authorized and empowered to make binding decisions concerning settlement, or able to obtain such authority by telephone in the course of the conference."[62]

The rule proposed in the statute is somewhat broader than the local rule presently in force in this district. To the extent that it differs, it would confer broader authority on the district judge, to be invoked as discretion dictates. We recommend that it be adopted by the court.

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60. 28 U.S.C. §473(b)(5).

61. Civil Justice Reform Act of 1990, H.R. Report 101-732 at 16.

62. Local Rule 21(d) par. 3.

# APPENDIX IV

## RECOMMENDATIONS OF THE ADVISORY GROUP FOR ACTION BY AGENCIES OTHER THAN THE COURT

## RECOMMENDATIONS OF THE ADVISORY GROUP FOR ACTION BY AGENCIES OTHER THAN THE COURT

1. Congress, acting through the respective Committees on the Judiciary, should hold hearings addressed to the process of authorizing new judgeships and the processes of filing judicial vacancies.[1]

2. Congress should have available and seriously consider a detailed assessment of the potential impact of legislative proposals on the federal judicial system in order to: (a) avoid ambiguities and omissions in the drafting; (b) examine whether jurisdiction in an Article III court is the optimal choice; and (c) provide, in timely fashion, the added resources necessitated by the legislation.[2]

3. The Federal Judicial Center, and other suitable organizations, should be encouraged to undertake research in the relationship between delay in civil litigation and the cost of litigation.[3]

4. Lawyers should be sensitive to their professional obligation to recognize the impact on cost to the client of the lawyer's litigation practices and procedures, including discovery. The Bar should participate with the judges in Bench-Bar programs devoted to exploring existing practices and their implications.[4]

5. Litigants, particularly institutional litigants, should assume the responsibility of exploring with counsel the development of litigation policies intended to achieve efficient, economical and professionally responsible practices.[5]

6. Federal Rule of Civil Procedure 4(j) should be amended to reduce the permissible period from the filing of a civil complaint until service of process, which presently is 120 days.[6]

7. The process of authorizing and funding whatever number of magistrate judgeships is necessary to enable the court to handle its caseload, civil and criminal, should be expedited.[7]

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1. See Advisory Group Report (page 26).

2. See Advisory Group Report (pages 31-33).

3. See Advisory Group Report (page 43).

4. See Advisory Group Report (page 45).

5. See Advisory Group Report (page 46).

6. See Advisory Group Report (pages 93-94).

7. See Advisory Group Report (page 96).