CIVIL JUSTICE

EXPENSE AND DELAY REDUCTION PLAN

for the

DISTRICT OF SOUTH CAROLINA

prepared as required by the

CIVIL JUSTICE REFORM ACT

Revised: November 29, 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: CIVIL JUSTICE EXPENSE)
AND)
DELAY REDUCTION PLAN)

ORDER

3:93-MC-310

The Civil Justice Expense and Delay Reduction Plan, attached hereto, is hereby ADOPTED.

The Clerk is directed to circulate copies of the plan, together with copies of the report of the advisory Group to all persons, as provided by statute.

ENTER this twenty fourth day of November, 1993.

C. WESTON HOUCK
CHIEF UNITED STATES DISTRICT JUDGE

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EXPENSE AND DELAY REDUCTION PLAN
FOR THE
DISTRICT OF SOUTH CAROLINA
(CIVIL JUSTICE REFORM ACT)

INTRODUCTION AND OVERVIEW

The Civil Justice Reform Act ("CJRA"), 28 U.S.C. §§ 471-482, requires each district to develop a civil justice expense and delay reduction plan. To aid in the development of those plans, the CJRA directs the appointment of an advisory group for each district to study the condition of the docket and to make recommendations to the court. This plan was prepared by the judges of the District of South Carolina after reviewing this district's Civil Justice Reform Act Advisory Group Report ("Report") and makes various references to that Report.

The advisory group's analysis of the "State of the Docket" in South Carolina demonstrates that, overall, our district disposes of cases expeditiously. On average, cases are disposed of in less than one year. Recent trends, however, indicate growing caseload burdens and lengthening times to disposition. Report Section II. (Summarized at Appendix A to this Plan).

To address these recent trends and various areas identified by the advisory group and the judges of the district as subject to improvement, we adopt the changes set forth herein. Most of these can be implemented by internal district procedure or local rule. Some, however, are directed at other branches of government.[1] We also recommend continuation of a numerous local rule procedures which further the purposes of the CJRA.

[1] Congress invited the districts to identify significant contributions that might be made by "the litigants, the litigants' attorneys, and by the Congress and the executive branch." 104 STAT 5089 § 102(3) (1990) (Congressional Statement of Findings) (reprinted at 28 U.S.C.A. § 471, Legislative History).

STATE OF THE DOCKET

I. DESCRIPTION OF THE COURT AND DISTRICT

The District of South Carolina is divided into eleven divisions which cover the entire state. The district is currently authorized one temporary plus nine permanent district judges. The temporary position is new and, as yet, unfunded. We also have two active senior district judges, four full time magistrate judges and two part time magistrate judges. See App. A. Section I.A.&B.

Cases are generally assigned to and remain with one judge throughout the life of the case although the district judges may refer certain proceedings to a magistrate. Distribution of cases between the judges is handled in a manner that insures relatively even weighted case distribution. See App. A. Section I.C.

II. ASSESSMENT OF CONDITIONS IN THE DISTRICT

Case filings and weighted case filings in the district increased slowly but steadily from statistical year ("SY") 1985 through SY 1989. After a brief decrease in SY 1990, there were significant increases in both SY 1991 and SY 1992. See App. A. Section II.A.1. These increases reflect significant growth in both diversity cases and federal question cases.

Various measures of the condition of the docket reflect that the district has generally remained current but is beginning to experience some problems as a result of the growth in caseload. For instance, pending cases, which fluctuated within a narrow range for the six preceding years, rose substantially in SY 1991 and SY 1992. See App. Section II.A.2. Terminations, by contrast, dipped in SY 1990 and SY 1991 although they did rise again (substantially) in SY 1992. See App. A. Section II.A.3.

The ratio of pending to terminated cases similarly remained low and steady for the six years preceding SY 1991. The rate for these six years indicated that cases were being disposed of faster than they were being filed and that the average case duration was less than nine and one half months. The ratios for the following two years (SY 1991 and SY 1992) indicate that filings now exceed terminations by a small percentage and average case duration is now at or

slightly over one year. See App. A. Section II.A.4. Other measures of timeliness available for SY 1985 through SY 1991 indicate cases were generally disposed of in less than one year. See App. A. Section II.A.5. The district has very few cases more than three years old. See App. A. Section II.A.7.

In recent years, the district has had an increasing number of cases requiring trial for resolution. The district's percentage of cases requiring trial also exceeds national averages. Jury demands are also becoming more frequent in this district. See App. A. Section II.A.6. The district also has a substantially greater percentage of removed cases than the national average. See App. A. Section II.A.8.

All of the above data led to the conclusion by the advisory group and the judges of this district that the district has been and is generally disposing of cases on an expeditious basis. We do, however, appear to be facing new challenges, including substantial growth in filing rates and decreases in the percentage of cases resolved without trial. These new challenges need to be addressed to insure we maintain a current docket. At present, however, the condition of the docket does not call for drastic measures.

Specific areas for improvement identified by either the advisory group or the judges of the district include:

- Backlogs in the resolution of motions in some cases;
- Nonavailability of a more expeditious means for disposing of smaller or simpler cases;
- Failure to encourage and make available some form of alternative dispute resolution;
- Encroachment of the criminal docket;
- Increasing availability of a federal forum to resolve disputes of a type formerly the province of state courts (without corresponding increases in judicial resources);
- Lack of adequate courtroom and parking facilities in certain divisions.

See App. A. Section II.B.

RECOMMENDATIONS

III. OVERVIEW

Pursuant to the Civil Justice Reform Act, the district has considered the following principles:

(1) the systematic differential treatment of cases to provide for individualized and specific management according to each case's needs, complexity, duration and the available judicial resources;

(2) 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;

(3) careful and deliberate monitoring of complex cases;

(4) encouragement of cost effective discovery;

(5) conservation of judicial resources by prohibiting consideration of discovery motions not accompanied by certification of consultation; and

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

See 28 U.S.C. § 473(a) (paraphrased). In considering these principals the group is directed to also consider the following specific 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.

28 U.S.C. § 473(b).

In addition to the mandated areas of consideration, and as authorized by 28 U.S.C. § 473(b)(6), this district also considered the following areas suggested by the advisory group:

- Improvements in the availability of courtroom and parking facilities;
- Means of addressing the impact of the criminal docket;
- Recommendations to the executive and legislative branches as to actions which impact the judicial branch;
- Miscellaneous recommended modifications or clarifications to the district's local rules;
- Variances from the Federal Rules of Civil Procedure;
- Means of handling cases returning from multidistrict litigation consolidation;
- General personnel needs of the district.

The advisory group's recommendations were, for the most part, adopted as proposed or with minor modifications as set forth below. A few proposals were not adopted.[2]

IV. SYSTEMATIC DIFFERENTIAL TREATMENT OF CASES AND MONITORING OF COMPLEX CASES

A. Analysis and Overview of Recommendations

The CJRA requires consideration of the "systematic differential treatment of cases." 28 U.S.C. § 473(1).[3] Systematic differential treatment means "individualized and specific management

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[2] The judges of this district determined not to adopt the proposals limiting protective orders, calling for return of multidistrict litigation, or addressing the impact of the criminal docket.

[3] The Civil Justice Reform Act requires the district, in consultation with the advisory group to consider

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

according to each case's needs, complexity, duration and probable litigation careers. " Id. The CJRA also calls for careful and deliberate management of complex cases, particularly as to discovery.[4]

Our district finds that current procedures in these areas are generally adequate given the nature of cases in the district and the state of the docket. Except as specifically noted, we find that firm but equitable enforcement of those local rules discussed below is the best means for providing systematic differential treatment of cases and proper monitoring and management of complex cases.

Some of the local rules discussed in this Plan are being refined to further enhance their effectiveness, to take into account revisions to the Federal Rules of Civil Procedure which are

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28 U.S.C. § 473(a)(1). See also 28 U.S.C. § 473(b)(1) (joint presentation of discovery plan at pretrial conference); and (b)(2) (requirement of party signature on requests for extension).

[4] The Civil Justice Reform Act requires the District to consider the following principles and guidelines

> (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 procedure 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.

28 U.S.C. § 473(a)(3).

scheduled to take effect December 1, 1993, and to incorporate changes required by this Plan.[5] All local rules discussed in this Report refer to the rule number and content as the rules existed prior to December 1, 1993.

Current local rule interrogatories require early input for from all non-exempt parties as to the law and facts at issue, the witnesses involved, and the amount of and anticipated time for discovery. See Local Rules 7.05 and 7.06, DSC. The courts routinely issue scheduling orders which take the requested time frames into account in setting discovery and other deadlines. Local Rule 7.01, DSC.

Answers to local rule interrogatories generally provide adequate information as to the level of case complexity[6] -- and, therefore, the need for any "differential treatment." They also satisfy the CJRA's call for joint pretrial input into a discovery plan. 28 U.S.C. § 473(b)(1). Where a judge finds it necessary or helpful to do so, he or she may also hold pretrial or status conferences to narrow issues and explore settlement possibilities. See Local Rule 7.02, DSC (recognizing that some cases may "require special treatment").

Most attorneys attempt to abide by the scheduling orders issued by the court. Where necessary, they may seek modification through agreement (with judicial consent) or judicial

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[5] The District Court Advisory Committee, a long standing committee made up of members of the Bar, has been tasked to complete revisions of our local rules including those related to pretrial automatic disclosures (Local Rule 7.00), those affected by pending revisions to the Federal Rules of Civil Procedure, and those required to implement this Plan. The latter include mediation rules (Plan § VII.), expedited docket procedures (Plan § IV.C.), discovery limits and procedures (Plan § VI.), and various local rule clarifications (Plan § VIII.D.). In addition, this committee has been asked to address minor revisions to the magistrate judge rules, as well as rules relating to the conduct of depositions, and jury questionnaire procedures. This committee will also consider uniform renumbering of our local rules.

[6] Lack of early notice of complexity is not presently a problem. If, in the future, it becomes a problem, we will consider the advisory group's proposed alternative that an inquiry directed towards level of complexity be added to the local rule interrogatories.

intervention.[7] Such agreement or intervention allows modification of initial scheduling to take into account any increased complexity of the case. Judges retain discretion to modify the limits upon request but should be cautions in relieving parties from deadlines they have merely ignored.

In the district, requests for extensions of discovery or other deadlines must contain an affidavit or statement of counsel as to the reason for the extension. See Local Rule 12.11, DSC, and note 7 above. We do not find it is necessary or appropriate to require that parties also sign such requests. See 28 U.S.C. § 473(b)(3).

To the extent there is any problem in the district with requests for extensions without client input, it is limited to extension of the trial date. Therefore, absent judicial exemption, party consent shall be required to extend the time for trial. This consent may be in the form of an affirmation of counsel, either that he or she has consulted with and has the approval of the client, or an explanation as to why the attorney has not done so.

Taken as a whole, the procedures contemplated by Local Rule 7 (discussed above) coupled with current practices discussed in this section and under the section of this plan titled "Early Judicial Involvement" (Section V. below) are generally adequate to insure sufficiently individualized pretrial case management. We agree with advisory group, however, that the following additional procedures or techniques should be implemented in the district:

- Establish a voluntary expedited docket for simple cases (see Section IV.C. below); and
- Increase availability and encourage use of alternative forms of dispute resolution (see Section VII. below).
- Establish regular motions docket tracking and encourage expeditious resolution of motions (see Section V.B. below);

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[7] Pursuant to Local Rule 12.11, motions for proposed consent orders extending any deadlines must be accompanied by affidavit. Though not expressly stated, this rule confirms that mere agreement of counsel is not enough to extend a court imposed deadline. Our judges generally grant consensual extensions. See "Judge Interviews, Summarized Responses" at A.1.(b) (Exhibit 9 to the Report). The judges vary in their willingness to grant nonconsensual extensions. Id.

- Use judicial "swat teams" if motions become backlogged (see Section IV.B. below);

With the exception of the "swat team" and "expedited docket," these suggestions are discussed in later sections of this plan. The suggestion to create a means of motions tracking is already being implemented.[8]

B. Use of Judicial "Swat Teams"

The following section of this plan (Section V.B.) addresses motions practices. It acknowledges the importance of expeditious resolution of motions and encourages their prompt resolution. To reduce backlogs which may develop in any motions docket, the judges of the district concur in the recommendation to utilize a judicial "swat team."

Under the swat team approach, one or more additional judges (possibly senior judges, visiting judges or magistrates) will set aside a period of several days to hear and rule on motions on another judge's docket. This procedure will be implemented if a judge's docket becomes particularly backlogged. The procedure will be set in motion by request of the judge whose docket is being addressed with concurrence of the Chief Judge or upon the recommendation of the Chief Judge. The specific procedure will be as developed by the Chief Judge.[9]

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[8] New software made available to the court enabled this tracking to be put in place. The present software is capable of generating a report showing the number of motions which have been pending over a particular period of time. Such a report would be especially helpful in implementing the motions docket suggestions. See below Section V.B.

[9] One possible procedure would be as follows. Prior to the motions hearings dates, the older pending motions would be divided between the swat team members according to their authority to resolve motions and any special circumstances making it more appropriate for a particular judge to hear a particular matter. For example, only nondispositive motions would be assigned to a magistrate participating in the team while those motions which require an increased knowledge of the underlying matter might be reserved for the judge whose docket is being addressed. Parties or their counsel should, however, be entitled to request hearing by the judge whose docket is being addressed. Such requests should set forth the reasons for the request (such as that the motion is closely tied to the merits or is an evidentiary issue which should be ruled on by the trial judge). Simpler motions for which a court reporter is waived might be heard by teleconference or in chambers, particularly if courtroom space is limited.

C. Establishment of an Expedited Docket

The district also adopts a voluntary expedited docket. This docket will be modeled on the recommendation of the Advisory Group for the Western District of Texas (excerpt attached at Exhibit 16 to the Report):

> We thus recommend that the . . . District create a "rocket docket" and assign that rocket docket to the full time magistrate judges. For those attorneys and litigants who believe that practice in federal court is unduly burdensome because of judicial interference in pretrial preparations, the rocket docket should offer several benefits. We recommend that no Rule 16 scheduling orders be issued in rocket docket cases. This would simply require amending Local Rule [7.03] to add rocket dockets cases as an additional exemption. . . . We also recommend that the Court excuse parties who consent to being placed on the rocket docket from filing pretrial orders. Instead, parties on the rocket docket would simply supply proposed findings and conclusions in nonjury cases and proposed instructions for a general charge in jury cases.
>
> For those attorneys and litigants who believe that motion practice in federal court often creates undue expense because of excessive briefing requirements, the rocket docket should offer the benefit of oral hearings with whatever limited briefing the parties agree to submit on nondispositive motions. . . . . [F]or those litigants and attorneys who want their dispute promptly resolved, the rocket docket should offer the guarantee of a trial within [six] months of consent. If the magistrate judge cannot guarantee a trial within [six] months, the magistrate judge should promptly notify the parties of the earliest available firm trial setting. Any party should be permitted to withdraw its consent to placement on the rocket docket at that point if the party so elects. The sole condition to being placed on the rocket docket and achieving these benefits should be that the parties consent to trial before a magistrate.

Report of the Advisory Group for the United States District Court for the Western District of Texas at 108-110.[10]

Local rules implementing this procedure will be modeled on the proposed rules from the Western District of Texas ("WDT") with the modifications shown in note 10 above and Exhibit 16 to the Advisory Group Report. This procedure is subject to availability of magistrates and support including courtroom facilities and reporters.

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[10] Since we are not adopting mandatory alternative dispute resolution other than opt-out mediation (see § VII. below), we have deleted the portion of the Western District of Texas Report relevant to exempting rocket docket cases from mandatory ADR. We have also modified their recommendation to reflect a six month rather than a four month maximum time to trial.

V. EARLY JUDICIAL INVOLVEMENT

A. Current Authority

Under the current local rules, the district has the authority for and procedures implementing early judicial involvement.[11] See generally Local Rule 7.14, DSC (expressly recognizing 16(b)'s directive for early judicial involvement). These rules provide for scheduling conferences to be held within 120 days after filing of the complaint. Local Rule 7.01, DSC. Our local rules envision that answers to standard court interrogatories will normally satisfy the scheduling conference requirement. Local Rule 7.02, DSC. The information gathered through these interrogatories is used to schedule discovery, amendment, and motions deadlines as well as to set a subject-to-trial date. See 28 U.S.C. § 473(a)(2) A, B, C & D. See also Section IV. above.

The CJRA's suggestion of setting early, firm trial dates, 28 U.S.C. § 473(a)(2) B, while appealing, does not appear workable given the impact of the criminal docket and general vagaries of docket planning. Some element of this technique is, however, present in the setting of a subject-to-trial date found in most (if not all) initial scheduling orders.

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[11] The Civil Justice Reform Act requires the District to consider the following principles and guidelines:

> (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.

28 U.S.C. § 473(a)(2). See also 28 U.S.C. § 473(b)(1) (joint discovery plan) and (b)(2) (attorney present at pretrial conferences should have authority to bind).

Although local rules and procedures as to early judicial involvement are generally adequate, some modifications may be helpful in the areas of motions practices, extensions of time to answer, and discovery procedures. Motions practices and extensions of time are discussed below. Discovery is addressed in Section VI.

B. Motions Practice

The district already has procedures requiring prefiling consultation as to most motions. Local Rule 12.02, DSC. Local Rules also adequately address the requirement for and content of supporting memorandum and time for filing. Local Rules 12.03-07, DSC. The time from filing to resolution of motions is, however, a growing area of concern.

The district recognizes the importance of prompt resolution of motions and adopts a goal of resolving all motions as expeditiously as possible. To aid the court in achieving this goal, local rules or standing orders will be adopted:

1) encouraging use of oral rulings and minute orders as to most motions;

2) acknowledging that it is fully appropriate to request a draft order from counsel for the prevailing party when the circumstances of the motion make it appropriate to include the court's rationale in the order; and

3) setting forth guidelines for the use of proposed orders.[12]

When proposed orders are requested, counsel will be encouraged to provide the order by hard copy and on diskette (if their word processing system is compatible with the court's).

When counsel drafts a proposed order, the rules will require that a copy be served on opposing counsel. Opposing counsel shall then have a reasonable time in which to comment.

[12] The United States Supreme Court and the Fourth Circuit have issued opinions acknowledging that it is not improper to solicit and adopt proposed findings if the court exercises independent judgment in adopting or revising the proposed findings. See Anderson v. Bessemer City, 470 U.S. 564, 571-73 (1985); and Aiken County v. BSP Division of Envirotech Corp., 866 F.2d 661, 676-77 (4th Cir. 1989).

The time allowed as well as the scope and method of comment shall be within the courts' discretion.[13]

Implementation of the goal of expeditious motions resolution will be facilitated by current electronic motions docket capabilities. On a quarterly basis, the Office of the Clerk of Court will request a report, by judge, listing all motions filed prior to the date when the request is entered. The resulting list will be printed in order of motion filing date for review by the judge whose docket is listed.

C. Extensions of Time to Answer

Rule 6(b) of the Federal Rules of Civil Procedure contemplates that all extensions of time to do any act required by Federal Rule or court order shall require court approval. Local Rule 12.11 requires that extension requests be made by motion with accompanying affidavit. Local Rule 7.14 states that the courts must be restrained in granting extensions including extensions of time to answer.

The requirement of judicial involvement to extend time to answer with the added affidavit requirement and indication of restrictive application has proved counterproductive. Considering that the Federal Rules of Civil Procedure require an answer within twenty (20) days of service absent acceptance of service by mail (under proposed rule revisions), that time is lost while a complaint makes its way to the appropriate person, and that clients often need to locate and hire counsel, extensions of time to answer are often needed. In practice, extensions are also frequently granted.

The district will, therefore, adopt a local rule allowing a one-time extension of time to answer, not to exceed twenty (20) days, based on a consent order submitted by the parties. No affidavit shall be required. We further endorse proposed revisions to the Federal Rules of Civil

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[13] For instance, comment might be by redlined draft or by letter. Comments might also, in the judge's discretion, be limited to matters which appear to differ from the court's oral ruling or drafting instructions in order to prevent rearguing.

Procedure which grant increased time to answer if service by mail is accepted. See Proposed Rule 12. Such an incentive would encourage cooperation and reduce litigation costs.

VI. COST EFFECTIVE DISCOVERY

The CJRA Act directs each advisory group to consider implementing the following principles:

> (4) encouragement of cost effective discovery; [and]
>
> (5) conservation of judicial resources by prohibiting consideration of discovery not accompanied by certification of consultation.

28 U.S.C. § 473.[14]

The latter recommendation is already covered by local rule in the district. Local Rule 12.02, DSC. Discovery planning and scheduling is addressed above at Sections IV. and V.

Current local rules also place limits on the quantity of discovery. See Local Rule 9.00, DSC. (limiting numbers of interrogatories and requests to admit).[15] Further requests require prior court approval and must be accompanied by affidavit "setting forth in detail the need for the extension." Id. Unnecessary requests or unwarranted opposition are subject to sanctions.

In the district, motions to compel discovery must be filed within twenty (20) days after receipt of the objected to response or failure to respond (the latter running from the due date). Local Rule 12.10, DSC. If extensions of time for discovery are sought, the supporting affidavit must state that the parties have diligently pursued discovery during the original specified time.

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[14] The Civil Justice Reform Act requires the District to consider the

> (4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices; [and]
>
> (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; . . . .

28 U.S.C. § 473(a)(4) & (5). See also 28 U.S.C. § 473(b)(1) (joint discovery plan) & (b)(3) (requests for extension of, e.g., discovery deadlines should include party signature). For our recommendation as to the requirement of a party signature see section IV.A. above.

[15] Changes recently adopted will delete any limit on the number of requests to admit.

Local Rule 12.11, DSC. Uniform, though not inflexible, enforcement of these existing local rules is the district's best tool to avoid discovery abuse and unnecessary cost and to encourage cost effective discovery.

A. Techniques Considered

With respect to the recommendations addressed by our advisory group, this district makes the following determinations:

1. *The proposed automatic disclosure of "core information."* The proposed automatic disclosure of all "relevant facts" upon which a claim or defense is based are presently adequately covered in Local Rule 7.

2. *Mandatory automatic exchange of all "relevant documents."* We adopt only a very limited requirement in this area. See below (subsection B.1.).

3. *Limitations on the number of interrogatories.* Limitations already in place and are adequate.

4. *Proposed limitations on the duration of depositions.* We do not adopt any change in existing practices which place no limits on depositions.

5. *Mandatory joint discovery and case management plans.* Existing procedures addressed above (Plan Sections IV. & V.) are adequate.

6. *Periodic pre-trial conferences.* Current procedures leaving such conferences to judicial discretion are adequate.

7. *Proposed automatic stay of "merit discovery" pending resolution of jurisdictional disputes.* We reject automatic stays as they would encourage jurisdictional contests. Current procedures allow for limitation or stay of discovery upon the motion of either party.

Each of the above procedural suggestions was, as noted above, found to be largely unnecessary for this district or was currently covered by local rule. Procedural changes to be adopted are set forth below.

B. Recommendations

1. Mandatory disclosure

The District of South Carolina currently requires disclosure of certain core information by both parties in response to the court's interrogatories. Local Rules 7.06 through 7.13, DSC. Current practices will be continued with the addition of a requirement that, where a claim is bottomed on a contract theory, plaintiffs will, within thirty (30) days of service of the summons and complaint, make available for inspection and copying the documents which plaintiff will rely upon to establish the contract upon which the claim is made.

2. Unlimited Requests to Admit

Local Rule 9.00 will be amended to allow an unlimited number of requests to admit.

3. Automatic Disclosure of Expert Qualifications and Anticipated Testimony

Local rule interrogatories will be amended to require automatic disclosure of a curriculum vitae ("CV") for all named experts who may testify.

4. Prompt hearing and resolution of discovery disputes

This is the most significant area where improvement is needed. It is addressed in the preceding sections. See Sections IV.B. & V.B.

VII. UTILIZATION OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

A. Summary of Recommendations

The act requires each district to consider the utilization of alternative dispute resolution programs in appropriate cases.[16] 28 U.S.C. § 473(a)(6). The District of South Carolina

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[16] The Civil Justice Reform Act requires the district to consider

> (6) authorization to refer appropriate cases to alternative dispute resolution program that-
>
> (A) have been designated for use in a district court; or
>
> (B) the court may make available, including mediation, mini-trial, and summary jury trial.

28 U.S.C. § 473(a)(6). See also 28 U.S.C. § 473(b)(4) (suggesting neutral evaluation program to be made available early in litigation) & (b)(5) (authorizing court to require presence of party with authority to bind at any settlement conferences).

[concludes] that the following methods of alternative dispute resolution ("ADR") are reasonably well suited for this district, at least under certain circumstances, and adopts their usage.

(1) MEDIATION;

(2) SUMMARY JURY TRIALS; [17]

(3) EARLY NEUTRAL EVALUATION; and

(4) MANDATORY JUDICIAL SETTLEMENT CONFERENCES.

Of the four techniques listed above, mediation is expected to provide the leading form of ADR. Summary trials will be available within the judges discretion but are expected to be utilized fairly rarely due to their cost and complexity. Early neutral evaluation and routine usage of mandatory settlement conferences will be tested on a pilot project basis and compared to the mediation program. The techniques adopted are discussed in greater detail below. We decline to adopt any systematic usage of court annexed arbitration.

In addition, we endorse procedures publicizing the availability and potential benefits of alternative means of dispute resolution. See Section VII.C. below. The advisory group is directed to compile a modest library of resource materials to be housed in the federal courthouse in each division. It is also to obtain or develop a brochure describing, in layman's language, the available means of ADR. The latter shall be made available to the general public through the clerk's office and, if agreeable, through the local bar.

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[17] Mini trials are seen as similar in cost-benefit to summary jury trials and are acknowledged as available but are neither recommended nor discouraged. See below § VII.B.2.

B. Assessment of ADR Alternatives

1. Mediation

Mediation is negotiation among the parties, facilitated by a trained nonparty neutral. Ultimately, the vast majority of all cases will settle before trial. By facilitating the negotiation process, mediation hastens the settlement which reduces the cost to the litigants, the pretrial burden on the court system, and the average life expectancy of the court's caseload.

In most federal mediation programs, lawyer-mediators receive modest or no compensation. Case selection in federal court mediation is generally left to the presiding judge. In most programs, the judge has the authority to order participation in at least one mediation session.

In the past five years, at least eight federal district courts have instituted mediation programs. In addition, mediation has been successfully utilized in state court settlement weeks in this state, and by various of our district's judges. See Report Section VII.B.1.

Because of the minimal cost of mediation, its proven success in the district and its applicability at various stages of a case, we anticipate that this ADR program will be the district's leading ADR program. Its viability is, however, dependent upon continued availability of skilled, no-cost or low-cost mediators or appropriate funding.[18]

The district will implement a mediation program along the lines set forth in the proposed Local Rules. See Proposed Local Rules at Report Exhibit 14. The District Court Advisory Committee is directed to refine this rule to allow judicial flexibility for experimentation with both opt in and opt out formats. Given the success of the recent state and federal court settlement weeks in the district and the better opportunity for tracking provided by such mass mediation, a "mediation week" format is the preferred method. By organizing mediation into a "mediation

[18] By working in conjunction with the State and local Bar Associations a program might be devised to give CLE or pro bono credit to volunteer mediators to reward (if not compensate) them for their commitment.

week," the disruption to the mediators (and the court) is minimized. Judges will, however, be free to utilize other formats if more suitable to them.[19]

Two methods of referral will be utilized. First, an "opt out" program, which would require some form of justification to be exempted, will be tested. Because of the significance of the right, it should be sufficient for a litigant to rely on the right to a jury trial as justification for opting out. Affirmation by counsel that mediation would serve no useful purpose will also be adequate justification. In the opt out program, the presiding judge will decide whether to grant the opt out based on input from the parties. Initially, either party could nominate a case for consideration or the judge could designate a case without party request.

Alternatively, an "opt in" program should be evaluated. "Opting in" would require agreement of all parties before the case is referred to mediation.

Survey and settlement results will be compared between the opt in and opt out programs as well as between mediation week and other formats. These results will be compared to each other and to results of other ADR programs to determine which forms of ADR are most effective in this District.

To ensure that mediation is a means of moving cases towards some form of resolution, referral to mediation will not constitute a reason for delaying the progress of a case. Neither the court nor the litigants shall rely on the pendency of mediation as a basis for any delay in discovery, resolution of motions or scheduling for trial.

2. Summary Jury Trial

A summary jury trial is a nonbinding, informal settlement process in which real jurors hear abbreviated case presentations. A judge presides. There are no witnesses. Party representatives authorized to settle the case attend. After the "trial," the jurors hand down an

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[19] Compilation and comparison of results will be dependent on availability of personnel. Survey forms should, however, be completed as mediation programs are implemented. Procedures for follow-up are discussed at Report Exhibit 17. Sample survey forms are included.

advisory verdict, which becomes the starting point for settlement negotiations. The presiding judge may participate in negotiations. If no settlement is reached, the parties proceed to trial.

Summary jury trial is an elaborate ADR device that requires the attention of a judge and a jury. It is best-suited to large, complex cases that would take weeks or months to try. Such cases are not routine in the district.

Summary jury trials are an ADR alternative already available in the district. Given their apparently limited usefulness here, such procedures are anticipated to be rarely utilized but their appropriateness is left to the individual judge.[20]

3. Early Neutral Evaluation[21]

In early neutral evaluation ("ENE"), a neutral evaluator, holds a brief, confidential, nonbinding, session early in the litigation. Afterwards, the evaluator identifies the main issues, explores settlement, and assesses the merits. When settlement seems unlikely, the evaluator assesses each side's case for liability and damages and issues a nonbinding decision. The evaluator may also recommend a discovery or motion plan and follow-up meetings. Parties do not lose the right to trial.

An ADR program as elaborate as systemic ENE does not seem appropriate for the district. Like court-annexed arbitration, a system-wide ENE program would be expensive. It is unlikely qualified volunteers would be available for this time consuming process. Moreover, the proposed mediation program may provide many of the same benefits, if available early in a case's development. Nonetheless, the district will experiment with ENE on a pilot basis in selected groups of cases after implementation of the mediation program. The results and costs will be

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[20] The mini-trial is a nonbinding settlement process primarily used out of court. Like the summary jury trial, the court mini-trial is a relatively elaborate ADR method, which uses a neutral advisor, lawyers, settlement-authorized clients, and a structured, but flexible procedure. Therefore, like the summary jury trial, courts generally reserve it for large disputes. The district's determination as to the mini-trial is essentially the same as to summary jury trials. We do not advocate its use but acknowledge its availability.

[21] This group is required to consider this technique by 28 U.S.C. § 473(b)(4).

compared to those of the mediation program and mandatory judicial settlement conference pilot program.

4. Mandatory Judicial Settlement Conferences

The settlement conference conducted by a judge or magistrate is the most common form of ADR currently used. Traditionally held on the eve of trial, judicial settlement conferences may be held throughout the litigation. Courts with multiple ADR options report that their settlement conference programs are the most widely used and best accepted of their ADR efforts.

Unlike less familiar ADR techniques, such as ENE, the settlement conference is an inexpensive way for litigants to resolve their dispute.[22] Casting a judicial officer as a settlement neutral seems to increase the likelihood of settlement. Settlement conference programs may distance the trial judge from the conference to prevent loss of judicial impartiality or its appearance. Programs may, alternatively, channel settlement work to particular judges or magistrates.

The district may benefit from more systematic use of judicial settlement conferences. We adopt a pilot program to test routine scheduling of settlement conferences. This program will be compared to the mediation program and ENE costs and results to determine the best utilization of each.

Our program will require that upon notice by the court, a representative of the parties with authority to bind[23] will be present or available by telephone during any settlement conference. If scheduling can be arranged, the pilot program will utilize several senior district judges, visiting judges, or magistrates to hold settlement conferences in cases assigned to other district judges.

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[22] Mediation sessions, as recommended above, would provide some of the same benefits without the impact on judge's time.

[23] See 28 U.S.C. § 473(b)(5) (suggesting requiring presence in person or by phone of party with authority to bind).

5. Court-Annexed Arbitration

Based on the discussion and analysis in the Advisory Group Report, the judges of the district conclude that the potential benefits of court annexed arbitration do not, for this district, outweigh its risks and costs. See Report Section VII.B.2. The condition of this district's docket does not justify adoption of such an elaborate ADR device.

C. Publicizing Alternatives to Trial

If funding permits a brochure will be prepared and offered which explains available private ADR devices, as well as ADR devices already available under the rules. Similarly, material on ADR techniques will be made available through the court if funding permits. This information will serve to educate the judges, attorneys and litigants in this district about available forms of ADR. Judges will emphasize the availability of the information to counsel and parties at any scheduling conferences. It will also be referenced along with the option of consenting to referral to a magistrate as contemplated by Local Rule 19.03.

VIII. NONMANDATED AREAS[24]

A. Facilities

Lack of adequate courtroom facilities has been a problem in three divisions: Charleston, Columbia, and Greenville. The problem is in the process of being remedied in the Charleston Division. In Columbia, an offer has been made to purchase appropriate property for later expansion of the court facilities.

Parking for jurors is also a major problem in the Columbia Division. It is a significant problem in Charleston.[25]

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[24] The district is directed to consider various specific techniques as well as: "such other features as the district court considers appropriate after considering the recommendations of the advisory group." 28 U.S.C. § 473(b)(6). The advisory group recommendations appear at Section VIII. to the Report.

[25] The GSA has acknowledged the existence of the parking problems.

The judges of the district urge appropriation of funding to insure adequate courtroom and parking facilities. We also recommend consultation with representations from the bar to insure that building or redesign takes into consideration the concerns expressed in the Advisory Group Report. Report Section IX.A.

B. Congressional and Administrative Action Which Impacts the Civil Docket

The judges of the district concur with the advisory group's recommendation that the legislative and executive branches give increased consideration of the impact on the judicial system of new legislation or stepped up enforcement. After consideration, they should appropriate or authorize funding increases to meet the increased demands.

C. Local Rules

The advisory group recommended various modifications to local rules. To the extent adopted, all modifications of local rules will be accomplished in consultation with the District Court Advisory Committee.

We concur with the advisory group recommendation to modify the local rules to allow extension of the time to answer a complaint via consent order (not to exceed one twenty day extension). See also Plan Section V.C. above and Report Section VIII.E. We agree that the following other local rule modifications should be made. Rules 12.06 and 16.00 require responses within a given number of days from filing of the matter to which responding. These two rules should be modified to indicate that time runs from date of service or receipt.

Rule 7.03 exempts all pro se litigants from the requirements of Rule 7.00. Rule 7.04, however, refers to unrepresented parties in its reference to Federal Rule 16(b)'s consultation requirement. We agree that Local Rule 7.04 should be clarified to state that the interrogatories apply only to represented parties not otherwise exempted by Rule 7.03. The District Court Advisory Committee will be asked to propose rules as to how consultations will be accomplished, if at all, as to the exempted parties (including unrepresented parties) and to further clarify the rule in this regard.

Local Rule 7.10 establishes the time in which a party against whom a cross-claim or counter-claim must answer local rule interrogatories to defendants. Answers are due "thirty (30) days after the time for answering expires." Local Rule 7.10, DSC. The rule should be clarified to require answers "within thirty (30) days after the time for answering the counter-claim or cross-claim expires" (additional language is underlined).

Local Rule 20.01 is also confusing. The first and second sentences appear to be in direct contradiction. The rule should be clarified.

D. Modification of Clerk Procedures

Recent modifications to Rule 5 of the Federal Rules of Civil Procedure are also causing some difficulties. Prior to the recent revisions, the Clerk of Court's Office could reject improper filings. This allowed the Clerk of Court to insure compliance with both federal and local rules. Now all filings must be accepted with later review for non conformity by a judicial officer.

The district concurs with the advisory group recommendation that a procedure be implemented through which the Clerk of Court's office issues a form noting when a filing is believed to be defective. The form would specify the defect and encourage voluntary correction. If corrected expeditiously, the court will have no need to rule on the initial filing.

E. Personnel Needs and Follow-up

Various suggestions in this plan may require some added personnel or shifting in duties. The expedited docket, for instance, might necessitate added assistance from courtroom support personnel. Similarly, the mediation week concept requires some level of coordination even if volunteer mediators are used. Follow up to determine progress towards established goals will also require some personnel time.

These duties may well be distributed among existing personnel or, in some cases, shared with bar association volunteers. The personnel requirements must, nonetheless, be addressed in determining whether and how to implement certain phases of the district's plan.

This concern is a critical concern in light of recent budget cuts which will ultimately result in the loss of fourteen (14) positions in the Clerk of Court's Office. This represents over twenty percent (20%) of the present staff of sixty-eight (68). Given such cuts, it will be impossible to serve even at current levels, let alone have flexibility to implement new programs to expedite case handling. The judges of this district, therefore, emphasize the need for 100% staffing.

Just as noted above as to impact on the judges' caseloads, new projects and programs, as well as stepped up civil and criminal enforcement of existing laws, place additional burdens on the Clerk of Court. The sponsors or backers of such projects, programs or stepped up enforcement need to insure that sufficient funding is made available to the courts, including the Clerk of Court, to guarantee the proper implementation of these programs without adverse effect on existing programs and duties.

IX. IMPLEMENTATION AND MONITORING

A. Responsibility

Responsibility for implementation of this Plan including coordination with the District Court Advisory Committee, CJRA advisory group, and court personnel will be determined by the Chief Judge.

B. Funding

The Clerk of Court will determine what funding is needed and available for implementation of this Plan.

C. Statistical Evaluation & Monitoring

Those statistical measures identified in Appendix B to this Plan will be prepared by the group identified by the Chief Judge as responsible for implementation and will be presented to the Chief Judge of the District at the time intervals specified in Appendix B. The Chief Judge, in conjunction with the other district judges and magistrate judges will utilize these figures to evaluate the benefits of those programs and techniques outlined in the plan. They will also be

used to evaluate the need for other measures to improve the administration of the district and to reduce any unnecessary costs and delays.

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STATE OF THE DOCKET

I. DESCRIPTION OF THE COURT AND DISTRICT

A. General Description of the District

The United States District Court for the District of South Carolina is divided into eleven divisions. 28 U.S.C. § 121 (Cum. Supp. 1991). The district covers the entire state of South Carolina and serves a diverse population. Civil Justice Reform Act Advisory Group Report (hereinafter "Report") Section I.A.

B. Judicial Positions

For the statistical years ("SY") 1985 through 1990, the district was authorized eight judgeships. In SY 1991 a ninth judgeship was authorized. 28 U.S.C. § 133 (Cum. Supp. 1991). This position has since been filled. In addition, the district has two active senior district judges. A tenth (temporary) judgeship was authorized during SY 1992 but has not been funded. The district is also authorized six magistrate judges. Four of these positions are full time and two are part time. As of the writing of this plan, all magistrate positions were filled. Report Section I.B.

C. Case Distribution within the District

As a result of the case assignment methods utilized in the district, differences in the divisions do not necessarily translate into differences in the judges' caseloads. For instance, appeals of Social Security benefit denials and prisoner petitions, both of which would otherwise be concentrated in specific divisions, are rotated among all the judges regardless of their division. Certain United States plaintiff cases are also rotated among the judges within a division. These cases are generally disposed of with less judicial time than the "average" case. With the exception

of asbestos cases[1] and L-Tryptophan cases,[2] all other cases are assigned within each division on a rotating basis without regard to the type of case involved. Report Section I.C.

Within the district each case is assigned to a specific judge at the time of filing. The case remains with that judge throughout the proceedings absent venue changes or other specific reasons for a change. Nondispositive pretrial matters may be referred to a magistrate. Use of magistrates for pretrial work varies widely between divisions and judges. Id.

II. ASSESSMENT OF CONDITIONS IN THE DISTRICT

No quantitative measure can demonstrate the true effectiveness or efficiency of our judicial system. Nonetheless, an analysis of statistical measures is some indication of the court's workload and the extent of any delays. This plan will review briefly the docket analysis presented in the Civil Justice Reform Act Advisory Group Report ("Report").

The Report analyzed purely numerical data available through the Federal Judicial Center as well as data available only through our Clerk of Court. It took into consideration the results of attorney and litigant surveys and interviews with the judges and other court personnel.

We concur with the advisory group's conclusions that the district's docket generally has moved at an appropriate pace but that recent trends may signal difficulties in the near future. We also concur with the various areas specified by the advisory group as needing improvement. These include among other things, the rate of disposition of motions, improving availability of alternative means of dispute resolution and providing a faster judicial track for simpler cases.

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[1] Prior to SY 1992, all asbestos cases were assigned to two judges in the Columbia Division. During SY 1992 the 202 asbestos cases then pending in the district were consolidated with other cases outside of the district for pretrial purposes.

[2] One judge in the Columbia Division is currently responsible for the pretrial stages of the L-Tryptophan multidistrict litigation. Currently, this involves over 650 cases.

A. Condition of the Docket

1. Filings and Judgeships

For SY 1985 through SY 1989, case filings and weighted case filings in the district of South Carolina demonstrated a pattern of slow but steady increase.[3] A substantial, but brief, decrease in case filings in SY 1990 foreshadowed an offsetting increase in SY 1991.[4] In SY 1992, filings increased seven percent (7%) over SY 1991 and thirteen percent (13%) over the previous high in SY 1989. Similarly, weighted case filings per authorized judgeship dropped in SY 1990 but rose again in SY 1991. The SY 1992 figures represented a further significant increase of roughly ten percent (10%) over either the SY 1991 or the SY 1989 figures. See Report Section II.A.1.

Prior to receiving the SY 1992 figures, the advisory group speculated that specific non-recurring factors might have accounted for the majority of SY 1990's low and SY 1991's high filing rates. With further increases reflected in the SY 1992 figures, however, they found it increasingly likely that the district may be experiencing a long-term change in filing trends. They also found the significant increase in weighted filings per judgeship of particular concern. See Report Section II.A.1. We concur with their analysis and join their concerns.

The advisory group also noted that the number of diversity case filing grew slowly from SY 1984 to SY 1988, dropped in SY 1989 and SY 1990, then rose sharply in SY 1991 to a figure well above any previous year. In the same period, federal question case filings rose steadily from 585 in SY 1984 to 970 in SY 1991 with only a temporary decrease during one year. See Report Section II.A.1. and figure 2.

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[3] Case filings increased gradually from 3,813 in SY 1985 to 4,004 in SY 1989. This represents a total five percent (5%) increase over the course of five years. Expressed in terms of filings per authorized judgeship, the figures increased from 478 to 501 filings. Weighted filings per authorized judgeship increased from 362 in SY 1985 to 421 in SY 1989 -- an increase of sixteen percent (16%) for the same period.

[4] There were 3,494 total case filings in SY 1990, compared to 4,238 in SY 1991. The average for the two years was within the range for the preceding five years.

2. Pending cases

Pending cases fluctuated within a fairly narrow range (no more than a ten percent variance) from SY 1985 through SY 1990. See Report Section II.A.2. and figure 3. As with filings, the number of pending cases rose substantially in SY 1991 and SY 1992. While the heavy SY 1991 increases in filings and pending caseloads may have been anomalies, it appears more likely that when considered with the SY 1992 figures, these increases may foreshadow a long term change in the docket. Report Section II.A.2.

3. Case terminations

Case terminations for the years SY 1985 through SY 1990 fluctuated as much as nine to ten percent. Terminations did not, however, vary more than six percentage points from the mean for the same period. The SY 1991 terminations figure, however, dropped significantly which may simply reflect the heavy increase in filings (including the L-Tryptophan multidistrict litigation) and a period of judicial vacancy. The resulting "backlog" may, therefore, be self-correcting. Report Section II.A.3.

4. Ratio of pending cases to case terminations.

One measure of a court's effectiveness in handling its caseload over time is the ratio of pending cases to case terminations. If this ratio decreases over time, it indicates that the court is improving its overall disposition rate. The ratio also provides the basis for a good estimate of the average duration or lifespan of a case.[5] Report Section II.A.4.

Our pending to terminated ratios indicate that for six consecutive years (SY 1985-1990), this district disposed of cases at a faster rate than they were filed[6] and sustained an estimated average case duration of less than nine and one half months. In SY 1991-1992, however, the

[5] This estimate is obtained by multiplying by twelve (12) the ratio of pending cases to case terminations. The result is an approximation of average case lifespan expressed in months.

[6] These ratios were .79 in SY 1990, .75 in SY 1989, .78 in SY 1988, .79 in 1987, .68 in 1986 and .74 in 1985. Report § II.A.4.

ratio changed dramatically resulting in a disposition rate slower than the filing rate.[7] These figures suggest an increase in average duration of twelve to thirteen months. They also suggest the court is "losing ground," though it is still maintaining a near even rate of pending cases to terminations. Report Section II.A.4.

While the SY 1991 figures may have been distorted by nonrecurring events, the SY 1992 figures increase the probability of a trend. Still, the SY 1991 and SY 1992 ratios indicate a disposition rate only slightly slower than the filing rate and an average duration at or slightly exceeding one year. The recommendations and analysis in this plan reflect our perception that current rates may not be anomalies but do not, as yet, require drastic measures. Report Section II.A.4.

5. Time to disposition

Another conventional measure of timeliness is the median time from filing to disposition.[8] Report Section II.A.5. This figure remained quite steady for the district from SY 1985 through SY 1991, fluctuating between seven and eight months. This estimate indicates a slightly faster disposition rate than that predicted by the pending to terminated case ratios. Report Section II.A.5.

Another means for measuring timeliness, the Indexed Average Lifespan ("IAL"), permits comparison of the characteristic lifespan of one district's cases to that of all districts over the past decade. The IAL is indexed at twelve months (the national average time to disposition). The figures for the District of South Carolina for the past decade indicate a faster than average disposition rate -- less than twelve months. See Report at Section II.A.5. and figure 4.

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[7] At the close of SY 1991, the ratio of pending cases to case terminations in the District of South Carolina was 1.12. For SY 1992, the ratio was 1.03. Report § II.A.4.

[8] Although this figure can be misleading in certain circumstances, as where the court disposes of a disproportionate number of "older" cases, it is a fairly accurate measure when the figure remains relatively stable. Comments of J. Shapard, CJRA Seminar, April 6-7, 1991.

The stability of both measures of timeliness, median time and IAL, and the fact that both indicate average case duration of less than one year, leads us to conclude that the docket in this district is in "good" shape. Comparison to the historic ratio of pending to terminated cases (Section II.A.4. above) reaffirms this conclusion, with the caveat that recent increases warrant further monitoring.

6. Method of Disposition

An increasing number of cases in the District of South Carolina seem to be requiring trial for ultimate resolution. Report Section II.A.6. and Report Exhibit 4. Similarly, more cases in South Carolina require trial than nationally. See Report Section II.A.6. and figure 5. We are also experiencing an increasing percentage of cases with jury demands. See Report Section II.A.6. and Report Exhibit 6.

These increases are of concern. Since the vast majority of all cases are resolved without trial, any increase in the percentage of cases requiring trial (particularly jury trials) would likely result in increased costs and added burdens on the court.

7. Percentage of Cases Three or More Years Old

The District of South Carolina has consistently had a very low percentage of pending civil cases which are three or more years old. At this time, "very old" cases are not a major concern in this district. See Report Section II.A.7.

8. Source of Cases

A substantial percentage of the civil cases in the district are removed from the state courts. This percentage is substantially greater than the national figures (twenty percent vs. twelve percent). In light of the policies behind removal, particularly as to diversity cases, the district does not recommend any particular measure to stem the flow. As to federal question cases, we note that any additional legislation which creates federal remedies will likely result in an even greater caseload for the district even if jurisdiction is concurrent. Report Section II.A.8.

9. Survey Data

a. Attorney Survey Responses

The general conclusion reached from the statistical data is borne out by the attorney surveys as reported by the Advisory Group Report. See Report Section II.A.9.a. and Report Exhibit 7. Most attorneys expressing an opinion as to timeliness indicated that their cases reached trial or were otherwise disposed of in a reasonable time. Many commented that delay is not a problem in the district. Nonetheless, a significant number, twenty-eight percent (28%), indicated that the particular cases surveyed should have been resolved sooner. Report Section II.A.9.

Of those reporting delays or undue costs, there were certain themes and suggestions repeated with sufficient frequency to warrant consideration.

Cause of delay	Number Reporting
Backlog of cases on court's calendar	20
Other (see comments: e.g. Bankruptcy, interlocutory appeal, Hurricane Hugo)	11
Inadequate case management by court	9
Dilatory actions by counsel	7
Dilatory actions by litigants	7

The majority of the respondents gave no response to this question, which lack of response may indicate a general view that delay is not a significant problem. Id.

Other comments and suggestions given with particular frequency include:

General comment	Number
Provide greater control of or limits on discovery	8
Increase use of ADR/settlement conferences	6
Increase use of dispositive motions	5
Increase number of judges/courtrooms	5
Provide more flexible (less expensive) means of discovery	4
Make greater use of magistrates	4
Modify jury selection procedures (reduce cost to attorneys)	3
Provide alternative case tracks	2

b. Litigant Survey Responses

The advisory group also surveyed litigants but received only a very limited response -- less than one sixth of those surveyed. The responses were less than complete in many instances and, therefore, could not be presumed to accurately reflect the views of the general litigant population. Nonetheless, the responses provide some insight into the views of those the system is designed to serve. See Report Section II.A.9.b. and Report Exhibit 15.

Almost two thirds of the litigants felt that their attorney received a fair fee while sixteen percent (16%) felt that their attorney did not. This compared with thirty percent (30%) who believed "costs" were much too high, twelve percent (12%) who thought they were slightly too high, and fifty percent (50%) who felt they were "about right." The distinction between views on attorney's fees and costs may indicate that while a substantial percentage felt litigation was too expensive they placed the blame on something (or someone) other than their attorney. Id.

Timeliness seemed a greater concern among the responding litigants. Well over half felt the matter took "much too long" (57%) or "slightly too long" (14%) to resolve. Slightly less than one third (29%) felt that the time to resolution was "about right." Very few respondents (14%) reported that either mediation or arbitration was tried. Id.

10. Judge Interviews

Interviews of the judges in the district revealed that most do not believe delay is a problem. The judges were only somewhat more likely to cite cost as a problem with two so indicating. See Report Section II.A.10. and Report Exhibit 9.

The following comments were repeated throughout the judicial interviews: (1) discovery is expensive, sometimes abused and may need both judicial control and self-imposed control by litigants; (2) prompt disposition of motions contributes to early resolution of cases; and (3) establishing and enforcing deadlines and trial dates contributes to expeditious case processing. Id.

11. Motions Docket

Most federal civil cases will require judicial resolution of one or more motions long before trial. Even if a motion is not dispositive, its resolution may have a major impact on moving the case along. By contrast, it is common for the non-resolution of motions to stall both discovery and settlement negotiations. All of this is to say that expeditious resolution of motions is critical to good docket management. Report Section II.A.11.

The motions docket data provided by the advisory group is some indication of the state of the motions docket. As the advisory group notes, however, the various figures are not directly comparable and make no effort to consider the reason a motion remains unresolved. We agree with the following conclusions from the data presented.

First there are substantial variances between the judges. Second, there are clearly a significant number of motions which remain unresolved for four or more months from the filing date. Further, it seems likely that a significant number of these are not being held in abeyance for reasons other than judicial backlog.

From this analysis, we conclude that the net effect of the current motions docket is to delay the progress of the district's cases. While the degree of delay appears only limited with some judges, it may be a significant concern for others. We conclude that a mechanism should be established to monitor the state of the motions docket, to encourage progress towards a goal mutually agreed upon in this plan, and to facilitate resolving backlogs as they arise. See Plan, Recommendations Sections IV.B. & V.B.

12. Magistrate Judge Caseload

The magistrate caseload data referenced in the Report provides a starting point for future analysis of magistrate caseload. The available data indicates a fairly even rate of assignment and pending civil caseloads between the full-time magistrates. Rates of motions assignments and

pending motions workload, however, vary widely. See Report Section II.A.12. and Report Exhibit 19.

Data such as that shown at Report Exhibit 19 to the Report should be prepared regularly to facilitate better utilization of the district's magistrates. By referring to such data, the magistrates can better evaluate their own workload. Similarly, district judges can better evaluate whether referral of a matter or motion will, in fact, expedite its handling.

13. Criminal Docket Status and Impact

As discussed in the Report, time expended in criminal trials has more than quadrupled from SY 1988 through SY 1991. The result has been a significant impact on the civil docket. Report Section II.A.13.

The Report concluded that congressional and executive branch actions which relate to criminal prosecutions are most likely responsible for the growing criminal docket and its consequential impact on the civil docket. The two congressional actions noted as most greatly impacting the docket were passage of the Speedy Trial Act and the Sentencing Reform Act of 1984. Executive branch actions noted as impacting the docket include various stepped up enforcement moves. Report Section II.A.13.

14. Pro se Filings

Pro se filings in the district have risen dramatically in recent years. Non-prisoner pro se filings have more than tripled since SY 1989 while prisoners cases are up by more than forty percent. Report Section II.A.14.

Pro se cases present special difficulties and may place greater demands on the court. As a result, such matters may consume a disproportionate amount of the court's time and resources. The increase is, therefore, of particular concern. We believe that the recent authorization of a pro se law clerk will have a significant positive impact on the handling of pro se matters.

B. Cost and Delay

As noted above, excessive cost and delay have not been major problems in the district. Certain recent trends must, however, be addressed to insure that problems do not develop in the future. Further, as in any system, improvements can be made to our current procedures.

The judges of this district agree with the advisory group that the following factors contribute to unnecessary delay and, consequently, cost:

- Backlogs in the disposition of motions in some cases;
- Nonavailability of a more expeditious means for disposing of smaller or simpler cases;
- Failure to encourage and make available some form of alternative dispute resolution;
- Increasing availability of a federal forum to resolve disputes of a type formerly the province of state courts (without corresponding increases in judicial resources);
- Lack of adequate courtroom and parking facilities in certain divisions.

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MONITORING OF STATISTICAL MEASURES AND EVALUATION OF PLAN RECOMMENDATIONS

I. STATISTICAL MEASURES

A. Judicial Workload Profile

Substantial information on the condition of the docket is provided on the Judicial Workload Profile ("JWP") which is provided to the district annually by the administrative office. In addition, a key measure of the status of the docket is easily derived from data contained in the JWP. That measure is the ratio of pending cases to case terminations. As discussed below, the JWP data and pending to terminated ratio will be reviewed or compiled annually and compared with the historical measures contained in the Civil Justice Reform Act Advisory Group Report ("Report").

1. Data available directly from the JWP

The measures listed below are provided on the JWP in a format that includes comparative data for the prior five statistical years. Each of these measures will be watched for any significant change or trend.

a. Filings;

b. Terminations;

c. Pending cases;

d. Authorized judgeships;

e. Vacant judgeship months;

f. Filings and weighted filings per judgeship;

g. Trials completed per judgeship;

h. Median time to trial of civil cases; and

i. Number and percentage of civil cases over three years old.

2. Pending to terminated case ratio

A key measure of the condition of the docket derived from the JWP data is the ratio of pending cases to case terminations.[1] This measure is obtained quite simply by dividing the number of pending cases by the number of terminations. An increase in the ratio indicates that the court is losing ground. A decrease in the ratio indicates improvement.

The ratio also provides a good estimate of the average duration of cases. This estimate is obtained by multiplying the ratio by twelve (12). The result is the average duration expressed in months. Historical data on these measures is contained in the Advisory Group Report at Section II.A.4.

B. Jury Demand Data

A factor of concern identified in the Report and this Plan is the increasing number and percentage of cases demanding a jury. Data on jury demands is compiled by the Clerk of Court. By comparing this data to the data contained in the Report at Section II.A.6. (and Exhibit 6), the district can identify if the trend of growing jury demands continues. This analysis and comparison shall be prepared by the Clerk of Court and presented to the judges on at least an annual basis.

C. Motions Docket Data

As noted in the Report (Section II.A.11) and this plan (Sections V.B. and II.A.), the recently implemented computer docketing system is capable of generating a report which lists, by judge, all pending motions. This listing can be generated in order of filing date, allowing a quick count of all pending motions filed within any given date (age) category. The Clerk of Court will generate such a report for all judges on a quarterly basis. The Clerk of Court will also prepare a cover sheet summarizing the number of motions falling into the following age categories:

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[1] Various other measures discussed in the Advisory Group Report were obtained from materials provided by the administrative office for purposes of the CJRA analysis. See Report § II.A.1. figure 2 (diversity, federal question, United States party suit analysis); § II.A.5 figure 4 (indexed average lifespan); § II.A.6 figures 5 (cases reaching trial) and 6 (trial hours); and § II.A.8. (percentage of removed cases). While these measures might be helpful to have in the future, they do not appear critical and they are apparently not of a type regularly generated.

- motions filed more than sixty-five (65) days before the date on which the report is generated;
- motions filed more than 125 days before the date on which the report is generated;
- motions filed more than 185 days before the date on which the report is generated.

Each judge will be provided the docket listing and cover sheet reflecting his or her own motions docket. The Chief Judge will receive copies of all cover sheets and dockets as well as a sheet indicating the compiled total for the district. The Clerk of Court will also prepare a chart comparing district totals and each judge's totals to earlier figures including those shown in the Report at Section II.A.11 for April 1993.

D. Magistrate Civil Caseload Data

The Clerk of Court will continue to compile data for the magistrate judges as shown in Exhibit 19 to the Advisory Group Report. This data will be compiled monthly and will be provided to each magistrate, each district judge and to the Chief Judge.

E. Other Statistical Data

A group or person ("Responsible Group") will be assigned by the Chief Judge to compile data reflecting the following information regarding any mediation:

1. the method of referral (opt-in or opt-out);
2. the format of the mediation (mediation week or individually scheduled mediations);
3. the number of cases initially nominated or referred for mediation;
4. the number of cases opting out of mediation (if applicable);
5. the number of cases actually mediated;
6. the number of cases settling --
   a. before the scheduled mediation,
   b. during the mediation,
   c. within one month after mediation;
7. the divisions and judges involved;
8. an estimate of the cost in terms of --
   a. judicial time, clerk time and administrative personnel time,

b. any educational costs (for mediators),
c. any pay or costs related to mediators;

9. any significant comments from those involved (judges, litigants, court personnel, mediators).

In addition to compiling this data, the Responsible Group will insure that survey forms are provided to the mediators for distribution and are collected.[2] The returned forms will be retained and, funding permitting, the responses will be compiled by the Responsible Group. If funding cannot be obtained, the Responsible Group will seek assistance through the appropriate bar association committee.

Similar data will be obtained and compiled as to the other ADR programs. Survey forms following, as closely as possible, the mediation survey forms will be prepared and utilized for the pilot programs in Early Neutral Evaluation ("ENE") and Mandatory Judicial Settlement Conferences.

II. EVALUATION OF PLAN RECOMMENDATIONS

The judges of the district will evaluate the statistical data and analyses described above to evaluate the impact of the plan and the need for other measures. To insure that information on pilot programs in ADR is properly retained, all judges will coordinate with the Responsible Group when scheduling ADR of the types referenced in the plan. They will cooperate with the Responsible Group to insure survey and statistical data is made available.

No later than six months after adoption of this plan, the Responsible Group will provide a report to the judges giving all information then available relating to the progress of this Plan (the data referenced above). Such information will be presented to the judges no less frequently

[2] Proposed forms are included at Exhibit 17 to the Report. Prior to utilizing these forms, they will be reviewed by the Responsible Group in conjunction with the Chief Judge or his designee to insure that they address relevant areas of inquiry. Consideration will also be given to whether the inquiries are suitable given the method of distribution and return (i.e. if they are to be taken up immediately after the mediation they should not inquire as to results several weeks down the road). The forms as then adopted will not be modified for at least one year. This will insure that data collected from the various mediations will be comparable.

then every six months thereafter. The judges will then discuss and modify the plan as necessary. See Memorandum to Chief Judges dated 2/5/93 re "Annual Assessments and Plan Revisions Under the Civil Justice Reform Act of 1990."

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