IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Miscellaneous No. 91-101-E

IN RE: PLAN FOR CIVIL JUSTICE DELAY AND EXPENSE REDUCTION

O R D E R

Upon consideration of the Plan for the Northern District of West Virginia to reduce delay and expense in civil actions, reported at Appendix C in the Report of the Advisory Group to the United States District Court for the Northern District of West Virginia, drafted pursuant to the provisions of the Civil Justice Reform Act of 1990, it is

ORDERED that said Plan, attached hereto and made a part hereof, be, and the same is hereby, adopted and implemented by the United States District Court for the Northern District of West Virginia.

It is further ORDERED that an authenticated copy of this Order and the attached copy of the Plan be made available to the public, filed at each of the statutory points of holding court in the Northern District of West Virginia. In addition, the Clerk of Court is directed to provide an authenticated copy of this order and attached copy of the Plan to the Director of the Administrative Office of the United States Courts, the Judicial Council of the Fourth Circuit, the Chief Judge of the United States Court of Appeals for the Fourth Circuit, and to the Chief Judges of each of the other United States District Courts located in this Circuit.

In addition, the Clerk of Court is directed to provide an authenticated copy of this Order and attachment to the Honorable Joseph C. Biden, Chairman, Senate Judiciary Committee and to the Honorable William W. Schwartzer, Director of the Federal Judicial Center.

ENTER: December 18th, 1991

United States District Judge

I hereby certify that the annexed instrument is a true copy of the original filed in my office.
Attest: [illegible]
Clerk, U.S. District Court
Northern District of West Virginia
By: Helen L. Stemple
Deputy Clerk

# APPENDIX C

## PLAN FOR CIVIL JUSTICE DELAY AND EXPENSE REDUCTION

By Appropriate Amendment(s) to the Local Rules for the United States District Court for the Northern District of West Virginia[13], Court Order or Modification of operating procedures, the Court should adopt and implement a plan which encompasses the following features:

I. Differential Case Management of Civil Cases into Three (3) Tracks.

A. Type I civil cases include student loan collection cases, cases seeking recovery of overpayment of veterans' benefits, appeal of Social Security Administration benefit denials, condition-of-confinement cases brought by state prisons, habeas corpus petitions, appeals from bankruptcy court decisions, land condemnation cases, and asbestos product liability cases. For these cases the clerk of court should continue case management consistent with its current procedure and bring cases to the court's attention when there is a motion to rule on or when the case is ready for deposition or other action.

B. Type II Civil Case - The remaining civil cases shall be divided into two tracks.

(1) Standard Case - All remaining Type II civil cases, except those classified as complex cases pursuant to subsection (2), shall be classified as standard

[13] The Reporters believe that the time sequence set forth in recommendation I(B)(1)(b) below in particular would best be achieved by amending the local rules so that practitioners may be advised before filing suit what procedures will govern.

civil cases. The clerk's office shall assume the case management of standard civil cases pursuant to the following guidelines:

(a) The clerk shall notify the parties upon the filing of a complaint or answer that unless the case is classified by the court as complex, the case will be managed as a standard civil case.

(b) Discovery in standard cases shall be pursuant to a local rule patterned after a draft revision of Rule 26 of the Federal Rules of Civil Procedure (hereinafter referred to as Rule 26) and subject to the following time frame:

(1) Within thirty (30) days following service of the answer, the parties shall exchange the required initial disclosure (Rule 26(a))[14].

(2) Except for the required initial disclosure (Rule 26(a)) and the deposition of parties, no discovery shall be permitted in the first 30 days following service of the answer (Rule 26(d)).

(3) Except for expert witnesses, all discovery shall be completed 180 days after service of an answer. Extensions shall be granted by the court only for good cause.

(4) Not later than 150 days after service of the answer, the plaintiff shall disclose its expert testimony to the defendant. Within 45 days of the disclosure of the plaintiff's expert testimony to the defendant,

[14] If an answer is filed simultaneously with a motion to dismiss under Rule 12, it is contemplated that this time periods will be tolled until disposition is made of the motion to dismiss.

the defendant shall disclose its expert testimony to the plaintiff (Rule 26(a)(2)). Discovery of expert witnesses shall be completed within 45 days following the defendant's disclosure of expert testimony to the plaintiff.

(Reporter's Note: The effect of this provision is that all discovery, except discovery of expert witnesses, must be completed 180 days after service of the answer. Since the decision to use experts or the type of experts to use may be dependant upon information obtained during discovery, the rule allows the parties to delay the decision on expert witnesses until late in the discovery period. The plaintiff's disclosure of expert testimony is what triggers the defendant's responsibility to disclose expert testimony. If the plaintiff waits until the 150th day following service of the answer to disclose expert testimony, the maximum time for the discovery of experts would be 240 days after service of the answer.)

(5) One hundred and twenty (120) days after service of an answer, the clerk of the court shall send a questionnaire to the parties to determine the status of discovery, i.e., the discovery completed and the discovery remaining to be complete. Based on the response to these questionnaires, the clerk shall bring to the court's attention those cases in which active judicial intervention may be necessary or appropriate.

(6) For the purpose of this rule, third party plaintiffs and cross plaintiffs shall be considered plaintiffs. Third party defendants and cross defendants shall be considered as defendants.

(2) Complex Civil Case. A case shall be classified complex when it is apparent that it raises issues of such complexity or that the discovery necessary to develop the case is of such a nature or extent that it cannot, even with a good faith effort, be completed in the time period set forth for standard cases. A case will be classified as complex upon the stipulation of all the parties and the approval of the court, upon the court's order on a motion filed by any of the parties, or by the court upon its own motion.

If a case is classified as complex, the court shall set a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure for the purpose of scheduling or sequencing discovery or utilizing such other forms of case management as will assist in reducing cost and/or delay. In complex cases, unless exempted by the court, the required initial disclosure of Rule 26(a) shall be disclosed by the parties at the scheduling conference called by the judge. Except for the required initial disclosure, Rule 26 shall be applicable to complex litigation only to the extent imposed by the court as part of its case management.

II. Motion Practice

Upon receipt by the Clerk of the Court of motions to dismiss filed pursuant to Rule 12(b)(6) or motions for summary judgment filed pursuant to Rule 56 of the Federal Rules

of Civil Procedure or motions relevant to the discovery process, the clerk shall promptly bring said motions to the court's attention.

If such a motion is not ruled upon by the court within thirty (30) days of its service, then the discovery period established for the case shall be tolled to the extent the ruling on said motion exceeds thirty days from the service. The discovery period for the case shall resume upon the entry of an order ruling on the pending motion.

III. Increased Utilization of Alternative Dispute Resolution

"Settlement Week Conferences" should be scheduled at regular intervals and not less than three times in a calendar year.

All civil cases in which discovery is completed, except for Type I civil cases, and those cases exempted pursuant to the provisions hereof, will be referred to a "Settlement Week Conference." A case will be exempted from "Settlement Week Conferences" if the parties, with the consent of the court, agreed to some other form of alternative dispute resolution, such as arbitration, summary jury trial, mini-trial, or mediation with a magistrate judge or settlement judge. A case will also be exempt if the court finds there would be no beneficial purposes served by requiring the case to be submitted to a "Settlement Week Conference."

At any time after service of an answer, the parties may request that the case be referred for early neutral evaluation, by an evaluator agreed upon by the parties, or to some other agreed upon method for alternative dispute resolution. For the purpose of this provision, contract negotiations of a labor contract are considered an alternative form of

dispute resolution. If the request is granted by the court, the running of the discovery time periods established for the case shall be tolled until the early neutral evaluation is completed, or it is reported to the court that the alternate dispute resolution has been unsuccessful, or the court determines that one or more of the parties are no longer participating in the alternative process in good faith.

"Settlement Week Conferences" should be conducted pursuant to the rules and procedures developed for the "Settlement Weeks" currently used in this district.

For those cases exempted from a "Settlement Week Conference" because the court has determined there would be no beneficial purpose served by such a referral, and for those cases not settled as a request of the "Settlement Week Conference," the court should set for each such case a date for the submission of a pretrial order/or conference and a "firm" date for trial.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in actions exempted by these rules or when otherwise ordered, each party shall, without awaiting a discovery request, provide to every other party:

(A) the name and, if known, the address and telephone number of each individual reasonably likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;

(B) a copy of or a description by category and location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

(C) the computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated 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 disclosures, or, except with respect to the obligations under clause (iii), because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence that the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

(B) Unless the court designates a different time, these disclosures shall be made (i) by plaintiff within 150 days after the service of an answer to its complaint, and (ii) by a defendant within 45 days after disclosure by the plaintiff[15].

(1) In lieu of providing a written report, a party may disclose the required information through a deposition of the witness under Rule 30 commenced at least within the time periods that disclosures are required in the preceding paragraph. Other parties shall have the right to defer their cross-examination of the deponent for a period of as many as 30 days[16].

(C) By order in the case, the court may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, each party shall provide to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes:

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[15] There was disagreement within the Advisory Group and in the comments received concerning this sequencing of expert disclosure. The Group recommends that this issue be reviewed during the pendency of the experimental period.

[16] It is the intent of the drafters that the costs of producing the expert for this deposition will be borne by the proponent of the expert's testimony. If the opponent elects to exercise the option of deferring cross-examination, then the opponent will be responsible for bearing the costs of producing the expert on that subsequent occasion. Any other depositions of the expert will be governed by the normal rules of cost allocation.

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before the end of the 180 day discovery period. Within 14 days thereafter, unless a different time is specified by the court, other parties shall serve and file (i) any objections that deposition testimony designated under subparagraph (B) cannot be used under Rule 32(a) and (ii) any objection to the admissibility of the materials identified under subparagraph (C). Objections not so made, other than under Rules 402-03 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. The disclosures required by the preceding paragraphs shall be made in writing and signed by the party or counsel in compliance with subdivision (g)(1). The disclosures shall be served as provided by Rule 5 and, unless otherwise ordered, promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,

whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. Limitations in these rules on the number of interrogatories may be altered by the court for particular types or classifications of cases. The frequency or extent of use of the discovery methods permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery to the resolution of the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision
(c).
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(4) Trial Preparation: Experts.

(A) A party may by deposition examine any person who has been identified as an expert whose opinions may be presented at trial.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under

subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certificate that the movant in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except for depositions of a party or with leave of 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. Unless the court upon motion, for the convenience of parties and

witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired as follows:

(1) A party is under a duty seasonably to supplement its disclosures under subdivision (a) if the party learns that the information disclosed is not complete and correct. With respect to expert testimony that the party expects to offer at trial, the duty extends both to information contained in reports under Rule 26(a)(2)(A) and to information provided through a deposition of an expert and any additions or other changes to such information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is not complete and correct.

(3) The duty to supplement responses may be enforced by order of the court, or imposed by agreement of the parties, or at any time before trial through new requests for supplementation of prior responses.

(f) [Abrogated.]

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a) by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry the disclosure is complete and correct as of time it is made.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party

who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.