REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

Report of the Civil Justice Reform Act Advisory Group of the United States District Court, Southern District of Mississippi

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REPORT OF THE ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

I. Introduction

In recent years, the public, the bench and the bar have complained that our civil justice system involves excessive costs and undue delays. Whether true or false, this perception undermines confidence in the justice system, and it deserves to be addressed in a systematic fashion.

a. The Civil Justice Reform Act of 1990.

To deal systematically with this concern, Congress enacted the Civil Justice Reform Act of 1990 ("the Act"), 28 U.S.C. § 471 et seq.. The Act requires each United States district court to develop and adopt a Civil Justice Expense and Delay Reduction Plan ("the Plan"). The purposes of the Plan "are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § 471.

The Act requires each district court, prior to implementation of its Plan, to consider the recommendations of an advisory group comprised of lawyers who practice regularly in the district. The advisory group is required to submit to the district court a report which is to include:

(a) An assessment of the court's civil and criminal dockets, including the condition of those dockets, trends and case filings and demands being placed on the court's resources, identification of the principal causes of cost and delay in civil litigation, and an examination of the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the court;

(b) The basis for its recommendation that the district court develop a Plan or select a model Plan;

(c) Recommended measures, rules and programs; and

(d) An explanation of the manner in which the recommended Plan complies with principles and guidelines of litigation management and cost and delay reduction identified in the Act.

The Act charges the advisory group to take into account the particular needs and circumstances of the district court, the litigants, and the attorneys; and to ensure that its recommendations for reducing costs and delay include significant contributions by the court, the litigants, and the attorneys.

In formulating its Plan, each district court is required to consider, in consultation with its advisory group, certain principles and guidelines, including:

(a) Treatment of cases that tailors the level of case management to the complexity of the case, the

amount of time needed to prepare it for trial, and the resources available to prepare and dispose of it;

(b) Early and continuing involvement in the pretrial process by a judicial officer;

(c) Monitoring of appropriate cases through discovery or case management conferences;

(d) Encouragement of cost-effective discovery;

(e) Discouragement of unnecessary discovery motions; and

(f) Authorization to refer cases to alternate dispute resolution programs.

28 U.S.C. § 473.

In addition, the Act directs the district court and the advisory group to consider litigation management techniques in formulating the Plan.

b. Implementation of the Act in the United States District Court for the Southern District of Mississippi.

Pursuant to the Act, Chief Judge William H. Barbour, Jr. of the United States District court for the Southern District of Mississippi ("the Court") on March 1, 1991, appointed the Advisory Group for the United States District Court for the Southern District of Mississippi (the "Advisory Group"). The Advisory Group consists of the following members:

Joe H. Daniel, Chairperson	Jackson
Patricia W. Bennett, Reporter	Jackson
Betty Morgan Benton	Jackson
Raymond L. Brown	Pascagoula
James P. Cothren	Jackson

W. Wayne Drinkwater, Jr.	Jackson
Walter W. Eppes, Jr.	Meridian
Samuel E. Farris	Hattiesburg
Stephen J. Kirchmayr, Jr.	Jackson
Daniel E. Lynn	Jackson
Albert D. Malone	Jackson
Carroll E. Rhodes	Hazlehurst
Landman Teller, Jr.	Vicksburg
Michael Ulmer	Jackson
Jessica S. Upshaw	Gulfport

In discharging its responsibilities under the Act, the Advisory Group has met on numerous occasions over a two-year period, both as a body and through subcommittees. In pursuing its task, the Advisory Group has attempted to obtain information from lawyers and judges actively involved in civil litigation in the District. The Advisory Group reviewed statistical data relating to the Court, relied on its collective experience in civil litigation, and sought the thinking of experts around the United States. This Report is submitted in satisfaction of the responsibilities of the Advisory Group under the Act.

II. Assessment of the Docket of the United States District Court for The Southern District of Mississippi

The Southern District of Mississippi consists of five divisions: the Western Division, headquartered at Vicksburg; the Jackson Division, headquartered at Jackson; the Eastern Division, headquartered at Meridian; the Hattiesburg Division, headquartered at Hattiesburg; and the Southern Division, headquartered at Biloxi. The District includes 45 counties, many of which are intensely rural, and three standard metropolitan statistical areas: Jackson, Gulfport-Biloxi, and Pascagoula-Moss Point. The population

of the District is approximately 1,600,000. Currently, the District is authorized six active judges and three magistrate judges. In addition, one senior district judge sits regularly to assist in civil litigation.

Civil cases are initially assigned to judges by divisions. Cases originating in the Western Division are assigned to Judge David Bramlette and to Magistrate Judge John R. Countiss III. Cases originating in the Jackson Division are assigned to Chief Judge William H. Barbour, Jr., Judge Tom S. Lee, Judge Henry T. Wingate, or Judge Bramlette, and to Magistrate Judges Countiss or Alfred G. Nicols. Cases originating in the Eastern Division are assigned to Judge Lee and to Magistrate Judge Countiss. Cases originating in the Hattiesburg Division are assigned to Judge Charles W. Pickering, Sr., and to Magistrate Judge Nicols. Cases originating in the Southern Division are assigned to Judge Walter J. Gex, III, Senior Judge Dan Russell, or Judge Bramlette, and to Magistrate Judge John M. Roper. Of course, all cases are subject to reassignment to balance the workload or for other reasons.

The condition of the District's docket has improved substantially over the past few years. Still further improvement is probable. This improved condition has occurred for two principal reasons.

First, persistent vacancies in active judgeships, which lasted until 1990, have now been filled. In addition, the Federal Judgeship Act of 1990, 28 U.S.C. § 133, authorized

an additional judgeship for the District effective December 1, 1990. As a result, since December, 1991, the District has enjoyed the services of six active district judges and three full-time magistrate judges, as compared with four active district judges and two full-time magistrate judges in the 1985-1990 period. However, the short period in which the District has been fully staffed makes statistical review of the District's recent performance not fully representative or predictive of the future.

The second factor responsible for improvement of the District's docket is the departure of asbestos litigation. Thousands of asbestos plaintiffs filed cases in the District throughout the 1970s and 1980s. From 1981 to 1990, 3,423 asbestos cases were filed here, many of which involved multiple plaintiffs and defendants. The presence of this intractable litigation significantly skewed the District's docket and caseload. Happily, asbestos filings in the District have now practically disappeared, and the transfer of all asbestos litigation to the United States District Court for the Eastern District of Pennsylvania pursuant to an order of the Judicial Panel on Multidistrict Litigation eliminated asbestos as a significant problem in the District.

From the most recent available information, the condition of the District's docket appears satisfactory for

the foreseeable future. The District's average per-judge caseload is at or below the national average. Filings in the District have decreased significantly, from a high of 3,210 in the twelve-month period ending June 30, 1986, to 2,171 in the twelve-month period ending September 30, 1992. This decrease, together with the transfer of all pending asbestos cases, has resulted in a dramatic decline in the number of pending cases, from 5,502 on June 30, 1987, to 2,396 on September 30, 1992. The increase in the number of active district judges from four to six during this same time gives reason to believe that the docket should move far more quickly in the future than in the recent past.

This docket reduction and increase in effective judgeships have not yet resulted in significantly faster disposition of pending civil or criminal felony cases. The median time from filing to disposition of criminal felony actions in the district has actually increased slightly from 5.0 months in 1986 to 6.0 months in 1992. This is only slightly above the national average of 5.9 months. On the civil side, the median time from filing to disposition has dropped to 12.0 months in the twelve-month period ending September 30, 1992, down somewhat from prior years.[1]

Happily, the percentage of civil cases on the docket more than three years old has shown a steady and dramatic

[1]To some extent, these may be misleading statistics, measuring as they do only the cases disposed of during the relevant period. The District in 1992 was able to begin clearing out a backlog that had existed for years.

decline. As of June 30, 1985, cases more than three years old comprised 14.1% of the total civil caseload. By June 30, 1990, this percentage had risen to 36.5% of all pending civil cases. The number had dropped to 6.1% as of September 30, 1992. This improvement reflects the transfer of the asbestos backlog and the hard work by the judges.

The District's caseload is dominated by contract and personal injury actions, which together account for approximately 50% of the total number and total burden of the civil caseload. Other important components of the civil docket include civil rights cases and prisoner petitions. The prisoner petitions are particularly troublesome, because they are often pro se and are difficult to assess or to move forward. The District does not have a significant antitrust, securities, or patent and trademark docket; the docket is also underrepresented in complicated commercial matters and large financial disputes.

The criminal caseload has comprised a relatively small but growing share of the total docket. For the 12-month period ending June 30, 1985, criminal filings made up only 4% of the District's total filings. For the 12-month period ending September 30, 1992, that percentage had risen to 10.5%. Trial time in the District is devoted primarily to the civil docket. Approximately 80% of the total trials in the District in recent years have been of civil matters.

On balance, the District's docket appears stable. There is no reason to believe that the District will

experience sharply increased civil filings in the years ahead.[2] Further, although the District's performance in recent years has approximated national averages, further improvement may be expected, given significant declines in filings and pending cases and the increase in number of active judges. For all these reasons, the Advisory Group expects that over the next few years, the District will be able significantly to reduce the time it takes to dispose of civil cases, and to reduce or eliminate the number of stale cases on its civil docket.

III. Identification of Causes of Cost and Delay

In seeking to identify the principal causes of cost and delay in the District, the Advisory Group drew from its experience and judgment, and from the thinking of experts in other districts. To insure that its conclusions accurately reflected actual conditions here, the Advisory Group prepared and administered two comprehensive questionnaires.[3] The first questionnaire was submitted to all district judges and magistrate judges in the district. The second questionnaire was submitted to lawyers who practice in the District. Both questionnaires incorporated the best features of questionnaires used by other advisory groups

[2]One caveat is the probable construction of a new federal prison, now scheduled to be constructed near Yazoo City. The Advisory Group anticipates that any such new construction would increase to some extent the filing of prisoner petitions in the district, although it is presently impossible to be more precise about the impact this might have.

[3]Copies of the questionnaires appear as appendices 1 and 2 to this Report.

throughout the country and were very extensive in seeking the causes of excessive expense and delay.

To insure that the lawyers' responses were based on recent and significant litigation experience, the Advisory Group identified 167 civil cases in the District which were concluded either by a directed verdict, jury or bench trial, or dispositive motion from April 1, 1990, to March 31, 1992. Questionnaires were mailed to all counsel of record in those cases. The questionnaires sought information relating to the attorneys' experience in the particular cases under review, rather than to the attorneys' general impressions of practice in the District. Approximately 141 responses were received.

a. The Judicial Questionnaire.

The judges felt that prisoner petitions caused more delay than any other single type of civil matter. Other delay-causing cases included labor disputes, asbestos cases, and civil rights litigation.

Eight of the nine judges believed that discovery was the principal cause of expense in civil litigation. Discovery disputes and summary judgment motions were the two procedures that caused the most delay and expense for the responding judges, all of whom responded. The judges identified products liability, complex tort, and bad faith insurance cases as matters which generated disproportionate numbers of discovery disputes. The judges also pointed to a

lack of cooperation among some members of the bar as a significant factor contributing to discovery disputes.

Some of the judges felt that limits imposed by the Speedy Trial Act and issues presented by the sentencing guidelines interfered with and caused delay in the civil docket.

The judges divided on whether civil cases take too long to litigate in the District. Among those who felt that undue delays do occur, protracted discovery, products liability litigation, and mass tort cases were identified as causes. A solid majority of the judges believed that it costs too much to litigate civil actions in the District.

Early judicial intervention to limit discovery was the primary method suggested by the judges to reduce civil litigation expense.

b. The Attorney Questionnaire.

The average time from filing to disposition of the civil cases reviewed was 25.5 months. Since the studied cases were limited to those which were either tried or concluded by dispositive motions before trial, it is not surprising that the duration of these cases was somewhat longer than the average for all civil cases disposed of during this period (12 months according to the last available U.S. District Court -- Judicial Workload Profile).

Approximately 60% of the responding attorneys believed that undue delays had occurred in their cases. Respondents

focused on both the litigants and the Court in assigning reasons.

A significant number of attorneys believed that the failure of lawyers to respond adequately to discovery and to adhere to court-imposed deadlines was a major cause of delay. The responses also pointed to a failure of the Court, in some instances, to rule promptly on dispositive motions and other motions and to provide early and firm trial settings.

The largest single factor identified by the lawyers as affecting the time required to dispose of the cases under review was the backlog of cases on the Court's calendar, followed closely by dilatory tactics of counsel, and inadequate case management by the Court. Virtually no respondents characterized the Court's level of case management as excessive, or felt that too much case management had contributed to delay.[4]

In significant numbers, responding attorneys identified more frequent judicial involvement in the case, stricter enforcement of procedural rules, and the early establishment of a trial date as steps that would have promoted earlier resolution of the case. Virtually none of the attorneys felt that limits on the number of witnesses or depositions would reduce delay. Only 28% of the respondents felt that arbitration or mediation would have reduced fees and costs.

[4]As noted above, these comments were made concerning cases litigated during a period in which the District was operating with far less judicial manpower than is now available.

Over 70% felt that alternate dispute resolution techniques would not have had any such effect.

The attorneys were asked to estimate the percentage of total litigation expenses attributable to various litigation activities. The results were revealing. On average, the following activities were associated with the stated percentages of litigation cost and total time:

Activity	Cost	Time
Investigation, drafting complaint or answer	12.2%	15.6%
Discovery	36.8%	34.8%
Other motions	13.4%	16.5%
Settlement discussions	7.6%	9.2%
Status and pretrial conferences, case management	9.8%	10.9%
Trial	29.3%	26.4%

Because a far higher percentage of the surveyed cases were tried than in the civil docket as a whole, the percentage of time and expense attributable to trial is unrepresentative. However, the percentages assigned clearly demonstrate that with respect to the typical case, which is settled prior to trial, the lion's share of litigation costs are attributable to discovery.

Because of the continuing controversy over the District's use of a stacked calendar system in setting civil cases for trial, the Advisory Group specifically asked attorneys to address that system, as it affects expense and

delay. The overwhelming majority of the respondents -- 69% -- felt that the stacked calendar system increased litigation costs significantly, by making planning more difficult and by inconveniencing parties and witnesses. Approximately a third of the respondents felt that the stacked calendar system delayed disposition of cases, while a fourth felt that it expedited consideration of the cases.

As a general matter, those responding to the questionnaire believed that the use of the stacked calendar system creates significant inconvenience for the litigants and attorneys; however, there appears to be no other way to dispose effectively of cases in a timely manner. Therefore, the Court is urged to be sensitive to the potential inconvenience and costs visited on the litigants by the use of this calendaring procedure.

Significantly, a solid majority of those responding to the questionnaire felt that the entry of a discovery scheduling order early in the litigation was effective in reducing delay, at least where the order was enforced.

More than half the surveyed lawyers believed that differential treatment of civil cases that tailored the level of discovery and case management to the needs of the individual case would reduce delay. There was less confidence that any such differential treatment would reduce litigation expense.

One of the strongest positive reactions of the responding attorneys was for early and continuing control of

the pretrial and discovery process by the Court. Approximately 76% of the attorneys felt that this would reduce delay; a plurality thought that early intervention would also reduce expense.

c. Conclusions on Delay and Expense.

The questionnaire responses confirmed the common thinking of the Advisory Group on the primary procedural causes of expense and delay. The discovery process, which is open ended and frequently conducted without regard to the needs of the case, is the primary culprit. Other expense and delay-producing events are attributable to a lack of early and frequent judicial intervention in the litigation, which can result in dilatory and obstreperous tactics by counsel. The Court's failure to rule promptly on motions, the outcome of which may determine the future of the litigation, is also a factor; as is the failure of lawyers to work cooperatively and meet scheduled deadlines.

The Advisory Group specifically recognizes that most of the judges in the district are moving toward early judicial intervention, with strong control over fitting discovery to the real needs of the case.

Prisoner petitions, complex litigation, and an historic shortage of active judges in this District have also contributed to delay, although there is little the Advisory Group or the Plan can do to affect these factors.

IV. Recommended Measures, Rules and Programs

On the basis summarized above, the Advisory Group proposes a multifaceted recommendation for consideration by the Court. First, the Group recommends the retention of certain present procedures that are effective in reducing cost and delay. Second, the Group recommends development of a Plan for this District. Based on its considerable study and work, the Advisory Group has developed a proposed Plan for the Court's consideration. The Advisory Group has maintained close contact with its counterpart in the Northern District and believes that consideration should be given by the judiciary in both Districts to confer once the plans for both Districts become available and to strive to reconcile the two plans so that rules of practice may remain uniform throughout the two Districts. Finally, the Advisory Group recommends proposing, through the Judicial Conference or Administrative Office, a system for assessing the impact of new federal legislation on the docket of federal courts.

a. Present Procedures That Should Be Retained.

The Advisory Group recommends that the Court retain existing procedures that are working well, and consider changes in existing procedures only to the extent needed to address significant problems. To that end, the Advisory Group notes that many of the District's present practices should be continued without alteration.

1. First, the Advisory Group emphasizes the continuing need for uniform local rules in the Northern and Southern Districts of Mississippi. Adoption of the Uniform Local Rules represented a step forward in federal civil litigation in this State. Although the Advisory Group believes that its Plan represents the best approach for the District at this time, the benefits of uniform practice in the Northern and Southern Districts are such that both Courts should strive to coordinate both plans, where possible. To that end, the Advisory Group would be happy to work with members of the Court and with the Northern District Advisory Group to reconcile any differences in the two plans.

2. The Advisory Group recommends no change in the manner in which the Court presently handles motions. Uniform Local Rules 6 and 8 work well. With respect to discovery motions, the Advisory Group specifically endorses the requirement of Uniform Local Rule 6(c) that moving counsel certify, as a prerequisite to a motion to compel, that counsel have conferred in good faith to resolve the dispute. Likewise, the time limits for designation of expert witnesses set by Uniform Local Rule 6(g) reduces delay and should be retained.

3. The Advisory Group believes that, with the modifications described below, the basic structure of the discovery process established by the Federal Rules of Civil Procedure should be retained. Therefore, the Advisory Group

does not recommend the adoption of voluntary disclosure requirements in addition to those now recognized by the Uniform Local Rules or the Federal Rules of Civil Procedure.

4. The Advisory Group supports the Court's present approach to pretrial conferences and pretrial orders, as provided in Uniform Local Rule 10.

5. The Advisory Group does not believe that the Court has any proper role in revising or limiting fee agreements between clients and their counsel. Specifically, the Advisory Group does not believe that the Court should undertake to place a limit on contingent fees. The reasonableness of any fee arrangement is governed by Rule 1.5 of the Rules of Professional Conduct. Placing additional limits on such fees would threaten the ability of unpecunious litigants to have their rights vindicated at all.

b. The Goals of the Proposed Plan.

The Advisory Group believes that the Plan to be adopted by the Court should have the following general goals. The Advisory Group has attempted to address these goals in its proposed Plan.

1. Discovery is the most expensive procedural aspect of the District's civil litigation. It is not pursued intelligently, is open ended and, because it inflicts more pain on the recipient than on the propounder, it is typically overdone. Under current procedures, it is difficult to limit discovery to an amount and frequency

consistent with the size and complexity of the case. Clearly, the Plan must give a practical basis by which discovery may be reduced, and tailored to the needs of the case.

2. The increased number of district judges and magistrate judges in the District makes early intervention and greater case management feasible, and the Plan must provide for increased case management, with firm deadlines for discovery and scheduling orders.

3. Pretrial motions and discovery disputes significantly affect the timely disposition of cases; thus, prompt ruling on motions is encouraged by the Plan.

4. We live in an electronic age. The traditional practice that hearings are conducted with the Court and all counsel personally present is far more expensive than telephonic hearings. As communications continue to improve, the use of the telephone and other means of electronic communication should become the first option of the Court and counsel rather than the last resort.

Telephonic hearings are particularly appropriate when no evidence is to be received. Motions to compel, motions for extension of time or continuances, and motions involving pure questions of law are well suited for telephonic treatment. Likewise, status conferences could often be held by telephone, as could pretrial conferences where the parties had submitted the proposed version of the pretrial order to the Court in advance. A request to conduct a

hearing telephonically could be begun by one of the parties, but the Court should also feel free to direct a telephonic hearing.[5]

5. And judicial proceeding is expensive. The Advisory Group believes that alternate dispute resolution procedures should be encouraged. However, the utility of such procedures, including summary jury trials, depends heavily upon the parties' willingness to participate in them. Where one or both parties are not willing to participate in good faith, alternate dispute resolution procedures tend to become another layer of process that must be negotiated before a final decision can be obtained. Thus, the court should encourage and reward -- but not mandate -- alternate dispute resolution procedures.

In sum, the central purpose of the proposed Plan is to limit discovery, increase judicial involvement in the litigation, and establish procedures that will match civil actions with the lowest degree of pretrial procedure needed for their just resolution. The proposed Plan is intended to allow the Court to treat cases differently, depending on characteristics of those cases.

c. Summary of the Proposed Plan.

The Advisory Group recommends adoption of a Plan that limits discovery by adopting a tracking system, placing each

[5]Where one party is represented by counsel in the same locale as the Court, and other parties are represented by counsel removed from the Court, insistence on personal appearances may be employed as a tactical weapon by local counsel. Where this occurs, the Court should act.

case into a pretrial mode appropriate for its resolution. This system, known as Differentiated Case Management ("DCM"), recognizes that many cases require little or no discovery, have few legal issues, and involve a smaller number of parties. Other cases may involve substantially more parties and witnesses, complicated legal issues, and require more extensive discovery. Because early judicial intervention in civil litigation is essential in reducing delay, DCM significantly increases the level of judicial involvement.

Under the proposed Plan, each civil case is assigned to a designated case management track: Expedited, Standard, Complex, Administrative, or Mass Tort. The tracking assignment occurs at a Case Management Conference ("CMC") held within 15 days after the last responsive pleading is filed. The tracking assignment governs both the nature and extent of discovery and other pre-trial procedures, as well as the timing of a trial date.

The Plan provides that prior to the CMC, counsel for the parties are to confer and prepare a joint Case Management Statement ("CMS"), identifying the principal legal and factual issues, outlining alternate dispute resolution procedures that may be pursued, identifying motions needed to advance the case, and describing any discovery in progress or contemplated. The CMS also recommends scheduling of various pretrial activities.

At the CMC, the district judge or magistrate judge identifies the principal legal and factual issues, considers referring the matter to alternate dispute resolution, determines scheduling of discovery and motions, and places appropriate limits on the type and quantity of discovery. The judge also establishes firm discovery deadlines consistent with the track assignment.

No discovery will be allowed for cases placed on the Administrative track. These cases are simply referred directly to a magistrate judge for a report and recommendation. For cases placed on the Expedited track, discovery by the usual methods is allowed, but a limit of 10 single-part questions is imposed for each form of written discovery (interrogatories, requests for production, and requests for admissions). Only the parties and one fact witness per party may be deposed. For cases on the Standard track, each written discovery method is limited to 15 single-part questions, and depositions are limited to the parties and three fact witnesses per party. No numerical limits are placed on written discovery for cases assigned to the Complex or Mass Tort tracks. On those tracks, the court may provide for discovery consistent with the needs of the case. Of course, all limits and discovery are subject to revision by later court order.

The Plan also establishes objective standards for disposition of cases placed on the various tracks. Expedited cases are to be completed within 9 months after

filing. Standard cases are to be completed within 15 months after filing. Complex cases are to be completed within 24 months after filing.

The Plan contemplates no changes in existing motion practice, except that the Court is expected to rule on motions within 60 days of receipt of the last brief. Dispositive motions are generally to be deemed denied if not ruled upon prior to the pretrial conference.

The Plan encourages the use of alternative dispute resolution procedures by giving tangible benefits to litigant who voluntarily participate in them. Priority of trial setting is given to those parties who voluntarily participate in alternate dispute resolution but who are unable to resolve the entire dispute through those procedures. To assist in alternate dispute resolution, the Clerk of the Court will maintain and make available to counsel a list of alternate dispute resolution agencies and resources. Other features of the Plan call for certain modifications in the manner in which the Court deals with precise matters, the preparation of practitioners' handbooks, increased use of telephone conferences, and the rotation among the judges of responsibility for the criminal docket.

V. Better Assessment of the Impact of Legislation

Clearly, the enactment of federal legislation recognizing new rights has been one of the great engines

fueling the litigation explosion in federal courts throughout the United States. The District has not been immune from those effects.

Nevertheless, the Advisory Group has little basis on which to make pronouncements on the subject of how future legislation should be dealt with by the courts. To the extent that future federal legislation does promise to impact the federal courts, that impact should be viewed from two perspectives.

The first is a congressional perspective. Clearly, Congress should take into account the effects on the civil justice system of any new statute creating additional rights, or adding to federal jurisdiction. It would certainly be useful for the Judicial Conference of the United States or the Administrative Office of the United States courts to be given an opportunity, prior to passage, to assess the likely impact of such proposed legislation on the federal courts and to recommend measures that might be incorporated into the proposed enactment or otherwise to assist in reducing or ameliorating that impact.

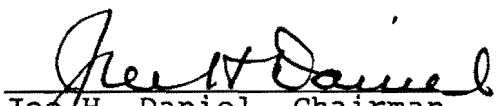
The second perspective is judicial. After passage of any act that may affect the federal judiciary, the Judicial Conference or the Administrative Office should recommend changes in court procedures to accommodate the substantive rights being created. This is not a task that can easily be done by the district courts on an individual basis. It

should instead be addressed by an authority with sufficient resources to permit sustained study and analysis.

VI. Conclusion

Reduction of expense and delay in our civil justice system is not a problem susceptible of a single -- or simple -- solution. Whatever Plan the Court ultimately adopts should be periodically assessed and modified to meet changing circumstances. To that end, the Advisory Group finally recommends that the Court and the Advisory Group conduct a biennial review of the Plan and the civil justice system in the District.

Respectfully submitted,
July 2, 1993



Joe H. Daniel, Chairman
Advisory Group

APPENDICES 1 AND 2

SURVEY FOR THE DISTRICT COURT JUDGES
OF THE SOUTHERN DISTRICT OF MISSISSIPPI

Questions for Court from the Advisory Group Under the Civil Justice Reform Act of 1990

This questionnaire seeks assistance in determining whether there are categories of cases that are more likely than others to engender particular types of delay or expense. If such delays or costs are identified, specific rules or guidelines might be developed by category to attack the problems identified.

1. Of the categories of cases listed below, what particular categories of cases, if any, cause more delay in your calendar than others?

Asbestos
Bankruptcy
Banks and Banking
Civil Rights
Commerce: ICC Rates, etc.
Contract
Copyright, Patent, Trademark
Criminal
ERISA
Forfeiture and Penalty
Fraud, Truth in Lending
Labor
Land Condemnation, Foreclosure
Personal Injury
Prisoner
RICO
Securities, Commodities
Social Security
Student Loan and Veterans
Tax
Other

_____

_____

_____

2. Time Limits

(a) What is your practice regarding monitoring service of process?

(b) What is your practice regarding extensions of time to respond to complaints or motions?

(c) What procedures have you found most effective in enforcing time limits?

3. Motion Practice

(a) Describe your procedure for monitoring the filing of motions, responses and briefs.

(b) Do you use proposed orders from attorneys?

(c) Describe your internal policies for handling motions which are ready for ruling - (i.e., priority of ruling, policies for written opinions; policies regarding published opinions).

4. Do you encourage counsel to consent to trial before a magistrate judge? If yes, at what stage in the proceeding? If no, why not?

5. Settlement Conferences

(a) Do you hold settlement conferences?

(b) Describe your practices or procedures in dealing with settlement.

(c) What is your practice and feeling regarding the trial judges?

6. Final Pretrial Conferences

(a) Describe your procedures regarding final pretrial conferences.

(b) How do you structure the sequence of trial issues, i.e., do you bifurcate trials and under what conditions?

(c) Describe your role in exploring settlement possibilities.

(d) Would the trial be facilitated if the trial judge held the final pretrial conference?

7. Setting Trial

(a) Describe your method for scheduling trials (i.e., date certain, trailing, etc.).

(b) Describe procedures you have found to be most effective in scheduling trials.

8. Alternative Dispute Resolution

(a) What are your opinions of the effectiveness of alternative forms of dispute resolution?

(b) Have you ever used any forms of alternative dispute resolution, and if so, what forms?

9. Impact of Criminal Caseload

(a) How do criminal cases impact the processing of civil cases?

(b) What criminal cases should or should not be handled by the U.S. Attorney (i.e. are there categories or types of cases by group or size which should not be handled by the U.S. Attorney in the District Court?)

(c) What can the U.S. Attorney do to expedite the handling of criminal cases?

10. Do you think it would be an improvement in case management techniques to use civil "wheels" for case assignment, dividing cases into categories such as standard, complex and expedited?

Yes _____ No _____

11. Do you think it would be useful to assign all cases brought by a particular pro se plaintiff to the same judge?

Yes _____ No _____

12. Do you think the related-case rule (i.e., separate cases containing same basic factual or legal basis) should be expanded to increase the potential for consolidation of pretrial proceedings?

Yes _____ No _____

13. Are there particular types of cases that should be exempt from the requirement of a Rule 16 conference at the inception of the case?

Yes _____ No _____

14. If you answered yes to question 13, what types of cases should be exempt?

_____

15. Under what circumstances should a district judge handle the Rule 16 conference?

_____

_____

_____

16. Do you find that scheduling orders are an effective case management device?

Yes _____ No _____

17. If you answered yes to question 16, in what types of cases do you believe such orders are useful?

_____

_____

_____

18. What categories of cases, if any, generate a disproportionate number of discovery disputes?

_____

19. Should the Court's method of handling discovery disputes differ depending on the category of case?

Yes _____ No _____

20. If you answered yes to question 19, in what way should the method of handling discovery disputes differ by the type of case?

_____

_____

_____

21. Should the range of discovery devices available to litigants be limited by the category of case?

Yes _____ No _____

22. Should the number of interrogatory questions be restricted in particular categories of cases (beyond the limitations already found in the Local Rules)?

Yes _____ No _____

23. Do you believe that discovery motions should be prohibited and replaced initially by a letter to a Magistrate Judge?

Yes _____ No _____

24. If you answered yes to question 23, in what categories of cases should the number of interrogatory questions be restricted? Please indicate if you believe this should be the rule in <u>all</u> cases.

_____

_____

_____

25. Do you think that the use of standard interrogatories in particular categories of cases would be useful (e.g., some courts require asbestos plaintiffs to answer standard exposure and injury interrogatories at the outset of the case; RICO case statements)?

Yes _____ No _____

26. In what particular categories of cases do you think such a device would be useful?

_____

27. Do you believe that parties should file a note of issue when their case is ready to be placed on the trial calendar?

Yes _____ No _____

28. Would that device be more useful in some types of cases than in others?

Yes _____ No _____

29. If you cannot try a case when it is ready, do you routinely ask that it be assigned to a "ready" judge for trial?

Yes _____ No _____

30. Do you think it would be helpful to place all "ready" cases on a central trial list for the next available judge?

Yes _____ No _____

31. Do you think this technique would be more useful in particular categories of cases than in others?

Yes _____ No _____

32. If you answered yes to question 31, in what particular categories of cases would you suggest this be done.

_____

_____

_____

33. Do you routinely bifurcate trials (e.g., separating liability and damage issues)?

Yes _____ No _____

34. Do you believe it would be more useful to require bifurcation in certain categories of cases rather than in others?

Yes _____ No _____

35. In what types of cases would required bifurcation be useful.

_____

_____

_____

36. Do you [as opposed to the court as an institution] employ any special procedures for screening pro se cases to identify ones not likely to be meritorious?

Yes _____ No _____

37. If you answered yes to question 36, what are the special procedures you employ e.g. Pro Se screens cases 15% of civil actions brought by pro se litigants.

_____

_____

_____

38. What procedures do you follow to identify pro se cases in which counsel should be appointed?

_____

_____

_____

39. Do you think it would be useful to hold hearings in prisoner cases at prisons?

Yes _____ No _____

40. If you answered yes to question 39, would you be willing to travel to prisons, to conduct such hearings?

Yes _____ No _____

41. Do you think it would be useful for the court, together with the pro se clerk, to develop a standard set of interrogatories to be used in prisoner cases?

Yes _____ No _____

42. Identify by category any specific causes of delay or expense that you believe are more likely to become a problem with respect to some of the listed categories than others.

_____

_____

_____

43. Other than the categories of cases already used by the court for statistical purposes, can you suggest any means you think would be useful for differentiating cases on your docket for the purpose of analyzing delay or expense.

_____

_____

_____

44. In your view, what are the principal causes of expense in the conduct of civil litigation?

45. Are there any trends with respect to the types of cases that are before you that are factors in causing expense?

a. What are those trends?

46. What is the most time consuming aspect of your docket?

a. What would assist you in handling this aspect of your docket?

47. Have the Sentencing Guidelines contributed to delay in your handling of your civil docket?

a. In what way?

b. Do you anticipate that the delay caused by the Guidelines will be reduced for any reason?

c. What reason?

d. Have these reasons had any impact to date on diminishing the degree to which Guidelines issues consume your time?

48. What other types of legislation have caused delay in your handling of your civil docket?

a. How do you cope with such an impact?

b. What suggestions do you have for reducing the impact of such legislation?

49. <u>General Comments</u>

(a) Do you think civil cases take too long in this District? If so, are there certain types of cases which take longer than others.

(b) Do you think it costs too much to litigate civil cases in this District? If so, what can be done to decrease the costs of litigation?

(c) What, in your opinion, is the most effective tool or process to expedite civil cases.

(d) What difficulties have you encountered in moving your civil case docket?

(e) What other recommendations or suggestions do you have for addressing the cost or delay of civil cases?

CIVIL JUSTICE ADVISORY GROUP
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

CONFIDENTIAL QUESTIONNAIRE FOR ATTORNEYS

Please respond to the following questions and return this questionnaire on or before July 31, 1992, to:

Ms. Patricia W. Bennett
Mississippi College
School of Law
151 E. Griffith Street
Jackson, MS 39201

Please feel free to call Wayne Drinkwater, (601) 948-5711, or Patricia Bennett, (601) 944-1950, if you have questions or comments about this questionnaire.

I. General Instructions.

Please indicate your responses to multiple-choice questions by circling the number of the response. Unless otherwise indicated, circle one response for each set of choices. Space is provided for comments.

II. Timeliness of Litigation

A. The court records indicate that this case took approximately _____ months from the filing date of the case to the disposition date. Is that the duration of the case for your client.

1. The duration given above is correct for my client.

2. The duration for my client was approximately _____ months.

3. I do not recall the exact duration of this case for my client.

B. Did any of the following cause delays in your case? (Circle one or more.)

1. There were no delays.

2. Failure of lawyers to respond within a reasonable time to discovery requests.

3. Failure of the district judge to rule on discovery matters within a reasonable time.

4. Failure of the magistrate judge to rule on discovery matters within a reasonable time.

5. Unavailability of the district judge to resolve discovery disputes.

6. Unavailability of the magistrate judge to resolve discovery disputes.

7. Use by counsel of unnecessary interrogatories, requests for production of documents, or requests for admissions.

8. Unnecessary requests for more time by lawyers.

9. Failure of the district judge to rule on dispositive motions within a reasonable time.

10. Failure of the magistrate judge to rule on dispositive motions within a reasonable time.

11. Failure of the district judge to set the case for trial promptly.

12. Other, please explain:_____

_____

_____

_____.

C. If delays were experienced in your case, circle the number of the statement which most closely reflects the effect of these delays upon the costs (fees and expenses) of the litigation for <u>your</u> client:

1. The delays increased costs substantially.

2. The delays had no substantial effect on costs.

3. The delays reduced costs substantially.

D. If you believe it took too long to resolve your case, what actions should you or the court have taken to resolve your case more quickly? (Circle one or more.)

1. More frequent court involvement in discussing settlement of the case.

2. Court orders limiting the amount of time that parties may seek discovery.

3. Better communication between yourself and the opposing attorney(s) to avoid unnecessary discovery and motions.

4. Court ordered limits on the number of witnesses that may testify.

5. Court ordered limits on the number of depositions which may be taken.

6. Better preparation by the attorneys to avoid costly delays in pretrial or trial proceedings.

7. Better preparation by yourself to avoid costly delays at pretrial or trial proceedings.

8. Stricter enforcement of procedural rules and use of penalties on parties that violate them.

9. The court should set a "firm" trial date that would not be rescheduled or modified.

10. Providing more judges to the Southern District of Mississippi so that more cases can be heard in a timely fashion.

11. Other, please explain:_____

_____

_____

_____.

III. <u>Management of the Litigation</u>

A. The oversight or supervision of the litigation by the judge or magistrate or by routine court procedures, such as scheduling orders, will be referred to as "case management". We are interested in determining whether

the case we are inquiring about from you was intensely managed, largely unmanaged, or managed at some level in between.

Would you please characterize the level of case management by the Court in this case.

1. Intensive
2. High
3. Moderate
4. Low
5. Minimal
6. None
7. Do not recall

B. How would you characterize the level of case management by the Magistrate in this case?

1. Intensive
2. High
3. Moderate
4. Low
5. Minimal
6. None
7. Do not recall

C. Listed below are several case management actions that could have been taken by the Court or the Magistrate in this case. For each listed action, please circle one number to indicate whether or not the Court or Magistrate took such action in this case.

		Was Taken	Was Not Taken	Do Not Recall	Not Applicable
1.	Hold discovery to a firm schedule.	1	2	3	4
2.	Hold other scheduling order deadlines, such as dates for designating experts, etc., to a firm schedule.	1	2	3	4
3.	Set and enforce time limits on allowable discovery.	1	2	3	4
4.	Narrow issues through conferences or other methods.	1	2	3	4
5.	Rule promptly on pretrial motions.	1	2	3	4
6.	Refer case to alternative dispute resolution, mediation or arbitration.	1	2	3	4
7.	Set an early and firm trial date.	1	2	3	4
8.	Conduct or facilitate settlement discussions.	1	2	3	4
9.	Exert firm control over trial.	1	2	3	4

IV. <u>Cost of Litigation</u>

A. Please estimate the amount of money at stake in this case

$_____ (actual damages or amount of claim)
$_____ (punitive or exemplary damages, if any)

B. What type of fee arrangement did you have in this case?

1. Hourly rate.
2. Hourly rate with a maximum.
3. Set Fee.
4. Contingency.
5. Other (please describe)._____

_____

_____

_____.

C. What is the approximate portion of both the <u>total</u> litigation <u>costs</u> and <u>time</u> for your client that may be attributed to <u>each</u> of the following activities?

ACTIVITY	COSTS	TIME
Preliminary investigation of the case, drafting complaint, or answer	_____%	_____%
Discover, including motions related to discovery	_____%	_____%
Other motions (e.g., summary judgment, motions to dismiss, TRO)	_____%	_____%
Negotiations for settlement or other stipulated disposition	_____%	_____%
Status conferences, scheduling conferences or hearings, final pre-trial conferences, and other case management related events	_____%	_____%
Trial	_____%	_____%

Other (please specify)

_____	_____%	_____%
_____	_____%	_____%
_____	_____%	_____%
_____	_____%	_____%
TOTALS	100%	100%

D. To what extent was your client concerned about possible consequences beyond the monetary or other specific relief sought in this specific case, such as possible future litigation based on similar claims or the possibility of a legal precedent of significant consequence for your client?

1. Such consequences were of dominant concern to my client.

2. Such consequences were of some concern to my client.

3. Such consequences were of little or no concern to my client.

4. I'm not sure.

E. Were the fees and costs incurred in this case by your client.

1. Much too high.
2. Slightly too high.
3. About right.
4. Slightly too low.
5. Much too low.

F. Please indicate the total cost you spent on this case for each of the categories listed below. If you are unable to categorize your costs, please indicate the <u>total</u> only.

1. Attorney's expenses (photocopying, postage, travel expenses, etc.) _____

2. Consultant's fee _____

3. Expert witness fee _____

4. Other (please describe)

_____ _____

_____ _____

_____ _____

_____ _____

5. Total cost of litigation _____

G. In retrospect, would arbitration or mediation have reduced the fees and costs incurred in this case by your client.

1. Yes
2. No

H. If costs associated with civil litigation in this district are too high, what suggestions or comments do you have concerning the reduction of costs?_____

_____

_____

_____

_____.

V. General Notes and Comments

A. Based upon your review of the docket sheet, scheduling order and your previous answers to this questionnaire, do you believe the time it took to resolve this case was:

1. Much too long.
2. Slightly too long.
3. About right.
4. Slightly too short.
5. Much too short.

B. If this case actually took longer than you believe reasonable, please indicate what factors contributed to the delay. (Circle one or more.)

1. Excessive case management by the Court
2. Excessive case management by the Magistrate
3. Inadequate case management by the Court
4. Inadequate case management by the Magistrate
5. Dilatory actions by counsel
6. Dilatory actions by the litigants
7. Court's failure to rule promptly on motions
8. Magistrate's failure to rule promptly on motions
9. Backlog of cases on Court's calendar.
10. Other (please specify) _____

_____

_____.

C. Based upon your review of the docket sheet, scheduling order, and your prior answers to this questionnaire, please list the principal factors which contributed to the length of time it took to dispose of this case (i.e., if it was quickly disposed-why? and if not, what slowed it down?) _____

_____

_____

_____

_____.

D. If delay is a problem in this district for disposing of civil cases, what suggestions or comments do you have for reducing those delays?_____

_____

_____

_____

_____.

VI. Stacked Calendar

The Southern District of Mississippi uses a stacked calendar, i.e., cases are placed in a queue for trial during a two to three-week period and are tried in sequences as the court becomes available.

A. With regard to the effect of the stacked calendar on the timeliness of the disposition of cases in the Southern District of Mississippi, indicate the statement that most closely applies:

1. The stacked calendar expedites disposition substantially.

2. The stacked calendar has no substantial effect on the timeliness of disposition.

3. The stacked calendar delays disposition substantially.

COMMENTS:_____

_____

_____

_____

B. With regard to the effect of the use of the stacked calendar on the costs (fees and expenses) of litigation, indicate the statement that more nearly applies.

1. The stacked calendar decreases costs substantially.

2. The stacked calendar has no substantial effect on costs.

3. The stacked calendar increases costs substantially.

COMMENTS:_____

_____

_____

_____

VII. Scheduling Orders

Rule 6(d) of the local rules of the Northern and Southern Districts of Mississippi currently mandates entry of a discovery scheduling in most civil cases.

A. With regard to the effect of the current procedure on the timeliness of adjudication, indicate the statement that most nearly applies:

1. The current procedures are very effective in preventing delay.

2. The current procedures have no substantial effect on timeliness.

3. The current procedures cause substantial delay.

COMMENTS:_____

_____

_____

_____

VIII. Statutory Proposals

The Civil Justice Reform Act of 1990 identifies a number of "principles and guidelines of litigation management."[1] Each district court, in consultation with its advisory group, "shall consider and may include" these principles in a Civil Justice Expense and Delay Reduction Plan.[2] The purpose of the proposals is to reduce cost and delay in civil litigation. The following questions elicit your opinion regarding the efficacy of these statutory proposals.

Two groups of statements follow each statutory proposal listed below. Please indicate the statement from each group that most closely reflects your opinion regarding the efficacy of the proposal.

A. The statute proposes systematic, differential treatment of civil cases that tailors the level of individualized and case-specific management to criteria such as case complexity.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

---

[1] 28 U.S.C. § 473(a).

[2] 28 U.S.C. § 473(a).

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS:_____

_____

_____

_____.

B. The statute proposes early and ongoing control of the pretrial process through involvement of a judge or magistrate judge in (a) assessing and planning the progress of the case; (b) setting early, firm trial dates, with the trial to be presumed to occur within 18 months of the filing of the complaint unless the judicial officer certifies that either the complexity of the case or the demands upon the docket prevent trial within that period; (c) controlling the extent and the time for completion of discovery.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS:_____

_____

_____

_____.

C. The statute proposes providing careful and deliberate monitoring of discovery in cases deemed to be complex.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS: _____

_____

_____

_____.

D. The statute proposes requiring counsel for each party in a case to jointly present a discovery-case management plan at an initial pretrial conference.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS:_____

_____

_____

_____.

E. The statute proposes encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS:_____

_____

_____

_____.

F. The statute proposes 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 matters set forth in the motion. The Southern District of Mississippi already has such a requirement in effect through local rule 6(c)(1).

1. The local rule reduces delays significantly.

2. The local rule has no substantial effect on delays.

3. The local rule causes substantial additional delay.

1. The local rule reduces costs substantially.

2. The local rule has no substantial effect on costs.

3. The local rule increases costs substantially.

COMMENTS:_____

_____

_____

_____.

G. The statute proposes authorization to refer appropriate cases to alternate dispute programs 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.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS:_____

_____

_____

_____.

H. The statute proposes a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pre-trial conference, or explain the reasons for their failure to do so.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS: _____

_____

_____

_____.

I. The statute proposes a requirement that each party be represented at each pre-trial 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.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS: _____

_____

_____

_____.

J. The statute proposes 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.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS: _____

_____

_____

_____.

K. The statute proposes 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 non-binding conference conducted early in litigation.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS:_____

_____

_____

_____.

L. The statute proposes a requirement that, upon notice by the court, representative of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference.

1. The proposal would reduce delays significantly.

2. The proposal would have no substantial effect on delays.

3. The proposal would cause substantial additional delay.

1. The proposal would reduce costs substantially.

2. The proposal would have no substantial effect on costs.

3. The proposal would increase costs substantially.

COMMENTS:_____

_____

_____

_____.

IX. General Comments

Are excessive costs or delays a problem in the Southern District of Mississippi? If so, what are the cures? Will the statutory proposals be helpful or hurtful? Your comments are welcome.

PROPOSED

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

A PROPOSED CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

PREAMBLE

This is the proposed Civil Justice Expense and Delay Reduction Plan for the Southern District of Mississippi. It is recommended pursuant to the Civil Justice Reform Act of 1990 ("the Act"), 28 U.S.C. §471 et seq.. This plan has been developed from the report of the Advisory Group appointed pursuant to the Act.

The Advisory Group considered the accumulated works of other district court advisory groups that had already proposed expense and delay reduction plans. Great weight was given to the Model Civil Justice Expense and Delay Reduction Plan ("Model Plan") as the cumulative wisdom and work product of other advisory groups and the Judicial Conference of the United States. Equally great weight was given to the experience of practitioners in this district, both on the advisory group and those responding to a targeted survey. The judicial officers of the district were also surveyed, and their responses were strongly considered in reconciling the Model Plan with the particular experiences and needs of the Southern District.

It is the consensus of the Advisory Group that the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi already successfully incorporate many of the principles of differentiated case management, and discovery and motion practice espoused by either the Model Plan or the individualized plans of other districts. To promote uniformity, address the concerns and issues mandated by the Act, and to assimilate and adapt the concepts of the Model Plan and the plans of other districts where appropriate to the particular needs and characteristics of the Southern District of Mississippi, the Advisory Group recommends the following Differentiated Case Management Plan to the United States District Court for the Southern District of Mississippi. Because experience with the Uniform Local Rules strongly support the argument for uniform rules for both the Northern District and Southern District of Mississippi, the Advisory Group urges the judiciary in both districts to confer once the plans for both districts become available and to strive to reconcile the two plans so that rules of practice may remain uniform throughout the two districts.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
CASE MANAGEMENT PLAN

I. GENERAL PROVISIONS

A. Purpose. The Differentiated Case Management Plan adopted by the Court is intended to permit the Court to manage its civil docket in the most effective manner, to reduce costs and to avoid unnecessary delay, without compromising the independence or the authority of either the judicial system or the individual judge. The underlying principle of the plan is to make access to a fair and efficient court system available and affordable to all citizens.

B. Definitions.

1. Differentiated Case Management ("DCM") is a plan providing for management of cases based on case characteristics. This system is marked by the following features: the court reviews and screens civil case filings and channels cases to processing "tracks" which provide an appropriate level of judicial, staff, and attorney attention; civil cases having similar characteristics are identified, grouped, and assigned to designated tracks; each track employs a case management plan tailored to the general requirements of similarly situated cases; and provision is made for the initial track assignment to be adjusted to meet the special needs of any particular case.

2. Judicial Officer is either a United States District Judge or a United States Magistrate Judge.

3. Case Management Conference ("CMC") is the conference conducted by the judicial officer within fifteen (15) calendar days after the time for the filing of the last responsive pleading.

4. Case Management Statement ("CMS") is the joint statement prepared by the lawyers and reviewed by the judicial officer at the case management conference. The statement shall include the determination of track assignments, whether the case is suitable for reference to an alternative dispute

resolution ("ADR") program, the type and extent of discovery, the setting of a discovery cut-off date, and deadlines for filing motions.

5. Court means the United States District Judge, the United States Magistrate Judge, or Clerk of Court personnel, to whom a particular action or decision has been delegated by the Judges of the United States District Court for the Southern District of Mississippi.

C. Date of Application. This plan shall apply to all civil cases filed on or after January 1, 1994 and may be applied to civil cases filed before that date if the assigned judge determines that inclusion in the DCM plan is warranted and notifies the parties to that effect.

D. Conflicts with Other Rules. In the event that the Rules of this plan conflict with other Uniform Local Rules adopted by the Southern District, the Rules in this plan shall prevail.

II. TRACKS, EVALUATION, AND ASSIGNMENT OF CASES

A. Types of Tracks.

1. Expedited - Cases on the Expedited Track shall be completed within nine (9) months or less after filing, and shall have a discovery cut-off no later than one hundred (100) days after filing of the CMS.

2. Standard - Cases on the Standard Track shall be completed within fifteen (15) months or less after filing and shall have a discovery cut-off no later than two hundred (200) days after filing of the CMS.

3. Complex - Cases on the Complex Track shall have the discovery cut-off established in the CMS and shall have a case completion goal of no more than twenty-four (24) months.

4. Administrative - Cases on the Administrative Track shall be referred by court personnel directly to a magistrate judge for a report and recommendation.

5. Mass Tort - Cases on the Mass Tort Track shall be treated in accordance with the special management plan adopted by the court.

B. Evaluation and Assignment of Cases.

1. Evaluation Criteria - The court shall consider and apply the following factors in assigning cases to a particular track:

(a) Expedited:

(1) Legal Issues: Few and Clear
(2) Required Discovery: Limited
(3) Number of Real Parties in Interest: Few
(4) Number of Fact Witnesses: Usually few
(5) Expert Witnesses: Few, if any
(6) Likely Trial Days: Three (3) or less
(7) Character and Nature of Damage Claims: Usually a fixed amount

(b) Standard:

(1) Legal Issues: More than a few, some unsettled
(2) Required Discovery: Routine
(3) Number of Real Parties in Interest: Usually fewer than five (5)
(4) Number of Fact Witnesses: Usually less than ten (10)
(5) Expert Witnesses: Usually fewer than four (4)
(6) Likely Trial Days: Five (5) or less
(7) Character and Nature of Damage Claims: Routine

(c) Complex:

(1) Legal Issues: Numerous, complicated and/or possibly unique
(2) Required Discovery: Extensive
(3) Likely Trial Days: More than five (5)
(4) Suitability for ADR: Moderate
(5) Character and Nature of Damage Claims: Usually requiring expert testimony

(d) Administrative:

Cases that, based on the court's prior experience, are likely to result in default or consent judgment or can be resolved on the pleadings or by motions.

(e) Mass Tort:

Factors to be considered for this track shall be identified in accordance with the special management plan adopted by the court.

2. Evaluation at the Time of Filing - Counsel shall at the time of filing a complaint or responsive pleading designate the case to a particular track.

3. Assignment - The court will assign each case to one of the case management tracks at the case management conference, to be held within 15 days after the receipt of the last responsive pleading.

III. EARLY ASSESSMENT AND PRETRIAL CASE MANAGEMENT

A. The Case Management Statement. No later than five days prior to the case management conference, counsel shall confer and no later than two days before the conference shall file a concise, joint case management statement, which shall include:

1. Principal Issues. Identify the principal factual and legal issues that the parties dispute.

2. Alternative Dispute Resolution. Identify the alternative dispute resolution procedure which counsel intend to use, or report specifically why no such procedure would assist in the resolution of the case.

3. Jurisdiction by a Magistrate Judge. Indicate whether all parties consent to jurisdiction by a magistrate judge under 28 U.S.C. § 636(c).

4. Disclosure. Identify the parties' disclosure obligations pursuant to Rule 26, Federal Rules of Civil Procedure and Uniform Local Rule (6)(g).

5. Motions. Identify any motions whose early resolution would likely have a significant effect on the scope of discovery or other aspects of the litigation.

6. Discovery.

(a) Describe all discovery completed or in progress.

(b) With respect to at least the first phase of discovery, describe the areas of agreement and disagreement, and identify the reasons for any disagreement. (The areas of disagreement will be resolved, if possible, at the case management conference).

(c) Recommend limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.

7. Scheduling.

(a) Recommend dates by which discovery should be completed, expert witnesses disclosed, motions filed, and for all other matters covered by Uniform Local Rule 6(d).

(b) Recommend the dates or intervals for supplementation of disclosures.

B. The Initial Case Management Conference. Within 15 days of the filing of the last permissible responsive pleading, or on the first date thereafter available on the judicial officer's calendar, the judicial officer will schedule and conduct the initial case management conference as contemplated by Rule 16, Federal Rules of Civil Procedure, which shall be attended by lead trial counsel for each party. The following matters shall be covered at the case management conference:

1. Principal Issues. Identify the principal factual and legal issues in dispute.

2. Alternative Dispute Resolution. Consider referring the case to an alternative dispute resolution procedure.

3. Jurisdiction by a Magistrate Judge. Discuss whether all parties will consent to jurisdiction by a magistrate judge under 28 U.S.C. § 636(c).

4. Disclosure.

   (a) Review the parties' compliance with their disclosure obligations.

   (b) Consider whether to order additional disclosures.

5. Motions.

   (a) Determine whether to order early filing of any motions that might significantly affect the scope of discovery or other aspects of the litigation.

   (b) Provide for the staged resolution, or bifurcation of issues for trial consistent with Rule 42(b), Federal Rules of Civil Procedure.

6. Discovery.

   (a) Determine the plan for at least the first stage of discovery.

   (b) Impose limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.

7. Settlement. Determine the status of settlement negotiations, and the advisability of a formal mediator or settlement conference either before or at the completion of discovery.

8. Scheduling.

   (a) Fix time limits to join other parties, amend the pleadings, complete any additional disclosures, conclude discovery, file motions, and for all other such matters that may be covered by Uniform Local Rule 6(d).

   (b) Fix the dates or intervals for supplementation of disclosures.

   (c) Fix the date for the next conference with or hearing by the court; if any.

(d) Fix the date or the time period (by month and year) for commencement of the trial.

C. Attendance at Case Management Conference. Participating attorneys will be required to have authority to bind the parties on matters which may be discussed at the case management conference. The judicial officer may require the attendance or availability of the parties, as well as counsel.

D. The Case Management and Scheduling Order. No more than ten (10) calendar days after the initial case management conference, the judicial officer will enter a case management and scheduling order that will address all of the matters covered in the initial case management conference. The order shall specify that its provisions, including any deadlines, having been established with the participation of all parties, can be modified only upon a showing of good cause or by agreed order; so long as the agreed order does not affect the trial date.

E. Costs and Expenses. The court shall use its authority to impose costs and expenses for violation of any provisions of the case management and scheduling order, including violations of the duty to disclose and/or supplement discovery.

IV. PRETRIAL CONFERENCE

A. Scheduling. A final pretrial conference will be held by the judge assigned to try the case not less than fourteen (14) days prior to the trial date.

B. Attendance. Each party shall be represented at the final pretrial conference by counsel who will conduct the trial. Counsel shall have full authority from their clients with respect to settlement. The judge may require the attendance or availability of the parties, as well as counsel.

C. Pretrial Order. The parties are required to file, no later than five (5) business days prior to the final pretrial conference, a proposed pretrial order in accordance with Uniform Local Rule 10.

D. Conference. The final pretrial conference will be used to discuss all matters in the pretrial order

and to resolve as many issues as possible prior to the commencement of trial.

E. Settlement. Counsel shall have conferred with their clients on the subject of settlement and be prepared to discuss the status of settlement negotiations, settlement prospects, and any other matter that appears to be likely to further the just, speedy, and inexpensive resolution of the case, including notification to the parties of the estimated fees and expenses likely to incurred if the cases proceeds to trial.

V. DISCOVERY CONTROL AND MOTIONS PRACTICE

A. Controlling the Extent and Timing of Discovery.

1. Pre-Discovery Disclosure. This subject is adequately covered by Rule 26, Federal Rules of Civil Procedure and Uniform Local Rule 6(g).

2. Setting Discovery Deadlines. A firm discovery deadline will be set by the judicial officer presiding over the case management conference and should be consistent with the track assignment.

3. Attorney/Party Signatures for Requests to Extend Discovery Deadlines. The court in its discretion may require the requesting attorney and party to sign requests to extend discovery deadlines.

4. Limits on the Use of Discovery. Unless good cause is shown to expand, the court should limit the number of depositions, interrogatories, requests for production, and requests for admission to the track assignment as set forth below.

(a) Expedited Cases - Interrogatories, requests for production and requests for admission should each be limited to ten (10) single-part questions. Depositions should be limited to the parties and no more than one fact witness deposition per party without prior approval of the court.

(b) Standard Cases - Interrogatories, requests for production and requests for admission should each be limited to fifteen (15) single-part questions.

Depositions should be limited to the parties and no more than three fact witness depositions per party without prior approval of the court.

(c) Complex Cases - The case management and scheduling order should provide for discovery consistent with the needs of the case.

(d) Administrative Cases - No discovery should be the norm.

(e) Mass Tort Cases - The case management and scheduling order should provide for discovery consistent with the needs of the case.

5. Methods of Resolving Discovery Disputes. The procedure to be followed is covered in Uniform Local Rule 6(c).

B. Motion Practice.

1. Motions Practice in the Context of the Discovery. All discovery motions must be filed so that they do not affect the discovery deadline. This subject is otherwise governed by Uniform Local Rules 6 and 8.

2. Form and Length of Motions. The procedure to be followed is governed by Uniform Local Rules 6 and 8.

3. Case Dispositive Motions. The procedure to be followed is governed by Uniform Local Rule 8.

4. Rulings on Motions. With the exception that routine discovery motions should be ruled upon promptly, the court should strive to issue its opinion within sixty days of the receipt of the last brief. Dispositive motions shall be deemed denied if not ruled upon prior to the pretrial conference, unless the Court expressly reserves ruling on such motion in the pretrial order.

VI. ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

A. Alternative Dispute Resolution ("ADR") techniques should be encouraged in appropriate cases, but not mandated.

1. At the case management conference, the judicial officer will inquire about ADR. Counsel must be prepared to advise the court on each party's position on the different ADR resources available.

2. The clerk of the court will maintain and make available to counsel a list of all arbitration, mediation or other ADR agencies and other resources. The court may in its discretion direct the clerk to delete any person, agency or other entity from the list.

3. In the event that all parties agree to ADR, the judicial officer may in the exercise of his or her sound discretion stay all or part of the case and hold the case management and scheduling order in abeyance during the pursuit of ADR.

4. As an incentive to use ADR, any case referred to ADR will receive preferential treatment on the court's calendar in the event any portion of the case requires further handling by the court.

B. Early Neutral Evaluation and Settlement Conferences should normally be accomplished in the ordinary course of the case management conference and any subsequently scheduled status conference or pretrial conference.

C. Non-Binding Summary Jury Trials.

1. The judicial officer may convene a summary jury trial with the agreement of all parties, either by written motion or their oral motion in Court entered upon the record.

2. There shall be six (6) jurors on the panel, unless the parties agree otherwise.

3. The panel may issue an advisory opinion regarding:

(a) The respective liability of the parties, or

(b) The damages of the parties, or

(c) Both the respective liability and damages of the parties. Unless the parties agree otherwise, the advisory opinion is not binding, and it shall not be appealable.

4. Neither the panel's advisory opinion nor its verdict, nor the presentations of the parties, shall be admissible as evidence in any subsequent proceeding, unless otherwise admissible under the Federal Rules of Evidence. Additionally, the occurrence of the summary jury trial shall not be admissible.

5. The costs associated with the summary jury trial shall be borne equally by the parties, unless the parties agree otherwise.

VII. OTHER FEATURES

A. Role of the Courtroom Deputy. The courtroom deputies shall be trained to participate in case management starting with the procedure used to compute time limitations and the duty to provide routine notices with regard to at least the following: periodic notices during discovery, requests for extensions of time, and notices for case management and pretrial conferences.

B. Use of Visiting Judges. The court should utilize visiting judges to assist when appropriate. In the past, visiting judges have generally handled civil matters. Visiting judges could be even more helpful if they handled criminal matters and thus enabled the judges in this district to devote time to the civil docket, where the ongoing management of a single judge is very important in a case's progress.

C. Telephonic Conferences. The court will hold pretrial and other conferences and any scheduled oral arguments on motions by telephone when requested and when that practice saves the attorneys, parties, or court time and money.

D. Annual Assessment. The court will consult with the advisory group to develop quantifiable, objective criteria and non-quantifiable, subjective criteria by which to measure the court's success in reducing delay and cost. The court will expect the advisory group to monitor

such success and to advise the court as to its findings and any additional recommendations. In compliance with 28 U.S.C. § 475, and in consultation with its advisory group, the court will "assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve litigation management practices of the court."